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KeyPoints

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Pretrial Justice 101: Key Points for Policymakers

by Marc Levin, *Director of the TPPF Center for Effective Justice*

1. The front door of the criminal justice system affects more people than any other part. In 2012, there were 12.2 million arrests in the U.S., according to the FBI.[1] About 220,000 people are admitted to county jails every week whereas state prisons admit 10,000 per week.[2] Nationally, 62 percent of jail inmates are pretrial detainees, with the remainder being those convicted and serving a sentences for misdemeanors, and others convicted of felonies who are waiting to be picked up by the state prison system.[3] The cost per day of county jails varies from $114 in California to $50 to $60 in Bexar County (San Antonio), Texas.[4]

2. The Eighth Amendment of the U.S. Constitution and most state constitutions prohibit excessive or unreasonable bail.[5] This provision parallels language in the English Bill of Rights of 1689, which sought to stop the practice of judges fining the King's political enemies and then jailing them for nonpayment.[6] However, it doesn't guarantee that the accused will be released from jail; the U.S. Supreme Court and lower appellate courts have generally upheld federal and state statutes requiring denial of bail or extraordinarily high bail in cases involving the most serious offenses, finding that in light of the public safety interest at stake, making bail unattainable is neither excessive nor unreasonable.[7] Nonetheless, our constitutional tradition demonstrates that the presumption in all but the worst cases involving the most dangerous defendants is that persons not yet convicted of a crime should have the opportunity to be released prior to trial, with appropriate conditions to protect the public and ensure they return to answer for their conduct. A 2007 Bureau of Justice Statistics study found that 62 percent of defendants obtained release from jail prior to trial, bail was denied in less than seven percent of cases, and that about seven in 10 defendants secured release when bail was set at less than $5,000, but only one in 10 when bail was set at $100,000 or more.[8]

3. There are several important goals that pretrial justice policies seek to achieve. These goals typically fall into the following categories: 1) making sure the defendant shows up for hearings and trial so that justice can be dispensed, 2) ensuring that the public is protected from defendants committing crimes during the period prior to trial, 3) observing constitutional rights to reasonable bail and due process that apply to those arrested but not yet convicted, and 4) controlling jail costs, which are the largest expense in many county budgets. These considerations require balancing the cost of keeping the accused in jail against the risks that, if released, he will not appear for his trial and may even commit a new offense. Either entails the cost of finding and securing him and, in the case of a new offense, a possible cost to a victim.

4. Today, there are several different types of pretrial release, which may be used in combination. Methods of pretrial release are generally divided into financial and non-financial categories, and include commercial bail, pretrial supervision, cash deposit bond, and release on an individual's own recognizance. Most defendants cannot come up with enough cash to post their entire bond, so often they retain a bondsman who posts a surety bond and typically charges the defendant 10 percent of the total amount, which is nonrefundable, in exchange for taking on the risk of the defendant failing to appear. With a cash deposit bond, the defendant typically pays the county 10 percent that is returned except for an administrative fee if he shows up for hearings and is not re-arrested. Pretrial supervision programs, which are typically operated by a separate county agency, a probation department, or even a non-profit agency, require an individual to meet conditions such as reporting regularly to an officer and submitting to drug testing, and the violation of such conditions can lead to a return to jail. When someone is released on their own recognizance, all they must do is a sign a paper promising to appear. In some jurisdictions, individuals can be released on both commercial bail and pretrial supervision. Pretrial defendants who fail to appear for a hearing are subject to arrest by authorities and, if on commercial bail, being taken into custody by a licensed private investigator or bond enforcement agent.

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5. The use of commercial bail, or a surety bond, uses the private sector in the process of inducing the accused to appear for trial and securing "skips"—those who fail to appear. Many defendants are able to obtain commercial bail within hours of being jailed, which may be set according to a fixed schedule and/or upon appearance before a judge or magistrate within 24 hours. Commercial bail does not entail the use of public funds and the intent of laws governing bail is to create a financial incentive for bondsmen to ensure the defendant appears at all hearings, as they are subject to forfeiture of up to the entire bond amount if they do not. Commercial bonding off-loads some share of cases and responsibility for producing defendants at trial on to the private sector.

