MASSACHUSETTS BAIL: ALTERNATIVES AND OPPORTUNITIES

Legal Skill in Social Context: Social Justice Program

In conjunction with: CRIMINAL JUSTICE POLICY COALITION

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1. PREFACE

This document represents the culmination of many months of research on the issue of bail in Massachusetts. Compiled by a team of twelve students at Northeastern University School of Law, it provides a set of recommendations for alternatives to the Commonwealth’s current “cash bail” system. The Massachusetts Bail Fund, a project of the Criminal Justice Policy Coalition, commissioned this report through Northeastern’s Legal Skills in Social Context program, making it one of fifteen such annual social justice projects that create useful legal products across a variety of public interest fields. The goals of this document are twofold: First, it seeks to create a set of substantial policy recommendations to mitigate potential disparate impacts imposed by the current bail system on defendants of color or low socioeconomic status. Second, it introduces several substantive steps that Massachusetts can take to alleviate any such impacts. These recommendations arise from an examination of several model jurisdictions including Kentucky, Maine, Oregon, New York, Virginia, Colorado, and Ohio, and the federal system.

2. EXECUTIVE SUMMARY

The Criminal Justice Policy Coalition, the Massachusetts Bail Fund, and Northeastern University School of Law share a common goal of social justice through a more equitable legal system. To this end, we have sought to amass a body of data that would show quantitative evidence of disparate impact in the area of pretrial justice. Our presumption that such a disparate impact may exist stemmed both from the personal experiences of attorneys and other participants in the criminal justice system and from the observable phenomenon that, with disproportionate frequency, the criminal justice system as a whole deals with people living in poverty and people
of color. Each of our recommendations attempts, in part, to make the current pretrial process more equitable for all members of society, and for marginalized social groups in particular.

In spite of this objective, however, we have been unable to amass quantitative data to verify reports of large-scale disparate impact in Massachusetts. Thus, our first recommendation is the creation of a data-driven study on the implementation of bail decisions in the Commonwealth. Inherent in this recommendation is the establishment of a data-collection protocol for the Commonwealth and the development of a model for interpreting that data.

Another step we propose is the adoption of a risk assessment tool that would enable bail decisions to more closely reflect a defendant’s actual flight risk. Such a tool would help inform judges’ discretion in setting bail by providing an objective method for determining which individuals should be sent home to await trial. Risk assessment relies on predictive factors that can help ground a judge’s determination of an individual’s likelihood of failing to appear (FTA) or of committing a crime while awaiting trial. Consideration of a formal risk assessment would insulate a judge’s decision through objectivity, and would therefore make such determinations less susceptible to allegations of bias. We have investigated risk assessment models, including those utilized in Kentucky, Virginia, Ohio, and the federal system. Risk assessment methods vary in their reliance on certain types of data and on their form of administrative implementation, providing Massachusetts a variety of approaches it may consider. A formal method of risk assessment could result from action of the legislature, by enshrining the
use of such a method in a statute, or from action of the courts, by education or by its incorporation as a regular procedural element.

Another proposed alternative to cash bail is a system of unsecured bonds. Under such a system, defendants leave jail, either on personal recognizance or with conditions, but pay no money upfront. Instead, defendants released on unsecured bonds pay only if they fail to appear for a court date or fail to comply with pretrial conditions. Thus, unsecured bonds maintain the incentive to adhere to the conditions of pretrial release, while eliminating de facto penalties for those without means to pay a cash bond. Based on the success of unsecured bond programs in other states, we recommend a pilot program to explore implementation of unsecured bonds in Massachusetts.

To accompany the changes to cash bail that would lead to a more equitable administration of justice, we also recommend the development of a pretrial services agency, either as a discrete government department or as a non-profit organization. While either formulation would be a positive step for the Commonwealth, we more highly recommend the latter. The jurisdictions we examine in this report include examples of both kinds of organizational schemes. Pretrial services, regardless of the operational method, promote cost-saving in several ways. First, they enable more effective determinations of who should qualify for release on personal recognizance. Second, pretrial services help courts reduce the number of individuals detained, requiring only that moderate-risk defendants accept responsibility for participating in monitoring programs and other terms of conditional release.

Finally, Massachusetts should consider a notification system to help reduce FTA rates in certain jurisdictions. Studies of programs in Nebraska, Oregon, and Colorado reveal that notifications such as postcards or phone calls (either live or automated) containing information
about court dates can reduce FTA rates. While such a system would involve a substantial initial investment, the resources saved by decreasing the FTA rate would offset these initial expenses. This cost-benefit analysis shows the most favorable results in urban areas, where FTA rates are generally higher than those in more rural areas.

Not only is bail a constitutional right, but it is a vital first step in the criminal justice system that can dramatically affect the ultimate disposition of criminal proceedings. Ensuring that Massachusetts’s bail system operates both efficiently and fairly is crucial to ensure not only the rights of pretrial defendants, but the most economic use of tax payer money. The subsequent proposals represent a variety cost-effective measures that will streamline bail in Massachusetts. While different in kind and degree, each is a step towards a more equitable outcome for all defendants regardless of their ability to pay.

3. What is Bail?

Introduction

Cash bail is one of several systems courts across the country use to release defendants awaiting trial, by securing their promise to return to court. Generally, options for adjudicating issues of pretrial detention include releasing defendants on their own recognizance with or without restrictive conditions, into the custody of a third party, or on bail or bond. Alternatively, a court may detain a defendant, either by denying bail outright or setting bail at an amount the defendant cannot afford. In calculating amounts for cash bail, many jurisdictions (including Massachusetts) assign a dollar amount (or surety), and require the defendant to pay 10% of that

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2 Id.
amount to secure his or her release. A judge decides whether to set bail and in what amount, as well as other non-monetary conditions, where appropriate. These decisions are statutorily defined to assess the defendant’s risk of FTA and committing subsequent offenses while awaiting trial.

The requirement of a cash payment in order to release a defendant carries its own consequences and creates obstacles for the accused. Even if a defendant can post bail, raising the required funds often proves difficult. Those who are able to do it may deplete their resources or those of family and friends. Those who are unable to do it face pretrial detention and other disadvantages in preparing their defense, such as locating and contacting witnesses. Detention also removes defendants from their communities and social support structures before adjudication of the charges pending against them. Families suffer when pretrial detention causes defendants to lose employment, housing, and custody of children.

“People detained due to money bail are put under greater pressure to enter a plea bargain, which has become the de facto standard in resolving more than 95% of cases each year... People with children at home, a job or housing at stake, or a desire to avoid the hard conditions of jail could be and have been coerced into entering a guilty plea to avoid pretrial detention, particularly if the time they have already spent will count toward the prospective sentence.”

Even a facially neutral bail system may impact low-income and other vulnerable populations disproportionately.

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3 Id.
4 Id.
6 Justice Policy Institute, Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail 13 (2012).
7 Id.
8 Id.
9 Id.
10 Id. at 25-26.
11 Id. at 13.
In the literature produced over the past twenty years, scholars have examined racial and socioeconomic disparities in the criminal justice system, with a significant focus on pretrial processing. Presently, there are no published Massachusetts studies focusing on disparate impacts on race, socioeconomic status, or gender during pretrial processing. Despite this absence, many studies paint a clear picture of how pretrial processing disproportionately harms poor people and people of color, and we would be remiss to ignore these disparate impacts or assume that Massachusetts is immune to this phenomenon. Indeed, statistics compiled by the Bureau of Justice show that 83.5% of the jail population in 2002 earned less than $2,000 a month prior to arrest.

Pretrial legal processing is an important and often pivotal moment in a defendant’s passage through the criminal justice system. On its face, the decision to release a defendant on personal recognizance, release a defendant on cash bail, or detain a defendant can appear unimportant in comparison to subsequent stages, such as sentencing. However, pretrial decisions often play a significant role in determining final outcomes for defendants.

A 2013 study of a supervised release program in Queens, New York, demonstrates the way pretrial processing can affect the ultimate outcome in defendants’ lives. In lieu of cash bail, the program allowed defendants accused of non-violent crimes to be released on the

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12 For a thorough analysis of studies looking at disparate impacts throughout the criminal justice system along lines of race and ethnicity, ROBERT D. CRUTCHFIELD, APRIL FERNANDES & JORGE MARTINEZ, RACIAL AND ETHNIC DISPARITY AND CRIMINAL JUSTICE: HOW MUCH IS TOO MUCH?, 100 J. Crim. L. & Criminology 903 (2010); see Appendix A.

13 Id.


15 Id.

condition that they meet regularly with caseworkers who can, for example, recommend resources and verify employment. The study followed defendants charged with non-violent offenses who were released through the program and those who were not released, tracking conviction rates and severity of sentencing for each group.

Of those program participants who were eventually convicted, only 11% of those released at arraignment received prison sentences and 29% of those released some time after arraignment received prison sentences. In contrast to these figures, 75% of those denied pretrial release received prison terms (potential program participants who were denied release met the same eligibility requirements as the program participants: non-violent offenses and other criteria). While the program had no great effect on conviction rates and thus had little impact on the final adjudication of cases, the impact on defendant’s lives – especially whether they could avoid incarceration – as well as the financial effect for the state, was substantial. Furthermore, the fact that the conviction rate remained largely unchanged demonstrated that pretrial services need not hamper the effective prosecution of cases.

As the above study reveals, pretrial processing can have a substantial impact on the lives of defendants. Moreover, the defendants who tend to receive worse pretrial outcomes tend to be poor people of color and members of other marginalized groups. One nationwide study from 2008 found that as many as 65% of defendants held before trial were detained due to insufficient

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17 Id.
18 Id.
19 Id. Note: Defense lawyers must request participation in the program, and many will often forgo requesting the program if they think a release on personal recognizance is likely. This serves to screen out many low-risk defendants.
20 Id.
21 Id.
funds, high bails, or rejection by a bail bondsman. As mentioned above, five out of six people in jail made less than $2,000 per month before their detention.

The statistical disparities presented in the above studies set the scene for this report and illustrate the importance of creating robust alternatives to cash bail. Such alternatives are not only possible, but are commendable, having positive social consequences such as maintaining the fabric of communities and saving the Commonwealth money. There are many examples where pretrial services have served both of these functions. In 2007, the Broward County Jail in Florida was so full that a judge declared the conditions unconstitutional. Instead of building a new $70 million jail as the state had originally proposed, county commissioners voted to expand the County’s pretrial release program. Within a year, the jail population declined so dramatically that the sheriff closed an entire wing, saving taxpayers $20 million annually. In Massachusetts, positive changes that benefit individuals and save taxpayer dollars are likewise possible. Indeed, such changes are badly needed. In 2013, a judge ordered the Sheriff of Middlesex County to end unconstitutional overcrowding in a Cambridge jail, ordering that no more than 230 people be held in a facility that, in recent years, has frequently housed more than 400. The fact that it was built to house only 160 people, however, demonstrates the need for the Commonwealth to initiate a more sustainable long-term approach to pretrial overcrowding.

22 Petteruti & Walsh, supra note 14.
23 Id; see also CRUTCHFIELD ET AL., supra note 12.
25 Id.
26 Id.
28 Id.
Constraints on pretrial conditions and bail amounts come from several sources of law: the Eighth Amendment to the U.S. Constitution and its interpretation through case law, the Massachusetts State Constitution and bail statute, and relevant case law interpreting this state law.

**CONSTITUTIONAL RESTRICTIONS ON BAIL: THE EIGHTH AMENDMENT**

The Eighth Amendment forbids the government from requiring “excessive bail.”29 In *United States v. Salerno*, the Supreme Court of the United States held that provisions in the Bail Reform Act of 1984 that allow judges to order defendants detained pending trial on the grounds that those defendants pose a threat to another person or the community did not violate the Eighth Amendment.30 The Court held that the Eighth Amendment’s protection against excessive bail applies only when bail is used to reduce the risk of FTA. Thus, bail is not excessive when the government detains a defendant on other grounds.31 In writing for the Court, Chief Justice Rehnquist explained that the government’s interest in preventing a potentially dangerous defendant from leaving custody outweighs the defendant’s interest in his or her personal liberty.32 Arguments that pretrial detention on basis of dangerousness violates the Eighth Amendment are unlikely to succeed in limiting the extent of or ending the practice of pretrial detention because the controlling precedent in *Salerno* has found pretrial detention on such grounds constitutional.

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29 U.S. Const. amend. VIII.
31 Id. at 754-55.
32 Id. at 751-52.
THE MASSACHUSETTS BAIL STATUTE

On its face, the Massachusetts bail statute appears neutral. The statute contains a presumption that a defendant will be released on personal recognizance unless the judge determines that this will endanger the safety of the community or fail to assure that the defendant appears in court.\(^{33}\) Similarly, defendants should also be granted the least restrictive condition that will reasonably assure their appearance.\(^{34}\) Judges will consider the following when making bail determinations: the nature and circumstances of the offense charged, the potential penalty, family ties, financial resources, employment record, criminal record, record of FTA, alleged acts involving “abuse” as defined in Mass. Gen. Laws ch. 209A, § 1, and the status of being on bail, probation, or release for another conviction.\(^{35}\)

CONSTITUTIONAL CHALLENGES IN MASSACHUSETTS

Based on Massachusetts Supreme Judicial Court (SJC) jurisprudence on this issue, a constitutional challenge to the Massachusetts bail system would be unlikely to succeed. Several constitutional challenges have been attempted regarding pretrial practices in Massachusetts. These challenges have largely centered on the Due Process Clause (DPC) of the Fourteenth Amendment to the U.S. Constitution.

In *Aime v. Commonwealth*, the defendant brought a constitutional challenge against a provision of the 1992 amendments to the Massachusetts bail statute.\(^{36}\) This provision authorized judicial officers to deny the release of individual held in pretrial detention if the officers believe

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\(^{34}\) *Id.*

\(^{35}\) *Id.*

the release of the individuals would endanger a specific person or the community.\textsuperscript{37} No proof of dangerousness is necessary for a judicial officer to deny release.\textsuperscript{38} In \textit{Aime}, a judicial officer prevented the release of the defendant by setting the bail at an amount that the defendant could not afford.\textsuperscript{39} The SJC held that such wide discretion in assessing dangerousness and setting bail amounts in a way intended to prevent release infringed on the defendant’s “interest in freedom from detention.”\textsuperscript{40} It also held that the lack of procedural safeguards on judicial officers’ discretion did not conform with the Federal Bail Reform Act and violated the DPC.\textsuperscript{41} While such a decision may seem promising, it is important to note that this holding only affected the amendments to the statute and not to the statute itself. The Court explicitly distinguished between the amendments and the provisions of the bail statute that it considered unconstitutional. These included the authorization of a judicial officer to exercise discretion in denying an arrestee’s release, both in considering that individual’s flight risk and in setting the defendant’s bail based on the criteria set out in 276 § 57.\textsuperscript{42}

The SJC showed consistency in its viewpoint of the constitutionality of holding defendants without bail if they are considered flight risks in its decision in \textit{Querubin v. Commonwealth}.\textsuperscript{43} In this case, the defendant challenged the constitutionality of § 57 of the Massachusetts bail statute on the grounds that it violated his Due Process rights.\textsuperscript{44} The Court held that a judge has the “inherent authority” to hold a defendant in pretrial detention without bail if that judge has determined that bail “will not reasonably assure defendant’s appearance before the

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 210.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 212, 214.
\textsuperscript{42} Id. at 207-08.
\textsuperscript{43} 795 N.E.2d 534 (Mass. 2003).
\textsuperscript{44} Id. at 538.
Accordingly, the Court cited as a substantial consideration the state’s interest in having the defendant appear in court.\footnote{Id. at 540.} In \textit{Querubin}, the Court distinguished \textit{Aime} as involving preventive detention (wherein a judicial officer predicted dangerous activity by the defendant) rather than assuring the presence of a defendant who had already been indicted, which the court cited as a “well-established and historic reason for pretrial detention.”\footnote{Id. at 539.}

In \textit{Mendoza v. Commonwealth}, a defendant challenged the constitutionality of a provision of § 58A that “required the pretrial detention of a defendant for three days if the Commonwealth requests a continuance prior to a hearing on dangerousness.”\footnote{Id. at 543.} The Court found that such detention was constitutional so long as the Commonwealth showed “good cause” as determined by a judge’s discretion.\footnote{673 N.E.2d 22, 25 (Mass. 1996).}

In addition, the constitutionality of the common practice in Massachusetts of setting an amount for cash bail and another amount for a “surety bond” – typically ten times the amount of the cash bail – has also been challenged and upheld by the SJC. In \textit{Commonwealth v. Ray}, the Court ruled that a judge may set alternative bails: cash bail in one amount and surety in another.\footnote{Id. at 543.} Although § 58 of the statute states that cash bail and surety bonds must be “equivalent,” the Court ruled that “equivalent” does not mean numerically equal, but rather equal in effect on a defendant’s circumstances. In theory, this would require that bails be set equitably rather than equally, and based on a particular defendant’s circumstances.

