Utah State Courts

Report to the Utah Judicial Council on Pretrial Release and Supervision Practices

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1. Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions. *32*

2. Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases. *35*

a. For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions. *35*

b. When these types of charges are filed by Information, service should be by summons, rather than a warrant. *35*

3. Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses. 37

a. The recommendations of the Board of District Court Judges regarding pretrial release and bail practices should be promptly implemented. 37

4. Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made. 37

a. Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors. 37

b. Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court. 37

c. Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented. 37

d. For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no bail and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented. 37

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a. The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases, e.g. traffic. 43

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7. Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release. 46

8. The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered. 46

9. The Council should create a standing committee on Pretrial Release and Supervison Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, to develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders. 51

10. Uniform, statewide data collection and retention systems should be established, improved, or modified. 52

a. Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively. 52

b. All stakeholders should collect consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of pretrial release and supervision practices. 52

c. The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices. 52

11. Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices. 53

12. The public in general and the media in particular should be educated about pretrial release and supervision practices issues. 53

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Executive Summary

Committee Charge

In fall 2014, the Judicial Council chose pretrial release practices and alternatives as its 2015 study item. A committee was formed and was charged with conducting a thorough assessment of existing pretrial release practices used in Utah's courts and determining if there are alternatives that should be considered. Specifically, the committee was asked to: (i) determine what constitutes "best practices" in the field of pretrial release; (ii) conduct an inventory of current practices and assess both their effectiveness and the extent to which they are consistent with best practices in this field; (iii) determine how best to improve the information needed by judges when making a release decision, including evaluating evidence-based assessment tools and instruments; (iv) review the statutory history of release and bail legislation; and, (v) evaluate pretrial release alternatives in terms of public protection, the integrity of the court process, the ability to guard against punishment prior to conviction, and cost implications or savings potential.

The Council asked the committee to complete its work and report its findings at the November 2015 Council meeting. The Committee met monthly from March through October and heard from local and national experts on pretrial release issues. These included presentations from, among others, Professor Shima Baradaran of the S.J. Quinney College of Law at the University of Utah, Rob Butters of the Utah Criminal Justice Center at the University of Utah, David Litvak and Pat Kimball from Salt Lake County Pretrial Services, national experts Timothy Schnacke, Executive Director of the Center on Legal and Evidence-Based Practices, and Michael R. Jones, Director of Implementation at the Pretrial Justice Institute, as well as committee members Brett Barrett, Deputy Insurance Commissioner at the Utah Department of Insurance, Judge James Brady of the Fourth Judicial District Court, Judge Brendan McCullagh of the West Valley City Justice Court, Brent Johnson, General Counsel for the Utah State Courts, and Gary Walton, owner of Beehive Bail Bonds. In addition to gathering data from court databases, the committee surveyed district and justice court judges and compiled data from county jails.

The committee divided its work into three parts and formed subcommittees to address the following: (i) legal frameworks as they currently exist both nationally and locally and possible changes to local frameworks; (ii) monetary bail or financial conditions to pretrial release; and (iii) non-financial conditions to pretrial release. These subcommittees met between committee meetings to gather information and prepare

recommendations. As part of this process, the committee conferred with representatives from Arizona and Colorado concerning pretrial reform efforts underway in those states, and with the Laura and John Arnold Foundation (Arnold Foundation), a non-profit foundation that has funded research and developed tools to improve pretrial release systems. Committee members also spent many hours researching their assigned topics and reviewing the substantial literature in this area. Although this report is intended to be comprehensive, due to the volume of research done, only a fraction of the information members gathered and considered is included in this report. Many of the materials cited in this report have been compiled in an electronic database, which will be made available upon request.

Issues Identified

The committee identified numerous areas in need of improvement in Utah's current practices. First, and foremost, Utah's laws discourage judges from exercising discretion to make individualized decisions regarding pretrial release. Instead, judges are encouraged to follow a system driven by a fixed monetary bail schedule that sets amounts based on the level of the charged offense and not on the pretrial risks a particular person poses.

A second issue, related to the first, is judges are not given the information they need when making a pretrial release or monetary bail decision. For example, judges usually make pretrial release decisions with nothing more than a probable cause statement prepared by an arresting officer or prosecuting attorney, rendering it all but impossible to make individualized determinations. Only one county utilizes a validated risk assessment tool to measure the risk associated with pretrial release; even coupled with a pretrial services division tasked with community supervision, significant obstacles to getting judges necessary information remain.

Other serious problems stem from differing customs and practices that have developed among and within the various judicial districts that hinder the careful application of uniform standards. There is also great hesitation among judges to deny bail under circumstances where it can properly be denied and to instead set monetary bail at unusually high levels with the hopes that it will keep defendants in custody. Conversely, judges hesitate to order defendants released on recognizance or on other non-monetary conditions, despite having statutory authority to do so.

Lastly, there is a lack of meaningful, reliable data. Court IT systems do not capture all of the data needed and most jails in Utah lack important information, so between the two we are unable to track such basic data as how many inmates remained

in custody until their trial, what percentage of inmate populations are pretrial, and how long pretrial detainees are in custody.

These problems are solvable and judges in Utah are genuinely committed to solving them. Fixing the problems will not be quick or easy but it is essential that the judiciary start now, in a comprehensive, organized fashion. The committee has developed the following recommendations that, as a whole, will go a long way toward addressing this important issue.

Summary of Recommendations

1. Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions.
2. Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases.
    a. For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions.
    b. When these types of charges are filed by Information, service should be by summons, rather than a warrant.
3. Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses.
    a. The recommendations of the Board of District Court Judges regarding pretrial release and monetary bail practices should be promptly implemented.
4. Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made.
    a. Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors.
    b. Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court.
    c. Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented.

d. For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no pretrial release and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented.

5. Pretrial supervision practices and procedures, that are appropriate to the size and needs of the community involved, should be developed and implemented.

   a. Because release conditions will be imposed, and alternatives to jail detention ordered, a mechanism to monitor and enforce them should be implemented.

   b. The court or local governments should consider an automated system that uses phone calls, texts, or other technology to remind defendants of upcoming court dates.

6. Pretrial release is an individualized decision. Judges should not set monetary bail based solely on the level of offense charged.

   a. The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases (traffic citations, for example).

   b. The Uniform Fine and Bail Schedule should be renamed "Uniform Fine Schedule."

7. Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release.

8. The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered.

9. The Council should create a standing committee on Pretrial Release and Supervision Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders.

10. Uniform, statewide data collection and retention systems should be established, improved, or modified.

a. Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively.

b. All stakeholders should collect and share consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of various pretrial release and supervision practices.

c. The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices.

11. Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices.

12. The public in general and the media in particular should be educated about pretrial release and supervision practices issues.

Introduction

"It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release."[1] More than ever, the judiciary appears to be using monetary bail to decide whether someone will remain in custody pending the resolution of their case. For those who lack the financial resources to pay this money to the court, or to pay 10% to a commercial bail agent, this usually means they will remain in custody until their cases are resolved. And for most of those who remain in custody, their cases will ultimately be resolved by guilty pleas and sentences with credit for time served—meaning they will be released back into the community.

The problem is not new. The Manhattan Bail Project, undertaken by New York City during the early 1960s, demonstrated the problems associated with overreliance on monetary bail and showed that many defendants could be safely released on their own recognizance if judges had the right information and tools available to them. The American Bar Association ("ABA") studied the issue, inviting input from a broad range of interested parties. In 1964, with the publication of its *Standards for Criminal Justice*, the ABA articulated a series of standards governing pretrial release decisions. The National Association of Pretrial Services Agencies ("NAPSA") formed in 1972 and, six years later, published its first set of standards. In February 2002, the ABA House of Delegates approved the Third Edition of the *ABA Standards for Criminal Justice: Pretrial Release.*[2] And in 2004, NAPSA published its third edition[3] which borrowed from and expanded upon the ABA Standards. These standards, complimented by a growing body of evidence-based practices, form the foundation for how pretrial release and supervision practices should look moving forward.

Utah's statutory framework does not currently meet these standards. Moving Utah closer to these standards will require a sustained, consistent effort. It is sadly ironic that New York City, which was at the forefront of pretrial release reform decades ago, now finds itself in the midst of a crisis brought about in large part by imposing

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[1] TIMOTHY R. SCHNACKE, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 1 (2014) [hereinafter SCHNACKE, FUNDAMENTALS OF BAIL].

[2] ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3rd ed. 2002).

[3] *See* NAT'L ASS'N OF PRETRIAL SERV'S AGENCIES, STANDARDS ON PRETRIAL RELEASE (3rd ed. 2004).

irrational monetary bail on individuals who cannot afford it, and then housing them in a dangerous jail populated almost entirely by those awaiting trial.[4] Thankfully, the committee found nothing in Utah approaching these kinds of abuses. There are undoubtedly serious issues, but those issues can be remedied with meaningful, sustained efforts accompanied by a constant review of our performance.

Background

Definitions and Meaning

As the committee quickly discovered, any discussion of this topic must begin with defining some basic terms and discussing how these terms and phrases are frequently misused. Of course, the most vexing term among them is the word "bail." As legal writing authority Bryan Garner explains, "bail" is a "chameleon-hued legal term" with strikingly different meanings depending on its overall use as a noun or a verb.[5] *The Fundamentals of Bail* offers a good explanation of how and why this and other terms have morphed from their intended meanings and why it matters.

> A sentence from a newspaper story stating that "the defendant was released without bail," meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term "bail"(which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being "held on $50,000 bail" not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail—a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case.[6]

Unfortunately, the public and the media have come to use the amount of bail "as a sort-of barometer of the justice system's sense of severity of the crime."[7] This faulty use of terms has its genesis in how states define "bail," which can vary even within the same statute. Utah is a perfect example of this. Utah's statute states that a person "who may

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[4] Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER, June 7, 2015; *PBS NewsHour: How Kalief Browder Became the Face of Rikers Island Abuse* (PBS television broadcast June 23, 2015) (transcript available at http://www.pbs.org/newshour/bb/kalief-browder-became-face-rikers-island-abuse).

[5] BRYAN GARNER, DICTIONARY OF MODERN LEGAL USAGE 100 (Oxford Univ. Press, 3rd ed. 2011).

[6] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 115.

[7] *Id*.

be *admitted to bail* may be released either on the person's own recognizance or upon posting bail…."[8] Thus, under the Utah Code, "admission to bail" can mean either release on recognizance or release on satisfying monetary conditions, but "bail" by iteself refers to financial conditions of release.

As this report will explain, what "bail" or "admission to bail" should reference is the *process* of releasing a defendant from custody on conditions designed to assure both public safety and the person's appearance in court. For clarity, the committee attempts here not to use "bail" without explaining what it means. So when referencing the financial conditions that the term "bail" has come to mean in modern usage, the phrase "monetary bail" is used.

"Bond" and "bail bond" are other misunderstood terms. "A bond. . . occurs whenever the defendant forges an agreement with the court, and can include an additional surety [(bail bondsman)], or not, depending on that agreement."[9] Because bonds are an agreement with the court to return and face the process surrounding criminal charges, they do not necessarily have to include money, but can instead include a variety of other conditions for release, such as electronic ankle monitoring and probation-style check-ins.

A "surety" is a person who is primarily liable for paying another's debts or performing another's obligations.[10] So a "surety bond" is when a commercial bail bond agent signs an agreement with the court, secured by an amount of money, pursuant to which the surety guarantees the defendant will appear in court. The surety charges the defendant a fee for the service—in Utah, usually no more and no less than 10% of the face amount of the bond. The surety is then liable for the full amount of the monetary bond if the defendant fails to appear. Commercial bail bond companies frequently require collateral from the defendant or the defendant's family as a condition of issuing the bond. "Cash bond" or "cash bail," meanwhile, reference the amount of money that must be posted with the court to secure release. If the defendant makes all court appearances, the money is returned; if the defendant fails to appear, the money posted is forfeited. "Unsecured bonds," as the name suggests, are agreements between a defendant and the court whereby the defendant agrees to pay money to the court if the

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[8] UTAH CODE § 77-20-1(2) (2015).

[9] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 105.

