

Pretrial 101

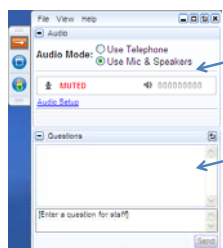
Lindsey Carlson
General Counsel
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Pretrial 101: An Introduction

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General Counsel
Pretrial Justice Institute



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Pretrial Justice Institute

- ◆ Nation's only non-profit dedicated to ensuring safe, just, and informed pretrial decision-making
- ◆ Mission is to advocate for fair and effective pretrial practices that eliminate inappropriate detention, optimize diversion from prosecution, and maintain community safety.
- ◆ Achieves mission through:
 - ◆ Supporting research on pretrial policy and practice;
 - ◆ Providing technical assistance, education, and training to criminal justice stakeholders; and
 - ◆ Advocating in legislatures and communities for reform of pretrial practices and policies.



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What is Bail?

- ◆ The **HISTORICAL PURPOSE** of bail was to maintain the integrity of judicial process by assuring defendants appear for trial.
- ◆ It is a **CONTRACTUAL OBLIGATION** by the defendant to the court.
- ◆ **Black's Law Dictionary**: "A procedure to procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within jurisdiction of court."



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The State of Bail

National Public Radio Special Series on Bail:

<http://www.npr.org/templates/story/story.php?storyId=122725771>



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Bill of Rights (1791)

Sixth Amendment
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defense.

Eighth Amendment
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Constitutional Amendments




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Stack v. Boyle, 342 US 1 (1951)

- ◆ **Facts:** 12 individuals were arrested and charged under the Smith Act. Their bail was eventually fixed at \$50,000, which was an abnormally high amount for such charges. The defendants argued their bail was excessive.
- ◆ **Holding:**
 - ◆ The purpose of bail is to assure the presence of the defendant. Bail set higher than reasonably necessary to effectuate that purpose is excessive.
 - ◆ Bail must be fixed for each individual defendant according to standards relevant to assuring the presence of that defendant.
 - ◆ Pretrial release permits the unhampered preparation of defense, protects the presumption of innocence, and prevents punishment before conviction.



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Bail reform movement

- “In too many instances, the present system . . . neither guarantees security to society nor safeguards the rights of the accused. It is lax with those with whom it should be stringent and stringent with those whom it could safely be less severe.”
 - Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927; reprinted 1966)



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Vera Personal Recognizance Experiment, 1961

- Interviewed defendants at jail
- Demonstrated that defendants could be released and show up for trial based on factors like community ties, rather than on their ability to afford bail
- Origin of “release on own recognizance”
- Origin of “Vera Point Scale”



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1964

- Illinois adopts a Ten Percent Deposit Plan, allowing defendants to post 10 percent of a bail amount directly with the court, effectively eliminating commercial sureties.
- The first of two National Conferences on Bail and Criminal Justice is held.
- Pretrial programs modeled after the Manhattan Bail Project begin in St. Louis, Chicago, Tulsa, and Nassau County, New York.



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National Conference on Bail and Criminal Justice May 27 - 29, 1964

"There is a special responsibility on all of us here, a special responsibility to represent those who cannot be here, those who are poor, those who are unfortunate – the 1,500,00 persons in the United States who are accused of crime, who haven't been yet found guilty, who are yet unable to make bail and serve a time in prison prior to the time that their guilt has even been established. For these people, for those who cannot protect themselves, for those who are unfortunate, we here, over the period of the next three days, have a special responsibility . . ."

