NDNY FEDERAL COURT BAR ASSOCIATION, INC.
www.ndnyfcba.org

NOTICE OF CLE PROGRAM

The Federal Public Defender's Office, the Syracuse University College of Law, and FCBA's CLE Committee *Presents*

"Criminal Justice Reform, Implicit Bias, and Criminal Law Update"

This program will focus on reform of the federal criminal justice system and identifying implicit bias in criminal practice but will also include legal updates on several other criminal law topics. Our speakers will include Mirna Martinez Santiago, Esq., who has lectured widely on the issues of diversity, inclusion and the elimination of bias, and Bill Hicks, Jr., of the Administrative Office of the United States Courts, who will speak about the federal courts' Detention Reduction Outreach Program ("DROP"). Other presenters include two distinguished professors from Syracuse University College of Law, which is graciously hosting this program--Lauryn P. Gouldin and Todd A. Berger, who both focus on criminal law issues. Among our other speakers and panelists will be U.S. District Judge Brenda K. Sannes, U.S. Magistrate Judges Hon. Thérèse Wiley Dancks and Andrew T. Baxter, and representatives from the U.S. Probation Office, the Federal Public Defender's Office, and the U.S. Attorney's Office.

This course offers 7 hours of CLE credit, including two that qualify for New York's requirement for diversity, inclusion, and elimination of bias.

We are offering the program live in Syracuse at Dineen Hall, Room 340. Parking is available in the Stadium Lot next to SU College of Law. Lunch will be included.

Wednesday, May 29, 2019
9:00 a.m. – 4:30 p.m. (Registration at 8:30 a.m.)

Live at Dineen Hall, Syracuse College of Law, Room 340
950 Irving Avenue
Syracuse, NY 13210
(Parking in the Stadium Lot next to the Law School)

R.S.V.P. for CLE by May 10, 2019

Faculty

Hon. Brenda K. Sannes
U.S. District Court Judge
Northern District of New York (Syracuse)

Hon. Andrew T. Baxter
U.S. District Magistrate Judge, NDNY (Syracuse)

Hon. Thérèse Wiley Dancks
U.S. District Magistrate Judge, NDNY (Syracuse)

Mirna Martinez Santiago, Esq.
Acacia Network, Inc.
Rising Phoenix Center for Law & Politics

Bill Hicks, Jr.
Pretrial Services Administrator
Administrative Office of the United States Courts

Lauryn P. Gouldin, Esq.
Associate Dean for Faculty Research & Associate Professor of Law
Syracuse University College of Law

Todd A. Berger, Esq.
Associate Professor of Law & Director, Advocacy Programs and Criminal Defense Clinic
Syracuse University College of Law

Lisa Peebles
Federal Public Defender, NDNY (Syracuse)

Paul Evangelista
First Assistant Federal Public Defender, NDNY (Albany)

Molly Corbett
Federal Public Defender Research and Writing Specialist, NDNY (Albany)

Liana Snyder, MSW
Senior Probation Officer, NDNY (Syracuse)
(Syracuse)

Ben Berry
Supervising Probation Officer, NDNY (Syracuse)

Lisa M. Fletcher, Esq.
Supervising Assistant U.S. Attorney (Syracuse)

Timed Agenda

9:00 - 9:05 a.m.	**Welcome**
9:05 - 9:15	**Increasing Diversity in the Federal Judiciary (Magistrate Judge Dancks)**
9:15 - 10:50	**Recognizing/Addressing Implicit Bias in Criminal Practice (Ms. Martinez-Santiago)**
10:50 - 11:05	**Break**
11:05 - 11:35	**Overview of Criminal Justice Reform Issues (Judge Baxter, Prof. Gouldin)**
11:35 - Noon	**The First Step Act (Ms. Corbett)**
Noon - 1:00 p.m.	**Lunch**
1:00 - 2:00	**U.S. Courts' Detention Reduction Outreach Program (Mr. Hicks)**
2:00 - 2:50	**Panel Discussion—Detention and Alternatives (Moderator--Judge Baxter; Mr. Hicks, AFPD Evangelista, AUSA Fletcher, USPO Snyder)**
2:50 - 3:05	**Break**
3:05 - 3:50	**Update of *Carpenter* and Other Fourth Amendment Issues (Prof. Berger)**
3:50 - 4:30	**Sentencing and Prior Convictions (Judge Sannes, FPD Peebles, USPO Berry)**

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

"Criminal Justice Reform, Implicit Bias, and Criminal Law Update" has been approved for both newly admitted and experienced attorneys, and is in accordance with the requirements of the New York State Continuing Legal Education Board for 5.0 credits toward the **professional practice** requirement and 2.0 credits towards **diversity, inclusion, and elimination of bias.**

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members and all current students at the Syracuse University College of Law.

*** PLEASE REMEMBER TO STOP AT THE REGISTRATION DESK TO SIGN OUT AND TURN IN YOUR EVALUATION FORM.**

MORNING SESSION MATERIALS

WHY DIVERSITY ON THE BENCH IS IMPORTANT

I am a firm believer that a diverse bench is essential to the public's confidence in the judiciary. From a philosophical standpoint, there is actual justice and the perception of justice. Actual justice is arriving at the correct result as best as possible based upon the facts and the law without the interjection of passion or prejudice. The perception of justice is when the parties feel they had a full and fair opportunity to be heard, and were respected by the Court regardless of the outcome. Each is a necessary element of the continued vitality of the "Rule of Law" upon which our societal foundation relies. Actual justice can be achieved, but the public's acceptance of the result — that is the adherence to the Rule of Law — can be nonetheless undermined by a negative perception of justice.

People from all walks of life and status call Central New York and the surrounding communities home. A bench that reflects the diversity of the public it serves enhances public confidence in the role of the courts in our democracy. The judiciary should represent, as much as possible, the demographic characteristics of the population it serves because courts that are diverse can see the world from the viewpoint of those before them. Diversity encompasses things such as gender, race, ethnicity, national origin, sexual orientation, gender identity, parental status, physical ability, religious affiliation or lack thereof, socio-economic background, veteran status, age, and geography. The perception of inclusion requires not only that judges have diverse areas of practice or legal expertise, but also that they have varied personal backgrounds and experiences in order to make the difficult and sensitive decisions required of them.

On the issue of legal experience, a diverse judiciary should reflect the diversity of the legal profession. Because judges draw from their experiences as lawyers, it is important that the bench collectively has experience across all areas of the law and in representing clients along the socio-economic spectrum.

On the issue of personal and life experiences, a diverse judiciary is more than symbolic. Judges bring their whole selves to the job. A wide range of views on the bench creates better, richer jurisprudence by incorporating a broader and more representative range of experiences, backgrounds, and perspectives. In Justice Ruth Bader Ginsberg's words: "A system of justice will be the richer for diversity of background and experience. It will be the poorer in terms of appreciating what is at stake and the impact of its judgments if all of its members are cast from the same mold."

By including all voices, a diverse bench promotes public confidence that the judicial system is fair and objective. After all, a court's essential business is to dispense justice fairly and administer the laws equally. It has been said, and I agree, that the true measure of a great society is how we treat the least among us. The Third Branch safeguards constitutional rights for each and every one of us, and particularly in protecting the rights of the vulnerable and disadvantaged. The public will only have confidence and trust in such an institution if it does not exclude from its ranks the communities it is supposed to protect.

It has also been said that you can't be what you can't see. I'm not sure I entirely agree, but it does make it a heck of a lot harder. So a diverse judiciary establishes role models for all groups and contradicts stereotypes that individuals from certain groups cannot obtain judicial positions. A diverse bench can only be developed and maintained if we are all committed to its success. The "pipeline" is critical and includes working on diversifying law student population and increasing diversity among judicial interns and clerks. As lawyers and judges, we should speak with community groups, minority bar associations, law school alumni, and other groups to help build the pipeline for future judicial applicants. Outreach to underserved communities through high school and community colleges, for example, is crucial to feeding the pipeline. Civic education classes about the key role the courts play in our government could plant a seed early on and spark an interest in a young person who may not otherwise dare dream of becoming a lawyer and then a judge. Diverse individuals need to become involved in the process of selecting judicial candidates by working on political committees and campaigns, judicial screening committees, and merit selection panels. When judicial openings come up, diverse candidates need to apply. So nudge a qualified individual with a diverse background to apply if you learn of a judicial opening, or apply yourself. If women and minorities don't apply to be judges, they can't be selected as judges. It's that simple. So whether someone taps you on the shoulder and says you should apply, or you think it is something you want, then step up, answer the call, and have fortitude. The judiciary will not spontaneously become more diverse. Like any other worthwhile pursuit, it takes work and perseverance. The result will be a more inclusive and representative bench, and the Rule of Law will prevail.

US Magistrate Judge Thérèse Wiley Dancks
District Court Northern District of New York
Past President CNYWBA

Mirna Martinez Santiago, Esq.

MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

Diversity, Inclusion, Elimination of Bias and Cultural Competence Reference List

What is Implicit Bias?

"Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

A Few Key Characteristics of Implicit Biases

- Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that **favor our own ingroup**, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques."

http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/

Reeves, A., *Diversity in Practice: What Does Your Brain See?,* Nov. 2012, available at http://www.nextions.com/wpcontent/files_mf/1352727388_magicfields__attach_1_1.pdf ("The research effectively disproves that any of us are 'color-blind' or 'gender-blind.' We 'see' race and gender even when those characteristics are undefined.").

Implicit Bias in the Legal Profession

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why ("Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.")

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at https://bol.bna.com/minorities-women-still-underrepresented-in-law/ ("Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that 'aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.'")

Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation and Lawyers Aren't Doing Enough to Change That,* May 27, 2015, ("Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.")

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms,* Nov. 19, 2015, available at http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf (noting in particular that the percentage of African-American firm associates has declined each year since 2009)

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, (citing as a top disappointment that "[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.")

Lam, Bourree, *The Least Diverse Jobs in America,* June 29, 2015, available at http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/ (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list)

New York State Bar Association, *Judicial Diversity: A Work in Progress,* Sept. 17, 2014, available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html ("People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations"), at p. 8.

Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias ("Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for "writing analysis" and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man's memo a rating of 4.1 on a scale of 5, while the African American's memo got a 3.2.")

Negowetti, Nicole E., *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: "[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and 'the lawyer's own character, insight, and experience.' . . . Without specific metrics to objectively evaluate the quality of an associate's work, stereotypes and implicit biases will influence one's judgment.")

http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email "Male partners make 44% more on average than female partners, survey finds," ABA Journal, October 13, 2016.)

http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/ ("A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they "feel they have no choice.") See also http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why

http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases (Partners "saw" more errors in memo attributed to black sounding name in study, even when memo was exactly the same."

http://www.abajournal.com/news/article/women_underrepresented_in_lead_trial_lawyer_positions_aba_study_reports

https://news.vanderbilt.edu/2016/06/22/massive-database-shows-state-judges-are-not-representative-of-the-people-they-serve/

https://www.law360.com/articles/1090659/gains-stall-for-female-partners-in-numbers-salaries (The number of female equity partners at top law firms has barely budged in more than a decade, with few signs of women making significant inroads into the upper tiers of management at law firms.

https://www.law360.com/health/articles/1090860/legal-funder-burford-puts-50m-toward-female-led-litigation?nl_pk=7125193a-2ea1-46ae-96ca-a48719519b91&utm_source=newsletter&utm_medium=email&utm_campaign=health&read_more=1 ("Litigation funding behemoth Burford Capital on Wednesday said it will put its money where its mouth is on the issue of promoting gender parity in BigLaw.")

Implicit Bias in Employment & Wages

MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

"Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process," Therese Macan and Stephanie Merritt, International Review of Industrial and Organizational Psychology 2011, Volume 26 (2011).

http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html

https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html?_r=0

https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html

http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation. See also https://www.census.gov/quickfacts/table/PST045215/00 (showing declining numbers of "white alone" individuals in the United States).

Ian Ayres, When Whites Get a Free Pass, THE NEW YORK TIMES (Feb. 24, 2015), at A23, available at https://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html

http://time.com/3666135/sheryl-sandberg-talking-while-female-manterruptions/

Jessica Bennett, How Not to Be 'Manterrupted' in Meetings, TIME.COM (Jan. 14, 2015)

Tonja Jacobi & Dylan Schweers, Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates, HARV. BUS. REV. (Apr. 11, 2017), https://hbr.org/2017/04/femalesupreme-court-justices-are-interrupted-more-by-male-justices-and-advocates.

http://gap.hks.harvard.edu/orchestrating-impartiality-impact-%E2%80%9Cblind%E2%80%9D-auditions-female-musicians (Implementation of blind auditions caused a surge in hires of female and diverse musicians in symphony orchestras.)

http://www.nber.org/papers/w9873 (In an audit study of employer hiring behavior, researchers Bertrand and Mullainathan (2003) sent out identical resumes to real employers, varying only the perceived race of the applicants by using names typically associated with African Americans or whites. The study found that the "white" applicants were called back approximately 50 percent more often than the identically qualified "black" applicants. The researchers found that employers who identified as "Equal Opportunity Employer" discriminated just as much as other employers.)

http://neatoday.org/2015/09/09/when-implicit-bias-shapes-teacher-expectations/ ("Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination by the National Bureau of Economic Research.")

https://www.npr.org/2018/10/01/649701669/the-american-dream-is-harder-to-find-in-some-neighborhoods ("If a person moves out of a neighborhood with worse prospects into to a neighborhood with better outlooks, that move increases lifetime earnings for low-income children

by an average $200,000. The task force's report identified early childhood development, college and career readiness, family stability and strong social networks as key factors that enhance upward mobility. It singled out segregation as a key obstacle.")

Implicit Bias in Criminal Justice

Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. http://www.bjs.gov/content/pub/pdf/p13.pdf

Blind injustice: the Supreme Court, implicit racial bias, and the racial disparity in the criminal justice system, *American Criminal Law Review*, Summer 2014: http://ic.galegroup.com/ic/ovic/AcademicJournalsDetailsPage/AcademicJournalsDetailsWindow?failOverType=&query=&prodId=&windowstate=normal&contentModules=&display-query=&mode=view&displayGroupName=Journals&dviSelectedPage=&limiter=&currPage=&disableHighlighting=&displayGroups=&sortBy=&zid=&search_within_results=&p=OVIC&action=e&catId=&activityType=&scanId=&documentId=GALE%7CA375696910&source=Bookmark&u=mnamsumank&jsid=cce6cbf0363435a6bf3d6170d4b781a0

http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (Discussing colorism: "Other research explored the connection between criminal sentencing and Afrocentric features bias, which refers to the generally negative judgments and beliefs that many people hold regarding individuals who possess Afrocentric features such as dark skin, a wide nose, and full lips. Researchers found that when controlling for numerous factors (e.g., seriousness of the primary offense, number of prior offenses, etc.), individuals with the most prominent Afrocentric features received longer sentences than their less Afrocentrically featured counterparts. … This phenomenon was observed intraracially in both their Black and White male inmate samples.")

https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department (The Department of Justice found reasonable cause to believe that the Baltimore Police Department engages in, among other things, a pattern or practice of conducting stops, searches and arrests without meeting the requirements of the Fourth Amendment and focusing enforcement strategies on African Americans, leading to severe and unjustified racial disparities in violation of Title VI of the Civil Rights Act and the Safe Streets Act.)

https://www.psychologytoday.com/us/blog/the-crime-and-justice-doctor/201811/implicit-bias-within-the-criminal-justice-system "[B]lack men are significantly more likely to be stopped and questioned by the police and subsequently arrested, and far more likely to receive a harsher sentence in comparison to white men. This is also true for black women, who are four times more likely than white women to be sentenced to prison and for a longer term. Research also supports the fact that black men are twice as likely to be sentenced to death for capital crimes in comparison to white males."

https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854 The median probability across counties of being {black, unarmed, and shot by police} is *3.49*(PCI95: 1.77,

6.04) times the probability of being {white, unarmed, and shot by police}. The median probability across counties of being {hispanic, unarmed, and shot by police} is *1.67*(PCI95: 0.99, 2.68) times the probability of being {white, unarmed, and shot by police}.

https://www.huffingtonpost.com/entry/cops-forcibly-detain-black-man-vegetation_us_5b0335b1e4b07309e05b57f5

Implicit Bias in Education

http://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem (Study of pre-school teachers showed that 42% "saw" challenging/disruptive behavior by black children when there was none.)

https://www.aft.org/ae/winter2015-2016/staats (Understanding implicit Bias: What educators should know)

http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/
(Research shows that African American students, and especially African American boys, are disciplined more often and receive more out-of-school suspensions and expulsions than White students. Perhaps more alarming is the 2010 finding that over 70% of the students involved in school-related arrests or referred to law enforcement were Hispanic or Black. Citing to Education Week, 2013.)

http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-i (Research suggests that Black students as young as age five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks. In a simple analysis of this phenomenon, the over-zealous application of "zero tolerance" policies gets all the blame, but a deeper dig will show a far more complex scenario.)

https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf ("The consequences for Black communities policed by biased officers has been tragic, but it can be equally consequential in schools, points out Becki Cohn-Vargas, the co-author of *Identity Safe Classrooms: Places to Belong and Learn.* "This is not about blaming or pointing fingers," she said, but it clear that the decisions made by teachers also do affect children's life trajectories. Unequal discipline, for example, may fuel the school-to-prison pipeline that has disproportionately affected students of color. …Whether or not a teacher "believes in" her students and expects them to succeed has been shown to affect how well that student does in school, particularly among disadvantaged students. But educators should be aware that those expectations can be influenced by their own implicit racial biases.")

http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-ii-solutions
(Youth of color are overrepresented at every stage of the juvenile justice process. Much of the literature that discusses this overrepresentation focuses on racial disparities in the juvenile justice process itself. However, a comprehensive understanding of this racial disproportionality is not

possible without examining racial bias in the "feeder systems" that funnel our children into the juvenile justice system.)

https://www.npr.org/sections/ed/2016/06/20/482472535/why-preschool-suspensions-still-happen-and-how-to-stop-them (black students — from kindergarten through high school — are 3.8 times more likely to be suspended than white students.)

Implicit Bias and the LGBTQ Community (Legal or Otherwise)

https://www.sciencedaily.com/releases/2015/07/150723083718.htm (U.S. Supreme Court's positive ruling on same sex marriage caused a decrease in conscious and unconscious bias against gay people.)

http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html
("Over the course of a career, the effects of implicit decision-making can lead to significant, detrimental consequences for the careers of LGBT lawyers. For example, in a law-firm setting, straight partners handing out choice assignments may subconsciously feel more comfortable working with straight associates and thus seek their assistance first, leading to fewer billable hours and less challenging work for LGBT lawyers. Because LGBT attorneys are less likely to choose traditional, opposite-sex family arrangements, LGBT lawyers and their straight counterparts can have social differences that might reinforce implicit biases in some settings. Or a referral source may have a subconscious concern that an LGBT colleague might be perceived negatively by the client or in a courtroom, and choose to pass the case along to a straight colleague.")

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf ("Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors' decisions.1 Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors.")

https://www.huffingtonpost.com/cody-cain/religious-freedom-vs-gay-_b_7718830.html (When people use "religious freedom" as a means to discriminate.)

https://www.advocate.com/politics/2018/1/24/homophobe-sam-brownback-confirmed-religious-freedom-ambassador

https://www.huffingtonpost.com/entry/opinion-signorile-gay-bi-men-murders_us_5a730f74e4b06fa61b4df141 (Hate crimes against LGBTQ individuals increased exponentially in 2017.)

Implicit Bias in Life

https://nypost.com/2017/12/18/restaurants-racist-sign-with-man-in-blackface-sparks-outrage/?utm_campaign=iosapp&utm_source=mail_app

Mirna Martinez Santiago, Esq.

MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

https://www.huffingtonpost.com/entry/nazi-hitler-halloween-costume-kentucky-dad-apology_us_5bd647f8e4b055bc948d56cd (This is in 2018.)

https://www.newsweek.com/wearing-braids-sends-black-girls-detention-malden-charter-school-608303

https://www.elitedaily.com/life/culture/black-girls-natural-hair-racism-schools/1953497

https://www.nbcnews.com/news/nbcblk/louisiana-girl-sent-home-school-over-braided-hair-extensions-n902811

https://www.nbcnews.com/news/nbcblk/diverse-congress-worth-celebrating-it-s-just-start-experts-say-n956226

http://www.abajournal.com/news/article/showing_anger_in_the_courtroom_can_backfire_for_women_lawyers_study_suggest/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email ("The research suggests that women lawyers are more likely to be judged in a harsher light than men when they display assertiveness, self-promotion or anger, according to University of California at Hastings law professor Joan Williams…. A separate study led by Arizona State University psychology professor Jessica Salerno looks at anger in the courtroom. It concludes that gender bias affects the way people perceive a lawyer's effectiveness when showing anger in closing arguments.")

https://www.pbs.org/newshour/economy/report-black-women-less-likely-to-be-promoted-supported-by-their-managers

https://www.nbcnews.com/news/nbcblk/every-tally-hate-crimes-blacks-are-most-frequent-victims-n938541 (""It has been the case historically, and certainly since we started to get valid statistical information on hate crimes, that African Americans have been the group most frequently targeted," said Jack McDevitt, director of the Institute of Race and Justice at Northeastern University.)

https://www.psychologytoday.com/us/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism ("Research has shown that hearing colorblind messages predict negative outcomes among Whites, such as greater racial bias and negative affect; likewise colorblind messages cause stress in ethnic minorities, resulting in decreased cognitive performance (Holoien et al., 2011). Given how much is at stake, we can no longer afford to be blind. It's time for change and growth. It's time to see. The alternative to colorblindness is *multiculturalism*, an ideology that acknowledges, highlights, and celebrates ethnoracial differences. It recognizes that each tradition has something valuable to offer. It is not afraid to see how others have suffered as a result of racial conflict or differences.")

Strategies for Interrupting Implicit Bias

http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history

https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf

http://nypost.com/2017/10/25/kelloggs-called-out-for-racist-cartoon-on-cereal-box/

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf ("Studies show that people who have close friends who are LGBT tend demonstrate less anti-LGBT bias.")

https://www.usatoday.com/story/money/2017/04/27/whats-your-salary-becomes-no-no-job-interviews/100933948/

https://www.usatoday.com/story/news/politics/2018/12/20/criminal-justice-reform-bill-passes-congress-goes-president-trump/2373992002/

The Business Case for Diversity in Law

The Business Case for Diversity: Reality or Wishful Thinking?
Institute for Inclusion in the Legal Profession. http://www.theiilp.com/Resources/Documents/BusCaseDivReport_11_Final.pdf
("The business case for diversity – where corporate clients apply the "carrot" of continued or increased business and the "stick" of an implied decrease, withdrawal or even loss of business to encourage law firms to become more diverse, or use their economic power to support the economic success and financial independence of diverse lawyers through the growth of minority- and women-owned law firms – is not a new concept. ... [But] despite almost three decades of concerted efforts to use the business case for diversity to diversify the legal profession by increasing diversity among lawyers in large law firms and the level of economic success achieved by minority- and women-owned law firms, what progress has been seen has been disappointing.")

- This study gives wonderful insight on the hard statistics regarding diversity in law firms, breaking it down by race, ethnicity, gender, disability, and military status. It seeks to answer two main questions: Is the oft discussed business case for diversity truly creating a more diverse and inclusive legal profession? If not, how can the business case be more effective? The article provides the perspective of diverse partners, and how diversity (or a lack thereof) has impacted their profession. It also confronts skepticism in the business case for diversity, and the fact that even though clients and law firms outwardly push for diversity, very little is actually done internally to make it happen.

Making the Case: How Diversity and Inclusion Can Improve Your Firm's Financial Outlook. The International Association of Defense Counsel (IADC), Diversity and Inclusion In-House And Law Firm Management. November 2017. https://www.wglaw.com/portalresource/lookup/wosid/cp-base-4-73904/media.name=/Diversity___Inclusion___in_House_L_F_M_JOINT_-_November_2017.pdf
("Indeed, there can be a clear strategic advantage to having a trial team that consists of diverse attorneys since jury pools are more diverse today than they have ever been. ... Law firm management, however, must be aware that the use of women and diverse attorneys could be tantamount to exploitation depending on how these attorneys are used. Therefore, to the extent that there is a strategic purpose for using a woman or a diverse attorney in litigation, law firms must be careful to staff matters so that diverse attorneys are an integral part of the team rather than used solely because of their diverse background as 'window dressing.'")

- This article suggests firms should focus on three main areas; talent, since the largest percentage of law school graduates is now female and a larger percentage of diverse students are graduating from law school; client relationships, because the selection of counsel is often determined by how comfortable someone feels with another person, so business developed by the relationship of one of the diverse lawyers within your law firm with clients can increase the number of business opportunities for the law firm; and

standing out, since diversity can make the difference in a world where competition is very tight.

Stagnant Progress on Law Firm Diversity Can't Continue.
The American Lawyer - Young Lawyer Editorial Board. July 2018. https://www.law.com/americanlawyer/2018/07/09/stagnant-progress-on-law-firm-diversity-cant-continue/?slreturn=20180919125256
("According to the National Association for Law Placement 2017 Report on Diversity in U.S. Law Firms, "women and minority partners remain fairly dramatically under-represented in U.S. law firms," with women minorities being the "most dramatically underrepresented group" of all. Some metrics predict that the industry will not see gender parity until 2081... Implicit bias offers an explanation for why the same law firms that attract diverse talent at the outset are failing to retain it.")

- This article addresses the lack of diversity in law firms, the reasons it exists, and how to implement a stronger call to action including re-orientating the hiring process, confronting bias, and more.

Diversity Makes Cents: [Clients Demand] The Business Case for Diversity.
American Bar Association Section for Litigation. http://nbacls.com/wp-content/uploads/2013/08/diversity_makes_cents.authcheckdam.pdf
("Diversity helps the bottom line in a variety of ways. First, diverse law firms attract and retain better lawyers. The pool of available white male law school graduates continues to shrink. As noted above, approximately half of law school graduates today are women and 20% are minorities. Firms that seek candidates solely through the "old boys network" are finding that this network is becoming smaller and smaller. ... Not only is business being developed by the relationships established by women and minority lawyers and clients, some corporate clients today are demanding that their law firms have respectable diversity statistics.")

- This article discusses the benefits that diversity brings to law firms, not only extrinsically, but in terms of productivity and client satisfaction.

Corporate Clients Demand More Diversity From Law Firms.
American Bar Association. Feb. 2017. https://www.americanbar.org/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/
("About 15 percent of respondent firms' attorneys are members of racial or ethnic minority groups while more than 90 percent of the partners are white. Additionally, African American lawyers are less represented in law firm populations than they were nine years ago while Asian Americans represent the largest group of non-white attorneys. Despite this, the survey showed that these attorneys are less likely than African American or Latinos to be partners or hold leadership positions within their respective firms.")

- This article discusses how large corporate clients are now demanding more from firms, and some interesting statistics.

Harrison, Nicole. Why You Should Seek Diversity in Your Law Firm. https://www.defenselitigationinsider.com/2015/04/15/why-you-should-seek-diversity-in-your-law-firm/
The article summarizes the reasons to: strength, better work product, greater capabilities, a larger network, and relatability.

MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

Lee, Kate. Workplace Diversity Impacts the Bottom Line.
https://www.fronetics.com/workplace-diversity-impacts-the-bottom-line/
("Recent research conducted by McKinsey & Company found that ... companies in the top quartile for gender diversity are 15% more likely to have financial returns above their respective national industry medians, and when it comes to ethnic diversity the financial returns are even greater – 35%.") Essentially, diversity matters to productivity and efficiency within professional settings.

The High Cost Of BigLaw's Lack Of Diversity.
Law 360.
https://www.law360.com/articles/795768/the-high-cost-of-biglaw-s-lack-of-diversity
("In the broader corporate community that forms BigLaw's client base, diversity pays off. Last year, McKinsey & Co. found that companies in the highest quartile of racial or ethnic diversity are 35 percent more likely to financially outperform companies in the bottom quartile. Also last year, Bersin by Deloitte found that the highest-performing companies — with higher cash flow, profitability and growth — make diversity and inclusion a priority and "align their diversity and inclusion strategy to organizational objectives. ... The case for legal diversity isn't just about profits per partner. It's also about outcomes, abilities and the strength of an outside team.")

Limitations On the Business Case for Diversity.
Worklaw Jotwell, Sept. 2017.
https://worklaw.jotwell.com/limitations-on-the-business-case-for-diversity/
("A business case for diversity may be perceived as more legitimate than antidiscrimination law because it offers a connection between increased diversity and inclusion and positive performance outcomes. It may also be favored because it frames the efforts as proactive, to reap financial rewards, rather than reactive, to stop discrimination and avoid punishment.")
("The business focus on diversity may paint minorities as competitors for economic and social resources and may thus cause resistance because that competition poses a threat to scarce resources and privileges of the dominant group. Additionally, by emphasizing the benefit of diversity, organizations may send a message that the dominant group is less valuable. Finally, diversity values may generate resistance because they conflict with color-blind "meritocratic" ideology that is becoming more and more pervasive.")

- This article discusses how framing the issue in a different light can make all the difference in diversity, since more people are concerned with profit and numbers than morality and ethics. It is a summary of Breaking Down Bias: Legal Mandates vs. Corporate Interests Washington Law Review, Vol. 92, pp. 1473-1513, 2017 by Jamillah Williams.

We Need to Test Ourselves
Legal Week, November 2017.
https://www.law.com/legal-week/sites/legalweek/2017/11/23/we-need-to-test-ourselves-eversheds-chief-ranson-on-the-business-case-for-diversity/
In this video, Eversheds Sutherland co-CEO Lee Ranson discusses the influence of clients on law firm diversity, what law can learn from the big four accountants, how US firms differ from their UK counterparts, and how he is looking to improve the diversity of Eversheds Sutherland's management team.

Diverse Teams Feel Less Comfortable — and That's Why They Perform Better.

Harvard Business Review. September 2016.
https://hbr.org/2016/09/diverse-teams-feel-less-comfortable-and-thats-why-they-perform-better?referral=03758&cm_vc=rr_item_page.top_right
("In numerous studies, diversity — both inherent (e.g., race, gender) and acquired (experience, cultural background) — is associated with business success. For example, a 2009 analysis of 506 companies found that firms with more racial or gender diversity had more sales revenue, more customers, and greater profits. A 2016 analysis of more than 20,000 firms in 91 countries found that companies with more female executives were more profitable.")

Law Firm Diversity: They All Talk the Talk, But It's Harder to Walk the Walk.
BGC Attorney Search.
https://www.bcgsearch.com/article/900047350/Why-Major-Law-Firms-Are-Actually-Against-Diversity-Do-Not-Be-Too-Diverse-or-You-Will-Not-Get-Hired/
This article gives anecdotal evidence and opinions on how diversity can actually make law firms uncomfortable.

5 Best Practices for Improving Law Firm Diversity and Inclusion.
The National Law Journal, July 2018.
https://www.law.com/nationallawjournal/2018/07/18/5-best-practices-for-improving-law-firm-diversity-and-inclusion/
The article goes into detail within these five suggestions: (1) Show support from the top down; (2) Focus on inclusion, not just diversity; (3) Hire a dedicated inclusion professional; (4) Broaden your pool; and (5) Improve accountability.

Nine Tips for Building a Diverse and Inclusive Law Firm
American Bar Association.
https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/winter2016-0116-tips-to-build-diversity-and-inclusion-at-law-firms/
This article suggests that diverse and inclusive law firms perform better, relate better to clients, courts, juries, and other decision makers important to their clients' success. They provide nine tips (and explanations) on how to improve diversity, which are: (1) Diversity-Aligned Recruiting (2) Invest in Diverse Attorneys (3) Consider Diversity for Internal Roles and Positions (4) If You Develop Associates, Diverse Attorneys Will Come (5) It's as Easy as "Let's Do Lunch" (6) Celebrate Differences to Create Inclusion (7) Community Outreach (8) Diverse Management (9) Communication.

Model Rules of Professional Conduct

Rule 8.4: Misconduct (Attorneys)

Maintaining the Integrity of the Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

MirnaMSantiago@gmail.com
MirSantiago@AcaciaNetwork.org

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 2.3: Bias, Prejudice, and Harassment (Judges)

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

117 Yale L.J. 1420

Yale Law Journal
May, 2008

Feature

Kate Stith [a1]

THE ARC OF THE PENDULUM: JUDGES, PROSECUTORS, AND THE EXERCISE OF DISCRETION

ABSTRACT. Early scholarship on the Federal Sentencing Guidelines focused on the transfer of sentencing authority from judges to the Sentencing Commission; later studies examined the transfer of discretion from judges to prosecutors. Of equal significance are two other institutional competitions for power: one between local federal prosecutors and officials in the Department of Justice in Washington ("Main Justice", and the other between Congress and the Supreme Court. Congress's enactment of the Feeney Amendment in 2003, in reaction to sentencing data and decisions appearing to reveal that sentencing judges were willfully ignoring the Guidelines, represented a direct challenge to every level of the federal judiciary, to the Sentencing Commission, and to front-line federal prosecutors. By design, this legislation simultaneously empowered Main Justice, which was Congress's partner in the endeavor to achieve nationwide "compliance" with the Sentencing Guidelines. In its 2005 decision in United States v. Booker, the Supreme Court undid the Feeney Amendment, introduced the opportunity for judges openly to exercise judgment independent of the Guidelines, constrained the leverage that inheres in prosecutors in a mandatory sentencing regime, and counteracted the centralizing impulse of Main Justice. The Court's recent decisions elaborating Booker confirm that, once again, sentencing is to a significant extent a "local" event. The Sentencing Commission and Main Justice may still be calling signals but the decision makers on the playing field--judges and prosecutors--need not follow them. The pendulum of sentencing practice may increasingly swing back toward the exercise of informed discretion as newly appointed local decision makers are able to see beyond the narrow and arbitrary "frame" of the Federal Sentencing Guidelines.

*1421 FEATURE CONTENTS

*1422 INTRODUCTION

In the federal criminal justice system, both prosecutors and judges have historically exercised broad discretion--prosecutors in charging (or not charging), and judges in sentencing. Both prosecutorial and judicial discretion in the criminal process date back to the very beginnings of the Republic. [1] For most of our history, the exercise of discretion has simply been taken for granted by judges, by prosecutors, and most importantly, by Congress, which has created a system of criminal laws that requires--and has always required--the exercise of discretion. Unlike the civil system in continental Europe, the common law has never featured or claimed to feature mandatory exercise of prosecutorial power.

In the modern era, we have grown suspicious of discretion. To a formalist, discretion seems the very antithesis of law. To a realist who views law as simply power, discretion is, at best (in Judge Marvin Frankel's memorable book title), "law without order." [2] A central campaign of the modern age-- extending far beyond sentencing and the criminal justice system--has been to reduce the discretion of government officials. [3]

I use the term "power" to refer to lawful authority to take action against an individual. "Discretion," on the other hand, is the authority not to exercise power. In the context of the criminal law, to exercise discretion means, most simply, to decide not to investigate, prosecute, or punish to the full extent available under law. Discretion in federal criminal law enforcement is so great and so difficult to constrain because it is a necessary concomitant of the substantive federal criminal law. [4] That is, federal statutory criminal law has ***1423** great breadth and has always included both lesser-included offenses and

overlapping offenses. Moreover, the federal criminal law has always been an adjunct to state criminal law; most conduct that violates federal law also violates state law. Thus, in many instances, federal prosecutors must decide both whether to intervene in potential state prosecutions and, if they do choose to intervene, which crimes to charge. Federal prosecutorial decision makers (whoever they may be--line prosecutors, U.S. Attorneys, or officials and bureaucrats in the Department of Justice) necessarily have broad charging discretion. Concomitantly, sentencing authorities (whoever they may be--judges, administrative agencies, or prosecutors) necessarily have broad discretion over punishment. As Congress well understands when it enacts federal criminal proscriptions, both prosecutorial and sentencing discretion are inevitable because of the broad reach of these proscriptions and the severity of authorized punishments.[5] Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.[6] Someone has to exercise authority to decide what to investigate, what to prosecute, what to charge, and how great punishment will be.

