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# THE HISTORY OF BAIL AND PRETRIAL RELEASE

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# THE HISTORY OF BAIL AND PRETRIAL RELEASE[1]

## A. INTRODUCTION

While the notion of bail has been traced to ancient Rome,[2] the American understanding of bail is derived from 1,000-year-old English roots. A study of this "modern" history of bail reveals two fundamental themes. First, as noted in June Carbone's comprehensive study of the topic, "[b]ail [originally] reflected the judicial officer's prediction of trial outcome."[3] In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant's probability of making all court appearances and not committing any new crimes. The science of accurately predicting a defendant's pretrial conduct, and misconduct, has only emerged over the past few decades, and it continues to improve. Second, the concept of using bail bonds as a means to avoid pretrial imprisonment historically arose from a series of cases alleging abuses in the pretrial release or detention decision-making process. These abuses were originally often linked to the inability to predict trial outcome, and later to the inability to adequately predict court appearance and the commission of new crimes. This, in turn, led to an over-reliance on judicial discretion to grant or deny a bail bond and the fixing of some money amount (or other condition of pretrial release) that presumably helped mitigate a defendant's pretrial misconduct. Accordingly, the following history of bail suggests that as our ability to predict a defendant's pretrial conduct becomes more accurate, our need for reforming how bail is administered will initially be great, and then should diminish over time.

## B. ANGLO-SAXON ROOTS

To understand the bail system in medieval England, one must first understand the system of criminal laws and penalties in place at that time. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs, which often led to wars. As Anglo-Saxon law developed, wrongs once settled by feuds (or by outlawry or "hue and cry," both processes allowing the public to hunt down and deliver summary justice to offenders) were settled through a system of "bots," or payments designed to compensate grievances.[4] Essentially, crimes were private affairs (unlike our current system of prosecuting in the name of the state) and suits brought by persons against other persons typically sought remuneration as the criminal penalty. In a relatively small number of cases, persons who were considered to be a danger to society ("false accusers," "persons of evil repute," and "habitual criminals,") along with persons caught in the act of a crime or the process of

1 While much of the text in this section is attributed to its source by footnote, any un-attributed statements were derived primarily from the following sources: F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898) [hereinafter Pollock & Maitland]; Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959, 1125 (1965) [hereinafter Foote]; Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas]; Gerald P. Monks, *History of Bail* (1982); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983) [hereinafter Carbone]; Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corrections, Issue 3:1; Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book,* Pretrial Servs. Res. Ctr. (Dec. 1999) [hereinafter Lotze, et al.]; Marie VanNostrand, *Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Crime & Just. Inst., Nat'l Inst. of Corrections (2007)) [hereinafter VanNostrand]; and material found on the Pretrial Justice Institute's website, at http://www.pretrial.org/. Carbone, in turn, cites to E. De Haas, *Antiquities of Bail* (1940), as well as to Pollock & Maitland for additional "thorough studies on the origins of bail." All links to websites are current to September 23, 2010.

2 *See* Lotze, et al., *supra* note 1, at 2 n. 3.

3 Carbone, *supra* note 1, at 574.

4 *Id.* at 519-20.

escaping, were either mutilated or summarily executed.[5] All others were presumably considered to be "safe," so the issue of a defendant's potential danger to the community if released was not a primary concern.

Nevertheless, the Anglo-Saxons *were* concerned that the accused might flee to avoid paying the bot, or penalty, to the injured (as well as a "wite," or payment to the king). Prisons were "costly and troublesome," so an arrestee was usually "replevied *(replegiatus)* or mainprised *(manucaptus)*," that is, "he was set free so soon as some sureties *(plegii)* undertook *(manuceperunt)* or became bound for his appearance in court."[6] Thus, a system was created in which the defendant was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction. The amount or substantive worth of that pledge, called "bail" (akin to a modern money bail bond), was identical to the amount or substantive worth of the penalty. Thus, if an accused were to flee, the responsible surety would pay the entire amount to the private accuser, and the matter was done.

According to Carbone, "[t]he Anglo-Saxon bail process was perhaps the last entirely rational application of bail."[7] Because the amount of the pledge was identical to the amount of the fine upon conviction, the system accounted for the seriousness of the crime and fulfilled the debt owed if the accused did not appear for trial. All prisoners facing penalties payable by fine were bondable, and the bail bond was perfectly linked to the outcome of trial – money for money.

## C. THE NORMAN CONQUEST TO 1700

The system became significantly more complex after the Norman Conquest, beginning in 1066:

> In the period following the Norman invasion, criminal justice gradually became an affair of the state. Criminal process could be initiated by the suspicions of a presentment jury as well as the sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses, and the delays between accusation and trial lengthened as itinerant royal justices administered local justice.[8]

Summary mutilations and executions were gradually phased out, but the overall use of corporal punishment increased, giving many offenders a greater incentive to flee. System delays also caused many persons to languish in primitive jails, and the un-checked discretion given to judges and magistrates to release defendants led to instances of corruption and abuse. Moreover, as the penalties changed, ideas about which persons should be bondable also shifted. The first to lose any right to bail whatsoever were persons accused of homicide, followed by persons accused of "forest offenses" (i.e., violating the royal forests), and finally a catch-all discretionary category of persons ac-

5 *See id.* at 520-521, and accompanying notes.

6 Pollock & Maitland, *supra* note 1, at 584. Indeed, even those unable to pay the "bot" were typically handed over to the victim for either execution or enslavement. Carbone, *supra* note 1, at 521 n. 18. If they fled, they were declared "outlaws," subject to immediate justice from whoever tracked them down. Apparently, however, certain offenses were considered to be "absolutely irreplevisable," requiring some form of prison to house the offenders. *See* Pollock & Maitland, *supra* note 1, at 584-85.

7 Carbone, *supra* note 1, at 520.

8 *Id*. at 521 (footnotes omitted).

cused "of any other *retto* [wrong] for which according to English custom he is not *replevisable* [bailable]."[9]

In medieval England, magistrates rode a circuit from county (shire) to county to handle cases. The shire's reeve (now known as the sheriff) was given the duty of holding individuals accused of crimes until the magistrate arrived. Because of the broad discretion given to these sheriffs to hold persons pretrial, bail administration varied from county to county, and instances of abuse became more frequent. Indeed, "[b]ail law developed in the twelfth and thirteenth centuries as part of an assertion of royal control over the authority of the sheriffs," which had grown increasingly corrupt.[10]

Following exposure of widespread abuse in the bail bond-setting process, Parliament passed the first Statute of Westminster, which assembled and codified 51 existing laws – many originating from the Magna Carta – and which covered, among other things, bail. Importantly, the Statute departed from traditional Anglo-Saxon customs by establishing three criteria to govern bailability: (1) the nature of the offense (categorizing offenses that were and were not bailable); (2) the probability of conviction (requiring the sheriff to examine all of the evidence and to measure such variables as whether or not the accused was held on "light suspicion"); and (3) the criminal history of the accused, often referred to as the bad character or "ill fame" of the accused. According to Carbone, "[i]n defining the criteria to govern bail, the Statute of Westminster rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial. Despite the overlapping and conflicting concerns of the statute's criteria, each criterion can be reduced to a simple standard: the seriousness of the offense offset by the likelihood of acquittal."[11] Indeed, this standard governed English bail bond determinations for the next five centuries.

During that 500-year period, Parliament occasionally passed legislation defining the bailability of crimes not mentioned in the Statute of Westminster. Mostly, however, Parliament focused on adding safeguards to the bail process to protect persons from political abuse and local corruption. For example, due to the vague nature of the terms "ill fame" and "light suspicion," as applied by local justices of the peace, in 1486 Parliament required the approval of two justices, rather than one, to release a prisoner and to certify the bailment at the next judicial session. In 1554, Parliament required that the bail bond decision be made in open session, that both justices be present, and that the evidence that was weighed be recorded in writing, essentially introducing the notion of a preliminary hearing into the law.