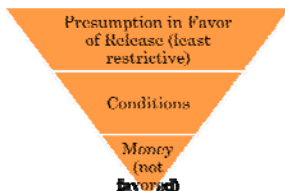


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Federal bail reform act 1966

- Sole focus was on appearance risks
- Hierarchy of bail conditions:



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US v. Salerno, 481 US 739 (1987)

- ◆ **Facts:** Federal prosecutors sought to detain the defendants under the Bail Reform Act on the grounds that they were alleged members of the mafia, and no conditions of release could protect the public or assure their appearance at trial. The defendants challenged the constitutionality of the Bail Reform Act.
- ◆ **Holding:**
 - ◆ The government has a legitimate interest in preventing further crimes by dangerous defendants through pretrial detention in very limited circumstances.
 - ◆ The Act provides the constitutionally required procedural safeguards to prevent unfair or unnecessary detention, including: the right to counsel, the ability to call witnesses, the government's burden of proof by clear and convincing evidence, and written findings of fact by the judicial officer.
 - ◆ "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."




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Why does Pretrial Justice Matter?

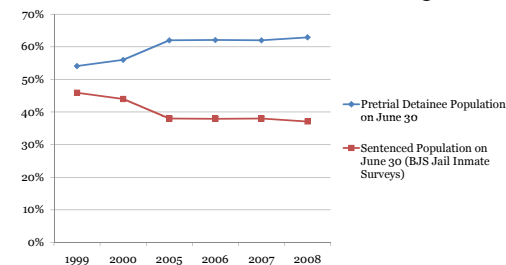
- Who's in jail?
- What are the current pretrial practices and laws throughout the nation?
- Why is this a problem?
- What are high-functioning pretrial risk assessment and management systems, and how can they help?




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Who's In Jail? 2/3rds Jail Inmates are Awaiting Trial



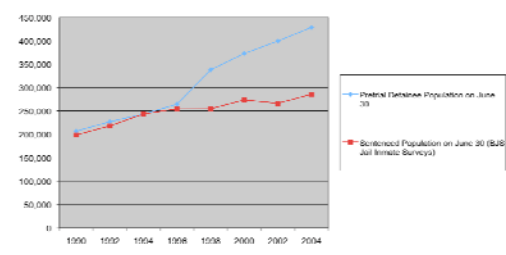
Year	Pretrial Detainee Population on June 30 (%)	Sentenced Population on June 30 (BJS Jail Inmate Surveys) (%)
1999	54%	46%
2000	56%	44%
2005	62%	38%
2006	62%	38%
2007	62%	38%
2008	63%	37%




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Trends since 1990: Pretrial vs. sentenced populations



Year	Pretrial Detainee Population on June 30	Sentenced Population on June 30 (BJS Jail Inmate Surveys)
1990	200,000	200,000
1994	220,000	220,000
1998	250,000	230,000
2000	350,000	240,000
2002	400,000	230,000
2004	450,000	240,000





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Current Pretrial Practices



NATIONALLY:

- ◆ **Bail Conditions Set**
 - Non-financial for 25% arrested on felony charges
 - Financial conditions for 70% arrested on felony charges
 - Held without bail for final 5% arrested on felony charges
- ◆ So in total, 95% of individuals arrested on felony charges were legally "released" by the court, in that they had conditions of release set

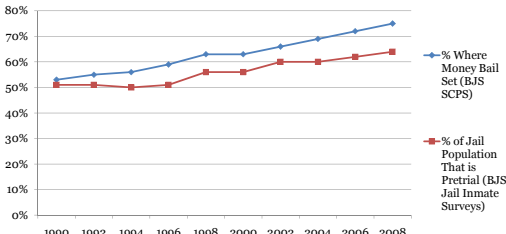

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Current Pretrial Practices



- ◆ 95% of felony arrests had bail set; Only 58% actually obtained released
 - 28% of those to obtain release were released on recognizance (promise to return)
 - 42% obtained release via bondsmen
 - 8% posted a 10% bond deposit to court
 - 5% posted the full amount of their bond to the court;
 - 12% were released with nonfinancial conditions (to pretrial)
 - 6% were released both with nonfinancial and financial conditions


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Increased use of Money Bail has Increased Pretrial Detention





