

# The Landscape of Pre-trial Release in the United States

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# Bail Policy Affects Real People

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# Bail Policy Affects Real People

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# Presumption of Innocence

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Historically applied pretrial

Since 1960s, equated with prosecutor's burden of proof

Very few guiding principles

# Changes to Bail Policy

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Until 1950s, bail presumed for all defendants

1960s/1970s other factors considered

- Weight of evidence
- Impact on safety of community
- Predictions of defendant's guilt
- Predictions of whether defendant will commit crime

# Due Process

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Protects individual liberty from restraint without adequate legal procedures

Underlying basis for presumption of innocence pretrial

Focus has become on preventing defendants from being found guilty if police/prosecutors misstep

# Improper Understanding of Due Process Allows for Violations

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## *Gerstein v. Pugh*

- No protection of reputation or due process
- Detention before judgment of peers

## State Exceptions for Murder

- Historically, no pretrial release for capital offenses “where proof is evident or presumption great”
- Courts have denied bail if defendant is “dangerous” and if defendants interfere with witnesses

# Three Principles to Guide Pretrial Rights

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1. No restraint on liberty without proper basis. Proper basis includes attendance at trial, interference with judicial process and if defendant is detained, protecting security of facility with as little interference with defendant's trial preparation

# Three Principles to Guide Pretrial Rights

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2. Judges should not predict or infer guilt, though judicial notice of previous convictions and failure to appear in court are relevant to whether defendant should be released pretrial.

# Three Principles to Guide Pretrial Rights

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3. Focus pretrial protections on maintaining factual innocence as well as legal innocence

# Problem

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The United States is the only country that has money bail

Bail leads to more incarceration later

Bail leads to less favorable plea deals

Over 500,000 people in jail awaiting trial, 2/3 of which have been deemed low bail risk (costing taxpayers \$9 billion last year alone)

# Focus

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Save local governments money by analyzing and reforming bail for both misdemeanor and felony defendants

How do we do it?

# Outline

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- ❖ Types of Pre-trial Release
- ❖ ABA Policy
- ❖ What Best Practices and the Evidence tell us as far as pretrial release?

# Types of Pre-trial Release: Release on Recognizance

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# Types of Pre-trial Release: Cash Bail

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# Types of Pre-trial Release: Percentage Bail

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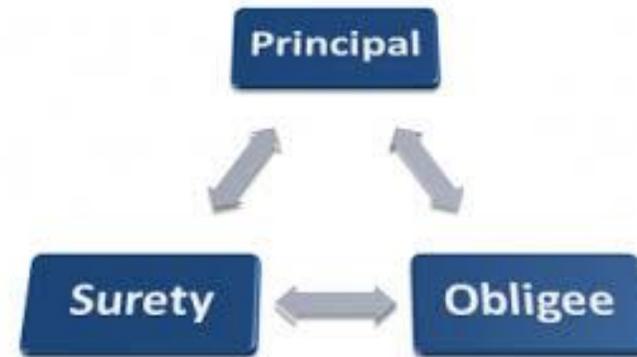
# Types of Pre-trial Release: Property Bail

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# Types of Pre-trial Release: Surety Bond

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# Types of Pre-trial Release: Conditional Release

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# Types of Pre-trial Release: Pre-trial Services

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# New Initiatives: Reduce Reliance on Money Bail

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- Increase pretrial release supervision programs
- Diverting defendants to pretrial release supervision programs rather than incarceration can reduce costs for each defendant from up to \$45,000 per year in incarceration to \$432 for pretrial release.

# New Initiatives: Alternatives to Incarceration

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Developing alternatives to incarceration (discussed in the ABA policies below) the Southern District of Iowa saved \$1.7 million in 2008-2009 and was able to release 15% more defendants with an increased rate of court appearance and a decreased rate of arrests for new crimes.



# New Initiatives: Goals

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## Goals

- Save States Money
- Reduce Recidivism
- Protect the Public

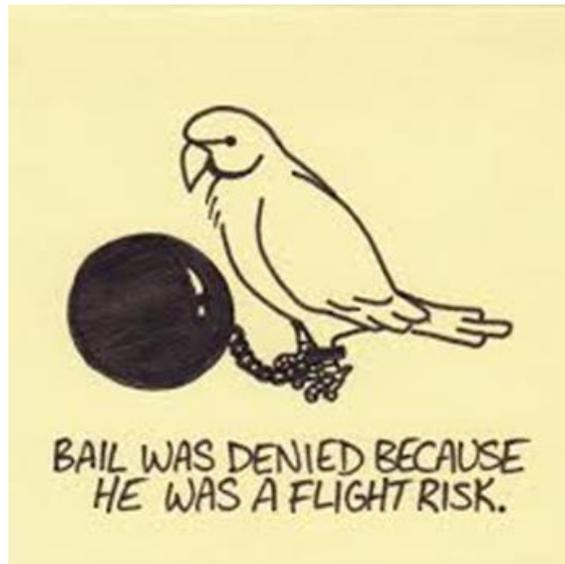


# Pre-Trial Release Reform

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## Concerns

- Despite legitimate concerns regarding bail reform, many pre-trial detainees do not present a significant risk of flight and are unlikely to pose a public danger
- A method to more accurately distinguish those who pose a risk of violence from those who do not must be incorporated