Although judges have the authority to set so-called “alternative bails,” the SJC has narrowly interpreted the authority of judges in imposing conditions related to bail, finding a
requirement that any such action be specifically authorized by the bail statutes. When defendants are released on personal recognizance, the Court has held that judges cannot impose restrictions on that release.\textsuperscript{51} In \textit{Dodge}, the Court examined instances where statutory authority to impose such conditions was explicit (for offenses involving physical force\textsuperscript{52} and in actions to protect victims of physical abuse\textsuperscript{53}).\textsuperscript{54} It concluded that the legislature’s grant of power in those situations meant that its silence under other circumstances constituted a deliberate omission of the power to set conditions outside of the specific circumstance dictated in the statute.\textsuperscript{55}

Following a similar rationale, the Court ruled in \textit{Delaney v. Commonwealth} that defendants whose bail is revoked due to allegations of subsequent criminal activity are not entitled to a de novo review of that revocation.\textsuperscript{56} Because § 58 sets out specific situations in which defendants have a right to a de novo review of a bail determination, the Court found that the legislature intentionally declined to add such a provision to other situations where the statute does not contain one.\textsuperscript{57}

Even in situations where the SJC has found that pretrial detention has violated a defendant’s constitutional Due Process rights, it has been reluctant to remedy the violation by dismissing indictments. In \textit{Commonwealth v. Imbruglia}, the Court established the rule that the dismissal of an indictment is only appropriate when the defendant can show prejudice caused by intentional prosecutorial misconduct undertaken with reckless disregard of the defendant’s

\begin{footnotes}
\footnote{52} Mass. Code Regs. ch. 276 § 42A
\footnote{53} Mass. Code Regs. ch. 276 § 58A
\footnote{54} Com. v. Dodge, 705 N.E.2d 612, 616 (Mass. 1999).
\footnote{55} Id.
\footnote{56} Delaney v. Com., 614 N.E.2d 672, 676 (Mass. 1993).
\footnote{57} Id.
\end{footnotes}
ability to “mount a defense.”\textsuperscript{58} This standard significantly limits a defendant’s ability to appeal such a decision because of the difficulty in showing prosecutorial intent. Applying this test, the Court found in \textit{Commonwealth v. Perito} that, although in that case the defendant’s Due Process right to participate in his own arraignment was violated and he was therefore held unconstitutionally, a dismissal of the charges against him would be an inappropriate remedy.\textsuperscript{59} Thus, even if a specific instance of pretrial detention is ruled unconstitutional, the high bar required for a court to impose a remedy make it unlikely that this type of challenge will be successful, even on a limited case-by-case basis. Given this body of law regarding bail in Massachusetts, we do not consider litigation to be a realistic option for bail reform in the Commonwealth.

4. SOLUTIONS AND POSSIBLE APPROACHES

DATA ON THE MASSACHUSETTS BAIL SYSTEM

\textbf{INTRODUCTION}

Despite a dearth of quantitative data, anecdotes and interviews suggest there are many problems with the Massachusetts bail system. There may be misapplication of the statute caused by abuse of discretion when setting bail.\textsuperscript{60} Race, gender, and socioeconomic status may be impacting bail amounts.\textsuperscript{61} Judges may be setting exceedingly high bails in order to keep defendants detained, or may be considering dangerousness as a factor outside of the required

\begin{footnotesize}
\begin{enumerate}
\item 387 N.E.2d 559 (1979).
\item \textit{Id.}
\item Interview with Makis Antazoulous, Suffolk County Public Defender (Oct. 19, 2013).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
dangerousness hearings. Additionally, judges may be setting pre-determined bail amounts for certain elements of the crimes alleged, and as such, disregarding specific facts of cases.

Despite these and other criticisms of Massachusetts’ bail system, there is limited data to support such theories. Currently, there are no published studies that focus on disparate impacts of pretrial processing in Massachusetts, particularly on low-income and minority defendants. It is highly likely that this absence is due, at least in part, to the lack of easily accessible data on bail in Massachusetts.

In comparison to several other states, Massachusetts lacks published data on issues of pretrial release. Other states have used their own bail data to assess and help reform their bail systems to alleviate the disparate impact of cash bail. For example, in Stephens v. Bonding Assoc. of Kentucky, the Kentucky Supreme Court criticized the commercial bail system and quoted agency reports and legal articles that called for a new kind of bail system. Statutory reforms followed this decision and led to Kentucky’s elimination of bail bondsmen within their bail system.

Some studies have looked at national aggregate bail statistics, some of which are referenced above. The data for these studies is based largely on data from the Bureau of Justice Statistics. However, no counties in Massachusetts are included in this dataset.

Due to the lack of available quantitative information, it is difficult to determine whether the Massachusetts bail system, as practiced, adheres to the language and intentions of the statute. This obstacle does not necessarily negate attempts to generate solutions to suspected problems.

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62 Id.
63 Id.
64 Stephens v. Bonding Assoc. of Kentucky, 538 S.W.2d 580, 582 (Ky. 1976).
66 Id. at 15.
We believe that an individual’s liberty is too fundamental a right to be decided without a certain level of transparency providing insight into bail decisions. Thus, we recommend various methods of data collection and tracking.

**Benefits of Data Collection**

Although there is anecdotal evidence of a disparate impact of bail on certain populations, a research study to collect information on all aspects of the bail process performed pursuant to rigorous social science standards and to analyze factors affecting bail decisions would benefit the cause of transparency. As discussed above, the goal of determining the existence of a disparate impact from bail (when controlling for all other factors) is to mitigate that impact. The Commonwealth’s lack of readily available information on pretrial bail determinations prevents discovery of a disparate impact. Despite the possible disparities within bail, it is difficult to establish the existence of unfair practices in Massachusetts without the necessary statistical information. Consequently, this report cannot highlight and therefore help to mitigate potential abuses of discretion. Furthermore, this means that potential victims of discriminatory bail practices are denied recourse in proving personal discrimination, or disparate impact more generally.

In addition to its necessity in determining if Massachusetts’ bail system creates disparate impacts, data about the Massachusetts bail system is necessary to determine if bail practices are cost-effective. If basic data, including the total costs of bail, are not collected and maintained appropriately, it is impossible to effectively or convincingly show the relative cost of bail. This is particularly applicable as Massachusetts is debating whether to purchase pretrial risk assessment tools, discussed below in the Ohio Risk Assessment Section.
Additionally, judges, lawyers, and administrators have reported that information from demonstration agencies has allowed them to make better-informed decisions. Furthermore, data can help set an objective standard for what is considered “excessive” or “appropriate,” particularly in comparison to income. This could give the government and the public a clearer picture of how the Massachusetts bail statute is applied against a wide array of defendants, highlighting on a broad scale the reasons judges impose bail and whether cash bail has disparate impacts on different segments of the population.

A thorough study to determine if, and if so what, disparate impacts or other aspects of bail exist may also lead to reform of the ways in which data is kept in Massachusetts. Over time, as with the Pretrial Release Information Management system in Kentucky, the organization of bail data could lead to training policies that help ensure this data remains complete and free of mistake.

**Sources of Data**

There are, nevertheless, potential sources of pretrial release and bail data in Massachusetts. Each courthouse in Massachusetts maintains its own record of bail decisions made in that courthouse. Because this information is public, these records should be retrievable from the Clerk’s office. Jails may keep some of this data as well. However, a problem with using jail data is that jails will not have data on those who are released on their own recognizance.

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68 Interview with Natasha Frost, Assistant Dean, School of Criminology and Criminal Justice at Northeastern University, in Boston, MA. (Jan. 23, 2014).
69 *Id.*
In order to obtain a defendant’s bail information, researchers must first use the arraignment sheets to determine which court set the defendant’s bail.

To link the bail amounts to information such as prior convictions, bail amounts may need to be linked to offenders’ Criminal Offender Record Information (CORIs). The request for CORIs requires an access clearance from the Massachusetts Department of Criminal Justice Information Services (DCJIS). The approval for access and the time an approval can take relates to the research agency’s previous clearance, if any, number of CORIs requested, and type of project. For research groups, part of the clearance process may regard human subject issues for research. CORI searches for researchers are free, but there is a charge of $25 per defendant for groups that qualify a business.

A researcher then must link the defendant’s information present in the CORI with his or her arraignment sheet at a specific courthouse, followed by bail amounts. Once the correct information is gathered about each defendant, it will likely be in paper form, which will require a digitization process. The information for defendants, their histories, and bail amounts need to be linked. In order to do this, each defendant’s information must be coded electronically into a data management program. Each variable will contain labels for different values of that variable (for example, different dollar amounts for the variable of bail amount set). Defendants have specific

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70 Id.
73 Interview with Natasha Frost, supra note 68.
74 Id.
values for each of these variables. Merging allows each defendant’s information to be continuous from his or her history to his or her bail amount, thereby allowing for analysis. The codebook from Cohen and Kyckelhahn’s study, available for 1990 through 2006, provides a useful example for how data can be coded for Massachusetts.

Reliability considerations should be taken into account when coding. Reliability regards the consistency of a measure: obtaining the same results when measuring something more than once. This means a comparison among multiple researchers should be done to make sure the data are coded correctly. This is called inter-rater reliability. Validation considerations should also be taken into account to make sure that the data are accurate.

**GUIDE FOR DATA COLLECTION**

As discussed, Massachusetts judges are not required to record their rationale for bail decisions. Therefore, the factors that may be the most important to a judge are not accounted for or readily ascertainable. All that remains are the impressions of defendants, attorneys, and bystanders, which can be helpful, but remain limited since they are anecdotal.

In light of the fact that much, if not all, of the relevant data on bail in Massachusetts does exist in some publicly available form, this paper proposes two solutions to the problem of the lack of data. These can be used either in conjunction with each other or independently.

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75 COHEN & KYCKELHAHN, supra note 65.
78 Id. at 138.
First, the state, either through the court administration or the office of probation, should systematically collect and synthesize data relevant to pretrial release, extracting the data from every new criminal case file and for several prior years of criminal case files readily available for data entry. Among the information to be collected from each case file (discussed fully below) would be: the defendant’s age, race, gender, hometown, education level, prior convictions and offense levels (including prior defaults on court appearances), the bail amount set (or other conditions of release), and the court’s reason(s) for setting bail. There are several recommended types of data that the Pretrial Justice Institute, a nation-wide leader in bail reform, advises courts to keep in addition to various independent and dependent variables that could help make the Massachusetts bail system a more fair and transparent operation.  

Second, an independent agency, such as a research institution or a non-profit, should systematically collect and synthesize the same data from public records. Normally, once a defendant appears in court and a judge sets bail, all of the data described in section (1) are publicly available in the defendant’s court file and are subject to public disclosure under the Commonwealth’s public record laws. These two data-collection methods could easily fit into the data-analysis models described below.

If the two approaches above are not successful or available, field research may be an appropriate method to obtain data for a study, though not as a systematic maintenance of data.

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81 See Mass. Gen. Laws Ann. ch. 66, § 10 (West); Foley v. Commonwealth, 429 Mass. 496, 498 (1999); Supreme Judicial Court Judiciary/Media Steering Committee, Guidelines on the Public's Right of Access to Judicial Proceedings and Records at 5-6 (2000), http://www.mass.gov/courts/sjc/docs/pubaccess.pdf (stating that criminal case files are presumptively open to public inspection); Id. at 2 (citing In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) which held that First Amendment right of access extends to bail hearings); Access to these files could be secured through a standard public records request.
While there are some limitations to field research, it can provide useful perspectives to bail in practice.

Field research or participant observation of bail hearings would make it possible to describe, "what is going on, who or what is involved, when and where things happen, how they occur, and why … things happen as they do in particular situations." Therefore, field research can be a useful strategy for studying relationships among people, as it can provide context. Furthermore, field research is useful when there are important differences between the views of insiders (i.e. those within the court system) and outsiders. As bail hearings are public, a researcher can easily gain access to the appropriate setting.

There are some consequences to contemplate when considering field research. First, certain situations may expose the researcher to an inter-rater reliability problem. For example, in observing how judges set bail, there may be research bias if only one researcher records the reactions of a judge. Therefore, more than one researcher is necessary. Second, observations done without the judge’s knowledge of the researcher’s presence should be compared to a setting where the judge has knowledge. This will control for the possible effect of having a researcher present at the bail hearing, especially if the court is aware of this fact. Lastly, field research may severely limit sample size (discussed below), and thus may limit the ability to institute a random probability sample of the data.

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83 Id. at 21.
84 Id. at 18; see also Jeffery T. Ulmer, Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines (1997) (being part of the literature of interactions of local court actors).
85 In statistics, inter-rater reliability, inter-rater agreement, or concordance is the degree of agreement among raters. It gives a score of how much homogeneity, or consensus, there is in the ratings given by judges.
86 Id. at 22.
Sample Size

Once the variables are considered, determination of sample size becomes necessary. Sample size needs to be ample to be representative and to show a statistically significant difference between bail amounts as the result of an independent variable. Standard error in a statistics model decreases as the sample size increases.\textsuperscript{87}

If it is not feasible to collect all defendants’ bail data, or if the sample frame is just too large, then simple random sampling should create the sample, whereby every subject has an equal chance of being in the study.\textsuperscript{88} Random sampling allows for valid inferences about the population from which the sample is drawn (for example, the population of pre-trial detainees in Massachusetts).\textsuperscript{89} This also permits estimates of sampling error.\textsuperscript{90} It further avoids bias.\textsuperscript{91}

VARIABLES TO CONSIDER

There are a number of variables to consider. The dependent variable, which is the variable to be predicted, would be either the severity of bail set or dollar amount of bail set. Therefore, the research should be designed to predict an equation for how bail is calculated. This is essentially what linear multiple regression analysis can do by providing statistically significant factors in a linear equation to predict bail.\textsuperscript{92} For example:

\[
(a)(\text{bail history}) + (b)(\text{primary charge}) + (c)(\text{race}) + \ldots + \text{error} = \text{amount of bail in dollars}\]  

\textsuperscript{87} MAXFIELD & BABBIE, supra note 77, at 232.
\textsuperscript{88} Id.
\textsuperscript{89} MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 256 (2\textsuperscript{nd} ed. 2001).
\textsuperscript{90} Id. at 244.
\textsuperscript{91} Id. at 236; see also MAXFIELD & BABBIE, supra note 77 (providing additional sampling possibilities).
\textsuperscript{92} FINKELSTEIN & LEVIN, supra note 89, at 351.
\textsuperscript{93} See Terms Defined section for more information at 89.
All of the variables to the left of the equal sign are independent variables: variables that are believed to predict the dependent variable, amount of bail in dollars.

