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# THE PRETRIAL DETENTION "CRISIS": THE CAUSES AND THE CURE

## INTRODUCTION

Amidst the exposure surrounding the double murder trial of O.J. Simpson, the controversial use of pretrial detention was again brought to the forefront.<sup>1</sup> O.J. Simpson spent three months in prison before trial<sup>2</sup> although he was not convicted on either murder charge.<sup>3</sup> The lengthy pretrial detainment of O.J. Simpson and his subsequent not guilty verdict gives rise to the question: does pretrial detention best serve justice? Indeed, some may argue that the detainment of O.J. Simpson during his double murder trial provides a strong impetus for re-evaluating the current status of the pretrial detention system.

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1. Although the focus of this Note is on the federal pretrial detention statute, the indistinguishable effects of state and federal pretrial detention makes such an analogy appropriate.

2. Police took O.J. Simpson into custody on June 17, 1994. See Art Berman & John J. Goldman, *Nation Transfixed by Extraordinary Spectacle Chase: Millions are Riveted to Their TVs by Bizarre Pursuit of Simpson*, L.A. TIMES, June 18, 1994, at A-1. His trial began three months later in September of 1994.

Although three months seems like a long time to spend in jail before trial, "[t]he Bail Reform Act itself contains no time limits on the period of detention." *United States v. Melendez-Carnon*, 790 F.2d 984, 996 (2d Cir. 1986). In fact, at least one circuit has ruled that a sixteen month pretrial detainment period was not excessive. See Bruce D. Pringle, *Bail and Detention in Federal Criminal Proceedings*, 22 COLO. LAW, 913, 914 (1993) (citing *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986)).

In addition to the three months O.J. Simpson spent in prison before the trial, he was also incarcerated throughout the duration of the trial. In total, O.J. Simpson spent 15 months in prison, yet was ultimately acquitted of both murder charges. *California v. Simpson*, No. BA079211, 1995 WL 704381, at \*2-3 (Cal. Super. Ct., Oct. 3, 1995).

3. See *Simpson*, 1995 WL 704381, at \*2-3.

Section 3142 of the Bail Reform Act of 1984 (BRA or the Act)<sup>4</sup> authorizes a judge to detain a federal criminal defendant pending trial. This section allows a judge to detain a defendant if the judge determines that conditions exist that raise doubt as to whether the defendant will appear at trial or whether the defendant may cause harm to the community.<sup>5</sup> But the pretrial detention system has been plagued with deficiencies since its inception.<sup>6</sup> Pretrial detention has a negative impact on a jury's verdict,<sup>7</sup> on a pretrial detainee's access to legal representation,<sup>8</sup> and on the operation of the federal court system.<sup>9</sup> Accordingly, experts contend that the pretrial detention system is trapped in a state of "crisis."<sup>10</sup>

In fact, the BRA was met with an onslaught of legal scrutiny and proposed solutions even before the system was implemented.<sup>11</sup> Yet these proposed solutions failed to take into account all the deficiencies of the Act. Therefore, even if these proposed solutions are implemented, they would not solve the "crisis." Because the shortcomings of the pretrial detention exist at several levels of the criminal justice system, the effective amelioration of the pretrial detention system hinges upon change at several levels of the criminal justice system.

This Note recommends that scholars and legislators adopt a wide perspective when formulating a solution to the pretrial detention "crisis." Part I traces the history of section 3142 and provides a working definition of the statute. Part II discusses some of the shortcomings of the Act and the causes of the "crisis." Part III demonstrates the urgent need for a solution by describing the

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4. 18 U.S.C. § 3142 (1994). This section is appropriately entitled: "Release or detention of a defendant pending trial." *Id.*

5. See § 3142(e).

6. For a discussion of the problems and concerns that arose from the implementation of the pretrial detention system, see *infra* Part III.

7. See *infra* Part III.A.

8. See *infra* Part III.C.

9. See *infra* Part III.D.

10. See Daniel B. Ryan, *The Federal Detention Crisis: Causes and Effects*, FED. PROBATION, Mar. 1993, at 54.

11. See *infra* Part IV.

negative effect of pretrial detention on defendants, the prison system, defense attorneys, and the federal court system. Part IV outlines a few of the proposed solutions and highlights the strengths and weaknesses of each proposal. In conclusion, Part V makes recommendations to marshals, probation officers, prosecutors, public defenders, and judges on how to effectively modify the pretrial detention system.

### I. HISTORY OF SECTION 3142 OF THE BAIL REFORM ACT

Congress enacted section 3142 of the BRA in response to the inadequacy of its predecessor, the 1966 Bail Reform Act (1966 Act).<sup>12</sup> The impetus for the revision was the inability of the 1966 Act to protect society from crimes committed by accused criminals while out on bail.<sup>13</sup> The 1966 Act's primary goal was to guarantee a defendant's presence at trial.<sup>14</sup> In contrast, the purpose of the 1984 BRA was to prevent defendants from committing crimes while released on probation.<sup>15</sup>

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12. 18 U.S.C. § 3146 (1966), *repealed by* Pub. L. No. 98-473, § 203(a), 98 Stat. 1976 (1984).

13. *See* S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3185 ("Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.").

14. *See* S. REP. NO. 98-225, at 3 ("The adoption of these changes marks a significant departure from the basic philosophy [sic] of the Bail Reform Act [of 1966], which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings."). For criticism of the Bail Reform Act of 1966, *see* H.R. REP. NO. 91-907, at 87-104 (1970).

Before 1966, federal courts almost exclusively used monetary bonds to assure a defendant's presence at trial. The 1966 Act instituted nonmonetary conditions designed to assure a defendant's appearance in court. *See* Pringle, *supra* note 2, at 913.

15. For example, the 1984 BRA creates a rebuttable presumption favoring detention if the defendant has been previously convicted of certain offenses. *See* 18 U.S.C. § 3142(e). Section 3142(e) reads in pertinent part:

In a case described in subsection (f)(1) of this section [detention sought on motion by the Government], a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the [judge] finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal

Section 3142 of the BRA authorizes either the prosecuting attorney or the judge to initiate a pretrial detention hearing via a motion.<sup>16</sup> However, there are limits to when pretrial detention can be sought.<sup>17</sup> Section 3142(f)(1) of the BRA permits the prosecuting attorney to initiate a pretrial detention hearing if the case involves a crime of violence, an offense for which the maximum sentence is life imprisonment or death, or an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act.<sup>18</sup>

Section 3142(f)(2)(B) of the BRA loosens the restrictive nature of section 3142(f)(1) by granting authority to the prosecuting attorney or

jurisdiction had existed;

(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

*Id.*

16. *See* § 3142(f).