# Pre-Trial Release Reform

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Options after properly measuring a defendant's risk:

- Place individual in pre-trial detention
- Release individual to pre-trial release supervision program
- Release individual on his/her own recognizance

# Pre-Trial Release Reform

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Accurate identification of risk can result in financial benefits and more equitable justice

- Two-thirds of the 500,000 pre-trial detainees are *low bail risk* (no significant risk to themselves or community with high likelihood of reappearance at court)
- Can decrease costs of operating detention facilities and housing detainees
- Can reduce collateral consequences of confinement

# Pre-Trial Release Reform

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## Significant fiscal savings

- Releasing low risk defendants leads to significant savings to local/state budgets
  - Last year alone, taxpayers spent \$9 billion on pre-trial detainees
- Confining defendants causes loss of income, leading to increased recidivism and risk to the public upon release
- Defendants who are economically secure with a familial structure are more likely to appear in court

# Pre-Trial Release Reform

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A model for reform: *The ABA Criminal Justice Standards for Pretrial Release*

- Call for assignment of least restrictive bail conditions and the release of defendants pending trial
- Detention should only be implemented after clear identification of relevant risk factors by adequate pre-trial service agencies

# Success Story: Kentucky

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## Pre-trial Diversion

- Officers trained to be neutral in all decisions
- Unified state-wide
- Provides select individuals with non-punitive case process if they satisfy certain conditions of release
- Program entirely voluntary
- If successfully completed, charges are dismissed with prejudice



# Success Story: Kentucky

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## Social Work Pilot Project

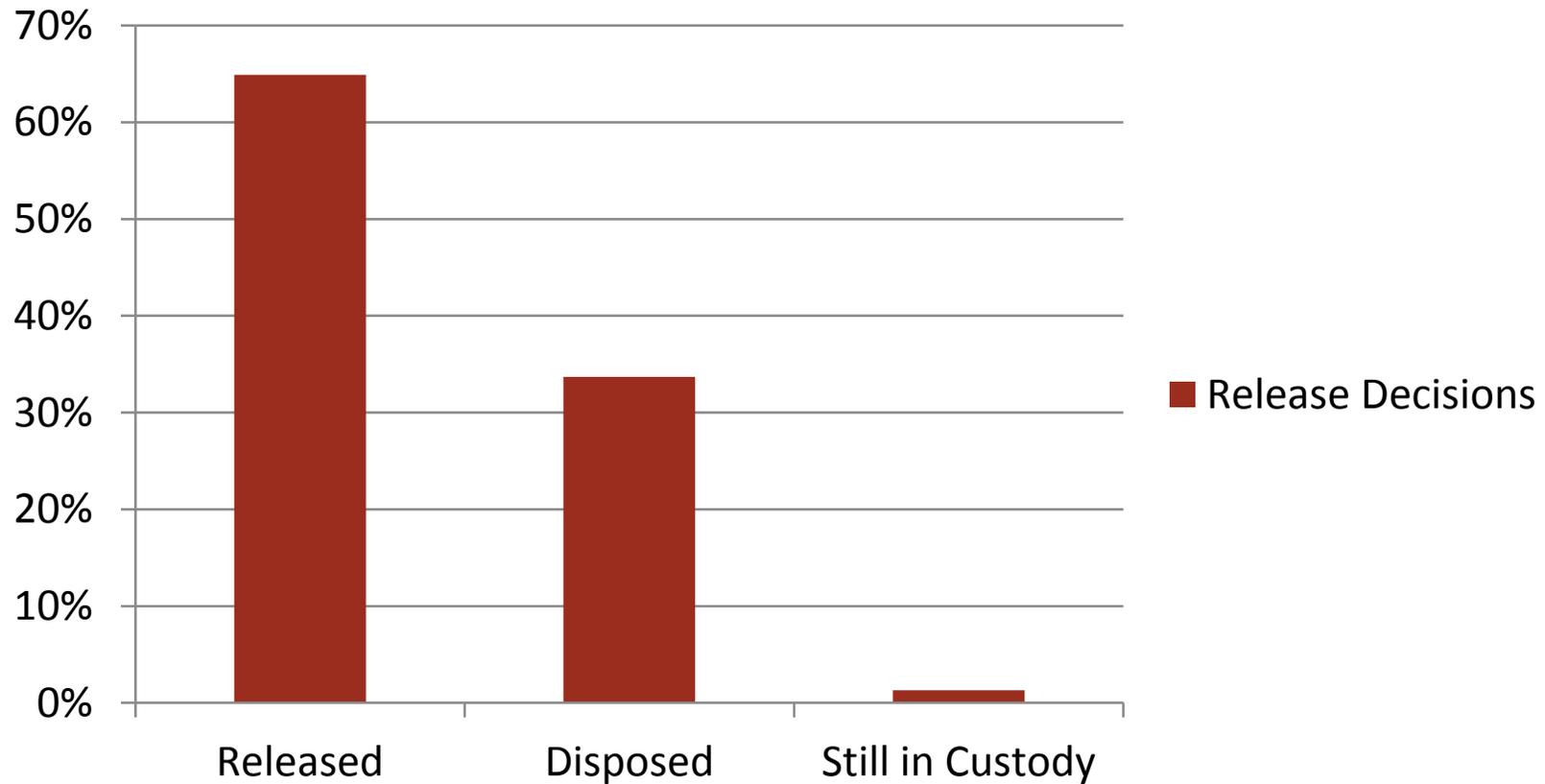
- Social workers placed at public defender's offices throughout state
- Help treat offender's "root" problem



