



AMERICAN BAIL COALITION

# Presentation to the Advisory Group on Pretrial Release and Detention of the Connecticut Sentencing Commission

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AMERICAN BAIL COALITION



# Who Are We, What Do We Do?

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- American Bail Coalition, Surety Bail Insurance Companies
- Approximately 350 Licensed Bail Agents in Connecticut plus staff
- ABC works on bail and pretrial release issues in numerous jurisdictions throughout the country
- Advocate for best practices in bail setting and regulation of bail agents and insurance companies to protect the public
- Jeff Clayton—background





# Evidence-Based Practices and the “Scientific” Justice System

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A philosophy shift from punishment to  
rehabilitation

“Using stuff that works?”

Will never replace human judgment, will  
only complement and inform it



# Current National Picture

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- Various activist groups are advocating to eliminate all financial conditions of bail and replace it with a release/no-release system like the D.C. and federal systems
- This is a major decision-point
- These release/no-release policies were a major legislative topic of conversation this year (example: NM, NJ)
- Reform in NJ is a model of the end-the near elimination of financial conditions in favor of release, release on supervision, or preventative detention





# Current National Picture

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- Increased use of risk assessments, which if used properly, may assist judges in being better informed prior to making a decision on bail
- Most jurisdictions have not taken the step of eliminating financial conditions or surety bonds
- Kentucky still has financial bail—just no surety bonds—majority of people who were released from jail posted cash up until a couple of years ago—now the number is about 1/3 of all defendants posting a financial bail bond





## False Assumptions in “Pretrial Justice”

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- Monetary bail is unconstitutional—due process and equal protection challenges from *Clanton* to *Houston* (materials)
- Former U.S. Solicitor Paul D. Clement (see materials):

*“Bail is a liberty-promoting institution as old as the Republic.”*

*“Plaintiff would have this Court effectively abolish monetary bail on the theory that any defendant is entitled to immediate release based on an unverified assertion of indigency. Nothing in the Constitution supports that extreme position. Instead, the text and history of our founding charter conclusively confirm that monetary bail is constitutional.”*





# False Assumptions in “Pretrial Justice”

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- 70% of people in jail nationally are there “pretrial” and are “innocent,” “have been convicted of no crime,” and “cannot afford their bail” —Connecticut: 78% had three or more prior convictions, and 60% had 1 or more prior felony convictions
- ABC has identified at least ten administrative or other legal reasons other than “affordability” of bail that keep people in jail
- Only a real localized jail study at the file level can isolate the magnitude of the problem and what factors, financial or not, drive it



# False Assumptions in “Pretrial Justice”

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- The concept that masses of people sit in jail for extended periods of time due to not being able to afford their financial bail is largely false (see materials, Los Angeles County study)





# False Assumptions in “Pretrial Justice”

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The following is a snapshot of **10,545** pretrial inmates in the LA County Jail and who are eligible for bail:

- **3,501** already sentenced for another crime – **NO BAIL**
- **2,066** with outstanding warrants – **NO BAIL**
- **2,014** with “no bail” designations – **NO BAIL**
- **1,229** with assaultive crimes – **NO BAIL**
- **386** who are classified as high security – **NO BAIL**

**TOTAL ELIGIBLE FOR BAIL**

**1,349**

**(or 12% ... NOT 70%)**





# ABC Has Proposed Solutions

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- The Kaleif Browder case renewed conversation but focused only on money and not other bail issues like his hold for a probation violation—look at other holds
  - Set meaningful bail--\$1 bail? \$100 bail?
  - Better review procedures to make sure review process from a bond schedule or initial setting is expedited—*City of Riverside*
  - Public-private partnerships—state pay or state contracted surety bail as an insurance product—lift the indigent up, not drag everyone else down
  - Diversion programs
  - Accountable drug and alcohol treatment efforts
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# Reject the No Money System

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- It is easy to say we don't want a "wealth-based" bail system
  - Ability to pay is one of a basket of factors, and is a consideration as to whether bail is excessive
  - The cost of bail is marginal compared to all of the other costs that offenders will be expected to pay
  - Typically, third-parties are providing a surety (financial guarantee) to the Courts and the defendant at their own expense—you would be cutting off a private benefit provided to a defendant and the Courts
  - Protects community's associational and familial rights
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# Reject the No Money System