Over time, additional abuses led to additional reforms. For example, bailability under the Statute of Westminster was initially based on a recitation of a formal charge. Nevertheless, in 1627, King Charles I successfully ordered local judges to hold five knights with no charge, circumventing the Statute, as well as provisions in the Magna Carta upon which the Statute was based. Parliament responded by passing the Petition of Right, prohibiting detention by any court without a charge. In 1676, an individual known only as Jenkes was arrested and held for two months on a charge that, by law, required admittance to bail. Jenkes' case, and cases like it, ultimately led to Parliament's passage of the Habeas Corpus

9 *Id.* at 523 (internal quotation and footnote omitted).

10 *Id.* at 522 n. 29.

11 *Id.* at 526.

Act of 1679, which established procedures to prevent long delays before a bail bond hearing was held. This reform was only a minor hurdle for some of the stubborn and unruly judges of that time, who learned that the monetary amount of a bail bond could also be used to detain a defendant indefinitely. According to Foote, "[t]he Act of 1679 stopped the procedural runaround to which Jenkes had been subjected, but by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention."[12] Addressing this matter, the English Bill of Rights of 1689, accepted by William and Mary as they assumed the throne, stated that "excessive bail ought not be required," a phrase similar to that found in the Eighth Amendment to the U.S. Constitution.

## D. BAIL IN THE UNITED STATES

Caleb Foote summarized the state of English law on bail at the time of American Independence as follows:

> [A]s the English protection against pretrial detention evolved it came to comprise three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right, by a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary. Second was the simple, effective habeas corpus procedure which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689.[13]

Generally, the early colonies applied English law verbatim, but differences in beliefs about criminal justice (including the belief that the English laws were unnecessarily confusing), differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail. Even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases.[14] In 1682, "Pennsylvania adopted an even more liberal provision in its new constitution, providing that 'all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'"[15] The Pennsylvania language introduced consideration

12 Foote, *supra* note 1, at 967.

13 *Id.* at 968.

14 It is noted that the substantive criminal law of this period of time is often considered barbaric by today's standards. For example, despite the relatively liberal bail law in Massachusetts, along with homicide that Colony still punished by death (and therefore made unbailable) the offenses of idolatry, witchcraft, blasphemy, cursing or smiting a parent, and stubbornness or rebelliousness on the part of a son against his parents. *See id.* at 981. Moreover, many persons were imprisoned by the colonies for simply being impoverished: "In 1788, a year before Congress was to consider what was to become the eighth amendment, Massachusetts enacted legislation which . . . provided for compulsory work in houses of correction for, *inter alia,* 'all rogues, vagabonds and idle persons . . . common railers or brawlers, such as neglect their callings or employment, misspend what they earn, and do not provide for themselves for the support of their families . . . and of . . . vagrant, strolling and poor people.'" *Id.* at 990. By 1830 there were roughly three times as many persons imprisoned for debt as were imprisoned for crime. *Id.* at 991.

15 Carbone, *supra* note 1, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (footnotes omitted).

of the evidence for capital cases, and, "[a]t the same time, Pennsylvania limited imposition of the death penalty to 'willful murder.' The effect was to extend the right to bail far beyond the Massachusetts Body of Liberties and far beyond English law."[16] The Pennsylvania law was quickly copied, and as the country grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[17]

This is especially important, given that the United States Constitution itself only explicitly covers the right of habeas corpus in Article 1, Section 9, and the prohibition against "excessive bail" in the Eighth Amendment, which has been traced back to the 1776 Virginia Declaration of Rights.[18] There is no explicit right to bail in the U.S. Constitution, and the Constitution does not define which crimes are bailable, nor which defendants can be detained.[19] Nevertheless, also before the first Congress in the spring and summer of 1789 was Section 33 of the Judiciary Act, which granted an absolute right to bail in non-capital federal criminal cases.[20] To Foote, "advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of that right in the Constitution itself" was an anomaly that Congress likely did not recognize.[21] Still, through the Judiciary Act, the federal government joined a number of states, which, through their respective constitutions, provided a right to bail for nearly all defendants. Accordingly, at least in the federal justice system, "[p]rinciples of the early American bail system – set forth in the Judiciary Acts of 1789 and the U.S. Constitution's Eighth Amendment – were: (1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial."[22]

## E. THE PRACTICAL ADMINISTRATION OF BAIL IN ENGLAND AND AMERICA

As American law governing release on bail bonds was being established, cultural differences between the colonies and England also led to changes in the administration of bail. As discussed previously, under the Anglo-Saxon system of laws persons accused of committing serious offenses, persons with lengthy criminal histories, and those caught in the act of committing an offense were often summarily executed. For less serious crimes, the Anglo-Saxon system provided for pretrial release. This was partly due

16 *Id.* at 531-32 (footnotes omitted).

17 *Id.* at 532.

18 Article 1, Section 9 of the United States Constitution states that "[ T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The Eighth Amendment to the Constitution states that "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

19 Professor Foote argues that the founding fathers meant to include a right to bail provision, such as that found in the Statute of Westminster, but inadvertently left it out. *See* Foote, *supra* note 1, at 971-989.

20 The Judiciary Act provided a detailed organization of the federal judiciary that the constitution had sketched in only general terms. Section 33 of that Act read: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law."

21 Foote, *supra* note 1, at 972.

22 Spurgeon Kennedy, D. Alan Henry, John Clark, & Jolanta Juszkiewicz, *Pretrial Release and Supervision Program, Training Supplement,* Pretrial Servs. Res. Ctr. (Wash. D.C., 1997), at 2 [hereinafter Kennedy, et al.].

to the fact that the magistrates tasked with hearing these cases traveled from county to county, and were often only present in a particular locality a few months of the year. Because most persons were released, jails were rarely necessary, and those that did exist were primitive.

Under the Anglo-Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend, neighbor, or family member, to agree to stand in for the accused if he absconded. As the bot system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly. After the invasion, however, with increased use of corporal punishment, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act.[23] Moreover, the threat of corporal punishment led to increasing numbers of offenders who refused to stay put. As noted by Carbone, these changes in the substantive criminal law, as well as other factors such as procedural delays, led to complexities that required a "new equation" between pretrial release and the criminal sanctions:

> The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pretrial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue then calculating the amount of the bot.[24]

The colonies faced these same complications, with some additions. As noted by author Wayne H. Thomas, Jr.:

> First, unlike English law, the Judiciary Act of 1789 and the constitutions of most states provided for an absolute right to have bail set except in capital cases. Second, the absence of close friends and neighbors in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and, third, the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee. Commercial bonds, never permitted in England, were thus a useful device in America.[25]

## F. THE RISE OF THE COMMERCIAL MONEY BAIL BONDSMAN

Arbitrary money bail bond amounts, coupled with a growing number of defendants who were unable to pay them (either by themselves or with the help of friends or relatives), combined to give birth to a profession unique to the field of American criminal justice – the commercial money bail bond industry. There is some debate on when, exactly, this profession got its start.

23 According to one commercial bail bondsman website, "Bonds are . . . an arbitrary number set for court appearance, and are not normally lowered over time." http://www.austinbailbonds.net/faq/. The arbitrary nature of bail bond amounts is typically overlooked or even ignored by actors in the criminal justice system because more meaningful alternatives have not been pursued.