Year	% Where Money Bail Set (BJS SCPS)	% of Jail Population That is Pretrial (BJS Jail Inmate Surveys)
1990	52%	50%
1992	55%	50%
1994	58%	50%
1996	60%	52%
1998	65%	55%
2000	63%	55%
2002	68%	60%
2004	70%	60%
2006	72%	62%
2008	75%	65%


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Current Pretrial Practices: State Bail Laws

- ◆ 23 states are “Right to Bail” states. These states have constitutional provisions entitling nearly all defendants to bail.
- ◆ At least 32 states have a presumption of release on personal recognizance.
- ◆ 45 states require or permit courts to consider public safety when setting bail.
- ◆ Only 24 states have some kind of preventive detention mechanism – meaning in 21 states, courts are required to set bail for public safety but are not permitted to deny bail.
- ◆ Many states do not provide or require public defenders at bail hearings.

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National Standards

- American Bar Association Criminal Justice Standards on Pretrial Release
- National Association of Pretrial Services Agencies
- National Association of Counties Policy on Pretrial Release

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What's the Problem?

- ◆ **Collateral Consequences of Needless Detention:**
 - The longer the time in pretrial detention, the greater likelihood of conviction and more severe sentencing – no matter the charge or criminal history.
 - Four times as many defendants serve time pretrial than are incarcerated after conviction.
 - Serving time in any facility slightly increases recidivism.
- ◆ **Racial Disparities:**
 - Money bail creates disparities in release rates between low-income individuals— disproportionately minorities— and higher-income individuals.

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What's the Problem?

- ◆ **Constitutionally Suspect Practices**
 - Detention without due process requirements.
 - disproportionate detention of minorities may violate equal protection requirements.
 - Bail may be excessive in violation of 8th Amendment.
 - Failure to provide defense counsel at bail hearing may violate 6th Amendment right to counsel.
- ◆ **Public Safety:**
 - Money bail permits defendants who pose legitimate risks of flight or danger to nevertheless buy release.
- ◆ **Overcrowded and Costly Jails:**
 - Pretrial detainees contribute to jail crowding and cause dramatic increases in jail costs.




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High-Functioning Pretrial Risk Assessment and Management Systems

- Impartial screening of all defendants booked into the jail, regardless of charge
 - Verification of interview information and criminal history checks
 - Follow up reviews of defendants unable to meet the conditions of release
- Assessment of risk of pretrial misconduct through objective means and presentation of recommendations to the court based upon the risk level
 - Detain, release, release with conditions
 - No financial release conditions required



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High-Functioning Pretrial Risk Assessment and Management Systems

- Accountable and appropriate supervision of those released
 - include proactive court date reminders,
 - progress reports to court
- Reporting on process and outcome measures to stakeholders
 - Release rates by risk category; appearance rates and public safety rates by type of release



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Key Research Findings

- Individuals held pretrial are more likely to be convicted to more severe sentences than those out pending adjudication, holding all constant.
- Serving time in any facility can slightly increase recidivism, controlling for all other factors.
- Validated risk assessment tools more effective than subjective judgment.
- Recidivism rates can be reduced when interventions are matched to risk levels.

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Why use evidence-based pretrial practices?

- Identifies individuals by risk category so appropriate and safe bail decisions can be made
 - Early assessment for specialty courts or other diversion to ensure those systems are also high-functioning
 - Setting money bail means the court legally released the defendant. Dangerous/violent can buy freedom.
- Aids with jail population management
 - Saves room in jail for sentenced offenders, dangerous defendants, and violators of community supervision

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Where do we go from here?

- Forthcoming publications
 - Pretrial Risk Assessment
 - International Association of Chiefs of Police
 - American Probation and Parole Association
- Attorney General's National Symposium on Pretrial Justice, Spring 2011
- Bureau of Justice Assistance, major grant program
- Communications and state legislative efforts



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Second Tuesdays at 2 Webinar

Evidence-Based Practices
January 11, 2011 @ 2pm Eastern
Register at: www.bjatrain.org