[10] *See id.* 23-25.

defendant fails to appear, but that agreement is not secured by cash, bond, or other collateral.[11]

A "commercial surety" or "compensated surety" is a third party who guarantees the defendant's appearance in court by promising to pay a financial condition if the defendant fails to appear.[12] The agent for that surety is sometimes called a "bail bondsman." In Utah, commercial sureties must be licensed by the Utah Department of Insurance. Some are asset backed, meaning they must maintain and commit assets with a total value that exceeds the total amount of surety bonds issued by them at any given time.[13] Others are insurance backed, meaning an insurer or underwriter guarantees the surety bonds up to a certain amount.[14]

"Pretrial," as used in this context, means the period of time between arrest and sentencing.[15]

"Pretrial services" is used to describe pretrial services agencies or programs that perform a variety of functions, including actively monitoring the defendant and the administration of a "pretrial risk assessment," which refers to a scientifically validated instrument that attempts to measure likelihood of failure to appear, likelihood of committing crimes during the pretrial period, and, sometimes, propensity for violence.[16]

"Pretrial risk" refers to the risk that a defendant will either fail to appear in court (sometimes called "FTA") or commit a new criminal offense during the period of pretrial release.

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[11] PRETRIAL JUSTICE INSTITUTE GLOSSARY OF TERMS, http://www.pretrial.org/glossary-terms (last visited Nov. 4, 2015) [hereinafter PJI GLOSSARY OF TERMS].

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Under Utah Code section 77-20-7(1)(a), the surety remains liable on a bond or undertaking during all proceedings "up to and including the surrender of the defendant for sentencing" even if the undertaking provides otherwise. A surety may, at any time and for any reason, surrender a defendant to any county jail booking facility in the state and in doing so obtain an exoneration of the bond. *See* UTAH CODE § 77-20-8.5.

[16] PJI GLOSSARY OF TERMS, *supra* note 11.

History of Bail

The history of "bail" is long, reaching as far back as ancient Rome, and much has been written on the subject.[17] There are several historical threads relating to bail that are of interest to our discussion, the first of which began in those ancient times, moved through the Middle Ages, and continued until the 1800s. That thread was marked by the use of personal sureties. Personal sureties were respected members of the community that agreed to take responsibility for those accused of crimes, make sure they appeared to face the charges, and, in early days, agreed to stand in for them if they failed to appear. A personal surety pledged to secure the release of the accused, which required the surety to pay if the accused failed to appear. The surety could not charge a fee for this service or otherwise seek indemnification. For centuries, this personal surety system existed as the primary means of ensuring those charged with crimes appeared to face charges. [18]

The second, related thread followed the Norman Invasion and was marked by a move from private criminal justice to public justice and "crimes of royal concern," which we know as felonies today, that came under the jurisdiction of royal justices. At the same time, sheriffs were commanded under the *writ de homine replegiando* to release defendants for bailable offenses, and, concomitantly, to detain defendants for non-bailable offenses. Around the 1270s the British crown uncovered two primary abuses by sheriffs within the bail system: "(1) they were extracting money from bailable defendants before releasing them (and sometimes even arresting innocent people for no reason to demand payment); and (2) they were releasing otherwise unbailable defendants, also for 'considerable sums of money.'" Both were considered equally egregious.[19] This resulted in the Statute of Westminster, which "made it clear that bailable defendants were to be released and unbailable defendants were to be detained," thereby removing the sheriffs' discretion. Nonetheless, over the next few centuries several other major statutes were enacted to address these continued abuses.[20]

The seventeenth century brought about the "most notable reforms," including the creation of the Petition of Right and the Habeas Corpus Act of 1679. The former

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[17] *See* SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 23.

[18] *See id.* 23-29.

[19] TIMOTHY R. SCHNACKE, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE'S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 15-16 (2014) [hereinafter SCHNACKE, MONEY].

[20] *Id.* 17-18.

prohibited detention without charge, and the second provided procedure for preventing delays in bail hearings.[21] Because the Habeas Corpus Act, as part of its procedure, allowed for discretion in setting bail amounts, this also led to the setting of bail in "unattainable amounts." Ultimately, that led to the English Bill of Rights, which proscribed excessive bail.

The proscription against excessive bail, however, was in the context of the personal surety system, which persisted through this period of English history.

> [S]ureties were individuals who were willing to take responsibility over defendants—for no money and with no expectation of indemnification upon default—and the sufficiency of the sureties behind any particular release on bail came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of collective, non-family groups.[22]

"[A]ny financial condition set at bail was . . . secured only by the promise of the personal surety, and it was payable only upon" the accused's failure to appear and face the charges.[23] "[T]he personal surety system … virtually ensur[ed] that those deemed bailable were released with 'sufficient sureties.'"[24]

However, in the 1800s both England and America began to run out of personal surieties. The reasons are varied. In America, there was a "'growth of impersonal urban areas [that] diluted the strong, small community ties and personal relationships supporting the personal surety system,'" and "'the unsettled frontier [] increased the risks of a defendant's flight and created a further disincentive to the undertaking of a personal surety obligation.'"[25] The bottom line is the demand for personal sureties outstripped supply, which meant changes to come.

> It is at this point in history that England and the United States parted ways in how to resolve the dilemma of bailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether

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[21] *Id.* 19.

[22] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 36.

[23] SCHNACKE, MONEY, *supra* note 19, 14.

[24] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 40.

[25] Schnacke, Money, *supra* note 19, 31 (first alteration in original).

when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification.[26]

The states, then, ended up with a system that looks very different from the one originally created. "[A]n alternative to the personal surety system was necessary to effectuate bail as a mechanism for release and to reduce the growing jail populations due to the detention of bailable defendants. Accordingly, states began experimenting with new ways to administer bail" and this meant a transition to commercial sureties.[27] The first commercial surety opened for business in America in 1898. By 1912, the Supreme Court wrote that "'[t]he distinction between bail [i.e., common law bail, which forbade indemnification] and [personal suretyship] is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary.'"[28]

So, while countries like England, India, Ireland, and New Zealand made commercial sureties effectively illegal, the United States (and the Philippines) created a system in which "bondsmen chose defendants for their ability to pay [the bondsmen's] fees and offer collateral, and those who could not do so typically stayed in jail."[29] In doing so, the United States arguably rejected its own Supreme Court precedent that proscribed a system in which bailable defendants were not freed prior to trial.[30]

Tim Schnacke, of the Center for Legal and Evidence-Based Practices, comments that "[i]nstead of being a solution to the problem of unnecessary detention of bailable

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[26] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 40.

[27] SCHNACKE, MONEY, *supra* note 19, 31.

[28] *Id.* 32 (quoting *Leary v. United States*, 224 U.S. 567, 575 (1912)) (third alteration in original).

[29] *Id.* 31.

[30] *See United States v. Barber*, 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time; and, as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived, in many instances, of their assistance and support."); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of [a] crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction, and pending a writ of error."); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.")

defendants due to the lack of sureties, the advent of commercial bail in America virtually guaranteed that the problem would continue."[31] "The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded."[32] Yet reform in the American twentieth century was slow due to a line of cases that essentially affirmed the monetary bail system.[33] One area of reform that did occur, however, was in the federal bail statutes, which returned to the release/no release dichotomy. When someone is charged with a federal offense, the presumptive financial condition is unsecured, meaning no money is required up front for release. Other accepted release conditions include release to a personal surety, someone who agrees to have custody of the defendant and "who agrees to assume supervision and to report any violation of a release condition to the court."[34] States, on the other hand, have been much slower to change even as large reform efforts in the area of pretrial release have cropped up across the nation.

This resistance to change is seen in Bureau of Justice Statistics data from 2009. That data shows that 50% of defendants released pretrial in the 75 largest counties in the country were released on commercial monetary bail.[35] Overall, 62% of felony defendants were released pretrial while 38% were detained until case disposition.[36] Of that 38%, only 4% were actually denied monetary bail.[37] Among detained defendants, 83% were allowed monetary bail, but could not pay it.[38] Moreover, only 50% of those released were released within 1 day.[39] 83% of all released defendants made all court

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[31] SCHNACKE, MONEY, *supra* note 19, 33.

[32] *Id.* 34.

[33] *See, e.g.*, *United States v. Lawrence*, 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,577) (Defendant's inability to pay $1,500 financial condition was not *per se* excessive); *United States v. McConnell*, 842 F.2d 105, 107 (1988) ("But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."); *see also* SCHNACKE, MONEY, *supra* note 19, at 34-38.

[34] *See* 18 U.S.C. §§ 3141, 3142; *see also* SCHNACKE, MONEY, *supra* note 19, 39-40.

[35] Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* Figure 12 (Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 243777), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

[36] *Id.* Table 12.

[37] *Id.*

[38] *Id.*

[39] *Id.* Table 14.

appearances, while only 17% failed to appear.[40] And 84% of released defendants were not rearrested pretrial.[41]

Defendants detained pretrial have worse outcomes than those who are released. "Controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released."[42] The Laura and John Arnold Foundation also studied this issue using a sample size of 150,000 defendants and, in November 2013, released its findings. Its findings showed "that—all other things being equal—defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained."[43]

Reform Movements in Other States

Several states have embarked on pretrial release reform, the effect of which is to make the pretrial release decision more consistent with its historical meaning. Common themes in each of these jurisdictions, consistent with ABA and NAPSA standards, is the implementation of pretrial risk assessment tools, which use a defendant's risk level, rather than financial conditions, to prescribe release decisions. According to the ABA, "[a] pretrial risk assessment is a tool that calculates a risk level for a defendant. The risk level corresponds to the defendant's likelihood to fail to appear or of new criminal activity." Moreover, "[i]t provides a calculated analysis of the risk the defendant poses, rather than just determining risk based on gut instinct or the limited facts provided to a judge. It also helps eliminate any personal biases against defendants for their race, age, gender, or socio-economic class."[44]

Kentucky is one of these states and it has worked hard to get pretrial release right. In 1976, Kentucky created a pretrial services agency as part of its state judiciary to replace its outlawed commercial surety system. Kentucky administered a pretrial risk instrument it had created based upon other jurisdictions' validated instruments. The instrument included factors such as prior failures to appear along with non-static

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[40] *Id.* Table 18.

[41] *Id.* Table 19.

[42] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 28.

[43] *Id.*

[44] ABA CRIMINAL JUSTICE SECTION, ABA RESTORING THE PRESUMPTION OF INNOCENCE PROJECT 1, http://racialjusticeproject.weebly.com/uploads/6/9/3/9/6939365/pretrial_risk_assessment_website_summary_aba_poi_2015.pdf.

factors, such as residency and community ties, which were uncovered through interviews. Kentucky validated its own instrument in 2010 and the results indicated it was working fairly well.[45] In 2013, Kentucky began using the Arnold Foundation's "Public Safety Assessment—Court (or PSA-Court)." Six months into its pilot program, Kentucky reported pretrial release crime rates had dropped 15%, while the number of defendants released pretrial had increased.[46] Additionally, "[t]he PSA-Court [had] proven to be highly accurate at identifying the small group of Kentucky defendants who are at an elevated risk of committing violence if released before trial."[47] And Kentucky had noted no increase in the number of missed court appearances.[48]

More recently, five counties in Arizona attempted to achieve similar results as they began pilot programs using the PSA-Court. Arizona ultimately chose to adopt that assessment tool statewide, and while Arizona's pilot report has not yet been released, feedback from Arizona representatives to the committee has been positive.

According to the Arnold Foundation's website,

> The PSA was created using a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions. We analyzed the data to identify the factors that are the best predictors of whether a defendant will commit a new crime, commit a new violent crime, or fail to return to court. These factors are related to a defendant's criminal history and current charge. They do not include factors that could be discriminatory such as race, gender, level of education, socioeconomic status, and neighborhood. The PSA is more objective, far less expensive, and requires fewer resources to administer than previous techniques. And because it was developed and validated using data from diverse jurisdictions from across the country, it can be used anywhere in the United States. It is currently being used in 29 jurisdictions, including three entire states—Arizona, Kentucky, and New

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[45] JAMES AUSTIN, ET AL., KENTUCKY PRETRIAL RISK ASSESSMENT INSTRUMENT VALIDATION 1(October 29, 2010), http://www.pretrial.org/download/risk-assessment/2010%20KY%20Risk%20Assessment%20Study%20JFA.pdf.