The inevitable exercise of charging and sentencing discretion in the federal criminal justice system has been a recurring theme in the saga of the Federal Sentencing Guidelines, whose recent transformation by the Supreme Court from a "mandatory" to an "advisory" regime[7] I consider in this essay. I do not ***1424** view the Court's recent Guidelines decisions only from an internal perspective--that is, in terms of the competing constitutional doctrines expounded in these cases. Rather, I consider the recent decisions against the backdrop of inevitable, ongoing institutional rivalries. The institutions in play include not only the inferior federal courts (both trial and appellate), Congress, and the U.S. Sentencing Commission, but also the Supreme Court, federal prosecutors in the ninety-four U.S. Attorneys' offices, and, importantly, the U.S. Department of Justice in Washington, D.C. ("Main Justice"). Early scholarship on the Federal Sentencing Guidelines focused on the transfer of sentencing authority from judges to the Sentencing Commission; later studies have examined the transfer of discretion from judges to prosecutors. Of equal significance are two other ongoing competitions for power: one between local federal prosecutors and officials in Main Justice, the other between Congress and the Supreme Court. In its 2005 decision in United States v. Booker[8] and its recent decisions elaborating the new sentencing regime constructed in Booker, the Supreme Court asserted the significant responsibility and authority of sentencing judges, local prosecutors, and the Supreme Court itself.

In Part I, I seek to identify the critical decisions made in constructing and implementing the Guidelines, decisions that ultimately resulted in increased prosecutorial power and discretion. This discretion could, and would, be used to influence defendants to plead guilty or face remarkably severe Guidelines sentences. Although it was not the goal either of sentencing reformers or of Congress, the actual result of the Guidelines regime that

took effect in late 1987 was to transfer sentencing authority not to the U.S. Sentencing Commission, but to federal prosecutors in general and--particularly in recent years--to Main Justice.

Because I have elsewhere expressed skepticism about the project of uniform application of sentencing rules,[9] I do not dwell here on the issue that motivated the Sentencing Reform Act[10]--the existence of "disparity" among judges in sentencing. Disparity unquestionably exists. But requiring judges to apply national sentencing rules risks masking both the continued significance of the individual judge in sentencing and the increased leverage over defendants afforded to prosecutors in plea bargaining. The federal effort to stamp out ***1425** judicial disparity through the Guidelines was probably not successful.[11] In any event, the decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines.

Part II explains why neither appellate decisions nor raw sentencing data are an accurate tool to measure the Guidelines' success in achieving greater national uniformity in sentencing--nor even for measuring the extent to which the Guidelines are actually implemented. Each criminal sentencing is ultimately highly "local," a result of the strategic decisions of the prosecutor, the defense attorney, and the judge--all acting within the factual confines of the case at hand as well as the larger norms and practices of the judge's courtroom, of the federal district, and of the relevant circuit. Further, the sentencing decisions of the courts of appeals--including the "win/loss" ratio for defendants and the government--tell us very little about law on the ground. Few sentencing decisions are appealed by defendants, and even fewer are appealed by the government.[12] While courts of appeals may use these cases to signal to district courts how rigorously they should apply the Guidelines, this signal is imperfect at best and may be ignored altogether in cases that are not likely to be appealed. Indeed, even ground-level sentencing data--the sort of data assiduously compiled by the Sentencing Commission for every sentence in the federal courts--is a poor measure of the extent of Guidelines implementation and compliance. Although we can count the case reports submitted by judges, and thereby determine the ratio of reported Guidelines sentences to reported non-Guidelines sentences, there is no way to judge how accurate these reports are--or even what "complying" with the Guidelines would mean.

The unreliability of appellate decisions and raw sentencing data as portrayals of actual practice has not always been appreciated. Interested political observers, in particular, have looked to appellate case law and to the frequency of reported non-Guidelines sentences as a measure of the extent to which judges have "complied" with the Guidelines and thus implemented Congress's design to reduce sentencing disparity. Part III recounts Congress's

2003 decision--in reaction to sentencing decisions in particular white-collar cases and to nationwide data that appeared to reveal that sentencing judges were willfully ignoring the Guidelines in a growing proportion of cases--to enact legislation that represented a direct challenge to every level of the federal judiciary, the Sentencing Commission, and local prosecutors. By design, this ***1426** legislation, known as the Feeney Amendment ("Feeney"),[13] simultaneously empowered Main Justice, which was Congress's partner in the endeavor to limit if not eliminate the exercise of discretion by decision makers in the field. Feeney added language to the Sentencing Reform Act to overturn a unanimous Supreme Court case, Koon v. United States,[14] that appeared to encourage judicial disregard of the Guidelines. Feeney also directed the Sentencing Commission to amend the Guidelines to reduce judicial discretion to impose below-Guidelines sentences, and directed the Department of Justice to monitor the sentencing advocacy of prosecutors and the sentencing decisions of judges--all in aid of reducing the opportunities for individual judges and prosecutors to exercise discretion outside the confines of the Guidelines.

I explain in Part IV why Booker (as well as Booker's immediate predecessor, Blakely v. Washington,[15] and Booker's progeny of 2007[16]) can be understood as an institutional response by the Supreme Court--which for more than a decade had been loath to intervene or even seriously analyze constitutional and other issues raised by the Guidelines--to several developments that threatened the integrity of federal criminal sentencing and, indeed, of the whole federal criminal justice system. In a dramatic exercise of judicial power, Booker undid the Feeney Amendment, limited the power that inheres in prosecutors in a regime of mandatory sentencing rules, and counteracted the centralizing impulse of Main Justice. The doctrinal basis of Booker's holding that mandatory Guidelines are unconstitutional, sounding primarily in the jury-trial right of the Sixth Amendment, had been elaborated over the course of several years--beginning in the late 1990s, continuing with Apprendi in 2000,[17] and most importantly with Blakely in 2004. But it is not a mere coincidence, in my view, that both Blakely and Booker--including the latter's unexpected remedy that left the Guidelines in place but assertedly made them "advisory"--occurred in the wake of Congress's own extraordinary intervention in 2003 and Main Justice's subsequent restrictions (required by Feeney) on local prosecutorial autonomy.

The Supreme Court's three federal sentencing decisions of 2007 reaffirm that Booker restored significant judicial power, and thus permits the exercise of ***1427** judicial discretion, over sentencing; post-Booker discretion is greater even than that which existed under the pre-Feeney Guidelines, though not nearly as great as that which existed in the pre-Guidelines era. By introducing the opportunity for federal trial judges openly to exercise judgment independent of the Guidelines, Booker and its progeny not only allow judges to provide a counterweight to prosecutorial leverage over defendants, but also counteract the constraints

that Main Justice imposed on line prosecutors in the wake of the Feeney Amendment. [18] Once again, sentencing is to a significant extent a "local" event. After Booker, the Sentencing Commission and Main Justice may still be calling signals but the decision makers on the playing field--judges and prosecutors--need not follow them.

I. TRY AND CATCH THE WIND: EFFORTS TO LIMIT DISCRETION IN FEDERAL CRIMINAL SENTENCING

Neither sentencing reformers nor their supporters in Congress set out to transfer sentencing discretion from judges to prosecutors. The idea of Marvin Frankel, then a judge in the Southern District of New York and later exalted as the "father of sentencing reform" by Senator Edward M. Kennedy, [19] was simply to make criminal sentencing subject to "law." Judge Frankel did not foresee (or at least did not discuss) the possibility that written sentencing rules could have the effect of transferring sentencing discretion to prosecutors. But the drafters of the Sentencing Reform Act (including then-Professor Stephen Breyer, on leave from Harvard Law School and serving on Kennedy's staff when the Senator introduced sentencing reform legislation in the late 1970s) were aware of this possibility. They sought to give the new administrative agency charged with writing sentencing rules, the U.S. Sentencing Commission, authority to ensure that these rules, and not the charging decisions of prosecutors, would determine federal sentences. Likewise, the original members of that Commission (who included then-Judge Stephen Breyer of the Court of Appeals for the First Circuit) made earnest efforts on several fronts to cabin not only the discretion of judges but also, to a lesser extent, the discretion of prosecutors. The Commission was assisted in this effort by Main Justice, which directed U.S. Attorneys and front-line prosecutors to limit their exercise of discretion, and thereby achieved a measure of centralized control over federal prosecutorial charging and sentencing decisions.

*1428 A. The Sentencing Reform Act of 1984: Sentencing Rules To Control Judges

The most direct method of limiting discretion is to spell out in detail the rules that decision makers must apply, so as to reduce the need or opportunity for the exercise of judgment. A paradigmatic example is the Federal Sentencing Guidelines, [20] whose overriding purpose was to reduce inter-judge sentencing disparity by reducing judicial discretion. [21] The Guidelines are an extraordinarily complex set of sentencing factors, with weights attached to each factor that judges were instructed to apply to calculate each offender's "applicable [G]uideline[s] range." [22] The Sentencing Reform Act required that judges sentence within this range unless there was a lawful ground for "departure," either specified by the Sentencing Commission in the Guidelines themselves or, residually, if the case involved highly atypical

and extraordinary factors not taken into account by the Commission in its Guidelines.[23] In order to ensure that sentencing judges faithfully and fully applied the Guidelines, including their requirement of "real offense" sentencing and their limitations ***1429** on departures from the calculated Guidelines range, the Sentencing Reform Act provided, for the first time, that both the defendant and the government would have the right to appeal. Appeals could be based either on the ground that the sentencing judge had misapplied the Guidelines in calculating the range or on the ground that the judge had departed from this range for a reason not expressly sanctioned by the Guidelines or the Sentencing Reform Act.[24] In other words, district judges had an obligation to implement the Guidelines, and the courts of appeals would be available in every case to "police" the sentencing judges.[25]

Accordingly, from their inception, the Sentencing Commission's proclamations were not merely "guidelines" or recommendations, but enforceable rules that sentencing judges were legally obliged to follow. Even the sentencing judge's authority to impose a sentence outside the calculated Guidelines range (to "depart") was itself the subject of Guidelines, technically called "Policy Statements,"[26] issued by the Commission. Opportunities for departure did exist. In the most important of these, the judge was released of all obligation to give a sentence in the Guidelines range when the government made a motion (the "5K1 motion," as it became known, after the section of the Guidelines authorizing such motions)[27] for a downward departure on the ground that the defendant had substantially assisted in the prosecution of others. Beyond such government-sponsored departures for cooperators, however, the original Guidelines limited interstitial opportunities to depart for reasons not expressly permitted by the Guidelines themselves. Indeed, inasmuch as departures not expressly permitted by the Guidelines were available only in cases exhibiting extraordinary circumstances or aberrant behavior,[28] the Guidelines were for all intents and purposes "mandatory" for most defendants other than cooperators. As Justice Antonin Scalia recognized in his 1989 dissent in Mistretta (involving a challenge to the constitutionality of ***1430** the Guidelines regime on separation-of-powers grounds),[29] and as Justice Harry Blackmun's majority opinion refused to acknowledge, the Guidelines were law.[30]

The intentions of the Sentencing Commission notwithstanding, reducing judicial discretion through sentencing rules--whether promulgated by a legislature or by an administrative agency such as the Commission--threatens to enhance prosecutorial authority over sentencing: once the rules are published, the prosecutor, through her discretionary charging authority, effectively determines what the defendant's Guidelines sentencing range will be. To be sure, prosecutorial charging practices have always affected the sentence, but when judges had discretion to impose any sentence up to the statutory maximum or down to the statutory minimum, prosecutorial power was potentially limited or counterbalanced by the

possibility of judicial discretion. Moreover, it is an overstatement to suggest that a federal prosecutor ever has unlimited discretion in selecting charges or determining the sentence. Though certainly broad-ranging, even the federal criminal law is limited in its scope and often detailed in its specification of elements of an offense; as a result, evidentiary and resource constraints necessarily limit the charges that a prosecutor can bring in any given case. [31]

Yet there is no doubt that because they set forth the consequences of each statutory charge and each specified sentencing factor, the Federal Sentencing Guidelines had the potential to effect a transfer of discretion over the severity of punishment from the judge to the prosecutor. Indeed, even as Congress set about in the late 1970s and early 1980s to construct a system in which judicial discretion would be severely limited, the architects of that system realized the possibility that the effect of their reform efforts could be to transfer decision-making power not to the bureaucratic institution they were creating to write ***1431** sentencing rules (namely, the U.S. Sentencing Commission), but to federal prosecutors. [32]

In the early years during which Congress debated Senator Kennedy's sentencing reform bill, the Justice Department may not have fully realized the potential of sentencing rules to enhance prosecutorial power. The Department did not oppose efforts to reform sentencing, but a review of the legislative materials indicates that, at best, sentencing reform was not high on the legislative agenda of the Carter Administration. [33] The Department's Criminal Division was in any event preoccupied with other concerns, which ultimately did lead to incremental first steps in the centralization of prosecutorial discretion in Main Justice. In the wake of the ABSCAM investigation, which ensnared and convicted several members of Congress and led to oversight hearings highly critical of the underlying investigation, [34] the Criminal Division in 1979 promulgated nationwide regulations on the use of informants and ***1432** undercover agents by the FBI. [35] Of even greater potential significance, the Criminal Division prepared and published in 1980, under the signature of Attorney General Benjamin Civiletti, the first general policy statement to guide the exercise of prosecutorial discretion within each of the ninety-four districts. The 1980 Principles of Federal Prosecution provided somewhat abstract guidance relevant to all types of federal prosecutions, while conceding the importance of local control over prosecutorial priorities and saying very little about sentencing. [36]

In these years, the ninety-four U.S. Attorneys exercised significant local autonomy both in charging and in setting prosecutorial priorities. While approval from Main Justice was required by statute in some circumstances (for instance, prior to seeking a court-authorized wiretap), [37] and by internal regulation for prosecution of certain offenses (for instance, where the conduct has already been prosecuted in state court), [38] for the most part there was

little centralized control of line prosecutors--Assistant U.S. Attorneys--beyond that which a U.S. Attorney might choose to exercise within his own district.[39] The Justice Department itself had no policies related to criminal sentencing. Indeed, the 1980 version of Principles of Federal Prosecution cautioned prosecutors not to make "sentencing recommendations" unless required to do so by a plea agreement or where warranted by "the public interest."[40]

Under the Reagan Administration, however, the Department included the Sentencing Reform Act in its pending crime control proposals.[41] The Department strongly supported sentencing guidelines as a means of achieving nationwide sentencing uniformity and ensuring more severe punishment of ***1433** violent and white-collar crime; departmental spokesmen expressly noted and approved the prospect of guidelines that would be based not just on the offense of conviction, but also on the offender's criminal history and the particular facts of his criminal conduct.[42] As enacted, the Sentencing Reform Act of 1984 provided that a representative of the Department of Justice would sit ex officio on the Commission.[43]

The 1984 legislation included provisions that sought to ensure that the advent of sentencing guidelines would not simply transfer sentencing authority to line prosecutors in their plea bargaining with defendants. The Sentencing Reform Act specifically authorized the Commission to issue policy statements governing judicial review of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure.[44] The accompanying Senate Report explained, "This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."[45] Of equal significance, the statute contained several admonitions that in effect urged the Sentencing Commission to adopt sentencing rules that were based not only on the offense of conviction (which would give individual prosecutors significant control over the sentence by exercising their charging ***1434** discretion), but also on additional aspects of the offender's "real offense,"[46] in order to avoid undue control of sentences by prosecutors.

B. The Sentencing Commission: "Real Offense" Sentencing To Control Prosecutorial Undermining of Sentencing Rules

The Sentencing Commission, too, well understood from the beginning that sentencing rules could simply transfer discretion to prosecutors.[47] Yet many thoughtful reformers[48] -- apparently including Judge Breyer, one of the original members of the Commission--doubted the feasibility of regulating prosecutorial charging authority through the simple mechanism of ex ante rules. In the introductory chapter of the Guidelines, widely understood to have been written by Judge Breyer, the Commission asserted that it had "decided that these initial guidelines will not, in general, make significant changes in current plea agreement

practices." [49] While a strong proponent of the Guidelines "real offense" approach, [50] Breyer was apparently of the "incrementalist" [51] view that both judicial and prosecutorial discretion could not simultaneously be limited. In any event, the Commission was busy enough just trying to write from scratch sentencing rules for judges, and it is highly ***1435** unlikely that the Department of Justice would have continued to support the enterprise if the Commission had sought to constrain directly the discretion of prosecutors as well as judges.

The Commission did, however, make a powerful attempt to restrain prosecutorial discretion indirectly, by accepting Congress's invitation to use the offense of conviction only as the starting point for the calculation of an offender's Guidelines sentence. The final Guidelines, promulgated in mid-1987 to take effect on November 1, 1987, provided that the ultimate sentence would be calculated on the additional basis of a host of supplementary aggravating factors (and a few mitigating factors), including consideration of the offender's criminal behavior related to the crime of conviction (even if not charged or convicted) and his prior criminal convictions. [52] Paradoxically, the Commission sought to limit prosecutorial control of sentencing by imposing additional controls on the judge--specifically, requiring her to sentence not on the basis of the offense of conviction alone, but also on the basis of "real offense" factors beyond the offense of conviction. The idea was that these "real offense" factors either existed or did not exist in any given case; it did not matter whether the prosecutor charged them or not. In this way, a sentence would be based on the rules set forth by the Commission, not on the exercise of discretion by either the judge or the prosecutor.

Stephen Breyer has been perhaps the most influential supporter of some sort of Guidelines regime. He has many times explained--first as a judge and Commissioner, [53] and most recently as a justice in his Apprendi and Blakely dissents [54] and his Booker remedy opinion [55] --that the reason that the Guidelines require "real offense" instead of "charged offense" sentencing is to ensure that punishment is not based on the arbitrary value judgments of the judge or the prosecutor. Rather, sentencing is to be based on the value judgments of the expert agency whose rules are written in advance without any particular defendant in mind. To ensure that judges sentence on the basis of "actual" offense conduct, rather than what the prosecutor charges, the particular sentencing rules created by the Commission were based on easily ascertainable factors such as prior convictions, and on quantifiable criteria such as amount of drugs or amount of monetary loss. The Guidelines largely ignore--indeed, ***1436** generally prohibit consideration of--less objective criteria such as those relating to the character or personal history of the offender. [56]

Moreover, chapter six of the Guidelines included several admonitions to judges designed to avoid prosecutorial undermining of the enterprise of "real offense" sentencing. While these instructions were clearly in tension with the assertion in the introduction of the Guidelines

that the Commission did not intend to interfere with plea bargaining, the chapter six policies addressing these bargains were directed to the judge rather than to the prosecutor. [57] A judge could accept a plea agreement to drop or withhold some charges only if "the remaining charges adequately reflect the seriousness of the actual offense behavior." [58] Similarly, the judge could accept an agreement providing for departure from the Guidelines range only if there was a "justifiable" reason [59] for the departure, as provided in the Sentencing Reform Act or the Guidelines themselves. A third rule required that all plea agreements accepted by a judge must "set forth the relevant facts and circumstances of the actual offense conduct" and "not contain misleading facts." [60] Finally, the Commission asserted that the sentencing judge is not bound by factual stipulations of the parties, but instead is to determine "the facts." [61]

C. The Inquisitorial Implications of "Real Offense" Sentencing

It is one thing to tell the judge that she must sentence on the basis of "the facts." It is something else altogether to ensure that she knows what "the facts" are. The prosecutor and defense attorney in a common law, adversarial system of justice do not, separately or in tandem, perform the function assigned to an investigating magistrate in an inquisitorial system. In particular, as long as defendants are allowed to plead guilty and as long as prosecutors do not operate under a requirement of "mandatory" prosecution, it will be in the interest of both parties in many cases to arrive at a settlement that involves less than full application of the law. Where a negotiated settlement has been ***1437** reached, neither the defense attorney nor the prosecutor has any incentive to inform the sentencing judge of facts beyond those corresponding to the elements of the offense to which the defendant has pled guilty and the Guidelines factors that the parties have agreed are relevant. The judge in the common law tradition is not an independent investigator, but rather, a neutral factfinder on the basis of the evidence brought to her attention by the parties in the case.

The Sentencing Commission was aware of this problem. To overcome it, the Commission adopted a further inquisitorial procedural innovation by enlisting a third party--beholden neither to the prosecutor nor to the defendant--to assist the judge in ferreting out "the facts" of the case. This third party was the probation officer, an employee of the judicial branch whose task during the era of discretionary sentencing was to provide the judge with a pre-sentence report containing, in addition to a social history of the defendant, an outline of the two "versions" of the facts--those pressed by the prosecutor and those pressed by the defendant. The Sentencing Commission boldly sought to transform both the role of the probation officer and the content of the pre-sentence report. Henceforth it would contain only one version, presumably that of the probation officer himself, noting facts in dispute. Moreover, the probation officer was assigned the task of determining the "actual" facts of the case, independent of the parties. Finally, the Commission took great pains to teach

probation officers around the country the content and application of the hundreds of pages of Guidelines rules, so that each one could perform for the judge an initial calculation of the defendant's Guidelines range and any lawful bases for departure up or down from this range. [62]

A final inquisitorial innovation was to require--rather than merely allow--judges to base the sentence on the "actual" facts (the "real offense"). [63] Accordingly, the judge as factfinder was explicitly empowered to range beyond the factual assertions of the parties, and even beyond whatever additional facts the probation officer might have brought to her attention, through sua sponte inquiries into the existence of aggravating or mitigating Guidelines factors that no one else had raised.

In the early years of the Guidelines, complaints from defense counsel suggested that this system was working as envisioned by the architects of the Guidelines. There were suggestions that the probation officer was a "third ***1438** adversary in the courtroom," [64] advising the judge of facts that neither the defense attorney nor the prosecutor sought to bring to the judge's attention. And there was concern in many quarters that the Guidelines' list of sentence enhancements--ranging from the amount of monetary loss in a fraud case to the defendant's "role in the offense" [65] or "obstructive" [66] conduct in the whole gamut of federal criminal cases--essentially created new "Guidelines crimes." [67] The defendant would, in effect, be held "accountable" [68] and punished for these crimes--yet without any formal charge by prosecutorial authorities, much less the opportunity to demand a trial by jury and proof beyond a reasonable doubt.

The sentencing hearing in the Blakely case, under Washington State's statutory regime of mandatory guidelines (which closely resembled the federal system in structure), provides an example of the inquisitorial approach in practice. There, the defendant pleaded guilty to kidnapping, and neither the prosecutor nor the probation officer chose to allege at the sentencing stage that the kidnapping was "aggravated," a finding that would have supported a sentencing enhancement. But the judge knew enough about the case, which had been widely publicized, [69] to raise the issue on his own, and he ordered the prosecutor to present evidence of aggravation, resulting in a three-day hearing at the end of which the judge applied the sentencing enhancement. [70] The sentencing in Blakely proceeded as it would in an inquisitorial system, in which ***1439** the judge is charged not merely with fact-finding, but with finding out the facts. [71]

From a comparative law perspective, it is not surprising that mandatory real offense sentencing was adopted in large part to limit the discretion of prosecutors. Hallmarks

of inquisitorial systems, in theory if not practice,[72] include the ideals of "mandatory" prosecution and of the dossier compiled by an independent, investigatory factfinder.[73]

The U.S. Constitution, however, was not written to delineate the powers of government and the rights of the accused in an inquisitorial system of justice. Under the accusatorial approach embedded in our eighteenth century Constitution, an individual cannot be formally punished for crimes with which she was not duly charged and convicted. As discussed in Part IV, in its belated constitutional awakening to the realities of regimes featuring determinate sentencing enhancements, the Supreme Court held in Apprendi, Blakely, and Booker that punishment for conduct for which the defendant has not been charged and convicted--that is, for conduct that a judge decides, on a lesser standard of proof, a defendant "really" did--is incompatible with the adversarial procedures guaranteed by the Fifth and Sixth Amendments. In retrospect, it is astounding that for a decade this basic constitutional defect of the Guidelines system escaped the notice of every member of the Supreme Court but one.[74]

*1440 D. Main Justice: Constraints on Prosecutors and the Pursuit of Centralized Control

As noted, the Guidelines' requirement of "real offense" sentencing and nonadversarial judicial fact-finding directly constrained only judges. There were no comparable directions to prosecutors. Yet the new regime could succeed only if prosecutors refrained from encouraging pleas of guilty by agreeing not to bring to the judge's (or the probation officer's) attention one or more available "Guidelines crimes"[75] --aggravating Guidelines factors that required additional punishment. Whatever the desires of Congress and the Sentencing Commission, prosecutors have a strong incentive to settle cases, if only to be able to investigate and prosecute the next case in the long line of matters awaiting their attention. Moreover, plea bargaining norms and practices, and the relationships among probation officers and prosecutors, varied greatly among the ninety-four federal districts in the country and among judges and prosecutors within particular districts.[76] If the Sentencing Guidelines were to achieve the goal of reducing inter-judge disparity throughout the federal system, it would be necessary to attend more directly to wide variances in prosecutorial charging and plea bargaining.

Main Justice swiftly came to the rescue.[77] Although it had never before sought to direct or monitor routine charging and plea decisions across the land, the Department of Justice in 1989 issued a new directive that sought to hold all federal prosecutors to the Guidelines' regime of "real offense" sentencing, and in particular sought to prohibit "fact bargaining" over sentencing enhancements.[78] To be sure, the "Thornburgh Memorandum," as it came to be *1441 known after the Attorney General who issued it, was not the first step toward

centralization of policies on prosecutorial charging discretion. As previously noted, in the final days of the Carter Administration, the Department had issued general "principles" to guide federal prosecutors. [79]

But the Thornburgh Memorandum contained more specific and more prescriptive language concerning both plea bargaining and (unlike the 1980 Principles) sentencing bargaining. On charging and charge bargaining, it directed that "a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not . . . be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct." [80] On sentencing, Main Justice went even further in its instructions to prosecutors than the Sentencing Commission had in its limitations on judges. Prosecutors were instructed "only to stipulate to facts that accurately represent the defendant's conduct" because Congress "could not have . . . intended the reforms [it] enacted to be limited to the small percentage of cases that go to trial." [81] A slightly milder variant of this new national policy on bargaining of charges and sentences was reissued by Attorney General Janet Reno in 1993. [82] The Reno Memorandum was left in place by the administration of President George W. Bush until after Congress enacted the Feeney Amendment in 2003. [83]

The motivation behind these internal limits on prosecutorial charging authority is uncertain. To be sure, credible voices from various quarters had long called for either legislative or internal limits on the exercise of prosecutorial discretion, in particular on prosecutors' charging discretion. [84] It is also likely that officials and others in Main Justice had become true believers in the overriding mission of the Sentencing Reform Act, to achieve uniform (and severe) sentences nationwide.

***1442** But it is also true that the interests of the Department's leaders and bureaucrats in implementing national sentencing policies are very different from the interests of line prosecutors across the country, who face distinct demands from law enforcement agents and judges, and from their own U.S. Attorneys. [85] It would be consistent with the facts as we know them to conclude that the Sentencing Guidelines presented Main Justice (abetted by Congress and by critics of particular prosecutorial decisions) with an opportunity to indulge a natural impulse to centralize control of all federal prosecution, an impulse that continues to this day.

An early study of the Justice Department's response to the Guidelines presciently recognized that the Department's actions "must . . . be understood in the context of an effort by those at the pinnacle of the criminal justice pyramid . . . to get those on the diffuse lower ranks, who have potentially conflicting interests and agendas, to comply with centrally

determined policies." [86] In the cause of aiding Congress and its Sentencing Commission in their mission, Main Justice was able to assert for the first time not merely its primacy in enunciating the general prosecutorial priorities of the Department, but also its direct control of the exercise of prosecutorial discretion nationwide. The project to achieve nationwide uniformity in sentencing, as represented by the Sentencing Reform Act and the Guidelines, became, from the perspective of Main Justice, a project to achieve nationwide centralization of prosecutorial power, as represented by the Thornburgh Memorandum and its successors.

We would do well to recognize that the Thornburgh Memorandum (and later, those of Attorneys General Reno and Ashcroft) sought to centralize the exercise of prosecutorial power essentially by delegitimating the exercise of prosecutorial discretion. The central command of these policies is that prosecutors must apply the criminal law severely by charging "the most serious, readily provable" offense in nearly every case. The federal criminal law is generally not designed to serve such severe purposes; it has lesser-included and overlapping offenses that are applicable to many sets of facts--and it fairly cries out for the exercise of informed prosecutorial discretion. Perhaps it is politically inevitable that if called upon to respond in one sentence to the question, "What should prosecutors charge?", officials at Main Justice must answer "the most serious charge available." (They can hardly answer, for instance, "about half the most serious charge.")

But until the Feeney Amendment in 2003, no one actually asked the Department this question, much less required it to issue a system-wide policy ***1443** related to charging under the Guidelines. [87] Main Justice itself chose to issue national policies on charging and sentencing, stimulated by the emergence of the Sentencing Guidelines. If all federal prosecutors had abided by the pronouncements from Main Justice, the result would have been a rigidity in law enforcement wholly incompatible with the flexible and variable substantive criminal law that Congress has enacted. Moreover, defendants in principle would have been denied the opportunity to urge anyone--court or prosecutor--to judge how the laws should be applied to the particular facts of their case. [88] Finally, had prosecutors actually refused to exercise discretion in charging and plea bargaining, it is quite possible that discretion would have simply devolved to a lower (or earlier) stage in prosecution--law enforcement agents. [89]

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CONCLUSION

The "Guidelines" promulgated by the U.S. Sentencing Commission under the Sentencing Reform Act of 1984 were no mere guidelines; from the beginning, they were mandatory rules for sentencing. The most significant consequence of the Sentencing Reform Act was the transfer of power over punishment from judges to line prosecutors and the Department that employs them. In the wake of the 2003 Feeney Amendment, the Guidelines became more rigid as judicial discretion was further squeezed out of the system, and as prosecutorial discretion became more severely constrained under policies of Main Justice that sought to centralize control over prosecutorial charging and plea decisions. While data on Guidelines application and on departures do not reveal the actual workings of the law on the ground, examination of data over time can reveal trends. The trend after Feeney was a free-fall in

judicial (non-government sponsored) departure rates, to only 5% of all cases in 2004. [327] This was the lowest level since the earliest years of the Guidelines. However, 2004 was also the year that the Court decided Blakely, which foretold the unconstitutionality of the mandatory Sentencing Guidelines, as decreed the next year in Booker.

And so, the Supreme Court has for now prevailed--with Justice Breyer both a (reluctant) hero and a "winner." The Booker remedy managed to save the Guidelines (albeit as a still-evolving species of highly degraded law), while simultaneously allowing greater exercise of judicial discretion, as former Sentencing Commissioner Breyer apparently had always preferred. Most importantly, both in holding the Guidelines unconstitutional and in constructing the Booker remedy, the Court as a whole asserted the authority of the Judicial Branch in the face of both a Congress and an Executive Branch that had failed to accord it adequate respect.

Booker's assertion of authority was not just on behalf of district judges; it was for the federal judiciary as a whole--and most saliently for the Supreme Court itself, whose unanimous decision in Koon had been undone cavalierly by the Feeney Amendment. Rita, Gall, and Kimbrough also make clear that Booker empowers both defendants and line prosecutors--not directly, but by ***1495** permitting these adversarial parties in a criminal case to present reasons to a judge for tempering implementation of the Sentencing Commission's policies. At a minimum, the Court has to some extent restored discretion, localized in judges and prosecutors in the ninety-four federal districts of the nation.

There is a nice irony in the fact that the counter-revolution of Booker and its progeny, which revives the discretion of district judges and local prosecutors, is a direct result of "real offense" sentencing--the very approach that, at the dawn of the Guidelines era, the Sentencing Commission had adopted to directly reduce the power of judges and indirectly reduce the power of prosecutors over criminal punishment. [328] The Booker merits decision held that mandatory "real offense" sentencing is unconstitutional, and Booker's remedy restoring significant opportunities for the exercise of judicial discretion indirectly liberates line prosecutors from a regime in which fidelity to the law required that they seek the most severe "real offense" sentence available.

While Congress has the constitutional authority to undo both halves of the Booker decision, [329] it appears for the moment to have moved on to other concerns. Crime is down. Issues of executive power, rather than judicial power, are at the fore. After its brief burst of energy in Feeney, Congress seems to have become bored with criminal sentencing. That issue has been largely kicked back to the federal district courts, where it resided for two centuries, essentially ignored by Congress, Main Justice, and the people themselves. The abject fear of judging has abated considerably.

***1496** To be sure, we have not come anywhere near full circle. There are still powerful forces arrayed against the exercise of sentencing discretion by district judges responsive to local concerns, the particular facts of the case at hand, and the advocacy of the parties. As a formal matter, courts of appeals may still second-guess judges whose sentences are found to be an "unreasonable" application of the broad statutory sentencing criteria that are the lodestar of sentencing law after Booker. At a more practical level, Main Justice may, through those U.S. Attorneys and line prosecutors who yield with ease to its centralizing directives, meet and parry every move judges make to judge outside the Guidelines. [330] Most importantly, the Guidelines remain the starting point for all sentences, with an anchoring effect [331] made all the more powerful by Rita's go-ahead to the courts of appeals to treat Guidelines sentences as presumptively reasonable. [332] The Guidelines are now the frame, in both law and practice, in which sentences are viewed. [333]

If it should come to pass that only the Guidelines, and not local judgments outside of the Guidelines, are hereafter considered "reasonable," we could not fairly ascribe that result to a decree from on high. Booker loosed the weight of law that compelled the whole federal criminal justice system to profess to comply with the arbitrary metrics of the Guidelines. Even without the force of law, however, the gravitational pull of the Guidelines on the pendulum of sentencing practice remains strong. It is possible that as a new generation of ***1497** prosecutors and judges enters into service, the pendulum may swing back toward the local exercise of informed discretion, if Booker lasts that long. But incumbent sentencing decision makers may be reluctant to regard as unreasonable the sentences they were obliged to seek and impose for two decades under the command and the conceit of law.

a1 AUTHOR. Lafayette S. Foster Professor of Law, Yale Law School. The author appreciates the research assistance of LoganBeirne, Claire McCusker, Anne O'Hagen, Richard Re, Katherine Schettig, and Andrew Verstein; the questions posed byparticipants in the Seminar on Advanced Criminal Law at Fordham Law School, and in the Honours Class on Sentencing,Faculty of Law and Criminology, University of Leiden, Netherlands; and the powerful insights into sentencing and criminaljustice in the companion piece in this issue by Dan Richman. Working with editor Madhu Chugh has been a special privilege.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

December 27, 2018

MEMORANDUM

To: Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges
Federal Public/Community Defenders
Chief Probation Officers
Chief Pretrial Services Officers

From: James C. Duff

RE: PUBLIC LAW 115-___, THE FIRST STEP ACT OF 2018 **(INFORMATION)**

On December 21, 2018, the President signed S. 756, the "First Step Act of 2018" (P.L. 115-___)[1] ("the Act"). A copy of the Act is attached (attachment 1). This memorandum briefly summarizes the Act, which implements sweeping reforms to the criminal justice system, including sentencing and prison reform.

