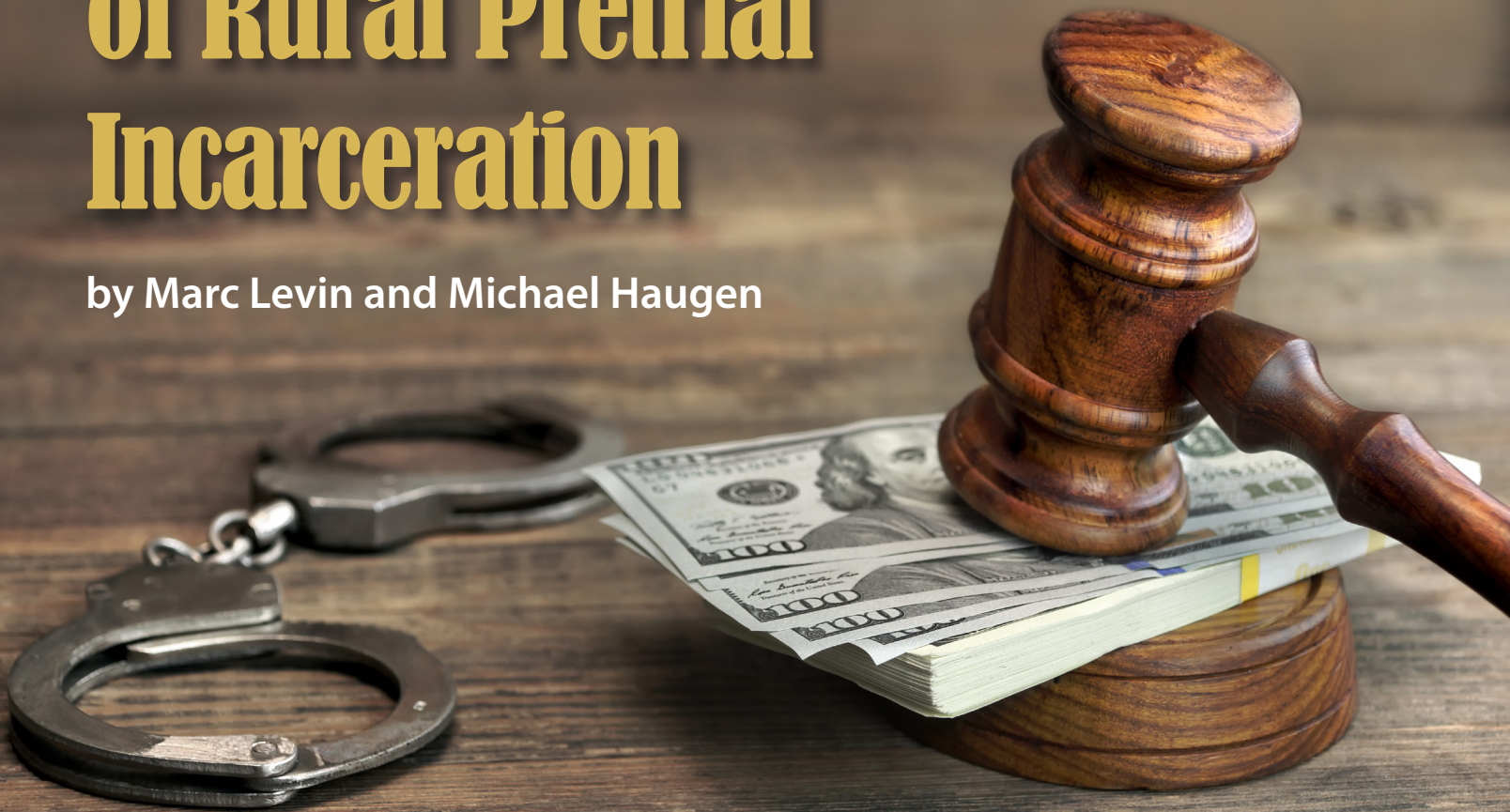


OPEN ROADS AND OVERFLOWING JAILS: Addressing High Rates of Rural Pretrial Incarceration

by Marc Levin and Michael Haugen



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Executive Summary

The axiom that a person is considered innocent of a criminal act until he or she has been proven guilty is a bedrock principle of the American criminal justice system. Yet in many jurisdictions, it appears to have been forgotten. The pretrial population of defendants has significantly increased—particularly in rural areas of the country. Jails in smaller jurisdictions are responsible for an outsized share of jail population growth. Indeed, from 1970 to 2014, jail populations grew by almost sevenfold in small counties but only threefold in large counties.

This paper explores why this growth may have occurred and makes numerous recommendations to reduce pretrial populations, particularly in rural America. The first place to start is by reducing the number of offenses carrying the potential for arrest and jail time—the overcriminalization of our society must be reversed. The next step is to restore our historical commitment to individual liberty and the presumption of innocence by following these five guiding principles of pretrial justice policy:

- There should be a presumption of pretrial release without conditions or cash bond, grounded in the American maxim that people are innocent until proven guilty.
- Conditions of release, if any, should be the least restrictive to ensure public safety and appearance at trial.
- Courts—after due process—should have the authority to deny bail in the most serious cases involving highly dangerous defendants after determining that a compelling government interest exists and there are no possible conditions under which the defendant could be released that would reasonably protect public safety and ensure re-appearance.
- The burden should be on the state to prove the need for conditions of release or denial of bond in an adversarial proceeding where the accused is present.
- Individual judicial consideration should be required for each accused.

For a host of reasons, ranging from limited resources to dispersed populations, addressing pretrial incarceration in rural areas is a particularly complex undertaking. Also, there are many moving parts to implementing changes in a deliberate manner that produce sustainable results without unintended consequences. Ultimately, as rural communities across the country take many different paths to addressing the meteoric rise in rural pretrial incarceration over the last few decades, they must not lose sight of the destination: a constitutional system that produces greater public safety with less collateral damage.

Key Points

- Both the Constitution and Supreme Court precedent demand that pretrial liberty be the norm, and that detention is to be a “carefully limited exception.” In practice, this has not been the case.
- While prison populations have fallen recently, the nation’s jail populations have steadily increased—particularly pretrial detainees. Rural areas, not urbanized ones, are responsible for a disproportionate amount of this growth.
- Potential causes for increasing rural pretrial jail populations include a lack of presumption of pretrial release, economic incentives to build unnecessary jail capacity, and rising drug abuse.
- Possible solutions for rising pretrial populations include reducing jailable offenses, expanding police diversion, use of validated risk-assessments at intake, and revising state bail laws.

Introduction

“In our society, liberty is the norm, and detention prior to trial ... is the carefully limited exception.” ([U.S. v. Salerno](#))

Although it has never been explicitly codified in statute nor immortalized in our Constitution, the axiom that a person is considered innocent of a criminal act until he or she has been proven guilty is a bedrock principle of the American criminal justice system. It was on this basis that former United States Supreme Court Chief Justice William Rehnquist penned the above philosophical truism—in a majority opinion upholding the constitutionality of the Bail Reform Act of 1984, which permits courts to detain potentially dangerous criminal defendants prior to trial. This was part of a raft of state and federal laws created in the 1970s and 1980s that added risk to public safety to the traditional role of bail in simply ensuring re-appearance, but prior to such statutes explicitly allowing this “it was widely acknowledged that judges deliberately set unaffordable bail amounts on pretextual flight risk grounds so that dangerous individuals would be detained until trial” ([Gouldin, 848](#)).¹ While recognizing that there may exist situations in which pretrial detention is necessary to prevent additional lawbreaking, or otherwise prevent fleet-footed individuals from absconding from justice, Rehnquist nonetheless erred on the side of restraining government’s deprivations upon individual liberty. Pretrial detention is to be a “carefully limited” practice. This applies both to the frequency with which it is used, the due process that is afforded, and the duration of the detention, which also raises further constitutional issues involving the right to a speedy trial.

This paper addresses the implications of the national growth in pretrial incarceration over the last few decades, particularly the recent growth in pretrial incarceration in rural areas even while it has started to decline in urban areas. Since the 1970s, jurisdictions have experienced general growth in their corrections systems—a trend that has slowed and started reversing only in the last few years. Increased prison and jail populations buffet local and state budgets and impose an attendant burden on taxpayers.

However, tightening local and state coffers are not the only impetus for reform. There has been growing realization among stakeholders that simple warehousing of individuals

¹ Footnote from [Gouldin](#): “Citing Clara Kalhous & John Meringolo in “Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives,” 32 PACE L. REV. 800, 813 (2012) (explaining that between 1966 and 1984, “federal courts were taking matters into their own hands, effectively denying bail in cases where they deemed defendants to be dangerous by setting inordinately high bail, albeit on stated grounds of risk of flight.”); Goldkamp & Vilcicā, *supra* note 16, at 128 described the historical problem of the “*sub rosa* use of preventive detention through cash bail”.)”

does not necessarily yield concomitant returns on public safety. For instance, detaining low- to moderate-risk defendants before trial—who, by definition, are presumed innocent—has been shown to increase the likelihood of new criminal activity ([Lowenkamp et al. 2013b, 4](#)). Furthermore, various studies described herein have been published in recent years demonstrating that pretrial detention, even for short periods, contributes to loss of employment, greater financial difficulties, residential instability, and a diminished ability to provide for dependent children.

Incarceration, whether in prison or jail—while obviously sometimes necessary—has far-reaching social and economic impacts. As a result, policymakers have begun adopting new policies aimed at reducing prison and jail populations while enhancing public safety ([Right on Crime](#)). While falling prison populations—which are coincident with falling, historically low crime rates—spell the success of these efforts, the nation’s jail populations have not followed suit. Instead, these populations have generally gone in the other direction. Not only have pretrial jail populations gone up commensurately, they now form a disproportionate segment of those held in local jails.

Driving much of this increase in local jail populations—whether pretrial detainees or otherwise—have not been those located in large cities or even their suburbs, as might be expected. Rather, jails in smaller jurisdictions are responsible for an outsized share of jail population growth. Indeed, from 1970 to 2014, jail populations grew by almost sevenfold in small counties but only threefold in large counties² ([Subramanian et al., 8](#)). This presents local and state policymakers with challenges that larger jurisdictions generally do not encounter, given their size and greater pool of resources.

After reviewing the legal and constitutional framework for pretrial policy, we’ll discuss several putative causes for this finding. Although reasons for this disproportionate growth arise from different factors—some of them likely to be unique, or of greater import, to different locales—chief among them may be:

- A lack of capacity in rural areas to rapidly process cases;
- Inability of many defendants to afford high-money bail amounts, reluctance of courts to use recognizance release, and inaccessibility of alternatives to address defendants with substance abuse, mental health, or other issues;
- Economic incentives to build more jail capacity than is immediately necessary;

² In [Subramanian et al. \(8\)](#), the authors define “small” counties as those with fewer than 250,000 residents and “large” counties as those containing more than a million.

- The opioid crisis and other drug problems, and;
- Lagging socioeconomic trends in rural areas.

We will then explore the consequences of high rates of pretrial incarceration, including in rural areas, and identify possible solutions for achieving better outcomes for public safety, taxpayers, and defendants' constitutional rights.

For background, many forms of pretrial release will be discussed and some jurisdictions use more than one in the same case:

- *Recognizance release* – The defendant simply promises to reappear in court.
- *Unsecured financial bond* – The defendant or someone on their behalf promises to pay a certain amount if the defendant does not reappear, but no funds are posted upfront. An example is the I-bond in Illinois where defendants sign indicating that they will appear, and if they do not, they may be held in contempt by the court and held personally responsible for a specified amount. While evidence discussed later in this paper indicates many more defendants could be safely released through recognizance or unsecured bonds—and the American Bar Association has recommended this approach—it can require judicial courage since in the case of failure there is not a bondsman or pretrial supervision agency to blame ([American Bar Association Resolution](#)).
- *Cash deposit bond /collateral* – The defendant posts money or property (title to a car, jewelry, etc.) to the court/county that is returned only if the defendant reappears. Typically, if the defendant posts money, it is 10 percent of the total bond which the county returns if the defendant reappears.
- *Commercial bail* – A bail bondsman posts the entire amount set by the court and the defendant, often through a family member or friend, typically agrees to pay the bondsman 10 percent. The defendant is theoretically liable for the remainder if they abscond, but if they are re-arrested and jailed for an alleged new offense the bondsman's liability is typically discharged. The bondsman may also take collateral and/or offer the ability to pay some portion of the premium through installments.
- *Pretrial supervision* – The defendant reports to the court in some manner, which could be in person, by electronic monitoring, and/or through an application or text message. In some jurisdictions, pretrial supervision can encompass can include non-intrusive forms such as simple text reminders of court dates to treatment requirements, drug testing, and restrictions on the right to travel. It is often accompanied by a personal bond in

a nominal amount such as \$25, but is also used by some jurisdictions in addition to financial forms of release. A pretrial services agency or division of a court or probation department typically encompasses screening of defendants, typically using a validated risk assessment instrument—but may also refer defendants to treatment providers, temporary housing, and other services in the community.

In sum, the findings in this paper indicate that pretrial detention is excessive in rural areas but that changes to current policies and practices can better protect constitutional principles, improve public safety outcomes, and reduce overall costs to taxpayers through lower jail costs, although some of these savings will be needed to more efficiently process cases and implement effective alternatives.

Historical, Legal, and Constitutional Framework for Pretrial Justice

Pretrial incarceration represents a deprivation of liberty that should be the exception, not the norm. The right to bail dates back to the Magna Carta in 1215 and the Statute of Westminster in 1275 ([Hegreness, 917](#)). It is encompassed in the Eighth Amendment of the U.S. Constitution and similar provisions in the Texas Constitution and more than 80 percent of all state constitutions that prohibit the use of “excessive bail” ([Hegreness, 935](#)). The Oxford Dictionary ([2018](#)) defines bail as “the temporary release of an accused person awaiting trial, sometimes on condition that a sum of money is lodged to guarantee their appearance in court.” Financial forms of bail, although not necessarily commercial bail, have been used for centuries in America, and before that dating back to medieval England. Bail became more complex after the Norman conquest of England in 1066, though it was not until 1898 that the commercial bail bond business first came to this country ([Schnacke et al. 2010, 2, 7](#)).³

In its amicus brief in *O'Donnell v. Harris County*, the Cato Institute explains that at the time the U.S. Constitution was written—and in our first century as a nation—it was understood that money bail must either be attainable for the specific defendant or denied ([Shapiro and Watkins, 10-12](#)):

³ The earliest forms of bail in medieval England were designed to curtail blood feuds, and, at that time, a value was placed on each person based on social rank ([Schnacke et al. 2010, 2](#)). The cases involved two private parties—so they would be civil in our modern nomenclature. The punishment upon conviction would be a fine paid to the injured family. Therefore, the bond amount was the same as the punishment amount, and, in fact, all defendants were released in such cases. Thus, there was not a question as to what constituted excessive bail. The bond was unsecured, so the personal surety may have posted an item of nominal value such as a stick, but would be liable to the accuser in the whole amount if the accused did not return to court. Practices such as secured bonds and a court setting an amount tied to other factors would come later following the dawn of the Norman period in 1066.