Essentially, the dependent variable demonstrates disparate impact. As mentioned, the dependent variable could be the bail type (increasing in severity or detention length) or, more likely, for cash bail, the amount of bail set in dollars (as shown in the equation above). If detention length is used, there must be a determination as to whether detention length includes the time a defendant is held prior to securing release, or refers only to the time a defendant is held following the bail hearing.

The independent variables of interest would be those believed to cause the disparate impact of bail. This will most likely be the race, gender, or socioeconomic status of the defendant, if available. Other independent variables that may impact bail should be taken into account as well, so that if changes are seen, researchers can trace if the changes can be accounted for by variables other than the independent variables of interest. These variables are called control variables. The following is a list of control variables to consider for a research study:

- Amount of evidence against the defendant (for example, number of witnesses);
- Primary charge type;
- Primary charge seriousness;
- Pending charges;
- Past failures to appear;
- Prior criminal record, particularly violent offenses (this model could be replicated from sentencing guideline literature);
- Gender;
- Social class (perhaps measured by using the proxy of a private or public attorney);
- Number of persons entering the jail at the time the defendant’s bail is being considered;
- Family ties;
- Employment status;

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94 COHEN & KYCKELHAHN, supra note 65.
96 MAXFIELD & BABBLE, supra note 77, at 185.
The inclusion of these control variables would help strengthen a model to predict bail amount. Of the control variables, seriousness of offense and prior criminal record are especially important to consider, as the majority of bail studies indicate their impacts are significant (significance discussed below). If an additional amount of bail is attributable to the independent variables of interest after taking into account control variables, there may be evidence of a disparate impact in pretrial processing outcomes.

ANALYSIS

What statistical analysis is needed to show that disparities exist in the bail system? Evidence of racial discrimination in a bail setting has “proven elusive to scholars and lawyers alike.” Once the data are collected, it is easy to obtain basic statistical information, such as the average amount of bail. However, the traditional way to statistically test for discrimination in bail is to estimate bail amounts using a regression equation. In order to show that disparities in the bail system exist, the data collection needs to show that there is a statistically significant difference in the amount of bail that one receives because of a certain factor. Multiple regression analysis can estimate “how factors that are both permissible (that is, related to a defendant’s flight risk) and observable (that is, seen by the judge at the time of bail setting) affect the size of

100 Id.
bail.” If race is the independent variable of interest, regression then determines, “after controlling for these factors, [if] race is still a significant determinant of the bail amount.” In the previous example equation, the weights $a$, $b$, and $c$ are called regression coefficients. If the coefficient is statistically significant in the analysis, its associated variable is considered to be a significant explanatory factor that predicts bail. For example, if $a$ is statistically significant, then bail history would be a significant explanatory factor that predicts bail.

Statistical significance is a relationship observed in a set of sample data. It simply means that the probability of a relationship as strong as the one that is observed between the independent variable and the dependent variable is no more than a certain percentage. It is a measure of the probability that an observed relationship (here, a disparity) is not due to chance. Significance at the 0.05 level, which is a very common level to use, means the probability of a relationship as strong as the one observed between the variables is no more than five percent. This means that there is a five percent probability that the relationship is due to chance.

The regression approach, like all methods of data analysis, has some vulnerability, as it is a construction of social science used to predict human behavior. Alternative explanations of the regression results can occur if variables are omitted. Omitted variables may include the true variable that explains the different amount of the dependent variable. Unless the omitted variable is considered, it could appear as if the independent variable of interest is influencing the dependent variable. Therefore, it is important to consider control variables.

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101 Id.
102 Id.
103 FINKELSTEIN & LEVIN, supra note 89, at 351.
104 MAXFIELD & BABBIE, supra note 77, at 434.
105 Id.
106 Id.
107 AYRES, supra note 99, at 300.
CRITIQUES AND RESPONSES

FEASIBILITY

The largest matter to consider is the feasibility of a research project. This section has highlighted the most important issues to consider when undertaking this type of project. These data-collection proposals are susceptible to limited-resources arguments, e.g., that the time and expense required for collecting such data are not worth the potential benefits. Bail reformers can counter this criticism with two key arguments. First, pretrial release is cheaper than pretrial detention, so any step that results in releasing more defendants safely prior to trial, including data collection, will ultimately save the Commonwealth money. Second, the Commonwealth’s Constitution prohibits excessive bail. Therefore, the Commonwealth should take steps to collect data to determine if some defendants are being held on bail that is excessive in light of their relative risk level. Without the baseline data described in this section and appropriate risk-assessment data described in Section 4, the government will be hard-pressed to sustain an argument in support of its current practices. In the private arena, having such data in hand could help bail reform advocates oppose the state’s bail statute and promote legislation implementing an evidence-based risk-assessment system. Yet, without this data, bail reform advocates are without evidence to justify their proposals for change.

STEPS FOR FUNDING

Considering the scope of a study of this kind, steps for funding should be considered. One option is to apply for grants from foundations such as Open Society Foundation, which has

\[108\] *Infra* p. 31.
a global campaign for pretrial justice and maintains an open call for grant proposals.\textsuperscript{109} Another potential source of funding is the National Institute for Justice (NIJ).\textsuperscript{110} These are just a few examples of this type of funding and not exhaustive.

**Privacy Issues**

Some may object to widespread data collection on criminal proceedings on the grounds that it invades individual privacy. For example, some arrest information, such as certain prior charges or certain information collected for “investigative purposes,” may be withheld from the public under the state’s CORI regulations.\textsuperscript{111} However, this objection can be overcome in two ways. First, the information sought, including any that may later be included in a CORI record, becomes public once the case is filed in open court.\textsuperscript{112} Since this project is concerned only with bail decisions, it would only seek access to information that has entered the public domain.\textsuperscript{113} Second, this project would not seek access to personally identifiable information that falls under the privacy exemption in the state’s public records law.\textsuperscript{114} The Secretary of the Commonwealth, for instance, has classified potential privacy exemptions as “‘intimate details of a highly personal nature’ includ[ing] marital status, paternity, substance abuse, government assistance, family

\textsuperscript{111} See 803 Mass. Code Regs. 2.03.
\textsuperscript{114} Galvin, supra note 112, at 13.
disputes and reputation.”\textsuperscript{115} In short, the information sought will not result in an invasion of privacy.

\textit{LEGAL RAMIFICATIONS}

If a disparate impact is uncovered through a statistically significant finding, how can this information be used to challenge the constitutionality of the Massachusetts bail system? What has been persuasive in other research?

Statistical evidence like multiple regression can be brought into a case through an expert witness.\textsuperscript{116} The decision to qualify an expert in regression analysis rests with the court.\textsuperscript{117} Furthermore, the party providing the expert witness must show that the methodology underlying the testimony is scientifically valid, which can be established through the \textit{Daubert} factors: whether the theory or technique has been tested, whether the theory or technique has been subjected to peer review, the known or potential rate of error and the standard controlling the techniques operation, and whether the theory or technique is generally accepted.\textsuperscript{118}

One step to acknowledge before presenting this evidence in a case, however, would be to distinguish the issue from cases like \textit{McCleskey v. Kemp}.\textsuperscript{119} In \textit{McCleskey}, a statistical study that showed disparity based on race in the implementation of the death penalty was ruled insufficient as evidence of racial discrimination. The court required “exceptionally clear proof” of discretionary abuse – specifically, that there had to be intent to discriminate.\textsuperscript{120} Therefore, any sort of legal step that could be taken in reference to bail may have to show clear, individual proof

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\textsuperscript{115} \textit{Id.}, quoting Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980).
\textsuperscript{116} Fed R. Civ. P. 26 (providing rules for disclosure of expert testimony).
\textsuperscript{118} \textit{Daubert v. Merrell Dow Pharm., Inc.}, 509 U.S. 579, 593-594 (1993).
\textsuperscript{120} \textit{Id.} at 297.
\end{flushleft}
that an extra-legal factor was used in the bail decision, rather than just evidence of a disparate impact in how bail is assigned.\textsuperscript{121}

However, courts have accepted statistics as proof of intent to discriminate in other cases. These are cases in which the court believes that an application of inference can be drawn from general statistics, such as when there are fewer entities and fewer variables relevant to such decisions, like jury venire cases and cases dealing with statutory violations of Title VII of the Civil Rights Act of 1964.\textsuperscript{122} Expert testimony and statistical evidence have also become important to class action litigation for discrimination in employment.\textsuperscript{123}

\textbf{RISK ASSESSMENT}

\textbf{INTRODUCTION}

Simply stated, risk assessment is an actuarial approach to pretrial release.\textsuperscript{124} Risk-assessment tools are built from actuarial data to predict the risk a pretrial defendant poses so that a judicial officer may impose conditions prior to trial on that defendant that are commensurate with his or her risk level.\textsuperscript{125} The structure, oversight, and implementation of risk assessment tools vary widely across jurisdictions, but in general the tools share a common goal: to use data to predict how likely a defendant is to fail to appear for a mandatory court hearing, to commit a new offense while released pending trial, or to violate the conditions of his or her release.

\begin{quote}
\textit{Consideration of a formal risk assessment would insulate a judge’s decision through objectivity, and would therefore make such determinations less susceptible to allegations of bias.}
\end{quote}

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\textsuperscript{121} Id. at 280.  \\
\textsuperscript{122} Id., at 295.  \\
\textsuperscript{123} Grace E. Speights & Bernard R. Siskin, The Impact of Statistical Evidence in Class Action Litigation, in ALI-ABA COURSE OF STUDY MATERIALS, ADVANCED EMPLOYMENT LAW AND LITIGATION 859, 861 (Vol.1 2011).  \\
\textsuperscript{124} Tim Murray, Address at Community Discussion on U.S. Pretrial Programs & Resources (Nov. 13, 2013).  \\
\textsuperscript{125} Id.
\end{flushright}
Advocates analogize risk-assessment tools in the field of pretrial release to the use of actuarial data in the insurance industry. In other words, the tools are premised on the notion that individual cases are likely to follow statistical patterns of risk based on a pre-determined set of verified factors. The general idea is that data, not intuition, should guide decisions regarding whether a person is released pending trial – and, if so, under what (if any) conditions.

While a complete history of risk-analysis tools is not necessary here, it is worth noting a few preliminary facts to consider. First, contemporary American approaches to risk assessment date back to just the 1960s, meaning evidence-based risk assessment tools are relatively new to the discussion of bail and pretrial release in the American criminal justice system, which itself has 1,000-year-old English roots. Second, bail-reform advocates like the Pretrial Justice Institute urge that risk-assessment tools should be validated (“normed” or proven reliable) within specific jurisdictions. Currently, Virginia, Ohio, and Kentucky use risk-assessment instruments that have been validated statewide. Validation of a risk-assessment instrument can cost anywhere from $20,000 to $75,000. On the other hand, the Federal pretrial services system uses the same validated tool across all federal jurisdictions. Each of these tools will be examined in greater detail below.

127 Murray, supra note 124.
128 Id.
129 Id.
131 Mamalian, supra note 126, at 19.
132 Id.
133 Id. at 35.
134 Timothy P. Cadigan et al., The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA), 76 FED. PROB. 3, 5-6 (2012).
Massachusetts should adopt an evidence-based risk-assessment tool to ensure that any pretrial conditions imposed on defendants are commensurate with each defendant’s relative risk level. In essence, we are proposing that the Commonwealth fortify (and, if necessary, modify) its statutory bail factors with hard data. For instance, the Commonwealth’s bail statute currently allows a judicial officer setting bail to consider, “on the basis of any information which he can reasonably obtain,” the following factors in his or her decision:

- The nature and circumstances of the offense charged;
- The potential penalty the person faces;
- The person’s family ties, financial resources, employment record and history of mental illness;
- His or her reputation and the length of residence in the community;
- His or her record of convictions, if any;
- Any illegal drug distribution or present drug dependency;
- Any flight to avoid prosecution or fraudulent use of an alias or false identification;
- Any failure to appear at any court proceeding to answer to an offense;
- Whether the person is on bail pending adjudication of a prior charge;
- Whether the acts alleged involve abuse as defined in other sections of the law;
- Whether the acts alleged involve a violation of a temporary or permanent order issued pursuant to other sections of the law;
- Whether the person has any history of orders issued against him or her pursuant to the aforesaid sections;
- Whether the person is on probation, parole, or other release pending completion of sentence for any conviction; and
- Whether he or she is on release pending sentence or appeal for any conviction.135

Broken down into their elements, these factors contain more than 20 distinct data points that a judicial officer may consider when making a pretrial release decision.136 However, the statute contains no guidance on how to weigh these factors in relation to each other.137 For example, if a defendant has strong family ties but is not employed at the time of arrest, where does this leave the defendant in the eyes of the court? Furthermore, while many of the statutory factors make intuitive sense and several of them are proven reliable predictors of pretrial risk in

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136 Id.
137 Id.
other jurisdictions, Massachusetts thus far has assembled no body of data, aside from anecdotal evidence, to prove that these factors are reliable predictors of pretrial risk *for Massachusetts defendants* (and, if they are reliable, to what extent). Additionally, other jurisdictions have gathered data showing that factors not enumerated in the Massachusetts bail statute – for example, education level and age – *are* statistically relevant in predicting pretrial risk, while others enumerated in the statute – for example, the nature of the offense charged – *are not* necessarily statistically relevant in predicting pretrial risk.¹³⁸

In essence, this proposal suggests that the Commonwealth use the massive amount of data on criminal defendants already available to it to achieve two ends: (1) to determine what data points are accurate predictors of pretrial risk for Massachusetts defendants; and (2) to supply judicial officers tasked with making pretrial release decisions with accurate and specific data on the pretrial risk a particular defendant poses. While we will address the merits and shortcomings of this proposal at more length at the end of this section, it is worth emphasizing here that much of the data required to accomplish these goals already exists in court files across the state, and that jurisdictions that have taken similar steps have reduced the number of defendants incarcerated pending trial. This reduction in pretrial incarceration can ensure equitable administration of a facially neutral bail statute in addition to dramatic cost-savings to the public purse.

The remainder of this section provides a detailed analysis of four verified risk-assessment tools, followed by specific action steps that we propose for Massachusetts. The section concludes with an analysis of the critiques of this proposal, with analysis.

¹³⁸ *See, e.g.*, Cadigan et al., *supra* note 134.
Kentucky defines a pretrial risk assessment tool as “an objective, research based, validated assessment tool that measures a defendant’s risk of flight and risk of anticipated criminal conduct while on pretrial release pending adjudication.” To obtain the data needed for this assessment, pretrial service officers explicitly interview defendants for the purposes of determining an individual’s flight risk and risk of re-offending after release. Risk assessment does not displace the court’s discretion, but is a significant determination that must be factored into a decision to detain or release. “The court shall consider the pretrial risk assessment for a verified and eligible defendant [one whom pretrial services has interviewed and verified the identity of].” This consideration reduces the risk of an arbitrary determination, and requires that the amount of bail set takes into account basic factors of risk assessment as it pertains to each individual, including “the past criminal acts and the reasonably anticipated conduct of the defendant if released.” If bail is denied, a written record demonstrating due consideration of such risk factors is required. The statutory requirement for a judge to show in writing that he or she appropriately weighed risk assessment factors when denying a defendant bail was upheld in Abraham v. Commonwealth.