[46] LAURA & JOHN ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT-COURT IN KENTUCKY 1 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf.

[47] *Id.*

[48] *Id.* 1-2.

Jersey—as well as three of the largest cities and two of the largest jail systems.[49]

The PSA or PSA-Court is a good example of a pretrial risk assessment that is consistent with ABA and NAPSA standards—which call for the use of evidence-based practices in pretrial release and supervision decisions—and could be administered in Utah to improve the pretrial process.

"Evidence-Based Practices:" What It Means in this Context

The term "evidence-based practices" encompasses a wide variety of movements within the criminal justice system to capture relevant data and use them to improve the predictive value of pretrial release and other decisions. "Under the current system, we make decisions based on gut and intuition instead of using rigorous, scientific, data-driven risk assessments. This has led to a public safety crisis nationally, where too many high-risk defendants go free, and too many low-risk defendants remain locked up for long periods."[50] What it means to embrace evidence-based practices, then, is to use "scientific, data-driven risk assessments" to make pretrial, supervision and, longer term supervision decisions. "With the advent of the newest versions of statistical pretrial risk instruments that test the interrelated predictability of numerous variables . . . research has added an indispensable tool to allow any particular judge to do his or her job of trying to predict the inevitable failures."[51]

Every pretrial release decision carries with it some degree of risk. The pretrial release decision is perhaps best viewed as an exercise in risk management, recognizing that risk cannot and will never be eliminated entirely, but when fairly understood can be minimized. Release decisions should "embrace risk so that release is the norm, and then [] mitigate that risk only to the level of *reasonable* assurance. Pretrial risk assessment instruments are tools that allow judges to both embrace and mitigate risk."[52] *A*n evidence-based assessment of a defendant's risk of failure to appear or danger to others "can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions . . . appropriate for that

[49] Laura & John Arnold Found., *Public Safety Assessment*, ARNOLDFOUNDATION.ORG, http://www.arnoldfoundation.org/initiatives/case-studies/public-safety-assessment-2/ (lasted visited Nov. 5, 2015).

[50] LAURA & JOHN ARNOLD FOUND., RESEARCH SUMMARY, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 5 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

[51] SCHNACKE, MONEY, *supra* note 19, 54.

[52] *Id.*

individual . . . reduces pretrial detention without impairing the judicial process or threatening public safety."[53]

In Utah, portions of the Justice Reinvestment Initiative (JRI) were passed and implemented this year. As part of JRI, the Utah Commission on Criminal and Juvenile Justice (CCJJ) issued a request for proposal (RFP) to counties statewide on several new evidence-based reforms.[54] One tool specified on the RFP is the LSI-R:SV, an evidence-based tool assessing the criminogenic risk and needs of individuals booked into jail that includes mental health and substance use screens. "[The LSI-R:SV] will identify low-risk/low-need offenders who may be released or assigned to minimal interventions to prevent the inefficient use of time, resources, full assessments, and programming, from which the offender is not likely to benefit."[55] The CCJJ's RFP provides for "supervision/transition programs and practices implemented by counties that reduce recidivism and reduce the number of offenders per capita who are incarcerated utilizing evidence-based principles." The RFP further provides for "a Pre-trial Risk Assessment on individuals charged with a class B misdemeanor or above offense entering the county correctional facility/jail." This latter priority is a subject of this report. Though it sounds similar to the criminogenic risk and needs screen (LSI-R:SV), the pretrial risk assessment serves a fundamentally different purpose.

The pretrial risk assessment is designed only to assist judges in making release decisions at the pretrial stage. So, although both the pretrial risk assessment and the risk and needs screen are designed to assess risk, including risk to recidivate (commit new crimes), the pretrial risk assessment applies only to pretrial release while the risk and needs screen applies to case processing and disposition. Said another way, the pretrial risk assessment is not intended to predict long term whether a defendant will commit new crimes; it is only intended to predict the likelihood that, if released, the defendant

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[53] Arthur W. Pepin, *2012-2013 Policy Paper: Evidence-Based Pretrial Release*, CONF. ST. CT. ADMINS. 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/evidencebased_pretrialrelease.authcheckdam.pdf.

[54] The CCJJ has adopted three priorities for the RFP: A) Statewide Evidence-Based Risk and Needs Screening, B) Statewide Pretrial Risk Assessment, and C) Supervision/Transition Programs and Practices. Priority A grants have been awarded and the RFP has been issued for Priority C. The RFP has been delayed for Priority B for a number of reasons, including the receipt of input from this report and ensuring sufficient resources for implementation of the tool selected.

[55] Commission on Criminal and Juvenile Justice, *Grant Application*, JUSTICE.UTAH.GOV, http://webcache.googleusercontent.com/search?q=cache:0Q5i6vsCEs4J:www.justice.utah.gov/Documents/CCJJ/Grants/JRI/2015CPIPGRANTAPPLICATION2015.doc+&cd=1&hl=en&ct=clnk&gl=us (last visited Nov. 5, 2015).

will commit new crimes prior to the disposition of the case and return to court to face the charges. The risk and needs screen, on the other hand, is designed to predict the long-term risk of committing new crimes and the defendant's need for supervision before and after sentencing. Both sets of tools demonstrate a firm commitment to evidence-based practices.

Public Attitudes about Pretrial Release

How courts handle pretrial release issues affects the public's perception of and confidence in the judiciary. Since 2010, pretrial release policies and practices have received increased attention in the media. In the past year especially, the monetary bail system has received increasingly critical attention from the media.[56] News articles have questioned whether the monetary bail system we currently use is the best way to ensure court appearances and to prevent violence and recidivism by defendants before trial.[57] Indeed, the consistent theme throughout these reports is that the system unduly burdens poor people, even though they remain innocent until proven guilty.

Reports of monetary bail's effect on individuals are sobering. Numerous articles told of Kalief Browder, a teenager who was held without trial for more than three years at Rikers Island—including two years in solitary confinement—for allegedly stealing a backpack which he claimed he did not steal.[58] Following his release, he committed suicide.[59] The media also reported on a mother arrested for endangering a child when she left her baby with a friend at her domestic violence shelter and went to get diapers after curfew.[60] After her arrest, she remained in jail for nearly a month because she could not afford bail.[61] Five months after her release, she was still trying to regain custody of her child.[62]

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[56] Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, Nat'l Pub. Radio (Jan. 21, 2010), http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates.

[57] *See, e.g.*, Editorial, *Bail System Should Be Based on Risk, Not Resources*, THE HARTFORD COURANT, August 20, 2015, http://www.courant.com/opinion/editorials/hc-ed-reform-the-bail-system-20150819-story.html.

[58] *See* Gonnerman, *supra* note 4; *PBS NewsHour*, *supra* note 4.

[59] *Id.*

[60] Nick Pinto, *The Bail Trap*, N.Y. TIMES, August 15, 2015, http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

[61] *Id.*

[62] *Id.*

Not all of the media attention about pretrial release is negative, though. A number of reports have highlighted the initiatives cities and states are taking to reform their laws and constitutions to create more efficient systems. These articles speak favorably of systems that incorporate pretrial risk assessments[63] and expanded pretrial service programs, including drug testing, drug recovery programs, and ankle monitoring.[64]

Perhaps in part due to media reports about these issues, the public supports pretrial release reform. A poll of likely 2016 nationwide voters conducted in 2013 showed that 7 in 10 voters support using pretrial risk assessments in lieu of monetary bail. Further, nearly half of those polled strongly support the use of pretrial risk assessments. *See* Table 1 below.

Table 1. Support for Pretrial Risk Assessments Nationwide.

		% Support (% Strong Support)
All		70% support (47% strong)
Gender	Men	72% support (52% strong)
	Women	67% support (44% strong)
Age	Under 50	72% support (50% strong)
	Over 50	67% support (44% strong)
Party Identification	Democrat	74% support (51% strong)
	Independent	66% support (44% strong)
	Republican	69% support (46% strong)
Region	Northeast	66% support (40% strong)
	Midwest	70% support (50% strong)
	South	69% support (48% strong)
	West	74% support (51% strong)

Source: Public Welfare Foundation and Pretrial Justice Institute, 2013.

[63] *Id.*

[64] Patrick Sullivan, *Addiction Getting Worse, So Bail Restrictions To Get More Severe*, THE TICKER, September 8, 2015, http://www.traverseticker.com/story/addiction-getting-worse-so-bail-restrictions-to-get-more-severe.

Utah's Current Pretrial Release and Supervision Practices System

Utah's current statutory system includes many of the things needed for effective pretrial release and supervision, but it could be improved. Utah law provides that persons accused of a crime are bailable, with notable exceptions.[65] Under the Utah Constitution, all persons charged with a crime are bailable except:

> (a) [P]ersons charged with a capital offense when there is substantial evidence to support the charge; or
>
> (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or
>
> (c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.[66]

The Utah Code adds another category of non-bailable offenses for a person charged with a felony "when the court finds there is substantial evidence to support the charge and it finds by clear and convincing evidence that the person violated a material condition of release while previously on bail." [67] Further, a person arrested for domestic violence may not be released on bail, recognizance, or otherwise, unless as a condition of that release the person is ordered and agrees in writing that until further order of the court, "the person will: (a) have no personal contact with the alleged victim; (b) not threaten or harass the alleged victim; and (c) not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim."[68]

Outside of this, all arrestees have a right to "bail," and under the United States and Utah constitutions, "[e]xcessive bail shall not be required…"[69] Within existing law, the right to "bail" includes release on recognizance or release upon posting monetary bail.

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[65] UTAH CONST. art. I, § 8(1).

[66] *Id.*

[67] UTAH CODE § 77-20-1(1)(d).

[68] *Id*. § 77-36-2.5(2).

[69] U.S. CONST. amend. VIII; UTAH CONST. art. I, § 8(1).

> Any person who may be admitted to bail may be released either on the person's own recognizance or upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court….[70]

The conditions must be calculated to: (a) ensure the appearance of the accused, (b) ensure the integrity of the court process, (c) if appropriate, prevent direct or indirect contact with witnesses or victims by the accused, and (d) ensure the safety of the public.[71]

Current pretrial release and supervision practices in the state also need improvement. There is no statewide office or agency for pretrial release and supervision. These responsibilities are handled at the county level. Other than Salt Lake, no county has a dedicated pretrial services agency. In other counties, pretrial supervision, to the extent it exists, must be done by private, for-profit providers. In jurisdictions where private providers are not available, or where defendants cannot afford them, there is no pretrial supervision at all. In these circumstances, judges can either release defendants on recognizance and hope they come to court, or hold them in custody until their cases resolve.

Salt Lake County has a pretrial services agency that manages pretrial release. According to the agency's website,

> All defendants booked into the jail are screened for release by a Criminal Justice Services Jail Screener. In order to be recommended for release from the jail, a defendant must:
>
> - Have current charges and criminal history that falls within court authorized release guidelines.
> - Have verifiable ties to the community.
> - Provide names and phone numbers of individuals who can verify information regarding the defendant.
> - Not have had a previous Pretrial release that was unsuccessful.
> - Not be a threat to self or the community.[72]

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[70] UTAH CODE § 77-20-1(2).

[71] *Id.*

[72] Salt Lake County Criminal Justice Services, *Pretrial Screening*, SLCO.ORG, http://slco.org/criminal-justice/pre-trial-programs/pre-trial-screening/ (last visited Nov. 5, 2015).

Salt Lake County is the only county in Utah that uses a validated pretrial risk assessment. Although both Utah and Weber counties use worksheets that take into account information such as the defendant's offenses, employment status, and whether the defendant has a place to live in order to assess whether the defendant should be released on recognizance, these worksheets do not appear to be validated.

Salt Lake County uses a tool called the SLPRI, or Salt Lake Pretrial Risk Instrument, to conduct its jail release screenings. The SLPRI uses a combination of static and non-static factors to determine a risk score. The SLPRI has its merits for long-term, statewide application, especially since it is already in use. But the drawback to having a tool with non-static factors is that it requires an interview with the defendant to complete the process. An interview-based tool results in more manpower and time resources than those tools that use only static factors, such as the Arnold Foundation's PSA, which pull from existing databases only. The Arnold Foundation asserts that "none of the interview-based factors improved the predictive analytics of the risk assessment. In other words, for all three categories–new criminal activity, new violent crime, or failure to appear–the addition of interview-dependent variables did not improve the risk assessment's performance."[73] However, Salt Lake County has validated both the static and non-static factors it uses in the SLPRI; those factors are thus predictive of the behavior they seek to measure. Salt Lake County feels strongly that both static and non-static factors are an important part of any pretrial risk assessment tool.