- Regarding prison reform, Title I of S. 756 requires the Bureau of Prisons to create a system of risk and needs assessment and recidivism reduction programming, through which qualified prisoners (excluding those convicted of specified offenses) can earn time towards early release to the community. The early release may occur by transfer to prerelease custody (to be served either in home confinement or at a residential reentry center) or to supervised release (up to 12 months before the projected expiration of the prison sentence). Consistent with Judicial Conference policy, judges will not be involved in deciding whether a prisoner will receive early release. We anticipate that the supervision of persons released early to the community will fall on the federal Probation and Pretrial Services System.

[1] Although the President has signed this bill, the new law does not yet have a Public Law number. The Office of the Federal Register at the National Archives and Records Administration has informed us that they will not assign Public Law numbers during a government shutdown. Presumably, one will be assigned after the shutdown ends.

- Regarding sentencing reform, Title IV reduces and targets mandatory minimum sentences for prior drug felons; broadens the existing safety valve; eliminates stacking under Section 924(c) of Title 18; and, retroactively applies the Fair Sentencing Act of 2010. These reforms are consistent with Judicial Conference policy.
- Title V reauthorizes the Second Chance Act of 2007.
- Section 603(b) reforms 18 U.S.C. § 3582(c)(1)(A) to allow prisoners to bring motions directly to federal court "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier".
- Section 607(b) requires the AO Director to report to Congress within 120 days of enactment and describe the availability of, and plans to expand access to, medication-assisted treatment for opioid and heroin abuse in the probation system.
- Section 609 enacts a Judicial Conference position to ensure the supervision of sexually dangerous persons who have been conditionally released from civil commitment.

By letter dated November 30, 2018 (attachment 2), I shared with the Senate Judiciary Committee our views regarding S. 3649, the most recent legislative predecessor to S. 756. The AO's Probation and Pretrial Services Office will engage in a thorough analysis of the Act and will share that analysis with the courts; questions may be directed to Stephen Vance in the Probation and Pretrial Services Office at 202-502-2636.

Attachments

cc: Circuit Executives
District Court Executives
Clerks, United States Courts of Appeals
Clerks, United States District Courts

In the Senate of the United States,

December 18, 2018.

Resolved, That the Senate agree to the amendment of the House of Representatives to the bill (S. 756) entitled ''An Act to reauthorize and amend the Marine Debris Act to promote international action to reduce marine debris, and for other purposes.'', with the following

SENATE AMENDMENT TO HOUSE AMENDMENT:

In lieu of the matter proposed to be inserted by the House amendment to the text of the bill, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''First Step Act of 2018''.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

AFTERNOON SESSION MATERIALS

SEPTEMBER 2018

Federal PROBATION

a journal of correctional philosophy and practice

SPECIAL ISSUE ON:
PRETRIAL SERVICES: FRONT-END JUSTICE

◆ ◆ ◆ ◆ ◆

Federal PROBATION

a journal of correctional philosophy and practice

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The Administrative Office of the U.S. Courts

James C. Duff, *Director*

Matthew G. Rowland, *Chief*
Probation and Pretrial Services Office

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Federal Probation
Administrative Office of the U.S. Courts
Washington, DC 20544
telephone: 202-502-1651
fax: 202-502-1677
email: Ellen_Fielding@ao.uscourts.gov

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THIS ISSUE IN BRIEF

SPECIAL ISSUE ON Pretrial Services: Front-End Justice

Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)

Sara J. Valdez Hoffer
U.S. Probation Office, District of Kansas

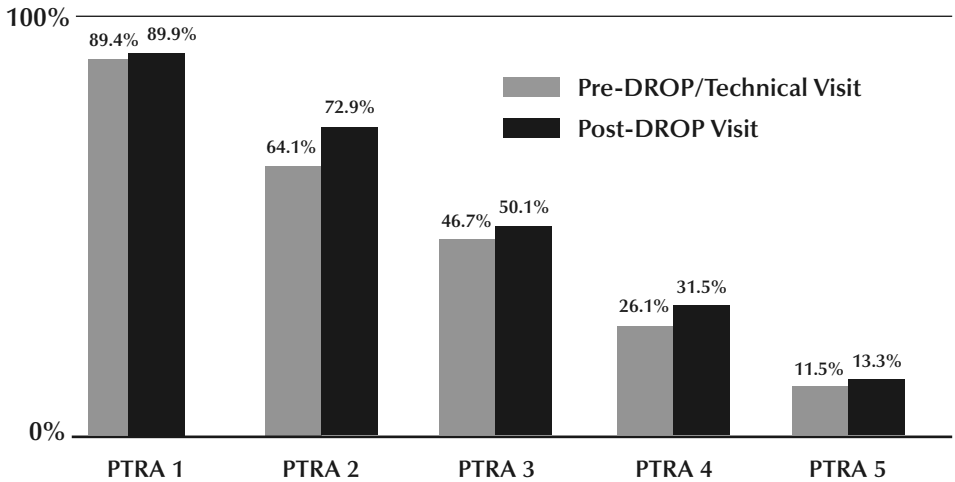
IN 2015, THE Detention Reduction Outreach Program (DROP) was developed by the Probation and Pretrial Services Office (PPSO) of the Administrative Office of the U.S. Courts (AO) in response to the rising national detention rate. Specifically, Probation Administrator William E. Hicks, Jr. evolved DROP from an idea he had while working as an officer in his home district. Mr. Hicks' dream was to create a program that encouraged more interaction between the Administrative Office and the field. He calls that vision "boots on the ground."

DROP is an evidence-based program designed to reduce unnecessary pretrial detention through collaboration with stakeholders and through education regarding better use of the Pretrial Risk Assessment (PTRA). DROP, which is designed to last two days, includes one day of meetings and education with probation and pretrial services staff only. On the second day, PPSO staff and probation and pretrial services staff from the district (usually upper management team members) meet with district stakeholders, including judges, representatives from the federal public defender's office, and representatives from the U.S. Attorney's Office. Both days include discussion about the history and framework of pretrial services and the development and use of the Pretrial Risk Assessment Tool; a review of national release trends and supervision trends, and a review of release and supervision trends specific to the district hosting the program. This education and trend review allows everyone involved to analyze their district outcomes compared to national outcomes and to identify areas for improvement. By accurately understanding the goals and statutory duties of pretrial services, each agency is better able to recognize where changes in process and/or culture may need to occur.

The training with probation and pretrial services staff concludes with a breakout group session. During this session, officers separate into small groups and answer questions concerning what their district is doing well to reduce unnecessary detention, what barriers they are facing to effectively complete their job duties, and what the district's focus should be moving forward. Through these breakout groups, officers work to develop an action plan concerning the future of the district. Often, this is the most exciting and meaningful portion of the visit. PPSO staff record the outcomes of the breakout sessions and, following the visit, the information is summarized into a report with a recommendation on how the district should proceed in its efforts to reduce unnecessary detention. The report is provided to the chief probation and pretrial services officer, usually one month following the visit.

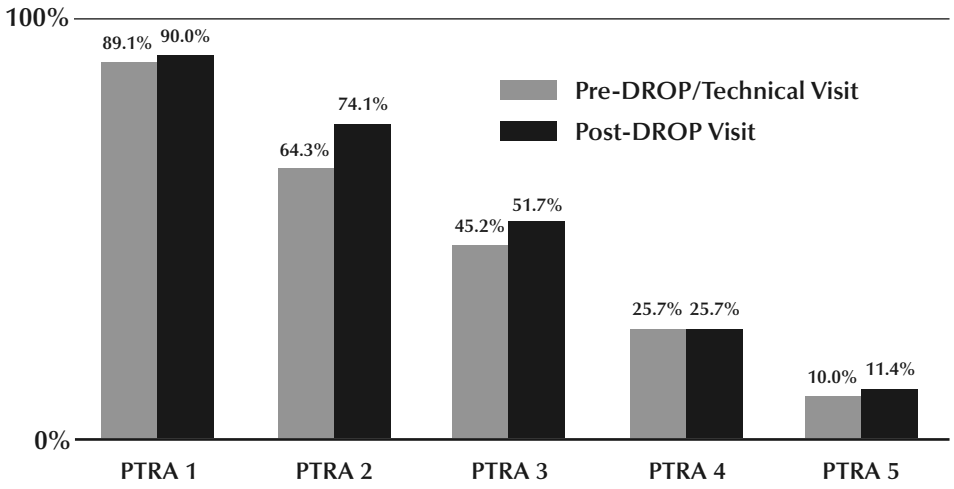
Since its development, DROP has been presented in 15 districts across the nation. Three additional districts have received a modified form of the program known as "DROP-like technical assists" by PPSO staff. Those districts that have hosted the program have experienced a wide range of impacts. First, all districts visited before fiscal year 2018 have shown an increase in PTRA implementation rates. In one district, timely PTRA completion rates have increased by almost 70

FIGURE 1
DROP Visit Outcomes: Release Rates Before and After DROP



Two Districts were excluded from the sample. One was less than 6 months Post-DROP and the other was an outlier.

FIGURE 2
DROP Visit Outcomes: PTS Release Recommendations Before and After DROP



Two Districts were excluded from the sample. One was less than 6 months Post-DROP and the other was an outlier.

percent. Eight participating districts have seen increases in their release rates, ranging from 1 to 12 percent. Further, when those release rates are reviewed by individual risk categories, increases have been experienced by as much as 20 percent in target risk categories. Officer recommendations have also been positively impacted through the DROP program. Overall, officer recommendations for release have increased—and continual reviews have shown that these increased officer recommendations and actual release rates have not resulted in any statistically significant change to rates of nonappearance or rearrest.

In addition to statistical changes, districts have experienced several other internal changes following DROP visits. Several districts have formed work groups to review outcomes and address areas of improvement. In some districts, these work groups are made up solely of probation and pretrial staff, while in others, stakeholders are also involved in the work groups. Further, even in those districts where a work group has not been developed, districts have employed a variety of methods to maintain collaboration with their stakeholders, including brown bag luncheons and regular educational meetings. Finally, several local policies have been amended and new local policies have been developed based on the discussion and education generated through DROP.

One DROP Example: The District of Kansas

In May of 2015, the District of Kansas became the second district in the nation to host DROP, following the Eastern District of Louisiana. Like most districts that have hosted the program, the District of Kansas has experienced several positive changes from the DROP visit. To begin, immediately following the DROP visit, the district experienced an increase in release rates. (See Table 1.)

In addition to an increase in the release rate, the district implemented a number of other changes following the DROP program. First, a work group was formed with the mission of advancing the district-wide goals identified at the time of the visit. In the District of Kansas, these goals included regular review of district outcomes (including officer recommendations compared to actual release rates); regular review of the number and appropriateness of conditions of pretrial release recommended by officers; and regular monitoring of district-wide supervision outcomes such as failures to appear and rearrest rates. The work group continues to meet on a quarterly basis and, in addition to reviewing the goals listed above, the group regularly discusses difficult PTRA calculation scenarios and other challenges that arise in the area of pretrial services. Another Kansas goal created at the time of the DROP visit was to educate all stakeholders regarding the PTRA. With the approval of the court and following a district-wide education initiative, the district began including the PTRA in the bail report in March of 2016. Finally, the district adopted an aggressive approach to recommendations based on risk and instituted a requirement of supervisor approval for any detention recommendations on low- or moderate-risk defendants.

At the start of fiscal year 2018, almost three years after the initial DROP visit, the District of Kansas held an in-district follow-up meeting. At the meeting, district trends and outcomes were reviewed, goals were re-evaluated, and officers were provided with updated education that has been added to the DROP curriculum as it has evolved over the past several years. It was clear at the meeting that the district has retained its initial excitement and passion for the initiative. The statistical data reviewed also demonstrated this continued enthusiasm. The review of trends showed the district has continued to progress in the years following DROP. Specifically, while the characteristics of the defendant population have remained similar, the district's release rates were higher than the national average in fiscal year 2016 and fiscal year 2017, when they previously had been consistently below the national average; the district yielded an overall increase in release recommendations by officers of 7 percent; and the district remained among the top districts achieving PTRA timeliness. Additionally, data showed that the district previously averaged 12 conditions of release per defendant. However, as of the beginning of 2018, the district averaged closer to 10 conditions per defendant according to PACTS data and possibly as low as seven to eight conditions according to other federal data sources. Importantly, despite the increases in release recommendations and release outcomes, the district's rearrest and technical violation rates remain unaffected.

TABLE 1
District of Kansas increase in Release Rates Following DROP

	10/01/2014 – 09/30/2015	10/01/2015 – 05/03/2016
Overall	44.1%	57.2%
Category 1	88.9%	91.1%
Category 2	66.7%	81.5%
Category 3	43.0%	63.5%
Category 4	19.6%	24.5%
Category 5	10.4%	11.4%

To better understand the true impact of DROP, Kansas officers were polled on what portion of DROP had the greatest impact from the officers' perspectives. Officers identified five influencing factors. First, officers noted that understanding the actual consequences to the defendant had a large impact. These consequences to defendants of pretrial detention include impacts on defendants from the time of sentencing to the term of post-conviction supervision. Next, officers found that understanding the proper use of the PTRA was extremely helpful in moving in the right direction. Officers noted that reviewing the appropriate use of alternatives to detention and recommendations for conditions of release was an important component of the program. Extremely empowering for officers was the meeting with the judges, where they expressed their perspective and expectations regarding officer recommendations. Specifically, in the District of Kansas, the judges clarified that they are interested in receiving the officer's recommendation based on the officer's experience regardless of what the officer may believe the outcome of the court will be. Finally, the commitment by every level of staff in the district, from line officers to the chief, motivated officers to get on board with the initiative. The support and encouragement of the entire management team was especially important in reassuring officers and advancing the project. Overall, officers were challenged and inspired, two very common outcomes of the DROP program.

DROP Common Findings

Throughout the course of the DROP program several common themes have become apparent. First, it has become clear that officers struggle with risk-based recommendations and appropriate recommendations for alternatives to detention. In other words, officers struggle with making recommendations that are consistent with the statutory obligation of "least restrictive conditions" and the federal risk principle. Officers must always begin at release on personal recognizance. They then can work to identify specific risks of non-appearance and risks of danger. In order to minimize those risks, officers should recommend the least restrictive conditions necessary to address the identified risk. If there are no risk factors identified, defendants should be released on a personal recognizance bond. And finally, detention should only be recommended if there are no conditions or combination of conditions that can reasonably assure the defendant's appearance or safety to the community. Based on the discussions occurring through DROP, it appears that officers are often recommending a "standard" set of conditions, usually based on their experience in court and their knowledge of what they believe the judge will most likely impose. Through DROP, officers review the important duty of conducting an individual assessment of each case and then making the appropriate recommendation independent of what the officer believes the court may decide. Officers are reminded of two important points: First, there are several factors the court is considering in its decision that the pretrial services officer is prohibited from considering and, therefore, pretrial services should be recommending release at a higher rate than the actual court outcomes; second, alternatives to detention are most appropriate for moderate- to high-risk defendants.

The second common finding through DROP is that PTRA timeliness is frequently misunderstood. The PTRA is an evidence-based tool developed to assist officers in making appropriate recommendations regarding release or detention. PTRA is not a stand-alone tool, and it should always be used in combination with a thorough pretrial investigation and the officer's professional judgment. Therefore, the appropriate use of the PTRA is to complete the assessment prior to the judicial decision. This means that, in preparation for the court to make a decision regarding release or detention at the initial appearance, the tool should be completed before the defendant's appearance in court. If the government or defense attorney is requesting a continuance of the hearing for a period (i.e., three or five days), then the tool can be completed by the time of that hearing. Completing the PTRA before the judicial decision allows officers to have the score and risk classification available to them before making any recommendation to the court concerning release and detention or appropriate conditions of release.

The DROP program has also proven there is tremendous value in meetings between U.S. Probation and Pretrial Services personnel and our stakeholders. As previously mentioned, several districts have amended local policies or procedures or implemented new policies or procedures as the result of the DROP visit. Many of these changes concern issues that were previously unaddressed and had lingered for a significant amount of time, resulting in barriers to the officers' ability to complete their work, limiting the efficiency of the initial judicial process, and depriving the court from having all available information to make an informed decision. By bringing everyone together, DROP "gets the conversation going" and aids in all stakeholders understanding how each of their actions impact the pretrial phase of the judicial process. This has been shown to be extremely effective not only in achieving local policy/procedural change but in generating the educational piece necessary for everyone to implement an evidence-based approach to pretrial services.

The DROP program has shown that data quality continues to be an important concern in the federal system. Prior to the DROP presentation, a copy of the data that will be presented is forwarded to the district for review. It is not uncommon for the district to respond and note that the data being captured by an internal system called the Decision Support System (DSS) is incorrect and to recognize that certain outcomes need to be more accurately captured in the system. DROP has shown that the reduction in the number of data quality analysts employed in the districts, a reduction mostly driven by budgetary issues, has had a serious impact on the accuracy of what is recorded in the PACTS system. In the current era, when PACTS data can have so many implications for a district, this is an important issue that districts often remain unaware of until they are presented with the DROP presentation summary.

During the educational portion of the program, districts are informed of important DSS reports that can be used to monitor district outcomes and help identify areas of improvement. These reports include: DSS 1288, Officer Release Recommendations; DSS 1277, PTRA Timeliness; DSS 1273, Personal Contacts by Risk; DSS 1248, Total Release Population by Risk; DSS 1156, Latest Release Rates by PTRA; and DSS 1244, Pretrial Services Supervision Outcome Report.

Finally, the greatest area for improvement that has become clear through DROP is the need to strengthen a pretrial culture rooted in reducing unnecessary detention and being least restrictive with conditions of release. A portion of the program reviews the top ten districts with the highest release rates in the nation and the bottom ten districts with the lowest release rates in the nation. This section of the program is especially important for many DROP participants. Officers and stakeholders are shown that represented in both the

top ten districts and the bottom ten districts are districts from across the nation, including districts located within the same state; districts with similar defendant populations, including risk levels and offenses charged; and districts that are combined (that is, with both the pretrial and probation functions located in the same office) as well as districts that are bifurcated (with separate pretrial and probation offices). In order to ensure a strong pretrial culture, there are practices all districts should employ. The part of the AO's *Guide to Judiciary Policy* that focuses on pretrial services provides a list of specific practices districts must employ to ensure a strong pretrial culture. These practices include presuming release; remaining objective during the investigation; reporting in a neutral language; advocating for the least restrictive conditions; focusing on addressing risk; and developing consistent recommendations through the use of the PTRA. On the pretrial supervision side, officers must neither under-supervise nor over-supervise, and they must use strategies directly related to the identified risk factors. And, of course, officers must always maintain pretrial client confidentiality. Strengthening a pretrial culture has been shown to be the most important discussion piece that comes from the DROP program.

The Future of DROP

Shortly following the Bail Reform Act of 1984, the nation faced a detention crisis. Since that time, several initiatives have been created to combat the issue, yet the national detention rate has continued to rise despite these many efforts. Only recently has the federal system shown the first signs of a shift in direction. The DROP program is clearly one effort that can be attributed to this progress. Although the program has only been presented in a limited number of districts, numerous other districts have been made aware of the program and have initiated local-level efforts based on the same theory. These districts are unable to host a formal DROP visit for a variety of reasons, but they are still inspired by the movement and want to experience similar outcomes. In the meantime, the DROP program continues to evolve based on the lessons learned through DROP and other platforms of discussion. What began primarily as a review and discussion of statistical data and national trends has now grown into a full two-day educational curriculum that covers a tremendous amount of information not previously coordinated for officers and stakeholders. During fiscal year 2019, it is anticipated that six additional DROP visits will be conducted and an equal number is expected to be presented the following year. With each district being visited, the message continues to reach more officers and become clearer to all. Our federal system must get focused on the mission to reduce unnecessary detention. That is our job!

Any district interested in hosting a DROP visit should contact Probation Administrator William Hicks for further information.

Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary

Thomas H. Cohen[1]
Christopher T. Lowenkamp
William E. Hicks
Probation and Pretrial Services Office
Administrative Office of the U.S. Courts

AFTER A PERSON is arrested and accused of a crime in the federal system, a judicial official must determine whether the accused person (that is, the defendant) will be released back into the community or detained until the case is disposed (American Bar Association, 2007). The decision to release or detain a defendant pretrial represents a crucial component within the criminal justice process (Eskridge, 1983; Goldkamp, 1985). In addition to curtailing a defendant's liberty, the decision to detain a defendant pretrial can potentially affect case outcomes by increasing the likelihood of conviction, the length of an imposed sentence, and the probability of future recidivism (Heaton, Mayson, & Stevenson, 2017; Lowenkamp, VanNostrand, & Holsinger, 2013; Oleson, VanNostrand, Lowenkamp, Cadigan, & Wooldredge, 2014). Given the importance of the pretrial release decision, the process is increasingly being informed by actuarial risk instruments capable of assessing a defendant's risk of pretrial misconduct involving missed court appearances or threats to public safety (Bechtel, Lowenkamp, & Holsinger, 2011). This has particularly been the case in the federal system, which has adopted the Pretrial Risk Assessment Instrument (hereafter, PTRA) to assess a defendant's likelihood of engaging in pretrial misconduct involving missed court appearances, pretrial revocations, or rearrests for new criminal activity (Cadigan & Lowenkamp, 2011; Cadigan, Johnson, & Lowenkamp, 2012; Lowenkamp & Whetzel, 2009).

The PTRA is an actuarial risk assessment instrument used by federal officers to assess a defendant's likelihood of engaging in several forms of pretrial misconduct, including failing to make court appearances, committing criminal activity that results in a new rearrest, or having a revocation while on pretrial release (Cadigan & Lowenkamp, 2011; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). Implemented in fiscal year 2010, the PTRA has nearly universal usage rates. Since the PTRA is being extensively used in the federal pretrial system, ongoing and comprehensive research is required to ensure its validity. Although the PTRA was re-validated five years ago on a relatively small sample of released defendants (n = 5,077), with actual officer-completed PTRA assessments (Cadigan et al., 2012), a revalidation of the PTRA is necessary to assess this instrument's predictive performance on a substantially larger population of federal defendants who received PTRA assessments during the course of their pretrial investigations. In addition, it is necessary to examine whether the PTRA predicts specific forms of pretrial violation outcomes, such as rearrests for any or violent criminal activity, pretrial revocations, or missed court appearances.

This report provides a synopsis of key findings from a longer study examining the PTRA's predictive efficacy, which has been accepted and will be published by *Criminal Justice and Behavior* (see Cohen & Lowenkamp, in press). It sought to revalidate the PTRA on a large national sample of released federal defendants with actual PTRA assessments. The revalidation component primarily assessed the PTRA's overall accuracy in predicting any forms of pretrial violations (e.g., any adverse events) as well as its capacity to predict specific pretrial violations, including new criminal rearrests for any or violent offenses, missed court appearances, and pretrial revocations. The prediction of rearrest activity is especially important because we relied on official rap sheets rather than data entered into the Administrative Office of the U.S. Courts (AO's) case management system by pretrial officers (e.g., the Probation and Pretrial Services Automated Case Management System or PACTS for short), to assess the frequency of rearrest activity among the released

[1] Thomas H. Cohen, Social Science Analyst, Christopher T. Lowenkamp, Social Science Analyst, and William E. Hicks, Probation Administrator, Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, Washington, D.C. This publication benefited from the careful editing of Ellen W. Fielding. Direct correspondence to Thomas H. Cohen, Administrative Office of the U.S. Courts, One Columbus Circle, NE, Washington, D.C. 20544. (email: thomas_cohen@ao.uscourts.gov). A longer version of this paper has been accepted by the peer-reviewed journal *Criminal Justice and Behavior* (See Cohen & Lowenkamp, in press). Readers interested in the longer version of this report should contact the authors for more information.

federal pretrial population. Last, this report will briefly address the PTRA's capacity to predict pretrial violations across racial and ethnic groups and for males and females.

Before delving into these issues, a brief overview of risk assessment in the federal pretrial system and the PTRA is provided for background purposes. Afterwards, study methods will be detailed and principal findings presented. The study will conclude by discussing implications for the federal pretrial system and for officers charged with making release/detention recommendations.

Risk Assessment in the Federal Pretrial System

In the federal system, pretrial and probation officers play a major role assisting judicial officials with the pretrial release decision under the auspices of the Pretrial Services Act of 1982 (18 U.S.C. §3152) (AO, 2015; Lowenkamp & Whetzel, 2009). This legislation established pretrial services agencies within each federal judicial district (with the exception of the District of Columbia) and authorized federal pretrial and probation officers to collect, verify, and report on information pertaining to release decisions, make recommendations on the release decision, supervise released defendants, and report instances of noncompliance to the U.S. Attorney and federal courts (Lowenkamp & Whetzel, 2009; VanNostrand & Keebler, 2009). The officer's authority to investigate a defendant's background in the bail decision was further expanded by the Bail Reform Act of 1984 (hereafter, the 1984 Act) (18 U.S.C. §3141 – 3150). This act required federal officers and the courts to consider a defendant's dangerousness or threat to the community safety, in addition to flight risk, when making pretrial release decisions (18 U.S.C. §3141 – 3150) (AO, 2015; Cadigan et al., 2012; Goldkamp, 1985; Lowenkamp & Whetzel, 2009; VanNostrand & Keebler, 2009). Last, the 1984 Act identified several factors federal courts should consider when making pretrial release/detention decisions (AO, 2015; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009; VanNostrand & Keebler, 2009).[2]

The use of an actuarial pretrial risk assessment tool in the federal system was initiated when the Office of the Federal Detention Trustee (OFDT), an agency within the U.S. Department of Justice responsible for administering and controlling the cost of pretrial detention within the federal system with support from the AO, sponsored a study to "identify statistically significant and policy relevant predictors of pretrial risk outcome [and] to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community …." (VanNostrand & Keebler, 2009: 1). One of the major recommendations of this study was that the federal system develop and implement an actuarial risk tool that could be used to inform pretrial release and detention decisions (Cadigan et al., 2012; VanNostrand & Keebler, 2009). As a result, the federal Probation and Pretrial Services Office (PPSO) within the AO constructed, validated, and ultimately implemented the PTRA.

The Federal Pretrial Risk Assessment (PTRA) Tool

The development and implementation of the PTRA is well documented (see Cadigan & Lowenkamp, 2011; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). In summary, the PTRA was constructed using the same archival data employed in the OFDT study (Cadigan et al., 2012). Specifically, construction and validation samples comprising about 200,000 federal defendants released pretrial from fiscal years 2001 through 2007 were used to construct a risk instrument capable of predicting a released defendant's risk of failure to appear, rearrests for new criminal activity, or pretrial revocation (Cadigan et al., 2012; Lowenkamp & Whetzel, 2009).

Using regression modeling techniques, 11 items were identified and incorporated into the PTRA risk scoring algorithm (Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). These items include factors measuring a defendant's criminal history, instant conviction offense, age, educational attainment, employment status, residential ownership, substance abuse problems, and citizenship status.[3] Weights for these items were calculated based on the magnitude of the bivariate relationship between the selected factors and the pretrial violation outcomes mentioned above and ranged from zero to three points, depending upon the item being scored. Ultimately, this process resulted in a risk-scoring algorithm that generated raw scores for each defendant ranging from 0 to 15 that were further grouped through visual inspection and confirmation of best fit into the following five risk categories: PTRA one (scores 0 – 4), PTRA two (scores 5 – 6), PTRA three (scores 7 – 8), PTRA four (scores 9 – 10), or PTRA five (scores 11 or above) (Lowenkamp & Whetzel, 2009). Both the initial validation and revalidation studies showed the PTRA successfully differentiating defendants by their risk of garnering pretrial violations involving failure to appear, new criminal rearrests, and pretrial revocations (Cadigan & Lowenkamp, 2011; Lowenkamp & Whetzel, 2009).

While these studies show the PTRA serving as an adequate predictive mechanism, as is the case with any risk assessment, ongoing validation is required, as is investigating the instrument's validity with subpopulations of interest. The last PTRA re-validation occurred five years ago and was done on a small sample of released federal defendants (n = 5,077) with actual officer-completed PTRA assessments (Cadigan et al., 2012). In addition, to date there has been no published research on the PTRA's capacity to predict violent crimes or its predictive validity across race, sex, or ethnic subpopulations. Moreover, prior research efforts relied on officer-imputed rearrest data entered into PACTS rather than on rearrest activity extracted from official rap sheets.

Present Study

In the present study we will evaluate the PTRA's predictive efficacy by primarily exploring its capacity to predict any forms of pretrial violations (e.g., any adverse events) as well as its abilities to predict specific forms of pretrial violations, including rearrests for any or violent criminal activity, missed court appearances, or pretrial revocations among a national population of federal defendants released pretrial. We will also briefly detail whether the PTRA predicts pretrial violation outcomes equally well across racial, ethnic, and sex groups.

Participants

The sample used to assess the PTRA's overall predictive validity was drawn from a larger population of 222,296 defendants who received PTRA assessments as part of their pretrial intake process between November 2009, when the PTRA was deployed in the federal system, and September 2015. This initial population included any defendants with

[2] The factors include information relating to a defendant's (1) background; (2) residence; (3) family ties; (4) employment history; (5) substance abuse; and (6) criminal history (AO, 2015); see also 18 U.S.C. §3141 – 3150 for a detailed list of factors courts should consider.

[3] For a detailed description of the PTRA risk factors, see Lowenkamp and Whetzel (2009). Note that many of these items are used by other pretrial risk assessments (see Bechtel et al., 2011; LJAF, 2013).

TABLE 1.
Descriptive statistics of federal defendants in study sample

Variable	n	% or mean
Race		
White, not Hispanic	35,581	42.8%
Black, not Hispanic	21,228	25.6
Hispanic, any race	20,112	24.2
Other race/a	6,170	7.4
Gender		
Male	61,200	71.7%
Female	24,161	28.3
Citizenship		
U.S. citizen	73,601	86.8%
Naturalized U.S. citizen	4,802	5.7
Citizen of another country	6,406	7.6
PTRA risk categories		
One	28,033	32.8%
Two	24,017	28.1
Three	20,992	24.6
Four	9,836	11.5
Five	2,491	2.9
Average age (in years)	85,356	37.8
Average PTRA raw score	85,369	5.8
Time on pretrial release (in months)	85,335	11.3
Average number of defendants	85,369	

Note: Includes federal defendants released pretrial with PTRA assessments occurring between fiscal years 2010 - 2015.
a/Other race includes Asians, Pacific Islanders, and Native Americans.

PTRA assessments regardless of whether they were released or detained pretrial. Defendants were deemed eligible for this study if they (1) were released pretrial so that we could track their pretrial violation outcomes (n lost = 111,400 defendants); (2) no longer had a case in an opened status, ensuring a complete measure of defendant violation activity while in the release phase (n lost = 24,376 defendants); and (3) had an actual PTRA assessment date for the purpose of tracking time while on pretrial release (n lost = 1,151 defendants). Using these criteria yielded a pool of 85,369 defendants that could be used to evaluate the PTRA's predictive validity.

Table 1 provides a descriptive overview of defendants in the PTRA validation sample. About two-fifths of the study population (43 percent) comprised non-Hispanic whites, while blacks (26 percent) and Hispanics of any race (24 percent) accounted for similar portions of defendants. Males accounted for 72 percent of the study population, and the average defendant age was about 38 years. The majority of defendants in the study population (93 percent) were either U.S. born or naturalized citizens; a fact that should not be too surprising given that nearly all non-citizens are detained pretrial. Around 61 percent of defendants were classified into the lower PTRA risk categories (e.g., PTRA ones and twos), 25 percent were deemed moderate risk (PTRA threes), and the remaining 15 percent were placed into the higher PTRA risk groups (e.g., PTRA fours or fives). Furthermore, the average PTRA score was 5.8, with a range of zero to 15 points.

Measures of Risk

The PTRA's history, development, and risk-scoring scales have been discussed in other sections of this paper and detailed in prior research (see Cadigan & Lowenkamp, 2011; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). To briefly reiterate, the scores generated from the PTRA range from 0 to 15 and are used to place defendants into five different risk categories. For purposes of this study, we assess how the total PTRA scores and five categories perform in terms of risk prediction. We do not gauge this instrument's predictive capacities at the individual item or domain level.

Measuring Pretrial Violations

For the section of this study focused on validating the PTRA's overall predictive efficacy, we examine whether this instrument effectively predicts rearrests for new offenses, rearrests for violent offenses, pretrial revocations, or failure to appears (e.g., FTAs). Pretrial revocations involve the removal of a defendant on pretrial release because of rearrests for new criminal activity or technical violations of release conditions, while FTAs imply the failure to show up to court for a designated hearing. Both violation outcomes were extracted from PPSO's internal case management database (hereafter, PACTS). Conversely, rearrests for new criminal activity were obtained from the National Crime Information Center (NCIC) and Access to Law Enforcement System (ATLAS). ATLAS is a software program used by the AO that provides an interface for performing criminal record checks through a systematic search of official state and federal rap sheets (Baber 2010). The ability to access and use official rap sheets represents a break from previous PTRA validation studies (see Cadigan & Lowenkamp, 2011; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009) where the pretrial rearrest data were entered into the federal case management system by pretrial officers.

Pretrial rearrests are defined to include arrests for either a felony or misdemeanor offenses (excluding arrests for technical violations) between the time of pretrial release and case closure. In addition to measuring any rearrests, we also identified rearrests for violent offenses committed during the pretrial release phase. For violent rearrests, we used the definitions from the NCIC, which include homicide and related offenses, kidnapping, rape and sexual assault, robbery, and assault (Lowenkamp, Holsinger, & Cohen, 2015). One issue with using rap sheet data involved our inability to distinguish events involving self-surrenders to federal officials from actual rearrests by federal officials resulting from new criminal activity. This is a problem in the federal pretrial arena, where defendants on pretrial release will often self-surrender to federal officials after case adjudication and sentence imposition. The inability to separate out these surrenders from rearrests meant that we could only count those pretrial rearrests involving state or local law enforcement entities.

In addition to modeling individual pretrial violation events, we investigated the PTRA's capacity to predict a combination of various pretrial outcomes, including outcomes involving any forms of adverse events: pretrial revocations, rearrests, or FTAs (i.e., any adverse event), or a combined outcome involving new pretrial rearrests or FTAs (i.e., new rearrest/FTA). We modeled these aggregated forms of violation activity to construct an instrument capable of predicting any form of pretrial misconduct as well as outcomes that fell outside technical violations of pretrial special conditions (Cadigan & Lowenkamp, 2011; Cadigan et al., 2012; Lowenkamp & Whetzel, 2009).

Table 2 presents information on the percentage of released federal defendants with pretrial violations between their release and case closed dates. Overall, about 14 percent of released defendants committed some form of pretrial violation—meaning they were revoked, rearrested, or had an FTA—during their time while on pretrial release. About 6 percent of released defendants garnered a new criminal arrest for any offense and 1 percent were arrested for violent offenses. Approximately 2 percent of released federal

defendants missed their court appearances, and a combined 8 percent of released defendants were either rearrested for a new offense or failed to appear.