# Success Story: Kentucky

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## Release Decisions



# Kentucky: Savings

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## Pre-trial Diversion

- Saved millions of dollars in incarceration costs
- Saved money by reducing court dockets through release and subsequent dismissal of charges

## Social Work Pilot Project

- Saved \$1.4 million in incarceration costs
- Reduced recidivism (14% compared to 29% for the rest of the state)
- If implemented statewide, projected savings of \$3.1 – \$4 million per year



# Decriminalization of Minor Offenses

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## Concerns

- Explosive growth in number of misdemeanors has caused significant burden on court systems
- Overworked/overburdened defense attorneys and prosecutors do not have time for cases with more serious offenses

# Decriminalization of Minor Offenses

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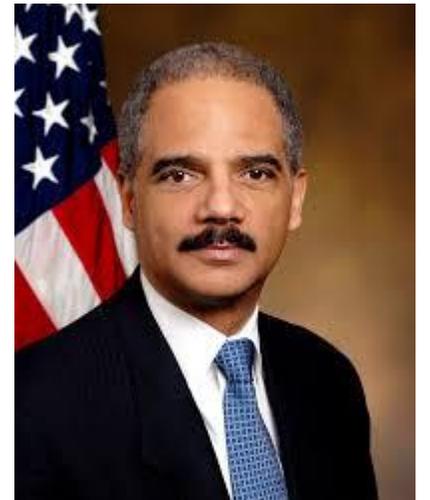
Suggestion: Call for governments to review misdemeanor provisions and, where appropriate, impose civil fines or nonmonetary civil remedies, as opposed to criminal penalties

# National Symposium on Pretrial Justice

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## AG Eric Holder's Remarks

- Nearly two-thirds of all inmates across the nation are pretrial detainees
  - Many are non-violent, non-felony offenders charged with crimes ranging from petty theft to public drug use
  - Disproportionate number are poor
- This can be avoided by competently assessing risk of release and offering alternatives to incarceration where appropriate

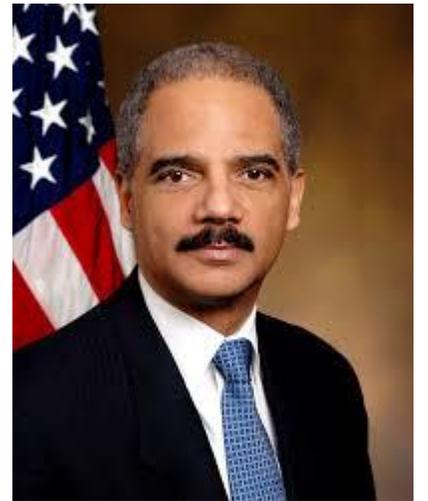


# National Symposium on Pretrial Justice

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## AG Eric Holder's Remarks (Cont.)