The committee recommends that a uniform statewide pretrial risk assessment tool be adopted. The Arnold Foundation's PSA is an attractive option because it is both cost-effective and efficient. But Salt Lake County's perspective should be weighed against the benefits of simplicity and uniformity since it is arguably an open question whether a pretrial risk assessment tool should have both static and non-static factors. On balance, if the Arnold Foundation's PSA is selected for statewide use, it must be locally validated after one year—as the SLPRI has been—to ensure that it is in fact predictive of recidivism and failures to appear.

When and How Pretrial Release Decisions Are Made in Utah

In Utah, the prosecution process relevant to this committee's work starts in one of two ways. [74] The first is by a warrantless arrest, meaning the arrestee is taken into

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[73] LAURA & JOHN ARNOLD FOUND., *supra* note 50, at 4.

[74] Traffic and other minor offenses initiated by citation proceed in a slightly different fashion. Under Utah Code section 77-7-18, "[a]ny person subject to arrest or prosecution on a misdemeanor or infraction

Continued…

custody based on a law enforcement officer's determination of probable cause that the arrestee committed a criminal offense, and the charging document formally setting forth those offenses is filed with the court thereafter. The second, lesser-used method, is the filing of an Information or Indictment with the court, and then serving the defendant with a summons or an arrest warrant.[75] The court is involved in each process at different stages, but in both situations, a neutral magistrate must make a preliminary decision regarding whether there is a factual and legal basis to hold the person in custody or to arrest them, and, if so, whether and under what conditions the person should be released from custody pending the resolution of the case. [76]

Where the process starts with a warrantless arrest, the rules state that "[i]n order to detain any person arrested without a warrant, as soon as is reasonably feasible, but in no event longer than 24 hours after the arrest, a determination shall be made as to whether there is probable cause to continue to detain the arrestee."[77] This occurs when an officer submits to a magistrate a written, sworn probable cause statement (which may be transmitted to the judge verbally or electronically, subject to certain conditions).[78] If the magistrate finds there is not probable cause to continue to detain the arrestee, "the magistrate shall order the immediate release of the arrestee."[79] "If the

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charge may be issued and delivered a citation that requires the person to appear at the court of the magistrate with territorial jurisdiction." A person receiving a citation issued pursuant to section 77-7-18 must appear where and when ordered "unless the uniform bail schedule adopted by the Judicial Council or Subsection 77-7-21(1) permits forfeiture of bail for the offense charged." UTAH CODE § 77-7-19(1). For these non-mandatory appearance cases, bail forfeiture is used as a mechanism to collect a fine without requiring court appearance.

[75] *See* UTAH R. CRIM. P. 4(a) (2015) ("[A]ll offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed"); UTAH R. CRIM. P. 5(a) (same); UTAH R. CRIM. P. 6.

[76] This process is one place where the law and the policies of the judicial branch intersect with the law enforcement functions of the executive branch; much of it occurs before anything is formally filed with the court; and it also occurs almost entirely at the local level because the counties operate the jails and prosecute the cases. What all of this means is that although the process is governed both by law and by court rule, in many important respects it has come to be governed by local customs and practices that have developed over time.

[77] UTAH R. CRIM. P. 7(c)(1). "The determination may be made by any magistrate, although if the arrestee is charged with a capital offense, the magistrate may not be a justice court judge."

[78] UTAH R. CRIM. P. 7(c)(2).

[79] UTAH R. CRIM. P. 7(c)(3)(A). The rule continues, "[i]f a probable cause statement is presented to a magistrate more than 24 hours after the arrest, the magistrate shall order the release of the arrestee unless the probable cause statement establishes that the delay was caused by a bona fide emergency or other extraordinary circumstances." *Id.* 7(c)(4).

magistrate finds probable cause to continue to detain the arrestee, the magistrate shall immediately make a bail determination."[80]

This is the first point at which the judicial branch steps in to determine whether and under what conditions someone will be held in custody. In most jurisdictions, responsibility for this function rotates among the judges so the judge who determines probable cause and sets monetary bail or release conditions is unlikely to preside over the case. In some jurisdictions, the probable cause review and bail determination occurs at the same time. In other jurisdictions, these are separate steps. In some, monetary bail is set by the judge; other jurisdictions rely on the Uniform Fine and Bail Schedule and use statutory bail commissioners. In short, the existing practices for making this particular determination vary greatly.[81]

In all jurisdictions, the judge tasked with making this decision has a probable cause statement prepared by the arresting officer, information about the criminal offense on which the individual has been booked in jail, and little else. In a few jurisdictions, the judge might be provided a record of prior bookings or a BCI report. Even in Salt Lake County, where individuals booked into the jail are given a validated pretrial release assessment, the results of that assessment are not made available to the judge at this stage. One consistent comment from judges formally surveyed by the committee and those with whom the committee discussed the matter informally is the lack of meaningful information with which to make an informed pretrial release decision.

With respect to setting monetary bail at this stage, the Rules of Criminal Procedure state, "[t]he bail determination *shall* coincide with the recommended bail amount in the Uniform Fine/Bail Schedule *unless the magistrate finds substantial cause to deviate from the Schedule*."[82] The Uniform Fine and Bail Schedule establishes a fixed monetary bail amount based on the level of the offense charged, without regard to the likelihood that a particular arrestee may fail to appear at court hearings or commit new offenses if released. For third degree felonies, the bail schedule amount is $5,000; second degree felonies are $10,000; first degree felonies that do not involve a minimum mandatory sentence are $20,000; and first degree felonies with a minimum mandatory

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[80] UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

[81] Memorandum from the Board of District Court Judges to Chief Justice Matthew B. Durrant Regarding Recommendations for a Uniform Process for Setting Bail (May 29, 2015) (attached as Addendum A).

[82] UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

sentence are $25,000.[83] The bail amount for class A misdemeanors is $1,950 while the amount for class B misdemeanors is $680, and for class C misdemeanors it is $340.[84] [85] This provision of rule 7 purports to limit the judge's discretion to set a higher monetary bail for someone who presents a high pretrial risk and commits a serious offense; it also purports to limit the judge's ability to order an arrestee's release on recognizance or on conditions other than monetary bail. The Utah Code, however, makes clear that the judge has the discretion to order a person released "on the person's own recognizance *or* upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court…."[86]

Once the court finds probable cause and sets monetary bail, the prosecutor must file an Information (or an Indictment) with the court setting forth the charges. Many jurisdictions in the state follow what has come to be known as the 72-hour rule—a "rule" that appears nowhere in court rules, the Utah Code, or case law—under which the prosecution must file charges within 72 hours of arrest, or obtain from the court a written extension of that deadline. If the prosecution fails to file within that time, the arrestee will be released. In most jurisdictions, this process is automatic and the jail simply releases arrestees if charges are not filed by the deadline. In others, arrestees are brought before the court to determine whether they should be ordered released, sometimes well beyond 72 hours after arrest. The processes seem to be driven by custom and practice, rather than law.

With the filing of the Information, or return of the Indictment, the "magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused."[87] [88] In the warrantless arrest scenario described above, the prosecution may request an arrest warrant; that warrant, upon issuance by the court, essentially

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[83] *See* UTAH UNIFORM FINE AND BAIL SCHEDULE 8 (approved May 12, 2015), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf.

[84] *Id*.

[85] Apart from these guidelines, the Schedule also sets a specific bail amount for certain offenses.

[86] UTAH CODE § 77-20-1(2) (emphasis added). Thus, insofar as rule 7 is read as requiring "substantial cause" to order release on recognizance, it conflicts with Utah Code section 77-20-1(2) and the statute controls.

[87] UTAH R. CRIM. P. 6(a).

[88] If the person now charged by Information was previously arrested, it is not common practice to notify the filing judge of that initial bail determination. Therefore, the signing judge on the Information may, without knowledge, supplant the prior decision.

supersedes the pretrial hold established at the probable cause review and becomes the basis for detaining the defendant. Also, "[w]hen a warrant of arrest is issued, the magistrate shall state on the warrant . . . the amount of bail . . . ."[89] Thus, the monetary bail set at this time supersedes the monetary bail set at the probable cause stage.

For the warrantless arrest scenario, this is the second point at which the judicial branch steps in to determine whether someone will remain in custody and, if so, under what conditions.[90] In practice, very little new information is provided to the judge at this stage. The State is now represented by counsel so the probable cause statement will have been reviewed by a prosecutor and the charges screened. More information may be known about the arrestee—who is now a defendant—but there is not a systematic method to ensure judges are provided this additional information. Once again, in most jurisdictions, judges are provided nothing more than a probable cause statement and the charges filed. In Salt Lake County, the only jurisdiction where pretrial risk screening is occurring, the results of the pretrial risk assessment are not made available to the judge reviewing the Information or arrest warrant.

According to the rule, an arrest warrant at this stage should be the exception rather than the norm. "If it appears to the magistrate that the accused will appear on a summons and there is no substantial danger of a breach of the peace, or injury to persons or property, or danger to the community, a summons may issue in lieu of a warrant of arrest to require the appearance of the accused."[91] In some jurisdictions, summonses are regularly and effectively used to advise out-of-custody defendants of the pendency of the case and notify them of court dates. In other jurisdictions, summonses are almost never used even with defendants who are no longer in custody or never were in custody. When an arrest warrant is used, a law enforcement officer must locate, arrest, and book the defendant in jail; the jail must then hold these individuals (unless they post monetary bail or are otherwise released) and transport them to court, all at substantial cost. A summons, on the other hand, "may be served by . . . any person authorized to serve a summons in a civil action," [92] or "by mailing it to

[89] UTAH R. CRIM. P. 6(b)(1).

[90] For cases initiated by the filing of an Information or Indictment, this is the first occasion on which the court reviews probable cause and determines whether pretrial detention is appropriate.

[91] UTAH R. CRIM. P. 6(b).

[92] UTAH R. CRIM. P. 6(c)(1).

the defendant's last known address." [93] If a defendant fails to appear in response to a summons or a citation, "[a] warrant of arrest may issue . . . ."[94]

As alluded to above, after charges are filed, the defendant must appear in court.[95] The point at which this first appearance occurs varies across jurisdictions. In most jurisdictions, it occurs within one or two business days after the charging document is filed. At the first appearance, the defendant is notified of the charges, provided a copy of the Information or Indictment, and advised of a variety of other rights including "rights concerning pretrial release, including bail . . . ."[96]

> If the defendant is charged with an offense other than a misdemeanor for which voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate within the county of arrest for the determination of bail under Section 77-20-1 and released on bail or held without bail under Section 77-20-1.[97]

At this point, the court must "allow reasonable time and opportunity to consult counsel and … allow the defendant to contact any attorney by any reasonable means, without delay and without fee."[98]

In most jurisdictions, the first appearance is used to make an indigency determination and to appoint counsel if the defendant qualifies. It is also the defendant's first opportunity to address the court on the matter of pretrial release and monetary bail. If both sides are represented by counsel at this stage, the prosecution may have additional relevant information, the defendant has an opportunity to address the issue for the first time, and the court has another opportunity to examine whether

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[93] UTAH R. CRIM. P. 6(c)(3).

[94] UTAH R. CRIM. P. 6(b). For defendants who are in custody at the time the charging document is filed, an arrest warrant and the corresponding review of pretrial release by the court is appropriate. But for defendants who are not in custody at that time, prosecutors should make a good faith determination of whether an arrest warrant is necessary or appropriate under rule 6.

[95] This appearance is not necessarily in person. Courts increasingly are relying on video connections with jails to handle this first appearance and this practice is expected to grow. One issue this presents is whether the defendant will have had at that point opportunity to consult with counsel regarding pretrial release and bail. Where this has not occurred, an additional in-court hearing with both parties represented by counsel may be necessary as a matter of right.

[96] UTAH R. CRIM. P. 7(e).

[97] UTAH R. CRIM. P. 7(d)(5).