Analytical Plan

In order to test for the PTRA's overall predictive capacities, we calculated descriptive statistics and measures of predictive validity (e.g., AUC-ROC scores). In the risk assessment literature, the Area Under the Receiver Operating Characteristic Curve (AUC-ROC) score measures the probability that a score drawn at random from one sample or population (e.g., a recidivist's score) will be higher than that drawn at random from a second sample or population (e.g., a non-recidivist score). The AUC can range from .0 to 1.0, with .5 representing the value associated with chance prediction. Minimum AUC-ROC scores of .56, .64, and .71 correspond to "small," "medium," and "large" effects, respectively (Rice & Harris, 2005). The AUC-ROC provides an accepted gauge of an instrument's predictive accuracy, in part because these scores, unlike correlations, are not influenced by low base rates (Babchishin & Helmus, 2016). This is especially important for the current study, where the base rates for certain pretrial violation outcomes such as violent rearrests or FTAs are particularly low.

Results

We examine the PTRA's overall predictive efficacy for all released defendants in the sample (n = 85,369). Figure 1 presents information on the percentage of released defendants committing pretrial violations involving any adverse events, pretrial revocations, a combined new criminal rearrest, or FTA, or new criminal rearrests for any offenses across the five PTRA risk categories. Results from Figure 1 show that the PTRA effectively predicts pretrial violations irrespective of whether the outcome of interest involves revocation from pretrial release, rearrest for any felony or misdemeanor offenses, or a combination of these outcomes. For example, the percentage of defendants with any adverse events—meaning they had a revocation, new criminal rearrest, or FTA—while on pretrial release increased in the following incremental fashion by PTRA risk category: 5 percent (PTRA ones), 11 percent (PTRA twos), 20 percent (PTRA threes), 29 percent (PTRA fours), and 36 percent (PTRA fives). These results were in the anticipated direction of higher failure rates for each increase in risk classification.

Similar patterns were revealed for the PTRA's capacities to predict specific forms of pretrial violations, including rearrests for any offenses or pretrial revocations. For instance, defendants rearrested for any offenses while on pretrial release amounted to 3 percent of PTRA ones, 5 percent of PTRA twos, 9 percent of PTRA threes, 13 percent of PTRA fours, and 17 percent of PTRA fives. The percentage of defendants with pretrial revocations or with a combined new criminal rearrest/FTA manifested similar patterns of increases by PTRA risk categorization.

Figure 2 presents information by PTRA risk category on the percentage of released defendants rearrested for violent offenses or who failed to appear. These violent rearrests and FTAs are presented separately because their base rates are relatively low. Though only 1 percent of defendants were rearrested for violent offenses while on pretrial release, the violent arrest rates climbed incrementally by risk category: Starting at 0.3 percent for PTRA ones, the violent rearrest rates increased to 0.7 percent for PTRA twos, 1.3 percent for PTRA threes, 2.1 percent for PTRA fours, and then 2.9 percent for PTRA fives. The percentage of defendants with FTAs also had similar patterns of increasing failure rates by PTRA risk categorization.

In addition to examining failure rates by risk category, an overview of the AUC-ROC scores in figures 1 and 2 shows them ranging from .67 to .73 for the FTA (.67), any rearrests (.68), violent rearrests (.69), combined rearrest/FTA (.68), any adverse events (.71), or pretrial revocations (.73) outcomes. These scores mean that the PTRA provides "good" to "excellent" predictive capacities for these specific types of pretrial violations (Desmarais & Singh, 2013).

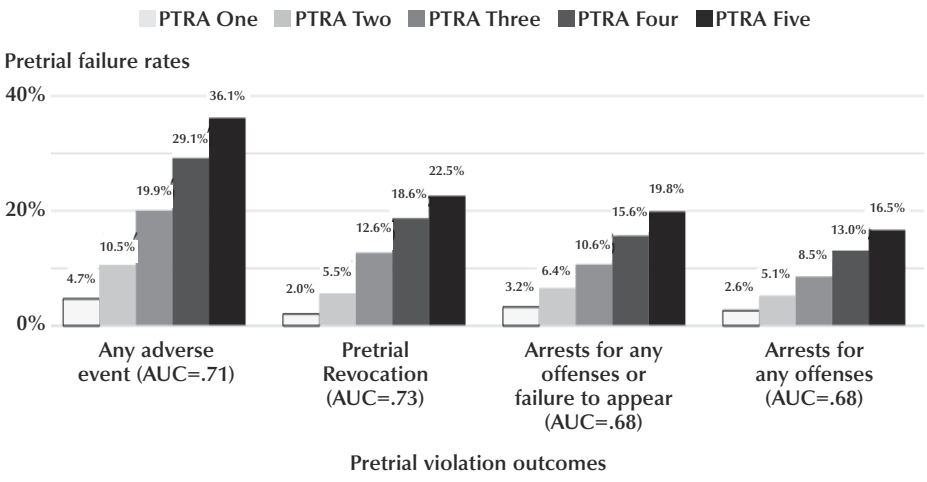
The relationship between each raw PTRA score—rather than risk categories—and pretrial violations encompassing any adverse events, rearrests for felony or misdemeanor

TABLE 2.
Percent of released federal defendants with pretrial violations, by violation type

Violation types	Percent of released defendants with pretrial violations
Any adverse events	13.8%
Pretrial revocation	8.1
New arrest or FTA	7.8
Arrests any offense	6.4
Arrests violent offenses	1.0
Failure to appear	1.7
Number of defendants	85,369

Note: Any adverse event includes pretrial violations involving new criminal arrests, failure to make court appearances, or pretrial revocations.
Specific failure events (e.g., new criminal arrest, pretrial revocation, etc.), will not sum to any adverse event total as defendants can experience multiple violation types simultaneously.

FIGURE 1
Pretrial Risk Assessment (PTRA) failure rates involving any adverse events, pretrial revocations, new criminal arrests, or combination of new criminal arrests/failure to appear, by risk level



Note: PTRA = Pretrial risk assessment instrument risk classification. AUC = Area under the receiver operating characteristic curve. Any adverse event includes pretrial violations involving new criminal arrests, failure to make court appearances, or pretrial revocations. Specific failure events (e.g., new criminal arrest, pretrial revocation, etc.), will not sum to any adverse event total as defendants can experience multiple violation types simultaneously.

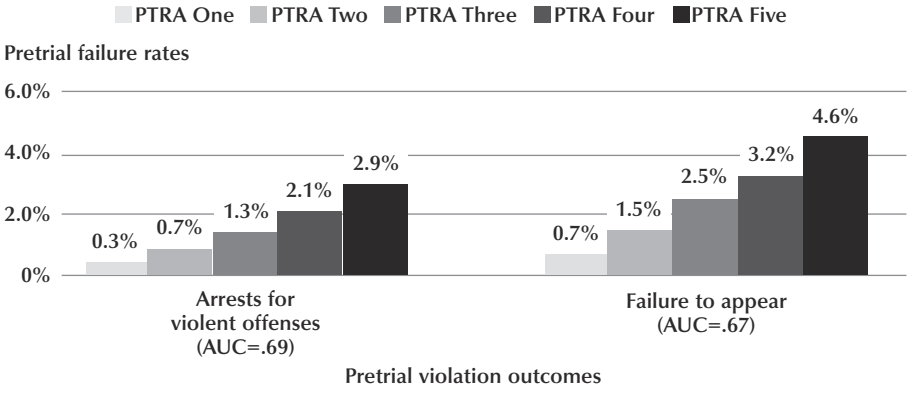
offenses, pretrial revocations, or a combined rearrest/FTA outcome are provided in Figure 3.[4] In this figure, the rates of pretrial failure involving these specific types of violations are shown to increase with each one-point increase in the PTRA scores. This pattern is particularly evident for pretrial outcomes involving any form of adverse events or rearrests/FTAs. While the percentage of defendants rearrested for new offenses increases gradually by each point score, it briefly flattens out between PTRA scores 11 and 12 before increasing again. For pretrial revocations, the pattern is one of increasing revocation rates until the PTRA score of 12 is reached; afterwards, the revocation rates declined slightly from 24 percent to 22 percent. It should be noted that defendants with PTRA scores of 13 or above were recoded into PTRA 13s, as there were relatively few defendants with these very high PTRA scores (n= 19) to produce statistically reliable estimates.

Given the low base rates for FTAs and rearrests for violent offenses, the relationship between these pretrial outcomes and the individual PTRA scores is shown in Figure 4. In a pattern mirroring the more common types of pretrial violations, the percentage of defendants who failed to appear or were rearrested for violent criminal behavior for the most part increases incrementally with each one-point increase in the PTRA score. There are some minor exceptions to these patterns: For instance, the FTA rate decreases slightly for defendants with PTRA scores of 0 or 1 before increasing again; moreover, the violent rearrest rates are essentially the same for defendants with PTRA scores of 1/2 and 5/6. Despite these exceptions, the general results even for these low base-rate events is one of gradual increases in the violation rates coinciding with increasing PTRA scores.

Another way of illustrating the PTRA's predictive capacities is to examine the odds of success, rather than the failure rates, for each of this instrument's risk categories. Table 3 presents information on the odds of success across the PTRA risk classification groups. In this table, only selected violation outcomes (i.e., any adverse events, combination of new criminal arrests or FTA, and new criminal arrests) are shown. The odds of success are interpreted as the odds of success occurring to the odds of success not occurring. Although the odds of success during pretrial release decline when moving from one risk category to the next, even for the highest risk category (e.g., PTRA fives), the odds of a defendant successfully completing his or her release term are either 2 to 1, 4 to 1, or 5 to 1, depending upon the violation outcome being examined. For the lowest risk defendants (PTRA ones), the odds of success range from 20 to 1 when analyzing any adverse events to 37 to 1 when focusing solely on arrests for any offenses. Even among PTRA threes, the odds of success range from 4 to 1 for any adverse event outcome to 11 to 1 for the new criminal

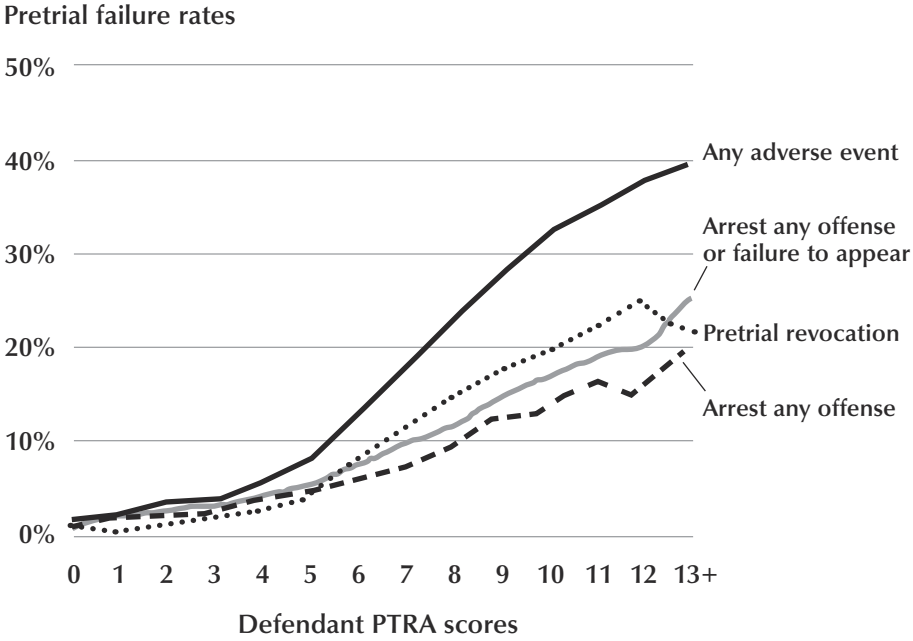
[4] The FTA and rearrest rates for violent offenses are not shown in Figure 3 because of the very low base rates for these outcomes. See Figure 4 for an examination of the FTA or violent rearrest rate by raw PTRA scores.

FIGURE 2
Pretrial Risk Assessment (PTRA) failure rates involving arrests for violent offenses or failure to appear (FTA), by risk level



Note: PTRA = Pretrial risk assessment instrument risk classification. AUC = Area under the receiver operating characteristic curve.

FIGURE 3
Percentage of federal defendants with pretrial violations involving any adverse events, pretrial revocations, new criminal arrests, or combination of new criminal arrest or failure to appear, by individual Pretrial Risk Assessment (PTRA) scores



Note: Defendants with PTRA scores above 13 were recoded into a score of 13 as there were not enough released defendants with PTRA scores above 13 (N= 19) to produce statistically reliable estimates.
PTRA = Pretrial risk assessment instrument individual score. Any adverse event includes pretrial violations involving new criminal arrests, failure to make court appearances, or pretrial revocations. Specific failure events (e.g., new criminal arrest, pretrial revocation, etc.) will not sum to any adverse event total as defendants can experience multiple violation types simultaneously.

arrest outcome.

In addition to illustrating the PTRA's general predictive capacities, we briefly summarize the PTRA's capacity to predict pretrial violations across several demographic categories.[5] Specifically, we find that the PTRA can successfully predict pretrial violations irrespective of a defendant's race, ethnicity, or sex. This finding is demonstrated by the fact that as the PTRA risk scores increase, so too does the likelihood of pretrial rearrest, and this pattern holds for whites, blacks, Hispanics, males, and females. For example, an analysis assessing the relationship between new criminal rearrests and the PTRA across matched samples of non-Hispanic white and black defendants indicates that the PTRA operates similarly for these two groups of defendants. In other words, there were similar patterns of incremental increases in the criminal rearrest rates by PTRA risk category for both non-Hispanic white and black defendants. Comparable patterns were manifested when examining the pretrial rearrest rates for non-Hispanic whites and Hispanics and males and females across the PTRA risk categories.

Conclusion and Implications

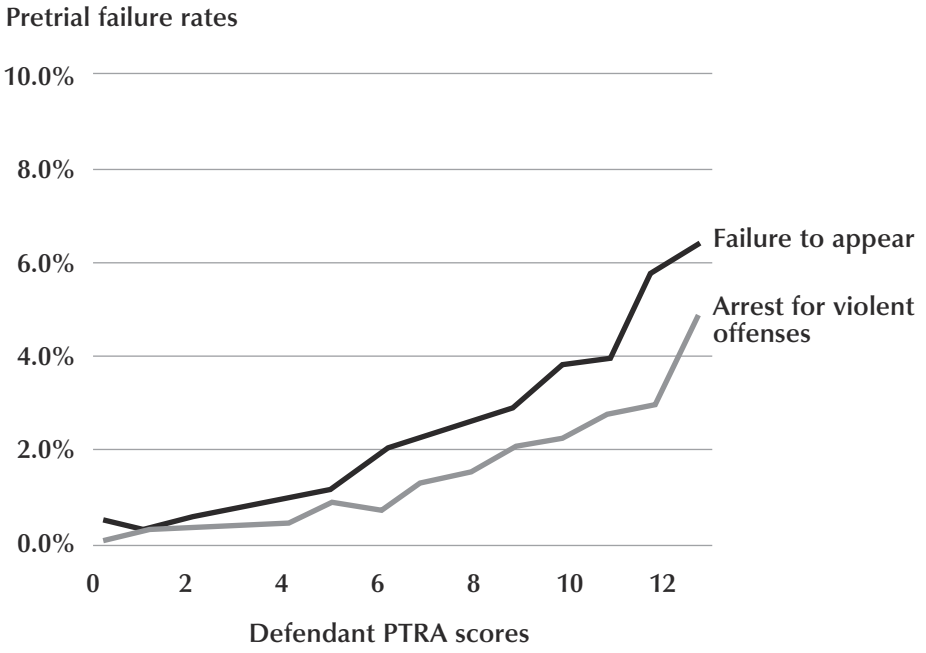
The current study sought to examine the PTRA's capacity to predict pretrial violations among federal defendants as well as to investigate the instrument for predictive biases across defendant demographic characteristics. Findings from this research show that the PTRA performs well in predicting violations in general, including any adverse pretrial events and a combined new criminal rearrest or FTA outcome. Moreover, the current study demonstrates that the PTRA can adequately predict specific types of pretrial violations, including rearrests for any or violent offenses, FTAs, or pretrial revocations.

The importance of this risk assessment's capacity to predict new criminal rearrests should not be understated. When the PTRA was initially developed, it relied on rearrest data entered by federal officers into the AO's probation and pretrial services case management system (PACTS); rearrest data generated from official rap sheets were not used to measure pretrial recidivism activity. Unlike previous PTRA validation studies, this research used official rap sheets and, even with changes on how rearrest activity was measured and tracked, it found that the instrument accurately predicted rearrests for new criminal behavior. Moreover, the instrument performed well in predicting violence, which had not previously been examined in the PTRA validation research.

It is remarkable and worth noting that the one score generated by the PTRA can predict these different types of pretrial outcomes. Recent developments in pretrial risk assessment have shifted towards the development of specific scales that maximize the prediction of different outcomes such as new criminal arrests or FTA (LJAF, 2016). However, it might be that the simplicity of a single score, the relative accuracy in predicting various outcomes with a single score, and the limitations of data available for scale construction and administration make single score assessments a continued viable option. In addition to general prediction, this research demonstrates that the PTRA can predict violations irrespective of defendant's race, ethnicity, and sex. These findings are supportive of a growing literature showing that risk instruments like the PTRA can be used to assess recidivism risk and inform criminal justice decisions without exacerbating biases in the criminal justice system (Skeem & Lowenkamp, 2016; Skeem, Monahan, & Lowenkamp, 2016).

Over the past several years, the

FIGURE 4
Percentage of federal defendants with pretrial violations involving arrests for violent offenses or failure to appear, by individual Pretrial Risk Assessment (PTRA) scores



Note: Defendants with PTRA scores above 13 were recoded into a score of 13 as there were not enough released defendants with PTRA scores above 13 (N= 19) to produce statistically reliable estimates. PTRA = Pretrial risk assessment instrument individual score.

TABLE 3.
Odds of pretrial success for selected violation types by Pretrial Risk Assessment (PTRA) categories

PTRA risk categories	Number of defendants	Any adverse event	Arrests for any offenses or failure to appear	Arrests for any offenses
PTRA One	28,033	20:1	30:1	37:1
PTRA Two	24,017	9:1	15:1	18:1
PTRA Three	20,992	4:1	8:1	11:1
PTRA Four	9,836	2:1	5:1	7:1
PTRA Five	2,491	2:1	4:1	5:1

Note: Any adverse event includes pretrial violations involving new criminal arrests, failure to make court appearances, or pretrial revocations.

[5] For a more in-depth discussion of the PTRA's capacity to predict pretrial violations outcomes between non-Hispanic whites and blacks, non-Hispanic whites and Hispanics, and males and females, see Cohen and Lowenkamp (in press).

federal pretrial system has experienced steady increases in overall detention rate. The potential influence officers can have on lowering the pretrial detention rate while producing positive outcomes should not be underestimated. Under 18 USC §1354, federal pretrial officers are required to collect, verify, and report to judicial officials on information pertaining to a defendant's flight risk and potential danger to the community and include in their reports recommendations for release or detention, and the special conditions associated with release recommendations. This report clearly shows that the PTRA should be one of the key tools officers rely on when assessing risk and making recommendations on whether a defendant should be released or detained pretrial.

When the PTRA was originally introduced, there was some hesitancy among officers to accept the tool as part of the process of making informed released/detention decisions. As late as 2014, only half of PTRAs were completed prior to the initial judicial decision to release or detain a defendant. Beginning in 2014, the AO initiated a program to reduce unnecessary detention by increasing its efforts to provide education to its stakeholders regarding the appropriate use and interpretation of the PTRA. Part of this outreach involved receiving feedback from judges, officers, and other stakeholders about the PTRA's purposes and capacities. Through these efforts, more officers are now using the PTRA prior to the initial release decision; at present, about 75 percent of PTRAs are being completed before the judicial decision on pretrial release.

This revalidation study is part of the AO's continued efforts to reduce unnecessary detention by providing updated data on the PTRA's capacity to predict pretrial success and/or failures. These findings support the contention that officers can and should use the PTRA to gauge a defendant's likelihood of committing pretrial recidivism and hence apply this instrument when making release recommendations. In fact, the results of this study should empower officers to confidently rely upon the tool and use it in conjunction with a thorough pretrial investigation and their own judgment to develop informed decisions.

When Congress enacted §3142(c), it directed that federal judicial officials make pretrial release decisions in a manner that "reasonably assures" that released defendants make all future court appearances and not threaten community safety. While "reasonable assurance" can be a somewhat elastic concept, this research makes clear that the PTRA can be used to empirically assess the odds of pretrial failure and assist judicial officials in making release decisions based on evidence and data. The finding that defendants on the lower or middle end of the PTRA risk scale have a 20 to 1, 9 to 1, or even 4 to 1 probability of pretrial success supports the position that judicial officials and pretrial services officers should weigh these odds against the decision to incarcerate persons charged with but not convicted of a crime (Lowenkamp & Whetzel, 2009). Ultimately, we believe that the PTRA can be used as a mechanism to help court officials better understand these odds of pretrial success and facilitate scientifically based release/detention decisions and pretrial supervision strategies.

References

Administrative Office of the U.S. Courts (AO) (2015). *Detention Reduction Outreach Program (DROP): Risk assessment as the foundation*. Washington, D.C.: Administrative Office of the U.S. Courts.

American Bar Association. (2007). *ABA standards for criminal justice third edition: Pretrial release*. Washington, D.C.: American Bar Association.

Babchishin, K. M., & Helmus, M. L. (2016). The influence of base rates on correlations: An evaluation of proposed alternative effect sizes with real-world data. *Behavior Research Methods, 48*, 1021-1031.

Baber, L. (2010). Results-based framework for post-conviction supervision recidivism analysis. *Federal Probation, 74(3)*, 5-10.

Bechtel, K., Lowenkamp, C. T., & Holsinger, A. (2011). Identifying pretrial failure: A meta-analysis. *Federal Probation, 75(2)*, 78-87.

Cadigan, T. P., & Lowenkamp, C. T. (2011). Implementing risk assessment in the federal pretrial system. *Federal Probation, 75(2)*, 30-34.

Cadigan, T. P., Johnson, J. L., & Lowenkamp, C. T. (2012). The re-validation of the federal pretrial services risk assessment (PTRA). *Federal Probation, 76(2)*, 3-9.

Cohen, T. H., & Lowenkamp, C. T. (in press). Revalidation of the federal Pretrial Risk Assessment Instrument (PTRA): Testing the PTRA for predictive biases. Manuscript accepted by *Criminal Justice and Behavior*.

Desmarais, S.L., & Singh, J. (2013). *Risk assessment instruments validated and implemented in correctional settings in the United States*. New York, NY: Council of State Governments Justice Center.

Eskridge, C. W. (1983). *Pretrial release programming: Issues and trends*. New York, NY: Clark Boardman Company.

Goldkamp, J. S. (1985). Danger and detention: A second generation of bail reform. *Journal of Criminal Law and Criminology, 76(1)*, 1-74.

Heaton, P., Mayson, S. G., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review, 69(3)*, 711-794.

LJAF. (2013). *Developing a national model for pretrial risk assessment*. Houston, TX: Laura and John Arnold Foundation.

LJAF. (2016). *Public safety assessment: Risk factors and formula*. Houston, TX: Laura and John Arnold Foundation.

Lowenkamp, C. T., & Whetzel, J. (2009). The development of an actuarial risk assessment instrument for U.S. pretrial services. *Federal Probation, 73(2)*, 33-36.

Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). *Investigating the impact of pretrial detention on sentencing outcomes*. Houston, TX: Laura and John Arnold Foundation.

Lowenkamp, C. T., Holsinger, A., & Cohen, T. H. (2015). PCRA revisited: Testing the validity of the federal Post Conviction Risk Assessment (PCRA). *Psychological Services,12*, 149-57.

Oleson, J. C., VanNostrand, M., Lowenkamp, C. T., Cadigan, T. P., & Wooldredge, J. (2014). Pretrial detention choices and federal sentencing. *Federal Probation, 78(1)*, 12-18.

Rice, M., and Harris, G. (2005). Comparing effect sizes in follow-up studies: ROC Area, Cohen's d, and r. *Law and Human Behavior, 29*, 615–20.

Skeem, J., & Lowenkamp, C. T. (2016). Risk, race, and recidivism: Predictive bias and disparate impact. *Criminology, 54(4)*, 680-712.

Skeem, J., Monahan, J., & Lowenkamp, C. T. (2016). Gender, risk assessment, and sanctioning: The cost of treating women like men. *Law and Human Behavior, 40(5)*, 580-593.

VanNostrand, M., & Keebler, G. (2009). Pretrial risk assessment in the federal court. *Federal Probation, 73(2)*, 3-29.

Federal Statutes

Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150

Functions and Powers Relating to Pretrial Services, 18 USC §§ 1354

Pretrial Services Act of 1982, 18 U.S.C. §§ 3152.

SEPTEMBER 2018

Federal PROBATION

a journal of correctional philosophy and practice

SPECIAL ISSUE ON:
PRETRIAL SERVICES: FRONT-END JUSTICE

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James C. Duff, *Director*

Matthew G. Rowland, *Chief*
Probation and Pretrial Services Office

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THIS ISSUE IN BRIEF

SPECIAL ISSUE ON Pretrial Services: Front-End Justice

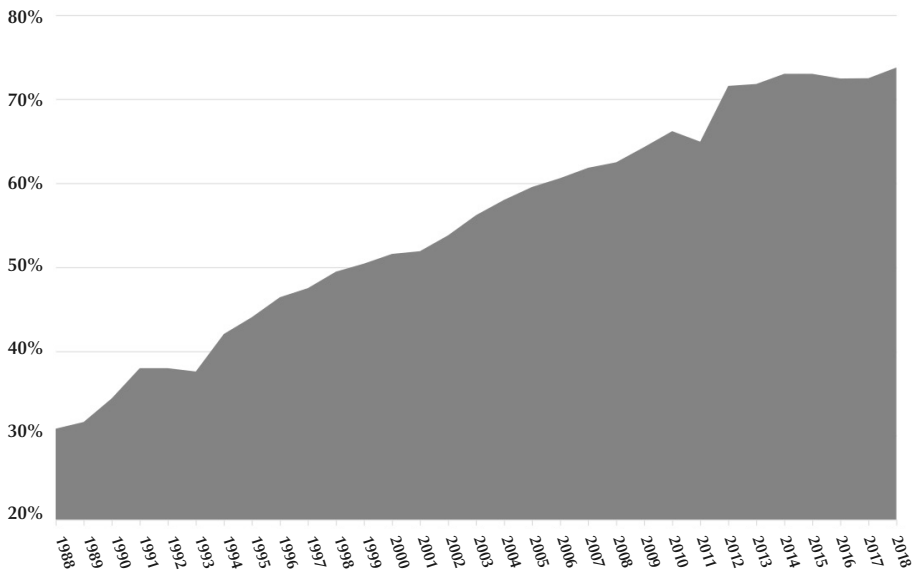
The Rising Federal Pretrial Detention Rate, in Context

Matthew G. Rowland[1]
Chief, Probation and Pretrial Services Office
Administrative Office of the United States Courts[2]

THE FEDERAL PRETRIAL detention rate has been steadily increasing. Twenty years ago, less than half of defendants were held pending trial; now the figure is nearly 75 percent (Figure 1).[3] The cost of this detention, in monetary terms, is approaching $1.5 billion a year (Department of Justice), and there are human costs as well. Researchers have connected pretrial detention to wrongful convictions, potentially longer-than-necessary prison sentences and higher recidivism rates (Gupta, Hansman & Frenchman) (Oleson, VanNostrand & Lowenkamp).[4]

The demographic disparity among those detained is yet another concern. Men are detained twice as often as woman. Blacks and Native Americans are detained more often than Asians, Pacific Islanders, and whites. Hispanics are detained at substantially greater rates than non-Hispanics. Similarly, non-citizens are detained at much greater rates than U.S. citizens (Figure 2). Those differences may raise concerns regarding judges' objectivity,

FIGURE 1
Federal Pretrial Detention Rate



Source: Judicial Business of the United States Courts and AOUSC Decision Support System

[1] The author would like to thank the following people for their assistance in developing this article: Brian Christ, Chief U.S. Pretrial Services Officer for the District of Oregon; Roberto Cordeiro, Chief U.S. Pretrial Services Officer for the Eastern District of New York; John Fitzgerald, Deputy Chief of the AO's Probation and Pretrial Services Office; Charles Robinson, Division Chief, AO's Probation and Pretrial Services Office; Stephen Vance, Chief, AO's Criminal Law Policy Staff; William E. Hicks, Jr., Administrator, AO's Probation and Pretrial Services Office; Thomas H. Cohen, Analyst, AO's Probation and Pretrial Services Office; and Christopher T. Lowenkamp, Analyst, AO's Probation and Pretrial Services Office.

[2] The views expressed in this article are the author's alone and do not necessarily reflect those of the AO, the Judicial Conference of the United States, its committees, or the federal probation and pretrial services system.

[3] All AO data cited in this article, unless otherwise noted, refers to cases processed in the 12-month period ending March 31, 2018 or of the year indicated. All race demographic data excludes Hispanics as Hispanics, and non-Hispanics are reported separately.

[4] It is often difficult in research to distinguish between correlation and causation, and that is true in terms of the relationship between pretrial detention and subsequent outcomes in criminal cases. Clearly, one interpretation is that pretrial detention has a corrosive effect on defendants—separating them from their legal team, family, and other potentially prosocial connections in the community. Detention also forces defendants, ironically, to associate with others involved in the criminal justice system, potentially creating negative peer networks. Another argument, however, is that judges are identifying those at higher risk at the pretrial stage, observing risk not fully captured by actuarial assessment devices. Consequently, the noted detention, sentence, and recidivism issues may flow from defendants' preexisting level of risk rather than from the detention itself.

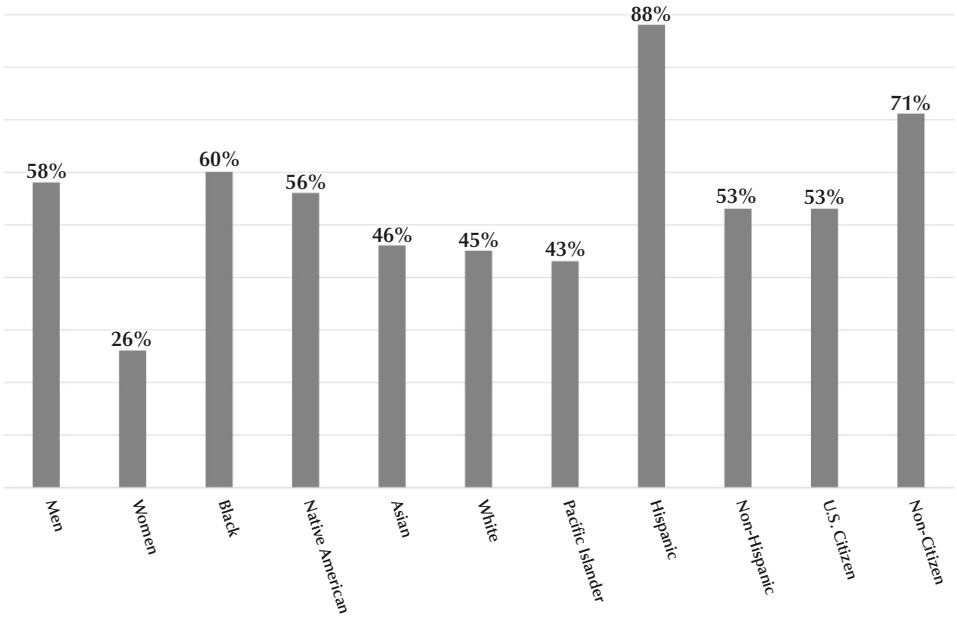
but like the overall pretrial detention rate, it is important to examine judges' decisions in context.

Judges are required by statute to consider specific factors when making release and detention decisions. Those factors, on their face, objectively relate to defendants' risk of flight and danger to the community.[5] They include the nature and circumstances of the crime charged; the strength of the evidence against the defendant and likelihood of conviction; the defendant's criminal history, including prior failures to appear for court proceedings; personal history; physical and mental condition; ties to the community; financial condition and employment record. In taking these factors into account, judges are required to be impartial and are precluded from discriminating against defendants based on gender, race, or other protected classification (Judicial Conference of the United States).

The demographic disparity may, therefore, be a byproduct of the courts' objective application of statutory required factors rather than invidious discrimination. At the heart of the statutory factors is the offense charged.[6] Although there is a presumption of innocence for people accused of crimes, the Supreme Court has upheld consideration of the charges lodged for detention purposes. The Court concluded that within the federal statutory framework, pretrial detention is reasonably designed to further the legitimate goal of public safety, not to punish defendants (*United States vs. Salerno*).

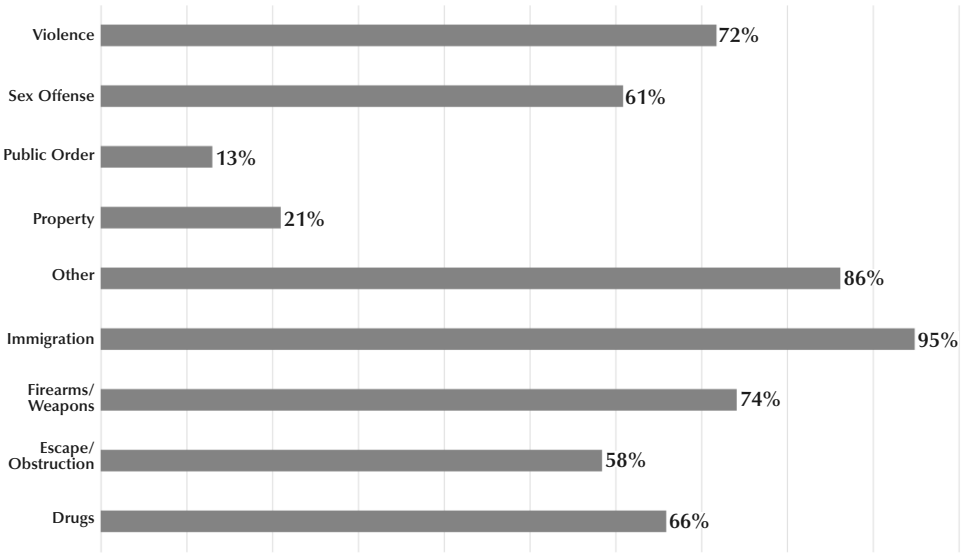
Some offenses inherently produce greater concerns about risk of flight and danger to the community than do others. For example, often those charged with illegal entry into the United States have acknowledged or obvious ties to other countries. Such ties increase the defendant's flight risk. Similarly, when defendants are charged with violence, weapons, and sex offending, concerns for community safety increase, another factor relevant to pretrial detention. Therefore, it is not surprising that defendants charged with different offenses have different release rates (Figure 3).