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140 See Kentucky Pretrial Services, supra.
142 Id.
144 Id.
145 Abraham v. Commonwealth 565 S.W.2d 152 (Ky. Ct. App. 1977). For a list of questions found in the Judicial Guidelines for Pretrial Release and Monitored Control, please see the Appendix.
Perhaps due in part to the fact that Kentucky’s Pretrial Services emerged as one of the first of its kind in the 1970s, and because it is formally incorporated into the court system, Kentucky’s risk assessment tool has significantly developed and evolved in both substance and methodology over time. Even within the past five years, Kentucky has sought to make substantive changes to its tool, striving for more reliably predictive data that can be collected in a way that is efficient, but with low administrative costs. These developments have come from both Pretrial Services as well as the state legislature, as both strive to craft an efficient and dependable tool with their own respective powers.\footnote{See, James Austin et al., \textit{Kentucky Pretrial Risk Assessment Instrument Validation} (Oct. 2010), http://www.pretrial.org/wpfb-file/2010-ky-risk-assessment-study-jfa-pdf/; Public Safety and Offender Accountability Act, 2011 Ky. Acts 2; Laura and John Arnold Foundation, \textit{Developing a National Model for Pretrial Risk Assessment} 3-4 (Nov. 2013), http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary_PSA-Court_4_1.pdf.}

For instance, in 2009 the Kentucky Pretrial Services Agency submitted a request to the Pretrial Justice Institute (PJI) to receive technical assistance on its risk assessment instrument.\footnote{Austin et al., supra note 146.} This external review constituted what is commonly referred to as a “validation,” which provides credentials, along with certain proposed changes, to a risk assessment tool.\footnote{Id.} The validation reviewed Kentucky Pretrial Service’s interview questions and suggested modifications that included redistributing the “weight,” or relative importance, of the factors.\footnote{Id.} The validation also suggested removing some inquiries entirely; those removed were unimportant to the predictive determinations because they produced such little variation in the scoring marks.\footnote{Id.} The modifications proposed also reflected an increased weight on factors used to assess the risk that a released individual poses to the public with respect to committing a violent crime while awaiting
trial, though still also weighing the risk of FTA.\textsuperscript{151} Validation of a risk assessment tool helps ensure that pretrial service officers are asking “the right” questions and helps focus those interviews on the most statistically predictive elements.\textsuperscript{152} By recalibrating the inquiries posed, the validated Kentucky risk assessment tool ensures that defendants who might otherwise face discrimination, either due to broadly prejudicial elements such as race or individual factors such as prior criminal acts, are evaluated according to only relevant, predictive data, increasing the likelihood that an individual’s risk level is appropriately determined.\textsuperscript{153}

The Kentucky General Assembly, for its part, passed the Public Safety and Offender Accountability Act,\textsuperscript{154} which incorporates “evidence-based practices” (EBP) into bail determinations to ensure that empirical research determines both the risk assessment level of a defendant and any ensuing requirements concerning conditional release or supervision.\textsuperscript{155} The General Assembly is explicit in citing financial concerns for this bill, and emphasizes that to relieve the pressure on jails, low and moderate risk individuals should receive non-financial release, provided that doing so does not present an increased risk to public safety.\textsuperscript{156} If such a risk does exist, the judge must document that fact when detaining an individual.\textsuperscript{157} Since the law’s enactment, Pretrial Services reports that there has not been a significant increase in overall release rates, though there has been an increase in non-financial release of low to moderate risk individuals, from 50$\%$ to 60$\%$.\textsuperscript{158} A legislative call for an objective standard of evaluation is justified in that such a system would effectively excise any arbitrary or emotionally-driven

\textsuperscript{151}Id.
\textsuperscript{152}Id.
\textsuperscript{153}Id.
\textsuperscript{154}Public Safety and Offender Accountability Act, 2011 Ky. Acts 2 [Also referred to as HB 463].
\textsuperscript{155}Id.
\textsuperscript{156}Id.
\textsuperscript{157}Id.
\textsuperscript{158}Pretrial Reform in Kentucky, supra, at 16.
evaluations in the pretrial release decision process, allowing for a more accurate system of release.\textsuperscript{159}

Beginning in July 2013, all counties in Kentucky integrated an experimental model called PSA-Court (Public Safety Assessment) from the Laura and John Arnold Foundation (LJAF), perhaps as a move toward developing the objective system advocated by the General Assembly.\textsuperscript{160} PSA-Court seeks to utilize only administrative data, to the exclusion of information gathered by preliminary interview and subsequent investigation.\textsuperscript{161} This model is still experimental, and rather than replacing the existing risk assessment tool, PSA-Court currently operates alongside Kentucky’s risk assessment tool, which still takes into account data gathered from both administrative sources and jailhouse interviews.\textsuperscript{162} Part of the logic behind choosing to incorporate both tools in Kentucky is to test the accuracy of PSA-Court.\textsuperscript{163} So far, in statewide (rural and urban) comparative studies based on historical data, using only administrative data to run a risk assessment has yielded results that do not deviate from the more traditional model.\textsuperscript{164}

PSA-Court uses three separate and distinct areas – new crime, new violence, and failure to appear – each with six points representing potential risk levels.\textsuperscript{165} The best predictive factors for each of these distinct areas were incorporated into this new tool, determined by using data taken from 1.5 million cases across 300 jurisdictions.\textsuperscript{166} Gathering data to build PSA-Court in this manner allows LJAF to claim universality across jurisdictions, and has led to the

\begin{footnotesize}
\begin{enumerate}
\item[160]  Laura and John Arnold Foundation, \textit{supra} note 146.
\item[161]  \textit{Id.} at 3-4.
\item[162]  \textit{Id.} at 5.
\item[163]  \textit{Id.}
\item[164]  \textit{Id.}
\item[165]  \textit{Id.} at 4.
\item[166]  \textit{Id.} at 3.
\end{enumerate}
\end{footnotesize}
foundation’s proposal that this tool could be the new national model.\textsuperscript{167} The report indicates that there are nine administrative data factors that are sufficiently determinative without supporting interview-data; these factors are drawn from the circumstances of the existing case as well as the defendant’s prior history, and do not include information like employment, drug use, and residence.\textsuperscript{168} LJAF also claims that the test operates fairly with regard to an individual’s race and gender.\textsuperscript{169} Finally, in addition to meeting the objective standard proposed by the legislature in its move for its “evidence-based practices,” another advantage of this newly proposed tool is that it would be cheaper to implement.\textsuperscript{170} Eliminating the need for interviews would alleviate strain on Kentucky Pretrial Services, reducing the need to expend the kind of time and money required to enable pretrial officers to conduct jailhouse interviews within 24 hours of an arrest.\textsuperscript{171} While PSA-Court’s “administrative-data only” approach might initially introduce costs for new technology and training, the probability of overall savings through efficient use of Pretrial Services’ resources is high.\textsuperscript{172}

\textbf{VIRGINIA}

As with most jurisdictions that create a pretrial risk assessment instrument, Virginia created its program with the goal of accurately predicting levels of risk for pretrial defendants.\textsuperscript{173} This level of risk is then used to provide the individual with the most effective forms of pretrial services.\textsuperscript{174} An accurate categorization of risk not only allows the state to distribute pretrial services based on the needs of the defendant, but also allows the state to help position the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{167} \textit{Id.} at 5.
\item \textsuperscript{168} \textit{Id.} at 3-4.
\item \textsuperscript{169} \textit{Id.} at 5.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Pretrial Reform in Kentucky, supra,} at 16.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} VanNostrand & Rose, \textit{supra} note 97, at 5.
\item \textsuperscript{174} \textit{Id.}
\end{itemize}
\end{footnotesize}
defendant to attain a successful pretrial outcome.\textsuperscript{175} Under Virginia’s model, the risk assessment is the foundation of a bail decision.\textsuperscript{176} Note that Virginia’s approach to risk assessment aligns with that of the PJI.\textsuperscript{177} The PJI defines risk management as “balancing the constitutional rights of the defendant with the risk the defendant poses using effective supervision and strategic interventions.”\textsuperscript{178}

Both Virginia’s pretrial service agencies and the original Virginia Pretrial Risk Assessment Instrument (VPRAI) were established through the Pretrial Services Act.\textsuperscript{179} While the Pretrial Services Act provides for the establishment of pretrial services agencies statewide, their establishment is not mandated by the act.\textsuperscript{180} As of 2009, there were 29 pretrial services agencies that served 80 of the state’s 134 cities and counties.\textsuperscript{181} By 2005, all of the pretrial services agencies statewide were using the VPRAI to predict a defendant’s danger to the community and likelihood of failure to appear in order to advise judges making bail recommendations.\textsuperscript{182} In 2007, Virginia began the process of validating the VPRAI.\textsuperscript{183}

The original version of the VPRAI was developed in accordance with statutory requirements.\textsuperscript{184} As mentioned above, its purpose was to identify the likelihood of a defendant’s failure to appear, to discern the danger a defendant posed to the community, and to assist pretrial officers in making a bail recommendation.\textsuperscript{185} The data for the creation of the tool were collected from personal interviews, arrest records, criminal history records, court records, as well as

\textsuperscript{175}Id.
\textsuperscript{176}VanNostrand & Rose, supra note 97, at 6.
\textsuperscript{177}See Mamalian, supra note 126, at 20.
\textsuperscript{178}Id.
\textsuperscript{180}VanNostrand & Rose, supra note 97, at 1.
\textsuperscript{181}Id. at 1.
\textsuperscript{182}Id. at 10.
\textsuperscript{183}Id.
\textsuperscript{184}VanNostrand & Rose, supra note 97, at 7.
\textsuperscript{185}Id.
current and prior adult criminal justice supervision records. The sample for the original VPRAI was composed of 1,971 adults arrested for one or more “jailable” offenses. The individuals hailed from seven different localities, each with substantially different community characteristics in order to ensure representativeness on a statewide level. In the development of the VPRAI, the dependent variable was the pretrial outcome: either success or failure to appear. There were 50 independent variables, or risk factors. The risk factors served as measures of demographic characteristics, physical and mental health, substance abuse, residence, transportation, employment and school status, income, charges against the defendant, and criminal history.

Once the data were collected, a bivariate analysis was used to determine statistically significant relationships between risk factors and outcomes. A multivariate analysis was then used to identify nine statistically significant predictors for pretrial outcomes. Points were assigned to each factor. The final score resulted in a 0 to 10 scale. The scores were then used to create risk levels (low, below average, average, above average, and high). This scale was in use by every pretrial services agency in the state by 2005.
After the VPRAI’s statewide implementation, the VPRAI Validation Advisory Committee was convened and tasked with validating the VPRAI.\(^{198}\) While the cost of Virginia’s validation process is unknown, validation in general can cost anywhere from $20,000 to $75,000.\(^{199}\) The purpose of validation is to test the predictive accuracy of the assessment instrument.\(^{200}\) The validation process of the VPRAI found that the original model was a valid predictor of pretrial outcomes.\(^{201}\) However, further testing in the validation process showed that one of the factors was notably insignificant in predicting pretrial outcomes.\(^{202}\) This factor was subsequently removed, leaving an eight-factor instrument.\(^{203}\) The revised instrument operates on a scale of 0 to 9.\(^{204}\) The revised factors can be found in the Appendix. Note that the VPRAI was validated for a second time in 2008.\(^{205}\)

The VPRAI is designed to be completed after arrest and the results presented at the defendant’s first court appearance.\(^{206}\) In order to be eligible for the VPRAI, a defendant must be an adult, must not be incarcerated at the time of arrest, must have been arrested for one or more “jailable” offenses, and must have been arrested for a criminal offense.\(^{207}\) After a defendant is assigned a risk level, there are eight options available for bail selection: (1) personal recognizance, (2) reduced bond, (3) same bond, (4) supervised release with personal recognizance bond, (5) supervised release with secure bond, (6) increased bond, (7) no bond, and

\(^{198}\) Id.
\(^{199}\) Mamalian, \textit{supra} note 126, at 35.
\(^{200}\) Id.
\(^{201}\) VanNostrand & Rose, \textit{supra} note 97, at 11.
\(^{202}\) Id. at 12.
\(^{203}\) Id.
\(^{204}\) Id. at 13.
\(^{206}\) VanNostrand & Rose, \textit{supra} note 97, at 14.
\(^{207}\) Id.
The report is created using a software program known as PTCC. A sample report can be found in the Appendix.

The VPRAI is a statewide instrument used by pretrial service agencies to advise judicial officials on bail decisions. It is an attempt by the Commonwealth of Virginia to use statistical analysis to provide the most beneficial services based on an individual defendant’s needs in the most cost-efficient way. The VPRAI’s double validations and continuing accuracy in predicting levels of risk make it a paragon for the potential of pretrial risk assessment instruments.

Ohio

The University of Cincinnati researchers who developed Ohio’s official risk assessment tool began with the premise that such a tool should provide two data points: (1) the likelihood that a defendant will appear for subsequent court dates and (2) the likelihood that public safety will not be threatened as a result of the defendant’s release. The researchers espoused the underlying view that transitioning to an objective, consistently applied system with explicit risk assessment criteria can help minimize the disparate outcomes that result from “arbitrary and subjective” bail decisions.

That said, risk assessment in Ohio is on somewhat ambiguous legal footing. In September of 2011, the Ohio Administrative Code was modified to order the Ohio Department of Rehabilitation and Correction (DRC) to select a “single validated risk assessment tool” for all

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208 Id at 22.
209 Id at 23.
211 Id at 2-3.
adult defendants. In December of that year, DRC adopted the Ohio Risk Assessment System (ORAS), developed by the University of Cincinnati, as the State’s risk assessment mechanism until further notice. However, the tool is nowhere referenced in the statute governing bail. Instead, the statute lists several of the typical common law risk factors, including “the nature and circumstances of the offense charged,” “[t]he weight of the evidence against the accused,” and the “history and characteristics of the accused,” including, but not limited to, his or her “physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, and criminal history.” While there is substantial overlap between the risk assessment tool and the statutory factors, the statute gives judicial officers additional leeway to consider factors that are not explicitly measured by the risk assessment tool in making pretrial release decisions.

To develop the ORAS, researchers employed structured interview questions and a self-report questionnaire. The tool has 63 items distributed across eight categories: criminal history (12 items), pretrial supervision (8), drug/alcohol use (10), employment (9), residence/transportation (5), medical and mental health (4), criminal thoughts/attitude (11), and criminal associations (4). Researchers collected this data from interviews with defendants, cross-referencing as much of the interview information as possible with available documentation. These factors were measured for correlation to either of two outcomes: whether the defendant failed to attend a mandatory court appearance or whether any new offense

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213 Ohio Admin. Code 5120-13-01(B).
215 Lowenkamp et al., supra note 210, at 4.
216 Id.
217 Id.
occurred while the defendant was out of jail prior to sentencing. The study analyzed 342 defendants between June 2006 and July 2007.