- Steps being taken now
  - Dept. of Justice already working to support pretrial services
  - Working to improve reentry policies
    - Interagency Reentry Council
- Need to engage key partners and innovators across the country to do more

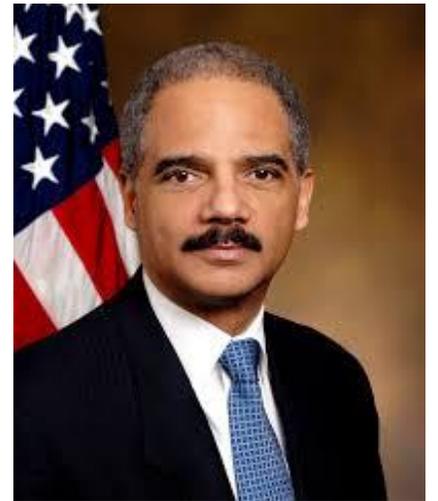


# National Symposium on Pretrial Justice

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## AG Eric Holder's Remarks (Cont.)

- What can be done now
  - Support the growth of existing pretrial service agencies and diversion programs
  - Encourage programs where they do not exist
- “[S]ee to it that for the poor man, the word ‘law’ does not mean an enemy, a technicality, an obstruction. Let us see to it that law, for all men, means justice.” (Robert Kennedy)



# ABA Policy: Pretrial Release Standards

## What are they?

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A set of ideals designed to standardize the decision to release or detain defendants pretrial in jurisdictions across the country.



# ABA Policy: Pretrial Release Standards

## Three Major Principles

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Enunciate a policy and presumption favoring release of the accused

Abolishment of compensated sureties for release (bail bondsmen)

Establishment of a comprehensive pretrial release service agency

# ABA Policy: Pretrial Release Standards

## Purposes of Pretrial Release Decision (10-1.1)

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To provide due process to the accused

To ensure defendant's appearance at all hearings before the court

To protect victims, witnesses, and the community from threats, danger, and interference

# ABA Policy: Pretrial Release Standards Policy Favoring Release (10-1.1)

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The law favors release of defendants pending adjudication

Deprivation of liberty is harsh and oppressive

Can cause economic and psychological hardships

Impedes ability to prepare adequate defense

Deprives the family of support

# ABA Policy: Pretrial Release Standards

## Release Under Least Restrictive Conditions

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Sufficient to:

- Ensure defendant's attendance
- To protect community (victims, witnesses, etc.)

Courts must have an arsenal of alternative release choices

# ABA Policy: Pretrial Release Standards Release on Own Recognizance

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Jurisdictions to adopt procedures to promote O.R. Release

Pretrial services agency should provide the court with information to help it make an appropriate release decision

# ABA Policy: Pretrial Release Standards

## Detention is Exception to Release

### Policy (10-1.6)

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These standards seek to limit use of detention

Establish criteria and procedures for detention when defendant is a danger or flight risk

Inordinate weight should not be given to the nature of the charge

# ABA Policy: Pretrial Release Standards Citation in Lieu of Arrest (10-2.1)

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Mandatory for minor offenses (usually non-violent)

- Exception when Defendant:
  - Fails to identify self
  - Refuses to sign promise to appear
  - Has no ties to the community
  - Has previous failures to appear
  - Is not in compliance with release conditions on other cases (probation or parole)
  - Is likely to re-offend

# ABA Policy: Pretrial Release Standards Use of Summons in Lieu of Arrest (10-3.1)

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## Mandatory summons for minor offenses

- Exceptions:
  - Accused fails to identify self
  - Arrest warrant necessary to locate accused
  - Arrest/Detention necessary to ensure public safety
  - Accused will likely fail to respond to summons
  - Accused has previously failed to appear
  - Accused not in compliance with release conditions on other cases (probation or parole)
  - Accused will continue to offend

# ABA Policy: Pretrial Release Standards

## Development of Comprehensive Pretrial Services (10-1.10)

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Every jurisdiction should establish pretrial services agency to:

- Conduct first appearance inquiries
- Present information to judge
  - Risk of failure to appear
  - Threat to anyone in community
- Develop and provide appropriate and effective supervision

# ABA Policy: Pretrial Release Standards

## Development of Comprehensive Pretrial Services (10-1.10)

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Find appropriate facilities for care, custody and supervision of released Defendants

- Halfway houses
- Treatment centers
- Counseling services

Monitor compliance

Inform the court of violations of release conditions

Assist released Defendants in finding employment, medical care, or drug treatment

Remind Defendants of court dates

# ABA Policy: Pretrial Release Standards

## Pretrial Services Investigation (10-4.2)

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Interview is voluntary

Intended solely for a determination of release condition or options

Cannot be used against the Defendant except for perjury

Used to determine risk of flight or danger to community

# ABA Policy: Pretrial Release Standards Information Included (10-4.2)

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Nature of the charge

Character, mental condition, family ties, employment, ties to the community, past conduct, history of drug or alcohol abuse, criminal history, record of previous court appearances