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- Financial conditions should have a role in the system—this option should fit within the framework and not be excluded simply because the proponents of some risk instruments designed them to eliminate financial conditions
  - Eliminating financial conditions means **preventative detention will be used**—clear and convincing evidence, court time, due process, heightened speedy trial requirements—New Jersey
  - Preventative detention in the federal system keeps 64% of all defendants arrested detained with no bail (see materials)
  - D.C. incarcerates 15-20% of all arrestees—what is Connecticut's number? New York's is around 10%.
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# Reject the No Money System

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- Too costly to go to a system with *no* financial conditions
- D.C. \$65.2 million to handle pretrial services supervision and evaluation in a city population of 660,000 (materials)
- Connecticut's population is 5.4 times larger—on per capita basis that is a \$352 million price tag for Connecticut—CT specific cost estimates would need to be done
- New Jersey--\$62 million first year, total annual economic cost to the state of New Jersey of \$510 million (materials)—Chris Christie ordered the Attorney General to do a new cost study



# Least Restrictive Form of Release

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- The dated ABA standard assumes that monetary conditions are always the most restrictive other than detention
- For most people who can post cash bond or obtain a surety bond underwritten by a licensed insurer, **a secured bond is typically the least restrictive form of release**
- The dramatic expansion of GPS monitoring, blood monitoring, drug screening chemistry, SCRAM, etc. was not contemplated in the 1970s—the use of correctional technology has become extremely restrictive in terms of liberty, privacy, and financial cost



# Least Restrictive Form of Release

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- The on-going cost of “non-financial” conditions should be considered
- Electronic monitoring companies are publicly-traded on Wall Street—they attempt, according to one article in the materials, to persuade public officials that defendants and convicted criminals will pay the charges (see materials)
- **All types of bond and conditions of release should be on a level-playing field for judges to impose when appropriate**





# Reject the Bail is Too High/Too Low Analysis

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- Justice McLaughlin’s letter (materials) from New York explains why the goal should be to support judicial discretion, which is going to get it “wrong” some percentage of the time and “right” some percentage of the time
- To say that bail is being set too “high” ignores the failures at the other end, when someone fails to appear or commits another crime that a higher bail may have prevented—the same line of logic can lead to the opposite conclusion much more easily, that every failure means bail was set too “low”







# Reject the Bail is Too High/Too Low Analysis

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- Taking a percentage of cases and saying these people cannot “afford” their bail ignores the decisions of judges in setting the initial bail and reviewing that bail with a factor of financial resources as a consideration
- The only truly effective evidence-based system would be no bail at all—100% effective—not reasonable
- There are costs to the system of a failure to appear to the courts, victims, witnesses, police, prosecutor, defense attorney, etc. that should be included in the analysis—one study says \$1,775 for each FTA (materials)



# Risk Assessments – What They Do

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- They tell us how likely someone is to “fail”
  - Many don’t tell us what the “failure” is—i.e., a risk score does not tell you which risk we are talking about, i.e., new crime and/or FTA
  - The new Arnold tool attempts to predict new crimes and FTAs separately—new within last 6 months
  - They give judges another tool to assess risk
  - They can inform bail decisions to a certain extent
  - Arnold: **Risk Assessment + Judicial Discretion**
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# Risk Assessments – Limitations

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- There is no “evidence-based” or scientifically validated way to *set bail or conditions of release*.
- Risk assessments only help identify who is risky, they do not help decide what conditions will obviate that risk
- The risk assessment does not help address criminogenic factors that lead to failure—in other words, what is the scientific basis to say that setting greater conditions based on a numerical risk score will obviate risk? Risk of crime or risk of flight?