17. *See id.* These limitations, in theory, prevent a prosecutor from seeking detention on a whim. The limitations dictate that:

The judicial officer shall hold a [detention] hearing . . .

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); or

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

*Id.*

18. *See id.*

judge to request a detention hearing if the defendant poses "a serious risk" to flee, obstruct justice, or intimidate a witness.<sup>19</sup> However, Congress' use of the "serious risk" language requires judicial interpretation. The inclusion of such a manipulable provision reflects congressional intent to rely on judicial discretion when making a detention determination.<sup>20</sup>

After a motion for pretrial detention has been filed, the court immediately conducts a detention hearing.<sup>21</sup> At the detention hearing, the defendant is afforded an opportunity to testify, present witnesses on his own behalf, and introduce evidence by proffer.<sup>22</sup> To sustain a motion for pretrial detention, the prosecution must show, by clear and convincing evidence, that the defendant presents either a risk of flight from the jurisdiction or a risk to the safety of any other person or the community.<sup>23</sup>

Section 3142 of the BRA does offer alternatives to detention.<sup>24</sup> For example, a defendant may be released on his own recognizance<sup>25</sup> or nominated for conditional release.<sup>26</sup> The existence of alternatives

19. § 3142(f)(2)(B).

20. See S. REP. NO. 98-225, at 5 ("[I]t is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.").

21. See 18 U.S.C. § 3142(f). Section 3142(f) provides:

The [detention] hearing shall be held immediately upon the person's first appearance before the [judge] unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

*Id.*

22. See *id.*

23. See § 3142(f).

24. See § 3142(a). The pertinent part of subsection (a) lists as alternatives to detention:

(1) release[] on [defendant's] personal recognizance or upon execution of an unsecured appearance bond . . . ;

(2) release[] on a condition or combination of conditions . . . ;

(3) temporar[y] detain[ment] to permit revocation of conditional release, deportation, or exclusion . . . .

*Id.*

25. See § 3142(a)(1).

26. See § 3142(c). Such conditions include the release of the defendant:

illustrates the impact that judges and other officers of the court<sup>27</sup> have at a detention hearing.<sup>28</sup> Indeed, the catch-all provision of section

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(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that [he] determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of narcotic drug or other controlled substance... without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties . . . in such amount as is reasonably necessary to assure appearance of the person as required . . . ;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

*Id.* Note that this list of alternatives to detention is not exhaustive.

27. The term “officers of the court” encompasses judges, marshals, prosecutors, probation officers, public defenders, and pretrial services officers.

28. *See infra* Part V.

3142(c)<sup>29</sup> illustrates Congress' desire to give the judge discretion at a detention hearing.<sup>30</sup> Although indicative of congressional intent, the manipulable nature of the statute leaves ample room for abuse<sup>31</sup> and has been the subject of much criticism.

## II. THE SHORTCOMINGS

The pretrial detention system has been met with criticism since its inception. The criticism stems from a combination of the negative effect of detention with the inability of the pretrial detention system to consistently detain only those defendants who pose a risk to society if released. The ineffectiveness of the pretrial detention system is traceable to several factors: the failure of pretrial services, the unavailability of probation alternatives, coercive actions by prosecutors, and the difficulty in predicting dangerousness inherent in section 3142. Because several factors contribute to the "crisis," a solution should not be limited to one aspect of the statute or a single officer of the court.

### *A. The Failure of Pretrial Services*

Congress enacted the Speedy Trial Act of 1974 (STA)<sup>32</sup> establishing pretrial services programs in ten representative judicial districts to determine if pretrial services warranted nationwide implementation.<sup>33</sup> Congress created these ten demonstration agencies

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29. See 18 U.S.C. § 3142 (c)(2)(xiv).

30. See *supra* note 20 and accompanying text.

31.

The [judge] is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release.

United States v. Salerno, 481 U.S. 739, 742 (1987) (citation omitted).

32. Pub. L. No. 93-619, §§ 3152-3156, §§ 3161-2174, 88 Stat. 2076, 2088 (1975), amended by 18 U.S.C. §§ 3152-3155 (Supp. III 1985).

33. See 18 U.S.C. §§ 3152-3155 (1976) (amended 1982).



to meet two goals: (1) to reduce the likelihood that defendants released before trial will commit a crime and (2) to reduce the number of released defendants who flee the jurisdiction.<sup>34</sup> Due to the success of the ten test programs,<sup>35</sup> Congress enacted the Pretrial Services Act (PSA) in 1982.<sup>36</sup>

The PSA mandated the creation of pretrial services programs in every federal jurisdiction.<sup>37</sup> Although the value of a well developed pretrial services program is evident,<sup>38</sup> some federal districts fail to provide adequate services.<sup>39</sup> This limitation tends to inhibit a judge from making an accurate detention determination.

While the PSA mandated the establishment of pretrial services programs in every federal judicial district,<sup>40</sup> the quality and funding of the program varies from district to district.<sup>41</sup> In accordance with section 3152(a) of the PSA, some federal districts established a separate pretrial services office.<sup>42</sup> In contrast, other districts developed a pretrial services office as an extension of pre-existing probation offices.<sup>43</sup> This inconsistency becomes significant when one considers the impact of pretrial services on a pretrial detention

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34. See *infra* note 35.

35. See Betsy K. Wanger, Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 326-29 (1987) (discussing how the success of demonstration agencies, implemented pursuant to the Speedy Trial Act, led to the enactment of the Pretrial Services Act of 1982).

36. Pub. L. No. 97-267, § 2, 96 Stat. 1136 (1982).

37. See § 3152(a). The Act also provides that once established, such services should be supervised by a chief probation or pretrial services officer. See *id.*

38. See Wanger, *supra* note 35, at 327 n.47. See generally S. REP. NO. 97-77, at 2-3 (1981) (discussing the origins of the Pretrial Services Act).