[98] UTAH R. CRIM. P. 7(f).

the defendant should remain in custody or be released and, if released, on what conditions.[99] Because this is the defendant's first opportunity to address the issue, pretrial release and monetary bail should be given *de novo* consideration with no weight given to prior decisions on the subject, unless the judge had detailed information when making the initial decision. In those jurisdictions where indigent defendants are not represented at this initial appearance, the topic should be addressed at the first hearing after which counsel has been appointed, subject to the same standard.

The issue of pretrial release and monetary bail can be addressed at later stages of the proceedings. "A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present." [100] That can occur in conjunction with a preliminary hearing or any other pretrial hearing. Once this type of bail hearing takes place and the court rules on the question, "[s]ubsequent motions to modify bail orders may be made only upon a showing that there has been a material change in circumstances."[101] What constitutes a "material change in circumstances" is undefined. Our survey of judges suggests that judges are open to addressing custody status generally whenever asked to do so, although those responding indicated that such requests are the exception rather than the norm.

Concurrent with the work of this committee, the Board of District Court Judges undertook a survey of practices across the state and the development of a series of recommendations to establish a uniform process for making pretrial release and monetary bail decisions. The Board's report to the Chief Justice, dated May 29, 2015, explains in detail the practices that have developed over time in various jurisdictions. [102] The report explains that "[g]eographic and demographic realities drove different bail practices too. In some rural counties, the district court convenes only twice per month to hear felony cases. The limited number of court days determines how quickly an arrested person appears for initial appearance and how quickly prosecutors are required to file."[103] At the other end of the spectrum, in "metropolitan areas, jail

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[99] As noted, these appearances frequently are done by video conference at the jail and indigent defendants often do not yet have counsel appearing for them, requiring them to address pretrial release issues pro se. In these circumstances, courts uniformly address custody status at the first hearing after counsel has been appointed.

[100] UTAH CODE § 77-20-1(5)(a).

[101] UTAH CODE § 77-20-1(5)(a).

[102] Memorandum from the Board of District Court Judges, *supra* note 81, 2-7.

[103] *Id.* 2.

crowding and transportation resources affect when people are released and brought to court."[104] After much effort and deliberation, the Board unanimously approved in May a series of recommendations, the implementation of which forms the basis for many of the recommendations we propose here. Those recommendations include the following:

- Probable cause statements for warrantless arrests must be reviewed electronically within 24 hours of arrest and, to meet this deadline, judges must review probable cause statements at least two times per day, once in the morning and once in the afternoon, seven days a week, 365 days a year.
- If the reviewing judge finds probable cause, an initial pretrial release decision would be made at the same time, which may include imposing conditions of release or setting monetary bail.[105]
- Informations would be required to be filed within 72 hours of booking. Failing to file within that deadline would result in the automatic release of the detained person, unless the prosecutor obtains an order from the court extending the time to file.
- If the prosecutor determines that charges will not be filed prior to the expiration of the 72 hour period, the prosecutor would be required to file proof of declination with the clerk and the court should enter a written order releasing the person from custody.
- Arrested persons who remain in custody would appear for an initial appearance on the next court day after the Information is filed, recognizing that these initial appearances will, in many instances, take place by video conferencing links with the jail.
- At the initial appearance (or the first appearance after which counsel has been appointed), the defendant would have the right to

[104] *Id.*

[105] The Board recommends establishing an electronic system that permits the magistrate to view the probable cause statement, enter a monetary bail amount, impose other conditions of release, and allow the arresting officer to include additional information that may be relevant to the release decision including statutory and constitutional factors. *Id.* 7. These recommendations make sense. However, the Board also recommends a link to the Uniform Fine and Bail Schedule for convenience. Because the committee recommends elimination of the "bail" aspects of the schedule, for reasons discussed in this report, a link to that schedule would be inappropriate but a link to the standards to be developed by the pretrial release committee would be appropriate.

readdress the issue of pretrial release or the monetary bail set at the probable cause stage. "This allows the arrested person the opportunity to be represented by counsel and to be heard regarding factors relevant to the setting of bail."[106]

- After a "bail hearing" has been held, any further motion to modify monetary bail or release conditions must be made in advance of the hearing and with notice to the prosecutor consistent with the requirements of Utah Code section 77-20-1(5) and (6).[107]

In addition to its ultimate recommendations, it is notable that the Board's report, not surprisingly, voiced the same concerns regarding current practices that this committee heard in its own survey of judges.

> When bail is set immediately upon a finding of probable cause, the reviewing magistrate has no [I]nformation or [I]ndictment, no recommendation from pre-trial release, and no other reliable records. By statute, conditions of release are imposed in the discretion of the magistrate to ensure appearance of the accused, ensure the integrity of the court process, prevent contact with victims and witnesses by the accused, and ensure the safety of the public. But the probable cause statement alone generally includes limited information that might guide the discretion of the magistrate in setting conditions of release designed to serve these important objectives.[108]

Before meaningful reform of the pretrial release and monetary bail systems can take place, uniform and consistent procedures must be implemented. Without this basic overhaul—as recommended by the Board of District Court Judges—efforts to improve the system and to incorporate evidence-based practices will inevitably fall short.

Incomplete Data

A significant obstacle affecting Utah's ability to enact reforms in this area is a lack of data. The collection and retention of pretrial release and supervision data in the state is unfortunately inconsistent and incomplete. The court has access to very little pretrial release data, [109] although it does have some limited monetary bail data, which

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[106] *Id.* 8.

[107] *Id.*

[108] *Id.* 8-9. The Board also questioned the wisdom of the requirement in the Rules of Criminal Procedure that judges adhere to the Uniform Fine and Bail Schedule. *Id.* 9.

[109] District Court Cases with Bail or Bond from Cases Filed in FY2013 (on file with author).

the committee refers to below. When the committee requested pretrial release data from 24 county jails, only Beaver, Iron, Salt Lake, Summit, Tooele, Utah, Washington, and Weber counties responded. But the committee has a reason to lack confidence in the data.[110] One or more of the responding county jails were unable to provide data on: (i) the average number of days a detainee was held without any hold or commitment; (ii) how many persons were arrested without a warrant; (iii) how many persons were released on their own recognizance; (iv) how many posted cash bail; (v) how many posted bond; (vi) how many were released on conditions other than OR, cash, or bond; or (vii) how many remained in custody until trial.

Although incomplete, data provided by the county jails is the best we have regarding the current pretrial release landscape in Utah.[111] Jail data shows that as of June 1, 2015, the total capacity of the jails was 5,724.[112] Of the 4,845 detainees that were housed on that date, 2,529 (52%) were pretrial detainees.[113] Of 446 (9%) pretrial detainees, the most serious charge was a misdemeanor.[114] In 2014, 38% (14,329) of the pretrial detainees in responding jails were released on commercial bond, with 14% (5,351) released on monetary bail, and 10% (3,951) released on their own recognizance.[115] The jails could provide no data regarding how many pretrial detainees were offered monetary bail as a condition of release but remained incarcerated because they could not afford to pay it. The data showed the average time pretrial detainees were held ranged from 7 hours to 140 days depending on the county's policies.[116]

Other than Beaver County, none of the counties who responded to our survey could identify the number of inmates who remained in custody until their cases were resolved.[117] This data does not exist in court databases either. That fact alone is concerning.

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[110] *See* Appendix B, Information on County Jails' Occupancy and Pretrial Detainees (June 1, 2015).

[111] *Id.* There is a discrepancy with the data provided by the jails when it comes to the number of pretrial detainees. The jails that responded reported that there were only 1,525 defendants held only on pretrial detention. However, the jails reported that there were 446 pretrial detainees with a misdemeanor as the most serious charge, and 2,083 pretrial detainees with a felony as the most serious charge, bringing the total number of pretrial detainees to 2,529.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

Recommendations and Discussion

Based on the background and issues identified above, the committee sets forth the following recommendations. These recommendations build on one another and should therefore be viewed as a comprehensive set of reforms, rather than individual action items.

1. ***Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions.***

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law."[118] "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[119] This core principle is embodied in our state constitution's admonition that "[e]xcessive bail shall not be required; excessive fines shall not be imposed."[120]

Consistent with this basic principle, there should be a clear, unequivocal statement—preferably in statute—recognizing a presumption in favor of pretrial release, free from financial conditions that many defendants cannot meet.

Utah has an existing framework that comes close to this standard, with statutes providing that "[a] person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right…"and making clear that, in this context, being "admitted to bail" means "released either on the person's own recognizance or upon posting bail…."[121] A clearer statement of this core principle, though, is appropriate.

To that end, and consistent with the other recommendations in this report, the committee recommends the following changes to pretrial release provisions of the Utah Code:[122]

- Utah Code section 77-20-1 or section 77-20-3 should be amended to incorporate the presumption identified above. Unless the judge

[118] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[119] *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

[120] UTAH CONST. art. I, § 9.

[121] UTAH CODE § 77-20-1(1), (2); *see also id.* § 77-20-3 (same).

[122] Members of the committee have drafted proposed revisions to Utah Code Title 77, Chapter 20; Title 77, Chapter 20b; and Title 77, Chapter 7. Senator Hillyard has opened a bill file and has agreed to look at the proposed changes.

finds that monetary bail is necessary to ensure the defendant's appearance, there is a presumption of release on recognizance or other, non-financial conditions. Where monetary bail is required, it should be set in the lowest amount likely to guarantee the defendant's appearance given the defendant's history and financial ability to provide security.

- Utah Code section 77-20-10(2) outlines a variety of conditions for release that the court can impose on defendants. This section should be referred to in section 77-20-3(1) which deals with release on recognizance, to make clear these conditions apply to all pretrial releases not just those pending appeal. That section should be further amended to make clear that the judge should impose the least restrictive conditions necessary, that the judge has the discretion to impose other, reasonable conditions on release, and to eliminate those conditions not applicable at the pretrial stage.
- Utah Code section 77-20-4 should be amended to make clear that a defendant is not entitled to a surety bond.
- Utah Code section 77-20-1(6) should be amended to make clear that: (i) a defendant is entitled to a full "bail hearing," at such time as the defendant is represented by counsel; (ii) pretrial release issues will be considered *de novo* at that hearing; and (iii) the material change in circumstance standard does not apply until after the defendant has been afforded such a hearing.
- Decisions regarding whether and under what conditions someone should be released from custody pending trial or appeal is a judicial function.[123] To ensure jail employees are not performing judicial functions, Utah statutes authorizing bail commissioners should be repealed, including Utah Code sections 10-3-920 to -922 and 17-32-1 to -4. To the extent authority is necessary to allow sheriffs to collect monetary bail, a limited provision in Title 17 Chapter 22 allowing this practice should be adopted.

[123] Existing law provides that "[t]he initial order denying or fixing the amount of bail shall be issued by the magistrate or court issuing the warrant of arrest or by the magistrate or court presiding over the accused first judicial appearance." UTAH CODE § 77-20-1(3)(a). If this applies at the probable cause stage, then the bail commissioner statutes are in conflict. If, on the other hand, this applies only after issuance of a warrant, it is unclear why judicial involvement would not be required at this stage.

- Bail-jumping, as a criminal offense, should be limited to felony cases and Utah Code section 76-8-312 should be amended to eliminate the offense of misdemeanor bail-jumping. Likewise, Utah Code section 77-7-22 should be amended to eliminate the misdemeanor crime of failure to appear on a citation. The committee's research showed that, at the felony level, bail-jumping charges are very rarely filed; at the justice court level, however, this charge is being filed far more than seems to be warranted.[124] Other sanctions exist to address any abuse of the process at the misdemeanor level.
- Utah Code section 77-7-21 should be amended to provide that only DUI, domestic violence and offenses involving a continued breach of the peace are class B and C misdemeanor offenses for which a person may be booked instead of cited.[125]
- Consistent with Recommendation 3 below, Title 77, Chapter 7 should be amended as necessary to ensure implementation of the recommendations of the Board of District Court Judges.
- Consistent with Recommendation 6 below, various statutory and rule references should be changed from the "Uniform Fine and Bail Schedule" to the "Uniform Fine Schedule."
- Consistent with Recommendation 8 below, Title 77, Chapter 20b, governing bail bond forfeiture, should be revised and updated to simplify the process and to address consistency, clarity, and organization.