24 Carbone, *supra* note 1, at 522.

25 Thomas, *supra* note 1, at 11-12.

*Taylor v. Taintor*,[26] the U.S. Supreme Court case that is commonly cited as the authority for bail bondsmen to act as bounty hunters, was decided in 1872, but it is not clear that the sureties in that case were acting in a commercial capacity. It is commonly believed that the first true commercial money bail bondsmen, persons acting as sureties by pledging money or property to fulfill money bail bond conditions for a criminal defendant in court, were Peter and Thomas McDonough in San Francisco, who began underwriting bonds as favors to lawyers who drank in their father's bar. When these brothers learned that the lawyers were charging their clients fees for these bonds, the brothers began to charge as well. By 1898, the firm of McDonough Brothers, established as a saloon, found its business niche by underwriting bonds for defendants who faced charges in the nearby Hall of Justice, or police court. The company, which became known as "The Old Lady of Kearny Street," rose and fell in only fifty years, leaving a legacy prototypical of the growing commercial surety industry. In an account of the firm's demise, Time Magazine reported the following:

> The Old Lady helped San Francisco be what many a citizen wanted it to be – a wide open town. She furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work. But she was also a catalyst that brought underworld and police department into an inevitably corrupt amalgam. At her retirement the San Francisco Chronicle waxed nostalgic: 'The Old Lady . . . will take to her rocking chair, draw her shawl about her . . . .' But many a citizen thought simply: 'Good riddance.'[27]

With a growing number of defendants facing increasingly higher money bail bond amounts, the professional bail bond industry flourished in America. If anyone ever saw these businesses as problematic, however, it was rarely reported. Nevertheless, by the 1920s Arthur L. Beeley studied records of the Municipal and Criminal Court of Cook County, Illinois, and in 1927 published his landmark study, *The Bail System in Chicago,"* which publicized the inequities of the bail system and explored the possibility of using alternatives to surety bail to effectuate pretrial release."[28] As Thomas recounts:

> Beeley found that bail amounts were based solely on the alleged offense and that about 20 percent of the defendants were unable to post bail. He also noted that professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay off on forfeited bonds. Beeley concluded that 'in too many instances, the present system . . . neither guarantees security to society nor safeguards the right of the accused.' It is 'lax with those with whom it should be stringent, and stringent with those with whom it could safely be less severe.' Among Beeley's recommendations were a greater uses of summons to avoid unnecessary arrests and the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual.[29]

26 83 U.S. 366 (1872).

27 *The Old Lady Moves On* (Aug. 18, 1941), found, at http://www.time.com/time/printout/0,8816,802159,00.html.

28 Thomas, *supra* note 1, at 13, citing Arthur L. Beeley, *The Bail System in Chicago* (Chicago: Univ. of Chicago Press, 1927; reprinted 1966).

29 *Id*. at 13-14.

## G. STACK V. BOYLE AND CARLSON V. LANDON

Little happened in the history of bail and the pretrial process between 1927 and 1951, the year the Supreme Court decided *Stack v. Boyle,* the first major Supreme Court case concerning issues in the administration of bail.[30] In that case, a number of federal defendants moved the trial court to reduce their money bail bond amounts on the ground that they were excessive under the Eighth Amendment. In support of their motion, the defendants submitted proof of their financial resources, family ties, health, and prior criminal records. It was undisputed that the money bail bonds set for each of the defendants was fixed in a sum much higher than that usually imposed for offenses with like penalties. The government produced no evidence relating to these four defendants, and rested its case on the fact that four other persons previously convicted of the same crimes had forfeited their bail bonds. The defendants' motions were denied, and the case was ultimately reviewed by the United States Supreme Court.

In its opinion, the Court held the government's actions unconstitutional, writing that "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."[31] Specifically, the Court wrote as follows:

> The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.[32]

Because the government produced no evidence to justify why the money bail bond amount for each of the defendants was higher than that usually fixed for similar crimes, the Court remanded the case to the trial court for new bail bond hearings.

Being the first expression of the Supreme Court's views on bail, the case is known for more than just its holding. First, the Court articulated the reasons for a federal right to bail:

> [f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[33]

Second, the case includes ample language to support the notion that bail should only be based on an individualized assessment of each defendant. The Court wrote as follows:

> Since the function of bail is limited, the fixing of bail for any individualized defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, are to be applied in each case to each defendant.[34]

30 *Stack v. Boyle,* 342 U.S. 1 (1951).

31 *Id*. at 6.

32 *Id.* at 5.

33 *Id.* at 4 (internal citations omitted).

34 *Id.* at 5, 6. In addition to granting a right to bail, at that time Rule 46 also required the bail bond to be set to "insure

This notion was amplified by Justice Jackson in his frequently quoted concurrence to the opinion, which eloquently summarized his position on individualized bail assessments:

> It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation, and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge, defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character, and relation to the charge -- elements Congress has directed to be regarded in fixing bail -- I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.[35]

Four months after *Stack,* however, the Supreme Court clarified that the traditional right to freedom before conviction in the federal system was not, in fact, absolute. In *Carlson v. Landon,* the Court wrote that,

> [t]he bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes or cases in which bail shall be allowed in the country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrestees must be bailable.[36]

With these two cases, the Supreme Court established that while a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures. Where a bail bond is permitted, however, there must be an individualized determination using standards designed to set the bail bond at "an amount reasonably calculated" to assure the defendant's return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, and no more.

## H. EMPIRICAL STUDIES AND THE MANHATTAN BAIL PROJECT

Empirical studies on the administration of bail, akin to Arthur Beeley's 1927 study, continued after *Stack* and *Carlson.* In 1954, Caleb Foote examined the Philadelphia bail system and demonstrated fundamental inequities in bail bond setting prac-

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

35 *Id.* at 9.

36 *Carlson v. Landon,* 342 U.S. 524, 545-46 (1952) (footnotes omitted).

tices.[37] At the time, Foote observed that for minor offenses, bail bonds were generally based solely on police evidence. For major offenses, a bail bond was set based on the District Attorney's recommendation approximately 95% of the time. Moreover, Foote observed that those who remained in detention pretrial were mostly poor and unable to raise the bond amount. Finally, Foote found that those defendants who were unable to pay their money bail bond amounts were more likely to be convicted and to receive higher sentences than those defendants who were able to pay their money bail bond amounts. Other studies in the 1950s and early 1960s showed similar outcomes, and laid the foundation for the bail reform movement of the 1960s:

> [these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[38]

Perhaps the most notable of these studies, and one of the first to explore alternatives to release on financial conditions (money bail bonds), was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. That study, named the Manhattan Bail Project, was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the defendant's own recognizance]."[39] The success of the program quickly became evident:

> In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial.[40]

The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.

## I. RISING DISSATISFACTION WITH COMPENSATED SURETIES

In Illinois, dissatisfaction with the commercial money bail bond system in Chicago led to state legislation in 1963 known as the Illinois Ten Percent Deposit Plan. Under this plan, Illinois

37 Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 Univ. of Pa. L. Rev. 1031-1079 (1954).

38 Thomas, *supra* note 1, at 15.

39 *Id.* at 4.

40 Lotze, et al., *supra* note 1, at 4; *see also* Thomas, *supra* note 1, at 4-6.

retained the use of money bail bonds as the predominant form of release, but eliminated the need for commercial money bail bondsman:

> Under this legislation, the 10 percent bonding fee that had previously been paid to the bondsman was to be paid to the court, which was now required to release the defendant on less than full bond. Moreover, the fee paid to the court, unlike the fee paid to a bondsman, is refunded to the defendant upon completion of the case, less a small service fee.[41]

By 1963 the courts, too, were also questioning the desirability of a system that was based on secured bonds and dominated by commercial money bail bondsmen, who had, in turn, become the focus of numerous inquiries into their often-abusive and corrupt practices.[42] As one court explained:

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who, in their judgment, is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[43]

41 Thomas, *supra* note 1, at 7 (footnote omitted); *see also Id.* at 183-89. For a more detailed description of the Illinois plan, *see The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 240-246 (Washington, D.C. April 1965). The Illinois system was upheld as constitutional against Due Process and Equal Protection challenges in *Schilb v. Kuebel,* 404 U.S. 357 (1971).

42 *See* Thomas, *supra* note 1, at 15-16.

43 *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

## J. THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

Statements such as the one quoted above got the attention of U.S. Attorney General Robert Kennedy, who in March of 1963 instructed all United States Attorneys to recommend the release of defendants on their own recognizance "in every practicable case."[44] He then convened the National Conference on Bail and Criminal Justice in May of 1964, bringing together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present "for analysis and discussion specific and workable alternatives to [money] bail based on the experience of the Manhattan Bail Project and some others which followed in its wake."[45] Opened with statements by Kennedy and Chief Justice Earl Warren, the Conference analyzed topics involving release on recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes (so-called "preventative detention"), pretrial release based on money or other conditions generally, and pretrial release of juveniles. Attorney General Kennedy closed the conference with the following statement:

> For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.
>
> ****
>
> What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely

44 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 297.

45 *Id.* at XIV.

> illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?[46]

## K. 1960S BAIL REFORM

Also in 1964, on the eve of the National Bail Conference, Senator Sam Ervin introduced a series of bills designed to reform bail practices in the federal courts. Hearings on the bills ultimately led to passage, in 1966, of the Federal Bail Reform Act. This Act, the first major reform of the federal bail system since the Judiciary Act of 1789, contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant's appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.[47] Generally, the Act provided that non-capital defendants were to be released pending trial on their personal recognizance or on "personal bonds" unless the judicial officer determined that these incentives would not adequately assure their appearance at trial. In those cases, the judge was to choose the least restrictive alternatives from a list of conditions designed to secure appearance. Those charged with a capital offense, or who were convicted and were awaiting sentencing or appeal, were given a different standard that included public safety: they were to be released unless the judge had reason to believe that they might flee or be a danger to the community.

After passage of the Federal Bail Reform Act of 1966, many states passed similar statutes. By 1971, at least 36 states had enacted statutes authorizing the release of defendants on their own recognizance. By 1999, "virtually every state [had] established by statute or case law the practice of pretrial supervised release."[48]

Moreover, by 1965, fifty-six jurisdictions reported operational bail projects modeled after the Manhattan Bail Project, and two statewide projects were reported to be operating in New Jersey and Connecticut. According to Thomas,

> [t]he procedure adopted for the release of defendants prior to trial in each of these jurisdictions was the written promise to appear. No money was required to secure such release. Although in limited use prior to the Vera experiment, written promises to appear became much more widely used as a result of the Manhattan Bail Project. The terminology varied from one jurisdiction to another, but whether it was known as own recognizance (O.R.), personal recognizance, pretrial parole, nominal bond, personal bond, or unsecured appearance bond, the result was the same. The defendant was released without posting money bail. In theory, the mechanisms differed; for example, nominal bond required the defendant to post one dollar. In practice, however,

46 *Id*. at 296.

47 *See* Lotze, et al, *supra* note 1, at 5. The Act was codified at 18 U.S.C. §§ 3141-3151.

48 *The Supervised Pretrial Release Primer,* Pretrial Servs. Res. Ctr. (BJA, August 1999).

> this was usually never posted. Also, unsecured appearance bonds, in theory, required the defendant to pay the full bond amount should he fail to appear, but this was rarely more than an idle threat. Likewise, most own recognizance releases involved criminal penalties for failure to appear, but these too were rarely enforced. The result was that defendants were released on their personal promises to appear, and this alone proved a sufficient guarantee of their appearance in court. Defendants released on O.R. appeared as well as or better than those on money bail. The Manhattan Bail Project reported a failure to appear rate of less than seven-tenths of 1 percent.[49]

The gradual change from bail projects fashioned after the Vera experiment to contemporary pretrial services programs began in the District of Columbia. Although the Bail Reform Act of 1966 specified factors to be considered in releasing defendants pretrial, it left unclear who should gather the necessary information. Pretrial services agencies, beginning with the District of Columbia Bail Agency, evolved to fill in this gap. In 1968, "[t]he D.C. Bail Agency assumed much greater responsibility in seeing that bail practices were carried out as mandated. In addition to interviewing, collecting background information, verifying information, [and] producing reports and recommendations to the court, the Pretrial Services programs began supervising defendants on various release conditions."[50]

## L. PROFESSIONAL STANDARDS

With interest growing in bail reform and more attention being given to the pretrial release decision, professional organizations began issuing standards designed to address relevant bail and pretrial release, detention, and supervision issues at a national level. The American Bar Association (ABA) was first, with its *Standards Relating to the Administration of Criminal Justice* in 1968,[51] followed by the National Advisory Commission on Criminal Justice Standards and Goals,[52] the National District Attorneys Association (NDAA), with its *National Prosecution Standards,*[53] and the National Association of Pretrial Services Agencies (NAPSA), with its *Performance Standards and Goals for Pretrial Release.*[54] Initially, each of these sets of professional standards were based on reforms codified in the 1966 federal act, and each reflected the view that the current bail system was flawed, primarily due to its emphasis on money bail bonds and commercial sureties. In its first expression on the topic, the ABA stated:

> [t]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant

49 Thomas, *supra* note 1, at 25.

50 *History of Pretrial Services Programs,* at http://www.pretrial.org/PretrialServices/HistoryOfPretrialRelease/Pages/default.aspx.

51 *See American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) [hereinafter ABA Standards].

52 *National Advisory Commission on Criminal Justice Standards and Goals* (*Corrections, Courts*) (1973).

53 *See National Prosecution Standards (2d Ed.),* Nat'l Dist. Atty's Assoc. (1991) [hereinafter Prosecution Standards]. The NDAA has released a third edition to its standards, albeit to members only through its website found at http://www.ndaa.org/.

54 *See Standards on Pretrial Release (3rd Ed),* Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004), at 11-12 [hereinafter NAPSA Standards].

> must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.[55]

Though virtually identical to the 1966 Bail Reform Act, these standards added input on two important issues: (1) potential danger to the community as a factor that should be considered by the judicial officer in making his decision (so-called preventative detention), and (2) abolition of surety bail for profit as an option.

### (i) Preventative Detention

The first of these issues, often referred to as the issue of "preventative detention" of arrestees who are considered threats to society, had been recognized as a common, albeit secretive practice for some time. Addressing the National Conference on Bail and Criminal Justice in 1964, one commenter noted:

> [w]hile we lack a statistical statement of the problem, it is apparent: (1) that many factors other than those which indicate the likelihood of flight are considered in the setting of bail; and (2) that bail is used, in current practice, to detain individuals in custody – not for assuring their appearance at trial – but rather because of the belief that the defendant, if allowed to go free, is likely to commit additional crimes or is apt to intimidate witnesses or victims.[56]

The elusive nature of this issue is apparent in the following statement, written in 1967: "[a]lthough it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion."[57] In the literature, persons often describe this practice as furthering a "sub rosa" purpose of bail, since the purpose of bail bonds until this time had always been only to assure the appearance of a defendant at trial.

Indeed, deterring flight was so ingrained as the sole purpose of bail that Congress left appearance of the defendant at trial as the sole standard for weighing the bail bond decision in the Federal Bail Reform Act. Thus, in non-capital cases the 1966 law did not expressly permit a judge to consider the defendant's future dangerousness or community safety during the release decision. The District of Columbia was particularly critical of this aspect of the Bail Reform Act, which allowed the release of potentially dangerous non-capital suspects. Moreover, this criticism found an audience with the Nixon administration, an administration that had campaigned on a law-and-order platform. A proposed amendment to the Bail Reform Act to allow for preventative detention was voted down. Nevertheless, as a compromise in 1970, Congress changed the 1966 Act as it applied to persons charged with crimes in the District of Columbia to allow judges to consider dangerousness to the community, along with risk of flight, in setting bail bonds in non-capital cases.[58]

55 American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), at 1 (reprinted in ABA Standards, *supra* note 50, at 31).

56 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 151 (statement of Herman Goldstein, Executive Director to the Superintendent of Police – Chicago, Ill.).

57 John V. Ryan, *The Last Days of Bail,* 58 J. of Crim. Law, Criminology, and Police Sci., 542, at 548 (1967) (footnote omitted).

58 District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

This was the beginning of a vigorous debate over whether or not community safety should be formally recognized as a factor for judges to weigh in setting bail bonds. This particular debate, the debate over preventative detention, would continue until passage of the Comprehensive Crime Control Act of 1984, which is discussed later in this paper.

### (ii) Compensated Sureties

The second issue raised in the newly adopted professional standards concerned abolition of compensated sureties. Increased use of non-financial release options during the period of bail reform in the 1960s reduced the courts' reliance on commercial money bail bondsmen. Over time, the courts and others realized that the administration of bail using commercial sureties was fundamentally flawed, and began to openly oppose the compensated surety system. The 2007 edition of the ABA standards provides the rationale for its long-standing position against compensated sureties:

> There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks – based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsmen's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.[59]

Today, as it was in 1968, the ABA's call for abolition of compensated sureties is adamant: "[T]heir role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification."[60]

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59 ABA Standards, *supra* note 51, at 45 (footnote omitted).