FIGURE 2
Federal Pretrial Detention Rate



Source: AOUSC Decision Support System; race categories do not include Hispanics

FIGURE 3
Federal Detention Rate by Offense



Source: AOUSC Decision Support System

What may be surprising is that there are distinct demographic patterns in terms of who is charged with different types of crimes. While drug charges are the most common across the majority of demographic groups, there is substantial variation. For example, property offenses are the second most common for women, Asian, Pacific Islander, and white defendants. In contrast, the second most common group of offenses for males and blacks relate to firearms and weapons. Native Americans are charged most frequently with violent offenses, while Hispanics and non-citizens are most frequently charged with immigration crimes (Figure 4). The unique federal jurisdiction provided by the Constitution and consistent

[5] See, 18 U.S.C. § 3142. Note, not everyone considers the statutory factors to be unbiased. Some civil rights organizations argue that factors such as prior failures to appear and rearrest are more reflective of police and prosecutors' decisions than the conduct of defendants (Pretrial Justice).

[6] It should be noted that prosecutors, not judges, decide which charges are to be brought against a defendant. Prosecutors, like judges, are ethically prohibited from discriminating against defendants based on demographic characteristics (American Bar Association), and their prosecutorial decisions are subject to published guidelines (Department of Justice).

FIGURE 4
Prevailence of Federal Offenses Charged within Each Demographic Category

	Female	Male	Asian	Black	Pacific Islander	Native American	White	Hispanic	Non-Hispanic	U.S. Citizen	Non-Citizen
Drugs	39%	34%	21%	38%	36%	19%	33%	21%	34%	40%	13%
Escape/Obstruction	3%	3%	2%	2%	4%	6%	3%	1%	3%	2%	0%
Firearms/Weapons	5%	22%	4%	28%	16%	9%	13%	3%	19%	18%	1%
Immigration	4%	3%	7%	2%	1%	4%	4%	62%	3%	6%	75%
Other	3%	2%	21%	1%	1%	2%	1%	7%	2%	1%	9%
Property	36%	17%	33%	16%	21%	7%	24%	3%	17%	16%	2%
Public Order	3%	3%	2%	2%	6%	3%	4%	0%	3%	3%	0%
Sex Offenses	2%	8%	5%	2%	5%	13%	12%	1%	8%	6%	0%
Violence	6%	9%	4%	9%	9%	37%	6%	1%	9%	8%	0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: AOUSC, Decision Support System

policy determinations across Presidential administrations have led to more prosecutions for illegal entry into the country, violence—particularly in "Indian Country," and weapons offenses. In turn those prosecutions have contributed to the demographic differences in release rates.

Another statutory consideration for pretrial detention release is prior criminal history. It is generally thought that minorities, blacks in particular, have more documented criminal histories than do whites (Gase, Glenn et al.). In the federal system, we do not have a uniform measure of criminal history at the pretrial stage. We can, however, derive such a measure by borrowing the criminal history scoring system used at sentencing. Developed by the United States Sentencing Commission, the scoring system relies primarily on the number of convictions and the length of custody terms imposed on defendants (United States Sentencing Commission). Looking at the current post-conviction supervision population for which we have criminal history scores, there are indeed significant demographic differences in terms of criminal histories.

Only 12 percent of women score within the most severe criminal history categories, compared to 33 percent of men.[7] There is also large variation among defendants of different races (Figure 5), with 11 percent of Asians in the most severe categories, 39 percent of Black defendants, 17 percent of the Native Americans, 15 percent of the Pacific Islanders, and 19 percent of the whites. Hispanic and non-citizens have roughly half the criminal histories of non-Hispanics and United States citizens. Notably, however, the Commission's system does not take foreign convictions into account, so the criminal histories of defendants with ties to other countries may be understated.

Consequently, it appears that the demographic differences in the charges against, and criminal history of, defendants may explain at least some of the difference in release rates.[8] To further explore that possibility, the Administrative Office of the United States Courts (AO) examined records related to 210,000 defendants charged in the federal system between 2012 and 2016. Focusing on United States citizens, cases were matched based on most serious offense, criminal history, and other empirical risk factors for which there was available data.[9] The results were analyzed by gender, the two largest race categories (black and non-Hispanic whites), and Hispanic origin and reported in an internal PPSO memo. With the stated controls in place, release rate differences between men and woman declined by 70 percent, going from 28 to 9 percentage points. The matching process eliminated the statistically significant differences between blacks and whites altogether, going from 17 percentage points to 1 percentage point. Nearly 60 percent of the difference between Hispanics and non-Hispanics could be explained by the controls, going from 11 to 7 percentage points. Of course, different models and datasets can be used to further explore the question of equity in release decisions, but the analysis already undertaken makes clear that many factors influence release rates and looking at one factor alone, such as demographics, would be incomplete.

So available data indicate that demographic disparity in detention may not stem from the release decision itself but rather from the characteristics of those being charged in federal court. That observation does not negate the fact that pretrial detention rates are at record high levels and on an upward trend for all demographic groups (Figure 5).

FIGURE 5
Pretrial Detention Rate

	2008	2018	Pct. Point Change
Men	48%	58%	10%
Women	19%	26%	7%
Black	55%	60%	5%
Native American	45%	56%	11%
Asian	35%	46%	11%
White	33%	45%	12%
Pacific Islander	39%	43%	4%
Hispanic	79%	88%	9%
Non-Hispanic	43%	53%	10%
U.S. Citizen	42%	53%	11%
Non-Citizen	61%	71%	10%

Source: AOUSC, Decision Support System

[7] The United States Sentencing Commission criminal history scoring system provides six categories, I-VI. The highest referred to in this article relates to those defendants in categories III-VI. The least severe category is I and includes defendants with no criminal history.

[8] For more information about the correlation of offense charge, criminal history, and release rates in the federal system, see Cohen and Austin.

[9] There is not discrete data currently available for each of the factors specified by statute relative to pretrial release. Consequently, all research in this area is inherently limited. The additional factors are those included in the Pretrial Risk Assessment device or PTRA. See, Cadigan, Johnson & Lowenkamp, "The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)."

Countervailing Costs and Concerns

Just as there are costs and concerns related to detaining people pending trial, there are costs and concerns related to supervising defendants during court proceedings. In most cases, to reduce risk of flight and danger to the community, the court imposes a term of community supervision monitored by a pretrial services or probation officer. That supervision, and the treatment programming it often entails, costs $177 million a year (AO). Another cost to pretrial release is that defendants have a greater opportunity to abscond, intimidate witnesses, and commit other crimes compared to those defendants who are detained (Alexander). The federal government spends $450 million a year on fugitive apprehension, and a portion of that is dedicated to searching for federal pretrial defendants who abscond before trial (Department of Justice). And while there is not an exact figure for the cost of crimes committed by persons released pending trial (General Accountability Office), conservative estimates put it in the hundreds of millions of dollars.[10]

What Should Be Done?

In light of the escalating federal pretrial detention rate and related concerns, some observers have suggested the federal system should model itself after state and local systems with lower detention rates and better release outcomes. For example, a keynote speaker at a National Association of Pretrial Services Agencies (NAPSA) conference[11] suggested that the federal system adopt the practices of the District of Columbia Superior Court.[12] That court has repeatedly posted an impressive 90 percent release rate, with an equal percentage of released defendants making court appearances and remaining free from rearrest. The pretrial agency supporting the court has been praised in the media (Marimow), even being favorably satirized on the popular television show Last Week Tonight with John Oliver (Avery, Carvell & Gondelman).

Unfortunately, the differences in size and operations between the two jurisdictions makes large-scale transfer of practices difficult.[13] For example, the Superior Court deals, relatively, with a homogenous defendant population concentrated in a small geographic area. Most of the charges filed in Superior Court are misdemeanors and infractions. In contrast, the federal system deals with a highly diverse defendant population and covers the entire country plus the federal protectorates of Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. Moreover, federal prosecutions overwhelmingly involve felonies and can be based on any one of 3,000 different statutory provisions (Cali). The alleged criminal conduct is often sophisticated (Wright), and associated with multi-year prison term upon conviction (United States Sentencing Commission) (Federal Bureau of Prisons).

The Purpose of This Article

The federal system is so unique that this article seeks to better contextualize its release rate and influencing factors. Hopefully, with that context, those of us within the system and outside observers can better identify opportunities for improvement. The discussion is organized as follows: (1) the structure of the federal pretrial system and the roles of those who are part of it; (2) the changing profile of defendants charged in federal court; (3) institutional incentives leading some defendants to acquiesce to, rather than contest, pretrial detention; and (4) the potential impact of legislative reform and judicial discretion in terms of the future of federal pretrial detention.

1. The Structure of the Federal Pretrial System

In fiscal year 2017, there were 77,000 criminal filings (AO, Judicial Business of the United States Courts). That caseload is handled by a "system" that is really more of a collaboration between the judiciary, the defense bar, prosecutors, and the United States Marshals Service. Although not often thought of as part of the system, defendants, their families, and friends greatly influence how processes work and the outcomes that are achieved. Each of the participants is independent, but their actions work interactively with the others.

Judges are responsible for pretrial release determinations under 18 U.S.C. § 3142. The judges hear from the parties and consider information and recommendations from judicial employees, specifically pretrial services officers, who are responsible for gathering, verifying, and communicating information relevant to the release decision and potential alternatives to detention under 18 U.S.C § 3154 [14]

Defense attorneys "serve as the accused's counselor and advocate" and file "motions seeking pretrial release of the accused" (American Bar Association). Prosecutors are responsible for timely and just charging decisions, and for seeking detention when needed to protect individuals and the community and ensure the return of defendants for future proceedings (American Bar Association) (Department of Justice). The U.S. Marshals Service houses defendants ordered detained and executes arrest warrants for those released who violate the conditions of their release (The United States Marshals Service).

Defendants and those who know them

[10] Using one published method on just 10 percent of the new charges filed against released defendants in fiscal year 2017 related to violence produced a loss figure of $147 million alone (McCollister, French, & Fang, 2010).

[11] Hon. Truman Morrison, National Association of Pretrial Services Agencies 44th Annual Conference and Training Institute, Salt Lake, Utah. September 11-14, 2016.

[12] The Superior Court of the District of Columbia was created by Congress in 1970 "to assume responsibility for local jurisdiction, similar to that exercised by state courts." (Federal Judicial Center). The Pretrial Services Agency for the District of Columbia that supports the Superior Court, as well as the U.S. District Court for the District of Columbia, is a federal entity as well, but operates separate and apart from the "federal system" supporting all the U.S. district courts outside the nation's capital. In the business vernacular and for purposes of this article, the "federal system" and "federal pretrial system" refers to the operations in the 93 United States District Courts outside the District of Columbia.

[13] Geographically, the jurisdiction of the Superior Court is a fraction of one percent of the federal system (Deloitte and Data Wheel). While the defendant population in Superior Court has historically been predominately African Americans charged with non-violent, public order-type offenses (Washington Lawyers' Committee for Civil Rights and Urban Affairs), African Americans make up less than 30 percent of the defendants charged in the federal system, and drug possession and public order offenses are extremely rare in the federal system (AO). In terms of caseload volume, the Superior Court deals with about one-fifth of the new pretrial cases handled by the federal system, and more of its cases are misdemeanors or deal with traffic offenses (76 percent) than is the case in the federal system (7 percent). Felonies constitute most of the federal system docket (DC Courts) (Probation and Pretrial Services Decision Support System).

[14] Courts have the option to create a separate pretrial services office or to empower its probation office to provide pretrial services. See, 18 U.S.C. § 3152. Presently, 19 judicial districts maintain a separate pretrial office. Courts are required to periodically consider consolidation of pretrial and probation offices for economic and operational efficiency (Judicial Conference of the United States). Either way, officers are subject to the same statutes, policies, and procedures. For purposes of this article, the term "pretrial services officers" is used to refer to any officer carrying out the pretrial function.

provide information relevant to the release decision; for example, they offer details about potential third-party custodians and verify residential and employment information. Without that type of information, the courts are often left with just charge and prior record information to make release determinations.

The federal system does not operate as a monolithic whole but rather through 94 judicial districts that have autonomy and discretion to deal with local issues. Once more, the different entities involved in the system have their own priorities and objectives. Needed consistency on material issues comes from adherence to the United States Constitution, federal statutes, the Federal Rules of Criminal Procedure, applicable case-law, and the principle of comity. Another melding factor is the existence of professional standards for pretrial work and organizations.

Standards in relation to making the pretrial decision making and operations have been developed by the National Institute of Corrections, Pretrial Justice Institute, National Association of Pretrial Services Agencies, and American Bar Association (Pilnik) (Pretrial Justice Institute) (National Association of Pretrial Services Agencies) (American Bar Association). The standards basically call for (1) a legal framework that supports pretrial release based on the least restrictive conditions possible; (2) release decisions that are grounded in objective assessments of defendants' risk of flight and danger to the community; and (3) the availability of meaningful alternatives to detention, especially options that are researched and "evidence-based."

The legal framework in the federal system affords defendants procedural safeguards through the Fifth Amendment of the United States Constitution[15] and protection from excessive bail under the Eighth Amendment (Department of Justice). In addition, there are statutes favoring defendants' release. For example, 18 U.S.C. §§ 3142 requires the defendant's automatic release when he or she is not charged with a particularly serious offense and the government does not contest or meet its burden of proof showing why the defendant should be detained. Where the government does seek detention, it has the burden of proof in many cases and must demonstrate the defendant is a risk of flight by a preponderance of the evidence and show danger to the community by an even greater standard, clear and convincing (Boss).

There is an exception, however, that is growing larger than the rule in favor of release. The exception is found in 18 U.S.C. §3142(e) and flips the burden of proof for release onto the defendant when the defendant is charged with offenses said to involve violence, drugs, and sex offending. A presumption of detention also extends to some predicate felons. The "presumption was created with the best intentions: detaining the 'worst of the worst' defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases." (Austin 61). Unfortunately, research indicates that the enumerated offenses may not be the best predictors of risk of flight or danger to the community (Austin 60). Consequently, the Judiciary has suggested that Congress reexamine the presumption provisions (Judicial Conference of the United States).

As to the standard for effective pretrial work that calls for informed and objective assessments of defendants' risk of flight and danger to the community, pretrial release decisions are made by United States magistrate judges and United States district judges. Magistrate judges are appointed to eight-year terms by the district court and, in turn, district judges are appointed by the U.S. President for a period of "good behavior," sometimes called life tenure, with consent of the United States Senate, and often after vetting by the American Bar Association (Quality Judges Initiative). By design, federal judges are not subject to the pressures of election and campaigning. In fact, they are ethically required to refrain from political activity, just as they are required to execute their duties fairly, impartially, and diligently (Judicial Conference of the United States).

The federal system has also added an empirical component to the release decision process. Specifically, pretrial services officers calculate and consider an actuarial score when fashioning a recommendation to the court. The tool, called the Pretrial Risk Assessment or "PTRA," is based on study of more than half a million federal cases from districts across the system. The PTRA has been statistically validated and revalidated (Cadigan, Johnson & Lowenkamp); it also continues to track release rates and release outcomes very well (Graphics 6 and 7). The officers responsible for the recommendations are particularly well qualified and trained.[16]

In regard to the third test for an effective pretrial services system, the federal system is progressively adopting innovative and evidence-based interventions as alternatives to detention. The most common alternative to detention is release conditioned on supervision in the community by pretrial services officers. It is common for the supervision term to also require substance abuse testing and treatment, as well as mental health evaluation and treatment, depending on the facts of the case. Home detention, usually enforced through electronic and GPS monitoring devices, is common in higher risk cases as well. While some services are rendered directly to defendants by pretrial services officers, over the past five years the federal judiciary spent $134 million on contract services to assist defendants with basic life necessities, needed medical and addiction treatment, and employment services. Notably, those goods and services were in addition to anything defendants could have afforded on their own or that would have been available to them as ordinary members of the public.

The approach taken by pretrial services officers is inspired by the "evidence-based" Risk, Needs and Responsivity Model (Serin & Lloyd). That model, and Judicial Conference policy, calls for officers to assess defendants' strengths and weaknesses relative to their compliance with the court-ordered conditions of release. The PTRA, mentioned earlier, is one of the factors considered by officers in the assessment stage. Once the assessment is made, officers tailor programming to maximize responsivity in the defendant, which will promote a successful outcome in the case. In undertaking these efforts, officers can only operate within the conditions of release imposed by the court, must seek to minimize the burden of the intervention, and always uphold the defendant's presumption of innocence (AO, Supervision of Federal Defendants).

[15] U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[16] Pretrial services officers average more than a decade of professional experience and at least 400 hours of related training. More than half exceed the requirement of a bachelor's degree with a master's degree or doctorate (AO).

Officers use a variety of "evidence-based techniques" in their interactions with defendants. Most relate to helping defendants acquire and use prosocial life skills with a focus on cognitive and choice awareness, recognition of the motive and influence of others, problem solving and deductive reasoning (Miyashiro) (Cadigan, 2009). The federal pretrial system continues to leverage technology and training of its staff (train-the-trainer) to maximize positive outcomes (AO Expanding Supervision Capabilities in Probation and Pretrial Services). In addition, the system is constantly studying data and monitoring outcomes in the effort to improve.

One area where, on the surface, the federal pretrial system is not following "best practices" is in use of summons rather than arrest to secure initial appearance (Pretrial Justice Institute). Although associated with a pretrial release rate of more than 90 percent in the federal system, summons were not commonly used. Instead, they were reserved for minor property, traffic, and drug possession, which are a small part of the federal docket, and typically involve defendants presenting little or no risk of flight or danger to the community.

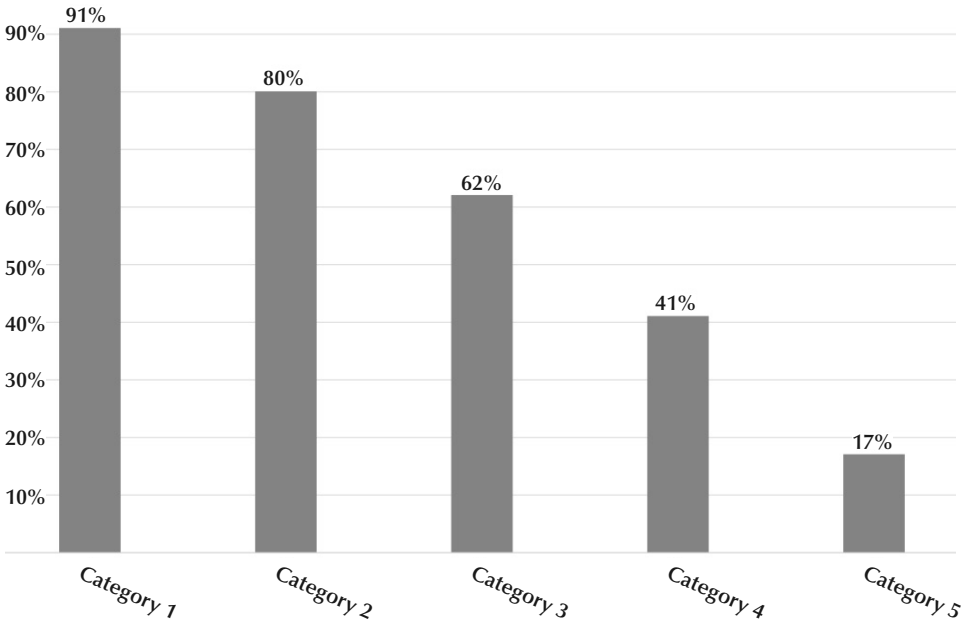
2. The Risk Profile of Federal Defendants

The risk of flight and criminogenic profile of defendants in the federal system has steadily worsened over the years, in part because of the focus of federal prosecutions. As acknowledged by the Department of Justice, "federal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources to achieve an effective nationwide law enforcement program, from time to time the Attorney General may establish national investigative and prosecutorial priorities" (Department of Justice). The priorities have generally focused on repeat offenders and offenses involving drug and human trafficking, violence, weapons, sex crimes, and illegal entry into the United States (Rowland). Between 1997 and 2017, the percentage of defendants charged with the crimes most associated with pretrial detention increased from 60 percent to 79 percent.[17]

There is a correlation between the nature of the charges and the use of pretrial detention. Over the past four years, the detention rates for those charged with immigration offenses has been about 95 percent and for those charged with drug and weapons offenses 75 percent. In contrast, the detention rate for property and financial offenses has been less than 30 percent, and for offenses such as DWI even less—13 percent. The offenses with the higher detention rates make up a greater proportion of the overall federal docket; hence they contribute to the higher overall detention rate.

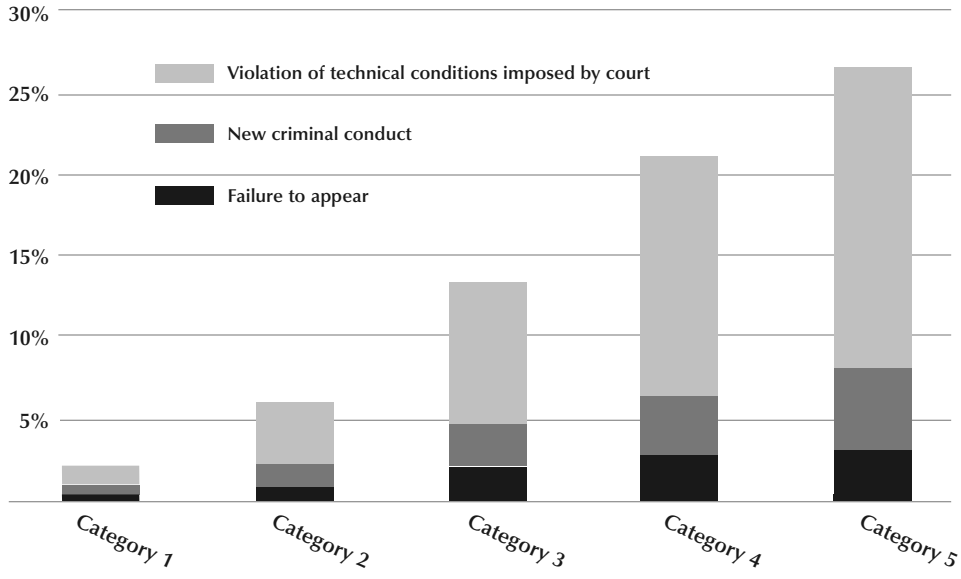
The high detention rate for immigration cases is in large part because the defendants have ties outside the United States and usually no verifiable connections to the district of prosecution. Therefore, the risk of flight is escalated. Moreover, even if those defendants were released pending trial, most would simply be taken into custody by U.S. Immigration and Customs Enforcement (ICE) for deportation proceedings. The percentage

FIGURE 6
Pretrial Release Rates by PTRA Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

FIGURE 7
Pretrial Release Outcomes, Violation Rates by Type and PTRA Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

[17] The offenses most associated with pretrial detention are: immigration, weapons, violence, sex offenses and drug trafficking (AO).

of defendants who are not United States citizens has increased, mirroring the overall increase in detention rate.

It is not only the type of charge brought in federal court that relates to release rates, however, but the nature of the underlying conduct. The media has expressed concern that many defendants are being incarcerated for simple possession and drug use: "[d]uring the period from 1993 to 2011, there were three million admissions into federal and state prisons for drug offenses. Over the same period, there were 30 million arrests for drug crimes, 24 million of which were for possession" (Rothwell). In the federal system, however, 91 percent of the defendants prosecuted for drug crimes in 2016 were charged with distribution-related offenses, not simple possession. Moreover, 99.5 percent of those drug offenders in federal prison were guilty of drug trafficking (Taxy, Samuels & Adams). This is not to say that federal defendants don't use or abuse drugs themselves, but it is not typically the reason they are charged federally.

In addition, the amount of drugs involved in federal offenses is usually large. Since the drug amount is a primary factor in determining the custody term under federal law, it is natural to consider it when assessing risk of flight pending trial. For every person arrested by the U.S. Drug Enforcement Administration, the agency seizes approximately 7.5 pounds of illicit drugs (Drug Enforcement Administration).

Similarly, the average loss amount in federal fraud cases is substantial. In cases where defendants are sentenced to imprisonment, the median loss is close to $800,000 (USSC, Quick Facts on Offenders in the Bureau of Prisons). Moreover, most defendants' relationship to the other contraband they are charged with, whether it be guns, child pornography, or counterfeit items, is generally substantive. Only 8 percent are considered minor or minimal participants in the offense as defined by the United States Sentencing Guidelines (USSC, Annual Sourcebook).

As noted above, immigration charges are also commonly prosecuted in federal courts. As with drug prosecutions, there are concerns that the wrong people are being targeted for immigration prosecution and treated too harshly in the process (Planas). Nonetheless, prosecutions continue, with a particular emphasis on illegal "reentry" cases, meaning people charged with repeatedly illegally entering the country (Light, Lopez & Gonzalez-Barrera).[18] About half of the people charged with and sentenced for immigration violations have one or more prior convictions in this country countable under the sentencing guidelines (USSC, Interactive Source Book of Federal Sentencing Statistics). Of those charged with illegal reentry, prior records tend to be even more serious. Nearly three quarters of the reentry defendants received a sentencing enhancement because of the gravity of their prior criminal record. A third of those defendants had one or more prior convictions related to violence, weapons, drug trafficking, or other type of aggravated felony (USSC, Illegal Reentry Offense).

The criminal history of defendants entering the federal system globally has been worsening, in terms of prior arrests, prior convictions, and previous prison terms. This is not only because of who is increasingly targeted for criminal prosecutions but because of the nature of federal offenses themselves. Many federal crimes have as an essential element of the crime that the defendant have a prior criminal record. For example, 18 U.S.C. § 922 makes it a federal crime for convicted felons to possess a firearm, so a prior felony is a precursor to the federal crime. Similarly, the federal offense of engaging in interstate commerce after failing to register as a sex offender, a violation of 18 U.S.C. §2250, requires an existing prior sex offense conviction.

Having prior arrests is associated with higher recidivism and having prior convictions foreshadows it even more. (USSC, The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders). It logically follows that it is appropriate for courts to consider the existence and nature of defendants' prior criminal record when making determinations of danger to the community at the pretrial stage. One study has found that the majority of federal defendants, 68 percent, have not just prior arrests but convictions (USSC, Quick Facts on Offenders in the Bureau of Prisons). The severity of the sentences imposed on prior criminal convictions, measured by the federal sentencing guidelines, has increased steadily over the years, going from an average of 2.82 points per defendant in 1992 to 4.11 points in 2016. In the past 20 years, the number of defendants designated under the guidelines as "career offenders," including armed career offenders, has increased 54 percent, going from 1,368 defendants in 1997 to 2,108 defendants in 2017. The Sentencing Commission has more recently established a classification "repeat and dangerous sex offender"; in the past five years the number of defendants assigned that classification has increased 64 percent, going from 182 defendants to 298 (United States Sentencing Commission).

3. Changing Incentives for Federal Defendants in Relation to Pretrial Release

The last time sweeping criminal justice reform was enacted in the federal system was in the mid-1980s. At the time, crime rates were at record highs, concerns about the corrosive effects of cocaine epidemics were intense, and the effectiveness of rehabilitative programming was seriously in question (Harty). As a result, Congress, like many state legislatures, adopted "a tough on crime" approach. That approach included adding potential danger to the community to risk of flight as grounds for pretrial detention, presumptive pretrial detention for certain defendants perceived as particularly dangerous, increased prison time for those convicted of crimes, and limits on judicial discretion at sentencing while abolishing parole (Deaton).

The statutory provisions allowing for detention on grounds of danger to the community and the presumption of detention in certain cases had a direct impact on pretrial release rates. So too did the changes providing for increased use of imprisonment and decreased judicial discretion at sentencing. Of the defendants who reached disposition in 1980, before the "tough on crime" reform went into effect, the federal conviction rate was 78 percent, and less than half (46 percent) of those convicted were sentenced to imprisonment. The average prison term was 52 months, but with parole and more generous good behavior rules many served one-third of their custody term or 17 months on average (AO) (Sabol & McGready).

By 2000, when the tough on crime approach was in full swing, the conviction rate had climbed 11 percentage points, imprisonment was part of the sentence for 9 out of 10 those convicted, and the average prison term imposed increased by 5 months (AO); defendants had to serve at least 85 percent of

[18] Jose Ines Garcia Zarate is one of the more well publicized cases of a repeat immigration violator. A Mexican native, he had seven drug and immigration prior felony convictions in the United States. He was deported to Mexico five times and was facing a sixth when a jury found that he possessed a stolen firearm and had accidentally shot and killed a tourist in San Francisco (Jose Ines Garcia Zarate Wiki: The Death of Kate Steinle).

their time regardless of their behavior while an inmate, and regardless of the risk they presented for recidivism.

The increased likelihood that they will be convicted and sentenced to prison and for a longer period creates a practical dilemma for federal defendants. The time spent by a defendant in pretrial detention is credited, under 18 U.S.C. § 3585(b), against any imprisonment term to be imposed in the case. Consequently, defendants can get a proverbial head start on a likely prison term and avoid the emotional trauma of having to leave their family not once but twice—staying in custody following original arrest. Another consideration for defendants is that Bureau of Prisons institutions, where most federal custody terms are served, are dispersed across the United States. This may mean that defendants will be separated from family and friends, as well as legal counsel, by hundreds of miles—if not more (Vigne) (Arons, Culver & Kaufman). Pretrial detention facilities, in contrast, tend to be closer to the district of prosecution and presumably to defendants' homes, making it easier for defendants to retain ties.

Defendants' involvement with the pretrial report process is voluntary, and they can decline to be interviewed by pretrial services officers (Criminal Justice Standards Committee). In fact, the percentage of defendants not interviewed by pretrial services has increased steadily over the years, nearly doubling to 44 percent of defendants between 1997 and 2016. In addition, it has become common for defendants who are interviewed to decline to answer specific questions that they fear may incriminate them or otherwise be detrimental to their interests.

4. Emerging Trends in the Federal Pretrial System

The federal pretrial system prides itself on upholding the presumption of innocence, despite the reality that the vast majority of defendants will ultimately plead guilty and be sentenced to imprisonment. One adjustment made in many judicial districts is the creation of voluntary pretrial programs offering defendants and their loved ones information on how the federal criminal justice system works and strategies on how to best manage the stress of prosecution (U.S. Probation Office for the District of Wyoming). Some jurisdictions, again recognizing the high conviction and imprisonment rate, have expanded to "preentry programs."

A more recent phenomenon, as judges have been afforded more discretion at sentencing (with the guidelines now being advisory rather than binding), is for courts to support sentencing mitigation programs. In all, 24 districts now have formal judge-involved intervention and treatment programs, with even more informal programs of various sizes. For example, the pretrial services office in the Eastern of New York maintains various programs for different types of defendants in different situations and with varying needs (Pretrial Services Office, Eastern District of New York).

Conclusion

Structurally, the federal system has the hallmarks of a quality pretrial program. The system is led by qualified and independent judges who consider recommendations from talented defense attorneys and prosecutors. The court also has the support of an agency that has specific authority on pretrial matters and provides a range of detention alternatives. Why then has the federal pretrial detention rate increased? The answer seems to rest on a combination of factors, including "tough on crime" federal statutes, severity of the crimes prosecuted in federal court, the increased risk of flight and danger to the community, and strategic choices by defendants and their attorneys not to engage in the pretrial process.

Courts are innovating in light of broader sentencing discretion afforded judges, and sentencing mitigation, preentry, and preparation programs are developing in a pretrial context. Also, Congress has been considering criminal justice reform that may directly impact pretrial release rates. So is it possible that federal pretrial release trends will change, and more people will be released without compromising community safety or impeding justice? Time will tell.

References

Alexander, Keith L. "11 defendants on GPS monitoring charged with violent crimes in past year in D.C." *Washington Post* 9 February 2013. 12 December 2017. <https://www.washingtonpost.com/local/11-defendants-on-gps-monitoring-charged-with-violent-crimes-in-past-year-in-dc/2013/02/09/9237be1e-6c8b-11e2-ada0-5ca5fa7ebe79_story.html?utm_term=.ad0f947a5592>.

American Bar Association. "Criminal Justice Section Standards." Washington, DC, n.d. 31 July 2018. <https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html>.

—. *Criminal Justice Section Standards, Defense Function*. n.d. 22 November 2017. <https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html>.

—. *Criminal Justice Standards for the Prosecution Function*. n.d. 22 November 2017. <https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html>.

—. *Criminal Justice Standards, Pretrial Release*. 2002. <https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html>.

AOUSC. "Annual Survey of Federal Probation and Pretrial Services Officers." Washington, DC, 2017.

—. "Decision Support System." The Administrative Office of the United States Courts, 2017.

—. *Expanding Supervision Capabilities in Probation and Pretrial Services*. 2012. 25 November 2017. <http://www.uscourts.gov/statistics-reports/expanding-supervision-capabilities-probation-and-pretrial-services>.

—. *Federal Offenders in the United States District Courts*. Washington, DC, 1980.

—. *Incarceration Costs Significantly More than Supervision*. 17 August 2017. <http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

—. *Incarceration Costs Significantly More than Supervision*. 17 August 2017. <http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

—. *Judicial Business of the United States.* Washington, DC, 2000.

—. *Judicial Business of the United States Courts*. Washington, D.C.: The Administrative Office of the United States Courts, n.d.

—. "Probation and Pretrial Services Decision Support System ." *Table H-1, Modified by Class of Offense*. Washington, D.C., 25 November 2017.

—. "Supervision of Federal Defendants." *Guide to Judiciary Policies, Vol 8, Part C*. Washington, D.C. , n.d.

Arons, A, K. Culver, E. Kaufman, J. Yun, H. Metcalf, M. Quattlebaum, & J. Resnik. *Dislocation and Relocation: Women in the Federal Prison System and Repurposing FCI Danbury for Men*. Arthur Liman Public Interest Program, Yale Law School. New Haven, Connecticut, 2014.

Austin, Amaryllis. "The Presumption for Detention Statute's Relationship to Release Rates." *Federal Probation*, December (2017): 52-64.

Avery, Kevin, et al. *Bail: Last Week Tonight with John Oliver (HBO)*. 7 June 2015. 7 December 2017. <https://www.youtube.com/watch?v=IS5mwymTIJU>.

Barone, Lisa. *The Great Correlation vs Causa-*

tion Debate. 13 September 2011. 2018 2 May. <https://outspokenmedia.com/internet-marketing-conferences/the-great-correlation-vs-causation-debate/>.

Boss, Barry. *Criminal Pretrial Detention Hearings*. n.d. James Publishing. 24 November 2017. <http://www.jameseducationcenter.com/articles/pretrial-detention-hearings/#Burden_of_Proof_and_Presumptions>.

Brent Chittenden - December 1, 2017. *Jose Ines Garcia Zarate Wiki: The Death of Kate Steinle*. 1 December 2017. 2 December 2017. <https://www.earnthenecklace.com/jose-ines-garcia-zarate-wiki-the-death-of-kate-steinle/>.

Cadigan, Timothy P. "Implementing Evidence-Based Practices in Federal Pretrial Services." *Federal Probation*, September (2009).

—. "Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982." *Federal Probation*, September (2007): 10-15.

Cadigan, Timothy P., James L. Johnson and Christopher T. Lowenkamp. "The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)." *Federal Probation* (2012): 5-15.

Cali, Jeanine. *Frequent Reference Question: How Many Federal Laws Are There?* 12 March 2013. 1 December 2017. <https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/>.

Cohen, Thomas H. and Amaryllis Austin. "Examining fedeal pretrial relelase trends over the last decade and the relationship between federal release practices and the deployment of the Federal Pretrial Release Instrument." *Federal Probation*, September (2018).

Criminal Justice Standards Committee. *ABA Standards for Criminal Justice, Pretrial Release*. American Bar Association, 2007.