It is worth examining an example of how the right to bail applied even for the most serious non-capital crimes during the Founding Era by considering *United States v. Lawrence*, 4 Cranch C. C. 518 (1835). In this case, Richard Lawrence attempted to assassinate President Andrew Jackson, failing only because two properly loaded pistols both misfired. Because no physical harm occurred, the laws of the time considered this act to be the common law crime of assault with intent to murder (which did not carry the death penalty). Any crime that was not a capital crime—even one as serious as this—was bailable and the Constitution was understood to prohibit bail more than the defendant could provide. *Id.* (“The chief judge then said ... that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.”). The judge initially suggested a bail of \$1000. The government recognized the right to bail here, but suggested that the amount be increased to \$1500 on the possibility that the defendant had friends who could assist in posting bail—a request to which the judge agreed. *Id.*

The understanding in *Lawrence*, that bail cannot be required of indigent defendants beyond what they could reasonably acquire, was broadly accepted for over 100 years. Joseph Chitty, [A Practical Treatise on the Criminal Law 130-31 \(1832\)](#) (“The rule is, where the offense is *prima facie* great, to require good bail; moderation, nevertheless, is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.”); *United States v. Brawner*, 7 F. 86, 89 (W.D. Tenn. 1881) (citing *Lawrence* for the proposition that “to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law”); William Smithers Church, *A Treatise of the Writ of Habeas Corpus* 532, § 397 (1886) (“To require larger bail than the prisoner can give is to require excessive bail, and to deny bail in a case clearly bailable by law.”); George Arthur Malcolm, *The Constitutional Law of the Philippine Islands Together with Studies in the Field of Comparative Constitutional Law* 497 (1920) (“It is substantially a denial of bail, and a violation of constitutional guarantees against excessive bail, to require a larger sum than, from the circumstances, the prisoner can be expected to give.”)

William Blackstone pointed out that pretrial release was considered so important in colonial America that it was a

crime on the part of a judge if he detained a bailable defendant ([Blackstone, Schnacke 2017, 8](#)). This belief co-existed with the use of financial conditions, as a Virginia Colony law from 1645 held sheriffs liable “to pay the award of the court” if they “shall neglect to take sufficient bayle of the party arrested, or otherwise consent to, or because of” an accused man’s escape (Duker, 27). Additionally, Congress declared in the Judiciary Act of 1789 that all defendants in non-capital cases were entitled to bail ([Judiciary Act of 1789](#)).

The corrections system also looked very different back then. First, in colonial America—and even immediately following the Revolution—there were few jails, and punishments often consisted of ostracizing the offender or even administering physical pain ([Meskell, 841](#)). Many prosecutions were handled by privately hired prosecutors, and judges were often mobile, traveling from one hamlet to another ([Schnacke et al. 2010, 6](#)).

In addition to cash bail, up until the mid to late 19th century, another common approach in the U.S. was the use of personal sureties and unsecured bonds ([Schnacke 2014](#)). This meant typically that either the defendant or an upstanding member of the community would not post any funds or property upfront, but would agree to pay if the defendant did not show up. So, even if the amounts were significant in some cases, it did not prevent release ([Schnacke 2017, 7](#)). Those making this promise were prohibited from being indemnified by the defendant and could not profit, as it was seen as a conflict of interest since, if the surety could easily collect the whole amount from the defendant, there would be no incentive for the surety to ensure the defendant would appear ([Schnacke 2014, 40](#)). Due to population growth and urbanization where people and communities became less connected, it became harder to find personal sureties, so that led to the advent of commercial bail around the turn of the century ([Schnacke 2014, 40](#)). While bail in the U.S. developed out of English common law and practice, Professor Devine explains how Great Britain, India, and Australia diverged from the U.S. toward a system that does not involve money, and indeed only the Philippines and the U.S. currently use commercial bail ([Devine](#)).

Turning to today’s realities, from 1990 to 2009, the proportion of felony defendants released on their own recognizance with no conditions fell from 26 percent to 14 percent ([Reaves, 38](#)). During this same period, the average bail amount went from \$25,400 to \$55,400, though the median bail amount has remained at approximately \$10,000. By 2009, almost 70 percent of felony defendants had been given bail amounts greater than \$5,000 ([Reaves, 18](#)).

For example, in California, the average bail schedule in 12 counties is estimated to have increased 22 percent to \$32,000 for some of the most frequently committed felony offenses even after adjusting for inflation from 2002 to 2012 ([Tafoya, 9](#)). Nationally, five out of six people detained before trial on a felony charge are held on money bail ([Cohen and Reaves, 2](#)). In one study, even when bail was set at \$5,000 or less, it was found that only about half of defendants could meet it ([Dobbie et al. 2016, 1](#)).

Of course, in addition to policies and practices relating to bail, there are many other factors that can influence rates of pretrial detention, including the number of arrests—which rose from 1980 to 1997, but has been in decline since then ([Snyder, 7](#)). For instance, we must take into account that the national percent of state court felony defendants held on bail has actually declined by about 3 percent ([Cohen and Reaves, 2](#)). Another possible reason for the increase in pretrial detainees is the simple fact that more people are being arrested. Total arrests of adults in the U.S. increased 22.9 percent from 1980 to 2014 ([BJS 2018](#)). The rural pretrial incarceration rate has continued to dramatically increase since 1997, so while this suggests arrest trends are not the primary driver, it does not mean that in certain jurisdictions arrests may not have fluctuated differently than the national figures and therefore continued to contribute to pretrial detention growth even since 1997.

The U.S. Constitution, as well as state constitutions, recognize negative rights that implicate freedom from overreaching government, such as a person's liberty interest in being adjudicated before being punished. These founding documents generally do not recognize "positive rights," such as being able to afford products or services, which would inevitably come at another's expense. Accordingly, while there are no constitutional infirmities associated with one person in a store having more purchasing power than another, there is an equal protection problem if pretrial detention is imposed on one otherwise similarly situated defendant but not the other. In that vein, the U.S. Court of Appeals for the Fifth Circuit has ruled that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" ([Pugh v. Rainwater](#)).

Regardless of the methods used for pretrial release, federal courts have also held that, in addition to the equal protection implications, pretrial incarceration raises due process concerns that require expeditious and individualized consideration of each defendant. On this point, U.S. Chief Justice Robert Jackson wrote in the seminal *Stack v. Boyle* case (1952): "Bail is not a device for keeping persons in jail upon mere accusation until it is found convenient to give

them a trial" (*Stack v. Boyle*). More recently, the U.S. Court of Appeals for the Fifth Circuit explained:

Yet, as noted, state law forbids the setting of bail an "instrument of oppression." Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules ([O'Donnell v. Harris County 2018a, 13](#)).

Further, the Fifth Circuit court ruling established a requirement for a bail hearing within 48 hours of admission into jail ([O'Donnell v. Harris 2018a, 16](#)).

When it comes to pursuing equality as a goal, traditionally conservatives view equal opportunity as a touchstone while those on the left seek equal outcomes. In the pretrial context, the quest for equal opportunity simply means that each defendant has the opportunity for the same objective review that focuses on legitimate government goals that are sufficiently compelling to justify this deprivation of liberty for those not yet convicted—ensuring defendants answer for their charges and avoiding harm to the public. While constitutional rights should not be at the whim of public opinion, it is not surprising that survey research indicates more than 8 in 10 Utahans, in a 2018 poll, believe pretrial decisions should be based on an objective analysis of public safety and flight risk, not ability to pay ([Pfeiffer, 2](#)).

Finally, there are legal and constitutional considerations that relate not just to the initial question of detention, but also how long someone should be detained without a resolution of their case. The Speedy Trial Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy trial," and some state constitutions have similar provisions. Unfortunately, there is no nationally published data on length of stay for pretrial defendants, but news reports suggest that it is not uncommon for some defendants to wait long periods prior to trial. For example, in April 2018 the Louisiana Sheriffs' Association said that some 2,181 pretrial or pre-sentencing defendants, about 15 percent of the current parish jail population, have been locked up for at least a year, with 674 of them having been there at least two years. ([O'Donoghue](#)). Similarly, in Cook County, Illinois (Chicago), more than 1,000 defendants had been awaiting trial for at least two years, according to the Sheriff's office ([Woodman](#)). In Mississippi, it was reported in early 2018 that 600 pretrial defendants had been in jail at least a

year ([Amy](#)). Each of these cases can be viewed in an online database ([MacArthur Justice Center](#)).

In light of the legal and constitutional framework and our historical commitment to limited government and individual liberty, five guiding principles of pretrial justice policy emerge:

- There should be a presumption of pretrial release without conditions or cash bond, grounded in the American maxim that people are innocent until proven guilty.
- Conditions of release, if any, should be the least restrictive to ensure public safety and appearance at trial.
- Courts—after due process—should have the authority to deny bail in the most serious cases involving highly dangerous defendants after determining that a compelling government public safety interest exists and there are no possible conditions under which the defendant could be released that would reasonably protect public safety and ensure re-appearance.
- The burden should be on the state to prove the need for conditions of release or denial of bond in an adversarial proceeding where the accused is present.
- Individual judicial consideration should be required for each accused.

The findings of this paper demonstrate that the frequent failure to be guided by these principles and considerations has contributed to a rise in jail populations over the last few decades that is most pronounced in rural areas.

Even as jurisdictions increasingly and rightly focus on identifying all defendants who can safely be released, they must also take into account the liberty interest of these individuals once they are out of jail. While any form of pretrial release is a lesser restriction on liberty, all conditions of release, whether it is a form of electronic monitoring or a treatment requirement, must be directly connected to the risk factors specific to that defendant for failure to appear and re-arrest. As a threshold question, these restrictions on liberty should also be based on more than what is sufficient for arrest: a police officer's belief that there is probable cause. The prosecutor and judge have an obligation to review the probable cause affidavit and the evidence available at the time so that they are confident the allegations, if true, constitute an offense.

Whether defendants are released on pretrial supervision, commercial bail, and/or other means, courts have sometimes imposed blanket conditions on all defendants charged with certain offenses. This has led to a line of federal court cases in which defendants have successfully challenged

policies such as a provision of the federal Adam Walsh Act that required electronic monitoring of all pretrial defendants charged with sex offenses (*U.S. v. Arzberger*). The same analysis applies to Second Amendment rights, especially following the *Heller* decision (*District of Columbia v. Heller*), which means that, rather than imposing cookie-cutter conditions for certain types of cases, courts must make an individualized determination that the deprivation of liberty imposed is necessary for public safety.⁴

Research Findings on Extent and Sources of Rural Jail Growth

Growth in Rural Jail Populations: By the Numbers

Before putting recent jail population growth into perspective—both in aggregate and among pretrial detainees—we must first define what constitutes “rural” versus “urban” and “suburban” counties. For this paper, we rely upon the definition derived by the Vera Institute for Justice in their examination of rural pretrial incarceration, *Out of Sight: The Growth of Jails in Rural America*. Whereas the National Center for Health Statistics uses a six-category hierarchy to delineate county size, for simplicity's sake, Vera collapses the four smallest categories into two pairs, for a total of four categories: (1) large urban metro, (2) large suburban metro, (3) medium and small metro, and (4) rural areas ([Kang-Brown and Subramanian, 8](#)). A rural county is defined as any discrete area containing fewer than 50,000 residents. Though typically sharing common traits such as low population density, rural counties vary widely in many other respects, with some relying on agriculture and others with an economic base driven by manufacturing or even tourism ([Erickcek and Watts, ii](#)).

Under this definition, there are more than 1,900 rural counties in the United States, containing about 45 million residents. Nonetheless, many counties with more than 50,000 people have low population densities, so medium-sized counties that are not part of major urban areas can still have many of the characteristics of rural areas and be instructive to examine. We refer to such counties, including Yakima County in Washington and DeKalb County in Illinois, later in this paper. Additionally, rural counties can still potentially benefit from solutions that have largely or entirely been utilized in urban or suburban counties, though careful thought must be given on how to adapt those to the rural setting.

⁴ Courts have imposed restrictions such as a prohibition on having a gun on defendants regardless of whether they are on pretrial supervision or commercial bail, but in the absence of pretrial supervision the enforcement mechanism for such a condition would simply be if the police happened to encounter that defendant with a gun.

As mentioned above, jail populations across the country have grown substantially over the last four decades. Likewise, pretrial jail populations have grown as well. One estimate shows that in 2013, America's pretrial jail population was five times higher (about 462,000 inmates) than in 1970 (about 82,900 inmates) ([Kang-Brown and Subramanian, 9](#)).⁵ Based on this estimate, it would mean that whereas about 50 percent of the nation's overall jail population was comprised of pretrial detainees prior to 1993, that number has since grown to roughly 66 percent.

In Texas, which has one of the largest criminal justice systems in the country, this proportion has become even more lopsided: In 1994, almost 33 percent of the jail population consisted of pretrial detainees—better than the national average. By 2016, however, that proportion had jumped to almost 74 percent⁶ ([TCJS 1994](#); [TCJS 2016](#)). One reason for this increase in percent terms is that Texas housed far fewer convicted felons in jails in 2016 than in 1994—the population of convicted felons dropped from 32,434 in 1994 to 4,628 in 2016. Of the pretrial defendants in the jails in 2016, 28,607 were charged with a felony, 6,152 were charged with a state jail felony, and 6,484 were charged with a misdemeanor.

These increases are not the end of the story, as an interesting finding arises in the data when one looks at the breakdown between county sizes. All four county categories have seen large upward trends for decades (albeit with brief declines in some areas). But growth in urban, suburban, and medium/small-sized counties leveled off beginning in 2005 and started falling shortly thereafter. Growth in rural counties has continued, though at a lesser rate ([Kang-Brown and Subramanian, 12](#)).

Geographically, pretrial incarceration in rural counties is highest in the South, with a rate of 355 per 100,000 people—followed by the West at 226; Midwest at 196; and Northeast at 154 ([Kang-Brown and Subramanian, 12](#)). In terms of demographics, it is not surprising that, as with jails in other types of communities, the vast majority of detainees are men. Data also show that black people are represented in numbers far greater than in the average population. However, most rural communities are overwhelmingly white, and the census of white people in rural jails rose 19 percent from 2004 to 2014, even while dropping 15 percent in cities. In a more pronounced trend, the population of

⁵ A limitation of these aggregate figures is that pretrial detention populations incorporate both defendants who have been in jail one day and one year.

⁶ To account only for those pretrial defendants being held in local jails on local charges, for an original offense—not those arrested for offenses in other jurisdictions or for those who violated parole but may not have committed an additional criminal offense—this figure excludes federal contract holdings and those revoked for state parole violation.

women in rural county jails increased 43 percent from 2004 to 2014, but fell 6 percent in urban jails ([Kang-Brown and Subramanian, 13](#)). Certain rural counties also have significant Native American populations, which raises complex challenges, such as incorporating pretrial decision-making into tribal codes and developing agreements between sovereigns to allow for pretrial officers from the county to come onto tribal lands ([Clark 2008](#)).