39. See Wanger, *supra* note 35, at 330-35 (discussing how "the congressional mandate of nationwide implementation of the 1982 Act has not been fulfilled"). Of 93 federal districts, only 7 contacted more than 90% of defendants before detention hearings; 54 contacted fewer than 50%; 26 contacted fewer than 25% of defendants; and 7 districts reported delivery of no pretrial services at all. See UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL DISTRICT COURTS' IMPLEMENTATION OF THE 1982 PRETRIAL SERVICES ACT, app. II at 19-21 (1985), cited in Wanger, *supra* note 35, at 331.

40. See Wanger, *supra* note 35, at 329.

41. See *id.* at 330-35.

42. See *id.* at 333-34.

43. See *id.* at 333.

hearing.<sup>44</sup> Because a judge relies on pretrial services offices in order to make an informed detention determination, an underdeveloped pretrial services office undermines the effectiveness of pretrial detention.

### *B. Unavailability of Probation Alternatives*

The unavailability of probation alternatives also negatively affects the use of pretrial detention. The lack of alternatives to detention, such as home electronic monitoring and halfway houses, limits what alternatives to detention a judge can arrange. Either an increase in spending or a reallocation of funding would present a judge with more alternatives to detention.<sup>45</sup> Such increases in spending would likely be cost-effective.<sup>46</sup> If federal districts are unable to afford various probationary tools, a judge is less likely to release a defendant into a probationary program. Such a limitation contradicts congressional intent, which envisioned a pretrial detention system which would rely on a judge's ability to make a risk determination and act accordingly.<sup>47</sup>

The federal court system recommends a variety of probationary alternatives.<sup>48</sup> These recommendations include alternatives to

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44. Pretrial services functions include the following:

[c]ollect[ing], verify[ing], and report[ing] to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release . . . .

18 U.S.C. § 3154(1).

The agency is also responsible for ensuring that a released defendant observes the terms of his or her release. *See* § 3154(3). In light of these responsibilities, an independent, fully funded pretrial services office would be ideal. *See* Wanger, *supra* note 35, at 322.

45. *See* Interview with Dan Cronin, Public Defender, Southern District of Illinois, in East St. Louis, Ill. (Nov. 14, 1995). Some districts have access to certain probationary tools, but simply can not afford them. *See id.*

46. *See id.*

47. *See* S. REP. NO. 98-225, *supra* note 20.

48. In November of 1991, the administrative offices of the United States Courts forwarded

detention<sup>49</sup> and conditions of release.<sup>50</sup> Although the alternatives to detention include home confinement with electronic monitoring and halfway houses,<sup>51</sup> this option may be idealistic at best. Electronic monitoring devices are cost effective when compared to detention,<sup>52</sup> but they are not available in every district.<sup>53</sup> Likewise, halfway houses may not be available or may be too far away from the pretrial services officer or courthouse to rationalize its use.<sup>54</sup>

### C. Coercive Actions by Prosecutors

Prosecutorial discretion also adds to the ineffectiveness of pretrial detention. Prosecutors have the authority to pursue a plea agreement and bargain with a defendant.<sup>55</sup> Because a prosecutor can decide whether or not to pursue pretrial detention,<sup>56</sup> they can use pretrial

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a reference on alternatives to detention to judicial officers in the federal court system. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL OFFICERS REFERENCE ON ALTERNATIVES TO DETENTION (1991).

49. *See id.* at 1-19. The list of alternatives include: reporting to a designated agency; third-party custody; outpatient substance abuse treatment; outpatient mental health treatment; curfew; financial conditions; bail bond with solvent surety; residential substance abuse treatment; residential mental health treatment; home confinement without electronic monitoring systems; home confinement with electronic monitoring systems; halfway houses; and return to custody. *See id.*

50. *See id.* at 20-26. The list of conditions of release include: employment; education; restricted association, place of abode, or travel; no victim/witness contact; no weapons; no excessive use of alcohol/illegal drugs; and a catch-all category to cover any other condition that is "reasonably necessary to assure the appearance of the defendant as required and to assure the safety of any other person and the community." *Id.* at 26. Examples given of such conditions include: surrender of a passport, professional license or certificate, or driver's license. *See id.*

51. *See also infra* note 54.

52. *See* Interview with Dan Cronin, *supra* note 45.

53. *See id.*

54. *See id.* The use of halfway houses as an alternative to detention is inhibited by United States Marshall's Office (USMO) guidelines. *See id.* The USMO is responsible for producing a detained defendant for federal criminal proceedings. *See* Ryan, *supra* note 10, at 55. USMO guidelines require that a defendant be detained within a reasonable commuting distance of the federal courts. *See id.* The Department of Justice determined that a reasonable distance to commute is a one-way 30 minute drive. *See id.* Consequently, if halfway houses are further than 30 minutes away from the court house, such an alternative becomes unavailable to a judge.

55. *See* interview with Dan Cronin, *supra* note 45.

56. *See* 18 U.S.C. § 3142(f).

detention as a bargaining chip during plea negotiations.<sup>57</sup> This converts pretrial detention from a method of protecting society from crimes committed by criminals out on bail into a tool which helps prosecutors obtain information or convictions. As a result, those criminals who are the target of section 3142 may be released on probation because they expose other criminals, while less dangerous defendants may be detained.<sup>58</sup> This phenomenon clearly contradicts the purpose of the statute.

#### *D. Difficulty in Predicting Dangerousness*

An important facet of pretrial detention is a judge's ability to predict which criminals are most likely to commit crimes if released on probation.<sup>59</sup> Defendants have attacked the BRA on grounds that the test for determining "dangerousness" is unconstitutionally vague.<sup>60</sup> Although the Supreme Court has upheld the constitutionality

57. See Michael Harwin, Note, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1095 (1993) (noting that although completely legal and normative, "it is widely acknowledged that the government now commonly misuses the leverage of pretrial detention to extract premature guilty pleas and cooperation agreements in exchange for pretrial release"). See also Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 339 n.33 (1990) ("The power of plea bargaining in the pretrial process where the defendant is detained is extraordinary; only 1% to 10% of all defendants ever make it to the trial stage. A first offender detainee is more likely to be convicted and severely sentenced than a recidivist with more than ten prior arrests who was released before trial.") (citation omitted).