DC Courts. "District of Columbia Courts Statistical Summary, CY 2016." n.d. *DC Courts*. 25 November 2017. <https://www.dccourts.gov/sites/default/files/matters-docs/Statistical-Summary-CY2016-Final.pdf>.

Deaton, William W. "The New Federal Criminal Code: A Sampler." *New Mexico Law Review* (1986): 45-58.

Deloitte and Data Wheel. *Washington, DC and United States*. n.d. 28 November 2017. <https://datausa.io/profile/geo/washington-dc/>.

Department of Justice. *Firearms Charges*. n.d. 28 November 2017. <https://www.justice.gov/usam/criminal-resource-manual-112-firearms-charges>.

—. *Offices of the U.S. Attorney*. November 2000. <https://www.justice.gov/usam/usam-9-6000-release-and-detention-pending-judicial-proceedings>.

—. *Principles of Federal Prosecution*. n.d. 28 November 2017. <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.23>.

—. "United States Attorney Manual." Washington, DC, n.d. 31 July 2018. <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200>.

—. *United States Marshals Service FY 2018 Performance Budget*. Washington, D.C.: Departmnet of Justice, 2017. <https://www.justice.gov/file/968956/download>.

—. *United States Marshals Service, FY 2017 Performance Budget*. Washington, D.C. : Department of Justice, 2016. 21 November 2017. <https://www.justice.gov/jmd/file/821276/download>.

Drug Enforcement Administration. *Statistics and FActs*. n.d. 29 November 2017. <https://www.dea.gov/resource-center/statistics.shtml#seizures>.

Federal Bureau of Prisons. *Federal Bureau of Prisons*. 2018. 30 July 2018. <https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp>.

Federal Judicial Center. *Courts of the District of Columbia*. n.d. 8 December 2017. <https://www.fjc.gov/history/courts/courts-district-columbia>.

Ford, Matt. *What Caused the Great Crime Decline in the U.S.?* 15 April 2016. 7 December 2017. <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/>.

Gase, L.N.,, B. A. Glenn, L.M. Gomez, T. Kuo, M. Inkelas and N.A. Ponce. "Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics." *Race and Social Problems* 4 December 2016: 296-312. 30 July 2018. <https://www.sfgate.com/crime/article/Arrest-rates-remain-higher-among-minorities-10594737.php>.

General Accountability Office. *Experts Report Challenges Estimating Costs and Suggest Improvements to Better Inform Policy Decisions*. Washington, D.C. : General Accountability Office, 2017.

Gupta, Arpit, Christopher Hansman and Ethan Frenchman. *The Heavy Costs of High Bail: Evidence from Judge Randomization*. New York: Columbia Unversity, 2016. 20 November 2017. <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>.

Harris, Kamala D. *Bail Reform Is About Criminal and Economic Justice*. 18 September 2017. 30 October 2017. <http://www.theroot.com/bail-reform-is-about-criminal-and-economic-justice-1818504734>.

Harty, Cheyenne Morales. "The Causes and Effects of Get Tough: A Look at How Tough-on-Crime Policies Rose to the Agenda and an Examination of Their Effects on Prison Populations and Crime." January 2012. *Scholar Commons*. 2 December 2017. <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=5262&context=etd>.

Johnson, Lyndon B. "Remarks at the Signing of the Bail Reform Act of 1966." 22 June 1966. *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=27666>.

Judicial Conference of the United States. *Code of Conduct for United States Judges*. n.d. 24 November 2017. <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

—. "Code of Conduct for United States Judges." Washington, DC: Administrative Office of the United States Courts, March 2014. 31 July 2018. <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#c>.

—. "Proceedings of the Judicial Conference of the United States." Washington, DC, September 2017. 10.

—. "Report on the Proceedings of the Judicial Conference." Washington, DC, March 2015. 12-13.

King, Ryan S., Marc Mauer and Malcolm C. Young. "Incarceration and Crime: A Complex Relationship." 2005. *The Sentencing Project*. 1 December 2017. <http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf>.

Light, Michael T., Mark Hugo Lopez and Ana Gonzalez-Barrera. "The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth." 18 March 2014. *Pew Research Center*. 29 November 2017. <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

Lynch, James P. and William J. Sabol. "Did Getting Tough on Crime Pay?" 1 August 1997. *Urban Institute*. 28 November 2017. <https://www.urban.org/sites/default/files/publication/70411/307337-Did-Getting-Tough-on-Crime-Pay-.pdf>.

Marimow, Ann E. "When it comes to pretrial release, few other jurisdictions do it D.C.'s way." *The Washington Post* 4 July 2016. 7 December 2017. <https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.d7599836f678>.

McCollister, Kathryn E., Michael T. French and Hai Fang. "The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation." *Drug Alcohol Dependence* (2010): 98-109, Table 1.

Miyashiro, Carol M. "Research 2 Results (R2R) -The Pretrial Services Experience." *Federal Probation* (2008): 111-119.

National Association of Pretrial Services

Agencies. *Standards on Pretrial Release*. Washington, D.C.: National Association of Pretrial Services Agencies, 2004. <https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards>.

Oleson, J.C., M. VanNostrand, C.T. Lowenkamp, T.P. Cadigan, J. Wooldredge. "Pretrial Detention Choices and Federal Sentencing." *Federal Probation* June 2014: 12-18.

Pilnik, Lisa. *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*. Washington, D.C. : The National Institute of Corrections, 2017.

Planas, Roque. "Inside The Immigrant-Prosecuting Machine That Transformed America's Deportation Policy." *Huffpost* 27 April 2017. 29 November 2017. <https://www.huffingtonpost.com/entry/immigrant-prosecution-deportation-policy_us_58ffa114e4b0073d3e7a04b1>.

Pretrial Justice Institute. *PJI Summary*. Gaithersburg, Md: Pretrial Justice Institute, n.d. 29 November 2017. <https://www.pretrial.org/download/pji-reports/PJI_Summary.pdf>.

—. *The Solution*. 2017. 21 November 2017. <http://www.pretrial.org/solutions/>.

Pretrial Justice. "The Use of Pretrial "Risk Assessment Instruments: A Shared Statement of Civil Rights Concerns." n.d. *Pretrial Justice.* Pretrial Justice. 2 August 2018. <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>.

Pretrial Services Office, Eastern District of New York. *Programs and Services*. n.d. 5 August 2018. <http://www.nyept.uscourts.gov/programs-services>.

Public Safety Performance Project. *Prison Time Surges for Federal Inmates*. 18 November 2015. 2 December 2017. <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates>.

QualityJudges Initiative. *FAQs: Judges in the United States*. Denver, Co.: Unversity of Denver, 2017.

Rothwell, Jonathan. *Drug offenders in American prisons: The critical distinction between stock and flow*. 25 November 2015. 28 November 2017. <https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>.

Rowland, Matthew G. "Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons ." *Federal Probation* September 2013: 3-16.

Sabol, William J., and John McGready. *Time Served in Prison by Federal Offenders, 1986-97*. Washington, D.C.: Bureau of Justice Statistics, 1999. 2 December 2017. <https://static.prisonpolicy.org/scans/bjs/tspfo97.pdf>.

Serin, Ralph C., and Caleb D. Lloyd. "Understanding the risk, need, and responsivity (RNR) model and crime desistance perspective and integrating them into correctional practice." 2017. *Centre for Forensic Behavioural Science, Swinburne University of Technology.* 25 November 2017. <https://researchbank.swinburne.edu.au/items/2dceb9b5-c6d8-41e1-b132-ab05837f89ad/1/>.

Sessions, Jeff. "Commitment to Targeting Violent Crime ." Washington, D.C., 8 March 2017. 28 November 2017. <https://www.justice.gov/opa/press-release/file/946771/download>.

Taxy, Sam, Julie Samuels and William Adams. "Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data." October 2015. *Bureau of Justice Statistics.* 28 November 2017. <https://www.bjs.gov/content/pub/pdf/dofp12.pdf>.

The Council of State Governments Justice Center. *The National Inventory of Collateral Consequences of Conviction*. n.d. <https://niccc.csgjusticecenter.org/>.

The United States Marshals Service. *Major Responsibilities of the U.S. Marshals Service*. 22 November 2017. <https://www.usmarshals.gov/duties/>.

The Vera Foundation; Department of Justice. "The National Conference on Bail and Criminal Justice." April 1965. *Department of Justice.* <https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf>.

U.S. Probation Office for the District of Wyoming. "Pretrial Orientation Manual." n.d. 18 December 2017. <http://www.wyp.uscourts.gov/docs/Pretrial-Orientation-Manual.pdf>.

United States Sentencing Commission. "Federal Sentencing Guidelines Manual." Vol. Chapter Four. Washington, DC, 2018.

United States Sentencing Commission. *Alternative Sentencing in the Federal Criminal Justice System*. May 2015. 30 July 2018. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf>.

—. *Annual Sourcebook*. Washington, D.C., 2016. 28 November 2017. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table18.pdf>.

—. *Illegal Reentry Offense*. Washington, D.C.: United States Sentencing Commission, 2015. 29 November 2017. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf>.

—. *Interactive Source Book of Federal Sentencing Statistics*. n.d. 29 November 2017. <https://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest&tocsection=0>.

—. "Quick Facts on Offenders in the Bureau of Prisons." February 2017. *United States Sentencing Commission.* 1 December 2017. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_Feb2017.pdf>.

—. "The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders." March 2017. *United States Sentencing Commission*. 2 Decembert 2017. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf>.

United States vs. Salerno. No. 481 U.S. 739. 1987.

Vigne, Nancy G. La. *The cost of keeping prisoners hundreds of miles from home*. 3 February 2014. 7 December 2017. <https://www.urban.org/urban-wire/cost-keeping-prisoners-hundreds-miles-home>.

Wallin & Klarich. *Federal Charges: Sentencing, Punishment*. 14 September 2010. <https://www.wklaw.com/common-federal-crimes/>.

Washington Lawyers' Committee for Civil Rights and Urban Affairs. *Racial Disparities in Arrests in the District of Columbia, 2009-2011*. Washington, DC, 2013.

Wright, Ronald F. "Federal or State?" *Criminal Justice* Summer 2006: 16-21. 9 December 2017. <https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_21_2_federalorstate.authcheckdam.pdf>.

Overview of Federal Pretrial Services Initiatives from the Vantage Point of the Criminal Law Committee

Stephen E. Vance
Chief, Criminal Law Policy Staff
Probation and Pretrial Services Office
Administrative Office of the United States Courts

THE JUDICIAL CONFERENCE of the United States was created by Congress in 1922 to make national policy for the administration of the federal courts, including the probation and pretrial services system.[1] One of its committees, the Criminal Law Committee, reviews issues relating to the administration of the criminal law and oversees the federal probation and pretrial services system. This includes, among other responsibilities, proposing policies and standards on issues affecting the probation and pretrial services system and reviewing pending legislation relating to the administration of criminal law.

There is a series of noteworthy national initiatives related to the federal pretrial services system, which can be summarized from the vantage point of the Criminal Law Committee. In particular, the Committee has monitored and made recommendations regarding: (1) pretrial diversion programs; (2) judge-involved supervision programs modeled after problem-solving courts in the states; (3) the use of data-driven strategies to reduce unnecessary pretrial detention; and (4) proposed legislation regarding the statutory presumption of detention.

I. Pretrial Diversion Programs

Pretrial diversion is an alternative to prosecution that, at the discretion of the United States Attorney's Office, diverts certain persons from traditional criminal justice processing into a program of supervision and services administered by the probation and pretrial services system. The United States Attorney's Office may formally decline or initiate prosecution depending on whether the program requirements are satisfied. The objectives of pretrial diversion supervision are to ensure that the divertee satisfies the terms of the pretrial diversion agreement and to provide the divertee with support services to help facilitate the divertee's compliance with supervision and reduce the likelihood that the divertee will recidivate. The statutory functions and powers related to pretrial services officers include collecting, verifying, and preparing reports for the United States Attorney's Office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense.[2]

The Judicial Conference of the United States has supported alternatives to criminal prosecution for several decades.[3] More recently, former Chair of the Criminal Law Committee Judge Irene M. Keeley of the Northern District of West Virginia testified before the Charles Colson Task Force on Federal Corrections that pretrial diversion is a potentially underutilized program in the federal criminal justice system.[4] Noting that less than one percent of activated cases are pretrial diversions, Judge Keeley expressed the Criminal Law Committee's readiness to work with the Department of Justice to discuss ways to increase the number of individuals participating in the pretrial diversion program.[5]

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[1] While national entities such as the Judicial Conference of the United States play a role in policy-making, the federal judiciary has a highly decentralized structure. Each district court in the 94 federal judicial districts also has the authority to issue and implement its own local policies and initiatives. For more information about the Judicial Conference and how it is organized and to read reports of the Judicial Conference proceedings, see: http://www.uscourts.gov/about-federal-courts/governance-judicial-conference.

[2] 18 U.S.C. § 3154 (10).

[3] In March 1980, the Judicial Conference agreed to support a bill to establish alternatives to criminal prosecution for certain persons charged with offenses against the United States and procedures for judicial involvement in pretrial diversion proceedings designed to standardize practices and to require equal treatment of similarly situated persons selected for pretrial diversion. JCUS-MAR 80, p. 43.

[4] *See* Testimony of Hon. Irene M. Keeley Presented to the Charles Colson Task Force on Federal Corrections on January 27, 2015 (on file with the Administrative Office of the U.S. Courts). The Charles Colson Task Force on Federal Corrections was a blue-ribbon task force created by Congress to examine challenges in the federal corrections system and develop practical, data-driven solutions. The Task Force met throughout 2015 to conduct its work and presented findings and recommendations to Congress, the Department of Justice, and the President in January 2016. The final report of the Task Force is available at: https://www.urban.org/features/charles-colson-task-force-federal-corrections.

[5] For a more detailed discussion about the Judicial Conference's support for and the state of pretrial diversion programs, *see* Testimony of Hon. Irene M. Keeley, *supra* note 4. In addition to taking a position on pretrial diversion, the Judicial Conference also recently recommended legislation expanding the scope of "special probation" under 18 U.S.C. § 3607. Section 3607 of title 18, U.S. Code, offers a process

II. Judge-Involved Supervision Programs

Since 2008, as part of its continuing exploration of evidence-based practices and its commitment to using empirical data to make programmatic resource decisions, the Criminal Law Committee has been discussing judge-involved supervision programs in the federal system.[6] These programs are modeled on "problem-solving courts" used by state and local governments since the 1980s. They operate at different stages of the criminal justice process and go by many names, including "pretrial diversion court programs," "drug court programs," "alternative-to-incarceration court programs," and "reentry court programs." In 2008, one type of judge-involved supervision program—post-conviction reentry court programs—had been implemented by 21 federal districts and was under development in another 31 districts.

As the Criminal Law Committee stated in its September 2009 report to the Judicial Conference, these federal reentry court programs "reveal an energetic commitment to the betterment of federal offenders and an enthusiasm that should be commended." While it considered research demonstrating the effectiveness of some judge-involved supervision programs in the state systems, the Committee determined that further research on the effectiveness of reentry court programs was necessary before endorsing a national model policy for these programs at the federal level. Further, the Committee recognized that programs of this kind are resource intensive and, because they typically involve a relatively small number of offenders, some assessment of cost-effectiveness might be prudent.

In 2009, upon the Criminal Law Committee's recommendation, the Judicial Conference endorsed the commissioning of a study "to assess the efficacy and cost-effectiveness of reentry court programs," and it asked the Committee "to consider the results of this study in recommending any appropriate model programs." The Criminal Law Committee subsequently asked the Federal Judicial Center (FJC) to design and conduct a study of reentry court programs in the federal courts. The FJC designed a two-pronged approach for the study. The first prong involved a retrospective assessment of 20 existing reentry court programs. The second prong involved a multi-year, randomized experimental study of a federal reentry court program model policy as implemented in five districts with new or relatively new reentry court programs.[7]

In June 2016, the FJC completed the final report of its randomized experimental study. Among the report's findings were that the study districts had difficulty adhering to the requirements of the reentry court program model policy, there was a high refusal rate for study participants who were randomly assigned to a reentry court program, there was a low completion or graduation rate for program participants, and no impact on revocation or recidivism rates was found.[8] The Criminal Law Committee concluded that, while the FJC's report added to the research literature on the efficacy and cost-effectiveness of the reentry court program model used during the study, additional information should be considered before it could decide what, if any, recommendations it would make to the Judicial Conference about a national model policy.

In recent years, the Committee has reviewed a broader body of empirical research on the effectiveness of judge-involved supervision programs, not just at the back-end of the process (i.e., when an individual is released from prison), but at the front-end (i.e., at the pretrial or presentence stage). While there has been a significant amount of promising research about the effectiveness of front-end drug courts in the states, there is not a significant amount of research about their effectiveness in the federal system. Pretrial and presentence judge-involved supervision programs in the federal system are in their infancy, but the number of such programs has increased rapidly in recent years. According to a recent survey conducted by the Administrative Office of the U.S. Courts, there are approximately 25 initiatives in the federal courts that may provide alternatives to incarceration or reduced sentences for certain defendants who satisfy the requirements of these programs.[9]

In June 2017, the Committee was briefed on a paper prepared by Christine Scott-Hayward, the Supreme Court Fellow assigned

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of special probation and expungement for first-time drug offenders who are found guilty of simple possession under 21 U.S.C. § 844. Specifically, a court may, with the offender's consent, place the offender on a one-year maximum term of probation without entering a judgment of conviction, and upon successful completion of the term of probation, the proceedings are dismissed. For offenders under the age of 21 that successfully complete their terms of probation, upon application by the offender, an order of expungement is entered. A bill was introduced in Congress, H.R. 2617 (115th Congress), the RENEW Act, that would expand the age of eligibility for expungement under section 3607 of title 18 from "under the age of 21" to "under the age of 25." The Committee on Criminal Law noted that the RENEW Act's aim of expanding the scope of section 3607 is consistent with practices already occurring in many courts looking to increase alternatives to incarceration and enhance judicial discretion and is consistent with Judicial Conference policy on sealing and expunging records in that it would not limit judicial discretion in the management of cases and adoption of rules and procedures. On recommendation of the Criminal Law Committee, the Conference agreed to support amendments to 18 U.S.C. § 3607 that provide judges with alternatives to incarceration and expand sentencing discretion. JCUS-SEP 17, p. 11.

[6] For a more detailed discussion of judge-involved supervision programs in the federal system, *see* Stephen E. Vance, *Judge-Involved Supervision Programs in the Federal System: Background and Research*, 81 Federal Probation 15 (2017); Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 Federal Probation 64 (2011).

[7] The experimental study design called for each study district to implement a reentry court program with offenders who began a term of supervised release after being randomly placed into one of two treatment groups (Groups A and B) or a control group (Group C). Treatment Group A had a reentry court program team consisting of a judicial officer, one or more probation officers, and representatives from the U.S. Attorney's Office and the Federal Defender's Office. Participation by a treatment provider is optional. Treatment Group B had a team similar to that of Group A, but the Group B reentry court program team did not include a judicial officer. The reentry court program model policy, which was based on the recommendations of groups like the National Association of Drug Court Professionals, guided the operations of the two program teams. The offenders assigned to Group C received standard supervision by a probation officer. Random assignments ended in April 2013, and the final participants graduated from the programs in October 2014.

[8] For a more specific summary of the findings of the FJC study, *see* Stephen E. Vance *Judge-Involved Supervision Programs in the Federal System: Background and Research*, 81 Federal Probation 15 (2017).

[9] *See also* United States District Court, Eastern District of New York, Alternatives to Incarceration in the Eastern District of New York, Second Report to the Board of Judges (August 2015) (cataloguing some of the existing diversion programs and describing the different methods of diversion from traditional criminal justice processing including by: (1) dismissal of charges, (2) reduction in charge to a lesser offense, (3) the vacatur of convictions, (4) avoiding prison through probationary sentences (agreed upon under Federal Rule of Criminal Procedure 11(c)(1)(C)), and (5) receiving a reduced sentence (e.g., a downward departure (or a variance) from the applicable Sentencing Guidelines range based on post-conviction rehabilitation)).

to the Sentencing Commission, on the emergence of pretrial diversion and front-end alternative-to-incarceration court programs in the federal system.[10] The paper explains that the evidence on the effectiveness of these programs, most of which is in the state system, is mixed. For instance, while drug courts that are properly designed and evaluated are typically found to reduce recidivism, there are minimal data on the effectiveness of other types of specialty court programs. The paper concludes by highlighting the need for program evaluation and using best practices in existing courts.

In November 2017, the Criminal Law Committee was briefed on a September 2017 report by the U.S. Sentencing Commission titled Federal Alternative-to-Incarceration Court Programs.[11] This report includes a summary of the nature of emerging front-end federal alternative-to-incarceration court programs and a discussion of relevant legal and social science issues. As discussed in the report, these programs have developed independently of both the Sentencing Commission and the Judicial Conference policy.

The report concludes that a number of questions related to the evaluation of the effectiveness of these programs are not capable of being answered at this time due to the nascent nature of the programs. As it explains, not only are the programs relatively new in the federal system, with as yet only a small number of graduates, they also have developed in a decentralized manner and differ from each other. Thus, they cannot yet be evaluated to determine whether the programs meet their articulated goals as effectively as, or more effectively than, traditional sentencing and supervision options. The report recommends that existing programs and any newly developed programs include input from social scientists so that data may be properly collected to allow for a meaningful evaluation at a later time.

The Criminal Law Committee remains aware that there are a number of judge-involved supervision programs currently operating in the federal courts, and that these programs continue to wrestle with issues related to adherence to evidence-based practices, resources, and measuring outcomes. The Committee has also recognized that there may be factors related to the effectiveness of community corrections generally that the districts may wish to consider when operating, or determining whether to operate, a judge-involved supervision program. The Committee and the FJC intend to continue exploring how districts can consider evidence-based practices demonstrated by social science research to reduce recidivism and protect the public. The Committee will continue to evaluate these judge-involved supervision programs and consider whether any recommendations should be offered to the Judicial Conference.

III. Data-Driven Strategies to Reduce Unnecessary Pretrial Detention

The Bail Reform Act of 1966, Pub.L. No. 89-465, was enacted to "revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, testify, or pending appeal, when detention serves neither the ends of justice nor the public interest." In making pretrial release or detention decisions, the courts are required to consider the least restrictive condition or combination of conditions to reasonably assure a defendant's appearance in court as required and the safety of any other person or the community.[12] Among other responsibilities, pretrial services offices are tasked with "prepar[ing] . . . such pretrial detention reports . . . relating to the supervision of detention pending trial."[13]

Despite these and other provisions designed to reduce unnecessary pretrial detention, the federal pretrial detention rate remains high.[14] The Criminal Law Committee has been briefed on and discussed data-driven strategies designed to reduce unnecessary pretrial detention and reasonably ensure that defendants will appear in court as required and will not pose a danger to the safety of any other person or the community, pending their appearance. These strategies include implementation of the Pretrial Risk Assessment Instrument (PTRA) to inform the recommendations of pretrial services officers regarding release or detention, training and outreach to stakeholders in the local districts, and the review of data reports to evaluate trends and outcomes.

In 2004, IBM Consulting Services issued a report commissioned by the Administrative Office of the U.S. Courts that highlighted several positive indicators of performance in the federal pretrial services system.[15] For instance, all respondents to a survey of magistrate judges rated the quality of bail reports and violation reports and the overall quality of pretrial supervision as either good or very good.[16] The report concluded, based on outcome data on violation rates, that the pretrial services system "appear[ed] to perform on par with or better than most state systems."[17] It noted, however, that a key outcome measure—the percentage of defendants detained prior to trial—was increasing.[18] The report's central recommendation was that the probation and pretrial services system should "become a results-driven system: to develop and maintain an infrastructure and management approach focused on collecting, analyzing and acting on outcome data."[19]

The Administrative Office subsequently developed the PTRA, which is an empirically-based actuarial risk assessment instrument that provides a consistent and scientifically valid method of predicting risk of failure-to-appear, new criminal arrest, and technical violations leading to revocation while on pretrial release. The PTRA includes five risk categories depending on whether defendants are at lower, moderate, or higher risk to fail to appear, have a new criminal arrest, or have a technical violation leading to revocation of release. In 2009, the Criminal Law Committee and a working group of pretrial services officers endorsed the national use of the PTRA. While the tool is intended to inform the release and detention recommendations of pretrial services officers, it is intended to supplement (not replace) their professional judgment and experience.

In addition to developing and implementing the PTRA, the Administrative Office has recently initiated the Detention Reduction Outreach Project (DROP), which is an on-site educational and training program in which Administrative Office and court staff visit districts interested in reducing their detention rates. During the visits, judges, probation and pretrial services staff, and

[10] Christine Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts* 22 Berkeley Journal of Criminal Law 47 (2017).

[11] This report is available at: https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs.

[12] 18 U.S.C. § 3142(c)(1)(B).

[13] 18 U.S.C. § 3154(8).

[14] See Matthew G. Roland, *The Rising Federal Pretrial Detention Rate, In Context* (this issue).

[15] *Strategic Assessment: Federal Probation and Pretrial Services* (on file with Administrative Office of U.S. Courts.).

[16] Id. at A-2.

[17] Id.

[18] Id.

[19] Id.

staff from the U.S. Attorney's Office and the federal defenders hear information about the PTRA's ability to identify low-risk defendants, review national and district-specific data related to release and detention, and focus on ways they can work together to reduce unnecessary pretrial detention.

Finally, the Administrative Office maintains databases and generates data reports to help inform release and detention decisions, including information to measure the implementation and use of the PTRA and how the PTRA may influence release outcomes. Measuring the effectiveness of recommendations regarding release or detention is complex in light of the balancing that is required between maximizing rates of pretrial release and minimizing pretrial misconduct. As one researcher put it, "There is no national benchmark that defines 'optimal' or even 'acceptable' pretrial release and misconduct rates."[20] The pretrial release decision-making process is essentially about striking a balance. It involves two potentially conflicting goals that must be reconciled: (1) to allow, to the maximum extent possible, pretrial release; but also (2) to ensure that defendants appear in court and do not pose a threat to the public or any specific individual during pretrial release.[21] Nevertheless, data reports are helpful for understanding the relevant populations and trends and making informed decisions.

IV. Proposal to Amend the Statutory Presumption of Detention

One contributing factor to the federal detention rate may be the effect of the statutory presumption favoring detention. Section 3142(e) of title 18 of the U.S. Code creates a rebuttable presumption that no condition or combination of conditions could reasonably assure the defendant's appearance or the safety of another person or the community. The presumption is triggered when the case involves certain offenses or certain penalties or when the defendant has a certain criminal history. To assess the impact of the presumption on the detention of low-risk defendants, the Administrative Office commissioned a study.[22] The study focused on the presumption applicable to defendants charged with certain drug and firearms offenses (hereafter, "the drug and firearm presumption").[23] Once the drug and firearm presumption cases were identified, they were compared to cases where this presumption did not apply, by offense type and PTRA risk level.

The study found that the drug and firearm presumption applied in 93 percent of cases charged with drug offenses. The analysis also showed that the lowest risk defendants who were charged in drug and firearm presumption cases were released 68 percent of the time, while other low-risk defendants without this presumption were released 95 percent of the time. Additionally, the study compared the rates at which probation and pretrial services officers recommended the release of defendants charged with an offense where the drug and firearm presumption applied compared to those charged with an offense where the presumption did not apply. Despite the Judicial Conference's policy that officers not consider the presumption,[24] the results reflected a similar disparity in their release and detention recommendations. Most notably, for low-risk defendants charged with an offense where the drug and firearm presumption applies, officers recommended release in 68 percent of cases; however, they recommended release in 93 percent of cases for low-risk defendants where the presumption did not apply.

Finally, for those defendants who successfully rebutted the presumption and were released on bond, outcome data were analyzed and compared to the outcomes for non-presumption cases in terms of rates of (1) rearrest, (2) rearrest for violent offenses, (3) failure to appear, and (4) technical violations ultimately leading to revocation of bond. Results failed to show that differences in outcomes between presumption and non-presumption cases were statistically significant. Although low-risk defendants charged with offenses where the drug and firearm presumption applies were slightly more likely to be rearrested, defendants across every other risk category who were charged in a presumption case were less likely to be rearrested for any offense, including violent offenses.[25]

In sum, overall the study suggests that there is a sizeable segment of low-risk defendants who are being detained as a result of the statutory presumption of detention. The vast majority of these defendants appear to be charged with drug trafficking offenses. Since low-risk defendants tend to be successful on pretrial supervision, regardless of whether they are charged with an offense where the presumption of detention applies, it appears that the presumption is unnecessarily increasing pretrial detention rates. In the years since the enactment of the statutory presumption in 1984, actuarial risk assessment has drastically improved and provided empirical evidence of the factors that contribute to a defendant's failure to appear or failure on pretrial supervision. These factors correlate less with the nature of the charged offense and more with the defendant's criminal history and past failures on pretrial release.

At its June 2017 meeting, the Criminal Law Committee discussed whether the study provided adequate support for a recommendation

[20] Clark, J., Pretrial Justice Institute, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*. at 9 (2008).

[21] Clark, J., Henry, A., *The Pretrial Release Decision*, 81 Judicature 76, 77 (1997).

[22] For a detailed overview of this study, *see* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 *Federal Probation* 52 (2017).

[23] This presumption is triggered when the judicial officer finds that there is probable cause to believe that the defendant committed an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), or an offense under 18 U.S.C. § 924(c) (Use of Firearm to Commit a Felony).

[24] *Guide to Judiciary Policy*, Vol. 8, Pt. A, Ch. 1, § 170(b)-(c) ("[T]he officer does not consider whether the rebuttable presumption applies to a defendant. . . . Determining whether a rebuttable presumption arises, whether a defendant has rebutted it, and whether the presumption is appropriately considered in the release decision requires a judicial officer to weigh evidence and make a finding. The officer has no authority to make such a finding. Although the presence of a presumption is easily identified, determining the appropriate consideration it receives is a legal issue and legal decisions are beyond the scope of an officer's functions.").

[25] The risk principle could explain the slightly higher rearrest rates found for lower-risk presumption defendants. The risk principle states that the level of supervision should be commensurate to a defendant's actual risk and that low-risk defendants do worse when they are grouped with and treated like higher-risk defendants. See, Andrews, D. R., Bonta, J., & Hoge, R. D., "Classification for effective rehabilitation: Rediscovering psychology," *Criminal Justice and Behavior*, 17, 19-52 (1990); Lowenkamp, C., & Latessa, E., "Increasing the effectiveness of correctional programming through the risk principle: Identifying offenders for residential placement," *Criminology and Public Policy*, 4(2): 263-290 (2004); Lowenkamp, C., Latessa, E., & Holsinger, A., "The risk principle in action: What have we learned from 13,676 offenders and 97 correctional programs?" *Crime and Delinquency*, 51(1): 1-17 (2006); Lowenkamp, C., Flores, A., Holsinger, A., Makarios, M., & Latessa, E., "Intensive supervision programs: Does program philosophy and the principles of effective interventions matter?" *Journal of Criminal Justice*, 38(4): 368-375 (2010).

to amend the presumption of detention statute. The Committee ultimately agreed to recommend that the Judicial Conference seek legislation that would amend the presumption of detention found in 18 U.S.C. § 3142(e)(3)(A) to limit its application to defendants described therein whose criminal history suggests that they are at a higher risk of failing to appear or posing a danger to the community or another person.[26] The Judicial Conference adopted the Committee's recommendation at its September 2017 session.[27]

[26] Specifically, it would limit application to those defendants charged with an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 and such defendant has previously been convicted of two or more offenses described in subsection (f)(1) this section, or two or more state or local offenses that would have been offenses described in subsection (f)(1) of this section if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses.

[27] JCUS SEP-17, p. 10.

Pretrial Detention and Bail

Megan Stevenson[*] *and Sandra G. Mayson*[†]

Our current pretrial system imposes high costs on both the people who are detained pretrial and the taxpayers who foot the bill. These costs have prompted a surge of bail reform around the country. Reformers seek to reduce pretrial detention rates, as well as racial and socioeconomic disparities in the pretrial system, while simultaneously improving appearance rates and reducing pretrial crime. The current state of pretrial practice suggests that there is ample room for improvement. Bail hearings are often cursory, taking little time to evaluate a defendant's risks, needs, or ability to pay. Money-bail practices lead to high rates of detention even among misdemeanor defendants and those who pose no serious risk of crime or flight. Infrequent evaluation means that the judges and magistrates who set bail have little information about how their bail-setting practices affect detention, appearance, and crime rates. Practical and low-cost interventions, such as court reminder systems, are underutilized. To promote lasting reform, this chapter identifies pretrial strategies that are both within the state's authority and supported by empirical research. These interventions should be designed with input from stakeholders, and carefully evaluated to ensure that the desired improvements are achieved.

INTRODUCTION

The scope of pretrial detention in the United States is vast. Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last 20 years.[1] There are 11 million jail admissions annually; on any given day, local jails house almost half a million people who are awaiting trial.[2] The U.S. pretrial detention rate, compared to the total population, is higher than in any European or Asian country.[3]

* Assistant Professor of Law, George Mason University.

† Assistant Professor of Law, University of Georgia.

1. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, Jail Inmates at Midyear 2014, at 1 (2015).

2. *Id.* at 3.

3. *See, e.g.*, Roy Walmsley, World Pretrial/Remand Imprisonment List 2-6 (1st ed. 2013).

Pretrial detention has profound costs. In fiscal terms, the total annual cost of pretrial jail beds is estimated to be $14 billion, or 17% of total spending on corrections.[4] At the individual level, pretrial detention can result in the loss of employment, housing or child custody, in addition to the loss of freedom. Pretrial detention also affects case outcomes. No fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant's chance of conviction, as well as the likely sentence length.[5] The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself—especially if some of those convicted are innocent. Finally, two recent studies have found evidence that pretrial detention increases the likelihood that a person will commit future crime.[6] This may be because jail exposes defendants to negative peer influence,[7] or because it has a destabilizing effect on defendants' lives.

Given the costs of pretrial detention, one might expect that detention decisions would be made with care. This is not how the system currently operates. For the most part, whether a person is detained pretrial depends solely on whether he can afford the bail amount set in his case. Nationwide, 9 out of 10 felony defendants who were detained pretrial in 2009 (the last year for which the data is published) had bail set and would have been released if

4. Pretrial Justice Inst., Pretrial Justice: How Much Does It Cost? 2 (2017); Melissa S. Kearney et al., The Hamilton Project, Ten Economic Facts about Crime and Incarceration in the United States 13 (2014).

5. *See, e.g.*, Will Dobbie, Jacob Goldin & Crystal Yang, The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), www.nber.org/papers/w22511; Arpit Gupta, Christopher Hansman & Ethan Frenchman, The Heavy Costs of High Bail: Evidence from Judge Randomization 22 (Columbia Law & Econ. Working Paper No. 531, 2016), http://ssrn.com/abstract=2774453; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017); Emily Leslie & Nolan G. Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments 34-35 (July 20, 2016) (unpublished manuscript), *available at* http://home.uchicago.edu/~npope/pretrial_paper.pdf; Megan Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes (January 12, 2016) (unpublished manuscript), *available at* https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf.

6. Gupta et al., *supra* note 5; Heaton et al., *supra* note 5. *But see* Stevenson, *supra* note 5 (finding no future-crime effects); Dobbie et al., *supra* note 5 (same).

7. Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections,* 124 Q. J. Econ. 105, 105 (2009); Megan Stevenson, Breaking Bad: Social Influence and the Path to Criminality in Juvenile Jails 1 (2015) (unpublished manuscript) (on file with author).

they had posted it.[8] Even at relatively low bail amounts, detention rates are high. In Philadelphia, between 2008 and 2013, 40% of defendants with bail set at $500 remained jailed pretrial.[9] Over the same time period in Houston, more than half of all misdemeanor defendants were detained pending trial; their average bail amount was $2,786.[10] Some pretrial detainees are facing very serious charges, but most are not: At least as of 2002, 65% of pretrial detainees were held on nonviolent charges only, and 20% were charged with minor public-order offenses.[11] The hearings at which bail is set—and which have such serious consequences—are typically rapid and informal.

In the last few years, the hefty costs of pretrial detention have generated growing interest in bail reform. Jurisdictions around the country are now rewriting their pretrial law and policy. They aspire to reduce pretrial detention rates, as well as racial and socioeconomic disparities in the pretrial system, without increasing rates of non-appearance or pretrial crime. The overarching reform vision is to shift from the "resource-based" system of money bail to a "risk-based" system, in which pretrial interventions are tied to risk rather than wealth.[12] To accomplish this, jurisdictions are implementing actuarial risk assessment and reducing the use of money bail as a mediator of release. The idea is that defendants who pose little statistical risk of flight (i.e., fleeing the jurisdiction) or committing pretrial crime can be released without money bail or onerous conditions. Riskier defendants can be released under supervision, and detention can be reserved for those so likely to flee or commit serious harm that the risk cannot be managed in any less intrusive way. (In practice, however, risk-assessment tools do not actually measure flight- and crime-risk; rather, they measure nonappearance- and arrest-risk, a point discussed at greater length below.)

This chapter offers a critical discussion of central pretrial reform initiatives, drawing on recent scholarship. We hope to provide readers with a deeper understanding of ongoing academic and policy debates around key reform goals: reducing the use of money bail, reducing racial disparities in pretrial detention,

8. Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009—Statistical Tables 1, 15 (2013).

9. Stevenson, *supra* note 5, at 12.

10. Heaton et al., *supra* note 5, at 736 tbl. 1.

11. Doris S. James, Bureau of Justice Statistics, U.S. Dep't of Justice, Profile of Jail Inmates, 2002, at 3 (2004).

12. *See, e.g.*, Christopher Moraff, *U.S. Cities Are Looking for Alternatives to Cash Bail*, Next City (Mar. 24, 2016), https://nextcity.org/daily/entry/cities-alternatives-cash-bail; Pretrial Justice Inst., Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process (2012).

evaluating risk of crime or flight, rationalizing pretrial detention, and tailoring conditions of release. In each area, we note the current direction of reform, survey relevant scholarship, and offer our own perspective on the best prospects for effective and lasting change. We evaluate pretrial reform initiatives on the basis of several criteria: effectiveness in promoting public safety and court appearance, intrusiveness to individual liberty, cost, and impact on racial and socioeconomic disparity.[13] Part I provides background. Part II is our substantive discussion. The chapter concludes with recommendations based on key reform priorities.

I. THE PRETRIAL SYSTEM

A. STRUCTURE AND HISTORY

The pretrial phase begins when a judicial officer or grand jury determines that there is probable cause to support a criminal charge, and it ends when the charge is adjudicated or dismissed. Once the state has charged someone, it has a strong interest in ensuring the integrity of the ensuing proceeding—including ensuring that the defendant appears in court and does not interfere with witnesses or evidence. The state also has an interest, as it always does, in preventing future crime, and some defendants may be particularly crime-prone. So the core goals of the pretrial system are to (1) ensure defendants' appearance, (2) prevent obstruction of justice, and (3) prevent other pretrial crime, all while minimizing intrusions to defendants' liberty.[14]

Since the turn of the 20th century, the primary mechanism for ensuring defendants' appearance has been money bail, or a "secured financial bond."[15] A defendant deposits the specified bail amount with the court as security for his appearance at future proceedings. If he does appear, the deposit is returned at the conclusion of the case. This system has inspired three waves of reform. The first, in the 1960s, sought to reduce the pretrial detention of the poor by limiting the

13. For further guidance on bail reform, see, for example, Am. Bar Ass'n, Standards for Criminal Justice: Pretrial Release (3d ed. 2007) [hereinafter ABA Standards]; Crim. Just. Pol'y Program, Harvard Law School, Moving Beyond Money: A Primer on Bail Reform (2016); Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 21-44 (2014); and *The Solution*, Pretrial Justice Inst., http://www.pretrial.org/solutions (last visited Mar. 25, 2017). The general principles these sources articulate represent broadly held views among contemporary reformers, policymakers and academics.

14. ABA Standards, *supra* note 13, § 10-1.1.

15. *See* Schnacke, *supra* note 13, at 21-40. Prior to that time, the system relied on the unsecured pledges of personal sureties. *Id.*; *cf.* William Blackstone, 4 Commentaries on the Laws of England 296 (1769) (explaining that an accused required to give bail must "put in securities for his appearance, to answer the charge against him").

use of money bail in favor of unsecured release ("release on recognizance").[16] But rising crime during the 1970s and 1980s prompted a second reform movement, this time directed at incapacitating dangerous defendants.[17] The Bail Reform Act of 1984 authorized federal courts to order pretrial detention without bail on the basis of a defendant's dangerousness.[18] Many states followed suit. Every jurisdiction except New York also authorized courts to consider public safety in imposing bail or other conditions of release.[19] More recently, money bail has been on the rise and rates of release on recognizance have declined.[20] The current wave of reform seeks to reverse that trend.

B. CURRENT PRACTICE

In practice, bail hearings are a messy affair. Every person who is arrested is entitled to a judicial determination, within 48 hours, that there is probable cause to believe she has committed a crime.[21] Many jurisdictions combine this with a bail hearing (or "pretrial release hearing"). It is common for such hearings to last only a few minutes. They are often held over videoconference with no defense counsel present. The presiding official may be a magistrate rather than a judge, and may not even be a lawyer. Available evidence suggests that the bail judges do not often take the time to make a careful determination about what bail an arrestee can realistically afford. Some jurisdictions use bail schedules that prescribe a set bail amount for each offense.[22] In others, statutory law directs judges to consider various factors in imposing bail or alternative conditions of release.[23] These statutes provide little guidance about how to weigh the factors, or which conditions of release are appropriate to manage different pretrial risks.

16. *See, e.g.*, John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1, 2 (1985).

17. *See generally id.*

18. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-87 (codified at 18 U.S.C. §§ 3141-50, 3062).

19. Goldkamp, *supra* note 16, at 56 & n.57.

20. Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, Pretrial Release of Felony Defendants in State Courts 2 (2007) (reporting that from 1990-1994, 41% of pretrial releases were on recognizance and 24% were by cash bail; from 2002-2004, 23% of releases were on recognizance and 42% were by cash bail); Reaves, *supra* note 8, at 15 ("Between 1990 and 2009, the percentage of pretrial releases involving financial conditions rose from 37% to 61%.").

21. Cty. of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991); Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

22. Pretrial Justice Inst., Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes 7 (2009) (reporting that 64% of surveyed counties use a bail schedule).

23. *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. Rev. 837, 866 (describing state statutes).

In most cases, a monetary bail amount is set, and in most cases, the defendant need not pay it directly to be released. Three mechanisms have developed for subsidizing bail. The dominant one is the commercial bail bond industry.[24] Commercial bail bondsmen charge defendants a non-refundable fee—usually around 10% of the total bail amount—for the service of posting the bond. Because of concern about the effect of this industry on defendants' incentive to appear and on the fairness of the process, some jurisdictions have outlawed it. Others have developed their own partial-deposit systems, which allow defendants to obtain release by depositing only a percentage of the total bail amount with the court.[25] A third, less common, mechanism is the community bail fund: a nonprofit organization that posts bail on defendants' behalf.[26]

C. LAW AND POLICY

The Supreme Court has affirmed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[27] A set of federal constitutional provisions protect pretrial liberty. Most importantly, perhaps, the Equal Protection and Due Process Clauses prohibit the state from conditioning a person's liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest.[28] Since 2015, a number of federal district courts have held that fixed money-bail schedules, which

24. Cohen & Reaves, *supra* note 20, at 4 (showing that 48% of all pretrial releases studied were based on financial conditions, most of which—33% of all releases—were on surety bond); *About Us*, Am. Bail Coalition, www.americanbailcoalition.org (last visited Jan. 31, 2017) ("The American Bail Coalition is a trade association made up of national bail insurance companies ....").

25. *E.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J.L. & Econ. 93, 94 (2004).

26. *See* Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 600 (2017) (noting that community bail funds have proliferated recently, motivated by "beliefs regarding the overuse of pretrial detention").

27. United States v. Salerno, 481 U.S. 739, 755 (1987).

28. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (holding that to "deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine ... would be contrary to the fundamental fairness required by the Fourteenth Amendment"); *see also* Statement of Interest of the United States at 1, Varden v. City of Clanton, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015) ("Incarcerating individuals solely because of their inability to pay for their release ... violates the Equal Protection Clause of the Fourteenth Amendment.") (citing Tate v. Short, 401 U.S. 395, 398 (1971)); Williams v. Illinois, 399 U.S. 235, 240-41 (1970); Smith v. Bennett, 365 U.S. 708, 709 (1961)). *But see* Brief for Amici Curiae Am. Bail Coalition et al., Walker v. Calhoun, No. 16-10521 (11th Cir. June 21, 2016) (arguing that this line of case law has no application in the pretrial context).

do not take ability to pay into account, violate these provisions.[29] Relatedly, the Eighth Amendment prohibits "excessive" bail.[30] This requires an individualized bail determination: Bail must be "reasonably calculated" to ensure the appearance of a particular defendant.[31] The Bail Clause permits detention without bail, but may prohibit any burden on a defendant's liberty that is excessive "in light of the perceived evil" it is designed to address.[32] The Due Process Clause prohibits pretrial punishment.[33] It also requires that any detention regime be carefully tailored to achieve the state's interest and include robust procedural protections for the accused.[34] The Fourth Amendment prohibits any "significant restraint" on pretrial liberty in the absence of probable cause for the crime charged.[35] The Sixth Amendment, finally, requires that counsel be appointed for an indigent defendant at or soon after her initial appearance in court.[36] It remains an open question whether defendants have a Sixth Amendment right to representation at the bail hearing itself.[37]

29. Pierce v. City of Velda City, 4:15-cv-570-HEA (E.D. Mo. June 3, 2015); Jones v. City of Clanton, 2:15-cv-34-MHT (M.D. Ala. Sept. 14, 2015); Thompson v. Moss Point, Miss., 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015); Walker v. City of Calhoun, Ga., 4:15-cv-170-HLM (N.D. Ga. Jan. 28, 2016); ODonnell v. Harris Cty., 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017). The Department of Justice took the same position under the Obama Administration. *See* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance of the Issue Addressed Herein at 3, Walker v. City of Calhoun, No. 16-10521-HH (11th Cir. Aug. 18, 2016); Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 7 (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download.

30. U.S. Const. amend. VIII ("[E]xcessive bail shall not be required.").

31. Stack v. Boyle, 342 U.S. 1, 5 (1951).

32. United States v. Salerno, 481 U.S. 739, 754-55 (1987).

33. *Id.* at 748-52.

34. *Id.* at 747, 75052. The Supreme Court upheld the federal pretrial detention regime against (among other things) a procedural due process challenge on the ground that it provided for an adversarial hearing, guaranteed defense representation, required that the state prove "by clear and convincing evidence that an arrestee presents an identified and articulable threat," directed that the court make "written findings of fact" and "reasons for a decision to detain," and provided immediate appellate review. *Id.* at 751-52.

35. Gerstein v. Pugh, 420 U.S. 103, 125 (1975); Manuel v. City of Joliet, 137 S. Ct. 911, 914 (2017).

36. Rothgery v. Gillespie Cty., 554 U.S. 191, 199, 212 (2008).

37. *See id.* at 212 n.15 (reserving judgment on that question). For a discussion of indigent defense, see Eve Brensike Primus, "Defense Counsel and Public Defense," in the present Volume.

Beyond the federal Constitution, federal statutory law and state law regulate pretrial practice. In the federal system, the Bail Reform Act lays out a comprehensive pretrial scheme.[38] At the state level, there is wide variation in pretrial legal frameworks. Approximately half of state constitutions include a right to release on bail in noncapital cases. The other half allow for detention without bail in much broader circumstances.[39] Most states also have statutes that structure pretrial decision-making.

In the policy realm, the American Bar Association has codified standards on pretrial release that represent the mainstream consensus among scholars about best practices in the pretrial arena.[40] Three core principles are worth highlighting. First, wealth cannot be the factor that determines whether someone is released or detained pretrial.[41] Secondly, money bail should be set only to mitigate flight risk (not threats to public safety) and as a last resort.[42] Finally, the state should always use the least restrictive means available to mitigate flight or crime risk.[43]

Ultimately, though, it is local implementation that truly shapes pretrial practice. There is huge variance across counties with respect to the timing of bail hearings, the presence of counsel, the qualifications and training of bail judges, the resources allocated for bail hearings, the prevalence of commercial bondsmen, the customary standards for bail-setting, and the availability of alternatives to detention or money bail.

II. PRETRIAL REFORM INITIATIVES

A. REDUCING THE USE OF MONEY BAIL

Reducing reliance on monetary bail is a central goal of many pretrial reform advocates.[44] The use of money bail, by definition, disadvantages the poor; people who have resources or access to credit are more likely to be released than those who do not. This fact is not only unjust. It also means that money-bail systems that do not meaningfully account for defendants' ability to pay are inefficient at managing flight- and crime-risk, and likely to be unconstitutional.[45] Although implementing procedures to assess defendants' ability to pay may help, it is difficult to assess accurately.

38. 18 U.S.C. §§ 3141-50, 3062.
39. Wayne R. LaFave et al., 4 Criminal Procedure § 12.3(b) (3d ed. 2000).
40. *See generally* ABA Standards, *supra* note 13.
41. *Id.* at 42 (§ 10-1.4(c)-(e)), 110 (§10-5.3).
42. *Id.* at 110.
43. *Id.* at 106 (§ 10-5.2).
44. To be precise, the core goal is to reduce the use of secured money bonds.
45. *See supra* notes 28-31 and accompanying text.

It is possible to operate an effective pretrial system with minimal reliance on money bail. The District of Columbia, for instance, has been running its pretrial system largely without it since the 1960s. Nearly all D.C. defendants are released on recognizance or with nonmonetary conditions; a small percentage are ordered detained. For the last six years, appearance rates have remained at or above 87% and rearrest rates at or below 12%—better than national averages.[46]

Replicating the D.C. model is no easy feat, however. The District benefits from an experienced and well-funded pretrial services agency. Without that infrastructure, limiting or eliminating money bail is likely to reduce appearance rates as well. Such initiatives should therefore be paired with alternative methods of ensuring appearance, such as court reminders or an expansion of pretrial services.

B. REDUCING RACIAL DISPARITIES IN DETENTION RATES

Black defendants make up 35% of the pretrial detainee population despite constituting only 13% of the U.S. population.[47] A second core objective of pretrial reform is to reduce this racial disparity in pretrial detention. In order to pursue this goal effectively, it is important to understand how such disparities arise.

First, arrest itself, as well as criminal-history information, may reflect racially disparate past practices.[48] For example, residents of heavily policed minority neighborhoods are arrested for drug offenses at disproportionately high rates relative to the rate of offending.[49] Even superficially colorblind methods of making pretrial custody decisions will embed these disparities. This is not an easy problem to fix, as actual criminal behavior is unmeasurable and decision-making in criminal justice has long relied on the criminal record as its proxy. Nonetheless, educating judges about this type of disparity (or using sophisticated risk-assessment algorithms to adjust for it) may alleviate the problem.

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46. *See* Pretrial Services Agency for D.C., Congressional Budget Justification and Performance Budget Request Fiscal Year 2017, at 1, 23 (Feb. 2016). Nationally, 16% of released defendants were rearrested and 17% missed a court date in 2009, the last year for which data is published. Reaves, *supra* note 8, at 20-21.

47. Minton & Zeng, *supra* note 1, at 3.

48. For discussions of the issue, see David A. Harris, "Racial Profiling," in Volume 2 of the present Report; Jeffrey Fagan, "Race and the New Policing," in Volume 2 of the present Report; Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in Volume 2 of the present Report; and Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report.

49. *See, e.g.*, Shima Baradaran & Frank McIntyre, *Race, Prediction and Pretrial Detention*, 10 J. Empirical L. Stud. 741, 759 (2013); Drug Policy Alliance, The Drug War, Mass Incarceration and Race (2014).

Secondly, bail judges may harbor explicit or implicit racial bias, which is to say that they may set higher bail or place more onerous conditions of release on minority defendants than otherwise similar white defendants.[50] A typical approach to measuring this type of bias is to see whether minority defendants have higher bail than white defendants after controlling for variables like charge type, criminal history, and age. Using this approach, many studies have found evidence of bias.[51] As the number and specificity of controls increase, however, this measure of bias tends to shrink or disappear. Baradaran and McIntyre found no evidence that judges set bail higher for black defendants than white defendants once defendants' specific charge and criminal history were accounted for.[52] Stevenson found no evidence that bail is systematically set higher or lower for black defendants in Philadelphia, conditional on the charge and criminal record.[53] While racial bias certainly exists, differential treatment of similarly situated defendants on the basis of race may not be a substantial contributor to racial disparities in pretrial detention.

Third, racial disparities may result from differing levels of wealth or access to credit across races. For example, Stevenson found that, in Philadelphia, only 46% of black defendants with bail set at $5,000 (and who need only to pay a $500 deposit in order to be released) post bail, compared to 56% of non-black defendants.[54] Stevenson estimated that 50% of the race gap in detention rates in Philadelphia is accounted for by differences in the likelihood of posting bail. The other 50% is due to the fact that black defendants in this dataset are, on average, facing more serious charges, have lengthier criminal records, and accordingly have higher bail set.[55] Similarly, Demuth found that black defendants do not have bail set at higher levels than white defendants, but concluded that the odds of detention for blacks are almost twice as large because they are less likely to post bail.[56] To the extent that racial disparities in pretrial detention rates are a direct function of socioeconomic disparity, reducing reliance on money bail should lessen them.

50. For discussions of the role of race in court decisionmaking, see Paul Butler, "Race and Adjudication," in the present Volume.

51. *See, e.g.*, Marvin D. Free, Jr., *Bail and Pretrial Release Decisions: An Assessment of the Racial Threat Perspective*, 2 J. Ethnicity in Crim. Just. 23, 31-33 (2004); Besiki Luka Kutateladze & Nancy R. Andiloro, Prosecution and Racial Justice in New York County—Technical Report ii–iii (2014), www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf.

52. Baradaran & McIntyre, *supra* note 49.

53. Stevenson, *supra* note 5 (manuscript at 23).

54. *Id.* (manuscript at 4).

55. *Id.* (manuscript at 25).

56. Stephen Demuth, *Racial and Ethnic Decisions in Pretrial Release and Outcomes*, 41 Criminology 874, 894 (2003) (finding that Hispanics generally have a higher bail set than whites, although that could be due to citizenship status).

Finally, racial disparities in pretrial detention rates can arise from disparities in charged offenses and past criminal records across racial groups that reflect actual differences in rates of criminal offending. It is extremely difficult to isolate this source of disparity. But to the extent that differential crime rates contribute to racial disparities in pretrial detention, the only long-term solution is to redress the underlying causes of the divergent rates.

C. IMPROVING PRETRIAL PROCESS

Pretrial reform necessarily entails some changes to pretrial process. The following five approaches hold particular promise.

1. Release before the bail hearing

Jurisdictions can reduce the number of people who require a bail hearing in the first place by increasing the use of citation rather than arrest, and by authorizing direct release from the police station (station-house release).[57] The process of arrest is obtrusive, time-consuming, expensive, and potentially damaging to community-police relations. Jurisdictions such as Philadelphia, New York, New Orleans, and Ferguson have recently begun substituting citations or summons for arrest for some categories of crime.[58] Even for crimes that require arrest, defendants who pose little risk of flight or serious pretrial crime should be identified rapidly and released. Risk-assessment tools may be helpful in identifying good candidates. Kentucky, for example, uses a risk-assessment tool to identify defendants who are eligible for station-house release.[59]

57. *See* ABA Standards, *supra* note 13, at 41 (§ 10-1.3), 63–74 (§§ 10-2.1–10.3.3); Rachel Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307, 351–352 (2016).

58. Mary T. Phillips, N.Y.C. Crim. Just. Agency, Desk Appearance Tickets: Their Past, Present and Possible Future (2014); Bruce Eggler, *New Orleans City Council Reclassifies Pot Possession, Prostitution to Reduce Criminal Dockets*, Nola.com (Dec. 17, 2010), http://www.nola.com/politics/index.ssf/2010/12/new_orleans_city_council_recla.html; Chris Goldstein, *Philly420: Marijuana Arrests Down 73 Percent*, Philly.com (Aug. 7, 2015) (describing initiative encouraging citation rather than arrest for marijuana possession), http://www.philly.com/philly/columnists/philly420/Philly_marijuana_arrests_down_73_percent.html; Consent Decree, United States v. City of Ferguson, 4:16-cv-00180-CDP (E.D. Mo. Mar. 17, 2016).

59. *See* Amended Order, Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program, Sup. Ct. of Ky. (2017), http://courts.ky.gov/courts/supreme/Rules_Procedures/201701.pdf.

2. Slowing down the bail hearing

Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.[60] It is hard to imagine that two minutes are sufficient to effectively evaluate the risk of flight, risk of serious crime, whether detention or conditions of release are necessary, and, if money bail is used, ability to pay. Taking more care during the bail hearing is likely to improve the courts' ability to evaluate risk and determine appropriate pretrial conditions. While slowing down the bail hearing would, barring other changes, increase costs, a bail hearing should only be required for defendants at risk of losing liberty. If more people charged with non-serious offenses were released before the bail hearing, the courts would have more time and resources to devote to evaluating whether detention or conditions of release are necessary for the remaining defendants.

3. Providing counsel

Decreasing the number of defendants who require a bail hearing would also lower the costs of supplying defense counsel to those at risk of losing their liberty. Currently, many jurisdictions do not provide counsel to indigent defendants at the bail hearing.[61] Sixth Amendment doctrine holds that defendants have the right to effective assistance of counsel at all "critical stages" of criminal proceedings.[62] The recent studies showing that pretrial detention substantially increases a defendant's likelihood of conviction and length of sentence support an argument that the bail hearing is a "critical stage".[63] While providing counsel at the bail hearing would come at some expense, the presence of counsel is

60. *See, e.g.*, Gerald VandeWalle, N.D. Chief Justice, 2013 State of the Judiciary Address (Jan. 9, 2013), *available at* http://www.ndcourts.gov/court/news/judiciary2013.htm; *Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, Injustice Watch (Oct. 14, 2016); Heaton et al., *supra* note 5, at 720 n.35. In both Philadelphia and Harris County, bail hearings are only a few minutes long on average. Heaton et al., *supra* note 5, at 720 n.35; Stevenson, *supra* note 5 (manuscript at 5).

61. Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 389 (2011); Pretrial Justice Inst., Pretrial Justice in America, *supra* note 22, at 8.

62. Rothgery v. Gillespie Cty., 554 U.S. 191, 199, 212 (2008).

63. *See* sources cited *supra* note 5. For additional arguments that defendants do or should have the right to representation at bail hearings, see, for example: Nat'l Right to Counsel Comm., Const. Project, Don't I Need a Lawyer?: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing (2015); Sixth Amend. Ctr. & Pretrial Justice Inst., Early Implementation of Counsel: The Law, Implementation, and Benefits (2014); Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 Crim. Just. 23, 47 (Spring 2016); Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763-83 (2002); Colbert, *supra* note 61, at 335; and Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 Mich. L. Rev. 1513, 1516 (2013).

also useful to the system as a whole: lawyers can provide information that may help a judge determine which defendants can be safely released. Furthermore, initiating defense representation at the bail hearing would facilitate early and more-effective investigation, plea negotiations, and case resolutions.

4. Information and feedback

The judges and magistrates who set bail may not be fully aware of how their decisions translate into detention rates. It may surprise some to learn how high detention rates can be even at relatively low amounts of bail. For example, 40% of Philadelphia defendants with bail set at $500—who need only pay a $50 deposit to secure their release—remain detained pretrial.[64] While it is conceivable that these detention rates are the result of well-considered policies, it is possible that the magistrates are unaware of how difficult it can be for defendants to come up with even relatively small sums of money. Increasing the flow of information and feedback to judges, magistrates, and policymakers is likely to improve pretrial decision-making.

5. Court reminders and supportive services

There are many reasons why a defendant may not appear in court beyond willful flight from justice. A defendant may not know when her court date is, have forgotten about it, or struggle to make adequate preparations (such as arranging transportation, child care, or time off from work). For these defendants, court reminders in the form of mail notifications, phone calls, or automated text messages may greatly increase appearance rates. The available research shows that phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%.[65] Entrepreneurial technology firms now offer automated, individually customized text-message reminders.[66] While the effectiveness of this type of reminder has not yet been evaluated, it holds considerable promise. Finally, improving court websites so that defendants can easily locate information

64. *See* Stevenson, *supra* note 5 (manuscript at 12).

65. Brian H. Bornstein et al., *Reducing Courts' Failure to Appear Rate By Written Reminders*, 19 Psych. Pub. Pol'y & L. 70 (2013); Tim R. Schnacke, Michael R. Jones & Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 Ct. Rev. 86, 89 (2012). These numbers, however, are best thought of as upper bounds on the effect of court reminders. These studies were randomized control trials—the "gold standard" in research—but only the "treatment on the treated" results were reported, which makes causal interpretation difficult.

66. *See, e.g.*, *What We Do*, Uptrust, http://www.uptrust.co/#about-uptrust-section (last visited Mar. 26, 2017).

relevant to their case should increase the likelihood of appearance. These methods come at relatively low cost and offer potentially significant savings.

Jurisdictions striving to reduce pretrial detention rates can also reinvest the savings by expanding supportive pretrial services. A pretrial services agency can connect defendants to a range of social services to address underlying risk factors like homelessness, joblessness, and addiction. It can also help defendants manage the logistics of attending court (transportation, child care, work leave, etc.). The D.C. Pretrial Services Agency provides these services, which may be one reason for D.C.'s low rearrest and nonappearance rates.

D. EVALUATING RISK

Actuarial risk assessment is a common theme in contemporary bail reform.[67] Reformers aspire to improve the accuracy and consistency of pretrial decision-making by assessing each defendant's statistical risk of non-appearance and rearrest in the pretrial period, and providing this assessment to judges along with a recommendation for pretrial intervention. Pretrial risk assessment holds great promise, but also raises concerns.

1. The promise of risk assessment

There is reason to be optimistic about the actuarial turn in pretrial practice. Risk-assessment tools should reduce the subjective, irrational bias that distorts judicial decision-making.[68] They may also mitigate judicial incentives to over-detain by absolving judges of personal responsibility for "mistaken" release decisions.[69] They have the potential to bring consistency to pretrial decision-making and ensure that like defendants are treated alike. So long as the tools are not opaque, they may improve the transparency of pretrial release decisions. Risk-assessment tools also offer a mechanism of accountability: risk scores and defendants' outcomes can be monitored, and if the tool or its implementation is resulting in unnecessary detention, inappropriate release or unwarranted disparities, the tool or implementation rules can be adjusted.

Several recent studies argue that tying pretrial detention directly to statistical risk can minimize detention rates while maximizing appearance rates, public safety, or both. Analyzing a dataset from the 75 largest urban counties in the U.S., Baradaran and McIntyre found that the counties could have released 25%

67. For an overview of pretrial risk-assessment tools and their expanding use, see Sandra G. Mayson, *Dangerous Defendants*, Yale L.J. (forthcoming 2017).

68. *See generally* John Monahan, "Risk Assessment in Sentencing," in Volume 4 of the present Report.

69. *See generally* Samuel R. Wiseman, *Fixing Bail*, 84 Geo. Wash. L. Rev. 417 (2016).

more felony defendants pretrial and reduced pretrial crime if detention decisions had been made on the basis of statistical risk.[70] In Philadelphia, Richard Berk and colleagues concluded that deferring to the detention recommendations of a machine-learned algorithm in domestic violence (DV) cases could cut the rearrest rate on serious DV charges (over two years) from 20% to 10%.[71] Jon Kleinberg and colleagues, working with New York City data, found that delegating detention decisions to a machine-learned algorithm could "reduce crime by up to 24.8% with no change in jailing, or reduce jail populations by 42.0% with no increase in crime," while also reducing racial disparities in detention.[72]

These are studies of policy simulations, not actual policy changes. There has been very little research evaluating the effectiveness of risk assessment in practice. One recent study showed that a law requiring judges to consider the risk assessment in the pretrial release decision led to a small increase in pretrial release, but it also led to an increase in failures-to-appear, and possibly in pretrial crime. Furthermore, the study showed that judges ignored the recommendations associated with the risk tool more often than not.[73] While risk assessments have promise, realizing their benefits in practice is not simple.

2. Concerns over accuracy, racial equality, and contestability

Pretrial risk assessment has also sparked controversy in the popular press. In 2016, news outlet ProPublica published a study that claimed to have discovered that the COMPAS, a prominent risk-assessment tool, was "biased against blacks."[74] It also opined that the COMPAS was "remarkably unreliable in forecasting violent crime," and only "somewhat more accurate than a coin flip" in predicting pretrial rearrest generally.[75] Finally, the article noted that statistical generalization may be at odds with individualized justice, and that proprietary risk-assessment tools like the COMPAS pose transparency concerns. These critiques—regarding accuracy, racial equality, and contestability—represent core concerns with actuarial assessment.

70. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497, 558 (2012).

71. Richard A. Berk, Susan B. Sorenson & Geoffrey Barnes, *Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions*, 13 J. Empirical Legal Stud. 94 (2016).

72. Jon Kleinberg et al., Human Decisions and Machine Predictions 1 (Nat'l Bureau of Econ. Research, Working Paper No. 23180, 2017).

73. Megan Stevenson, Assessing Risk Assessment 4 (June 2017) (unpublished manuscript) (on file with author).

74. Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

75. *Id.*

Debate about accuracy would benefit from an acknowledgement that no method of prediction is 100% accurate. It is particularly hard to predict low-frequency events like violent crime. The ProPublica article concluded that the COMPAS was "remarkably unreliable" on the basis that "[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so [in a two-year window]."[76] But that is much higher than the base rate.[77] An algorithm that can identify people with a 20% chance of rearrest for violent crime provides useful knowledge.[78] The policy-relevant question is not whether a tool is "accurate," but rather *what* statistical information it provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pretrial decision-making.

The concern for racial equality is similarly complex.[79] The most obvious source of racial bias in prediction would be if an algorithm treated race as an independently predictive factor, or over-weighted factors that correlate with race, like ZIP code, relative to their predictive power.[80] But none of the pretrial risk-assessment tools in current use utilize race as an input factor; the dominant tool, the Public Safety Assessment, relies exclusively on criminal-history information.[81] Two people of different races with the same criminal history will thus receive the same risk score. Nonetheless, risk assessment can have disparate impact across racial groups. In fact, if the base rate of the predicted outcome (e.g., rearrest) differs across racial groups, statistical risk

76. *Id.*

77. William Dieterich et al., COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity (2016); *see also* Baradaran & McIntyre, *supra* note 70, at 561 tbl. 3 (finding that, among all felony defendants in a national dataset, rate of pretrial rearrest for a violent felony was 1.9%).

78. In fact, other pretrial risk-assessment tools classify defendants as high-risk at substantially lower probabilities of rearrest. *See* Mayson, *supra* note 67.

79. For a more thorough discussion of racial equality in risk assessment, see Sandra G. Mayson, Bias In, Bias Out: Criminal Justice Risk Assessment and the Myth of Race Neutrality (June 2017) (unpublished manuscript) (on file with author).

80. *See, e.g.*, Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 Fed. Sent'g Rep. 237 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803 (2014).

81. Laura & John Arnold Foundation, Public Safety Assessment: Risk Factors and Formula (2016), www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.

assessment necessarily *will* have disparate impact.[82] This was the source of the disparity that ProPublica documented: The black defendants in its dataset had higher arrest-risk profiles, on average, than the white.[83] There is no easy way to prevent this result.[84] Nor is it a good reason to reject actuarial risk assessment, because subjective risk assessment will have the same effect. It is possible to modify an algorithm to equalize outcomes across racial groups, but usually requires treating defendants with the same observable risk profiles differently on the basis of race.[85]

The third set of concerns with pretrial risk assessment is procedural. If people cannot meaningfully contest the basis of their risk score, actuarial risk assessment might violate due process by denying a meaningful opportunity to be heard.[86] This problem arises with proprietary algorithms like the COMPAS and other "black box" machine-learned algorithms, although there are ways to make machine-learned algorithms more transparent.[87] A related concern is that no algorithm will take account of every relevant fact about a given individual. For this reason, most scholars believe that judges must retain discretion to vary from the recommendations of a risk-assessment tool, and jurisdictions have universally followed this practice.[88]

82. Where base rates differ across two groups, it is impossible to ensure that predictions are equally accurate for each group and also ensure equal false positive and false negative rates unless prediction is perfect. *See, e.g.*, Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 Big Data 153 (June 2017), Jon Kleinberg, Sendhil Mullainathan & Manish Raghavan, *Inherent Trade-Offs in the Fair Determination of Risk Scores*, Proceedings of Innovations in Theoretical Computer Science (forthcoming 2017); Julia Angwin & Jeff Larsen, *Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say*, ProPublica.com (Dec. 30, 2016), https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say.

83. *See* Dieterich et al., *supra* note 77; Julia Angwin & Jeff Larsen, *ProPublica Responds to Company's Critique of Machine Bias Story*, ProPublica.com (July 29, 2016), https://www.propublica.org/article/propublica-responds-to-companys-critique-of-machine-bias-story.

84. This kind of disparate impact is not a constitutional violation; equal protection prohibits only formal or intentional discrimination on the basis of race. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

85. *See, e.g.*, Richard Berk et al., Fairness in Criminal Justice Risk Assessments: The State of the Art (May 28, 2017) (unpublished manuscript), arxiv.org/abs/1703.09207. This is one manifestation of the difficulty of avoiding both disparate impact and disparate treatment. *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341 (2010).

86. *See, e.g.*, Hamilton, *supra* note 80; Rebecca Wexler, Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System (April 15, 2017) (unpublished manuscript), *available at* https://papers.ssrn.com/ sol3/Papers.cfm?abstract_id=2920883.

87. *See* Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. Pa. L. Rev. 633 (2017).

88. *But see generally* Wiseman, *supra* note 69 (arguing against such discretion).

3. Best practice in risk assessment

Given these concerns and the limitations of existing research, jurisdictions implementing pretrial risk assessment should keep a number of best practices in mind.

First, risk-assessment tools should be intelligible to the people whose lives they affect. To the greatest extent possible, the identity and weighting of risk factors should be public. Relatedly, tools that rely on objective data are preferable to tools that include subjective components.