The committee also recommends a number of amendments to rules 6 and 7 of the Utah Rules of Criminal Procedure, and to the Utah Code of Judicial Administration, including the following:

- Rule 7 of the Utah Rules of Criminal Procedure should be amended to incorporate the recommendations of the Board of District Court Judges, including establishing filing deadlines and addressing

[124] According to Court Services, in Fiscal Year 2015, the number of cases filed statewide under Utah's bail-jumping statute (section 76-8-312) were 210 in justice courts and 6 in district courts.

[125] Of course, cited individuals may be arrested and booked for other outstanding warrants. But persons charged with petit misdemeanor charges should be issued a citation.

failure to meet those deadlines, and making clear the prosecution has a responsibility to determine who has been charged and who must be released if they have not been charged.

- Rule 7 should also be amended to remove the requirement that the judges and magistrates must use the Uniform Fine and Bail Schedule when setting monetary bail.
- Rule 6 should be amended to more expressly state the preference for summonses, especially with a lack of information about risk.
- Rules concerning exoneration of bonds and procedures related to booking in counties other than where the warrant is issued should be clarified and revised.
- An amendment to the practice of law rules allowing bail agents and sureties to file pro se motions should be considered.

2. ***Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases.***
    a. ***For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions.***
    b. ***When these types of charges are filed by Information, service should be by summons, rather than a warrant.***

Individuals charged with low-level offenses should not be held in custody pending trial. "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability."[126] In a number of jurisdictions, due to costs, jail crowding, and related issues, this has become a de facto policy. In these jurisdictions, law enforcement understands that the jail will not accept most class B and C misdemeanors so

[126] AM. BAR ASS'N, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, STANDARD 10-2.1 [hereinafter ABA PRETRIAL RELEASE STANDARDS]. The standards further provide that, unless necessary to ensure the safety of any person or the community, "a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to a police station or to court." *Id.* 10-2.2. The ABA standards recognize exceptions for things such as being subject to arrest but failing to provide satisfactory identification, reasonable grounds to believe the person will not respond to a citation, violations of conditions of probation or parole, or a substantial likelihood of continuing criminal conduct. *Id.* 10-2.2(c)(i)-(vi).

individuals charged with these offenses who do not present a public safety risk are cited and released with instructions for reporting to court.

The committee recommends that the Utah Code be revised to reflect that class B misdemeanors, class C misdemeanors, and infractions should be initiated by citation or by Information and summons unless the offense involves driving under the influence, domestic violence, or another specified offense involving a continued breach of the peace.

Additionally, in all cases, judges should adhere to the standards of rule 6(b) of the Utah Rules of Criminal Procedure, which creates a presumption in favor of summonses over arrest warrants unless certain facts are shown in the Information—particularly as it relates to defendants who are not in custody or are no longer in custody, by requiring prosecutors to prepare and submit summonses when appropriate, rather than warrants.[127] Prosecutors should be required to identify, in the Information, the custody status of the defendant. If the defendant has been released, based on a judge's order, posting monetary bail, or otherwise, the prosecutor should not ordinarily request a warrant. Instead, the prosecutor should proceed by summons. If a prosecutor obtains information that he or she believes justifies issuance of warrant for a defendant who has been released from custody, or who has not been taken into custody, the prosecutor should specifically explain in the Information why a warrant is appropriate.

This recommendation is consistent with the changes other jurisdictions have made to their pretrial release practices.[128] This recommendation will require a change in practice for some prosecutors who, too often, request appearance by warrant when a summons is appropriate to secure a defendant's appearance.

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[127] *Id.* 10-3.3 (discussing standards for warrants versus summonses and requiring that judges state on the record reasons for declining to issue a summons).

[128] Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES, July 8, 2015, http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html?_r=0.

3. ***Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses.***
    a. ***The recommendations of the Board of District Court Judges regarding pretrial release and bail practices should be promptly implemented.***

"While the laws and rules related to bail are the same, bail procedures throughout the State are not."[129] As discussed above, the Board of District Court Judges has recommended the adoption of a uniform and consistent procedure to be followed by all courts across the state when making pretrial release and monetary bail decisions.[130] These recommendations build on those advanced by the Board. The committee urges the prompt implementation of the Board's recommendations. The committee's proposed changes to governing statutes and the Rules of Criminal Procedure will help to ensure compliance, but the many changes the Board recommends can be implemented immediately.

4. ***Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made.***
    a. ***Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors.***
    b. ***Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court.***
    c. ***Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented.***
    d. ***For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no bail and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented.***

Judges surveyed responded that they have too little meaningful information available to them when they make initial pretrial release decisions. When asked what information they would like to receive when making these decisions, the judges requested pretrial risk assessments that include information on the likelihood of the

[129] *Id.*

[130] Memorandum from the Board of District Court Judges, *supra* note 81, 1.

party to appear and domestic violence issues, AP&P supervision histories, employment and income verification, residency information, and criminal histories. By having current assessment results available at each stage where a pretrial release decision is made, judges will have the information they need to make informed, individualized decisions.

A validated pretrial risk assessment, with an accompanying risk level or score that is clear and understandable, is critical to this stage of the process:

> [W]hile complete predictability will never be attained, a pretrial risk assessment tool nevertheless allows a judge to say, for example, "This defendant is scored as 'low risk' or 'category one,' and accordingly I know that his performance should look like that of other defendants in the past who have been scored the same, which means that he likely has a 95% chance of showing up for court and a 91% chance of not committing a new crime."[131]

These assessments also help isolate what conditions of release, if any, may be relevant, confirm when and under what circumstances a no pretrial release decision can appropriately be made, and support that decision. [132]

When the committee examined the literature, heard from the experts, and looked at the trends both locally and nationally, the question was not whether a risk assessment tool should be implemented statewide, but rather what kind and how soon. There are a number of different types of validated assessments in use in various places. Some of these assessments use both static and non-static factors, meaning they collect data on the individual from various sources, such as criminal histories, prior failures to appear, etc., and also employ a short interview, usually consisting of between 5 and 15 questions, with some verification of information provided. This is the model Salt Lake County has developed and is the favored model in a number of jurisdictions. Others use an entirely static tool, meaning there is no interview with the arrested person, but instead just the collection of data from various public databases.

The committee collected information about both types of tools from a number of sources. This included consulting with Salt Lake County and the researcher who helped develop and validate its tool. It also included consulting with representatives from

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[131] SCHNACKE, MONEY, *supra* note 19, 54.

[132] *See U.S. v. Salerno*, 481 U.S. 739, 747 ("Congress did not formulate the pretrial detention provisions [of the Bail Reform Act] as punishment for dangerous individuals. . . . There is no doubt that preventing danger to the community is a legitimate regulatory goal.").

jurisdictions that have employed a purely static tool. There is a cost and time savings associated with a static tool, and it would be easier to employ remotely—something that may be of value to our more rural jurisdictions. Additionally, a static tool avoids some of the potential problems associated with the introduction of interviewer-based bias and the potential for variations in quality associated with the differences in interviewers' skills.

According to the Arnold Foundation, following a meta-analysis of the risk assessment tools used nationwide since the early 1960s, "the strongest predictors of FTA [(failure to appear)] and NCA [(new criminal activity)] were static factors such as prior convictions, prior misdemeanors, prior felonies, and prior failures to appear. In addition, the more dynamic factors such as residence and employment were less predictive or not predictive at all."[133]

The committee had a number of conversations with representatives from the Arnold Foundation and with pretrial services representatives in Arizona, which has implemented the Foundation's PSA-Court assessment statewide following a smaller pilot program. For a variety of reasons, the committee concluded that the PSA-Court tool, or one like it, should be implemented statewide. Using the PSA-Court as its standard, the committee determined the following about any pretrial risk assessment that is used:

- The tool must be research- and evidence-based, meaning there is empirical evidence to support its use in this context.[134]
- The tool must be either locally or nationally validated (meaning the tool has been statistically confirmed to do what it is expected to do), and if nationally validated, there must be a plan in place to validate it locally after one year.

[133] MARIE VANNOSTRAND, CHRISTOPHER T. LOWENKAMP, ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 5 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf.

[134] During the course of its research, the committee learned that a number of jurisdictions prepare "risk assessments" of inmates. Some of these appear to be used for jail management purposes, such as determining where particular individuals should be housed or what risk factors they may present in a jail setting, and the committee presumes they are appropriate for this purpose. However, some that the committee saw appear to be used for making pretrial release decisions. To the best of our knowledge, none of these assessments have been validated for that purpose. To the extent these assessments are being used to make pretrial release decisions that practice should cease.

- The tool should measure the risk of failure to appear and the risk of committing a new offense during the pretrial period. Also, if possible, it should have a valid mechanism for identifying the potential for violence.
- The committee recommends a tool that is capable of being administered without an interview (i.e., one that uses static rather than dynamic factors) as an interview-based tool may be impractical in some areas,[135] so long as it has the same or better outcomes than the interview-based tools currently in use.
- It should be cost- and time-effective, meaning ideally it would take less than 30 minutes to complete.
- It must be one that will work with our existing data systems—understanding that those systems may need to be modified going forward—and capable of prompt implementation.

The committee recommends that whatever tool is selected be employed statewide and that jurisdictions avoid adopting different assessment tools in different parts of the state. Doing so ensures quality and uniformity. It also makes training easier and provides a better basis for evaluating how the systems are working.

Systems need to be established that give the judge access to the results of the assessment any time a release decision must be made, including at the probable cause review stage. Judges should consider the results, along with the other facts available to them, and determine whether to order release. If the person presents a low pretrial risk, and the circumstances warrant, the judge should order the person released on recognizance with instructions to appear for court. If the person presents a moderate risk, or it appears release conditions are necessary or appropriate, the person should be released on the least restrictive conditions necessary to address an identified risk. If the person presents a high pretrial risk, the court should examine whether the person can be held without monetary bail and, if so, enter a no bail hold and then review that decision as the matter proceeds and circumstances warrant. If after exhausting these steps the judge is required to set monetary bail, the judge should do so with guidelines to be provided by the pretrial release committee. This process, outlined in the

[135] The committee understands that, as part of the implementation of JRI, risk and needs screening tools will be administered to all incarcerated persons, that these will require an interview, and that some of these interviews will be done remotely. If a static tool is not feasible for some reason, it may be possible to add to these screening interviews a pretrial risk assessment component.

flowcharts included in the addenda to this report, ensures that pretrial release without unnecessary monetary conditions remains the presumption and preserves judicial discretion to make an individualized decision.

5. ***Pretrial supervision practices and procedures, that are appropriate to the size and needs of the community involved, should be developed and implemented.***
    a. ***Because release conditions will be imposed, and alternatives to jail detention ordered, a mechanism to monitor and enforce them should be implemented.***
    b. ***The court or local governments should consider an automated system that uses phone calls or other technology to remind defendants of upcoming court dates.***

The ABA's standards governing pretrial release state that "[e]very jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions…."[136] Additionally, "[p]retrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis."[137]

Each jurisdiction in the state needs to have a team, the size and sophistication of which will vary, to provide an appropriate level of pretrial supervision. At present, only Salt Lake County has an established pretrial services agency. The least restrictive conditions pursuant to which individuals should be released from custody include things like periodic in-person and/or telephone check-ins; random drug and alcohol testing; classes and/or counseling; curfews; and electronic monitoring. For these conditions to be meaningful, someone must monitor compliance with them and "promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial."[138]

There are private, for-profit providers who provide some or all of these services, but private providers may not be the answer. Many defendants cannot afford these services. After all, if they cannot afford monetary bail, it is unlikely they will be able to

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[136] ABA PRETRIAL RELEASE STANDARDS, *supra* note 126, 10-1.10.

[137] *Id.*

[138] *Id.* at 10-1.10(f). That is not to say every person released requires supervision. As we have seen with sentencing and probation, individuals who are low risk to reoffend and have low needs should not be actively supervised.

afford a private pretrial services provider. This also raises constitutional concerns about punishment before conviction. So, while private providers may be appropriate for some things in some circumstances, they are not a complete solution to the problem.

The committee understands that not every community in the state has the same needs or the same resources; pretrial supervision teams necessarily must be tailored to fit the size and the needs of the particular community involved. Implementing this model will take time and require the dedication of resources. The committee did not have the time or the resources to develop a model pretrial program tailored to fit the needs of the various jurisdictions in the state. The committee recommends the pretrial committee undertake this task. The committee further recommends that each county that operates a jail facility and does not currently have a pretrial supervision program designate a liaison to that committee so that each jurisdiction can develop a program that serves the needs of their community and meets the standards set forth by the ABA and others.