58. See Harwin, *supra* note 57, at 1095.

59. See *supra* note 13. The primary objective of a court during a detention hearing is to determine whether a defendant is dangerous, that is, whether a defendant would threaten the "safety of any other person or the community" if released on bail. S. REP. NO. 98-225, at 12.

60. For example, in *United States v. Payden*, the defendant argued that the BRA was unconstitutionally vague because it gave inadequate notice of the conduct that would lead to pretrial detention. *United States v. Payden*, 598 F. Supp. 1388, 1396 (S.D.N.Y. 1984), *rev'd on other grounds*, 759 F.2d 202 (2d Cir. 1985). The court rejected this argument, reasoning that § 3142(g), which lists those factors to be considered when making a detention determination, effectively limits the discretion of a judge. See *id.* at 1397.

18 U.S.C. § 3142(g) reads:

The [judge] shall, in determining whether there are conditions of release that will reasonably assure . . . the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the

of the BRA,<sup>61</sup> the absence of a statutory definition of dangerousness makes detention hearings susceptible to discretionary inaccuracy.<sup>62</sup> Such inaccuracy prevents the criminal justice system from making an accurate detention determination in every case.

Although courts narrowly construe the limitations the BRA places on a judge's discretion at a detention hearing, empirical studies

offense is a crime of violence or involves a narcotic drug

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

The *Payden* court stated that:

The "void for vagueness" doctrine is usually applied to situations where a statute does not give notice of the type of behavior that is prohibited. The new bail statute does not prohibit conduct, rather it establishes a framework for a judge to detain an individual based on a predication of possible future conduct. A vagueness claim is therefore not appropriate for this statute.

*Payden*, 598 F. Supp. at 1396. See also *United States v. Edwards*, 430 A.2d 1321 (D.C. Cir. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982) (upholding the constitutionality of the District of Columbia pretrial detention statute); *Schall v. Martin*, 467 U.S. 253, 278 (1984) ("Our cases indicate . . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."); S. REP. NO. 98-225, at 9 ("[T]he committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy.").

61. *United States v. Salerno*, 481 U.S. 739 (1987).

62. See Jack F. Williams, *Process and Detention: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 335-345 (1994). Empirical studies generally conclude that pretrial predictions of dangerousness are inaccurate. These studies show that a large number of nondangerous defendants are nevertheless detained as dangerous. "[S]tudies on predicting dangerousness have shown that experts are accurate at predictions of future dangerousness about one-third of the time and that experts overpredict dangerousness, yielding a false positive rate of sixty percent." *Id.* at 343-44. See also THOMAS BAK, ADMIN. OFFICE OF THE UNITED STATES COURTS, DEFENDANTS WHO AVOID DETENTION—A GOOD RISK? (1994) (discussing statistics that show that "most defendants whom the government feared would commit an act of violence did not do so").

conclude that pretrial predictions of dangerousness are often inaccurate.<sup>63</sup> The inaccuracy of predictions of dangerousness means that a defendant who Congress desires to be detained may be released on bail while non-dangerous defendants may suffer the consequences of being detained.

### III. NEGATIVE EFFECTS OF PRETRIAL DETENTION

The shortcomings of the pretrial detention system negatively affect pretrial detainees, the prison system, defense attorneys, and the courts.<sup>64</sup> Therefore, in order to be successful, a solution must take into account each of these aspects of the criminal justice system.

#### *A. Effect on the Pretrial Detainee*

The legislative history of the BRA reveals congressional concern for the protection of society, not the troubles of the defendant.<sup>65</sup> At the time the defendant is detained before trial, however, he has not been found guilty. Therefore, he is entitled to the same constitutional safeguards which apply to other individuals.<sup>66</sup> Yet, a pretrial detainee is exposed to the same conditions as convicted criminals, even though the pretrial detainee may be ultimately acquitted.

The most glaring concern of the pretrial detainee is the large percentage of detainees who are eventually found guilty.<sup>67</sup> This fact may indicate that judges are correctly predicting which defendants pose a grave enough danger to the community to warrant detaining them before trial. Such an interpretation is logical because section 3142(g)(2) of the BRA instructs judges to consider the weight of the

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63. See Williams, *supra* note 62.

64. This list of negative effects should not be viewed as exclusive.

65. See *supra* note 13.

66. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law . . .").

67. For example, in 1987 and 1988, approximately 85% of pretrial detainees were eventually convicted of a criminal offense. See Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 15 (1989).

evidence against the defendant when making a detention determination.<sup>68</sup> On the other hand, the tendency of pretrial detainees ultimately to be found guilty may reflect juror bias. Jurors may reason that if the defendant was incarcerated, then he must be guilty of the charged offense because the government would not have jailed the defendant in the first place.<sup>69</sup>

The logistics of pretrial detention pose additional problems for the pretrial detainee.<sup>70</sup> Because of overcrowding, prisoners, including pretrial detainees, may be incarcerated in facilities far away from the district in which they are tried.<sup>71</sup> This distance can inhibit a defense attorney from consulting with the pretrial detainee. Further, a cross-country bus ride the day before trial may leave a defendant looking tattered and worn out.<sup>72</sup> Such a presence in the courtroom may reinforce a jury's inclination to convict a pretrial detainee. On the other hand, if the pretrial detainee appears relaxed and comfortable, a jury may infer that the defendant is not guilty.<sup>73</sup>

Eventually, the negative effects of pretrial detention spurred

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68. See 18 U.S.C. § 3142(g)(2).

69. Although judges will remove a jury to prevent it from seeing a defendant enter the courtroom in shackles, prison garb is an unmistakable indication that an individual is in the custody of the USMO.

70. See Vincent L. Broderick, *Pretrial Detention in the Criminal Justice Process*, FED. PROBATION, Mar. 1993, at 5-6 (discussing the difficulties defense attorneys have in communicating with their clients because, if detained, the clients are housed far away and moved often).

71. See Ryan, *supra* note 10, at 55 (citing Letter of Leonard F. Joy to Honorable James L. Oakes, Chief Judge, U.S. Court of Appeals, Second Circuit (Nov. 20, 1991)). Mr. Joy recounts a situation where a defendant awaiting trial was moved from a detention facility in New York to a facility in Texas due to prison overcrowding. See *id.*

72. See *id.* In his letter to Judge Oakes, Mr. Joy explained:

Many of our clients are being bounced around like ping pong balls between institutions. They are awakened in the middle of the night in preparation for a trip to court and when they arrive they are exhausted and have difficulty concentrating. More than one District Judge has commented on the sorry, exhausted condition some of the incarcerated defendants are in. The clients who have not yet had detention hearings often are kept for days with little or no hygiene and inadequate sleep and food.