6. County pretrial release programs often seek to avoid the potentially negative consequences of pretrial incarceration of some defendants who cannot afford bail. These programs are driven in part because of concerns that longer periods of pretrial detention for low-risk defendants may lead to unemployment,[9] great recidivism,[10] and more imprisonment or longer sentences compared to defendants who are released earlier.[11] Pretrial policies may also seek to address specific target populations, such as treatment diversion programs for appropriate mentally ill detainees, given that they tend to have more difficulty making bail and can cost more to incarcerate." By using a pretrial services program, defendants who may otherwise have stayed in jail until trial may have the opportunity to be released; two New York City studies found roughly a quarter of both felony and misdemeanor defendants who did not make bail were never convicted.[12] In some cases, these programs also enforce conditions such as drug testing and treatment on defendants released on bail. In Maine, for example, the non-profit Maine Pretrial Services interviews defendants who are unable to post bail and, based on their evaluation, recommends some to the judge as suitable for placement on pretrial services.[13] Defendants on pretrial supervision often pay a monthly fee to the extent they are able which defrays part of the cost, but typically these programs are paid for largely with public funds. The net cost or savings associated with such programs would depend largely on the extent to which they serve individuals who otherwise would have remained in jail and the jail costs that otherwise would have been incurred.

7. Some jurisdictions are implementing actuarial risk assessments to help judges and magistrates determine the amount of bail and/or conditions of pretrial supervision. Studies have shown these risk assessments can accurately predict which individuals will fail to appear or commit a new offense, particularly a violent offense. Risk assessment instruments, some of which also assess needs, are inventories containing questions about a defendant or offender that are designed to be predictive of whether the individual will recidivate. Risk factors may include age, criminal record, any previous failures to appear for hearings, employment status, substance use, and age of first offense. Points are assigned to each factor, resulting in a total score. Instruments are designed to inform decisions regarding custody, supervision, and referral for services. Risk assessment instruments are typically validated, meaning they are retrospectively tested to demonstrate that each factor and the total risk score are highly correlated with recidivism, failure to appear, or both.

8. A longer, in-person assessment instrument is not necessarily a better one. Many traditional pretrial assessment instruments involve interviewing defendants, which is time-consuming and resource-intensive given the high number of jail admissions in many jurisdictions. For local justice systems pressed for bandwidth and looking for an alternative for more rapidly assessing the pretrial population, Kentucky provides one model. In 2013, the Bluegrass state implemented statewide an assessment instrument "made up of nine risk factors such as prior criminal record, prior failure to appears, and the existence of other pending charges that can be obtained from administrative data" without an interview. While Kentucky still uses some data in addition to the assessment, in the first six months of Kentucky's adoption of this pretrial risk assessment for all of its courts, new offenses by those released prior to trial dropped from 10 percent to 8.5 percent while the percentage of defendants released pending trial increased from 68 percent to 70 percent.[14]

9. There are proven models of police diversion from jail for minor offenses, including citations and summons. New York City has been using desk appearance tickets since 1964 in lieu of bringing certain misdemeanant defendants to jail. Instead, police offers have the discretion to bring the subject to the nearby police precinct office where determine the arrestee's eligibility for a desk appearance ticket. Individuals are ineligible if, for example, their identification cannot be verified, they have outstanding or prior warrants, they are on parole or probation, or they are a recidivist. In 2012, nearly 80,000 desk appearance tickets were issued for offens-

es such as marijuana possession, driving with a suspended license, petty theft, and city code offenses.[15] In 2012, three-quarters of those who received these desk citations appeared for their arraignment.[16] If the arraignment was scheduled within 15 days of the arrest, the failure to appear rate was only 4 percent, which increased to a still modest 13 percent for arraignments within 16 to 30 days.[17] Substantially higher rates were observed in cases processed more slowly.[18] Notably, the Red Hook Community Center, a neighborhood community court which implements a restorative justice approach including restitution, victim-offender mediation, and community service such as cleaning up graffiti, had almost no failures to appear for desk appearance tickets.[19] Desk appearance tickets and other models of police citation can significantly reduce jail admissions and the associated costs to taxpayers, but jurisdictions should also ensure offender accountability by timely processing cases handled in this manner.