The committee did identify one thing the judiciary can and should do early on that will be fairly simple to implement. There is research showing that one of the easiest and most effective ways to reduce failures to appear is to institute a notification system. We are all familiar with the reminder calls, texts, and emails routinely used by everyone from doctors and dentists to hairdressers. These reminders are effective in reducing missed appointments and, not surprisingly, they work for courts, too. Michael Jones of the Pretrial Justice Institute, who addressed the committee, reported that one county in Colorado decreased its failure to appear rate by 60% after instituting a telephone reminder system for court dates. Salt Lake County Pretrial Services is developing a smartphone app that would perform a similar function—reminding defendants of their court dates. This is a relatively simple, concrete step the judiciary can and should take statewide to reduce failure to appear rates.

6. ***Pretrial release is an individualized decision. Judges should not set monetary bail based solely on the level of offense charged.***
    a. ***The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases, e.g. traffic.***
    b. ***The Uniform Fine and Bail Schedule should be renamed "Uniform Fine Schedule."***

Pretrial release decisions should be individualized based on a defendant's risk of failure to appear and threat to public safety.[139] Moreover, the court should impose the least restrictive conditions to release that are necessary to address the particular risk presented. Under the current system, however, monetary bail amounts are dictated by a schedule that looks only at the level of the offense charged, and not individual circumstances, and the Rules of Criminal Procedure require the monetary bail determination to "coincide with the recommended bail amount in the Uniform Fine/Bail Schedule *unless the magistrate finds substantial cause to deviate from the Schedule*."[140] The committee recommends that the schedule be revised to apply only to fines that may be imposed at the time of conviction, or amounts that may be paid and are subject to forfeiture in non-mandatory appearance cases, such as traffic citations, and that pretrial release concepts, including monetary bail, be removed from the schedule.

The "Uniform Fine and Bail Schedule" combines two distinct concepts that exist at opposite ends of the prosecution process. Fines reflect part of the penalty that courts may impose at the end of the process—after the defendant has been convicted and as part of sentencing. "Bail" as it is used in this context refers to the amount of money that may be pledged to the court, personally or through a surety, to secure release from custody prior to trial and conviction. There is not necessarily any logical connection between the two. The fine/bail schedule in Utah appears to have developed to accommodate the legal mechanism that we use to address traffic and other minor citations for which an appearance in court is not required. Under Utah Code section 77-7-21, a citation may be used in lieu of an Information "to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited."[141] In other words, for those cases in which a court appearance is not required, the recipient of

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[139] Pepin, *supra* note 53, 3.

[140] UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

[141] UTAH CODE § 77-7-21.

the citation can pay the amount set forth on the schedule as "bail" and when the person fails to appear, that bail is forfeited and imposed as a fine for the offense. This is a useful mechanism for addressing these cases. Whether it should be changed is beyond the scope of this committee's work. If it is retained, however, it should apply only to those offenses designated as "non-mandatory court appearance" in the schedule or by a judge.

One benefit of the fine/bail schedule in the pretrial release context is that it provides some level of uniformity in setting the amount of monetary bail across different courts and judges.[142] The committee believes that guidance and standards for handling pretrial release decisions, including the setting of monetary bail where it is necessary, are useful and should not be abandoned. Such guidelines, however, must recognize that pretrial release is an individualized decision, not one susceptible to plugging into a matrix. So, such a schedule could be expressed in ranges, not absolute figures, and should take into account risk factors. This schedule should be developed and promulgated by the pretrial release committee, keeping in mind the need to preserve judicial discretion in this area.

Another advantage of eliminating "bail" from the Uniform Fine and Bail Schedule, and deleting reference to it in rule 7(c) of the Utah Rules of Criminal Procedure is it will make clear that, when appropriate, judges can and should order appropriate individuals released on their own recognizance, or on any other conditions, as Utah law already permits.[143] Anecdotal evidence suggests that rather than doing this, judges currently reduce monetary bail to an amount that—hopefully—the defendant can afford. Conversely, Utah law allows certain individuals to be held without setting monetary bail, where there is substantial evidence to support the charge. These include persons: (a) who commit capital felonies, (b) who commit felonies while on probation, parole, or on pretrial release, (c) who commit a felony "and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction . . . if released," and (d) who commit a felony and violate a material condition of pretrial release.[144]

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[142] This uniformity may not be as uniform as commonly believed. By way of example, the schedule is silent on the question of what to do when there are multiple offenses charged – do you determine a monetary amount for each offense and then add them together, or do you set monetary bail based on the most serious offense charged? Judges in different districts—and often judges in the same districts—have opposite views on this.

[143] UTAH CODE §§ 77-20-3, 77-20-1(2).

[144] UTAH CODE § 77-20-1(1).

Anecdotal evidence suggests these provisions are rarely if ever invoked and individuals are almost never held without bail even when the circumstances warrant it. Instead, the practice has been to set a monetary bail amount that exceeds what the defendant could reasonably afford—with no guarantee the defendant or a commercial bail bondsman will not be able to pay it. Training judges to release on recognizance when circumstances warrant it, and to order "no bail" when circumstances warrant it, furthers transparent decision-making.

Finally, another reason to eliminate pretrial release and monetary bail from the fine/bail schedule is to eliminate potential court challenges. The committee takes no position on the merits of any legal challenge to Utah's Uniform Fine and Bail Schedule. The committee notes, however, that state and federal courts in a number of jurisdictions have struck down "bail schedules." Some have done so on statutory grounds,[145] others on constitutional grounds, relying on both due process, [146] and excessive bail clauses.[147] The features most commonly found in bail schedules that are struck down are fixed monetary bail amounts, rather than ranges,[148] and explicit or implicit requirements that the court set monetary bail in these amounts.[149]

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[145] *Pelekai v. White*, 75 Haw. 357, 861 P.2d 1205 (1993) (striking down bail schedule because it violated Hawaiian statutory provision requiring the amount of bail be set at the discretion of the judge on an individualized basis).

[146] *Clark v. Hall*, 53 P.3d 4116 (Okla. Crim. App. 2002) (striking down bail schedule because it "sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances" in violation of due process rights of citizens to an individualized determination of bail as guaranteed by Oklahoma Const. art. 2, § 8); *see also Ackies v. Purdy*, 332 F. Supp. 38 (D. Fla. 1970) (holding that setting bail according to master bond list which resulted in defendants being held anywhere from three days to three weeks violated due process clause of 14th Amendment).

[147] *Woods v. City of Michigan, Ind.*, 940 F.2d 275 (7th Cir. 1991) (discussing the possibility that bail schedules may be unconstitutional if "the bail amount listed on the schedule is excessive for a particular defendant accused of having committed a particular crime," thus running afoul of the 8th Amendment); *see also People v. Rosario*, 2015 WL 2445971 (V.I. May 20, 2015) (finding fixed amount bail schedule could violate 8th Amendment if the amount set according to the schedule was excessive as applied to a particular defendant).

[148] *See Pelekai*, 861 P.2d at 1210 (concluding that bail schedule setting fixed amount was illegal, but use of bail guidelines clearly leaving bail amount to discretion of judge based on individualized determination was permissible); *see also Demmith v. Wisconsin Judicial Conference*, 480 N.W. 2d 502 (Wis. 1992) (remanding fixed amount bail schedule to Judicial Conference to consider implementing bail schedule with range of amounts which would satisfy statutory requirement that bail guidelines must "relate primarily to individuals"); *Ex parte Jackson*, 687 So.2d 222 (Ala. Crim. App. 1996) (concluding that bail schedule listing a recommended range of amounts was permissible so long as bail was set after an individualized determination considering several factors).

[149] *People of the Virgin Islands v. Simmonds*, 2007 WL 1964540 (June 25, 2007) (holding that wholesale adoption of Court's Bail Schedule Order setting fixed amounts for bail based on charged offense as the

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7. ***Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release.***

Judges who have scores from a validated pretrial risk assessment tool will be in a much better position to make informed pretrial release decisions. These tools, however, do not answer every question or address every situation. Even with a pretrial release score, judges will have to conduct "bail hearings" and gather additional information. In Salt Lake County, judges can request from the county pretrial services agency a narrative report that explains the results of data they have gathered, makes detailed recommendations, and articulates what conditions if any should be imposed on the defendant's release. This "Sterling Report" is a useful tool that goes beyond a risk screening and the committee encourages other counties to adopt similar systems. Where such reports are not available (and even where they are), the court will have to rely on counsel to provide information and explain its significance.

Our survey confirmed that the practice in most courts in the state is each side simply proffers information to the court, much of it unsubstantiated, and then expects the judge to make a reasoned decision. That practice needs to change. Rules should set forth what information should be provided, in what form, and how that information bears on the release question. Release options should be explored and arrangements made before the hearing. Potentially affected parties should be consulted and given an opportunity to be heard. And all of these matters should be discussed by counsel in good faith in advance of the hearing. In this way, judges will be better educated and have the best opportunity to make sound pretrial release decisions.

8. ***The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered.***

Of the twin goals of pretrial release—ensuring attendance at court and ensuring the defendant does not commit new offenses while on pretrial release—monetary bail is designed to address only the first. Monetary bail is not intended to protect the public or victims from harm that could result if a person is released from custody, nor could it. The risk that a person will commit a new offense if released may affect the dollar amount the judge sets for a monetary bond, thereby reducing the likelihood the person

only method for determining bail amount violated the federal Bail Reform Act); *see also Pelekai*, 861 P.2d at 1205 (court order establishing fixed amount bail schedule as exclusive means for determining bail amount); *Woods*, 940 F.2d at 278 (same); *Clark*, 53 P.3d at 416 (bail determined by statute and set at nondiscretionary amount).

will be able to post monetary bail, and therefore be released from custody. However, if the defendant can pay that amount—or can obtain a bail bond[150] by paying 10% of that amount to a commercial bail agent—the person must be released from custody notwithstanding the risk they pose of committing new offenses.

Monetary bail purports to accomplish the goal of ensuring a defendant comes to court by a simple mechanism—if the defendant fails to appear, the bond is forfeited and the money paid to the state. For the commercial bail industry, this creates what they maintain is a powerful financial incentive to make sure the defendants they bail out show up for court. Bail agents are incentivized because they do not want to forfeit the monetary bail they have posted for the defendant. Defendants (or their families) are incentivized because if forfeiture occurs, the bail agent will come after them for the amount of the bond. Obviously, these financial incentives are built on one basic assumption—if a defendant fails to appear, the bond will be forfeited and paid to the state. Our committee discovered, however, that in Utah there is little to no risk that a bail bond will be forfeited even if the defendant fails to show up for court.

The committee obtained court data from district courts statewide for calendar year 2013 and discovered the following: Of the 16,981 defendants who were released on bail bond, 3,989—or approximately 23%—failed to appear at a subsequent court hearing.[151] For the 3,989 defendants who failed to appear, the court sent out forfeiture notices in only 990 cases—or 25% of the time. This means that 75% of the time, when a defendant failed to appear for court, the forfeiture process was *not even initiated*, let alone completed. In the 990 cases where forfeiture notices were sent, motions to forfeit were filed in only 32 cases, or 3% of the time. Prosecutors are required to file these motions, and these figures show this is not consistently being done. In sum, of the almost 4,000 defendants who failed to appear, only 32—or less than 1%—made it to the point of facing a motion to forfeit bail.[152]

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[150] Under the Utah Code, a bail bond is "a bond for a specified monetary amount that is … issued to a court … as security for the subsequent court appearance of the defendant upon the defendant's release from actual custody pending the appearance."

[151] The numbers obtained from Utah's court data seem consistent with other data the committee reviewed. Our county jail survey reported that during 2014, 14,329 inmates posted bond, with only 5,351 posting cash bail. Information on County Jails Occupancy and Pre-Trial Detainees, *supra* note 113.