An increase in rural criminal activity relative to other areas, perhaps the most obvious factor that would ostensibly account for disproportionate growth in rural jails, does not seem to explain it. Not only have overall crime rates been trending downward in all parts of the country, but rural areas traditionally have fewer victimizations than more populated areas ([Friedman et al., 1](#); [Truman and Langton, 10](#)). Other inputs must be driving continued growth in rural jails, even as jail populations in more populous jurisdictions have begun to fall.

Investigating Potential Causes of Higher Rural Pretrial Populations

Most of the attention regarding high levels of pretrial incarceration has been focused on large, urban jails in recent years. By contrast, there exists a dearth of research to explain how rural jails fit into the picture. This complicates any attempt to derive solutions that local governments can implement to bend the growth curve down.

However, some research is beginning to show that certain factors can more plausibly explain why rural jails have been driving increased pretrial populations (at least among most jurisdictions).

Lack of Focus on the Presumption of Pretrial Release Without Conditions

Perhaps the key factor in determining the overall flow of cases moving through any local criminal justice system is that society seems to have forgotten, at least in the case of pretrial detention, that American citizens are presumed innocent until proven guilty. This has had both legal and practical consequences. From the legal side, there is not a presumption of pretrial release without conditions. As this paper documents, there is not a focus on individual defendants to determine if there are legitimate government interests in keeping them in jail. Instead, the accused are often subject to bail amounts that preclude them from being released or to conditions of release unrelated to protecting public safety and preventing flight. On the practical side, this takes the form of a lack of availability of personnel (judges, prosecutors, defense counsel, etc.) to process individual defendants. This is particularly relevant to rural counties, many of which have difficulty attracting sufficient

numbers of court personnel—spurring some states to offer subsidies for qualified individuals willing to work in rural areas ([Bronner](#)). Additionally, many rural areas—particularly in large states—rely on circuit judges who cover multiple jurisdictions at once ([Runge](#)). The large distances these administrators must cover in a given period create a natural logjam of court cases, even in those areas with relatively less crime.

Yakima County, Washington, a non-urban jurisdiction, has recently demonstrated how best practices and the placement of key personnel can significantly impact the disposition of criminal justice at the local level. In addition to using a new pretrial assessment tool for all newly charged defendants and reducing use of secured bonds, Yakima County has also ensured that defense counsel will be present during first appearances ([PJI 2018a](#)). Providing the assessment tool can help speed the process by providing assurance to Yakima County judges, who previously had to rely largely upon personal assessments of a defendant’s circumstances.

These new policies likely contributed to a pretrial release rate that climbed from 53 percent to 73 percent, with no statistically significant difference in re-arrest and court appearance rates ([Brooker, 6](#)).

Potential Economic Incentives to Grow Jails

As overall local jail populations have surged in recent decades, so too has the proportion of inmates being held on behalf of other local, state, or federal jurisdictions.

Most local jails in the 1970s reported incarcerating only those individuals arrested, charged, and convicted in a local court. However, this had changed by 2013, with a Vera Institute analysis showing that roughly 84 percent of jails were found to be holding inmates—who were on pretrial detention or had been convicted—who belonged to a different jurisdiction ([Kang-Brown and Subramanian, 13](#)).

This shift in local jail composition can be seen in Texas. In January 1992, there were 4,689 total contract holdings spread across Texas’ county jails, a significant number of which were under federal control ([TCJS 1992](#)). By January 2017, this number had climbed to 7,575 total contract holdings—a 62 percent increase ([TCJS 2017](#)). These contract holdings for other jurisdictions grew almost 50 percent faster than the concomitant increase in those held on local charges (which grew 41 percent over the same period).

Economic factors can explain increases in contract holdings in local jails. Overcrowding in state and federal prisons creates high demand for bed capacity. As local jurisdictions build out additional beds to address their own concerns, they have a ready incentive to use any unused capacity—or

even to build capacity beyond their immediate needs—to house other inmates for financial remuneration, which can range between \$25 and \$169 per person ([Kang-Brown and Subramanian, 13](#)).

This has led to unintended consequences for smaller jurisdictions. As Kang-Brown and Subramanian ([22](#)) explain, Grant County, Kentucky, constructed more local jail capacity than it needed for its own use in the late 1990s. Two things happened shortly after: first, use of pretrial detention quadrupled. This “build it and they will come” phenomenon filled jail cells with a population that the county was financially responsible for, rather than sentenced felony offenders who would come with state money. Second, Kentucky state prisoners were later removed from local lockups after an abuse scandal rippled through the system, costing the county a daily per diem from the state and leaving local residents responsible for paying construction costs on jail capacity they no longer needed ([Wartman; Kang-Brown and Subramanian, 23](#)).

Similarly, Terrebonne Parish in Louisiana expanded its local jail capacity in 1993 due to overcrowding ([Zullo](#)). Prior to that year, the county’s pretrial incarceration rate never exceeded the state average ([Vera](#)⁷). However, after 1993, Terrebonne’s rate of pretrial detention eclipsed the state average and has trended upward through 2015. While other factors could explain this increase, this data suggests that the availability of new jail beds invited greater use of pretrial detention and was a likely proximate cause.

County officials in Meigs County, Ohio, have also petitioned local taxpayers for additional revenue to build new jail capacity, with the intention of using a portion to house detainees from other jurisdictions ([Tebben](#)).

Examples such as these ought to ring a cautionary note for counties that build more capacity than is necessary or that pencil in anticipated revenue from holding inmates from other jurisdictions: easy money rarely lasts forever.

The Opioid Crisis

Nearly every day, a new headline somewhere around the country details another grim account of increasing drug use and addiction in America, and the wide swath of personal destruction left in its wake—especially from opioids. In 2016, drug overdoses claimed nearly 64,000 Americans, according to the Centers for Disease Control and Prevention, with 42,249 of them caused by some type of opioid (principally heroin and fentanyl) ([CDC; Hedegaard et al.](#)).

7 The “Incarceration Trends” data tool, produced by the Vera Institute for Justice in 2015, compiles county jail population data from the Bureau of Justice Statistics Annual Survey of Jails and the Census of Jails. See “[Data Sources](#)” for further explanation.

Drug overdoses can, and do, occur anywhere and there is no national data that tracks the share of rural jail admissions attributable to opioid-related arrests. That said, opioid addiction and its related deaths have conspicuously hit rural areas especially hard, particularly in Rust Belt and Appalachian states. A notable rise in drug seizures and arrests has occurred tangential to this increase in addiction and overdose deaths, as well. A brief snapshot of how opioids (among other drugs) have flooded two hard-hit states in the eastern United States—with emphasis on an urban-rural dichotomy—follows.

Kentucky State Police (KSP) collects detailed crime information for all 120 counties across the Bluegrass State, including drug offenses.⁸ Using KSP crime reports for 2013 and 2016, we cross-referenced arrests for opioid-related crimes with county-specific population data from the United States Census Bureau, which allowed for a calculation of drug arrest rates on a per capita basis and a delineation between urban and rural counties statewide ([KSP 2013, 379](#); [KSP 2016, 383](#); Kentucky). We then calculated the average per capita drug arrest rate by county type (see **Table 1**).

⁸ KSP’s drug crime information collapses arrests for opium- and cocaine-related offenses into a single drug category—likewise, for “Other/Synthetics,” which includes synthetic narcotics such as fentanyl—which complicates efforts to gain a clear picture of how opioid-related arrests have increased over time (opium and cocaine each belong to a different drug class). Furthermore, if arrests for each drug move in opposite directions over time, this would confound accurate analysis of one drug in particular. While we report this data in our analysis anyway—ultimately, all drug arrests are qualitatively equal so far as jail population discussions go—caution must be used when viewing this data with an eye on opioids specifically.

Additionally, heroin was not given its own separate category until 2013. In the interest of providing an apples-to-apples comparison between years, we limited our data analysis to drug arrests between 2013 and 2016.

Table 1. Average per capita drug arrests in Kentucky, by county type (per 100,000 residents)

OPIUM/COCAINE	2013	2016	% CHANGE
Urban	69.24	85.92	24.09%
Rural (50k and <)	52.35	61.45	17.37%
Rural (10k and <)	35.28	53.60	51.92%
HEROIN			
Urban	85.74	102.93	20.05%
Rural (50k and <)	31.00	42.79	38.02%
Rural (10k and <)	21.03	19.27	-8.35%
OTHER/SYNTHETICS			
Urban	832.73	988.68	18.73%
Rural (50k and <)	812.77	1204.21	48.16%
Rural (10k and <)	806.96	1227.96	52.17%

Source: Authors’ calculations from data collected by the Kentucky State Police and U.S. Census Bureau.

As the data in **Table 1** shows, urbanized counties—for this section, any county over 50,000 in population—encounter more drug arrests across all three opioid-related offenses on a per capita basis. For two drug subcategories, however—heroin and other/synthetics—rural counties have seen much greater *increases* in drug arrest rates between 2013 and 2016. Rural counties under 50,000 saw an increase in heroin arrest rates of 38 percent, compared to a 20 percent increase in larger counties over the same period. Arrests for other and synthetic drugs tell the same story: Rural counties experienced an increase of 48 percent, compared to almost 19 percent in urbanized counties.

Additionally, **Table 1** reveals that very small rural counties in particular have been wrestling with increased drug problems. These counties, with populations below 10,000 residents, have seen arrest rates for opium/cocaine- and other/synthetics-related offenses grow at an even faster clip than larger rural or urban counties. They did, however, experience a drop in heroin arrests during the sample period.

Ohio has one of the highest drug overdose death rates in the country, with sharp increases in opioid-related deaths in particular. Between 2004 and 2016, heroin-related deaths increased by 1,064 percent, while deaths related to fentanyl leapt by a staggering 3,043 percent over a similar period ([ODH, 6](#)).

In a similar fashion as Kentucky, urbanized counties containing some of Ohio’s largest cities—including Cuyahoga County (Cleveland), Franklin County (Columbus), and Montgomery County (Dayton)—experienced some of the first significant heroin problems beginning in 2004 ([Wedd, 30](#)).⁹ Data for related arrests in rural areas for heroin was unavailable (probably due to their infrequency). By 2014, much of the state—in both rural and urban counties—was blanketed with heroin-related incidents,¹⁰ which increased by 124.5 percent between 2011 and 2014 alone ([Wedd, 9](#)). However, opioid-related incidents more generally were a problem long before heroin burst onto the scene in earnest in 2010, with the former rising over 600 percent on a per capita basis between 2004 and 2014.

Many other states are experiencing similar troubling increases in opioid-related arrests, among other drugs.

⁹ Several other urbanized counties in Ohio also experienced increases in heroin arrests in 2004, including Hamilton County (Cincinnati), Butler County (Cincinnati), Lucas County (Toledo), and Miami County. However, according to Wedd (30), the arrest rates in these counties in 2004 were unstable and therefore are not included in the discussion above.

¹⁰ An “incident” is defined by Wedd (6) as “one or more offenses committed by the same offender, or group of offenders acting in concert, at the same time and place.”

This data has obvious implications for criminal justice systems located in rural counties, since such areas do not commonly possess the infrastructure allowing them to absorb significant upward swings in daily receives into their local jails as larger jurisdictions can (as we previously explained). Most rural areas not only lack the basic bed capacity to accept new inmates, but also the pretrial services and supervisory staff needed to oversee individuals in the community, or otherwise steer them into available treatment or counseling services.

In Maine, a mostly rural state that has also been hit hard by the opioid epidemic, leaders of the nonprofit Maine Pretrial Services, which contracts with 10 counties, provided insight in response to our inquiry about the impact of this problem on pretrial justice:

The opioid epidemic has caused an exacerbation of rates of pretrial incarceration. Specifically, jurists are less comfortable releasing individuals suspected of or reporting out as individuals with substance use disorders. Many cases require a “bed to bed” transfer from the jail to a residential treatment facility, in which beds are scarce. Jurists are also wary of certain types of medication-assisted treatments, and have increased restrictions on use and possession ([Simoni and LaGrega](#)).

Despite the lack of national statistical data showing the connection between growing jail populations, including pretrial defendants, and the opioid crisis, the experiences of many counties suggest the trends are not unrelated. In DeKalb County, Illinois, the pretrial supervisor explained: “The opioid epidemic has led to many jurisdictions holding non-violent offenders in an attempt to save the defendants from themselves, as opposed to concerns about failure to appear or arrest for a new charge” ([Venditti](#)). This speaks to the need to provide alternatives to recognizance release and money bail, such as pretrial services coupled with treatment. In Mercer County, West Virginia, the jail had 2,000 more inmate days in 2016 than 2015, imposing significant additional costs on taxpayers that a county official said is 90 percent attributable to opioids ([Seligson and Reid](#)). In Ross County, Ohio, which is mostly rural, the mounting costs of the opioid crisis are not limited to the jail itself; with more and more parents either in treatment, jail, or otherwise unable to care for their child due to opioid addiction, the county’s child services budget increased to \$2.4 million from \$1.3 million. This suggests that, if some opioid-related defendants could be stabilized through treatment and diverted from substantial pretrial incarceration, there could be cost savings in other systems if they were then able to provide a suitable home for their child or children.

Amidst the opioid crisis, a rise in methamphetamine cases in rural areas has gotten comparatively little attention. A 2017 study by the Federal Bureau of Investigation (FBI) and Wisconsin’s attorney general found that such cases increased by 349 percent in the state from 2011 to 2015. The increase was most pronounced in rural areas, particularly northwestern Wisconsin ([Tolomeo](#)).

A detailed analysis of the factors driving continued opioid (and other drug) addiction and its sequelae in America is beyond the scope of this paper. However, policymakers in areas hard hit by drug addiction should heed a word of caution. In the absence of any obvious, countervailing factors that will attenuate this growth anytime soon, rural counties are particularly at risk of experiencing additional backlogs of drug cases awaiting adjudication—meaning many pretrial populations are likely to continue growing unabated. Policymakers should ensure that defendants in low-level drug cases are quickly screened and connected to treatment through diversion or as a condition of pretrial release, rather than languishing in jail. This can help ease pressure on already overtaxed counties and allow for more efficacious processing of court cases.

Lagging Socioeconomic Performance in Rural Areas

The surge in rural pretrial incarceration has occurred over the same time period that rural areas have lagged in other metrics, such as personal income, teenage pregnancy, family breakdown, and overdose deaths ([Overberg](#)). Last year, the *Wall Street Journal* went so far as to describe some rural areas that have been decimated by the loss of manufacturing jobs as “the new inner cities.” Rural areas have lower average incomes, particularly in southern states that have the highest levels of incarceration ([Census Bureau](#)).

A March 2018 study found that the loss in manufacturing jobs, many of which are in rural areas, has been a key driver of the opioid crisis, particularly among men out of the workforce ([Hurst et al.](#)). None of this is to suggest that poverty is an excuse for criminal activity, as parts of Appalachia have long had both high rates of poverty and low rates of crime, but it may well be that the psychological impact of falling from a prior economic position to a lower one, while still having the expectations and obligations associated with one’s former place in society, is particularly devastating ([Williamson](#)).