The ORAS as adopted has four distinct pieces: (1) pretrial, (2) prison intake, (3) re-entry, and (4) community supervision, which can be used for either pretrial conditional release or post-release supervision purposes. The pretrial piece is a risk assessment tool that is administered during a ten- to fifteen-minute interview of a defendant. Based on the score on a scale of 0 to 9, defendants are separated into three categories – high risk (6+), moderate risk (3-5) and low risk (0-2), where “risk” includes either failing to appear for a required court date or being rearrested while on release. High-risk defendants have an expected 30% chance of either type of failure; moderate-risk defendants have an expected 18% chance of failure; and low-risk defendants have an expected 5% chance of failure. A sample pretrial release questionnaire is available in the appendix.

The ORAS has particular relevance for Massachusetts because the Commonwealth has adopted the post-conviction portion of Ohio’s tool for statewide use. As of July 2013, approximately 760 Massachusetts probation employees had been trained in the post-conviction risk assessment module of ORAS. The probation officers were trained to use the system “to
determine the rehabilitative needs of offenders as well as assess their risk to the community.”

Pending further research on this issue, it is not clear at the present time whether Massachusetts intends to use the ORAS for pretrial release purposes.

While the ORAS is not immune to criticism, it has been validated twice and offers a broad base of data for assessing defendants’ risk factors at four stages in the criminal justice system. Thus, it provides a worthy model for other states to follow. That said, adopting the pretrial portion of the ORAS in Massachusetts could be legally problematic because two of the seven factors that the ORAS measures – the defendant’s age and the defendant’s residential stability – are not recognized as risk factors under the Massachusetts bail statute. Therefore, it is unclear whether a judicial officer could base a pretrial release decision, even in part, on these factors without a change in the law.

**FEDERAL SYSTEM**

The Federal pretrial risk assessment model is the only validated risk assessment tool in the country that was developed from nationwide data. Consequently, it is the only tool with a valid statistical claim for cross-jurisdictional application, as Federal courts in every judicial district in the country employ the tool. Because of this broad base of data, the tool deserves particular consideration as a model for implementation in a new jurisdiction.

Generally, bail and pretrial release in Federal courts are governed by the Pretrial Services Act of 1982 (18 U.S.C. § 3152) and the Bail Reform Act of 1984. The Bail Reform Act in particular allows a judge to use a rebuttable presumption that a defendant poses a threat to the

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226 Id.
228 Cadigan et al., *supra* note 134.
community, which means that the defendant is presumed to pose a threat to the community if he or she meets certain criteria, and the defendant can then present evidence to rebut this presumption.\textsuperscript{230} This rebuttable presumption applies if within the past five years the defendant was convicted of a violent crime, a crime with a sentence of death or life imprisonment, a crime with a sentence of ten years or more under the Controlled Substances Import and Export Act, a crime involving a minor victim, or a crime involving firearms or other deadly weapons.\textsuperscript{231} A judge can also use a rebuttable presumption that the defendant poses a threat to the community if he or she has been previously convicted of two or more violent offenses, capital offenses, offenses that carry a sentence of life imprisonment, or drug offenses that carry a maximum sentence of 10 years or greater, regardless of the charges the defendant is presently facing.\textsuperscript{232}

There are no Federal statutes directly related to risk assessment; instead, risk assessment research and implementation have fallen under the administrative purview of the judiciary, particularly the Office of Probation and Pretrial Services.\textsuperscript{233} The Federal risk assessment tool was created for to determine which factors most accurately predict whether a defendant will: (1) fail to appear at a required court hearing; (2) be re-arrested while on pretrial release; or (3) violate the terms of his or her release, and then to allow pretrial services officers to use that tool to make recommendations about a defendant’s risk level.\textsuperscript{234} As is often the case, judicial officers making

\begin{footnotes}
\item[230] 18 USC § 3142(e)(2)(A) (LexisNexis current through 12/9/13).
\item[231] Id.
\item[232] Id.
\item[234] Id. at 33-34.
\end{footnotes}
pretrial release decisions are free to stray from the risk assessment recommendation so long as the decision remains within the bounds of the law.\(^{235}\)

The Federal pretrial risk assessment tool measures eleven factors that are scored as 0, 1, or 2, and nine other factors that are not scored but may be analyzed for future revisions to the risk assessment tool.\(^{236}\) Typically, a pretrial services officer obtains these answers in an interview prior to the defendant’s initial appearance before a magistrate.\(^{237}\) The officer’s report will contain a recommendation of release, release on conditions, or detention; it is typically based on the defendant’s risk category, but it can deviate with appropriate approval.\(^{238}\) The tool was created (originally validated using archival data) in 2009, and revalidated in 2011, the first full year of its operation.\(^{239}\)

The defendants’ scores are grouped into five categories (I through V), with a score of 0-4 falling into Category I, 5-6 in Category II, 7-8 in Category III, 9-10 in Category IV, and 11+ in Category V.\(^{240}\) Category I defendants, who accounted for about 30% of the original sample group, had a 2% to 3% chance of failing to appear, being arrested while on release, or violating the conditions of his or her release.\(^{241}\) Category V defendants, who accounted for just 3% of the original sample group, failed to appear or were rearrested 20% of the time; this number rose to 35% when technical violations of the defendant’s conditions of release were included.\(^{242}\) The authors of this study also noted that violent-crime defendants get a 0 (lower risk) score in the

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\(^{236}\) Id.

\(^{237}\) Id. at 32.

\(^{238}\) Id.

\(^{239}\) Cadigan & Lowenkamp, *supra* note 235, at 33; Timothy P. Cadigan et al., *supra* note 134; See Appendix C.

\(^{240}\) Lowenkamp & Whetzel, *supra* note 227, at 35.

\(^{241}\) Id. at 35.

\(^{242}\) Id.
Federal scheme, which runs counter to the intuitive notion that a defendant charged with a violent crime may pose a higher risk of re-offending while on pretrial release. 243

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243 Id. at 33.
Similar to the Ohio tool, adopting the Federal tool in state courts in Massachusetts could be legally problematic because there is no language in the Massachusetts bail statute allowing a judicial officer to consider age, education, residence history, or citizenship status in making a pretrial release decision.\textsuperscript{244} That said, the Federal tool contains significant overlap with several factors that officers in Massachusetts already use in making pretrial release decisions, including prior convictions, prior failures to appear, and drug problems.\textsuperscript{245} It is also worth noting that the research used in creating and validating this tool is perhaps the only existing data that take into account (at least to some degree) the risk levels of Massachusetts defendants (assuming that at least some Massachusetts defendants were part of either or both studies), as Massachusetts lacks any comprehensive data on the risk levels of its pretrial detainees.

**ACTION STEPS**

**DRAFT LEGISLATION THAT CODIFIES A RISK ASSESSMENT TOOL FOR MA**

Drafting legislation that would mandate the incorporation and use of a risk assessment tool is one possible way to ensure that the benefits of such a methodology reach the courtroom. Legislation requiring a risk assessment tool would need to include both a mechanism for administration and a mechanism for data collection. For administration, probation officers likely possess the requisite experience to successfully use a risk assessment tool at the pretrial stage, though establishing a separate pretrial services department could be helpful should the probation office’s resources prove too restrictive. The criteria for pretrial risk assessment are often substantively similar to the criteria considered when determining the risk level of an individual.

\textsuperscript{244} Mass. Gen. Laws Ann. ch. 276, § 58 (West 2014).

\textsuperscript{245} Id.
eligible for parole; elements such as past criminal history, substance abuse, level of community
ties, and employment (whether current or prospective) are among the important considerations in
both sets of decisions. Although the current Massachusetts bail statute allows for pretrial
probation under some circumstances, it would be far more beneficial for a pretrial detainee to
have access to case management services, and the administration of such pretrial services can be
problematic when provided by an officer of the court.

In terms of data collection, any proposed legislation should endeavor to address the lack
of centralized data at the pretrial stage, either by creating or designating resources to allow the
court system to begin compiling and organizing relevant information. Access to data is essential
to determining what risk factors are relevant in Massachusetts generally, and perhaps within
specific cities and towns as well.\(^{246}\) Establishing a method of data-collection is critical to the
success of the risk assessment tool, and should not be overlooked due to any lingering logistical
hesitations.

**Draft Legislation that Encourages or Requires Judges to Use an Evidence-Based
Risk Assessment Tool when Making Bail Decisions**

Usually, risk assessment tools are designed to work in tandem with, rather than replace,
the court’s discretion. Accordingly, any proposed legislation would not unduly encroach on the
judiciary’s customary procedure, whether mandatory or discretionary.\(^ {247}\) Rather, legislation
seeking to incorporate a risk assessment tool into judicial determinations at a pretrial proceeding
might be comparable to statutes that demand special procedures for certain kinds of cases, such

\(^{246}\) See *supra* Part 4 p. 31-56.
\(^{247}\) E.g., Public Safety and Offender Accountability Act, 2011 Ky. HB 463.
as pretrial expert assessment in medical malpractice cases. Those kinds of statutes generally require that the court have access to expert testimony on the case before it goes to trial, and while those expert opinions are not generally binding on the court, the testimony does weigh in along with any discretionary decisions. Legislation requiring a judge to duly consider risk assessment determinations and to put onto the record any reasons for deviating from those determinations would have an effect similar to those specialized statutes by increasing uniformity and allowing the court to function in a way that is simultaneously transparent and fair.

**EDUCATE DEFENSE ATTORNEYS REGARDING THE LACK OF GOOD PREDICTIVE TOOLS FOR RISK ASSESSMENT IN MASSACHUSETTS**

The sheer lack of good pretrial risk data for Massachusetts defendants and the comparisons between validated risk assessment tools and Massachusetts’s pretrial release factors can provide defense attorneys with compelling arguments that prosecutors must do more to prove that a defendant’s risk level justifies cash bail. Defense attorneys can point out that defendants in jurisdictions like Kentucky, Virginia, and Ohio – and even defendants in Federal courts in Massachusetts – have the benefit of judicial officers making pretrial release decisions informed by the risk assessment tools discussed earlier in this section. Defendant A with risk assessment score X poses a Y percent chance of failing to appear, so the bail should be in a range commensurate with that risk. But in Massachusetts, prosecutors seeking bail have no such data and therefore, in one sense, lack solid evidence to support their bail request. Defense attorneys

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248 See, e.g., Mo. Rev. Stat. § 538.225 (2005), (requiring that counsel file an affidavit affirming the possession of written testimony from a legally recognized health care provider that supports the merits of the case in any action brought against a health care provider; the affidavit does not bind the court to any findings, but permits the case to move forward).
can also point out if and when prosecutors’ bail arguments are based on factors (e.g., if the crime charged is a violent crime) that were found not to be predictive of flight risk in other jurisdictions. And, on the other hand, defense attorneys can emphasize areas where their clients would score well on validated risk assessment tools from other jurisdictions whether or not those criteria are available for consideration under the Massachusetts bail statute.

EDUCATE JUDICIAL OFFICERS ON OTHER STATES’ RISK ASSESSMENT TOOLS AND ON THE MASSACHUSETTS STATUTE AUTHORIZING PROBATION OFFICERS TO INVESTIGATE DEFENDANTS PRIOR TO SETTING BAIL

Risk assessment accomplishes two goals that are presumably central to a judicial officer tasked with setting bail. First, validated risk assessment ensures that judicial officers can, to the best of their ability, assign release conditions that are commensurate with each defendant’s individual risk level. Second, risk assessment tools provide actuarial rationale if something goes wrong while a defendant is out on bail. Under the current system in Massachusetts, if someone released on bail commits a serious offense, the judicial officer who allowed the defendant’s release is susceptible to criticism from the public and the media. A validated risk assessment tool may not only decrease the likelihood that a dangerous defendant is released, but also give judicial officers a more easily articulated rationale for their decisions. Because of the multivariable analysis that the statute currently permits, a judicial officer may struggle to explain exactly how he or she came up with a particular set of release conditions given the twenty or more factors (many of which are difficult to accurately measure, e.g., reputation or family ties)

that go into such a decision. However, with a validated risk assessment tool in place, a judicial officer can clearly and precisely articulate his or her reasons for imposing certain conditions (e.g., based on a pretrial risk analysis, the defendant posed a 5% risk of re-offending, so less restrictive conditions were imposed; or the defendant posed a 30% risk of re-offending, so more restrictive conditions were imposed). In light of these arguments, judicial officers should, in the long term, become strong advocates for implementing risk assessment in Massachusetts.

In the shorter term, judges have another tool at their disposal: probation officers. According to state law, “each probation officer shall, as the court may direct, inquire into the nature of every criminal case brought before the court under the appointment of which he acts.”250 The statute goes on to require the probation officer to provide information on a defendant’s prior convictions “and all other available information relative thereto, before such person is admitted to bail in court.”251 In essence, this statute can be read as giving the court broad discretion to instruct probation officers to collect virtually any type of information about a defendant prior to a bail hearing, provided the information pertains to the “nature of the criminal case” or to a prior conviction. In turn, the judge could consider such information as relevant to the “nature and circumstances of the offense charged,” as authorized under the Massachusetts bail statute.252 By way of example, if a judge sitting in Dorchester believes the eleven-factor Federal risk assessment tool might give him or her a more quantifiable rationale for making bail decisions, he or she would be free to instruct a probation officer to collect this information about a defendant and proceed accordingly. Further research on the terms and conditions of the

251 id.
Commonwealth’s probation officers, along with any applicable collective bargaining agreements, would help assess the viability of this course of action.

CRITIQUES & RESPONSES

While risk assessment instruments are touted as eliminating traditional biases from the pretrial arena through the use of statistical measures, there are a number of critiques that challenge this image of qualitative, mathematical certainty. The following section will examine just a few of these critiques and attempt to apply them to the risk assessment instruments discussed above.

In their report *Pretrial Risk Assessment: Research Summary*, Charles Summers and Tim Willis raise the specter that using actuarial risk assessment instruments may not effectively predict the risk that certain groups of offenders pose. They argue that standard actuarial pretrial risk assessment instruments (APRAIs) often classify sex offenders as low risk, even though they may be statistically likely to reoffend while awaiting trial. There are greater implications for this type of misclassification. One such implication is that this built-in failure is antithetical to the goal of a risk assessment instrument: the standardization of pretrial recommendations and the maximization of the number of successful pretrial outcomes.

One rebuttal to this critique can be found by looking at the statistical accuracy of prediction for the instrument in question. The fact remains that despite occasional


\[254\] *Id.*

\[255\] *Id* at 4.

\[256\] Summers, *supra* note 253, at 1.
misclassifications, APRAIs remain an overall accurate assessment of risk. For example, the classifications provided by the revised Virginia Pretrial Risk Assessment Instrument resulted in an 82.0% success rate for all defendants released with pretrial supervision.257 These results indicate that even with the potential for miscategorization of offenders, APRAIs are still extremely accurate ways to predict a defendant’s likelihood of a successful pretrial outcome.