# Risk Assessments – Limitations

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- Over-supervision is detrimental to low level offenders
- How does a financial condition mitigate risk?
- How does supervision mitigate risk?
- How does electronic monitoring or uranalysis mitigate risk?
- Seven issues with Risk Assessments from defense perspective (see NLADA report in materials)
- Validation issues are real—Delaware example (materials)
- Do they work—San Francisco Public Defender (materials)





# Risk Assessments – Judges Haven't Been Blind

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- Nearly all validated risk assessments are based on prior criminality and failures to appear—history repeats itself
- The risk assessments mechanically weight the factors today without further consideration—you score risk points for a prior felony, but often we do not ask what that felony was, what were the underlying facts of the case
- For example, Arnold Foundation categories—prior crimes, prior FTAs, violent crime or not, another pending case, whether previously served a jail or prison sentence. The only factor not a prior failure is age.





# Risk Assessments – Judges Haven't Been Blind

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- Risk assessments often **ignore statutory factors**. What happens when judges consider the factors?
- Does the risk assessment validity break down—unresolved issue at this time.
- Trust the tool or trust the information—the Nevada issue
- What if the risk assessment shows that too many people are getting out of jail—then what?
- Are we confident that risk assessments will stand up to scrutiny when used as a basis to preventatively detain?



# Risk Assessments – Demographic Factors

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- The use of demographic factors for sentencing or setting of bail in the criminal justice system has been called into question by a prominent law professor (see materials).
- One recent study, “Machine Bias,” found that risk assessments discriminate based on race (see materials)
- Yale Law Journal Forum cited other issues—bills of attainder
- Many risk assessments use demographic or economic factors—e.g., age at first arrest, own or rent a home, income, etc.
- Eric Holder also questioned the use of these “tools” when he was Attorney General



# Risk Assessments – Resource Considerations

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- Unless risk assessments are computerized, staff will have to be hired to assess people—Albuquerque—14 FTE
- Because we know risk assessments are intuitive, and we know which factors we need to focus on, we know what information we need to get so Judges have it
- It may be that creating new programs to do the assessments will stall out due to human resource issues—yet, making sure all of the underlying information we know matters is readily available to judges would go a long way
- Judges can weight the factors with better information





# Risk Assessments – Validation

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- Not validated to set bail
- Will never be validated to set bail, because it's a probability of failure based on certain factors but it doesn't validate the conditions that will obviate the risk
- Should it be treated differently than other scientific or expert testimony evidence?
- Should Courts approve an instrument?
- Who validates, and what is validation? See NLADA report in materials.





# Evidenced Based Bail Setting – Advocacy Efforts

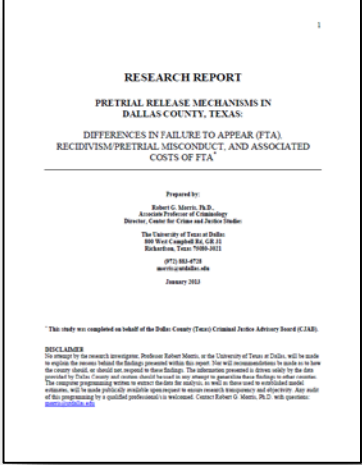
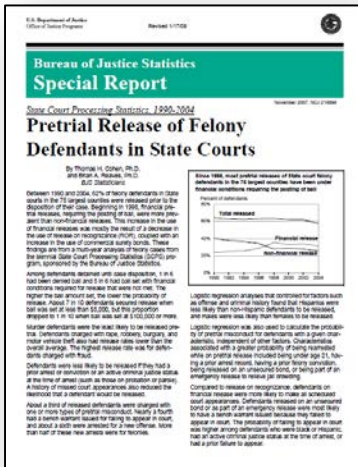
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- We are advocating for research among national organizations to move forward to have a more evidence-based approach in terms of what conditions of release and type of bond will mitigate the risk presented
- This research has not been done—John Jay College symposium recently concluded there are 30+ areas of necessary research that has not been done (see materials)
- Anne Milgram: We were “stunned by the lack of information”
- We have also been advocating for system-wide benefit cost-analyses



# Effectiveness of Surety Bonds

- Peer-reviewed academic studies back the effectiveness of surety bonds as the most effective form of release:





# Effectiveness of Surety Bonds

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*“Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time.”*



The Journal of  
LAW & ECONOMICS

**Eric Helland**, Claremont-McKenna College

**Alexander Tabarrok**, George Mason University

*The Fugitive: Evidence on Public Versus Private Law Enforcement on Bail Jumping, 2004*