10. Technology, such as electronic monitoring, automated reminder calls, and voice recognition reporting, can help reduce failure to appear rates. Even using a technology as simple and cheap as automated reminder calls was found to increase the percentage of defendants who appeared at their pretrial hearing.[20] Voice recognition technology allows individuals to report by phone and provide updates on their status, such as whether they have moved, with the system automatically verifying the identity of the caller.[21] While far more costly than these approaches, electronic monitoring whether administered by a county, bondsmen, or private contractor can play a role for those who are released prior to trial who pose more of a risk to abscond. A landmark 2006 study of 75,661 Florida offenders placed on radio frequency and GPS monitoring concluded that absconding was almost completely eliminated and revocations from supervision to prison fell by between 89 and 95 percent.[22] Part of the reason electronic monitoring is typically not appropriate for the lowest-risk offenders is that it can cost $5 to $25 a day depending on the technology and capacity for responding to alerts, with GPS costing substantially more than radio frequency monitoring. However, even on the high end, it remains less than jail and defendants, particularly those who can maintain employment, can in many cases cover part or all of the cost.

11. Swift, certain, and commensurate sanctions and incentives can enhance compliance with pretrial conditions of release. Those initially released prior to trial can nonetheless find themselves back in jail before their court date if they violate conditions, such as missing an appointment, leaving the county without permission, or testing positive for drugs. Partly due to high caseloads, a common approach to both pretrial and post-sentence supervision was to simply wait for several such violations to pile up and then revoke the individual to jail or prison. Instead, responses to each violation that are sure, swift, and proportionate have been proven to promote compliance.[23] They can include community service, mandatory treatment, increased reporting, fines, electronic monitoring, and even a weekend in jail whereby the individual can still keep their job. For example, a graduated sanctions grid in Ohio has been demonstrated to increase compliance while reducing incarceration costs.[24] Moreover, the maximum effect on influencing behavior among those on supervision has been found when graduated sanctions are coupled with positive incentives.[25] Supervision agencies that use incentives offer carrots such as earning one's way on to a lower level of monitoring and bus tokens.

12. Counties should analyze key data points before expanding their jails. Local jurisdictions contemplating growing their jail footprint should examine what factors are driving the jail population, which can include: a) courts that are not expeditiously processing cases due to excessive volume or other reasons; b) bail schedules that are set too high, focus only on the current offense and disregard risk level, or automatically deny bail in cases such as those involving nonviolent probationers who are arrested for technical violations such as missing a meeting; and c) the unnecessary use of jail to address traffic violations that do not affect public safety. Counties should also review their jail population data to determine the number of defendants who are locked up solely because they could not afford a commercial bond. Of course, there are some pretrial defendants who were properly denied bond or for whom bond was set at a very high amount because of the severity of their offense and/or on account of previous instances of fleeing. An analysis that identifies how many indigent, low-risk defendants are still in jail after 48 or 72 hours is likely to hone in those who could not afford to post bond. Jurisdictions should also re-examine fines and fees for the lowest-level misdemeanors for which jail is not a sanction except when the offender fails to pay, and explore alternatives such as community service for discharging such costs. Finally, protracted case processing times undermine all forms of pretrial release by lengthening the time period during which the individual must be monitored. One way to address the challenge of overloaded criminal courts that contribute to lengthy case processing times without additional spending is to convert underutilized civil courts in part or whole to criminal ones, as civil court volume has dropped dramatically in Texas and other jurisdictions that have enacted tort reforms.[26]

NOTES

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[9] "Unjust Deserts: A Thematic Review by HM Chief Inspector of Prisons of the Treatment and Conditions for Unsentenced Prisoners in England and Wales," HM Inspectorate of Prisons for England and Wales, Dec. 2000, p. 23-24.

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[17] Ibid, p.71.

[18] Ibid, p.71

[19] Ibid, p.54.

[20] Mitchel N. Herian and Brian H. Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," The Nebraska Lawyer, Sept. 2010.

[21] "Using Technology to Enhance Pretrial Services," Pretrial Justice Institute (2012), p.17.

[22] Ibid, p.20.

[23] "Effective Responses to Offender Behavior: Lessons Learned for Probation and Parole Supervision," American Probation and Parole Association, 2012, p.4-5.

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900 Congress Ave., Suite 400 | Austin, Texas 78701 | (512) 472-2700 phone | (512) 472-2728 fax | www.TexasPolicy.com