While an inability to afford money bail is a problem in all parts of the country—especially since only 41 percent of Americans report in a recent Bankrate survey that they could pay unexpected expenses from savings—practices such as the use of bail schedules that do not take into account a person’s ability to pay can have the most

pernicious effects in rural areas due to economic malaise and the lack of pretrial services documented earlier herein ([Cornfield](#)). A 2018 qualitative study of judicial bail decisions in California found that bail schedules were the most influential factor in the judge’s decision as to the amount of bail and that judges usually did not consider ability to pay ([Ottone and Scott-Hayward](#)).

Evaluating Forms of Pretrial Release

The extent to which different forms of pretrial release are available can have an impact on the rates of pretrial detention. In systems that rely largely or entirely on risk assessment, pretrial detention rates range from about 6 percent in Washington, D.C., 8 percent in Travis County, Texas, and 18 percent in New Jersey following reforms that took effect on January 1, 2017 ([Avilucea and Abdur-Rahman](#); [Carmichael](#)

[et al.](#); [Grant, 4](#)). In contrast, the pretrial detention rate in Tarrant County, Texas, which relies almost exclusively on money bail, is 32 percent ([Carmichael et al., 13](#)).

The Bureau of Justice Statistics ([BJS 2010, 1](#)) has noted that limitations make it problematic to compare the results of different forms of pretrial release across various jurisdictions. Notably, in many jurisdictions, defendants can be released on both a surety bond and pretrial supervision, which can complicate data analysis. Studies that compare counties suffer from the limitation that counties relying primarily on commercial bail typically release a lower percentage of those arrested while studies of different methods within a single county suffer from the difficulty of determining which release mechanism culled first from the pool

A Closer Look at Texas’ Counties

A recent detailed survey of 100 jurisdictions in Texas was performed to assist policymakers in decision-making involving risk-informed release ([Carmichael et al.](#)). The survey identified the 100 of the 254 counties in Texas that employ some form of pretrial supervision, encompassing 60 rural-sized counties and 40 larger counties—providing a suitable snapshot of pretrial conditions across Texas.

Among the counties surveyed, 63 of them provide pretrial supervision to some defendants with both surety (financial) and personal bonds (also known as “recognizance” bonds). Of the remaining 37 counties, 18 provide pretrial supervision in conjunction with personal bonds, while 19 provide only surety bond supervision. Most of the counties that provide supervision do so through probation departments that serve those counties, though state funding for probation does not cover pretrial defendants.

Only 25 (10 percent) counties utilize some form of risk-assessment tool to help inform judge’s release decisions regarding an individual’s threat to public safety, or their risk of flight ([Carmichael et al., 44](#)).

Slightly more than half (55) of surveyed counties provide “substantial” pretrial supervision. Such counties have operational costs ranging from \$25,000 to \$4 million, staff FTEs ranging from at least 1 and up to 39 personnel, and active caseloads ranging from 30 to 5,500 ([Carmichael et al., 44](#)). Unsurprisingly, most of these counties (35) are larger-than-rural in size, making them more likely to possess necessary financial resources to provide suitable supervision.*¹

* Carmichael et al. do not explicitly delineate which counties are rural or otherwise on Table 15 of their report. To do so, we cross-referenced all 100 counties on this list with current population data from the Census Bureau (see “Texas” in Reference list).

But 20 rural counties are also able to provide substantial pretrial supervision. Ten of these counties even contribute to the cost of operation (while the remainder are funded entirely by defendants):

- Personal bond supervision only: **Erath**
- Surety bond supervision only: **Stephens, Young**
- Personal and surety bond supervision: **Blanco, Brown, Burnet, Caldwell, Llano, Mills, and San Saba.**

The remaining 45 jurisdictions provide only “minimal” pretrial supervision services—defined as having operating costs below \$25,000; having less than 1 FTE providing supervisory services; and caseloads between 1 and 15 defendants. As might be expected, 40 of these 45 counties are considered rural.

Defendants released from pretrial detention on either personal or surety bond are supervised under a wide array of methods. In-person reporting and randomized drug testing are among the most popular for both bond types. Drug and alcohol monitoring are also frequently utilized, but counseling and treatment services—the “next step” on the substance abuse continuum—are only provided in about a third of supervision programs ([Carmichael et al., 46](#)).

It is interesting to note that automated text reminders are used in only 74 percent of personal bond releases and 61 percent of surety bond releases. Evidence has shown that text reminders can increase initial and subsequent appearance rates ([Murphy, 19](#)). Given cell phone ubiquity and the relative ease of setting up simple, automated messages to remind defendants of court dates, expanding use of such reminders would be a low-cost, low-effort way of expediting court dockets and reducing unnecessary pretrial detention.

of those arrested, likely leaving a more challenging clientele remaining.

While failure to appear at a specific hearing delays justice, the greatest concerns are re-arrest for serious crimes followed by long-term absconding. First, not only could re-arrest involve harm to a victim, but re-arrest is also a much more common problem, as illustrated by Alaska where prior to the 2017 reforms 37 percent of pretrial defendants were re-arrested before trial while only 14 percent had a failure to appear ([Fox and Cravez](#)). Second, many who fail to appear will later be tracked down and held accountable. Indeed, an analysis of defendants released in 2015 in Utah found that 89 percent of defendants who missed an initial court appearance ultimately appeared within three months, with nearly identical rates for those released on commercial bail and cash deposit bond, the two methods of release in the state ([Legislative Auditor General of Utah](#)). Finally, as discussed below, technological advancements are making it increasingly easy to inexpensively track a person's whereabouts, but a device that reduces the impulse to commit crime is not on the horizon.

An October 2010 study authored by criminologist James Austin and his colleagues at the JFA Institute validated the pretrial risk assessment instrument that was used in Kentucky—which discontinued commercial bail bonding in 1976 ([Austin et al. 2010](#)). However, Kentucky does require cash be posted with the court in many cases and in fact, in 2016, there were almost 15,000 cases where defendants were held in jail on bond amounts less than \$1,000 in 2016 ([Spalding](#)). Legislation considered by Kentucky lawmakers in 2018 would have, among other things, ensured that low-risk defendants could be released without regard to ability to pay ([Cheves](#)).

Prior to the study by Austin, this particular instrument had not been validated in Kentucky, though the pretrial risk instrument is based on other validated instruments. This study determined that, of 52,344 pretrial interviews conducted between July 1, 2009 and September 30, 2009, some 74 percent were released in part based on the findings of the assessment instrument. That is higher than the national average in 2004 of 56 percent ([Clark 2010, 48](#)).

In 2013, Kentucky adopted a new statewide risk assessment instrument that does not require an interview. The instrument was first validated on a representative sample of the state's population. This means it was tested retrospectively to show that the risk level designations do in fact correlate with failure to appear and re-arrest rates. Among the questions typically included in such instruments are whether the person has prior arrests and convictions, prior

failures to appear, and prior violent convictions. Following its adoption in July 2013, a greater percentage of defendants are obtaining release prior to trial while at the same time, new offenses by those released prior to trial have dropped nearly 15 percent ([Arnold Foundation 2014, 1](#)). Kentucky maintains an 88 percent appearance rate and a 91 percent public safety rate, which has been relatively consistent over the last several years ([McPherson](#); [Kentucky Statistical Analysis Center](#)). However, a December 2017 state report showed that progress has plateaued because courts are requiring low-risk defendants to post cash with the court before being released in 31 percent of cases (up from 22 percent five years ago), effectively overriding the assessment recommendations ([CJPAC](#)).

A recent study of two urban Texas counties (Travis and Tarrant) by the Public Policy Research Institute (PPRI) found that the county using a validated risk-assessment tool released fewer defendants who committed violent crimes while on bail ([Carmichael et al., 19](#)). While Tarrant County relied exclusively on commercial bail, in Travis County about half of defendants were released on pretrial services with supervision. The PPRI study also concluded that utilizing risk assessment costs \$900 less per defendant ([23](#)). This is mostly due to the high costs of unnecessarily jailing low-risk people and the costs of crime from releasing high-risk defendants.

For example, Cook County (Chicago) Sheriff Tom Dart notes that the most dangerous gang leaders are often able to post even high bail amounts because they and their fellow gang members have access to significant funds, which may be proceeds from illegal activity ([Lighty and Heinzmann](#)). In one highly publicized Chicago case, a high-ranking gang member and drug dealer facing serious weapons charges posted \$20,000 and upon leaving jail murdered a witness in the case, but under Illinois law the court did not have the authority to simply deny bail ([Lighty and Heinzmann](#)).

In striking down Harris County's misdemeanor bail system, the federal district court relied on a study of misdemeanor detainees from 2008 and 2013. That research projected that, due to the criminogenic impact of extended pretrial incarceration, the use of personal bond for many low-risk misdemeanor defendants might have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors ([Heaton et al., 787](#)).

A 2017 review of data in Harris County found across all risk levels that those defendants released on pretrial supervision had the lowest recidivism rates followed by those released on commercial bail ([Fabelo et al. 2017, 17](#)). Those who were detained pretrial had the highest recidivism rates. The findings were similar in Tarrant County.

A national study examining 27 counties made several findings concerning the efficacy of pretrial supervision:

1) a pretrial program's use of quantitative or mixed quantitative-qualitative risk assessments lowers a defendant's likelihood of pretrial misconduct; 2) a pretrial program's ability to impose sanctions and report to courts is associated with less pretrial misconduct; 3) the more ways a pretrial program has to follow up a failure to appear, the lower the likelihood of a defendant's pretrial misconduct; 4) a pretrial program's use of targeted mental health screening lowers a defendant's likelihood of pretrial misconduct; and 5) a pretrial program's ability to supervise mentally ill defendants lowers the likelihood of a defendant's re-arrest ([Levin, David, 1](#)).

When it comes to pretrial supervision, just as with schools, there is the potential for high-performing and low-performing entities. The National Association of Pretrial Service Agencies has adopted guidelines and standards that provide a helpful framework ([NAPSA](#)). Additionally, the National Institute of Corrections has outlined a set of performance measures for pretrial supervision programs ([NIC, v](#)). In addition to the proper focus on those measures that reflect the defendant's behavior, such as ensuring re-appearance and avoiding re-arrest, it is also important to monitor the performance of actors in the judicial system. For example, a key recommended measure is the concurrence rate, which provides an indication of the relationship between the results of the actuarial risk assessment and the release supervision level. *Id.* This should show, for example, that defendants assessed as low risk are by far most likely to be released on their own recognizance. *Id.* Pretrial supervision programs in Washington, D.C., and Yamhill County, Oregon, (which has about 100,000 people) report concurrence rates 72 and 88 percent respectively ([Evenson; Keenan and Cooper](#)).

A key issue that must be balanced is costs. Clearly, no defendant should be excluded from any pretrial services or diversion program due to an inability to pay. On the other hand, those defendants who can pay are often asked to do so, whether that is a monthly supervision fee of \$25 or a fee for a monitoring device. Counties should track savings on jail costs alongside costs to taxpayers that are inevitably associated with supervising a high number of indigent defendants. As explained below, there are examples of nonprofits providing pretrial services rather than government, but to the extent government provides those services, performance will be affected by overarching challenges confronting all government agencies, which include civil service rules making it difficult to discipline employees and high pension costs. Another important consideration

is to ensure independence of pretrial services agencies as well as probation departments so that practices and types of supervision conditions are consistent across the agency, rather than a fiefdom where one officer is assigned to each court and each judge imposes their own sets of conditions that are unmoored from any standards or evidence ([Padilla; Fabelo et al. 2011, 6](#)). Finally, courts must ensure pretrial supervision is not used for low-risk defendants who should be placed on recognizance release.

Another factor to consider in addition to reappearance and re-arrest rates is the time it takes to obtain release. Defendants generally are able to secure a nonfinancial release more quickly than a financial release ([Cohen and Reaves, 1](#)). According to the Bureau of Justice Statistics, 59 percent of felony defendants released on nonfinancial bail are generally released within one day, compared to only 45 percent for financial releases. The gap narrows by the end of a week of detention, with 80 percent for nonfinancial releases and 76 percent of financial releases secured within a week of arrest ([5](#)). This could be because some defendants who initially had money bail set were eventually reviewed for non-financial release, such as through a bail reduction hearing requested by their counsel.

According to a Bureau of Justice Statistics study of state court felony defendants released between 1990 and 2004, those released pursuant to emergency court orders to relieve jail overcrowding had double the failure rates of all other forms of release ([Cohen and Reaves, 8](#)). Those released through posting property as a collateral had the lowest rate of failing to reappear at 14 percent. Outcomes for commercial bail and pretrial supervision (conditional) release were similar, with those released on pretrial supervision having a slightly lower re-arrest rate and those released on commercial bail having a slightly higher re-appearance rate. Defendants released on their own recognizance had a relatively high failure-to-appear rate at 26 percent, exceeding that of all forms of release except wholesale releases to comply with court orders.

Key caveats are that this analysis of BJS data does not compare outcomes of defendants with similar risk levels who received various forms of release and indeed it predates the development of more accurate risk-assessment instruments. It also (1) does not account for defendants who may be on both commercial bail and pretrial supervision; (2) does not account for an unknown number of cases where bondsmen persuade a court to release them from a bond because the defendant is non-compliant; and (3) compares jurisdictions that rely on different forms of release. Jurisdictions relying primarily or entirely on commercial bail release a significantly lower share of the total number of people arrested,

which was exemplified by the earlier comparison of two Texas counties (Cohen 2010; [Carmichael et al., 10-13](#)). For both constitutional reasons and for achieving the best outcomes, low rates of pretrial detention are desirable and, accordingly, jurisdictions at a minimum should ensure that alternative forms of release are available.

In 2017, the Utah state auditor examined 2015 pretrial release outcomes in a state where 85 percent of defendants are released on commercial bail while 13 percent posted a cash deposit bond with the county which is returned if the defendant makes all required appearances ([Legislative Auditor General of Utah, 6](#)). The remaining 2 percent of defendants were released on both. In 2015, 26 percent of defendants released on commercial bail had a failure to appear compared with 17 percent released on cash deposit bond ([11](#)).

In 2018 the Charles Koch Foundation, Arizona State University, and the Sandra Day O'Connor College of Law released a multi-volume *Academy for Justice* compendium ([Academy for Justice](#)), which contained a 27-page chapter on pretrial justice and bail, which makes similar findings and recommendations as this paper ([Stevenson and Mayson](#)).

Similarly, the Buckeye Institute published a report in late 2017 critical of Ohio's money bail system, highlighting incidents where clearly dangerous individuals committed heinous crimes after purchasing their release, while poor, low-risk defendants languished in jail ([Dew, 3](#)). Of course, it is important to temper conclusions drawn from specific incidents, as there are undoubtedly horrific crimes committed by defendants awaiting trial on all forms of release. However, as outlined herein, the data demonstrates that employing an actuarial assessment of public safety risk lowers the chance of such incidents.

Two other recent reports by state-based think tanks are also notable and come against a backdrop of significant reforms. A Pegasus Institute study from 2017 on Kentucky's bail system found that, even though the state has not had commercial bail since 1976, courts are inconsistent in the amounts of cash they require various defendants to post with the county to obtain release, resulting in some low-risk defendants remaining in jail while other high-risk defendants go free ([Crawford, 2](#)).