Probation or parole status at time of offense

Sponsors

Risk of willful failures to appear

Threat to the safety of the community, victims, or witnesses

# ABA Policy: Pretrial Release Standards Other Restrictions If Not Released Own Recognizance

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Pretrial Services supervision

Supervision by any other qualified agency

Establishment of curfew, protective order, or geographical restrictions

Electronic Monitoring

No weapons

# ABA Policy: Pretrial Release Standards Other Restrictions If Not Released Own Recognizance

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No drugs or alcohol

Drug Court, Diversion program, or Mental Health Court

Financial Conditions

Work Release or other part-time custody arrangement

# ABA Policy: Pretrial Release Standards Abolishment of Compensated Sureties (10-1.4(f))

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Consistent with the processes provided in these Standards, compensated sureties should be abolished

- If financial bail is imposed:
  - Cash or securities of not more than 10% of the bail
  - To be returned at conclusion of case

# ABA Policy: Pretrial Release Standards

## Release on Financial Conditions (10-5.3)

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### Financial conditions:

- Discriminate against poor and middle class defendants resulting in higher rates of detention (commentary to 10-1.4(f))
- Other than unsecured bond should be imposed only when no other less restrictive condition of release will ensure appearance
- Financial conditions should not be set to prevent future criminal conduct
- To punish or frighten defendant or placate public opinion

# ABA Policy: Pretrial Release Standards

## Release on Financial Conditions (cont'd)

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If financial conditions are to be used, the Court should select from one these alternatives:

- Execution of an Unsecured Bond
- Execution of an Unsecured Bond accompanied by a cash deposit of 10% of total
- Execution of a Bond secured by deposit of full amount or by the obligation of qualified, uncompensated sureties

These Standards discourage the use of a predetermined bail schedule according to the nature of the charge.

# ABA Policy: Pretrial Release Standards

## Pretrial Detention (10-5.8, 10-5.9)

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Burden on prosecution to demonstrate by “clear and convincing evidence” to prove no condition or combination of conditions of release will ensure:

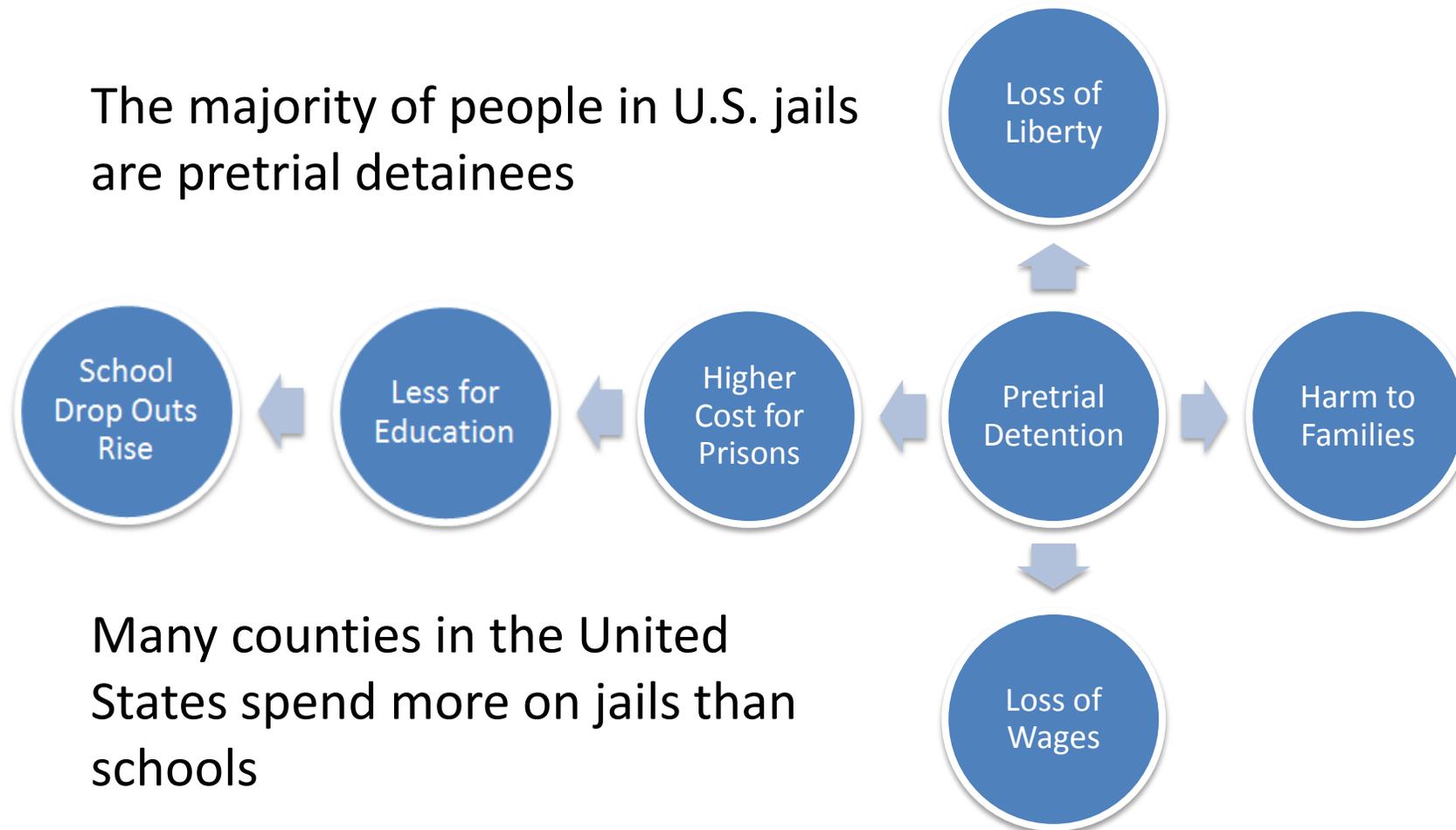
- Defendant’s appearance
- Safety of community