Second, stakeholders should take care in determining what risks to assess. At present, many tools measure pretrial "failure," a composite of flight risk and crime risk. But these two risks are different in kind and call for different responses.[89] As a number of studies have demonstrated, risk assessment can attain greater accuracy—and produce more-useful information—if it measures them separately.[90] Within each category, moreover, further divisions are warranted. Some people are at high risk for flight because they have powerful incentives to abscond. Others are just likely to struggle with the logistics of attending court. The response to these two groups should be different.[91] Likewise, most tools currently define crime risk as the likelihood of arrest for anything at all, including minor offenses. If society's core concern is violent crime, then assessing the risk of any arrest is counterproductive; people at highest risk for any arrest are *not* at highest risk of arrest for violent crime in particular, and vice versa.[92]

Third, criminal justice stakeholders should also take care to communicate accurately about risk assessment. If a risk-assessment tool measures the likelihood of arrest, it is inaccurate to say that it measures the risk of "new criminal activity." Risk-assessment tools should be cautious in the communication of risk assessments as well. Terms like "high risk" embed a normative evaluation.[93] To avoid unduly influencing courts' or stakeholders' judgment about the significance of a given statistical risk, an actuarial tool

89. *See* Gouldin, *supra* note 23.

90. *See, e.g.*, Baradaran & McIntyre, *supra* note 70; Kleinberg et al., *supra* note 72.

91. *See* Lauryn P. Gouldin, *Defining "Flight Risk,"* U. Chi. L. Rev. (forthcoming 2018) (manuscript on file with authors).

92. Baradaran & McIntyre, *supra* note 70, at 528-29; *see also* Laura & John Arnold Foundation, *supra* note 81 (using mostly different factors to predict arrest versus arrest for violent crime).

93. *See* Jessica Eaglin, Constructing Recidivism Risk for Sentencing (Aug. 12, 2016) (unpublished manuscript), *available at* https://ssrn.com/abstract=2821136; *see also* Crim. Just. Pol'y Program, *supra* note 13, at 21.

should report its assessment in numerical terms: "Statistical analysis suggests that this defendant has an X% chance of Y event within Z time period if released unconditionally, without supportive services."[94]

Fourth, criminal justice stakeholders should confront the value judgments that a detention regime guided by risk assessment will entail.[95] Someone must decide what degree of statistical risk justifies detention—if any does. Either the developers of risk-assessment tools will make that judgment implicitly, by choosing the "cut point" at which a risk is determined to be high and detention is recommended, or stakeholders can make it and direct the design of the tool accordingly. Similarly, any predictive system (including subjective risk assessment) will perpetuate underlying racial and socioeconomic disparities in the world, and stakeholders should determine how best to respond to this reality.

Fifth, it is imperative that actuarial risk-assessment tools are implemented carefully and monitored closely, with rigorous data collection and analysis.

E. RATIONALIZING PRETRIAL DETENTION

A reform model in which defendants are detained based on risk rather than ability to post bail requires that courts have authority to order pretrial detention directly. In states that still have a broad constitutional right to pretrial release, bail reform may thus require amendment of the state constitution.[96] This poses significant logistical challenges and raises the difficult question of when detention is warranted. In the 1970s and '80s, when the first preventive detention regimes were implemented, critics argued that due process and the Excessive Bail Clause categorically prohibit detention without bail.[97] The Supreme Court rejected that position in *United States v. Salerno*.[98] But it did not specify what type or degree of risk is sufficient to justify detention, beyond the broad principles that pretrial detention must not constitute punishment

94. This is the "positive predictive value" of a risk classification. *See, e.g.*, Chouldechova, *supra* note 82, at 155.

95. *See generally* Eaglin, *supra* note 93; Mayson, *supra* note 67.

96. New Jersey has recently completed this process. Its constitution now provides that "pretrial release may be denied" if a court finds that no condition of release would "reasonably" ensure appearance, protect the community, or prevent obstruction of justice. N.J. Const. art. I, § 11. The state legislature has enacted statutory rules to guide these decisions. N.J. Rev. Stat § 2A:162–15 *et seq.*

97. *See, e.g.*, Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 401 (1970).

98. 481 U.S. 739, 754-55 (1987).

or be excessive in relation to its goals. Even if the Constitution imposes little substantive constraint, the question of when pretrial detention is justified is also a moral one.[99]

It is clear that some defendants should *not* be detained. To begin with, detention is not justified if a less restrictive and cost-effective alternative would adequately mitigate whatever risk a defendant presents. Samuel Wiseman suggests, for instance, that detention should rarely be imposed as a response to flight risk, because electronic monitoring will nearly always reduce the risk to a reasonable level.[100] A related principle is that detention is unwarranted for defendants who pose little risk of flight or committing pretrial crime. The great promise of risk assessment is to identify this group and ensure their release. Finally, misdemeanor pretrial detention should be rare.[101] Defendants charged with misdemeanors generally do not pose a grave crime risk, and incentives to abscond should be weakest in low-level cases. Some research suggests that misdemeanor pretrial detention has lasting crime-inducing effects,[102] thus generating more crime than it prevents.[103] Pretrial detention in misdemeanor cases also appears particularly likely to skew the fairness of the adjudicative

99. A few contemporary scholars have argued that pretrial detention based on general dangerousness categorically violates the presumption of innocence. *See, e.g.*, R.A. Duff, *Pretrial Detention and the Presumption of Innocence*, *in* Preventive Justice 128 (Andrew Ashworth ed., 2013); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723 (2011). This argument has no legal traction in the United States, because the Supreme Court has held that the presumption of innocence is merely "a doctrine that allocates the burden of proof in criminal trials." Bell v. Wolfish, 441 U.S. 520, 533 (1979). As Richard Lippke has noted, furthermore, it is difficult to specify what a presumption of innocence would require in the pretrial context. *See generally* Richard L. Lippke, Taming the Presumption of Innocence (2016).

100. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344 (2014). Wiseman focuses on money bail that results in detention, but the argument applies to direct detention as well.

101. For a discussion of misdemeanors, see Alexandra Natapoff, "Misdemeanors," in Volume 1 of the present Report.

102. *See, e.g.*, Heaton et al., *supra* note 5.

103. *Id.* at 72 (finding that Harris County could have saved an estimated $20 million and averted thousands of new arrests by releasing every misdemeanor defendant detained on a bail amount of $500 or less between 2008 and 2013).

process,[104] because a guilty plea often means going home.[105] Scholars speculate that this dynamic may be a major cause of wrongful convictions.[106]

Beyond these classes of defendants, there is no easy answer to the question of when pretrial detention is warranted. Some scholars have suggested that it is justified when its benefits outweigh its costs.[107] Others have advocated for additional criteria,[108] or community involvement in detention decisions.[109] This important debate should continue. As a baseline, jurisdictions seeking to craft new pretrial detention regimes should ensure that:

104. Misdemeanor defendants detained pretrial in Harris County, Texas (2008-2013) were 25% more likely to be convicted than statistically indistinguishable defendants who were not detained, due almost entirely to the increased likelihood of pleading guilty. These results indicate that approximately 28,300 defendants would not have been convicted but for their detention. *Id.*

105. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 308 (2011) ("In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation."); *cf.* Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court 9-10 (1979) (reporting that in sample of more than 1,600 cases, "twice as many people were sent to jail prior to trial than after trial"). For a discussion of plea bargaining, see Jenia I. Turner, "Plea Bargaining," in the present Volume.

106. *See, e.g.*, Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. Empirical Legal Stud. 927, 930-31 (2008); Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1316, 1343-47 (2012). For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in the present Volume.

107. The most comprehensive cost-benefit analysis of pretrial detention concludes that we could achieve cost-benefit equilibrium, detain 28% fewer people, and save $78 million by adopting a statistical risk approach to detention decisions. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1 (2017); *see also* David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 Econ. Inquiry 750, 760-61 (2011); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 Chi.-Kent L. Rev. 23, 39 (2010).

108. *See, e.g.*, Richard L. Lippke, *Pretrial Detention Without Punishment*, 20 Res Publica 111, 122 (2014) (arguing that detention on the basis of crime-risk is justified only if the defendant is likely to commit a serious crime in the pretrial phase, no less restrictive means can prevent it, and there is "substantial evidence" of the defendant's guilt on a serious charge); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L. Rev. 1947, 1953 (2005) (arguing that the state should compensate detained defendants for their lost liberty); *see also* Mayson, *supra* note 67 (noting that there is no clear justification for pretrial detention for dangerousness if the state could not detain an equally dangerous person not accused of any crime).

109. *See, e.g.*, Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, and the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297 (2012); Simonson, *supra* note 26.

- Pretrial release is the default, and detention is a "carefully limited exception."[110]
- Detention procedures include, at minimum, the protections noted by the Supreme Court in *United States v. Salerno* (including an adversarial hearing and right to immediate appeal).[111]
- Detention requires clear and convincing evidence that (1) there is a substantial probability the defendant will commit serious crime in the pretrial phase or abscond from justice, and (2) no conditions of release can reduce the risk below that probability threshold. Jurisdictions should specify what numerical probability qualifies as substantial and what crime qualifies as serious for this purpose.

F. IMPLEMENTING NONMONETARY CONDITIONS OF RELEASE

In order to limit the use of money bail and reduce detention rates, bail reformers advocate non-financial conditions of release as an alternative for defendants who pose some pretrial risk. This section surveys the literature evaluating three common conditions: required meetings with pretrial officers, drug testing, and electronic monitoring. The emphasis is on high-quality studies such as randomized control trials (RCTs). Evidence from the probation or parole context is included if there is a lack of quality research in the pretrial context.

1. Meetings with a pretrial officer

The requirement of meeting periodically (in person or over the phone) with a pretrial officer is one of the most common conditions of release. Pretrial supervision is an expensive intervention, as it requires the time of a salaried employee of the state. It imposes time burdens on the defendant, and, in increasing the requirements of release, increases the likelihood that the defendant will fail to fulfill them.

There is no good evidence to support this practice. A small experiment conducted by John Goldkamp, in which defendants were randomly assigned to low-supervision or high-supervision conditions, found no difference in appearance rates or rearrest across the two groups, either for low-risk or

110. United States v. Salerno, 481 U.S. 739, 755 (1987).
111. *Id.* at 751-52.

moderate-to-high-risk defendants.[112] An experiment in the 1980s randomly assigned defendants to either more-intensive pretrial supervision or less-intensive supervision plus access to services (vocational training or drug/alcohol counseling). It found no difference in appearance rate or rearrest across the groups.[113] Very little other research exists. A correlational study funded by the Laura and John Arnold Foundation showed that pretrial supervision is correlated with increased appearance rates but is not generally correlated with reductions in new criminal activity.[114] This study was conducted across multiple jurisdictions that varied in their use of, and definition of, pretrial supervision. Correlational studies are generally considered weak evidence, so it is hard to draw firm conclusions from these results.

There are several well-executed studies on required meetings with supervising officers in the probation and parole context. An RCT in Philadelphia that reduced the frequency of required meeting with probation officers found no effect on new charges or re-incarceration.[115] An RCT evaluating the benefits of intensive probation (which, among other things, involves extra meetings with probation officers) shows no evidence that these meetings decrease criminal behavior.[116] The intensive supervision does, however, increase the likelihood that a defendant will be re-incarcerated due to a technical violation, at considerable cost to the state. Another study evaluating the effects of abolishing post-release supervision showed similar results: a decreased likelihood of re-incarceration due to technical violations, but little effect on crime.[117]

112. John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. Experimental Criminology 143, 154 (2006). They also include a non-experimental analysis that compares outcomes for a baseline group in a prior period who were not under supervision against the experimental groups who had varying levels of supervision. This is a weak research design, since the baseline data related to circumstances and events from four years before the experimental data, and many things could have changed in between.

113. James Austin, Barry Krisberg & Paul Litsky, *The Effectiveness of Supervised Pretrial Release*, 31 Crime & Delinq. 519, 523-35 (1985).

114. Christopher T. Lowenkamp & Marie VanNostrand, Exploring the Impact of Pretrial Supervision on Pretrial Outcomes 15-16 (2013).

115. Geoffrey C. Barnes, Charlotte Gill, & Ellen Kurtz, *Low-Intensity Community Supervision for Low-Risk Offenders*, 6 J. Experimental Criminology 159, 181-82 (2010).

116. Susan Turner, Joan Petersilia & Elizabeth Piper Deschenes, *Evaluating Intensive Supervision Probation/Parole (ISP) For Drug Offenders*, 38 Crime and Delinq. 539 (1992).

117. Ryan Sakoda, Efficient Sentencing? The Effect of Post-Release Supervision on Low-Level Offenders 4 (Dec. 2016) (unpublished manuscript) (on file with author).

More high-quality research on the effectiveness of pretrial supervision is needed. At the moment, the practice is far from "evidence-based," and the best available research shows no benefits. Indeed, the arguments for why it might be effective are fairly tenuous. Supervision implies a watchful eye and the guidance of a capable authority in troubling situations. Periodic meetings with a pretrial officer are unlikely to serve these functions. If a defendant is engaging in illicit behavior, she has every incentive to hide this from the pretrial officer, and the officer has no knowledge of such activities beyond what the defendant chooses to share. There are thus scant reasons to believe that meetings alone will have a deterrent effect or that the pretrial officer will have the information necessary to intervene if troubles arrive. Given its expense and intrusiveness, required check-ins with the pretrial officer should not be considered a core part of the portfolio of pretrial options unless better evidence emerges to support its use.

2. Drug testing

The use of drug testing during the pretrial period has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials. These studies mostly date from around the time when drug testing was broadly implemented: in the late 1980s and 1990s. A large RCT in Washington, D.C., showed that defendants who were assigned to drug testing were no less likely to have a pretrial arrest or non-appearance than those who were randomly assigned to drug treatment or release without conditions.[118] Another sizable RCT in Wisconsin and Maryland also found that drug testing had no benefit relative to release without testing.[119] Several other randomized trials showed similar results.[120] Unfortunately, these results have been ignored, and drug testing continues to be a mainstay condition of pretrial release.

The last decade has seen a surge of optimism about the benefits of drug testing in the probation context. A famous study from Hawaii's HOPE project showed that drug testing paired with "swift, certain and fair" sanctions can effectively reduce drug use and re-incarceration for people on probation.[121] In this

118. Mary A. Toborg et al., Assessment of Pretrial Urine Testing in the District of Columbia 13 (1989).

119. John S. Goldkamp & Peter R. Jones, *Pretrial Drug-Testing Experiments in Milwaukee and Prince George's County: The Context of Implementation,* 29 J. Res. Crime & Delinq. 430 (1992)

120. For a review of the relevant literature, see Marie VanNostrand, Kenneth R. Rose & Kimberly Weibrecht, State of the Science of Pretrial Release Recommendations and Supervision 20-24 (2011).

121. Angela Hawken & Mark Kleiman, Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE 4 (2009).

formulation, people receive immediate but light sanctions for each failed drug test. Unfortunately, the successes of the HOPE program have proven difficult to replicate. Multiple RCTs have found that drug-testing programs built on swift, certain and fair principles are no more effective than status quo procedures.[122]

Drug testing imposes burdens on the defendant, who must report for testing whenever notified. The state must pay the lab costs and the salaries of the monitoring officers. Researchers may yet find the key to the effective implementation of drug testing, but the best available evidence shows no indication that it is worth the costs or intrusions.

3. Electronic monitoring

There is limited high-quality research on the effectiveness of electronic monitoring (EM) in the pretrial period. However, there is growing evidence that electronic monitoring reduces criminal activity for defendants in the probation or parole context. (The evidence is more mixed on EM's effect on technical violations or return to custody.) Electronic monitoring has been found to reduce crime relative to traditional parole for gang members and sex offenders in California,[123] although it increased the likelihood of returning to custody for gang members, due to an increased likelihood of technical violations.[124] A study in Florida found that EM reduced technical violation, reoffending and absconding relative to those placed on unmonitored home arrest; a subsequent Florida study found that EM reduced probation revocation and absconding relative to probation as usual.[125] A high-quality study in Argentina finds that

122. *See, e.g.*, Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of Drug Testing and Graduated Sanctions Program for Probationers*, 15 Crim. & Pub. Pol'y 1073, 1086 (2016); Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 Crim. & Pub. Pol'y 1103, 1104 (2016).

123. Stephen V. Gies et al., Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program, Final Report vii (Apr. 2012); Stephen v. Gies et al.. Monitoring High-Risk Gang Offenders with GPS Technology: An Evaluation of the California Supervision Program Final Report vii (Nov. 2013). For a discussion of gangs, see Scott H. Decker, "Gangs," in Volume 1 of the present Report. For a discussion of sex offenders, Wayne A. Logan, "Sex Offender Registration and Notification," in Volume 4 of the present Report.

124. *See, e.g.*, William Bales et al., A Quantitative and Qualitative Assessment of Electronic Monitoring (2010); Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 Criminology & Pub. Pol'y 61 (2006).

125. The California and Florida studies used propensity score matching, which raises some concerns that those placed on EM differ in unobservable characteristics from the control group, leading to bias in the estimator. However, those on EM are generally higher risk than those on regular probation/parole, suggesting that the bias would lead these studies to underestimate the effects if anything.

EM reduces recidivism relative to pretrial detention; other quasi-experimental studies in Europe find that EM decreases recidivism and welfare dependency relative to incarceration.[126] Additional high-quality research is important to assess the effectiveness of EM at preventing flight and pretrial crime in the U.S.

Whatever benefit EM provides comes at substantial cost. EM is a significant burden on a person's liberty. It places strain on family relationships, makes it difficult to find employment, and can lead to shame and stigma.[127] Surveys of people serving sentences find that EM is considered only slightly less onerous than incarceration.[128] EM is also costly to the state. Purchasing the equipment, monitoring individuals, and responding to violations entails considerable expense. Many jurisdictions charge fees for monitoring that burden the poor and often cannot be paid.[129] Furthermore, EM can be overused. In one survey, supervising officers believed (on average) that a third of the people they supervised on EM did not need to be on EM because they posed no danger to society.[130] In conclusion: EM should be used selectively, and only as an alternative to detention.

RECOMMENDATIONS

The pretrial system is ripe for reform. An optimal pretrial system will maximize appearance rates while minimizing both intrusions to defendants' liberty and pretrial crime. The central principle that unites best practices in the pretrial arena is that any restraint on liberty should be tailored to the specific risk a defendant presents, and should be the least restrictive means available to reasonably reduce the risk. Given our existing knowledge about the operation of the pretrial system and the effectiveness of pretrial interventions, jurisdictions pursuing reform should prioritize the following strategies.

1. **Limit money bail as a condition of release,** to prevent detention on the basis of poverty.

126. Rafael Di Tella & Ernesto Schargrodsky, *Criminal Recidivism after Prison and Electronic Monitoring,* 121 J. Pol. Econ. 28, 28 (2013); Lars H. Andersen & Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence,* 13 Criminology & Pub. Pol'y 349, 351 (2014); Annais Henneguelle et al., Better at Home Than in Prison? The Effects of Electronic Monitoring Versus Incarceration on Recidivism in France 3 (2015) (unpublished manuscript).

127. *See* Bales et al., *supra* note 124, at 89-95.

128. *See, e.g.,* Brian K. Payne et al., *The "Pains" of Electronic Monitoring: A Slap on the Wrist or Just as Bad as Prison?,* 27 Crim. Just. Stud. 133, 140 (2014).

129. *See* Bales et al., *supra* note 124, at 102-103. *See generally* Beth A. Colgan, "Fines, Fees, and Forfeitures," in Volume 4 of the present Report.

130. Bales et al., *supra* note 124, at 104.

2. **Substitute citation or summons for arrest** where possible, and release most arrested defendants immediately after booking.
3. **Conduct thorough hearings with defense counsel** before imposing detention or other serious infringement of liberty (e.g., electronic monitoring).
4. **Detain defendants only if there is a substantial probability they will commit serious crime in the pretrial phase or abscond from justice,** and if less intrusive methods cannot adequately reduce that risk.
5. **Use conditions of release sparingly,** since few have been demonstrated to be effective and many involve non-trivial impositions on liberty.
6. **Support released defendants** by expanding access to services, providing reminders of upcoming court dates, and making court websites easy to navigate.
7. **Implement actuarial risk assessment cautiously and transparently,** with continuous evaluation by an independent third party.
8. **Pilot new pretrial initiatives in collaboration with an academic partner**, in order to measure their effectiveness and identify necessary improvements.

These strategies will, of course, require investment, financial and political. But they have the potential to produce significant returns for defendants and taxpayers alike. If the momentum for pretrial reform translates into action, we can inaugurate a more effective and more humane system of pretrial justice.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARPENTER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16–402. Argued November 29, 2017—Decided June 22, 2018

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held:

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 4–18.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz* v. *United States,* 389 U. S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is

prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith* v. *Maryland*, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States,* 267 U. S. 132, 149. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e.g., Kyllo* v. *United States,* 533 U. S. 27. Pp. 4–7.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e.g., United States* v. *Jones,* 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States* v. *Miller,* 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and *Smith,* 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 7–10.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 10–18.

(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,'" *Riley* v. *California*, 573 U. S. ___, ___—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in

development," *Kyllo*, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 12–15.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller*, are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller*, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ___. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 15–17.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 17–18.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A

Syllabus

warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.*, exigent circumstances—may support a warrantless search. Pp. 18–22.

819 F. 3d 880, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

CAREER OFFENDER GUIDELINE

The career offender guideline is not the same as 21 U.S.C. 851 or the Armed Career Criminal Act (ACCA) at 924(e) The term "career offender," which is a guideline classification is sometimes miss used by lawyers, courts and reporters. They will use the term to refer to a person who received a statutory enhancement under 21 U.S.C Section 851 or ACCA.

A defendant is classified as a "career offender" under the guidelines if the instant offense is a felony, defined as an offense punishable by death or imprisonment exceeding one year, that is a "controlled substance offense" or a "crime of violence" committed when the defendant was at least 18 years old, and the defendant has at least two "prior felony convictions" of either a "controlled substance offense" or a "crime of violence." USSG Section 4B1.1, 4B1.2.

Would a prior conviction no longer qualify as a "crime of violence" or "controlled substance offense" under the categorical approach or the modified categorical approach?

To determine whether a client was previously convicted of an offense with the requisite elements to qualify as a "controlled substance offense" or a "crime of violence" under the career offender guideline, courts apply the "categorical approach." *Descamps v. U.S.* 133 S.Ct. 2276 (2013) Under this "elements-based" approach, the prior conviction must be for an offense having the same (or narrower) elements as the applicable definition of the qualifying offense. If, by its elements, the offense of conviction applies more broadly than the qualifying offense, the prior conviction cannot be a predicate.

For example, under the career offender guideline, "controlled substance offense" is defined as "an offense under federal or state law, punishable by imprisonment exceeding one year, that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense. 4B1.2(b). The definition does not include offenses involving purchase, use or simple possession.

Consider a defendant who was previously convicted under a state statute that provides: "Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state 28 grams or more of cocaine commits a felony of the first degree which felony shall be known as "trafficking cocaine." The statute applies to

the purchase of cocaine, which does not qualify as a “controlled substance offense,” and to the sale of cocaine, which does qualify. The state court judgement simply cites the statute and recites all of the alternative offenses. *U.S. v. Shannon*, 631 F.3d 1187(11th Cir. 2011).

The Supreme Court held under these circumstances, the court is permitted to look beyond the judgment to a limited set of case-specific documents-i.e., the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial, and the plea agreement and plea colloquy transcript if the defendant pled guilty. If the elements of the offense of conviction cannot be determined from these documents without regard to the underlying fact, it must be assumed that the conviction was for the least culpable crime, i.e, the non-qualifying offense, *See Johnson* v. U.S. 559 U.S. 133 (2010).

Note: This does not include police reports.

The categorical approach is not always easy to apply. State statutes vary considerably. The breadth of a statute may only be known by researching state cases interpreting the statute. In addition, many state statutes set forth elements in the alternative, some of which describe qualifying offenses and some of which do not. It may be impossible to determine from the state court judgment whether the defendant was convicted of a qualifying offense.

Recent Developments with Federal Definitions of a "Controlled Substance Offense" under USSG §4B1.2 and Attempt Crimes

As you may recall, "prior convictions" used to increase sentences controlled by the definitions of "crime of violence" and "controlled substance offense" in USSG §4B1.2 require categorical analysis of whether they meet those definitions.

1st. A State Controlled Substance Offense May Not Qualify as a Federal Controlled Substance Offense if the State Drug Schedules include Substances Not Regulated under the Federal Drug Schedules.

***United States v. Townsend*, 897 F.3d 66 (2d Cir. July 23, 2018)**

Recently the 2d Circuit held NY Criminal Sale of a Controlled Substance, in 5th Degree (N.Y. Penal Law §220.31) is not a "controlled substance offense" under U.S.S.G. §4B1.2(b) and could not increase the sentence in USSG 2K2.1as a prior conviction for a controlled substance offense

Why is the decision important?

When a state's regulated substances includes substances that are not listed in the federal schedules, then the "controlled substance" element is not a categorical match with the federal offense because the prior conviction may include a substance that it not regulated under federal law. The state offense criminalizes broader conduct than the criminal conduct in the federal offense and the state conviction cannot be assured to be categorically the same as the federal conviction.

[NY regulates controlled substances in NY Public Health Law §3306 and includes, "HCG" or "human chorionic gonadotropin", a steroid not regulated federally.]

So in cases where prior state conviction is based on a prior drug conviction for a non-specified "controlled substance" in NY and other states, the conviction cannot

qualify as the predicate controlled substance offense if the state drug schedule includes substances not criminalized in the federal schedules.

The government has also acknowledged that a NY conviction for Criminal Possession of a Controlled Substance with Intent to Sell in 5th Degree, (N.Y. Penal Law § 220.06(1)) also falls outside the federal "controlled substance definition under the *Townsend* analysis

[in appeal submitted by our office in *US v. Tyrrell* awaiting Gov't Brief]

This decision affects sentences calculated under:

USSG §2K1.3, §2K2.1, §4A1.2, §7B1.1 and § 2L1.2

2nd. Attempt Offenses, and arguably other inchoate crimes, are not included as "crimes of violence" and "controlled substance offenses" in the definitions of those offenses in § 4B1.2.

United States v. Havis 2018 WL 5117187 (6th Cir. Oct. 22, 2018) (petition for rehearing en banc filed Nov. 5, 2018 govt ordered to respond), relied in part on **United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018)**

A panel of the 6th Cir. noted a convincing argument made by the defense, that because of the nature of the Sentencing Commission and the separation of powers doctrine the Commission is prohibited from adding offenses through commentary rather than amendment. The act bypasses Congressional review and violates the requisite notice and comment provisions of the Administrative Procedures Act. Absent these limits imposed by Congressional oversight and the APA, the Commission would be unconstitutional as an exercise in joint judicial and legislative acts in violation of the separation of powers doctrine.

Guidelines commentary can only interpret text. Commentary that increases the range of conduct to which a guideline applies is an act beyond interpretation.

Because the Commission acted outside its authority when it added attempt, and arguably the other "inchoate offenses" – aiding, abetting, conspiring to the guidelines.

Importance: Look at Commentaries with a fresh eye, is the language interpreting or adding offenses?

18 USC 3553(a) FACTORS & DOWNWARD DEPARTURE MOTIONS

IF YOU HAVE MITIGATING EVIDENCE THAT FALLS UNDER 3553(a), AND IT TECHNICALLY COULD BE RAISED THROUGH A DOWNWARD DEPARTURE MOTION **UNDER CHAPTER 5, PART H OR K**, PLEASE CONISDER WHETHER OR NOT ELIGIBILITY FOR THESE DEPARTURES IS SOLID BEFORE RAISING BY WAY OF A SPECIFIC DOWNWARD DEPARTURE MOTION. IF IT IS NOT, IT'S ALMOST ALWAYS BETTER TO ASK FOR A NON-GUIDELINE SENTENCE –A VARIANCE--UNDER 3553(a) UNDER BACKGROUND AND CHARACTERISTICS OF DEFENDANT RATHER THAN TYING YOURSELF INTO A SPECIFIC REQUEST FOR A DOWNWARD DEPARTURE MOTION. INSTEAD, CONSIDER ASKING FOR A VARIANCE FROM THE APPLICABLE ***ADVISORY*** GUIDELINE RANGE BASED ON THOSE SPECIFIC MITIGATING FACTORS THAT ARE DISCUSSED IN **CHAPTER 5, PART H OR K**. THIS IS BECAUSE TRYING TO APPEAL THE DISTRICT COURT'S REFUSAL TO DEPART UNDER A SPECIFIC GUIDELINE IS NOT ALWAYS BENEFICIAL. THERE IS CASE LAW IN THE CIRCUIT THAT SAYS REASONABLENESS REVIEW INCLUDES REVIEW OF WHETHER A DOWNWARD DEPARTURE WAS PROPERLY APPLIED AND THERE IS STILL PRE-BOOKER CASE LAW OUT THERE THAT SAYS DECISION TO DEPART IS NOT APPEALABLE ***UNLESS*** DEFENDANT CAN SHOW DISTRICT COURT MISUNDERSTOOD AUTHORITY TO DEPART. THE LATTER IS A VERY TOUGH HURDLE ON APPEAL. WHEN IT IS RAISED AS A 3553 FACTOR IN SUPPORT OF A VARIANCE, THE DENIAL IS REVIEWED FOR REASONABLENESS. THEREFORE, ON APPEAL, WE HAVE LESS BARRIERS WHEN WE ARGUE THAT THE SENTENCE IS SUBSTANTIVELY UNREASONABLE BECAUSE DEFENDANT HAS X,Y, AND Z, WHICH IS DOCUMENTED IN THE RECORD, AND THE DISTRICT COURT FAILED TO PROPERLY CONSIDER THIS MITIGATING FACTOR BECAUSE SENTENCE CANNOT BE LOCATED WITHIN PERMISSIBLE RANGE SUGGESTED BY 3553(a) FACGTORS, FAILED TO PROPERLY ACCOUNT FOR NEED TO PROVIDE DEFENDANT WITH X,Y,Z IN THE MOST EFFECTIVE MANNER, AND DISTRICT COURT PLACED TOO MUCH WEIGHT ON OTHER FACTORS (PUNISHMENT/DETERRENCE/PROTECT PUBLIC). ALSO, A SENTENCE CAN BE FOUND SUBSTANTIVELY UNREASONABLE IF IT IS JUST TOO LONG FOR THIS DEFENDANT BECAUSE OF MITIGATING FACTS IN THE RECORD THAT CAN BE CONSIDERED UNDER 3553(a).

HOWEVER, WHEN IT COMES TO **CRIMINAL HISTORY DEPARTURES UNDER CHAPTER 4**, WHICH ARE CONSIDERED HORIZONTAL DEPARTURES, YOU MAY WISH TO RAISE IT AS A SPECIFIC

CRIMINAL HISTORY DEPARTURE UNDER 4A1.3, EXCEPT FOR CAREER OFFENDER, SEE NOTE BELOW.

******FOR THESE ISSUES PLEASE SEE UNITED STATES V. INGRAM, 721 F.3D 35 (2D CIR. 2013) AND READ ALL OPINIONS***
YOU CAN ALSO CONSULT WITH JAMES AND I AS TO WHICH COURSE OF ACTION WOULD BE BEST BEFORE FILING YOUR SENTENCING MEMORANDUM

IT MAY FEEL AWKWARD, BUT WHEN THE COURT ASKS, "COUNSEL IS THERE ANYTHING ELSE?"—YOU SAY, "YES, YOUR HONOR, FOR THE RECORD, IN THE EVENT THERE IS AN APPEAL, WE OBJECT TO THE SENTENCE IMPOSED BECAUSE WE ASKED FOR X,Y, AND Z, AND THE COURT DENIED X,Y, AND Z, AND WE CONTINUE IN OUR OBJECTION AS STATED IN SENTENCING MEMO AND AS ARGUED ON THE RECORD." (SOMETHING ALONG THOSE LINES…IT HAS TO BE SPECIFIC TO THE THING YOU INITIALLY OBJECTED TO AND/OR SPECIFICALLY ASKED FOR, IN ORDER TO AVOID PLAIN ERROR REVIEW).

THE CIRCUIT HAS NOT RULED THAT FAILURE TO OBJECT KICKS IN PLAIN ERROR REVIEW ON SUBSTANTIVE REASONABLENESS REVIEW, SO BEST TO OBJECT ALL WAYS ALL DAY EVERY DAY.

IN YOUR FEDERAL CRIMINAL CODE BOOK, RIGHT AFTER THE TABLE OF CONTENTS IS A "TIME TABLE FOR LAWYERS IN FEDERAL CRIMINAL CASES" WHICH PROVIDES A SIMPLE GUIDE FOR THE READER.

ALSO, ALWAYS CHECK THE LOCAL RULES FOR THE NORTHERN DISTRICT OF NY

851/841 STATUTORY MINIMUMS

FIRST STEP ACT CHANGES TO DRUG MANDATORY MINIMUMS

21 U.S.C. SECTION 841(B)(1)(A)

10 years to life for drug type and quantity

15 years to life if one prior final conviction for "serious drug felony" or "serious violent felony"

20 years to life if death/serious bodily injury

25 years to life if two or more prior final convictions for "serious drug felony" or "serious violent felony"

Life if one prior final conviction for “serious drug felony” or “serious violent felony” plus death or SBI.

“Serious drug felony” now defined in newly created 21 USC 802(57)

-Only an offense described in 924e(2) (ACCA)

-federal offense under 21 USC 801 et seq. 21 USC 951 et seq. or 46 ch. 705

-state offense for manufacturing, distributing or possessing with intent to manufacture or

Or distribute a controlled substance as defined in 21 USC 802

-and a maximum term of imprisonment of 10 years or more prescribed by law

-and served term of imprisonment of more than 12 months

-and released from that term within 15 years of commencement of instant offense.

This new definition narrows the qualifying drug predicates that can be used to increase a mandatory minimum. Under the old definition, any offense “relating to” narcotic drugs, marihuana, anabolic steroids, depressant or stimulant substance would qualify as a predicate. The offense could include misdemeanors, no term of imprisonment was necessary and the age of the conviction didn’t matter.

The First Step Act while narrowing the definition for qualifying drug offenses, also added a new class of offenses, “serious violent felony” as a new basis for 851

“SERIOUS VIOLENT FELONY”

An offense described in section 3559©(2) or

“any offense that would be a felony violation of 18 USC 113 if it were committed in the special maritime and territorial jurisdiction of the United States”

And “for which the offender served a term of imprisonment of more than 12 months”

There is no staleness limit

18 USC Section 113(a)(1)-(3), (6)-(8) defines six “felony violations.”

3559©(2)(F)(i): “the term ‘serious violent felony means” a list of enumerated “Federal or State offense, by whatever designation and wherever committed.”

Also means 3559©(2)(F)(ii):

Any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use or threatened use of physical force against the person of another.

Additional Resources

Criminal Justice Reform Overview:

Reforming Criminal JusticeVolume 1: Introduction and Criminalization, Erik Luna, Editor and Project Director
http://academyforjustice.org/volume1/

Volume 2: Policing
http://academyforjustice.org/volume2/

Volume 3: Pretrial and Trial Processes
http://academyforjustice.org/volume3/

Volume 4: Punishment, Incarceration, and Release
http://academyforjustice.org/volume4/

Detention and Alternatives:

Federal Probation (September 2018), *Special Issue On: Pretrial Services: Front-end Justice*
https://www.uscourts.gov/sites/default/files/fedprobation-sept2018_0.pdf