While a defendant released on bail who posts a 10 percent premium does not receive those funds back even if they make all of their court appearances, ostensibly the county would collect on the full amount of the bond from the bondsman if the defendant fails to appear (though the bondsman is not liable whatsoever if the person is

re-arrested). However, the reality on forfeitures for fugitives is often murkier. In Texas, a bondsman may have up to a year to produce an absentee defendant before the case is ruled a forfeiture. Even then, the county must civilly sue the bondsman to collect.

Counties have a mixed record of enforcing forfeitures. For example, in 2009, Harris County, Texas, collected \$1.9 million in past-due payments from bondsmen, but \$26 million in forfeited bonds remained outstanding that had accumulated over many years, some involving bondsmen who have gone out of business or died ([Olsen](#)). In other counties, perhaps because counties often have limited legal resources to bring the civil suits required to collect forfeitures, the forfeitures are settled for considerably less than the actual amount. The county treasurer in Lubbock County stated that the county typically settles for only 5 percent of the bond amount when a defendant flees, which is less than the 10 percent that the defendant typically posts to the bondsman (however, due to a lack of published data on this phenomenon, it is not possible to fully assess the extent of this practice) ([Sullivan](#)). Similar reports of unpaid or greatly reduced forfeitures have been documented in Dallas, Fort Worth, Waco, and Florida. ([Krause and Timms 2011a](#); [Krause and Timms 2011b](#); [Berard](#); [Witherspoon](#); [Morgan](#)).

A related challenge is the lack of transparency on the part of many county governments in this area, making it difficult for the public to keep track of the amount of unpaid forfeitures that are outstanding, whether due to bankruptcies by bondsmen or other reasons. Even if a bondsman is eventually held accountable for a forfeiture, the insurance company backing the bondsman actually pays out and bondsmen with repeated forfeitures who are dropped by their insurer may be able to find another insurer ([Eligon](#)).

Finally, the Rio Grande Foundation released a report in 2018, entitled *Mend It, Don't End It: Reforming Bail Reform in New Mexico*, which lends support to the substance of the state's 2016 reforms, while suggesting improvements to the procedural rules that the New Mexico Supreme Court developed to implement it ([Ralph and Muska, 4-9](#)). In November 2016, nearly 9 in 10 New Mexico voters adopted [Amendment 1](#), which included both a preventive detention provision allowing bail to be denied for a felony if the court after a hearing finds "clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community" and a provision stating that "a person who is not a danger and is otherwise eligible for bail shall not be detailed solely because of financial inability to post a money or property bond." The Rio Grande report recommends that the rules adopted by the Supreme Court for implementing this amendment be revised to

provide more flexibility so that both prosecutors and defense lawyers have adequate time to review the evidence before the preventive detention hearing.

Given that the changes in New Mexico are so recent, there is no study that conclusively evaluates the impact. In New Jersey, where similar reforms involving risk assessment and preventive detention went into effect at the beginning of 2017, data does show a 20 percent drop in pretrial jail populations ([Grant, 4](#)). However, data on failure to appear and re-arrest rates is not yet ready because such data was not available to provide a baseline for the evaluation. It is also notable that both states made a few tweaks in the first several months of their new systems which could affect the data over the course of 2017 once it is available.

Similarly, Alaska adopted major pretrial reforms as part of Senate Bill 91 in 2016. Major provisions of this bill went into effect at the start of 2018, which means it is too early to assess the impact. The legislation came on the heels of pretrial incarceration growing 81 percent from 2005 to 2014 against a backdrop of high jail costs of \$150 per day—driven by the state’s unique geographic features and largely rural population which, in some cases, is accessible only by air or boat ([Kelly](#)). With the new system, pretrial officers conduct a validated risk assessment which is used by the court to inform their decision as to whether to detain or release with or without a form of supervision, such as electronic monitoring ([AMHTA](#)). The new system does not preclude the use of financial conditions, including commercial bail, but does establish a presumption against it for defendants assessed as being a low-risk for flight who are not charged with the most serious offenses ([Kitchenman](#); [Rivera](#)).

In regard to financial conditions, research on defendants in Colorado examined the impact of unsecured bonds compared with secured bonds on both re-arrest and re-appearance rates. The results demonstrated that unsecured bonds were equally effective in ensuring defendants returned to court and were not re-arrested ([Jones, 10-11](#)). The study provided an apples-to-apples comparison of defendants at each risk level, making it particularly informative.

One jurisdiction that has a long record of success with very low rates of both money bail and pretrial detention is Washington, D.C. While the nation’s capital has not traditionally attracted attention for good governance or high levels of public safety (though it has, like the rest of the nation, seen a drop of more than half in its crime rate since the mid 1990s), the D.C. Pretrial Services Agency has been a pioneer in the use of risk assessment and pretrial supervision ([District of Columbia](#)). Some 84 percent of defendants are released at their initial appearance, often with conditions,

and after a detention hearing three to five days later, another 64 percent of the remainder are released, resulting in a total pretrial release rate of 94 percent ([Keenan and Cooper](#)). Even with such a high rate, some 88 percent of defendants successfully complete their pretrial period, with only 12 percent being re-arrested ([PSADC](#)). Approximately 5 percent of those defendants released on supervision are required to post money or collateral with the D.C. Pretrial Services Agency ([PJI 2018b, 2](#)).

One of the most important takeaways from the Washington, D.C., experience is that even though most defendants who do not fall into the low-risk category on a pretrial risk assessment can still be safely released. Otherwise, Washington, D.C., could not achieve such outcomes with a 94 percent pretrial release rate (PSADC). This leads to several conclusions: First, there are often ways to remediate the risks. For example, a homeless person would likely be at a high risk of not appearing in court, but if they were connected to temporary housing, even a shelter, that may no longer be the case. Second, some defendants may land in the lowest risk category in one tool, but in a higher category in another tool. This is consistent with empirical research conducted by the Laura and John Arnold Foundation which found that pretrial supervision can reduce risks among moderate- and high-risk defendants ([Lowenkamp and Van Nostrand 2013, 12-17](#)). The study concluded that moderate- and high-risk defendants were found to be more likely to appear in court if on pretrial supervision and less likely to be re-arrested, although the difference on re-arrest was statistically significant in some multivariate models but only approaching statistical significance in another. *Id.*

While Washington, D.C., has had positive results through the release of the vast majority of defendants on pretrial supervision, New York City provides a model that demonstrates high rates of re-appearance, with a record of releasing nearly 70 percent of defendants on their own recognizance without conditions ([Fox et al., 6](#)). In 2016, 93 percent of defendants in New York City released on their own recognizance showed up on their court date or within 30 days of their court date ([Fox et al., 17](#)). New York City uses pretrial supervision and money bail (of both the commercial and non-commercial variety) in the remaining 30 percent of cases that typically involve higher-risk defendants. An analysis of New York City results found that, among the minority of defendants who received money bail and the minority within that data set who were able to post it, failure-to-appear rates were only better than similar recognizance defendants in the high-risk category, and that commercial bail was no more effective than funds posted with the county ([Phillips 2012, 139](#)). Re-arrest data compiled

among recognizance releases in 2001 when state law prohibited public safety considerations (meaning anyone without a high flight risk was to be released on recognizance) found a 17 percent re-arrest rate, but with only 3 percent for a violent charge ([Siddiqi 2009, 7](#)). While New York City is now seeking to drive down re-arrest rates further through supervised release of high-risk defendants, its commitment to recognizance release for the majority of defendants has remained constant amid the city's historic decline in crime rates ([Redcross et al., 2](#)).

Consequences of Pretrial Detention

It is self-evident that, if someone is detained in jail prior to trial, they are incapacitated from committing an offense in the free society during that period. When dealing with a defendant who poses a high risk of being re-arrested for the most serious types of crime, that benefit is highly significant.

The most direct economic impact of pretrial detention is the fiscal cost to taxpayers. This primarily affects county taxpayers who foot the bill for county jails, although a small number of jurisdictions also have city jails. Jails are one of the top expenses in county budgets. Given that, nationally, 62 percent of those in county jails are awaiting trial, much of the total jail costs are attributable to pretrial incarceration¹¹ ([Minton and Golinelli, 11](#)).

Notably, many people detained prior to trial are never convicted nor receive probation—meaning that the bulk of the punishment and fiscal cost of the entire case was incurred prior to trial. Two studies in New York City found that 46 percent of both felony and misdemeanor defendants who did not make bail were not sentenced to incarceration—with about half never convicted and the other half receiving a non-custodial sentence such as probation ([Philips 2008, 7](#); [Philips 2007, 59](#)). Accordingly, the pretrial disposition of the case frequently determines whether a defendant is subjected to incarceration for any substantial period. Thus, since on the one hand if the court places someone on probation they are confident they will report and not commit a serious offense, it may seem counterintuitive that the same person would have previously been detained for an extended period prior to trial at great expense to taxpayers. However, it could be that the lack of post-trial incarceration for those who were incarcerated pretrial is because they are let off with time served. While jail costs \$60.12 per day, probation in Texas only costs about \$3 per day ([Legislative Budget Board, 4-5](#)).

11 See Appendix Table 3 in Minton and Golinelli. The estimated number of unconvicted inmates in local jails in 2013 was 62 percent, while the convicted total was 38 percent.

In addition to costs of the days spent in jail prior to trial, there are also local and state costs that result from the greater likelihood that those detained pretrial will ultimately be found guilty, sentenced to prison, and given a longer sentence. According to a Princeton University study, “pre-trial release decreases the probability of being found guilty by 15.6 percentage points, a 27.3 percent change from the mean for detained defendants.” ([Dobbie et al. 2016, 3](#)). This could be in part attributable to the leverage created by pretrial detention for entering a guilty plea even if innocent, which in many misdemeanor cases is largely or entirely for time served. In Harris County alone, according to comments to NBC News by current District Attorney Kim Ogg, at least 317 defendants pleaded guilty under her predecessors to drug possession charges in this situation even though drug tests that came back a year later found the substance at issue was not in fact narcotics ([Schuppe](#)). Additionally, since those in jail prior to trial are not working, they are less likely to be able to afford their own legal representation and to be able to assist their lawyer from jail in marshalling the facts and evidence. A University of Pennsylvania study found that the 13 percent higher chance of being found guilty was mostly attributable to people who pled because they could not afford bail and likely would not have otherwise been convicted ([Stevenson 2017a, 17](#)).

Research shows that otherwise similar defendants who are detained pretrial are much more likely to ultimately be sentenced to jail or prison than those who are released. A study of Florida offenders found that, after adjusting for other variables, whether the individual was detained up until their trial was strongly associated with the likelihood of a prison sentence and with a longer incarceration sentence ([Williams](#)). One study found defendants detained pretrial are four times more likely to ultimately receive a jail sentence and three times more likely to ultimately receive a prison sentence compared with otherwise similar defendants who are released prior to trial ([Lowenkamp et al. 2013a, 3](#)). Significantly, the effect is even more pronounced among those assessed as low-risk.

Likewise, a 2017 Stanford University study of misdemeanor pretrial incarceration in Harris County, Texas, found that detained defendants are 25 percent likelier than similarly situated releasees to plead guilty and 43 percent likelier to be sentenced to jail, with sentences that average more than twice as long ([Heaton et al., 711](#)). This study also found that even after controlling for factors such as bail amount, offense, and criminal history, those who are detained pretrial are more likely to commit future crimes, which may be attributable to the negative influences of the jail environment

and the loss of pro-social factors such as employment, family, and housing during extended jail stays.

Unemployment is well-known to be a major risk factor for re-offending—or for offending for the first time, if the individual was not guilty in the first place (Chief Inspector of Prisons, 23-24). Research has found that low-risk defendants who are in jail for even a few days have a greater likelihood of committing new crimes than similarly situated defendants who are held no more than 24 hours, with the percent increase ranging from 17 percent for those held 2 to 3 days to more than 40 percent for those held 15 to 30 days.

Researchers Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger (2013b, 3) suggest that the observed higher recidivism rates could be the result of a loss of community stability, as a protracted jail stay undermines employment, housing, marriages, and other protective factors. Therefore, the economic impact of excessive pretrial incarceration not only includes incarceration costs before and after adjudication, but also the fiscal and human costs of increased recidivism.

A Princeton University study that examined 420,000 defendants found that “initial pretrial release increases the probability of employment in the formal labor market three to four years after the bail hearing by 9.4 percentage points, a 24.9 percent increase from the detained defendant mean” (Dobbie et al. 2017, 3; Dobbie et al. 2018, 204). The study concludes that after accounting for jail expenses, costs of apprehending defendants, costs of future crime, and economic impacts on defendants, the net benefit of pretrial release at the margin is between \$55,143 and \$99,124 per defendant (Dobbie et al. 2017, 3; Dobbie et al. 2018, 204).

The 2017 study by researchers at Harvard, Yale, and Princeton—results of which were summarized in a 2018 article in the *American Economic Review*—found that those who cannot make bail and are held in pretrial detention are more likely to enter a guilty plea and have lower future labor market participation and earning rates (Dobbie et al. 2017, 2; Dobbie et al. 2018, 203). Likelihood of employment was 24.9 percent lower for those detained. (Dobbie et al. 2017, 23; Dobbie et al. 2018, 204).

Perhaps most significantly, because the study tracked defendants for a two-year horizon, it was able to determine that, while those released from jail prior to trial were of course more likely to be charged with a new offense during the pretrial period—they were less likely to be re-arrested in the remaining period—there was no net public safety benefit of pretrial incarceration (Dobbie et al. 2017, 12; Dobbie et al. 2018, 214). Of course, this does not mean no one should

be detained prior to trial. While detaining everyone would produce no net benefits, detaining certain defendants can be net beneficial to the extent that an objective judicial review based on the factors identified in *Salerno* and informed by an actuarial assessment instrument can successfully identify those at greatest risk to seriously re-offend during the interim. Since those at greatest risk of being re-arrested for another serious offense are also those who are likely to receive a significant prison term, by carefully limiting pretrial incarceration as suggested in this paper, the net increase in incarceration and costs can be minimized.

In addition to the costs to taxpayers and the defendant, there may be costs involving family members. For example, research has found many negative outcomes for children whose families are incarcerated, including dropping out of school and ultimately ending up dependent on government or incarcerated themselves, though such costs may be distant. But more research is needed to distinguish between correlation and causation (Baughman 2017b, 7).

The economic cost of money bail on defendants who are never convicted is neither theoretical nor trivial. While this was a statewide report incorporating both urban and rural areas, the Maryland Office of Public Defender found that more than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing (Gupta et al. 4). The report also found that the 15 ZIP codes with the highest totals in bail bonds from 2011 to 2015 were among those with high poverty rates.

Still, the most profound economic impact comes from pretrial incarceration itself, and that impact is the same whether the defendant is in jail because he cannot afford 10 percent of the total bond in a jurisdiction that uses commercial bail, or 100 percent of an ostensibly smaller total amount in a state like Kentucky that has abolished commercial bail but requires money be posted to the court to obtain release in 34 percent of cases (CJPAC, 18). Thus, the core challenge remains addressing the use of financial conditions of release as a backdoor proxy for preventive detention unanchored by any limitations or objective standards but rather driven by judges who appear on the ballot in most states and have an incentive to avoid taking unnecessary risk. The Kentucky experience demonstrates that in achieving a pretrial release system that fully reflects our constitutional principles and the values embedded in them, the question of whether money is a prerequisite for release or part of the method of release is more important than whether the funds involved are solely posted by the individual or partly by the individual and a commercial surety.