60 Id. at 46. Best practice standards are common to a number of justice-related fields, but in the area of pretrial release, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system," which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals. See Marcus, *The Making of the ABA Criminal Justice Standards*, 23 Crim. Just. No. 4 (Winter 2009).

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100

## M. BAIL REFORM THROUGH THE 1970S

"Despite its impressive beginning, however, the bail reform movement waned considerably in the late 1960s. Many of the early own-recognizance release programs ceased operating, and those that remained often had tenuous financial and official support."[61] A good example is found in the creation of the Harris County, Texas, Pre-Trial Release Agency, which became a focus of attention when a federal court acted to remedy "severe and inhumane overcrowding of inmates" at the Harris County jail.[62] The federal court, recognizing the Agency's strong fundamental premise and great expectations at its creation in 1972, nevertheless found it to be "foundering," "deficient," and "ineffective" in 1975. The reasons for this were many, including harassment and sabotage by the money bail bondsmen, the Agency's inefficient physical placement, its lack of effective internal practices, and its lack of an adequate budget, personnel, training, and supervision. One of the biggest barriers to the Agency's success, however, was its reliance on methods that were largely subjective and often arbitrary. As the court noted, "[t]he largest impediment to prompt, efficacious operation of pretrial release is the agency's use of, and total reliance upon, a subjective standard of evaluation of each interviewee. That is, the 'gut' reaction of the interviewer is used to determine whether a defendant is a good risk for release on recognizance."[63] To remedy this particular situation, the court ordered the Agency to adopt an objective point system for evaluating release on recognizance, "designed with a view towards reducing to a minimum the refusing of 'PR' bonds on 'hunches.'"[64]

The movement toward more and increasingly efficient pretrial services agencies has continued through the 1970s to the present. By 2003, the Bureau of Justice Assistance estimated that pre-

law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts, including the Colorado Supreme Court, had used the Standards to implement new court rules. *Id.* According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects." *Id.* (internal quotation omitted).

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

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationale for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, various social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Study (the most notable social science experiment in the field), discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that the defendant may pose to public safety." ABA Std. 10-5.3 (a) (commentary).

61 Thomas, *supra* note 1, at 8.

62 *See Alberti v. Sheriff of Harris County,* 406 F. Supp. 649 (S.D. Tex. 1975).

63 *Id.* at 665.

64 *Id.* at 683.

trial services agencies were operational in over 300 jurisdictions in the United States.[65] Moreover, the federal system showed substantial progress toward bail reform in the 1970s. Because the 1966 Bail Reform Act contained no mechanism for gathering background information on defendants, in 1974 Congress created 10 pilot pretrial agencies within the federal courts to provide judges with the information necessary to make release decisions.[66] "[These] agencies, following and expanding on approaches initially developed by pretrial services projects in State court systems, developed strong support from judges and magistrates in the pilot districts."[67] Ultimately, after testimony from federal magistrates that neither defense counsel nor prosecutors were able to provide them with the information necessary to make an informed bail bond decision, Congress passed the Pretrial Services Act of 1982, which expanded the pilot program by establishing pretrial service agencies in virtually all of the federal district courts.[68]

## N. THE BAIL REFORM ACT OF 1984

While pretrial services programs found their footing in the wake of the 1966 Act, a new debate over the administration of bail began to emerge. "The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond. Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions."[69] The Bail Reform Act of 1966 had only narrowly addressed public safety. Under the Act, persons charged with *capital* offenses or awaiting sentence or appeal could be detained if the court found that "no one condition or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community."[70] Nevertheless, judges were not authorized to consider danger to the community for any other bailable defendants.

After Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, the first bail law in the country to make community safety an equal consideration to future court appearance in bail bond setting, many states drafted bail laws that also addressed future dangerousness and preventative detention. In 1984, Congress addressed the issue in the federal courts with its passage of the Comprehensive Crime Control Act of 1984.[71] Chapter I contained the Bail Reform Act of 1984, codified at 18 U.S.C. Sections 3141-3156, which amended the 1966 Act to include consideration of danger in order to address "the alarming problem of crimes committed by persons on release."[72] The

65 *See* John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington D.C.: BJA, 2003), at 2 [hereinafter Clark & Henry, *Programming*].

66 The pilot agencies were created in Title II of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 18 U.S.C. § § 3161-74.

67 Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, and Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential,* Nat'l Inst. of Just. (Washington D.C. 2001), at 6 [hereinafter, Mahoney, et al.].

68 Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152. For articles reflecting on the 25th anniversary of the Act, *see* Federal Probation (Admin. Office U.S. Courts, Sept. 2007).

69 *The Supervised Pretrial Release Primer,* Pretrial Servs. Res. Ctr. (BJA, August 1999), at 5.

70 Former 18 U.S.C. § 3148.

71 Pub. L. No. 98-473, 98 Stat. 1976 (1984).

72 *U.S. v. Salerno,* 481 U.S. 739, 742 (1987) (quoting S. Rep.

1984 Act mandates "pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[73] The Act further provides that if, after a hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person (as required) and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."[74] The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.[75]

In *United States v. Salerno,* the United States Supreme Court upheld the 1984 Act's preventative detention language against facial due process and eighth amendment challenges. After reviewing the Act's procedures by which a judicial officer evaluates the likelihood of future dangerousness, the Court wrote, "[w]e think these extensive safeguards suffice to repel a facial challenge," and "[g]iven the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment."[76] Responding to the argument that the Act violated the Eighth Amendment, the Court concluded:

> Nothing in the text of the Bail Clause limits permissible Governmental considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eight Amendment does not require release on bail.[77]

Prior to *Salerno,* the ABA had endorsed limited preventative detention in its revised Standards. After *Salerno,* both the NAPSA and the Prosecution Standards were revised to include public safety as a legitimate purpose of the pretrial release decision. By 1999, it was reported that at least 44 states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision.[78] Nevertheless, the need for improvement in this area is still evident. As noted in the ABA's current version of its *Standards for Criminal Justice,*

> although many states have revised their bail statutes to allow consideration of risk to public safety, no states have yet adopted a system that calls for the type of careful scrutiny of information about the defendant's background

98-225, p. 3, 1983).

73 18 U.S.C. § 3142 (b).

74 *Id.* § 3142 (e).

75 *See id.*

76 *Salerno,* 481 U.S., at 752.

77 *Id.* at 754-55.

78 *See* Lotze, *et. al., supra* note 1, at 12.

> and financial circumstances that was recommended in the [previous] Standards. On the contrary, it is common in many jurisdictions – especially ones that have no pretrial services program – for decisions about pretrial detention or release to be made with little or no information about the financial circumstances of the defendant or other factors relevant to assessing the nature of any risk presented by the defendant's release. Often, the decisions are made in hurried initial appearance proceedings in which the defendant is without counsel.
>
> * * * *
>
> Major improvements in pretrial processes are needed and are clearly feasible. A number of jurisdictions have established systems for gathering relevant and objective information about defendants' backgrounds and about the appropriateness of particular conditions for individual defendants, making release decisions based on such information, and successfully managing defendants on release through comprehensive pretrial services. In four states and the District of Columbia, bail bonding for profit has been completely or substantially eliminated.[79]

Specifically, Cohen & Reaves report that Illinois, Kentucky, Oregon, and Wisconsin do not allow commercial bail bonds, and the District of Columbia, Maine, and Nebraska allow these bonds but rarely use them.

In 1987, the Government Accounting Office studied the impact of the Bail Reform Act of 1984, as compared to the previous Act of 1966. In its report, the GAO found:

> (1) a larger percentage of defendants were detained during their pretrial period under the new law; (2) under the old law defendants were detained because they did not pay the set bail, while under the new law 51 percent were detained for lack of bail money and 49 percent were detained because they were considered a danger risk; (3) the new law left open to interpretation whether the money bail could be set at an amount that the defendant was unable to pay; (4) most of the defendants qualified for the rebuttable-presumption-of-danger provision were indicted for drug offenses that had imprisonment terms of 10 years or more; (5) the new law did not require federal prosecutors to seek pretrial detention of all defendants who met the rebuttable presumption criteria; (6) defendants released on bail who failed to appear for judicial proceedings totaled 2.1 percent under the old law and 1.8 percent under the new law; (7) defendants who were arrested for committing new crimes totaled 1.8 percent under the old law and 0.8 percent under the new law; and (8) although most court officials felt that the new bail law was more direct and honest because it allowed the system to label defendants as dangerous, they were concerned about the amount of time involved in attending detention hearings.[80]

These findings are enlightening to the federal system, as well as to the various state and local jurisdictions creating or modifying preventative detention provisions.