Judge to consider:

- Violent nature of crime
- Violation of prior release restrictions

# Disadvantages of Pretrial Detention

The majority of people in U.S. jails are pretrial detainees

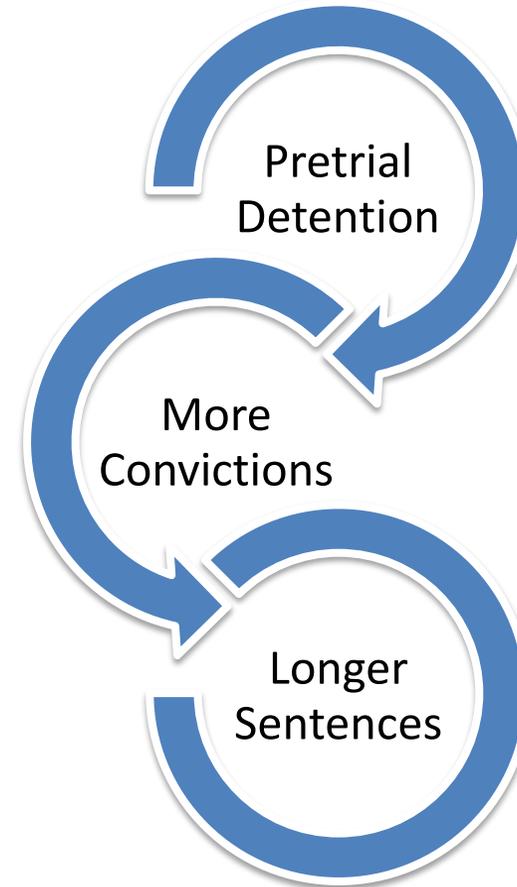


Many counties in the United States spend more on jails than schools

# Disadvantages of Pretrial Detention

Detention begets more detention

- ❖ Bail is often set high to keep people behind bars
- ❖ More likely to be convicted if they go to trial
- ❖ More likely to receive prison sentences rather than probation
- ❖ More likely to have longer sentences



# Preliminary Considerations

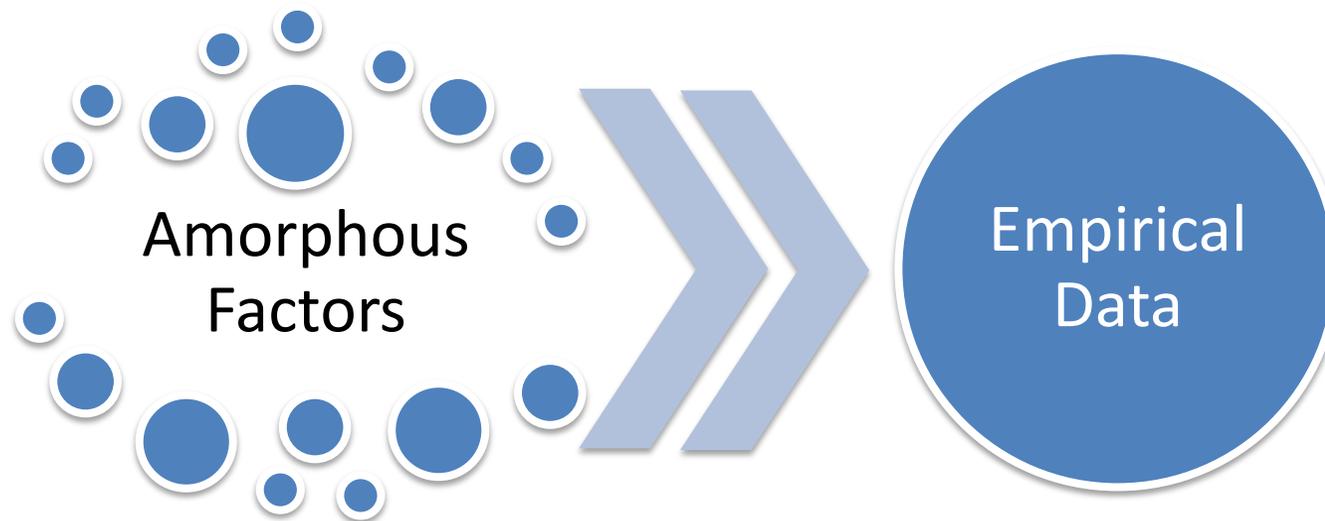
Are we detaining the right people?