In sum, a cost-benefit analysis that sought to monetize both the possible short-term crime prevention benefits, jail costs to taxpayers, and longer-term possible negative effects on re-offending and employment found that for the vast majority of defendants, the costs of pretrial detention at current levels outweigh the benefits ([Baughman 2017a, 29](#)).¹²

Solutions for Safely Reducing Rural Pretrial Incarceration

In addressing high rates of pretrial incarceration, which are most pronounced in rural areas, the threshold place to begin is to determine which defendants should even be arriving at jail. This translates to first focusing on reducing unnecessary arrests and jail admissions.

Reduce Number of Offenses Carrying the Potential for Arrest and Jail Time

There are simply too many criminal laws, with too many of them resulting in arrest and jail time. In Texas, for example, there are more than 1,700 offenses, and all but speeding (unless above 100 mph) and an open container of alcohol can result in arrest. This is only state statutory offenses, so it does not include regulations carrying criminal penalties and local ordinances. Texans have been arrested for not wearing a seat belt, an overdue library book, and an illegal commercial sign. Some offenses should be civil matters, while others that are jailable misdemeanors should be reduced to Class C misdemeanors that do not carry the possibility of jail time. Without the possibility of jail time, counsel would not be required in order to enter a plea, meaning the cases could be disposed of in the same manner as an ordinary speeding ticket.

Expand Use of Police Diversion

Police diversion represents an opportunity to identify individuals who may not need to be brought to jail. There are many forms of police diversion, which can include a specially trained police officer defusing a call regarding a disruptive mentally ill individual, the referral of a person to a civil process for drug or mental health treatment, and referral of a dispute to mediation.

One promising program is the Seattle Law Enforcement Assisted Diversion (LEAD) initiative which has now expanded to other jurisdictions. Through this program, police refer some individuals they apprehend for drug and prostitution offenses to a case manager who connects them to treatment and other services, including emergency housing for the many who are homeless. In addition to resulting in millions

¹² These types of cost-benefit analyses necessarily involve assigning numerical values to the costs of various types of crime. While this is done in a variety of contexts, including by insurers, these kinds of calculations inevitably involve elements that are both objective and subjective, such as pain and suffering.

of savings on jail and emergency room costs, an evaluation study “indicated that the odds of at least one nonwarrant-related arrest among LEAD participants were 34% lower than those of control participants” ([Collins et al. 2015a, 17](#)). Collins et al. observe that LEAD reduced recidivism among participants by 22 percentage points when compared to the control group which went through the traditional criminal justice process ([21](#)).

Additionally, LEAD participants’ judicial costs were reduced by \$2,100 from their pre-evaluation entry, compared to the control group participants which showed an overall \$5,961 increase in cost ([Collins et al. 2015b, 2](#)). Further, LEAD group participants saw 1.4 fewer jail bookings per person per year, 39 fewer days in jail per person per year, 87 percent lower odds of having at least one prison sentence post-evaluation, and a significant reduction in the number of felony cases per year. While LEAD began in Seattle, Colorado lawmakers appropriated funds in 2017 for LEAD-type pilot programs in four jurisdictions, including two in lesser populated areas: Alamosa, with approximately 10,000 people, and Longmont with about 93,000 people ([CDHS](#)).

Even after arrest, there are options for police diversion from jail. New York City has been using desk appearance tickets since 1964 in lieu of bringing certain misdemeanor defendants to jail. Instead, police officers have the discretion to bring the person to the nearby police precinct office where they determine the arrestee’s eligibility for a desk appearance ticket. Individuals are ineligible if, for example, their identification cannot be verified; they have outstanding or prior warrants; they are on parole or probation; or they are a recidivist. In 2012, nearly 80,000 desk appearance tickets were issued for offenses such as marijuana possession, driving with a suspended license, petty theft, and city code offenses ([Phillips 2014, 5](#)). If the arraignment was scheduled within 15 days of the arrest, the failure-to-appear rate was only 4 percent, which increased to a still modest 13 percent for arraignments within 16 to 30 days. Of course, warrants are ultimately issued for no-shows.

In Lubbock, Texas, police are able to refer appropriate cases to a mediation office within the court system that has achieved successful outcomes in nearly 90 percent of cases. A victim of a minor theft, for example, is much more likely to get an apology and restitution through this option than through protracted formal proceedings. Such programs typically focus on first-time offenders who are willing to take responsibility for their actions.

Another example of police diversion is the use of citations, which can be either criminal or civil. In 2007, Texas enacted a cite and summons law, which the Texas Public Policy

Foundation developed in collaboration with other advocates and groups, including the Combined Law Enforcement Association of Texas (CLEAT) and the Sheriffs' Association of Texas ([HB2391 Bill Analysis](#)). Under this statute, police may issue a citation and summons to appear on a specific date in court to individuals for certain misdemeanor offenses, including petty theft and possession of four ounces or less of marijuana. A minority of Texas counties, ranging from Travis to El Paso and Colorado (a rural county), are employing this authority, with some such as El Paso and Dallas, starting only in the last year or two even though the law took effect in 2007. The International Association of Chiefs of Police published a 2016 report examining the research and best practices on cite-and-summons programs around the country, finding that sound implementation and utilization of best practices such as automated reminders are critical to achieving high appearance rates ([IACP, 16](#)).

Florida has been a pioneer in civil citations. Through this program, police issue a citation for offenses such as shoplifting and the person must make arrangements to provide restitution and perform community service. In fiscal year 2011-2012, there were a total of 4,822 offenders released through the civil citation program. Of those, 3,888 completed the program ([Roberts, 2](#)). The recidivism rate for those who completed the program was 4 percent. The financial savings for the Florida Civil Citation Program have been impressive as well. It is estimated to cost on average \$5,000 to process a youth through the criminal justice system, compared to \$386 per youth for the Civil Citation Program ([Bishop et al., 1](#)).

In 2015, the police department in Gloucester, Massachusetts, a city which—with a population of about 29,000—qualifies as a small town, began an innovative police-led treatment initiative focusing on those with severe opioid addiction. Called the Angel Program, it enables individuals suffering from overdoses and other manifestations of addiction to voluntarily seek help from the police who place them in a detoxification or treatment program without the threat of criminal charges. Not only does the officer collect information on the individual and match them with a treatment center, but the officer also provides transportation, including an ambulance if necessary. Volunteer good Samaritans are also assigned to those participants who need emotional support. To provide a sense of the population the program has been serving, some 82 percent had a prior detoxification episode and the average age at which participants began abusing drugs was 15 ([Schiff, 15](#)).

Undoubtedly, some of the high-profile examples of police diversion such as New York City's desk appearance program come from major urban areas. Though Gloucester

only has a population of 29,000, they had more treatment resources than most other small towns. However, there are many examples of rural jurisdictions overcoming barriers to establish Crisis Intervention Teams (CIT) in which specially trained police officers are able to defuse many calls involving mentally ill individuals ([Skubby et al.](#)). CITs began in urban areas and among the challenges in rural areas are a lack of emergency psychiatric beds for those who cannot be stabilized at the scene, a lack of transportation, and a lack of officer training. Solutions have included collaboration among neighboring urban counties, including development of a system of regional transportation so that the officer is not taken off duty for many hours, and a commitment to training a larger percentage of officers than might be needed in an urban area, since in a small police force, relatively few total officers may be on duty at any given time ([Compton et al., 8](#)).

While different from the desk citation program in New York City, because it is not a diversion program in the sense that it does not resolve the case, Illinois has for years empowered police officers with significant authority to avoid bringing the arrestee to jail. Under Illinois law, police officers often take arrestees to the police station where they can release them on their own recognizance for virtually all misdemeanors other than domestic violence cases, as well as ordinance violations and regulatory offenses such as violations of hunting laws. The officer exercises his discretion to determine whether the person is likely to show up for court and is not a danger to the community. In addition to the officer's authority to release arrestees on their own recognizance, the officer may accept a cash deposit bond according to a schedule set by the court pursuant to 725 ILCS 5/110-7 or 725 ILCS 5/110-8 of the Illinois Code ([Chicago Police Department](#)). The amounts are low, ranging from \$120 to \$3,000, with the vast majority of offenses, and all non-traffic misdemeanors, at \$1,500 or less. The officer furnishes the arrestee with a receipt, deposits the funds with the court, and the defendant receives the money back upon re-appearing as required to resolve the case.

Randy Petersen, who spent 21 years with the Bloomingdale Police Department (Illinois), says that this authority was helpful in allowing officers to get back on the street and that in most cases as an officer in Illinois he and his colleagues released defendants on their own recognizance (Randy Petersen interview). Petersen said they did not decide to bring someone eligible for police station release to jail unless they had a separate outstanding warrant, posed a danger to the community, or were viewed as likely to flee. Illinois does not have commercial bail and in 2017 passed a law creating a presumption against money bail in cases involving low-level

defendants ([Illinois Bail Reform Act](#)). While bail schedules used by courts are often problematic, the use by these officers is different for several reasons, including the low amounts; the fact that the officers still release defendants on their own recognizance if they cannot pay so long as it is consistent with public safety; and absent the judicial imprimatur in creating the schedule, the officer would not have the legal authority to make a more individualized determination, which of course the defendant would still be entitled to as a matter of due process if brought to jail.

Some states such as Texas and Colorado also have state-funded programs to provide rural areas with emergency transportation service to bring to residential treatment severely mentally ill people apprehended by law enforcement who are a danger to themselves or others. Additionally, some police departments are now responding to calls involving severely mentally ill people with a trained clinician in the car, which has been demonstrated to result in a significantly higher number of incidents being successfully defused without the need for an arrest ([Shapiro et al., 3](#)). While it awaits formal evaluation, a pilot program of the Harris County Sheriff that could be especially promising for rural areas involves including the clinician participating remotely through the use of an iPad ([Ramsey](#)).

Create Presumption of Recognizance Release

As noted above, the concept of innocent until proven guilty seems to have become lost in many instances when it comes to pretrial incarceration. But not everywhere.

New York City has demonstrated that recognizance release can be effectively used in a high number of cases, far more than the 14 percent nationally. Cases where very low bail amounts are set likely involve a relatively minor charge given the role of the seriousness of offense in current bail determinations and a low level of risk if risk was assessed, but the prevalence of low bail nevertheless not being attainable indicates that a presumption of recognizance release could make a significant difference. This should be adopted. In addition, the burden should be on the state to prove, in an adversarial proceeding where the accused is present, that the need for conditions of release or denial of bail has overcome the presumption.

In many jurisdictions, the use of pretrial supervision is increasing. While this is appropriate in some cases, it should not be the first option. If after an individual consideration, a court finds that conditions of release are warranted, the conditions should be the least restrictive to ensure public safety and appearance at trial.

In light of challenges in some jurisdictions such as Kentucky, where courts often disregard such a presumption in existing law, policymakers should consider requiring that courts enter findings indicating why recognizance release is not sufficient, and conditions, financial or otherwise, are necessary for a low-risk defendant. Greater use of recognizance release for low-risk defendants can ensure that limited pretrial supervision resources can be focused on those who otherwise would have a substantial chance of being re-arrested.

Promptly Administer Risk Assessment Upon Intake

In Texas, only 25 of 254 counties report assessing pretrial risk, and only 6 of those as of 2017 reported using a validated instrument that can reliably predict defendants' risk of flight and threat to public safety ([Carmichael et al., xv](#)). However, in early 2018, the Texas Supreme Court rolled out a framework for a statewide pretrial risk assessment that does not require an interview, which they are piloting in Dallas County, and will eventually be available electronically throughout the state ([Griffith](#)). In largely rural DeKalb County, Illinois, all defendants are assessed by the pretrial department prior to first appearance, using the revised Virginia Pretrial Risk Assessment Instrument and 70 to 80 percent are ultimately released on unsecured bond, with the remaining either detained prior to trial or required to post funds with the county ([Venditti](#)).

With advances in research, it has been demonstrated that an assessment without an interview can be equally effective for determining risk of failure to appear, risk of re-arrest, and risk of re-arrest for a violent offense, just as longer assessments requiring an interview can—which often address factors such as employment that are more tied to socioeconomic status ([Arnold Foundation 2014, 2](#)). Since such assessments rely on existing data, they can be conducted in five minutes. The factors incorporated in one such assessment—the Public Safety Assessment promulgated by the Laura and John Arnold Foundation, which has been adopted in some form by dozens of jurisdictions—are as follows, with “FTA” denoting Failure to Appear, “NCA” denoting New Crime Arrest, and “NCVA” denoting New Violent Crime Arrest (see chart) ([Arnold Foundation 2016, 2](#)).

Of course, training is necessary for those personnel administering the assessment and jurisdictions that use such assessments to inform human decision-making, so that an algorithm alone does not dictate the final outcome. Additionally, while some critics of risk assessments argue they are racially biased, an analysis of the Kentucky pretrial assessment found that largely similar percentages of all races fell into each of the risk levels ([PJI 2018](#)). Likewise, a comprehensive review of the academic literature across

criminal justice and other disciplines by the National Institute of Corrections found that actuarial assessments result in more accurate decision-making than relying solely on professional judgment, including reducing the chance that race or other extra-judicial factors will influence the decision ([Thompson, 2](#)). Nonetheless, given the evidence of similar drug use levels among all races but widely different rates of conviction for drug possession based on policing patterns and methods of obtaining drugs, jurisdictions could choose to simply exclude drug possession cases from the prior-offense history factor.

In 2017, Nueces County, Texas, implemented the use of a pretrial risk assessment combined with two additional staff positions to administer the assessment and make recommendations to the court. Two documents provide a summary of the steps taken to operationalize this, including how challenges, such as accomplishing tasks on weekends, have been overcome, as well as the assessment itself and the forms used to process cases ([Nueces County Pretrial Risk Assessment](#); [Nueces County Jail Population Assessment](#)). Since the pilot program began in 2017, the jail population has fallen substantially, and the county is no longer looking at the prospect of building a new jail that could cost \$80 to \$100 million.

Revise State Bail Laws, Including the Option of Preventive Detention

States can take two sensible paths on bail laws, depending on whether there is an adequate mechanism for detaining

high-risk defendants without bail. Many states have constitutional provisions that sharply limit the cases in which a person can be denied bail, often referred to as preventive detention. In Texas, for example, the Constitution specifies that bail can only be denied in cases involving capital murder and certain domestic violence cases. In states with such limitations, efforts to address rural pretrial incarceration can take two different paths, depending on whether a constitutional amendment such as the ones recently enacted in New Jersey and New Mexico is attainable.