Furthermore, statutory exceptions can be made for certain kinds of offenses that are likely to have high recidivism rates in spite of risk assessment determinations. For instance, a Kentucky statute that emphasizes release on recognizance or with the least onerous conditions available makes explicit exceptions for several kinds of offenses, both by the nature of the alleged transgressions, and by the seriousness of the acts.258 While this statute makes specific reference to the use of a risk assessment tool, the language goes on to clarify that anyone accused of human trafficking, incest, or sexual activity with a minor is not subject to the protections of this statute.259

Similarly, Summers and Willis draw attention to another potential problem in the construction and use of APRAIs: in order to be truly accurate predictors, APRAIs should oversample under-represented groups in order to adjust for their small subgroup size.260 The failure to oversample leads to the following issue: If the point of a risk assessment instrument is to use statistically gathered information to assess risk in a way that is neutral to factors like race, gender, and social class, then this error in the assignment of risk seems to undermine the whole endeavor. Should an APRAI fail to sufficiently represent smaller subgroups, the instrument runs

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257 VanNostrand & Rose, supra note 97, at 12.
259 Id.
260 Summers, supra note 253, at 5.
the risk of reproducing the same disparate impacts that often occur in discretionary judicial bail decisions.

The PSA-Court tool currently in use in Kentucky makes explicit reference to avoiding any inaccurate determinations based on an individual’s race or gender.261 A press release takes particular note of the fact that “the assessment does not over-classify non-whites’ risk levels, which has been a concern in some other areas of risk assessment.”262 While the tool is still early in its development and no other information proving this assertion appears to be available, the fact that researchers are cognizant of this potentially problematic element is evident of a promising effort to promote a more accurate application of such a tool.

Summers and Willis raise two final issues that should be kept in mind when considering whether and how to pursue the development or implementation of a pretrial risk assessment instrument. The first is that instruments need to be re-tested for continuing validity.263 As discussed above, the revalidation process can be very costly. Some states may not have the funding to undertake continuing revalidations. The issue this raises is that the efficacy of the instrument may diminish as populations change; without revalidation, jurisdictions using the APRAI may be using an inaccurate tool.

Validation procedures hone rather than overhaul a risk assessment tool; essentially, while often a helpful endeavor, validation need not be a frequent expense. Validation of the Kentucky risk assessment tool in 2009 yielded a sleeker and more efficient set of criteria, though not radically different areas of inquiry.264 The validation did not change the fundamental nature of the tool, nor was its purpose to overhaul the system of risk assessment; validation merely served

261 Laura and John Arnold Foundation, supra note 146, at 5.
262 Id.
263 Id. at 5.
264 The JFA Institute, supra note 146.
as a sort of “check-up” for Kentucky’s tool, affirming its accuracy and suggesting improvements to fine-tune the tool. A few questions with limited predictive capabilities were removed, while most others were retained as presented, though they received different “weight” in the final determination. Updates are necessary in every aspect of the legal arena, as scientific studies and our notions of justice evolve. Accordingly, to assert that a tool should not be adopted in order to avoid periodic validations is somewhat of a specious argument that implicitly and wrongfully assumes that a risk assessment tool’s validation is a unique and unduly cumbersome undertaking, rather than a relatively rare and voluntary procedure that is more or less standard fare to guarantee unprejudiced pretrial procedures.

**Unsecured Bonds**

**Introduction**

An unsecured bond allows a defendant to be released without paying cash bail upfront. Defendants are instead obligated to pay a specific amount only if they fail to appear in court. Releasing defendants on an unsecured bond rather than posting a sum of money upfront may alleviate some of the disparate impacts on lower income defendants posed by the imposition of cash bail and further the goal of a more just and equitable pretrial system.

**Data Models**

While the concept of unsecured bonds is not new, few jurisdictions have been willing to implement a systematic study of unsecured bonds. A 2013 Colorado study serves as a model to

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265 *Id.*
266 *Id.*
267 32A N.Y Jur. 2d Criminal Law: Procedure §1414; C.R.S. 16-4-104.
examine and administer unsecured bonds when coupled with a thorough risk assessment.\textsuperscript{268} It would be possible for Massachusetts to construct a study in unsecured bonds that enables a selected population of defendants to be released on an unsecured basis at little to no administrative cost. Colorado may serve as a strong template for the Commonwealth’s own ambitions to move toward an unsecured bonds system.

Colorado has made significant strides in reforming its bail system in past decade.\textsuperscript{269} Pending legislation proposed in 2013 would change Colorado’s definition of bail from “the amount of money set by the court which is required to be obligated by a bond for the release of a person in custody to assure that he will appear before the court in which his appearance is required or that he will comply with other conditions set forth in a bond”\textsuperscript{270} to “a security which may include bond with or without monetary conditions.”\textsuperscript{271} This change reflects less emphasis on the use of monetary conditions.

Allowing an unsecured bond has been shown to be as effective as secured bonds, with FTA rates between defendants who were released on secured versus unsecured bonds differing by a statistically insignificant 0.69%.\textsuperscript{272} Likewise, unsecured bonds drastically reduced jail bed use, since more defendants were released pretrial when no cash-secured bond was required as a condition of release.\textsuperscript{273} The unsecured bonds were also accompanied by a risk assessment, remanding into custody those defendants who were at a high risk of FTA and placing specified

\textsuperscript{270} \textit{Id}.
\textsuperscript{271} \textit{Id}.
\textsuperscript{272} Pretrial Justice Institute, \textit{supra} note 268.
\textsuperscript{273} \textit{Id} at 12.
conditions based on the results of the risk assessment.\textsuperscript{274} Colorado has also kept surety and bail bond agents intact as well, allowing a wide array of options for release of defendants including personal recognizance with and without conditions.\textsuperscript{275} Colorado’s implementation of unsecured bonds can serve as a model for implementation of a similar approach in Massachusetts.

Kentucky, whose bail and pretrial system is held up throughout our work as a model system, has long included unsecured bonds in its bail statute.\textsuperscript{276} Within Kentucky’s bail statute, release on personal recognizance (ROR) is the norm, with an unsecured bond as the first option when ROR is deemed in appropriate.\textsuperscript{277} The statute explicitly states, “any person charged with an offense shall be ordered released by a court of competent jurisdiction pending trial on his personal recognizance or upon the execution of an unsecured bail bond in an amount set by the court or as fixed by the Supreme Court as provided by KRS § 431.540, unless the court determines in the exercise of its discretion that such a release will not reasonably assure the appearance of the person as required, or the court determines the person is a flight risk or a danger to others.”\textsuperscript{278} As with Colorado, in Kentucky “Pretrial Services must provide the judge or trial commissioner with information to assist the determination of pretrial release and supervision, including an assessment of risks posed by the defendant and recommendations for responding to the risks through use of appropriate conditions of release.”\textsuperscript{279} Since Massachusetts lacks both pretrial services and pretrial risk assessment, an exact replica of the Kentucky model may not feasible as an initial pilot program; however, it does provide a strong model for advocates to aspire to.

\textsuperscript{274} \textit{Id} at 4.
\textsuperscript{275} \textit{Id}.
\textsuperscript{276} KRS § 431.520
\textsuperscript{277} \textit{Id}.
\textsuperscript{278} \textit{Id}.
\textsuperscript{279} KY AP XIV, Sec. 2
MILITIGATION OF DISPARATE IMPACT

There are many reasons why an unsecured bonds program would be a worthy undertaking. Not only do unsecured bonds satisfy the ABA Standards for Pretrial Release, but they may also work to abate the disparate impact that current cash bail practices have on historically disenfranchised communities.\(^\text{280}\)

The current ABA Standards for Pretrial Release mandate that financial conditions should be used only when no other conditions will provide reasonable assurance that a defendant will appear for future court appearances.\(^\text{281}\) In addition, the ABA recommends that judicial officers should not impose financial conditions that result in pretrial detention of defendant solely due to the defendant’s inability to pay.\(^\text{282}\)

Despite these standards, the use of cash bail results in the incarceration of defendants who cannot afford to pay. State Court Processing Statistics indicate that the number of people who have been able to make their bail payments has decreased annually since 1992.\(^\text{283}\) The same study shows that as many as 65% of those incarcerated pretrial are jailed as a result of their inability to post bail.\(^\text{284}\) Despite these alarming numbers, the average bail amount has continuously increased over the last decade.\(^\text{285}\)

Perhaps unsurprisingly, there is indication that the inability to meet posted bail amounts correlates with socioeconomic class. Data from the Bureau of Justice Statistics show that 83.5% of the jail population in 2002 earned less than $2,000 per month prior to arrest.\(^\text{286}\) Though

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\(^{280}\) See CRUTCHFIELD ET AL., supra note 12.

\(^{281}\) ABA Standards for Criminal Justice, Pretrial Release, §10-1.4(c) (2d ed. 2009).

\(^{282}\) Id. §10-1.4(e).

\(^{283}\) Petteruti & Walsh, supra note 14.

\(^{284}\) Id at 11-12.

\(^{285}\) Id at 12.

\(^{286}\) Id.
research has indicated that racial minorities are disproportionately affected by bail amounts, current research suggests that race is a predictor of the denial of bail to the extent that race generally tends to correlate with socioeconomic status. Schlesinger’s 2005 study was especially powerful in its scope and findings. The study analyzed felony cases against male defendants in forty of the nation’s seventy-five most populous counties over a ten-year period. The study found that black and Latino defendants were respectively 25% and 24% more likely to be denied bail when compared to white defendants. Black defendants were granted non-financial release (release on personal recognizance with conditions) 12% less often and Latinos 25% less often than white defendants. Compared to white defendants, Latinos were twice as likely to be incarcerated prior to trial, and black defendants were 87% more likely to be incarcerated, suggesting that defendants of color have fewer economic resources and support networks than whites with similar legal characteristics.

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287 See CRUTCHFIELD ET AL., supra note 12.
288 Traci Schlesinger, Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 JUST. Q. 170-192 (2005); see Appendix B.
289 Id at 181.
290 Id.
291 Id at 183.
Comparison to White Defendants

<table>
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<tr>
<th></th>
<th>% MORE likely to be denied bail</th>
<th>% LESS likely to be granted non-financial release</th>
<th>% MORE likely to be incarcerated pretrial</th>
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<td>Black Defendants</td>
<td>25%</td>
<td>12%</td>
<td>87%</td>
</tr>
<tr>
<td>Latino Defendants</td>
<td>24%</td>
<td>24%</td>
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Given the ways in which cash bail can cause disparate levels of hardship for low-income defendants, unsecured bonds may be an effective way to combat these disparities. In allowing defendants to make bail without requiring cash upfront, unsecured bonds may relieve some of the pressure on low-income defendants to either accept plea bargains or plead guilty. On an even more basic level, unsecured bonds allow defendants to go home pending trial, both relieving the strain on an overcrowded jail system and mitigating the unjust practice of jailing defendants simply because they cannot afford bail.

**COST DISCUSSION**

Aside from the issues of liberty, social justice, and mitigation of disparate racial and socioeconomic impacts, unsecured bonds also present substantial fiscal benefit to local governments. When fewer defendants are detained pretrial the cost of an occupied jail bed is eliminated, saving tax dollars. Likewise, when a new jail is constructed in a county where there had not previously been one, property taxes in the area are likely to increase. Occasionally those
increases are quite dramatic. This was the case in Suffolk County, New York, where property taxes increased 40%.\textsuperscript{292}

 Aside from the measured fiscal costs of pretrial detention, unsecured bonds may help alleviate the hidden environmental costs of remanding pretrial defendants who cannot afford a cash bail.\textsuperscript{293} An unsecured bonds program would enable a greater number of defendants to be released, lessening these burdens on the jail system and the environment.

 The allocation of resources to local jails to hold pretrial detainees greatly limits a local government’s ability to allocate resources to other forms of social services. Residents of Suffolk County, New York, are now suffering from a dramatic disparity in funds allotted to the criminal justice system versus other services including education and healthcare services.\textsuperscript{294} For every $100 spent in Suffolk County $9 and $6 are spent on education and health services, respectively, while $19 is apportioned to public safety.\textsuperscript{295} These services, which are frequently accessed by people with lower incomes, are then limited in their scope, further compounding the negative impacts of cash bail on poorer populations. Unsecured bonds represent a way to release more defendants while they await trial and save precious resources for social services instead of jail beds.

 Similarly, the need for jail beds at the local level often imposes financial constraints on counties that would rather allocate resources elsewhere. In New York State, the new Suffolk County jail completed in early 2013 (a year behind schedule) was required by the state to


\textsuperscript{294} Kaplan, \textit{supra} nota 292, at 13.

\textsuperscript{295} Id.
manage the incarcerated population, yet it was be funded by local money only and cost $185 million. The expansion that was planned from the beginning is expected to cost another $102 million and will add another 440 beds to the complex. These costs have placed an immense strain on the county and it appears that taxpayers will be shouldering the burden.

The hard choices between prisons and schools often have dire effects on the wellbeing of entire communities. In Philadelphia, Pennsylvania, it was decided that while the educational system was underfunded by nearly $304 million, the state would build a new prison in the area to combat the existing facility’s overcrowding issues – at a cost of $400 million. However, the new facility would completely replace the old. The new facility will only house 100 more individuals than the old, which still leaves the complex technically overcrowded by 2,400 inmates. Meanwhile there is potential for 3,000 layoffs in schools in the area, including teachers; some schools are projected to close and students will have to travel much farther to get to the closest school. Unsecured bonds provide a way to mitigate these devastating choices by allowing more defendants release, freeing jail beds, and consequently producing fiscal savings.

**Action Steps**

A study similar to the Colorado Unsecured Bonds Study would provide an excellent opportunity for Massachusetts to apply unsecured bonds in a limited and controlled manner. A pilot program such as the one in Colorado would require that Massachusetts use a risk

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297 Id.
298 Id.
300 Id.
301 Id.
302 Id.
assessment tool to determine which defendants to release with an unsecured bond. A pilot program such as this would provide a unique opportunity for the state to implement both pretrial risk assessment and unsecured bonds. However, if Massachusetts is unwilling, or if implementing risk assessment and unsecured bonds simultaneously is too complex, merely providing judges in a particular jurisdiction with the option of granting release by way of unsecured bond is also a viable possibility.

**CRITIQUES AND RESPONSES**

The arguments against unsecured bonds are similar to the arguments against pretrial services and other forms of conditional release. These arguments overlook the fact that unsecured bonds can be tailored to apply only to non-violent offenders, or defendants with a low likelihood of committing an offense while released on bail. This can be accomplished by using a risk assessment tool as in the Colorado unsecured bonds study mentioned above. In fact, commentators have noted, “Conditional release, in its ideal form, is preferable to money bail because it provides a means of release tailored to each individual defendant that is not dependent on the defendant's personal wealth.”

Perhaps the greatest hurdle to reenacting the Colorado unsecured bonds model is Massachusetts’s lack of a pretrial risk assessment program. With the implementation of both an unsecured bonds program and a validated risk assessment scheme, Massachusetts could make significant strides towards a more equitable bail system for all defendants.

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303 Harmsworth, *supra* note 1, at 250-51.
304 *Id.* at 65.
305 *See supra* Part 4 p. 31-56.
PRETRIAL SERVICES

INTRODUCTION

We recommend establishing a pretrial services agency in the Commonwealth of Massachusetts. This agency could be either a government entity or an independent non-profit organization. A government entity would likely have more resources at its disposal than would a non-profit organization, while a non-profit organization would not require the potentially arduous process of legislative approval.

Pretrial services agencies in the United States currently exist in several states and municipalities, as well as in the federal government. As mentioned above, these agencies usually take the form of either a government entity or a non-profit organization. The Federal government, District of Columbia, and Kentucky all have government-run pretrial services agencies.306 The pretrial services agencies for the Federal government and Kentucky operate under the judicial branch.307 The pretrial services agency for Washington, D.C., operates under the executive branch.308 Maine's pretrial services agency, on the other hand, is an independent non-profit organization.309 Under either of these formulations, pretrial services agencies provide cost effective alternatives to pretrial detention.