Could we decrease pretrial detention rates without increasing danger to the public?

# Which Risk?

- Federal judges claim to rely on flight risk more than risk of danger
- So how can they improve their decisions?



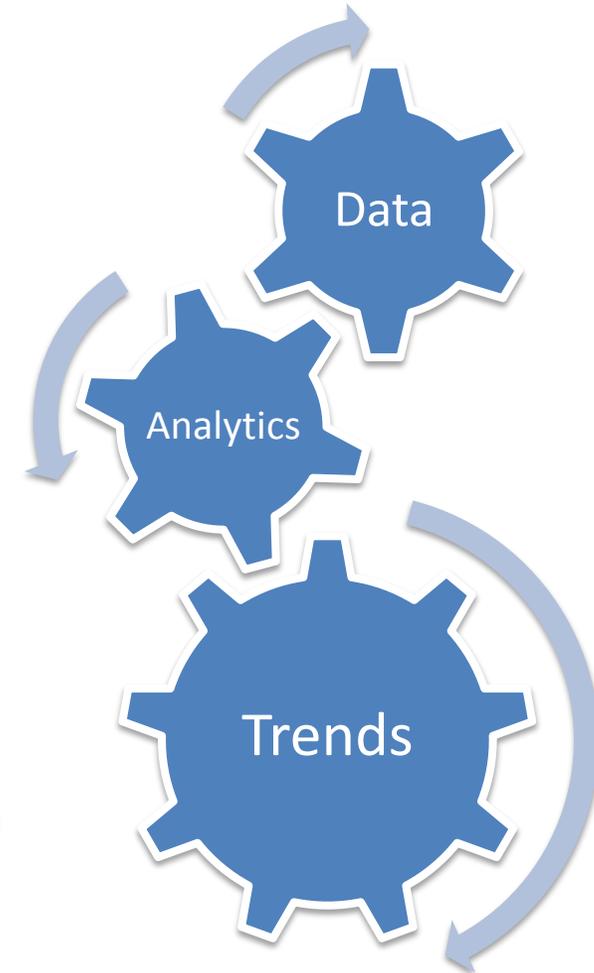
# **DEALING WITH DANGERS**

# Cutting Costs through Pretrial Release

- Miami-Dade County
  - Supervised each defendant for around \$400 annually
  - The average incarcerated defendant costs \$20,000 per year
- Iowa
  - Adopted a similar program that saved the state's Southern District \$1.7 million in 2009
- Technology was used in both circumstances – G.P.S. trackers and ankle bracelets

# Predicting Violence – Our Approach

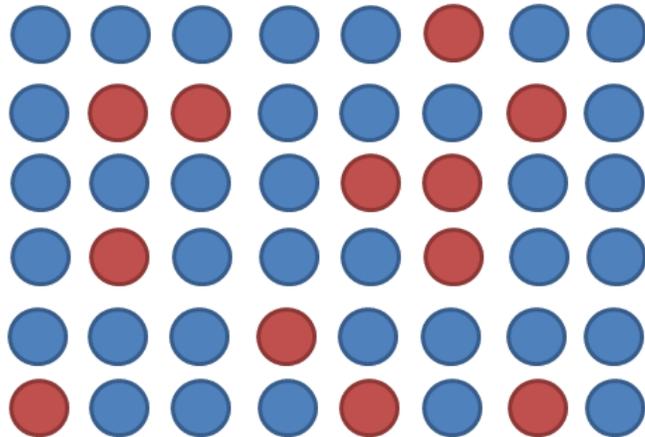
- Based on a nationally representative sample covering the seventy-five largest counties in the United States
- We analyzed data from more than 100,000 felony defendants over a 15-year period
- Found very clear trends regarding which defendants are more likely to commit crimes while free on bail