*Id.*

73. This does not imply that innocent defendants are found guilty solely because of their tattered appearance. It reflects the limited information that the jury has to determine guilt. Thus, it is likely that a juror would consider a defendant's appearance when determining guilt.

lawsuits.<sup>74</sup> Opponents of pretrial detention claimed the BRA violated an individual's right to be free from cruel and unusual punishment.<sup>75</sup> In *United States v. Salerno*,<sup>76</sup> however, the Supreme Court rejected the Eighth Amendment argument and upheld the constitutionality of the BRA.<sup>77</sup>

### B. Effect on the Prison System

Another side-effect of pretrial detention is the impact on the prison population. In some prisons, the occupancy far exceeds the maximum number of inmates the facility was intended to accommodate.<sup>78</sup> As a result, prison overcrowding leads to lighter sentences and the early release of convicted criminals.<sup>79</sup> Although prison overcrowding is a result of years of neglect and a combination of other factors,<sup>80</sup> the increase in the number of pretrial detainees enhances the problem. Moreover, the effect of pretrial detention on prison overcrowding appears unjustifiable when considering that

74. Defendants in such cases claimed pretrial detention violated their constitutional rights. *See, e.g., United States v. Salerno*, 481 U.S. 739, 744 (1987); *Schall v. Martin*, 467 U.S. 253, 261 (1984). The detainment of a defendant who is not guilty is another negative effect of the pretrial detention system, however, it is not treated as a separate category in this Note because it is encompassed in other negative effects discussed.

75. U.S. CONST. amend. VIII.

76. 481 U.S. 739 (1987).

77. *See id.* at 748 ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."). The opinion also states that preventing danger to the community is a legitimate and compelling regulatory goal which Congress has the power to initiate. *See id.* at 750.

78. *See* Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 447-48 (1993). *See also* Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 615 n.20 (1988) (providing specific statistics on prison overcrowding).

79. *See* Judith A. Johnson, *Our Exploding Jails*, 22 JUDGES' J., Winter 1983, at 4 ("The incarceration rate is more closely related to the amount of space available than to any other factor."). *See also* Tavill, *supra* note 78, at 615 ("Now maybe the time to become a criminal. The likelihood of being sentenced to prison or jail is decreasing daily [because of the prison overcrowding crisis].").

80. *See* Potts, *supra* note 78, at 447-50. The author discusses various factors that account for the prison overcrowding problem including "a wholesale incarceration attitude, tougher sentencing procedures, increased drug enforcement, decreased economic conditions, increased prison space as new prisons are built, and demographic shifts." *Id.* at 448.



many of the recommended pretrial detention alternatives cost substantially less than the \$21,900 a year it costs to incarcerate a single inmate.<sup>81</sup>

### C. Effect on Defense Attorneys

Like their clients, pretrial detention affects criminal defense attorneys. Specifically, defense attorneys encounter difficulty when attempting to build a case for their clients.<sup>82</sup> Although the negative impact of pretrial detention is not as severe for defense attorneys as pretrial detainees, the stigma of losing a case or professional repercussions for inadequate representation present a legitimate threat to an attorney's practice.<sup>83</sup>

Incarceration of a client affects a defense attorney's ability to build a case in several ways. First, an attorney's access to a client may be hindered if the client is jailed in a remote facility.<sup>84</sup> Second, if a client is moved from one facility to another,<sup>85</sup> a defense attorney may face difficulties locating the client.<sup>86</sup> Finally, even if a defense attorney has access to a client, the inability to meet confidentially

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81. See Potts, *supra* note 78, at 452-455 (citing Jim Bencivenga, *Serving Time in a Computer 'Cell'*, CHRISTIAN SCI. MONITOR, Dec. 17, 1991, at 12). But see Anna Quindlen, *A Corrections System that Doesn't Correct*, CHI. TRIB., Mar. 17, 1992, at 17 (estimating operating costs between \$25,000 and \$40,000 per inmate per year).

82. See Ryan, *supra* note 10, at 54-55.

83. Admittedly, the concerns of defense attorneys pale in comparison to those of a pretrial detainee. Yet the inability of a defense attorney to reach their client also harms the client. After all, the repercussions that a defense attorney might face would only come to fruition in the event of the client's conviction.

84. See Ryan, *supra* note 10, at 56 ("Members of the defense bar observed that the usual problems of preparing criminal cases for detainees were exacerbated in those jurisdictions where their clients were held in custody at a distance from the court. They further stated that the delays in their preparation time often impacted negatively on the ability of the courts to arrange their calendars."). If the defendant is represented by the public defender's office, the chance of being detained in a remote location increases. See Interview with Dan Cronin, *supra* note 46.

85. See *supra* note 72.

86. See Broderick, *supra* note 70, at 6 ("[A]ttorneys cannot contact [clients] because they do not know where they are. . . . Mail contact is difficult: the defendants have often been moved by the time mail reaches a location which has been identified. . . . When defendants are moved their court clothes and legal papers are often left behind.").

may restrict their communication.<sup>87</sup>

#### *D. Effect on the Federal Court System*

Pretrial detention also has a straining effect on the federal court system. The pretrial detention system demands the time and effort of prosecutors, judges, marshals, probation officers, public defenders, and pretrial services officers. This need for additional resources magnifies the problems generated by underfunding.

Consequently, pretrial detention causes an already slow judicial process to function even slower. The movement of pretrial detainees from one facility to another often forces a federal court to alter its calendar.<sup>88</sup> Such delays only reinforce the lack of confidence many people have in the criminal justice system.

### IV. PROPOSED SOLUTIONS

The proposed solutions to the pretrial detention crisis suggested by other commentators only address specific aspects of the criminal justice system. Some proposals focus on redefining the BRA in order to reduce judicial discretion when making a detention determination.<sup>89</sup> Another commentator contends that the

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87. See *id.* at 7 ("Defense attorneys often find it difficult or impracticable to travel to detention facilities, to connect with shuttled clients, or to meet confidently with clients in detention facilities without fear of eavesdropping.").