Pretrial services agencies run by probation offices are often less efficient, as probation


307 Office of Prob. And Pretrial Servs.; Kentucky Court of Justice. See also, Supra at note 273.


officers frequently have excessive workloads without the additional task of operating a pretrial services agency.  

MODEL SYSTEMS

THE FEDERAL AGENCIES

Federal pretrial services agencies are widespread and reduce the number of defendants detained pending trial. However, many agencies suffer from inefficiencies brought about by overworked probation offices. A Massachusetts government-run pretrial services agency could be successful if modeled after the federal system; however, to perform optimally it should be administered separately from Massachusetts's Probation Department (Office of the Commissioner of Probation).

The structure and duties of Federal pretrial services are provided in 18 U.S.C.S. § 3152, which is part of the Bail Reform Act of 1984, the current Federal bail statute. Pretrial services are managed by the Director of the Administrative Office of the United States Courts (the Director). The Director either directly provides or contracts to provide a pretrial services program for every Federal judicial district with the exception of the District of Columbia. Either a Chief Probation Officer or a Chief Pretrial Services Officer supervises these services. Information collected through pretrial services is confidential.

Pretrial services agencies are responsible for presenting judges with information to help

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310 Betsy Kushlan Wanger, supra note 67, at 332.
312 18 U.S.C.S. § 3152(a) (LexisNexis current through 12/9/13).
313 Id.
314 Id.
them determine whether defendants might fail to appear or pose a threat to the community.\textsuperscript{316} They provide judges with recommendations on whether to release defendants and upon what conditions to release defendants.\textsuperscript{317} Pretrial services agencies operate housing facilities for defendants (such as halfway houses or drug and alcohol treatment centers).\textsuperscript{318} In addition, pretrial services agencies are required to inform the court and the United States Attorney if a defendant violates his or her pretrial release conditions.\textsuperscript{319} They also assist people awaiting trial find employment.\textsuperscript{320}

The Speedy Trial Act of 1974 first established Federal pretrial services, setting up ten experimental Federal pretrial services agencies.\textsuperscript{321} Five of these agencies were led by their districts’ Chief Probation Officers, while the other five were led by a Chief Pretrial Services Officer selected by boards of trustees that were, themselves, created by the Act.\textsuperscript{322} The pretrial services agencies not led by Chief Probation Officers received better performance reports because probation officials already had excessive workloads prior to taking on the additional task of running pretrial services agencies.\textsuperscript{323} In spite of such evidence in support of Federal pretrial services agencies operating independently of probation systems, fifty-five of the ninety-three Federal district courts with pretrial and probation systems have pretrial services agencies led by Chief Probation Officers.\textsuperscript{324} Judges, lawyers, and administrators reported that the experimental

\textsuperscript{316} 18 U.S.C.S. § 3154(1) (LexisNexis current through 12/9/13).
\textsuperscript{317} Id.
\textsuperscript{318} 18 U.S.C.S. § 3154(4) (LexisNexis current through 12/9/13).
\textsuperscript{319} U.S.C.S. § 3154(5) (LexisNexis current through 12/9/13).
\textsuperscript{320} U.S.C.S. § 3154(7) (LexisNexis current through 12/9/13).
\textsuperscript{321} Wanger, supra note 67, at 326.
\textsuperscript{322} Id. at 332.
\textsuperscript{323} Id.
agencies allowed them to make better-informed decisions. More defendants accused of drug crimes—often viewed as having a higher risk of committing pretrial offenses—were released pending trial, but neither FTA rates nor pretrial crime increased as a result.

The Pretrial Service Act of 1982 expanded Federal pretrial services. The Act’s primary purpose was to reduce the risk of FTA and criminal activity while defendants were free on bail. It expanded Federal pretrial services agencies and allowed courts to use the risks of FTA and likelihood of the commission of a crime while awaiting trial as factors in determining the conditions of pretrial release.

A 1985 report by the U.S. General Accounting Office on the implementation of pretrial services in all ninety-three federal districts found that only seven districts managed to contact over 90% of defendants before their bail hearings, fifty-four districts contacted less than 50% of defendants before their hearings, and twenty-six districts contacted less than 25% of defendants. The practices of the seven districts that managed to contact over 90% of defendants should be examined more closely to determine why those districts were more effective than the others.

WASHINGTON, D.C.

The District of Columbia’s pretrial services program, the Pretrial Services Agency (PSA), has been active for forty-five years and operates on a fairly modest budget that makes up less

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325 Wanger, supra note 67, at 327.
326 Id. at 327-28.
327 Id.
328 Wanger, supra note 67, at 329.
329 Id.
330 Id.
than 1% of the District of Columbia’s annual budget, operating as a federal agency under the authority of the Executive branch. The PSA conducts a pretrial risk assessment for defendants in the District of Columbia. This assessment takes into account the defendant’s previous FTAs, prior criminal record, ongoing interactions with the criminal justice system, demographic information, substance abuse history, and mental health. Additionally, the PSA supervises defendants on conditional release and offers treatment services for defendants in need.

In 2012, the PSA supervised over 16,800 defendants. The total budget for the program in 2012 was $66,039,383, or about 0.68% of the city's fiscal year 2012 budget of approximately $9,600,000,000. According to statistics from the PSA, the agency met all but one of its outcome measure targets for fiscal year 2012. These outcome measure targets are determined by the percentage of defendants rearrested for violent and drug-related crimes while awaiting trial, the percentage of defendants who fail to appear at trial, and the percentage of defendants who finish their pretrial release period without having their pretrial release revoked for noncompliance.
Kentucky’s pretrial services program began in 1976 in response to the abolition of commercial bail bonds.\textsuperscript{341} Although the monitoring and administration of Kentucky’s pretrial services program are administered by a government entity much like the D.C. and Federal systems, Kentucky structures its pretrial program through the judiciary rather than the executive branch.\textsuperscript{342} The risk assessment tool that Kentucky has implemented is another distinguishing feature from the D.C. and Federal systems.\textsuperscript{343} Alongside the risk assessment tool, services including drug treatment and education have had a noticeable effect on the pretrial justice system in Kentucky.\textsuperscript{344} Kentucky has been working with the National Institute of Corrections’ (NIC) Pretrial Executive Network to develop meaningful ways to measure the success of these programs.\textsuperscript{345} Of the nearly 70% of pretrial defendants released in Kentucky, 90% appear for all future court dates and 92% do not commit further offenses while awaiting trial.\textsuperscript{346}

\textsuperscript{342} Id at 3.
\textsuperscript{343} Id at 10.
\textsuperscript{344} Id at 16-17.
\textsuperscript{345} Id at 14.
\textsuperscript{346} Id at 16.
Another avenue for implementing pretrial services is the creation of a non-profit organization.347 Maine Pretrial Services was incorporated in 1983 and has been supporting the pretrial process ever since.348 Non-profit pretrial services function much like the services administered through the government, but because non-profits generally have limited budgets and personnel they cannot address all pretrial defendants in the state.349 Maine has had great success with pretrial services, and residents in twelve of its sixteen counties have access to these services.350 Although Maine's pretrial services program is administered by a non-profit organization, the program is funded primarily by county-level government contracts, which increases the budget without completely removing the financial responsibility for pretrial

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Elizabeth Simoni, Address at Community Discussion on U.S. Pretrial Programs & Resources (Nov. 13, 2013).

Id.

Id.

Id.

Id.
services from the state. 351 Maine Pretrial Services’ one-million-dollar budget is used for screening defendants prior to arraignment and for analyzing their risks of flight and re-arrest. Along with conditions set by a judge, such as prohibiting use of drugs and alcohol, requiring treatment for mental health or substance abuse, or imposing a curfew, Maine Pretrial Services can add additional conditions, including requirements to report or to search for employment. 352 After a judge sets conditions, Maine Pretrial Services monitors and supervises released defendants. 353

As the movement toward pretrial services continues to expand around the country, more opportunities will arise to research the programs’ efficacy at mitigating disparate impacts within the criminal justice system. At this point in the development of pretrial services, however, the majority of research has focused on the concepts of cost-saving and reduction of FTA.

**ACTION STEPS**

In Massachusetts, the General Court can establish a government-run pretrial services agency through legislative action. Evidence that may help to convince legislators to be amenable to such action includes statistics on the low costs of a pretrial services agency and on the ways in which a government-run pretrial service agency could improve efficiency within the criminal justice system (by providing judges with more information on the likely outcomes of releasing defendants pending trial). Furthermore, pretrial services can reduce the rate of wrongful pretrial detention.

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351 *Id.*
353 *Id.*
Establishing a non-profit in Massachusetts that functions as successfully as Maine’s would likely require the Commonwealth to begin at a small scale and slowly work toward statewide implementation of services. Although Maine’s pretrial services program has been expanding for the past 40 years, it has not yet reached all sixteen of the State’s counties. Originally, Maine’s pretrial services program functioned only within the City of Portland. Only after a complex pay structure gave it the financial flexibility to expand was it able to cover more counties.\textsuperscript{354} To establish non-profit pretrial services in Massachusetts, the Commonwealth would need to either (1) find an existing non-profit currently working with pretrial defendants that could expand to provide comprehensive pretrial services, or (2) provide funding for a new non-profit with the sole purpose of providing pretrial services. The benefits of pursuing non-profit, rather than government, administration of these services include the provision of a flexible structure to fit Massachusetts’s specific needs and the use of private funding. A growing non-profit can more easily adapt and change over time in response to changing conditions within Massachusetts’s criminal justice system.

\textbf{CRITIQUES AND RESPONSES}

There are a number of different ways to spur the establishment of pretrial services in Massachusetts. However, inherent in any criminal justice system are some difficulties and flaws. Assigning pretrial services to an already-overworked and overburdened Administration department, some may say, will likely not produce the desired outcomes. Furthermore, the program will require funding – a concern in all areas of government. The establishment of a non-

\textsuperscript{354} Telephone Interview with Shawn LaGrega, Deputy Director, Maine Pretrial Services (Jan. 6, 2014).
profit organization would undercut those cost arguments, although some support from state or local governments will likely remain necessary.

In addition, it is difficult to assess the effectiveness of these programs in the aggregate because of the lack of data regarding pretrial services. Furthermore, with varying demographics across the country, many states have adapted highly tailored state-specific programs, the results of which are difficult to transpose onto other states.

**NOTIFICATION SERVICES**

**INTRODUCTION**

The American Bar Association (ABA) and the National Association of Pretrial Services Programs (NAPSA) maintain that pretrial services programs have a duty to remind defendants of their hearing dates. Among pretrial services programs, 87% fulfill this responsibility. A number of pilot projects and studies have tested the effectiveness of a notification system in reducing the FTA rate. Studies conducted in Nebraska, Oregon, and Colorado have shown that notification systems did, in fact, reduce FTA rates. The systems tested included reminders subsequent to a first court appearance and written or verbal notifications.

The rates of FTA across the United States can reach 25% or even 30%, when accounting for the myriad jurisdictions and categories of offense. An FTA proves costly for both the

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356 *Id.*

357 *Id.*

358 *Id.*
criminal justice system and the defendant.\textsuperscript{360} Courts suffer as time and resources are wasted for hearings that must be rescheduled if the defendant does not attend.\textsuperscript{361} Furthermore, an FTA is costly for the defendant, since he or she may incur penalties including detention until the next rescheduled court date.\textsuperscript{362}

\textbf{MODEL SYSTEMS}

\textit{NEBRASKA}

The National Institute of Justice funded a project in Nebraska to study the effect of a court date reminder on reducing FTA in 14 county courts.\textsuperscript{363} The project also dealt with the “race justice situation” that resulted from minority defendants’ increased likelihood of FTA as compared to white defendants.\textsuperscript{364} The study ran from March 2009 to May 2010, during which time postcards were mailed to select defendants.\textsuperscript{365} The project targeted FTA rates and the effects on three groups: black, Hispanic, and white defendants.\textsuperscript{366}

The 7,865 defendants included in the study were all charged with “non-waiverable, non-traffic” misdemeanors.\textsuperscript{367} Each defendant was randomly placed into one of four groups – those given no reminder (control), a simple reminder, a reminder with language about sanctions, or a reminder with language about procedural justice.\textsuperscript{368} The postcards included one or more of the following: the time and location, the possible penalties, a “procedural justice” statement atesting

\textsuperscript{359} Mitchel N. Herian & Brian H. Bornstein, \textit{Reducing Failure to Appear in Nebraska: A Field Study}, The Nebraska Lawyer at 11 (Sept. 2010), http://www.pretrial.org/download/research/Reducing%20Failure%20to%20Appear\%20Nebraska\%20Lawyer.%20September%202010%29.pdf.
\textsuperscript{360} Id.
\textsuperscript{361} Id.
\textsuperscript{362} Id.
\textsuperscript{363} Id.
\textsuperscript{364} Id.
\textsuperscript{365} Id.
\textsuperscript{366} Id.
\textsuperscript{367} Id. at 12.
\textsuperscript{368} Id.
to the “defendant’s ability to speak on his or her own behalf by appearing for court,” and the respect with which they would be treated by court staff.\textsuperscript{369}

There was an initial 12.6\% FTA rate in the study’s sample.\textsuperscript{370} FTA differed among counties, with a higher rate in urban areas.\textsuperscript{371} The study found that the rate dropped from 12.6\% to 9.7\% among the three non-control groups that received postcards of any type.\textsuperscript{372} This suggests that any notification can aid in the statistically significant reduction of FTA.\textsuperscript{373}

The Nebraska study also examined the element of race in FTA.\textsuperscript{374} The initial FTA rate for black defendants was 18.7\%, white defendants 11.7\%, and Hispanic defendants 10.5\%.\textsuperscript{375} The black FTA rate dropped to approximately 13.5\% with reminders.\textsuperscript{376} The rate for white defendants dropped to between 8\% and 9.6\% with reminders.\textsuperscript{377} Hispanic defendants saw the most statistically significant decrease – to 4.7\% – with the postcard giving a reminder and a list of possible sanctions.\textsuperscript{378} In all racial groups, the reminder-sanctions postcard had the strongest effect on reducing FTA rates.\textsuperscript{379}

\begin{quote}
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\end{quote}

\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} Id.
\textsuperscript{374} Id.
\textsuperscript{375} Id.
\textsuperscript{376} Id.
\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{379} Id. at 13.
The study concluded that reminder postcards had a causal effect by aiding in the reduction of FTA rates.\textsuperscript{380} The overall FTA rate decreased by 2.9\% with any type of reminder.\textsuperscript{381} Considering the large number of defendants involved in the study, the decrease is statistically significant.\textsuperscript{382} The study notes that racial groups respond differently to different types of reminders, though postcards with court dates and locations paired with the warning of potential sanctions proved most effective for all groups.\textsuperscript{383}

This decrease in FTA is associated with financial savings for the court system.\textsuperscript{384} However, the study notes that creating a reminder program creates some costs, as well. \textit{Id.}
Reducing the FTA rate by implementing a notification system would create the greatest benefit in urban jurisdictions, where the FTA rate and the number of defendants are higher.\(^{385}\)

**Multnomah County, Oregon**

In Multnomah County, OR, the Court Appearance Notification System (CANS) was created in 2005 to reduce FTA rates.\(^{386}\) After some initial success, the system continued and expanded from July 2006 to February 2007.\(^{387}\) The system used automated telephone calls to contact defendants before their trial date.\(^{388}\) The call consisted of a reminder of the hearing’s date, time, and location.\(^{389}\) The calls were considered complete when either an individual or an answering machine received the complete automated reminder.\(^{390}\) The system allowed up to four calling attempts for each defendant.\(^{391}\)

The initial FTA rate in Multnomah County was 29%.\(^{392}\) Within the group of defendants that received a telephone reminder, the rate dropped to 17%.\(^{393}\) This drop represented an approximate 41% decrease in FTA for defendants who received the notification.\(^{394}\) The

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\(^{385}\) Id. at 14.
\(^{387}\) Id.
\(^{388}\) Id.
\(^{389}\) Id.
\(^{390}\) Id.
\(^{391}\) Id.
\(^{392}\) Id.
\(^{393}\) Id.
\(^{394}\) Id.
program results concluded that different racial groups were equally impacted by this notification system, with equal reductions in FTA rates.395

Multnomah County reported that within the first eight months of the program, more than 750 defendants were prevented from FTA; that consequently, the criminal justice system saved approximately $1 million; and that the program would save a projected $1.6 million for the total time period of the project.396 The creation and maintenance of the CANS program itself cost roughly $56,000.397 Thus, the “annual net cost efficiency” is approximately $1.55 million.398 If the program were expanded to include all eligible defendants, the annual cost avoidance is estimated to surpass $6 million.399

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395 Id.
396 Id.
397 Id.
398 Id.
399 Id.
Jefferson County, Colorado

In Jefferson County, CO, a ten-week pilot program was created in 2005 to investigate the impact of a notification system on FTA rates. The notification consisted of a live telephone call to the defendants prior to their court date. It included a reminder of the date, time, and location of the hearing as well as a warning that a defendant’s FTA would result in a warrant. This pilot program reported that the FTA rate dropped by 43% as a result of the notification system. Within the first six months of the program, the FTA rate of defendants included in the study decreased from 23% to 11% – a total drop of 52%.