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# Effectiveness of Surety Bonds

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*“This analysis suggested that net of other effects (e.g., criminal history, age, indigence, etc.—see technical appendix), defendants released via commercial bonds were least likely to fail to appear in court compared to any other specific mechanism. This finding was consistent when assessed for all charge categories combined and when the data were stratified by felony and misdemeanor offenses, respectively.”*



**Robert G. Morris, Ph.D.,**

Associate Professor of Criminology, University of Texas at Dallas  
Director, Center for Crime and Justice Studies

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# Effectiveness of Surety Bonds

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*“Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.”*



U.S. DEPARTMENT OF  
**JUSTICE**

**U.S. Department of Justice**

Bureau of Justice Statistics

*State Court Processing Statistics 1990-2004*

*Release of Felony Defendants in State Courts*



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## Bail Systems—Get Local

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- Do not reform Connecticut’s bail system based on national talking points—Connecticut’s system is already advanced
  - Get to your file-level data and analyze it
  - Example—in jail in Contra Costa, California 30% of all defendants awaiting trial are facing homicide charges
  - Costs at the local level must be considered—the D.C. system may be a fine system, but is it more “fair”?
  - One Judge: “They have a lot of nice bells and whistles down there that would be nice to have, but which we cannot afford.”
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# Bond Schedules

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- Litigation being pursued to suggest they are unconstitutional—*Clanton, Buffin, Moss Point, etc.*
  - Novel equal protection theory—if someone can afford their bail, then unfair for poor person to wait at all (one minute, see transcript)
  - It is settled law for a generation that using bond schedules is constitutional as an interim, temporary measure
  - The key is timely and meaningful consider—Tuesday's gone.
  - Clanton settlement order still sets money bail in all cases at \$500 (materials)
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# Bond Schedules

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- Best practices—setting bail in all cases 24 hours a day upon a full hearing. Not cheap, so keeping schedules around is typically needed in most jurisdictions. Judges smooth out the edges.
- Schedules were created to allow for releases when court is not in session.





# What do the Reforms Tell Us

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- **The cost of eliminating the use of monetary conditions of bail is borne directly by local governments, the judiciary, and defendants**
- In New Jersey, the cost is going to be at least \$62 million annually in year one, total economic cost of \$510 million.
- Throwing out the entire system due to a new philosophy that monetary bail is blanket “unfair” is bad public policy—discovering the real issues and solving them with all partners at the table achieves accountability and progress



# Jefferson County, CO – Where it all Began

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- Eliminating the bail schedule, going to assessments and supervision, and reducing monetary bail combined, during a time when crime was falling to:
  - Increase the average daily pretrial population and increased the average pretrial length of stay by 29%
  - Increase the number of people staying in more than one day by 141%
  - Increase the number of outstanding warrants by 42% in felonies and 34% in misdemeanors
  - Increase the percent of the pretrial population in the jail from 35% to 42%





# Cost of Supervision and Monitoring

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- It is not free—someone must pay
- Monthly tabs in many jurisdictions can be as high as \$500 (see IBT Article re: Antonio Green case)
- Even a \$100 a month tab will add up to \$1,000 over 10 months—that is a financial condition of bail, to be borne by a county government or a defendant
- Continuous payments can ensnare defendants—miss a payment, what happens? Re-arrest?
- Who will pay for the indigent? Someone must pay



# Costs of Supervision and Monitoring

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“You go to the National Association of Pretrial Services Conference, or the American Parole and Probation Association, and in the vendor room is all this technology for tracking,” says Cherise Burdeen. “They portray it as a great technology, and they tell all these county folks, **“This doesn’t cost you anything; the defendant pays for it all!”**”



# We Support Judicial Discretion

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- Everyone loves judicial discretion...until they lose!
- We support judges making informed bail decisions—judges, not computers, should set bail
- We think surety bail should always be an option if it is the least-restrictive and the most appropriate form of release
- Surety bail will prove its worth in a local jurisdiction or not
- Eliminating all financial conditions has much bigger implications than eliminating surety bail agents



**We are here to help**  
Thank you for your time