88. See *id.* ("When lockdowns or headcounts occur in detention facilities courts must without advance notice readjust their often-crowded calendars."). See also BAK, *supra* note 62, pt. II (conceding pretrial detention sometimes leads to delays in the court calendar due to the difficulty of moving defendants from jail to court).

89. See *infra* Part IV.A. This faction of thought asserts the advantages of making pretrial detention determinations strictly by the percentages would outweigh the injustice to the few and correct the inherent flaws in the system. This Note, however, does not explore such a concept because it would require repealing much of section 3142. Such an approach would save the costs and delays of pretrial service officers. It would also satisfy those critics who feel a judicial officer is given too much discretion when making a pretrial detention determination. Further, prosecutors would no longer be able to misuse their authority to seek pretrial detention.

Such a solution, however, presents a serious departure from the historical conventions of the judicial system. Clearly, it demonstrates a lack of faith in the judicial system and, specifically, it reflects a lack of confidence in the conventional wisdom of judges. Further, the unequivocal randomness of such a system may produce a situation where an innocent person is

improvement<sup>90</sup> of pretrial services is the solution.<sup>91</sup> The history of bail reform,<sup>92</sup> however, suggests that in order to be successful a solution must work within the confines of the statute to improve all areas of the criminal justice system that effect a detention determination.

### A. Redefine the Statute

Critics of the BRA maintain that section 3142 allows judges and prosecuting attorneys too much discretion at detention hearings.<sup>93</sup> As a result, these critics have suggested a variety of specific changes to the BRA, all designed to decrease the discretion of judges and prosecutors.<sup>94</sup> For example, one commentator criticizes section 3142 for not limiting a prosecuting attorney or judge's ability to seek pretrial detention.<sup>95</sup> The commentator maintains that although section 3142 specifically lists the circumstances under which a detention hearing can be initiated,<sup>96</sup> the language of the statute fails to restrict its application because of the addition of a "crime of violence" to the list of triggering offenses.<sup>97</sup> Although a definition of "crime of violence" is provided in section 3156(a)(4),<sup>98</sup> the definition is fairly

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incarcerated, simply because he or she falls in a statistical category. In general, such a solution embraces an attitude which inherently contradicts the theory that you are innocent until proven guilty and violates the Eighth Amendment restriction on cruel and unusual punishment.

90. In some instances, however, the establishment of pretrial services is the answer. See *supra* Part II.A.

91. See Wanger, *supra* note 35 (arguing that the statutory mandate of pretrial services should be fulfilled).

92. Congress codified the change in bail law in 1966 and replaced it in 1984 with the current act.

93. See, e.g., Williams, *supra* note 62, at 389-90; John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, FED. PROBATION, Mar. 1993, at 29.

94. See Williams, *supra* note 62, at 378-88.

95. See *id.* Although the article concedes that the statute attempts to avoid such abuse, the author seeks a practical limit to the application of pretrial detention. See *id.*

96. See *supra* note 17. See also *United States v. Salerno*, 481 U.S. at 751 ("We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies [the defendant's interest in liberty].").

97. See 18 U.S.C. § 3142(f)(1)(A) (1994). Such a catch-all provision encompasses a wide range of offenses and its definition may vary from courthouse to courthouse.

98. The term "crime of violence" means—

broad and open to various interpretations.

One commentator suggests that the BRA should limit the length of time a pretrial detainee can spend in jail before his case is tried.<sup>99</sup> The commentator argues that a statutory maximum on the time spent in pretrial detainment would at least curtail the harm to the defendant.<sup>100</sup>

Another commentator recommends increasing the standard of proof required for the dangerous determination to one of "clear and convincing evidence."<sup>101</sup> Section 3142 of the BRA does not address the degree to which the judge must be persuaded that the defendant is dangerous.<sup>102</sup> Consequently, a low evidentiary standard is the only check on judicial discretion.<sup>103</sup> Accordingly, an increase in the burden of proof would limit the role a judge's discretion plays in a detention

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another;

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or

(C) any felony under chapter 109A or chapter 110.

18 U.S.C. § 3156(a)(4).

99. See Kevin F. Arthur, Comment, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378, 386-87 (1987). The District of Columbia pretrial detention model does include an express time limit of 120 days. See D.C. CODE ANN. § 23-1322(h) (1994).

100. See Arthur, *supra* note 99, at 386. The author explains that the Act contains "loopholes" that prolong pretrial detention:

Congress intended that the Speedy Trial Act would limit the length of pretrial detention. Section 3164 of the Speedy Trial Act states that pretrial detainees must come to trial within ninety days after detention begins. Unfortunately, the "days" to which that section refers are not calendar days. Section 3161(h) contains numerous provisions for "excludable time" that does not count against the ninety-day requirement.

*Id.* (footnotes omitted).

101. See Robert S. Natalini, Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 234 (1985).

102. In contrast, the statute explicitly states that a judge must be persuaded by a clear and convincing standard that the facts asserted to show dangerousness are true. See 18 U.S.C. § 3142(f) ("The facts the [judge] uses to support a finding . . . that no conditions or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.").

103. See Natalini, *supra* note 101, at 234-35 (asserting that because the prosecution has the burden of persuasion, the standard of proof must be a "preponderance of the evidence").

determination.<sup>104</sup>

History suggests, however, that statutory revision of the BRA is unlikely to be effective. Twice before, in 1966 and again in 1984, Congress made extensive revisions to the standard use of bail to remedy its then-existing deficiencies.<sup>105</sup> Despite Congress' efforts, the revisions did not lead to an effective pretrial detention system.

Indeed, minor statutory revisions, such as those suggested above, will not individually alleviate the pretrial detention "crisis." The pretrial detention system is in such a state of disarray that wide spread changes, not piece-meal modifications, are necessary. Furthermore, because the success of the pretrial detention system under section 3142 depends upon a judge's ability to make a case-by-case detention determination, limiting the role of judicial discretion at detention hearings may cause the system to self-destruct.