- This pilot program reported that the FTA rate dropped by 43% as a result of the notification system. Within the first six months of the program, the FTA rate of included defendants decreased from 23% to 11% – a total drop of 52%.

FTA Rate

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400 Timothy R. Schnacke, Michael R. Jones & Dorian M. Wilderman, Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 Court Review 86-95 (Nov. 2006), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview.

401 Id. at 88.

402 Id.

403 Id. at 89.

404 Id. at 92.
ACTION STEPS

Depending on how a notification program is designed and implemented, it can require infrastructure and staff, the costs of which can be high. While implementing a notification system can certainly be economically efficient as well, critics question the costs and real benefits of such programs. Decision-makers must weigh these costs against the potential benefits and avoided costs for the criminal justice system and the public. However, it is also quite possible for the financial benefit to the courts to outweigh the implementation costs of the notification program. Indeed, such was the case in the Nebraska, Oregon, and Colorado studies. In particular, the Multnomah County, OR, study was expanded and continued throughout the state. In Colorado, the study reported that program costs were outweighed by the benefits. In addition, other government actors, such as prosecutors and judges, experienced the benefit of reduced caseloads without any additional costs.

Critics may question the actual impact on FTA rates and whether a simple notification really prevents FTA. While all three studies above conclude that the FTA rates do, indeed, drop significantly with the implementation of notifications, the Nebraska study touches upon the fact that FTA rates differ based on jurisdiction. The study found that rural areas had lower initial FTA rates in comparison with urban regions, with the latter experiencing a higher decrease in FTA rates. A reasonable assumption is that there are more cases, higher FTA rates, and higher

\[\textit{Herian & Bornstein, supra note 359, at 14.}\]
\[\textit{Id.}\]
\[\textit{O’Keefe, supra note 390, at 2.}\]
\[\textit{Schnacke et al., supra note 404, at 92.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Herian, supra note 359, at 14.}\]
\[\textit{Id.}\]
court costs associated with urban jurisdictions.\textsuperscript{412} Thus, urban jurisdictions would most benefit, financially, from the notification program.\textsuperscript{413}

The implementation of a notification system in Massachusetts would be a beneficial aspect of a pretrial release program. However, these concerns should be addressed prior to its implementation. Officials should choose a proper site based on demographics – preferably an urban jurisdiction where a notification system could most heavily impact FTA. In addition, the costs of establishing and maintaining such a system must be considered, including personnel and infrastructure. The next practical question would be which notification system to implement – postcards (Nebraska), automated calls (Oregon), or live calls (Colorado). In Massachusetts, the costs and benefits of each method may be weighed to determine the optimal balance between program cost and effectiveness in order to implement a notification program appropriately tailored to the Commonwealth’s needs.

5. CONCLUSION

The Massachusetts bail system is in need of improvement. It can be made fairer and more efficient, and our analysis shows that there are proven, concrete steps that can provide substantial change at minimal cost to the Commonwealth.

First, Massachusetts needs to collect and analyze useful data on criminal defendants and pretrial detention decisions. Without such data, it is difficult to know what inequalities and inefficiencies exist and to determine the best methods to remedy them.
Second, Massachusetts should initiate a pilot program incorporating unsecured bonds into its pretrial process. Such a program is likely to show a decrease in the number of defendants held in jail due to inability to post bail and mitigation of the pretrial system’s disparate impact on low-income defendants.

Furthermore, Massachusetts should establish a pretrial services agency to identify defendants who can be released safely before trial, thereby reducing the jail and prison populations and their associated costs. Massachusetts should develop and adopt a risk assessment tool based on empirical data and tailored to predict with accuracy which defendants pose the highest flight risk. Such a tool would eliminate the risk of intentional or incidental discriminatory use of discretion, and would make pretrial procedure more efficient. This will ensure bail amounts are set in accordance with the law – at the minimum needed to ensure court appearances, while allowing those who do not pose a risk to go home from jail to return to their communities.

Finally, Failure to appear rates are a serious concern in any bail system. Investment in a notification system to remind released defendants of their court dates is a simple, effective, and cost-saving way to reduce FTA rates and ensure efficient administration of justice.

Bail is a complicated issue with pervasive effects throughout the criminal justice system. When the process fails to function as intended, there are negative consequences for all actors involved – from defendants and defense lawyers, to prosecutors, to judges, to municipalities, and even to schoolchildren. Beyond the economic and logistical consequences of a flawed system, we must not forget that the goal of the criminal justice system is justice. When defendants stand a greater chance of conviction solely because of their inability to effectively participate in their own defense while in jail, when courts and police departments must expend hundreds of dollars
to initiate proceedings against defendants whose failure to appear could have been prevented with a $0.34 postcard, when towns choose between building larger jails to house pretrial detainees and building schools, when mothers lose custody of their children while they languish in state prison because they cannot pay, can we truly claim that justice is being done?

As the steward of the oldest continually functioning written constitution in the world, Massachusetts has led the nation in promoting freedom and democracy for over 200 years. Today, it is incumbent upon the Commonwealth to adopt bail reforms and ensure that each of its citizens may find “security in the law.”

\[414\] Mass. Const. pmbl.
6. TERMS DEFINED

**Actuarial Data**: Data from actuarial tools or instruments. Actuarial assessment is an evaluation of this data characterized by the application of empirically demonstrated statistical rules. Because it is distilled from statistically significant relationships of pre-existing data about defendants’ characteristics and their actual procedural outcomes, researchers can use actuarial data to predict the likelihood that someone who bears those same characteristics will, in the future, have the same outcome. Risk assessment tools are comprised of actuarial data.

**Arraignment**: The stage of criminal proceedings between arrest and trial. At arraignment, formal charges are read to the defendant, who can enter his or her plea (i.e. guilty, not guilty, or no contest). Arguments are made by both sides about whether the defendant should be released or detained and/or the amount of bail, and the trial date is set.

**Bail Commissioner**: A non-legal professional hired and authorized to collect, but not set, bails. The position of bail commissioner is a form of part-time employment.

**Bivariate Analysis**: The analysis of only two variables in order to uncover whether they are related. It involves examining evidence that variation in one variable coincides with variation in the other.
Coding: The step in data analysis in which data is converted into a usable form for statistical analysis. Coding often involves the use of a coding manual, which provides all the dimensions to be employed in the coding process.

Commercial Bail Bonds: The practice, in some jurisdictions, wherein third parties post a defendant's bail in exchange for a non-refundable payment from the defendant. Commercial bail bonds are illegal in Massachusetts.

Conditional Release: An alternative to pretrial incarceration wherein a judge releases a defendant and imposes specific conditions upon him or her. If a defendant violates the terms of conditional release, he or she may face imprisonment for the duration of the pretrial process. Conditions of release may include alcohol or drug testing, stay-away orders, electronic monitoring, GPS tracking, or participation in counseling. Conditional release may be granted in tandem with a cash bail or as a substitute for cash bail.

De facto: “In fact.” De facto conditions are conditions as they actually exist, in contrast to de jure conditions, which are intended or proscribed by law. For example, in many Supreme Court cases decided during the 1960’s, the Court found that although localities had no laws mandating segregated schools, socioeconomic or demographic conditions in those areas created de facto racial segregation.
De novo: “Of new.” A de novo review is a type of legal appeal in which the facts and legal issues are reexamined by an appellate court as if for the first time, without consideration of lower court decisions.

Dependent Variable: The variable to be explained or predicted in a statistical model or experiment.

Disparate Impact: An effect of a government policy or action that disproportionately affects a particular class or group of people within society. When a government action creates a disparate impact based on a protected class (such as race, gender, or religion), the disparate impact provides some evidence of a violation of that class’s constitutional rights, although disparate impact, alone, is usually insufficient to prove such a violation.

FTA: Failure to appear. When a defendant awaiting trial while free on bail or ROR misses a scheduled court date, they have failed to appear. FTA may result in consequences including revocation of bail or the issuance of an arrest warrant.

Gender: For the purposes of this document, we use the word “gender” in the same way that it is used in the studies we cite: in most of these studies, the concept of gender is equated with biological sex. We recognize that the definition of gender is evolving and that the conventional understanding of the word has changed substantially in recent years. Depending on the context, the word “gender” can refer to biological sex; sex-based social structures (including gender roles and other social roles); gender expression (how a person represents or expresses one’s gender
identity to others), and gender identity (an individual’s internal sense of being male, female, or something else).

**Independent Variable**: A variable that are thought to correlate and produce changes in the dependent variable.

**Linear Multiple Regression Analysis**: A type of multiple regression analysis. In a linear regression model, the multiple regression model accounts for all dependent variables as well as error (the collective, unobserved influence of any omitted variables) and uses a linear equation to fit the relationships between variables to a linear curve in order to explain the dependent variable.

**Multiple Regression Analysis**: A statistical tool used to understand the relationships among a dependent variable and two or more variables. Multiple regression typically uses a single dependent variable and several independent variables. Multiple regression may be useful in determining whether a particular effect is present and in measuring the magnitude of that effect. This type of analysis can show correlation but not causality. Regression analysis is generally done with an equation.

**Multivariate Analysis**: Analysis of three or more variables in order to uncover their relationships. Multiple regression analysis is a type of multivariate analysis.
**Pilot Program**: A preliminary study of limited size and extent conducted to assess feasibility, time, cost, and statistical variability so as to understand and improve upon the program before implementing it on a larger scale.

**Race**: For the purposes of this document, we use the word “race” in the same way that it is used in the studies we cite. Racial categories are both functional and unavoidable in much social science research, and we draw on the categories present in the literature. However, we also acknowledge that these categories are limited and problematic. Understanding of race has changed dramatically over the past few centuries, and indeed, over the past few decades as well. We recognize that racial categories (such as “black” and “white”) are highly unstable, subjective, and socially constructed differentiations – the meanings of which vary dramatically depending on a myriad of factors.

**Risk Assessment**: The use of a system of statistically gathered and significantly predictive factors to assign a level of risk to a defendant in order to more ably and objectively guide a judge’s pretrial determination. Risk assessment is an actuarial approach to pretrial release.

**Risk Assessment Instrument/Tool**: A tool built from actuarial data to predict the pretrial risk a defendant poses, a risk assessment instrument allows a judge to impose conditions on a defendant prior to trial that are commensurate with his or her risk level. Many risk assessment instruments take the form of a list of scaled criteria, the sum of which provides a final score which can then be placed within a range of risk (i.e. low, moderate, high).
**ROR**: Release on personal recognizance. In this type of pretrial release, a judge will release a defendant from custody without requiring cash bail or a surety bond, and without imposing any other conditions. Massachusetts law includes a general presumption that defendants be released on personal recognizance.

**Surety Bond**: The money that a defendant must pay to the court if he or she fails to appear at trial. In Massachusetts, surety bonds are typically set at an amount ten times the value of the cash bail.

**Validity / Validation**: Validity (or validation) is concerned with the integrity of conclusions that are generated from research. Although there are many types of validity, this document is mainly concerned with measurement validity, which refers to whether a measure that is devised of a concept actually reflects that concept.
7. ORGANIZATIONS DEFINED

**American Bar Association (ABA):** A voluntary professional organization committed to supporting the legal profession with practical resources for legal professionals while improving the administration of justice, accrediting law schools, establishing model ethical codes, and more.

[www.americanbar.org](http://www.americanbar.org)

**Criminal Justice Policy Coalition:** A non-profit organization working to shape a Massachusetts criminal justice policy that is more effective, more human, and more just. CJPC works to expand the public discourse on criminal justice and build support for policy changes. CJPC uses networking meetings, sponsors public forums and conferences, organizes legislative action, and provides support and coordination to advocacy groups in furtherance of these goals.

[www.cjpc.org](http://www.cjpc.org)

**Laura and John Arnold Foundation (LJAF):** A philanthropic foundation that seeks to produce “substantial, widespread, and lasting changes to society that will maximize opportunity and minimize injustice.” The foundation seeks to confront unjust areas of society with innovative entrepreneurial problem-solving approaches. The foundation created the Public Safety Assessment-Court (PSA-Court), a “comprehensive, universal risk assessment tool.” The assessment tool was implemented in Kentucky in July of 2013; there are currently plans to implement the tool in other locations. The assessment has three six-point scales for risks of new crime, new violence, and failure to appear.
National Association of Pretrial Services Programs (NAPSA): An association that promotes pretrial justice through the development and support of pretrial services agencies. NAPSA seeks to provide evidence-based standards and education to individuals and agencies by updating standards, providing assistance to jurisdictions in need, and educating diverse practitioners.

www.napsa.org

National Institute of Justice: The research, evaluation, and development agency of the Department of Justice. NIJ seeks to use objective research in furtherance of crime reduction and an overall promotion of justice. Its stated strategic goals are to foster a science-based criminal justice system, to translate knowledge to practice, to advance technology, to work across disciplines, and to adopt a global perspective.

www.nij.gov

Open Society Foundations: The umbrella title for a group of national and regional foundations. The Open Society Foundations also include Open Society Institutes in New York, Budapest, London, Paris, and Brussels. While these entities are individually established and regulated - with activities and projects unique to each, they all focus on implementing initiatives within the common focus areas of Education and Youth, Governance and Accountability, Health, Media and Information, and Rights and Justice.

www.opensocietyfoundations.org
Pretrial Justice Institute (PJI): The Pretrial Justice Institute is a non-profit organization based in Washington, D.C. that advocates for evidence-based adult and juvenile pretrial policies in order to "eliminate outcomes that are influenced by race, gender, social class or economic status." PJI advocates for the use of pretrial detention "only as the result of due process" and when "no conditions would reasonably assure appearance and community safety."

www.pretrial.org