# Results

- Judges are often releasing and detaining the wrong people



Detainees that could have been released without increasing crime

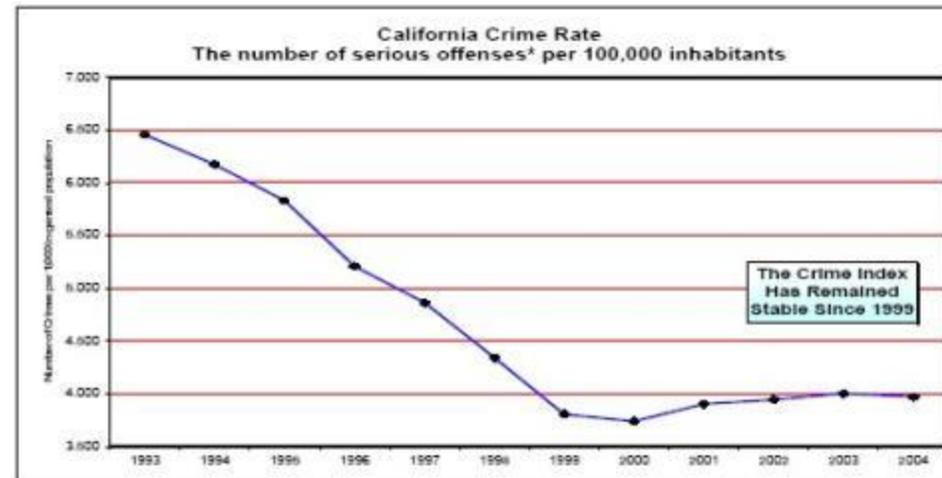
# Results

However, detention does stop crime

- 16% of defendants on bail are rearrested
  - 11.5 % are rearrested for a felony
  - 1.9% are rearrested for a violent felony
- Put another way, 80% of released pretrial defendants have less than a 3% chance of being rearrested for a violent crime



For almost all crimes, the average rearrests rates are only about 1% - 2% for a pretrial violent crime

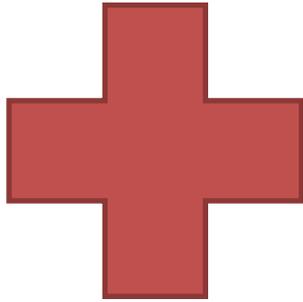


\* Source of all crime statistics is the California Crime Index.

# Results

Detention also stops flight, but empirically there is not much flight

- 3.4% of those released fail to appear multiple times
- Additionally, previous failures to appear are a significant predictor of future multiple failures to appear
- However, past failure to appear is not a good predictor of violent crime while it does predict being rearrested for a nonviolent crime



# Factors to Consider

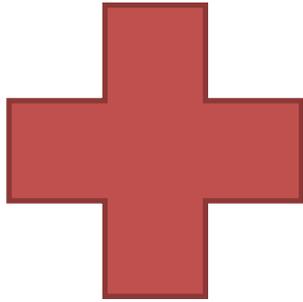


## Release

Defendants charged of drug felonies are among the least likely to be rearrested for a violent crime – about as likely as those brought in on driving-related offenses

## Detain

Defendants charged of robbery, burglary, and motor-vehicle theft are more likely to be rearrested for any crime on release than the average



# Factors to Consider



## Release

## Detain

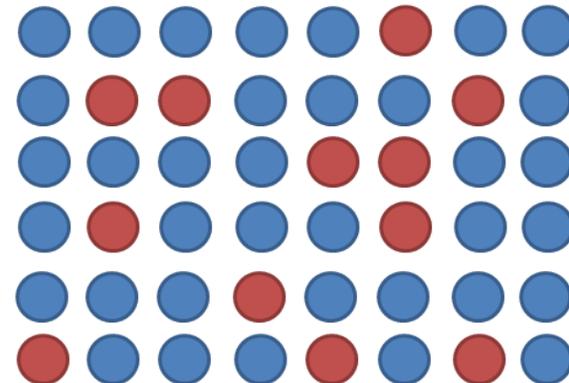
Older defendants are less likely to commit violent crimes

Defendants charged with fraud and public order violations are very unlikely to commit violent crimes

Defendants with a history of violent crime convictions are more likely to commit violent crimes

# Conclusion

- We could safely release 25% more defendants while decreasing pretrial crime levels
- Not based on prohibited factors such as gender or race, but statistical patterns
- Judges could safely release some older defendants, people with clean prior records, and people who commit fraud and public order violations, without increasing danger to the public



# What Does the Evidence Tell Us About Pretrial Release?

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It is a broken system that costs us money every day

There are alternatives that can save money without endangering the public