79 ABA Standards, *supra* note 51, at 32-33.

80 *Criminal Bail: How Bail Reform is Working in Selected District Courts,* GAO Report No. GGD-88-6 (Oct. 23, 1987) (press release), at 1.

## O. JAIL CROWDING

One of the most significant developments affecting the administration of bail in the last 20 years is undoubtedly jail crowding. As noted by the U.S. Department of Justice's National Institute of Corrections, jail crowding "can create serious management problems," can "compromise the safety of inmates and staff," can result in the "loss of system integrity," and "can even lead to system fragmentation."[81]

Moreover, as noted by the ABA, in addition to any negative consequences to the defendant that are caused by unnecessary pretrial detention (e.g., loss of job, strained family relations), "such detention, often very lengthy, leads directly to overcrowded jails and ultimately to large expenditures of scarce public resources for construction and operation of new jail facilities."[82]

In 1984, officials responding to a National Institute of Justice survey described jail crowding as "the most pressing problem facing criminal justice systems in the United States."[83] In 2000, a Bureau of Justice Assistance monograph reported that "jail crowding continues to be a nationwide problem. This is somewhat surprising because in the intervening years [between 1985 and 1999] there was a boom in the construction of correctional facilities in many parts of the country and a decline in crime through the entire United States."[84] By 2006, the nation's jail population totaled over 750,000 inmates, and local jail facilities operated at about 94% of their rated capacity.[85] Moreover, "[s]ince 2000, the number of unconvicted inmates held in local jails has been increasing. As of June 30, 2006, 62 percent of inmates held in local jails were awaiting court action on their current charge, up from 56 percent in 2000."[86] Another study of felony defendants in 75 of the most populous counties in the U.S. found that 38% of all defendants charged with a felony were held in confinement until the disposition of their court case.[87]

The cost of housing these pretrial inmates has become prohibitive (as much as $65 to $100 per inmate per day, or nearly $24,000 to $36,500 per inmate per year), and the cost to build new facilities is also high (as much as $75,000 to $100,000 per bed).[88] With only three realistic alternatives for alleviating a crowded jail facility (reduce bookings, reduce inmate lengths of stay, or build a new facility with more beds), many jurisdictions simply cannot continue to tolerate inefficient bail administration practices that exacerbate the crowding problem.

Today, jail crowding remains a legitimate, if not compelling purpose for jurisdictions to

81 Bennett & Lattin, *Jail Capacity Planning Guide, A Systems Approach* (NIC No. 022722, Nov. 2009) available at http://nicic.gov/Library/022722.

82 ABA Standards, *supra* note 51, at 33.

83 *National Assessment Program: Assessing Needs in the Criminal Justice System* (Washington, DC: Abt Assoc. for the Nat'l Inst. of Just., Jan. 1984), at 4.

84 *A Second Look at Alleviating Jail Crowding; A Systems Perspective* (BJA, 2000), at 1.

85 *See* William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (BJS 2007), at 5, 7 [hereinafter Sabol].

86 *Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000,* (BJS Press Release, June 28, 2007); *See* also Sabol et al., *supra* note 85, at 6

87 *See* Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, U.S. Dep't of Just. Office of Just. Programs, Bureau of Just. Stats. (Nov. 2007) at 2 [hereinafter Cohen & Reaves].

88 Of course, construction and management costs to build new jail facilities can vary widely based on a number of factors, and calculation of an accurate average jail bed cost can be elusive. *See* Alan R. Beck, *Misleading Jail Bed Costs,* at http://www.justiceconcepts.com/cost.htm.

reduce their reliance on the traditional money bail system. In the recent article, *The Impact of Money Bail on Jail Bed Usage* (American Jails, July/August 2010),[89] author John Clark presents the most recent Bureau of Justice Statistics data showing: (1) that jail populations, and especially pretrial inmate populations, have continued to rise even as reported crime has gone down; (2) that the growth in pretrial inmate populations is being driven by the use of money bail; and (3) that money bail adds significantly to a defendant's length of stay in the jail, and sometimes means that the defendant will not be released at all prior to case adjudication. The author concludes that "[i]n looking for ways to reduce correctional populations to better manage costs, the pretrial population must have a prominent place in any discussions. And at the forefront of those discussions must be the changing of reliance on money bail."

## P. MONEY BAIL BONDSMEN v. PRETRIAL SERVICES AGENCIES

Increased judicial reliance on personal recognizance bonds and on pretrial services agencies for supervision of released inmates has generated friction between these agencies and members of the commercial surety industry. During the mid-1990s, money bail bond organizations, including the National Association of Bail Insurance Companies ("NABIC") and various state bail organizations, worked with the American Legislative Exchange Council ("ALEC," an organization consisting of "state legislators and conservative policy advocates," including corporations and trade associations such as NABIC and the American Bail Coalition) to create an initiative titled "Strike Back!" Strike Back was an aggressive and concerted effort to eliminate pretrial services agencies (termed "free bail" agencies and "criminal welfare programs" in the commercial surety industry literature) and release on personal recognizance bond to promote the interests of the commercial surety industry. These efforts were opposed in the mid 1990s by organizations such as the Pretrial Services Resource Center (now known as the Pretrial Justice Institute),[90] and have been countered since by pretrial services and other justice organizations, which continue to call for the abolition of compensated sureties. In the years leading up to 2009-2010, money bail bondsmen have promoted their interests somewhat more passively through repeated reference to two studies, one examining failure to appear rates, fugitive rates, and capture rates for felony defendants released on cash bond, deposit bond, own recognizance, and surety bond,[91] and the other a comparison of pretrial release options in large California counties.[92]

## Q. 2009-2010 DEVELOPMENTS

Most recently, jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release. This renewed interest has been amplified in 2009 to 2010, as manifested by the following relevant bail-related events in several categories.

89 Available from the American Jail Association, at http://www.aja.org/advertising/jailmagazine/default.aspx.

90 *See, e.g.,* Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision,* Pretrial Servs. Res. Ctr. (July 1994, edited and reprinted in 1996) [hereinafter Kennedy & Henry]. The 1996 reprint is available online through the Pretrial Justice Institute, at http://www.pretrial.org/Docs/Documents/commsuretybail.doc.

91 Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping,* 47 J. of L. and Econ. 93 (2004).

92 Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties: 1990-2000,* found online, at http://www.suretyoneinc.com/sorpts/TheEffectivenessPreTrialRelease..pdf.

### Pretrial Risk Assessments

In April of 2009, the U.S. Department of Justice issued its document titled "Pretrial Risk Assessment in the Federal Court – For the Purposes of Expanding the Use of Alternatives to Detention," a report on the pretrial services function in the federal court system from an evidence-based perspective.[93] The study's stated purpose was to (1) identify statistically significant and policy relevant predictors of pretrial outcomes in order to identify federal defendants who are suitable for pretrial release without jeopardizing community safety or judicial integrity, and (2) develop recommendations for the use of funding that supports the federal judiciary's alternatives to detention program.

This study coincided with the creation of a Federal Pretrial Risk Assessment, which was developed by Dr. Christopher Lowenkamp to provide a consistent and valid method of predicting risk of failure to appear, new criminal arrests, and technical violations for the federal court system.[94]

For similar reasons, the State of Virginia revalidated its statewide pretrial risk assessment instrument in May of 2009,[95] and other jurisdictions across the United States are currently looking at ways to either create or incorporate existing validated risk assessments into their practices. For example, throughout 2009 several Colorado counties representing roughly 85% of the State's population continued their work on the Colorado Improving Supervised Pretrial Release project. That project aims to develop a similar validated pretrial risk assessment for use in the Colorado courts, as well as evidence-based supervision protocols that match pretrial release supervisory techniques to each defendant's specific risk profile in order to lessen his or her risk to public safety and for failure to appear for court.[96]

### National Crime Commission

In April 2009, U.S. Senator Jim Webb introduced his bill to establish the National Criminal Justice Commission Act, which would be tasked with a top-to-bottom review of all areas of the criminal justice system, including federal, state, local, and tribal government's criminal justice costs, practices, and policies.[97] On July 27, 2010, the House version passed, and on August 5, 2010, it was placed with the Senate version on the Senate legislative calendar.