### B. *Improve Pretrial Services*

The importance of the Pretrial Services Act of 1982 (PSA)<sup>106</sup> to the successful implementation of the BRA is recognized throughout the legal community.<sup>107</sup> Pretrial services offices (PTSO) are responsible for making detention recommendations to the judges conducting detention hearings.<sup>108</sup>

Advocates of an improved PTSO point to the effectiveness of pretrial detention in districts which have a fully implemented

104. Otherwise, the grand jury stands as the last check on judicial discretion because most courts have held that an indictment (from the grand jury) satisfies the probable cause requirement embodied in the Act. *See Williams, supra* note 63, at 381.

105. *See supra* notes 12-15 and accompanying text; Pringle, *supra* note 2, at 913.

106. 18 U.S.C. §§ 3152-3156. In short, "[t]he pretrial services mission is to 'staff' the judicial pretrial release function and to provide the wherewithal to manage the fair and effective use of pretrial release and detention." Goldkamp, *supra* note 93, at 32.

107. *See* Goldkamp, *supra* note 93, at 29 ("A large part of the emphasis of 'bail reform' was on developing pretrial services-type agencies to improve judges' decisions."). *See also* Joel B. Rosen, *Pretrial Services—A Magistrate Judge's Perspective*, FED. PROBATION, Mar. 1993, at 15 (urging fellow judges to make use of pretrial services when faced with detention decisions). *But see* Wanger, *supra* note 35 (discussing how the Pretrial Services Act was created to facilitate the successful implementation of the BRA, yet has failed to do so).

108. *See* 18 U.S.C. § 3154.

PTSO.<sup>109</sup> In those districts, detention hearings are held promptly and judges are fully informed on available alternatives to detention.<sup>110</sup> As a result, the negative impact of incarceration can be avoided.<sup>111</sup> Such advocates implore the implementation of a separate and fully operational PTSO.<sup>112</sup> However, an unrealistic over-tone hampers this scheme because it requires increased spending.<sup>113</sup> Consequently, the improved model of PTSO such commentators seek is not practical.

Apart from the practicality issue, the improved PTSO solution, exclusively, will fail to solve the pretrial detention crisis. Pretrial services officers are not the only officers who affect a detention determination. By failing to provide for all the negative factors of pretrial detention, a piece-meal approach will inevitably fail.

## V. THE SOLUTION

Although Congress entrusted detention determinations to judges,<sup>114</sup> they cannot successfully fulfill such a complex duty without the assistance of the entire criminal justice system. The tools Congress wanted judges to rely upon to make detention determinations include the following officers of the court: marshals, United States prosecuting attorneys, probation officers, pretrial services officers, and public defenders. Therefore, the burden of

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109. Districts that have successfully implemented such a program demonstrate that such a tool would not only improve the application of pretrial detention but also expedite the process. The acceleration of detention hearings would afford defendants a shorter wait in jail for a detention hearing. See Shelby Meyer & Kim M. Holloway, *The Fastrack Program*, FED. PROBATION, Mar. 1993, at 36.

110. See *id.*

111. A revamped PTSO does not necessarily result in fewer pretrial detainees. The judge still has the ultimate discretion to order detention. But an improved PTSO will help the judge make more accurate dangerousness determinations, thus avoiding detention of non-dangerous defendants.

112. See, e.g., Wanger, *supra* note 35, at 339.

113. See *id.*

114. See S. REP. NO. 98-225, at 5 ("The constraints of the Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial despite these fears, or it can find a reason, such as risk of flight, to detain the defendant (usually by imposing high money bond).").

justly utilizing pretrial detention falls upon several components of the criminal justice system; not one level of the administration.

First, the United States Marshals Office (USMO) must understand its impact on a detention determination. The USMO is responsible for transporting prisoners to and from the courthouse.<sup>115</sup> Significantly, the USMO has set a policy guideline of housing a secured defendant within a thirty minute drive from the courthouse.<sup>116</sup> Such a restriction places a practical limit on which probationary alternatives are available to a judge. The USMO must be more lenient in some circumstances. Such a policy change<sup>117</sup> would make particular probationary alternatives, such as halfway houses, available as alternatives to detention.

Likewise, the United States Prosecutor's Office (USPO) should reconsider its role in a detention hearing. By not using pretrial detention as a bargaining chip during plea negotiations, prosecutors would eliminate much of the criticism surrounding pretrial detention. Furthermore, pretrial detention would be utilized only in those circumstances truly warranting it, thus limiting the possibility of an

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115. U.S. MARSHALS SERV., U.S. DEP'T OF JUSTICE, UNITED STATES MARSHALS SERVICE PAST AND PRESENT (1992).

Confining prisoners in custody and safely transporting them to and from detention facilities to judicial proceedings is [a] historic function of the Marshals Service. . . .

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Annually, the Marshals Service receives more than 88,000 individuals charged with crimes. On the average, each prisoner was produced five time for appearances at detention hearings, trials, other court proceedings, for medical care, or transfers between detention facilities. The average number of prisoners in Marshals Service custody each day now stands at more than 15,000.

*Id.*

116. *See supra* note 54. The USMO applies the 30 minute drive standard loosely when determining where to incarcerate a defendant. As a result, defendants may end up being housed further away than the maximum 30 minute drive. Although this places strain upon a public defender, a public defender is sometimes willing to bear the burden if the defendant will be safer in a detention facility farther away. Public defenders would similarly overlook the inconvenience of contacting a defendant a far distance away in order to secure a probationary alternative for a defendant, such as a halfway house. However, the USMO adheres to the thirty minute drive standard more strictly with respect to alternatives to detention. *See* Interview with Dan Cronin, *supra* note 45.

117. The United States Marshals Service is an autonomous government agency whose director can determine agency policy. *See* 28 U.S.C. § 561 (1994).

inaccurate detention determination. Generally, the USPO must approach pretrial detention as a method of removing dangerous criminals from the street, not as an opportunity to extract guilty pleas or cooperation from accused criminals.<sup>118</sup>

One alternative is for the USPO to adopt an objective approach to seeking pretrial detention. A rating system like the one utilized by the Federal Bureau of Prisons in evaluating dangerous inmates provides a good example.<sup>119</sup> The Bureau of Prisons uses a point system when determining the security level of the facility in which an inmate should be detained.<sup>120</sup> The USPO could adopt a similar objective approach. Such a system might consist of defendants compiling points for incidents of dangerous behavior.<sup>121</sup> The USPO would then seek detention only after a defendant attained a certain point level. This way detention decisions are truly based on dangerousness, rather than on a defendant's willingness to cooperate with the government.<sup>122</sup>

Next, the enhancement of pretrial services is paramount to the successful renovation of the pretrial detention system.<sup>123</sup> Numerous studies and law review articles attest to the importance of pretrial services.<sup>124</sup> Thus, a separate, well-funded, well-organized pretrial services office (PTSO) is ideal. Unfortunately, a lack of funding for

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118. See *supra* Part II.C and accompanying notes.