With a preventive detention net that is sufficient to ensure public safety but also limited and subject to due process, courts will no longer feel compelled in cases involving the most dangerous to set extremely high bail amounts for the purpose of ensuring detention. Jurisdictions that use financial conditions would then be able to focus on the constitutional considerations outlined at the beginning of this paper. If, however, courts lack the legal authority to deny bail to those who pose a serious public safety danger, the only alternative to ensure they remain in jail is by setting bail high enough such that they cannot afford to post it. The imprecision involved in doing this necessarily means that the system will have some level of inequality, since some dangerous defendants with significant resources will likely be able to come up with 10 percent of whatever the high amount is. Nonetheless, even those rural areas in states where bail cannot simply be denied in all of those cases in which that is the right decision, can take many steps outlined below such as moving away from rigid bail schedules

and expanding alternative forms of release to ensure that the larger group of defendants who do not pose a significant risk to the public do not languish in jail simply because of a lack of funds.

To take the most comprehensive path of reform, in many states a constitutional amendment is necessary to provide judges the discretion to hold the most dangerous defendants without bail. Our constitutional traditions that are anchored in the belief that liberty is the default choice require that preventive detention be sharply limited, so it is the exception not the norm.

The National Center for State Courts has published a paper outlining how to ensure that the net is properly limited ([NCSC](#)). Based on [U.S. v. Salerno](#), the report notes that these safeguards should include:

RELATIONSHIP BETWEEN RISK FACTORS AND PRETRIAL OUTCOMES

Risk Factor	FTA	NCA*	NVCA*
1. Age at current arrest		X	
2. Current violent offense			X
<i>Current violent offense & 2 years old or younger</i>			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction		X	
<i>Prior conviction (misdemeanor or felony)</i>	X		X
6. Prior violent conviction		X	X
7. Prior failure to appear in the past two years	X	X	
8. Prior failure to appear older than two years	X		X
9. Prior sentence to incarceration		X	

Note: Boxes where an "X" occurs indicate that the presence of a risk factor increases the likelihood of that outcome for a given defendant.

Source: [Arnold Foundation, 2016, 2](#). "Public Safety Assessment; Risk Factors and Formula."

*NCA stands for "new criminal activity," and NVCA stands for "new violent criminal activity."

1. An adversarial hearing within a reasonably short time after arrest,
2. The right to counsel as an essential element of an adversarial proceeding,
3. A judicial finding of clear and convincing evidence that no conditions of release could provide reasonable assurance of public safety,
4. Pretrial detention orders that clearly state the specific reasons for detention,
5. An opportunity for appeal or review of the detention order, and
6. Strict adherence to the jurisdiction's speedy trial requirement.

Another requirement to add to this list is that there should be clear and convincing evidence, not just probable cause, that the defendant is guilty of a crime. Such evidence should be primarily established through information which law enforcement has already gathered about the instant charge, but it also could appropriately be bolstered by a record of any prior similar convictions even if they would not be admissible at trial. This can help ensure that defendants who are actually innocent are not denied bail. While no one should be denied pretrial release solely on the basis of an assessment instrument, the requirement that there be a judicial finding that no conditions of release could provide reasonable assurance of public safety should be informed by the use of an objective assessment. Ideally, the assessment should indicate not just the general risk of the person committing a new offense, but also the specific risk of a serious violent offense.

The District of Columbia, which in 1970 became the first jurisdiction in the U.S. to establish a preventive detention statute, incorporates both the seriousness of the charged offense and the weight of the evidence that the defendant is guilty in its criteria which the court should consider in determining a defendant's dangerousness ([District of Columbia Code](#)). These enumerated factors are violent and dangerous nature of the crime, weight of the evidence against the defendant, defendant's personal character and history (including community involvement, physical and mental health, substance abuse, financial resources), past failures to appear, criminal history, probation or parole status, and seriousness of the danger to others if the defendant is released.

It is critical that preventive detention be limited to cases involving a serious public safety risk, though flight risk should be considered to the extent that a defendant who flees would negate the effect of conditions designed to address the public safety risk. For example, a mentally ill defendant charged with assault who absconds would not benefit

from mandatory treatment. On the other hand, a homeless defendant in a minor marijuana case with no prior record may be a high risk of flight, but they are not dangerous, so preventive detention should be off the table. Therefore, while a high level of dangerousness must be a prerequisite to preventive detention, a high risk of flight that cannot be otherwise addressed exacerbates a defendant's level of public safety risk.

Exercise Prosecutorial and Judicial Discretion Regarding Use of Financial Conditions and Pretrial Diversion Toward Mental Health and Drug Treatment Alternatives

While legislation and even constitutional provisions can alter the statewide framework in areas such as what type of conduct is criminalized and leads to arrest, rural jurisdictions, like their suburban and urban counterparts, need not idly wait for changes in state law or, perhaps, for a lawsuit challenging their pretrial practices. Instead, many local district attorneys and governments are taking steps to ensure the availability of non-financial forms of release in certain cases, such as misdemeanors and/or nonviolent offenses ([McKinley](#); [Cramer](#)).

In some 48 states there are general statutes on pretrial diversion giving authority to prosecutors and judges to act, and some states also have specific diversion statutes on subgroups such as those charged with hot checks or veterans ([NCSL 2017](#)). By identifying suitable defendants for pretrial diversion very soon after incarceration, these defendants will be far more likely to accept the offer, as opposed to jail or prison time, since their employment, familial, and housing connections will be more intact in many cases, and they will have accumulated less jail credit.

Harris County has taken this approach in the last few years through close collaboration between the district attorney, probation director, and sheriff to screen defendants arrested in state jail felony cases charged with possession of less than a gram of drugs and immediately offer them pure diversion (dismissal if they complete required treatment) or deferred adjudication with the same course of treatment and supervision tailored to risk and need level if a repeat offense. For these first-time, low-level possession cases, pretrial diversion program participants were 50 percent less likely to be re-arrested than defendants who declined the offer, which resulted in serving time in the local jail, state jail, or obtaining dismissal of their case ([Joplin et al.](#)). For those repeat offenders who were also quickly steered into deferred adjudication with treatment, who did not take supervision, a 36 percent reduction in re-arrest rates was achieved. Similarly, Harris County has reported considerable success with

reducing both recidivism and jail utilization through its new diversion program for defendants with mental illness ([THHSC, 1](#)).

Given the earlier discussion regarding the high toll of opioids in many rural areas, it is notable that considerable research supports the diversion of those arrested for opioid possession, including those suffering from overdoses. Studies suggest that, while naloxone is often necessary to reverse an overdose, it is important to immediately segue the person into sustained treatment to avoid further abuse of opioids and additional overdoses ([NIH](#); [Rinaldo and Rinaldo, 11](#); [President’s Commission, 77-79](#)). Additionally, the best results have been attained when medication-assisted treatment (MAT) is not used alone, but rather combined with psychosocial counseling and accountability mechanisms such as drug testing and drug courts ([SAMHSA](#)). Examples of non-urban jurisdictions implementing MAT include Yamhill County, Oregon, where the head of the pretrial services program noted: “Opioid addiction drives an individual’s behavior which could be the difference of attending a court appearance or continuing drug-seeking behavior” ([Evenson](#)).

Additionally, unique challenges and solutions for establishing and sustaining successful rural drug courts, including tribal drug courts, have been identified—demonstrating how jurisdictions have overcome obstacles such as lack of transportation ([American University](#)). Finally, some jurisdictions have sought to relieve the strain on jails associated with opioid-related arrests by creating detoxification centers, many of which also serve those with other addictions ([Hayashida, 44](#); [Nosyk et al., 6](#)). A similar jail diversionary approach for alcohol-related offenses such as public intoxication has involved sobering centers ([Smith-Bernardin, 2](#)).

Regardless of the type of treatment and accountability mechanism that are utilized, the priority in the pretrial context must be rapid screening so that the defendant does not languish in jail, particularly given that most jails, because they are designed as short-term holding facilities, have limited treatment options, and severely mentally ill individuals often decompensate, endangering themselves, other detainees, and staff ([Armour, 887](#); [Galanek, 15](#)). Moreover, while treatment programs and drug courts typically also serve post-adjudication participants, pretrial diversion is not only valuable because it can result in much more rapid placement, but also because it is more likely to result in the person not having a criminal record at the end of the process if they fully comply. Conversely, once a person is adjudicated and convicted, while there may be limited options in some states for sealing records in a small share of cases, there is an inherent policy and practical challenge in making it as if the

conviction had not happened, as opposed to whether there truly never was a conviction.

Early prosecutorial screening of cases is also important to expeditiously identify cases in which there is not sufficient evidence to proceed. If a defendant remains in jail for a substantial period based only on the officer’s probable cause affidavit, that means no one with legal training has independently verified that the four corners of the document are sufficient to allege a crime. For this reason, some jurisdictions have a prosecutor on duty 24/7 to screen cases, including New Jersey which made this practice statewide in 2016 ([OAG, 18](#)). With regard to judges, the Fifth Circuit pointed out that they have an obligation to make an individualized bail determination, including inquiring into the defendant’s financial circumstances ([O’Donnell v Harris County 2018a](#)).

This paper has focused on reducing the number of incidents of unnecessary and even counterproductive pretrial detention. For those who are detained prior to trial, jurisdictions can reduce the length of pretrial stay—regardless of whether the defendant is ultimately convicted and sent to state prison—by complying with constitutional and statutory speedy trial requirements ([Conway](#)).

In Harris County, the county criminal justice coordinator encourages courts to prioritize those cases involving defendants jailed up until their trial by circulating weekly lists to the judges of cases before them in which the defendant has been in jail for a significant period. However, delays in the resolution of a case are a result of gamesmanship by both sides. In DeKalb County, Illinois, which has just over 100,000 people and a county seat with a population of about 17,000 people, the supervisor of pretrial services Michael Venditti cited the “increasing time it takes for an incarcerated person to reach disposition” as the biggest problem. He noted that “larger dockets and prosecutor/defense strategies involving waiting out the time the defendant could serve to get a better plea have resulted in many cases of defendants being incarcerated longer than they could be sentenced to upon conviction” ([1](#)).

Curtail Use of Bail Schedules and Adjust Bail Amounts When Financial Release Is Used, Based on the Presumption of Release

Bail schedules set by courts and counties typically list a standard bail amount of each category or type of offense. There is no research that would demonstrate whether bail schedules are more common or have higher average amounts in rural areas. However, a review of bail schedules in Nebraska found wide disparities in districts across the state in the bail schedule amounts for the same offense categories. For example, the bail schedule in the

Fifth Judicial District (rural Saunders, Seward, Platte, and Hamilton counties) sets bail at \$10,000 for Class I offenses; whereas it is \$5,000 in the Fourth Judicial District (which subsumes Omaha in urban Douglas County) ([ACLU, 19](#)).

Bail schedules, by definition, do not provide the type of individualized consideration that due process requires. Given that the vast majority of defendants do not have thousands of dollars in savings, bail schedules also assume commercial bail is the appropriate form of release for most defendants. Since bail schedules typically rely solely on the offense, they also may enable someone arrested for a relatively minor offense who poses a very high public safety risk—such as someone formerly convicted of homicide or rape—with factors indicating a risk of committing another serious crime to be released without any supervision.

Bail schedules proliferated at a time when risk assessments that do not require an interview were not yet available, and many jurisdictions lacked the personnel otherwise needed to evaluate a defendant's risk of flight and re-arrest. Now, however, given the availability of such assessments and the move toward a presumption of non-financial release for defendants with the least serious offenses and at the lowest end of the risk spectrum, whatever practical rationales for bail schedules that may have existed are no longer salient.

A 2007 Bureau of Justice Statistics study found 7 in 10 defendants secured release when bail was set at less than \$5,000, but only 1 in 10 when bail was set at \$100,000 or more ([Cohen and Reaves, 1](#)). Thus, the amount at which bail is set often determines whether the defendant obtains release prior to trial. Nationally, less than 25 percent of felony defendants are released without financial conditions, and the average bail for a typical felony defendant exceeds \$55,000 ([Reaves, 19](#)). Additionally, research shows the typical defendant earned less than \$7,000 in the year prior to arrest, so it is not surprising that less than half of defendants are able to post bail even when it is set at \$5,000 or less ([Dobbie et al. 2017, 1](#)).

In a review of data in Wisconsin, Measures for Justice found that 33 percent of pretrial detainees were being held on a bail amount of less than \$500 ([Measures for Justice](#)). The counties where this rate exceeded 50 percent were all rural counties: Grant, Burnett, Sawyer, Monroe, Rock, Green, Iowa, and Pierce. A 2018 study of upstate counties in New York, many of which are rural, also found that pretrial detention was ubiquitous for low-bail defendants. Of the more than 90,000 pretrial detainees in these upstate New York counties who spent at least one night behind bars after bail was set, 40 percent (35,679 people) had a bail of \$1,000 or less and 24 percent (21,833 people) had a bail of \$500 or less

([NYCLU, 5](#)). Some 60 percent of individuals held on bail in these counties were charged with only a misdemeanor or violation. The three most common misdemeanors were drug possession, petty theft under \$1,000, and criminal contempt (showing a lack of respect in the courtroom). The three most common violations were disorderly conduct, harassment, and trespass. Under state law, the maximum fine for violations is \$250, but the bail amount set exceeded that in 41 percent of cases. Assuming these pretrial detainees would have only had to pay 10 percent of the bail amount to a bondsman to obtain release, these are people who could not come up with between \$25 and \$100.

For those jurisdictions that nonetheless continue to use bail schedules, perhaps prior to such time that they have the necessary personnel to quickly screen defendants, they should seek to limit the degree to which equal protection is jeopardized by ensuring that an immediate bail reduction hearing is available for those defendants who cannot meet the amount in the schedule. The same can be done for those who are ineligible for bail at all under many counties' bail schedules, such as individuals charged with technical probation violations ([Ad Hoc Committee on Bail and Pretrial Services, 14](#)).

Jurisdictions can remedy this problem through ensuring that the defendant's financial circumstances are immediately evaluated and taken into account and creating a presumption of non-financial release and/or recognizance release in cases involving low-risk and nonviolent defendants ([Ad Hoc Committee on Bail and Pretrial Services](#)). While lowering their bail amounts, such as through bail reduction hearings, may be worth pursuing in jurisdictions that rely primarily on money bail, this strategy could bear limited fruit given the high number of defendants being detained on already low bail amounts and that a large share of defendants have minimal or no assets. Moreover, if the jurisdiction is dependent on commercial bail, bail bondsmen note that they have transactional and insurance costs that often mean it is not worthwhile to write bonds, especially those of \$500 or less, where the premium would be very low ([Boyer 2014](#)).

Explore Use of Pretrial Services and Supervision, Including Regional and Nonprofit Options, for Defendants After Due Process Hearing Demonstrates Recognizance Release Without Conditions is Inadequate to Address Flight and Public Safety Risk

Jurisdictions should explore a range of methods for providing pretrial supervision, but only for a discrete group of defendants who, based on an assessment and after the due process of an adversarial hearing with representation, have

been determined unsuitable for recognizance release. There are a wide range of models for providing pretrial supervision and services that some rural areas utilize ([Clark and Vetter, 17](#)):

- Relying on the existing probation department, which is equipped to provide supervision, given that they oversee individuals who have been adjudicated;
- A pretrial office within the court system;
- A pretrial office within the sheriff's department;
- A nonprofit entity;
- A multi-county entity;
- A statewide entity.