### The National Association of Counties

In October of 2009, the National Association of Counties (NACo), the only national organization that represents county governments in the United States, took a major step toward bail reform by adding to their Justice and Public Safety Platform, among other things, recommendations for county policies "ensuring" (1) pretrial investigation and assessment, and (2) least restrictive bail bond conditions, including release on recognizance, nonfinancial supervised release, and also preventative

93 VanNostrand, Marie, and Gena Keebler, *Pretrial Risk Assessment in the Federal Court,* found at http://nicic.gov/Library/023758.

94 *See Introduction to Special Issue on Assessing Pretrial Risk in the Federal Courts,* 73 Federal Probation 2 (Sept. 2009).

95 For a copy, as well as other documents associated with the Virginia pretrial risk assessment, go to http://www.dcjs.virginia.gov/corrections/riskAssessment/?menuLevel=5&mID=12.

96 *See* Michael R. Jones and Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado,* Topics in Community Corrections (U.S. Dept. of Just., Nat'l Inst. of Corr. 2008), at 13.

97 For the language of the bill, as well as related materials, including news articles, go to http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm.

detention.[98] Notably, in the section on Bail Practices and Release Options, NACo now recommends that states enact defendant-based percentage bail laws,[99] and that States and localities make greater use of such non-financial pretrial release options such as citation release and release on recognizance where there is a reasonable expectation that public safety will not be threatened.

Finally, and perhaps most relevant to those jurisdictions examining their current bail practices in light of the law and national standards, the platform states as follows: "NACo recommends that all counties establish a written set of policies and procedures aligned with state statute, national professional standards, and best practices on the pretrial release decision."[100]

### The Pretrial Justice Institute

In the last two years, the Pretrial Justice Institute, the only national nonprofit organization "dedicated to ensuring informed pretrial decision-making for safe communities,"[101] released a number of relevant documents and reports, including: (1) "A Framework for Implementing Evidence-Based Practices in Pretrial Services"; (2) its annual survey of pretrial services programs; (3) "Jail Population Management: Elected County Official's Guide to Pretrial Services" (with the Bureau of Justice Assistance and the National Association of Counties); and (4) "Understanding the Findings from the Bureau of Justice Statistics [BJS] Report, 'Pretrial Release of Felony Defendants in State Court.'"[102]

This last document is particularly interesting because of its effect. It was drafted in response to for-profit bail bond industry claims that certain national statistics produced by BJS demonstrated that "commercial bail is the most effective method of pretrial release."[103] For several reasons, the PJI document concluded that this statement was erroneous, and that the national statistics could not be used to determine effectiveness.[104] The PJI document sparked a debate that went unsettled until, in March of 2010, BJS itself released a document supporting PJI's position by advising persons not to use its statistics for causal associations, and specifically warning that "evaluative statements about the effectiveness of a particular program in preventing pretrial misconduct may be misleading."[105] Despite the warning, however, the for-profit bail bondsmen have continued using the national statistics for both causal associations and evaluative statements.

### Pretrial Services Agencies v. Commercial Bail Bondsmen – Part II

98 NACo, *Justice and Public Safety (09-10),* at 4, found at http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

99 For several reasons, many national bail experts believe that percentage bail laws only foster a flawed, money based bail system, and that better alternatives exist to help indigent defendants.

100 NACo, *Justice and Public Safety (09-10),* at 8, found at http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

101 PJI website, found at http://www.pretrial.org/AboutPJI/Pages/default.aspx.

102 For these and other documents, go to http://www.pretrial.org/Resources/Pages/archived%20publishedresearch.aspx.

103 *Id., Understanding the Findings,* at n. ii.

104 Other authors have also noted the misuse of these national statistics by commercial bail bondsmen, and have given independent assessments of limitations associated with using those statistics. *See Jones, Brooker, and Schnacke, A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District,* available through the Jefferson County, Colorado Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

105 *See State Court Processing Statistics Data Limitations,* at http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf.

In August of 2009, the National Association of Pretrial Services Agencies released *The Truth About Commercial Bail Bonding in America*.[106] This particular document was apparently drafted to counter a fairly strong and concerted effort by national for-profit bail bonding interests to promote commercial sureties and demote professional pretrial services agencies.[107] One of those interests, the Allegheny Casualty, International Fidelity, and Associated Bond Company ("AIA"), countered with a booklet entitled *Taxpayer Funded Pretrial Release, A Failed System,* which was designed to "point out the critical performance differentials between government and private sector bail bonding."[108]

Throughout 2009, the struggle between commercial sureties and pretrial services agencies took place mostly in state legislatures, with intense fights in several states. In Virginia, the for-profit bail bond industry unsuccessfully lobbied for passage of a bill that would: (1) significantly limit judicial discretion by requiring financial bonds in every criminal case unless the defendant was identified as indigent; and (2) reduce state funding for Virginia's pretrial services programs.[109]

In Florida, a bill that would prohibit those with money from being released to any entity but a for-profit bail bondsman failed to pass, as did a late amendment designed to prohibit supervised non-financial release for most felony defendants.[110] This failed legislative effort did not deter for-profit bail bond interests in that State, who continue to press their cause to county commissioners, judges, and sheriffs.

In Georgia, for-profit bail bonding interests successfully backed a bill that reduced the types of defendants who may be released to a pretrial services program with electronic monitoring.[111]

In November 2010, Washington State citizens will be asked to vote on a legislatively-referred constitutional amendment to enable that State to broaden its preventative detention provisions. The changes in law were precipitated by the 2009 killing of four police officers by an Arkansas parolee released on a $190,000.00 surety bond.[112]

Most recently, national bail bond interests have helped local bail bondsmen in Colorado craft "Proposition 102," a citizen initiative for the November 2010 election that would force judges wanting to authorize pretrial supervision to also add up-front money conditions to virtually all pretrial defendants' bail bonds. According to the

106 Found at http://www.napsa.org/publications/napsafandp1.pdf.

107 Many of the documents, videos, press releases, and related links promoted by the commercial bail bonding industry can be found at https://www.aiasurety.com/, the home page to the Allegheny Casualty, International Fidelity, and Associated Bond companies.

108 The booklet can be ordered from AIA through its website at https://www.aiasurety.com/home/pretrialtruth.aspx.

109 *See Bail bill would punish defendants for not being poor* (Feb. 2, 2010) found at http://articles.dailypress.com/2010-02-02/news/dp-local_tamara_0203feb03_1_pretrial-defendants-bank-account; *Bondsmen battle government program* (Jan. 28, 2010) found at http://fredericksburg.com/News/FLS/2010/012010/01282010/524141/index_html.

110 *See Battle over bail bonds* (April 13, 2010) found at http://www.miamiherald.com/2010/04/13/1576502/battle-over-bail-bonds.html; *Pretrial release targeted by bail bond lobby and Florida legislators* (March 27, 2010) found at http://www.tampabay.com/news/courts/criminal/article1083146.ece.

111 *See* Georgia HB 306, found at http://www.legis.ga.gov/legis/2009_10/fulltext/hb306.htm.