119. See generally Alan Ellis, *Securing a Favorable Federal Prison for Your Client*, 11 CRIM. JUST. 36 (1996).

120. See *id.*

121. For example, a defendant might acquire one point for a prior felony conviction and two points for avoiding arrest or for violating parole.

122. Another alternative is a system that holds prosecutors accountable for their decisions. A system which requires prosecutors to obtain approval from a supervisor before seeking pretrial detention may accomplish this goal. This managerial system would report to a congressional subcommittee which would ensure the non-abusive use of pretrial detention by either enacting legislation or making personnel changes. Such a system would have to be tiered to account for the immediate nature of detention determinations. Therefore, district supervisors and regional supervisors will have to be employed. These supervisors should be hired from outside the prosecutors office to promote non-bias and impartiality.

123. See Wanger, *supra* note 35, at 339 ("Lawyers, judges and lawmakers should reexamine the importance of pretrial services to just administration of the federal bail process.").

124. See *supra* Part II.A and accompanying notes.



the PTSO has led to its current inadequate state.<sup>125</sup> Even though the costs which accompany a separate PTSO may be justifiable when considering the cost-effective nature of probation alternatives, a separate PTSO may be an unrealistic goal.

Fortunately, alternatives to a separate, well-funded PTSO exist. For example, a single pretrial services officer could work out of the probation office,<sup>126</sup> focusing primarily on updating and presenting pretrial services reports. If one pretrial services officer is insufficient to handle the caseload, that officer could act as the pretrial services coordinator and delegate pretrial services duties to probation officers and oversee their work.<sup>127</sup> Regardless of which alternative is utilized, the performance of a pretrial services officer is critical to the effective use of pretrial detention.

Another modification that would improve the pretrial detention system is increasing the availability of alternatives to detention.<sup>128</sup> As this Note explains, several alternatives to detention are recommended by the judiciary but are not always available.<sup>129</sup> The unavailability of such alternatives is puzzling, considering that they are cost-effective.<sup>130</sup>

Increasing detention alternatives could be accomplished by either an increase in funding or a reallocation of funds. If the state is incapable of providing the necessary funding, there are at least two possible methods of holding defendants financially responsible for detention alternatives. First, the federal government could initially

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125. See Wanger, *supra* note 35, at 330.

126. See Interview with Dan Cronin, *supra* note 46. Such a scenario exists in the Southern District of Illinois. The probationary officer fills the role of probation officer as well as pretrial services officer. See *id.* However, it is difficult to distinguish the two roles. Different approaches are required when, on the one hand, dealing with a defendant who has not yet been convicted, and, on the other hand, assisting a defendant who has been convicted. See *id.*

127. See D. Alan Henry, *Pretrial Programs: Describing the Ideal*, FED. PROBATION, Mar. 1993, at 23. Henry also maintains a pretrial services officer's work is only half done after a detention hearing because he or she must monitor a defendant's probation. See *id.* at 25. If a judge is confident that pretrial conditions will be monitored, the judge may be more willing to consider the various alternatives to detention.

128. See *supra* Part II.B.

129. See *supra* Part II.B.

130. See Interview with Dan Cronin, *supra* note 45.

subsidize the development of alternatives, and eventually shift the cost of such detention alternatives on the defendants who are released on probation.<sup>131</sup> Alternatively, a judge could condition probation on the defendant maintaining employment.<sup>132</sup> The judge could then require the defendant to pay a certain portion of his paycheck to fund the probationary alternative. In addition, an improved pretrial services office would be able to monitor this process.

Furthermore, the public defenders office (PDO) can also help improve the pretrial detention system by becoming more aware of the available probationary alternatives and by impressing an informal influence on the PTSO. The PDO can also spend more time examining the evidence.<sup>133</sup> By examining the evidence thoroughly before a detention hearing, the PDO can possibly offer the judge additional reasons to release the defendant on bail. However, the statutory requirement of an immediate detention hearing<sup>134</sup> does not allow a public defender much time to sift through the evidence. Consequently, the PDO might have to utilize the five day continuance in order to obtain more time.<sup>135</sup>

Finally, judges must lead this necessary reform. Judges are the only officers of the court that have the power, influence, and respect to successfully initiate such changes. Accordingly, judges must take an aggressive, prominent role in the reformation of pretrial detention under section 3142 of the BRA. They should be more willing to order

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131. The difficulty with such an approach is that criminal defendants often cannot afford to pay for these alternatives. Consequently, wealth may become a determinative factor in the pretrial detention determination. *See id.*

Another drawback to this scheme is that it creates the potential for a scenario in which defendants who are not convicted must nevertheless pay for probationary alternatives. *See id.*

132. *Cf.* 18 U.S.C. § 3142(c)(B)(ii).

133. The weight of the evidence against the defendant is one of the factors the judge considers when making a detention determination. *See* § 3142(g)(2). Accordingly, if the public defender can make a stronger case for the defendant's innocence, the judge is less likely to order detention.

134. *See* § 3142(f).

135. *See id.* Comparatively, a continuance on motion of the attorney for the Government may not exceed three days. *See id.* Although the public defender would have the statutory ability to move for such a continuance, a pretrial detainee may not agree. After all, the detainee will be in custody for the duration of the continuance. *See id.*

creative alternatives to pretrial detention. Furthermore, judges must informally influence the various officers of the court to accept and fulfill the task of improving the system.

#### CONCLUSION

The shortcomings and abuses of the pretrial detention system are deeply rooted in the criminal justice system. Proposals which take a narrow approach to the problems raised by pretrial detention are inadequate. A successful solution requires change at the various levels of the criminal justice system which impact a pretrial detention determination. Only with this sort of comprehensive change, led by the judiciary, will the pretrial detention "crisis" be cured.

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