Creating a pretrial supervision capacity does not necessarily require creating a new government agency, especially in very lightly populated areas. In areas where police officers are assigned to certain neighborhoods or geographic areas, it may be possible to involve them in enforcing certain pretrial supervision conditions, such as a curfew, without unduly interfering with their existing responsibilities. In cases where the primary condition is participating in mental health or drug treatment, it may also be possible for the treatment provider to simply regularly report to the court through an existing assistant to the judge as to whether the defendant is participating. With advances in case management software platforms, it would be easy for the court assistant to simply receive an alert if the defendant is not faithfully continuing their treatment, or even to read any notes entered by the treatment provider. As jurisdictions, especially rural ones, scale up their pretrial supervision capabilities, they should consider such potential synergies that maximize existing resources.

Notable examples come from Kentucky and Maine, two states that are overwhelmingly rural. Kentucky established a statewide pretrial services program in 1976 under the state's Administrative Office of the Court. Since then, the state has been a leader in the implementation of a validated, statewide risk assessment instrument. In Maine, a nonprofit entity called Maine Pretrial Services has operated since 1983, providing assessment and supervision services by contract with ten mostly rural counties. They use an assessment based on Virginia's statewide assessment. In fiscal year 2017, failure to appear rates ranged from 2 percent in Lincoln County to 7.2 percent in Androscoggin County (Maine Administrative Office of the Courts).

Similarly, Summit County, Ohio, also uses an assessment based on the Virginia model and contracts with the nonprofit organization Oriana House to provide pretrial services, which in 2016 cost \$1.32 per day per defendant on

minimum supervision, \$2.64 for medium supervision, and \$5.02 for maximum supervision. In contrast, jail stays in Summit County in 2016 were more than \$133 per day ([Ad Hoc Committee on Bail and Pretrial Services, 19](#)).

One example of a rural county that addressed these challenges is St. Mary's County in Maryland. In this jurisdiction, the sheriff launched a pretrial services program in 2015 which incorporates both GPS monitoring for some participants as well as a vocational component. The county says it costs \$29 a day compared to \$149 a day for the jail, and that the jail, where the pretrial share of the population has declined to one-third, would otherwise have another wing in operation if the 45 defendants were not in the pretrial supervision program ([Dresser 2017](#)). While the program has not yet been subjected to an academic evaluation, the sheriff reports that 99 percent of defendants who have participated have shown up, and 92 percent have not been re-arrested. Participants have included an addicted, pregnant woman facing drug distribution charges who was on a high supervision level with drug testing and medication-assisted treatment and an indigent man in his early 20s who was arrested for driving with a suspended license who was placed on the lowest level of supervision. This latter participant received court reminders and enrolled in an insulation apprenticeship. One advantage of funding coming through the budget for the existing Sheriff's office, as is the case in St. Mary's County, is that county executives and the public can easily evaluate the net budgetary effect of the program, verifying that its cost is more than paid for through savings on jail beds.

Expedite Provision of Counsel to Indigent Defendants

The lack of legal representation is a major challenge, particularly in rural areas. The role of defense attorneys is critical in bringing facts to the court's attention that may justify pretrial release without financial conditions or with a bail amount the defendant can afford. Furthermore, for those defendants who ultimately get out of jail by entering a plea to time served, that cannot legally occur until the defendant speaks with a lawyer, since a line of Supreme Court decisions requires this defendants be afforded the opportunity to consult with an attorney before entering a plea. Unfortunately, rural areas face the most difficulty in providing counsel. For example, some 11 counties in Nebraska do not have a single attorney other than the elected prosecutor ([Gerlock](#)). One way Nebraska has sought to address this is by creating a career path program modeled after one for medicine through which college freshmen typically from rural areas wishing to practice law there can receive pre-law

programming and guaranteed admission to the University of Nebraska Law School ([Laird](#)).

While costs must always factor into policymaking, courts have established the right to counsel as a rare “positive right” in a Constitution that is otherwise full of primarily “negative rights.” A 2010 Cato Institute report noted that “of all the services that governments provide to the poor, [indigent defense] is arguably the one most defensible on libertarian (as well as other) grounds. Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that government provides to the public as a whole—law enforcement and social protection” (quoted in [Reddy, 1](#)). Indeed, the report argues this is “one of government’s most basic tasks, and indeed is typically seen as the primary *raison d’être* of the state.”

Legal representation at the time pretrial release decisions are made, including setting of financial and other conditions, may reduce the likelihood of the setting of higher bond amounts which increase the odds of pretrial detention, and moreover, such a policy may not have any detrimental effect on crime rates ([Carmichael and Voloudakis, 21](#)).

The Lawyers at Bail Project demonstrated this connection by randomly assigning lawyers to 300 bond hearings for non-violent defendants and comparing those to similar defendants in the control group ([Colbert et al., 1720](#)). Researchers examined the “number and nature of the charges, criminal history, nature of the defendant’s ties to the community, demographic characteristics, whether bail was given, and if it was, the amount at which bail was set” ([Levin, Marc 2015, 3](#)).

They found that only 13 percent of suspects without lawyers at the bond hearing were released on their own recognizance, but 34 percent of those suspects who did have counsel were released ([Colbert et al., 1753](#)). Furthermore, defendants who had counsel had their average bail set at approximately \$600 less. Lastly, the median time spent in jail for suspects without counsel was nine days, compared with two days for those with counsel.

Additionally, Colbert’s research teams, who interviewed each of the suspects, found an unquantifiable increase in the sense of procedural justice. Defendants with representation were more likely to believe that they had been treated with respect and that sufficient information, including information favorable to them, was presented.

Miami-Dade County in Florida and King County (Seattle) in Washington state are examples of jurisdictions with models designed to ensure early representation. In Florida,

a defendant’s first appearance occurs within 24 hours of arrest at which time the court decides on bail and/or other pretrial conditions ([Sixth Amendment Center, 14](#)). Arraignment, where the defendant is presented with the charges, does not occur until 21 days later for defendants in jail and 30 days later for those not in custody. Since it is not until arraignment that the defendant would be determined to be indigent and assigned counsel, the elected public defender created an early intervention unit solely dedicated to providing representation from the first appearance through the arraignment. This representation includes engaging in any plea negotiations prior to arraignment. Since a defendant cannot enter into a plea without an attorney, this could result in more rapid resolution of cases, which has the potential for reaping jail savings for the many defendants whose plea involves diversion, probation, or some other sentence that does not involve further incarceration.

In King County, the process of delivering early representation is similar, but relies more on the nonprofit sector. Indigent defense is primarily provided through four nonprofits that contract with the Office of Public Defender Service ([Sixth Amendment Center, 14](#)).¹³ There is also a panel that can appoint outside counsel where there is a conflict, such as multiple defendants or an overload of cases. Counsel is provided by one of these nonprofit agencies at the time of the initial appearance at which bail is set and probable cause is ascertained, if the screenings conducted by the Office of Public Defender Service staff based in the courtrooms have determined the defendant is indigent. As in Miami, in those cases that are not resolved by plea during the initial representation or involve complex issues requiring specialized knowledge, a different counsel is often subsequently assigned.

When it comes to non-urban counties, in Dekalb County, Illinois, all defendants are required to be provided a public defender at their first appearance if private counsel is not present, secured, or available ([Venditti](#)).

The key to providing counsel earlier in the process without adding to the total cost of the system is to reduce the number of individuals entering jail who qualify for indigent representation. This is important not only for controlling costs, but also because in many jurisdictions and particularly rural areas, there is a dearth of attorneys available to handle these

¹³ Much of the nonprofits’ legal staff have more recently been moved into the public defender’s office after a court ruling that they were entitled to government pensions. This Washington State Supreme Court decision in *Dolan v. King County* was persuasively criticized by the *Seattle Times* editorial board, which argued that the Court wrote these benefits into contracts between the organizations and county that did not provide for benefits and that these attorneys knew when they took positions with the nonprofits that they would not receive public employee pensions.

responsibilities. Fortunately, by decriminalizing conduct that should not be a crime, removing jail time as a possible punishment for conduct that does not implicate public safety, utilizing police diversion, and employing restorative justice practices, such as victim-offender mediation (typically done without attorneys in the room) in appropriate cases, jurisdictions can concentrate limited indigent defense resources on a smaller number of cases ([Levin, Marc 2005](#)).

Promote Family Involvement

Families, as well as other stabilizing figures, such as ministers, are too often excluded from the pretrial process. This can take many forms, beginning with the confiscation of cell phones upon arrest, making it difficult for defendants to contact those who could assist with meeting financial conditions of release and/or provide for needs such as transportation and housing that may be necessary for the defendant to be deemed a good candidate for certain pretrial diversion programs. The Constitution Project in a March 2015 paper also recommended that family members be able to attend pretrial hearings ([Constitution Project, 3](#)). An important related fact that may not be brought to the attention of the court without counsel or family present is that, according to a Connecticut study, defendants who are married are three to five times less likely to fail to appear ([Hedlund and Cox, 12](#)).

Match New Technologies with Defendants

Advancements in technologies hold great promise for keeping track of pretrial defendants and ensuring they show up for court. These technologies fall into two categories. First, there are those such as text reminders for court hearings which have a negligible cost and could sensibly be applied to virtually all defendants. A University of Chicago study of New York City defendants found that such text messages reduced failures to appear by 26 percent, with the most effective incorporating language about the consequences of arrest for failure to appear, what to expect at court, and planning the trip ([Cooke et al., 4](#)). Examples include:

“Helpful reminder: go to court on Mon, Jun 3 09:30AM. We’ll text to help you remember. Show up to avoid an arrest warrant. Reply STOP to end texts.”

“You have court on Mon June 03 at One Centre Street Manhattan. What time should you leave to get there by 9:30AM? Any other arrangements to make? Write out your plan.”

While one might think such e-reminders would be non-controversial, legislation to implement them failed in the 2018 session in Colorado ([HB18-1081](#)). The Professional Bondsmen of America took credit for defeating

what it called an “anti-bail” bill. ([Professional Bondsmen of America](#)).

An extension of text-reminders are newly developed phone applications in which the person being supervised is asked at certain times to answer specific questions instead of going in person to meet with a pretrial supervision or probation officer, and the phone verifies their location at the time. Advances in technology are also allowing biometric detection to be incorporated into phone applications, such as through verifying the respondent by their fingerprint on the phone. ([McCullom](#)).

Second, there are those such as electronic monitoring, ignition interlock, and continuous alcohol monitoring devices that involve substantial costs but can be net beneficial when applied to appropriate defendants. A 2017 study of federal pretrial defendants in New Jersey found that comparable defendants on location monitoring devices were more likely to re-appear and less likely to be arrested, although success rates on these metrics were well above 90 percent for both groups ([Wolff et al.](#)). Also, while focused on probation rather than pretrial supervision, a Florida study found that GPS monitoring dramatically reduced absconding and new offenses among those on supervision ([Padgett et al.](#)). Similarly, South Dakota has reported impressive results in supervising defendants with alcoholism through the 24/7 Sobriety Program that relies in part on a skin patch that continuously monitors alcohol in a defendant’s sweat ([Rand Corporation](#)). However, experts on monitoring technologies wisely emphasize the need to carefully screen those on pretrial supervision to identify those whose risk level and prior criminal history warrants this cost that either the defendant or taxpayers must incur, as well as this intrusion into privacy ([PJI 2012, 9](#); [Gelb](#)). Certain technologies may be especially useful in rural areas due to long distances that often separate residents from where courts, pretrial supervision offices, and treatment services are located. These include telemedicine and driverless cars.

Conclusion

The case for policy changes relating to rural pretrial incarceration is clear. As we have seen, rural areas are diverging from the rest of the nation, and current policies often result in suboptimal outcomes for public safety, taxpayers, and the protection of defendants’ constitutional rights. Legal scholars have sometimes observed that the Constitution, however admirable, is not a suicide pact, so perhaps the happiest conclusion of all is that the holding in *Salerno* that pretrial detention should be the exception rather than the rule is fully aligned with the best research since that time, demonstrating that it is only beneficial in a small segment of cases and is counterproductive in many more. Looking

to the future of pretrial release, advances in technology will likely continue to make it more efficient to ensure that pretrial defendants appear without the need for detention or conditions for that purpose, though our traditional commitments to ensuring due process and maximizing liberty must remain touchstones when taking advantage of technological breakthroughs. A continued focus on pretrial policy will be on identifying the small percentage of defendants too dangerous to be released and remediating the risk of re-arrest for serious offenses among the far greater share of defendants who do not pose an extreme risk, but are also not at the lowest end of the spectrum.

For a host of reasons, ranging from limited resources to dispersed populations, addressing pretrial incarceration in rural areas is a particularly complex undertaking. Also, there are many moving parts to implementing changes in a deliberate manner that produce sustainable results without

unintended consequences. For instance, as rural areas examine these recommendations against the backdrop of their existing jail populations, they will likely find many opportunities to improve outcomes. At the same time, they must balance the need for alternatives to pretrial incarceration, such as treatment for those with addiction and/or mental illness, with attention to due process informed by risk assessment to help avoid over-supervising defendants in the community. Rural areas are hardly monolithic, and they must calibrate their practices to their own populations, while keeping them in alignment with their state's broader legal framework concerning bail and preventive detention. Ultimately, as rural communities across the country take many different paths to addressing the meteoric rise in rural pretrial incarceration over the last few decades, they must not lose sight of the destination: a constitutional system that produces greater public safety with less collateral damage. ★

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About the Authors



Marc A. Levin is the vice president of criminal justice at the Texas Public Policy Foundation (TPPF) and Right on Crime.

An attorney and accomplished author on legal and public policy issues, Levin began the Foundation's criminal justice program in 2005. This work contributed to nationally praised policy changes that have been followed by dramatic declines in crime and incarceration in Texas. Building on this success, in 2010, Levin developed the concept for the Right on Crime initiative, a TPPF project in partnership with Prison Fellowship and the American Conservative Union Foundation. Right on Crime has become the national clearinghouse for conservative criminal justice reforms and has contributed to the adoption of policies in dozens of states that fight crime, support victims, and

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In 2014, Levin was named one of the *Politico* 50 in the magazine's annual "list of thinkers, doers, and dreamers who really matter in this age of gridlock and dysfunction."

Marc has testified on criminal justice policy on four occasions before Congress and has testified before numerous state legislatures. He also has met personally with leaders such as U.S. presidents, speakers of the House, and the Justice Committee of the United Kingdom Parliament to share his ideas on criminal justice reform. In 2007, he was honored in a resolution unanimously passed by the Texas House of Representatives that stated, "Mr. Levin's intellect is unparalleled and his research is impeccable."

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Haugen is a graduate of Eastern Washington University (EWU), with a Bachelor of Science degree in biology with pre-medicine option, and a minor in chemistry. He also holds an Associate of Arts degree in general studies from North Idaho College. At EWU, he participated in academic research in a molecular microbiology laboratory for two years, investigating genetic virulence factors and pathophysiology in microbes. In 2011, he presented his research before faculty and peers at the Student Research and Creative Works Symposium in Cheney, Wash.

His writing has appeared in *National Review*, *The Hill*, *Townhall*, *Washington Examiner*, *El Paso Times*, *TribTalk*, *Redstate*, *Ricochet*, and *Breitbart Texas*.

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