112 *See* at http://ballotpedia.org/wiki/index.php/Washington_Judge_Bail_Authority_Amendment_(2010); *see also Four days in May set stage for Sunday's tragedy,* at http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?document_id=2010392869&zsection_id=2003925728&slug=shootingjustice01m&date=20091201

Colorado Legislative Council Staff, the neutral and objective research entity of the Colorado General Assembly, Proposition 102 would cost Colorado taxpayers millions of dollars a year if it is passed.[113]

Proponents of Proposition 102 have written publicly that they are concerned with public safety and dedicated to decreasing crime and reducing recidivism. This should be contrasted, however, with quotes found in a recent news story by 9News (KUSA-TV in Denver), which exposed bail bondsmen for using technicalities and other unethical strategies to be exonerated from bail bonds whenever defendants fail to appear. As the story noted, "[The bail agent] said his allegiance is not to the courts and the justice system, but rather to the insurance company. 'My job is to protect the insurance company from the loss . . . It's not a greed thing, we just don't want to pay.'"[114]

These particular examples represent only a small portion of the overwhelming number of bills and initiatives concerning bail and pretrial release that were introduced throughout the country in the last two years, further testifying to the importance of the subject, as well as to the intensity of the fight.[115]

According to the Americans for the Preservation of Bail, the fight is indeed a national one, in which that group has vowed to "advance the responsible use of commercial bail," "expose[] pretrial services (sic) radical social agenda," "build coalitions in states . . . to identify threats to Commercial Bail," and to "[t]ake the fight against government run criminal welfare nationwide!"[116]

The commercial bail bond industry's national agenda has been manifested mostly through the work of Jerry Watson, Chief Legal Officer of AIA, past head of the American Bail Coalition, and past chairman of ALEC.[117] Both ALEC and the for-profit bail bonding industry have attempted to push nationally a model bill titled the "Citizens Right to Know: Pretrial Release Act," which would place numerous (and in most cases, additional) reporting requirements on pretrial services agencies.[118] In support of this and other bills, in April 2010, AIA and ALEC sent copies of the publication, *Taxpayer Funded Pretrial Release – A Failed System*,[119] to 2,500 legislators across the country.

The contentiousness of the national debate can be seen through countless news articles, editori-

113 Copies of the proposition's language are available through Jefferson County, Colorado, Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

114 *Justice delayed while some fugitives run free, bondsmen pocket fees,* found at http://www.9news.com/rss/article.aspx?storyid=139626. Mike Donovan, proponent of Colorado Ballot Initiative 92 (now Proposition 102), recently posted Bail USA's official response to the story, in which he stated that he didn't believe bail agents were doing anything wrong, and that, instead, the courts were making "serious mistakes."

115 For an updated list of all legislation relevant to bail and pretrial release across the country, go to https://www.aiasurety.com/home/resources/legislative-log.aspx. It is believed that Oregon will consider a bill to reinstate commercial bail bonding in that state in its next legislative session.

116 Go to http://www.preservebail.com/.

117 Mr. Watson's close affiliation with ALEC may foster the distribution of potentially misleading information. In a recent speech, Watson stated that he drafted an article questioning the efficacy of pretrial release agencies, but "got [ ALEC] to print it as an ALEC piece because we didn't want it to come from a bail bonding organization – we wanted it to look like it came from some neutral, political source." *See The Bail Agent's Perfect Storm – Conclusion,* found at http://www.channels.com/search?search_box=AIA+&search_type=Episode#/search?search_box=AIA+&search_type=Episode at 27:52.

118 *See The State Factor, Criminals on the Streets – A Citizen's Right to Know* (Jan. 2009) found at http://www.alec.org/am/pdf/sfbailbondjan09.pdf.

119 *See supra* note 108.

als, and advertisements highlighting the struggle between for-profit bail bondsmen and professional pretrial release agencies throughout 2009 and 2010. Perhaps the most widely disseminated report was a three-part National Public Radio piece in January 2010 on problems associated with the American money bail system.[120]

### Other Organizations

Organizations typically considered as being outside of the ongoing struggle between commercial sureties and pretrial services agencies also released several relevant documents throughout 2009 and into 2010. In November 2009, the National Institute of Corrections (NIC) of the U.S. Department of Justice published its "Jail Capacity Planning Guide: A Systems Approach."[121] In that document, the authors stress the need for an understanding of the interactive effects of criminal justice system policies and practices on jail planning, and suggest that system leaders combine data analysis with a qualitative review of such things as bail policies and adherence to national standards. In discussing specific jail population management strategies, the authors highlight the need for more purposeful booking decisions and early assignment of defense counsel to help manage pretrial inmate populations, and point to pretrial services programs as "indispensable component[s] of an efficient criminal justice system."[122]

The same month, the American Jail Association published "69 Ways to Save Millions" in its American Jails Magazine.[123] The article summarizes strategies gleaned from interviews with jail administrators across the United States on how to operate jails within budgets without compromising public safety, including strategies to review and revise bail and pretrial release policies. In the same edition of that magazine, author and NIC consultant Mark Cunniff emphasizes the need for agencies to undertake jail impact studies when implementing new program or policy initiatives in the criminal justice system.

In the NIC sponsored article titled, "A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,"[124] the authors cite to research demonstrating, among other things, the dangers of over-supervision of lower risk offenders as a possible cause for recidivism, and to "promising" research by John Goldkamp and Michael Gottfredson showing that judges using bail guidelines were more consistent in their use of release on recognizance than judges who did not use bail guidelines.[125]

Temple University Professor John Goldkamp's research, in particular, has special relevance to jurisdictions undertaking serious bail reform as he continues to publish articles on: (1) the lack of any empirical basis showing a relation between money and pretrial misconduct; (2) the abundance of empirical research showing that money is the primary reason for pretrial detention (except, perhaps, in the District of Columbia and the Federal systems, where it is rarely used); and

120 Transcripts and audio recordings of this report are available from the Jefferson County Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

121 David M. Bennett and Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach,* available at http://nicic.org/Downloads/PDF/Library/022722.pdf.

122 *Id.* at 10.

123 Found at http://nicic.org/Library/024189.

124 *See* National Institute of Corrections, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (Center for Effective Policy, Pretrial Justice Institute, Justice Management Institute, and the Carrey Group, May 2010) at 9 n.13, found at http://nicic.gov/Library/024372.

125 *Id.* at 43, 48.

(3) the need to engage judges centrally in the bail reform process through study and review of actual practices, followed by formulation of, or agreement on, judicial policies concerning bail and pretrial release.

Finally, on June 7, 2010, the American Probation and Parole Association published a resolution supporting pretrial supervision services, in part because those agencies base their decisions on likelihood of court appearance and community safety considerations, as opposed to for-profit bail bondsmen, who make decisions based primarily on monetary considerations.

### Crime and the Economy

The backdrop for all of these events, initiatives, and research has been (1) the foundering economy, and (2) the overall decrease in crime. Known widely as the late 2000s global recession, the significant deceleration of economic activity has had an impact on criminal justice systems generally, and particularly on various criminal justice actors, including for-profit bail bondsmen and defendants. According to author John Clark, "the riddle of the indigent defendant in the bail system" has been around for as long as money has been used as security.[126] Nevertheless, the recession has added complication to the already difficult requirement in many states to assess a defendant's financial condition for purposes of bail.[127] And yet, despite this recession, crime in the United States dropped dramatically in 2009, marking the third straight year of declines.[128]

126 Clark, John, *Solving the Riddle of the Indigent Defendant in the Bail System,* found at http://www.pretrial.org/Docs/Documents/Solving%20the%20Riddle.pdf.

127 *See, e.g.,* § 16-4-105 (1) (c) of the Colorado Revised Statutes.

128 See Crime rates down for third year, despite recession, found at http://abcnews.go.com/Politics/wireStory?id=10727789.

While many remain wary that the economy may create some longer term increase in crime, the current reduction has at least allowed criminal justice systems to focus on non-crisis driven improvements.

## R. CONCLUSION

Overall, the history of bail and pretrial release shows steady but slow progress toward the realization of an ideal system of bail administration based on accurate predictions of court appearance and the commission of new crime. To many, however, the history of bail shows only that true bail reform has not been completely attained.

An internet query will uncover a multitude of quotes about the topic of history, from pithy to scathingly sarcastic. However, we leave you with one relevant to the underlying theme of prediction in the field of pretrial release. "History teaches everything, including the future," wrote Alphonse Marie Louis de Prat de Lamartine, the French writer, poet, and politician. If he is right, then perhaps a solid historical background can, in fact, teach us something about the future of bail and pretrial release in the United States – a future molded by those who are dedicated to repeating historical successes, while avoiding its failures.

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"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." -- *United States v. Salerno,* 481 U.S. 739, 755 (1987) (Rehnquist, C.J., for the Court).