[152] A forfeiture of bail does not follow every single time a defendant fails to appear. Sometimes people legitimately forget their court date and reschedule an appearance; sometimes they are picked up by law enforcement before the forfeiture process is completed; and occasionally the bail agent will locate and surrender the defendant to the court or a county jail. However, we know that 75% of the time the notice that triggers the forfeiture process, which is due within 30 days of the non-appearance, is not even

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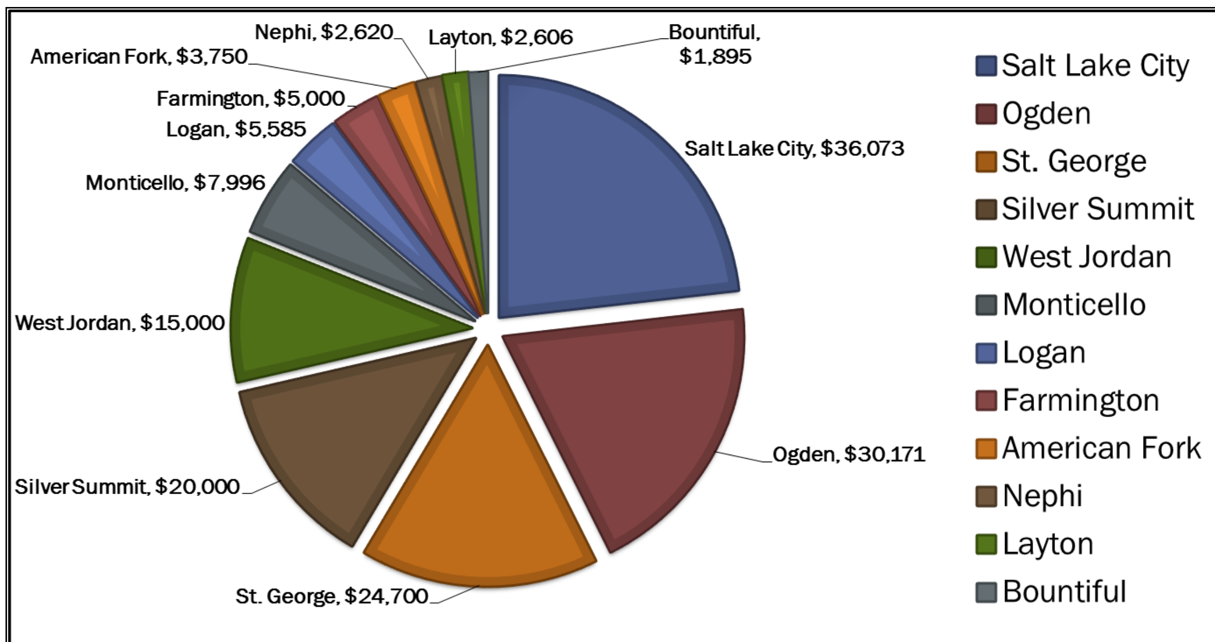
Data assembled by the Utah Insurance Department confirms these findings. There are currently 39 licensed commercial bail bond agencies in Utah, all regulated by the Utah Insurance Department. The data the Department presented showed that in 2014 the total amount of bail bonds written for Utah's courts was $110,546,649. The total judgment forfeitures paid by bail agencies that same year was $418,403—or 0.37%.[153] In fiscal year 2015, commercial bail bonds written for Utah's courts totaled $115,759,441, with $99,866,784 written in district court and $15,892,657 written in justice court. *See* Table 2. That same year, bail agencies paid a total of $246,892 in forfeitures, with $155,396 in district court (0.16% of the total written) and $91,496 in justice court (0.58% of the total written). *See* Table 3.

Table 2. District Court Forfeiture FY 2015 – Top 12.



District Court

Total Bail: $99,866,784

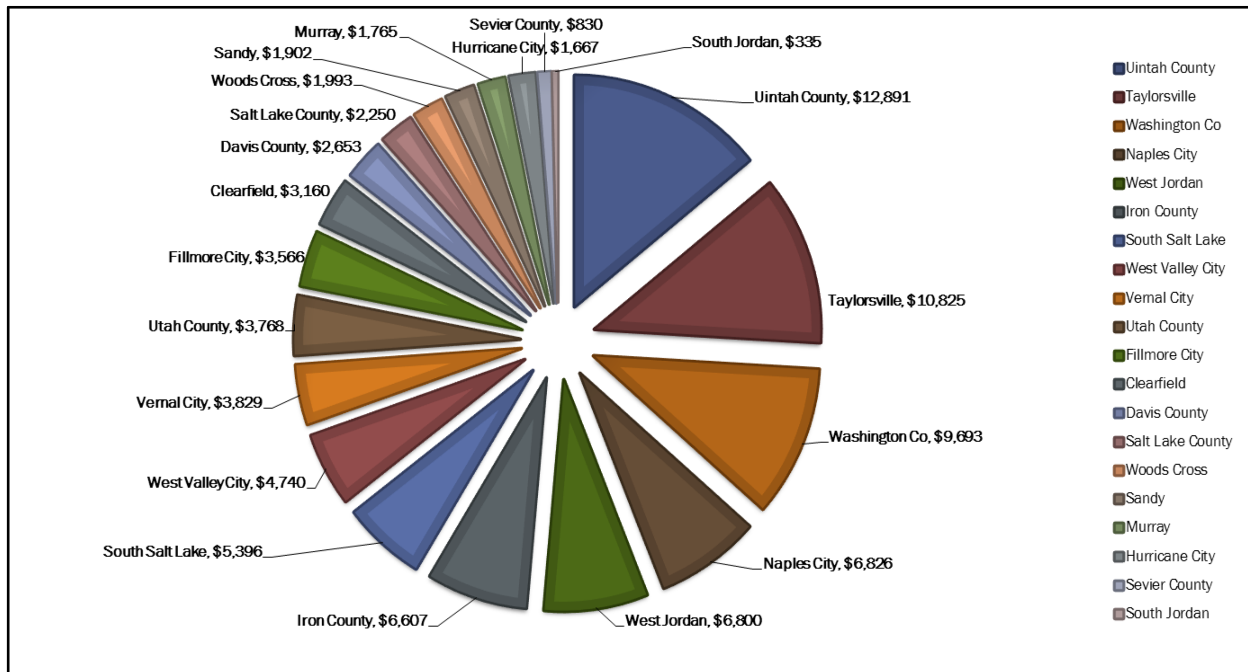
Total Forfeiture: $155,396

Source: Utah Department of Insurance, 2015

sent. That means in all of these instances the bond is automatically exonerated. Similarly, motions to forfeit are not filed every time a defendant fails to appear, but only when the defendant fails to appear and the surety agent does not locate and surrender them within 6 months. The low numbers of motions filed suggests that prosecutors are not filing motions to forfeit when they should be filed.

[153] According to the Insurance Department data, forfeitures in 2014 were more than double the forfeitures in 2013, which the total amount forfeited was $197,102.

Table 3. Justice Court Forfeiture, FY 2015 – Top 20.



Justice Court
Total Bail: $15,892,657
Total Forfeiture: $91,496

Source: Utah Department of Insurance, 2015.

In short, defendants released on commercial bail had a 23% failure to appear rate in 2013. A failure to appear rate of between 20 to 25% seems reasonably consistent with studies that have been done on the topic. But in Utah, when such a defendant fails to appear, there is a 75% chance the court will not even send the notice required to commence forfeiture proceedings; and, if it does, there is a 97% chance forfeiture proceedings will not make it past the motion phase.[154] Successful forfeitures account for considerably less than 1% of the total commercial bail posted with the court. Perhaps the only bright spot here is the record for collecting judgments in the rare instances in which forfeiture actually occurs. Thanks to the efforts of the Utah Insurance Department, commercial bail that is forfeited is actually collected almost 90% of the time.

A large part of the problem described above is the cumbersome statutory process for bail forfeiture. Over the years, with incremental changes, the forfeiture process has

[154] This data does not take into account cases where a motion may not be justified.

grown even more burdensome and difficult with some requirements seemingly imposed only for the purpose of making forfeiture more difficult and therefore less likely to occur. As an example, Utah Code section 77-20b-101 states that the clerk of court must, within 30 days of the defendant's failure to appear, "mail notice of nonappearance by certified mail, return receipt requested…;" notify the surety as listed on the bond "of the name, address, and telephone number of the prosecutor;" deliver a copy of the notice to the prosecutor "at the same time notice is sent" to the surety; and "ensure that the name, address, and telephone number of the surety or its agent as listed on the bond is stated on the bench warrant."[155] Additionally, the court clerk must do all of this not only for the bail agent but also for the underlying surety if the surety is different than the agent, requiring a careful examination of the bond itself (if one is actually filed with the court).[156] Any misstep may be fatal—when this occurs, the surety and its agent may be "relieved of further obligation under the bond…."[157] As noted earlier, there were almost 4,000 failures to appear in 2013. The cost of certified mail is $6.48. So, the State of Utah would be required to spend almost $26,000 on postage costs alone, just to send the notices required to start the process for district court cases.[158]

Additionally, responsibility for successfully forfeiting bail is divided between the court clerk, who is statutorily tasked with notice and related issues, and the prosecuting attorney, who must file the motion for bail forfeiture.[159] If the prosecuting attorney fails to follow up with a timely motion to forfeit the bail, it is again automatically exonerated.

At present, the supposedly powerful incentive that commercial bail bonds create to ensure court appearance does not exist. If commercial bail bonds are to have any utility, the forfeiture process must be simplified and improved. Specifically, we recommend:

- The notice process should be streamlined and updated. Notice to the surety and agent should be by electronic means sent only to a single email address the party provides at the time they post the bond. Such notices should be generated and sent automatically

[155] UTAH CODE § 77-20b-101(1).

[156] *Id.*

[157] UTAH CODE § 77-20b-101(3).

[158] The personnel costs necessary to prepare and manually mail these notices is many times greater than that.

[159] UTAH CODE § 77-20b-104.

from CORIS at the time of the hearing and/or issuance of the bench warrant.

- The surety can determine from the court file much of the information they need and artificial requirements for information to be included in written notices should be eliminated.
- Because this is a system purportedly built on financial incentives, creating financial incentives for agents to locate and surrender defendants early should be considered—for example, give the agent a reasonably short period of time to surrender a defendant and in return the bond is fully exonerated; then require the agent to pay an increasing percentage of the face amount of the bond as time goes on, until the full amount of the bond is forfeited. This would give agents real financial incentive to locate and surrender defendants who fail to appear instead of relying on law enforcement to do so.

There appear to be a number of legitimate reasons why courts have failed to diligently pursue forfeiture. Nevertheless, the judiciary needs to do a better job. Court personnel need to be trained and steps must be taken to ensure the process is commenced in a timely fashion and followed up as necessary. Finally, prosecutors must do their part in tracking and following up on these matters. Unless and until these steps are taken, these bonds truly are not worth the paper they are written on.

9. ***The Council should create a standing committee on Pretrial Release and Supervison Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, to develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders.***

The more time this committee spent studying the issue of pretrial release, the clearer it became that a long-term, sustained effort is necessary. Many states have worked on pretrial release issues and we talked to a number of them. Many of those efforts started the same way this one did—a committee tasked with exploring the issues. In each state we talked to, the work of these committees went on for years, not months, and those efforts were ongoing. The issues are too complex and there is too much at stake not to find a meaningful way to carry forward the work this committee has done.

Another thing that became clear over the last several months is that a centralized clearinghouse is needed where interested parties can go to collect information, seek

recommendations, and learn from the experience of others. We heard a number of stories about well-intentioned officials who undertook to improve their pretrial release practices, or set up pretrial service programs, only to find themselves quickly overwhelmed with the task and the associated costs. A multi-disciplinary committee focused specifically on these issues would be an invaluable resource. Such a committee could also serve the important purpose of creating a forum where the various stakeholders could address issues of common concern, seek input from others, and improve practices. If Utah wants to do pretrial release and supervision practices right, it will require a sustained effort. The creation of a standing committee, with a clear charter, moves this process forward.

10. ***Uniform, statewide data collection and retention systems should be established, improved, or modified.***
    a. ***Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively.***
    b. ***All stakeholders should collect consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of pretrial release and supervision practices.***
    c. ***The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices.***

Pretrial release and supervision data is spotty and inconsistent in Utah. In part, this is because there are different data systems in the different branches designed to accomplish different things. The committee recommends that all pretrial release and supervision stakeholders work to create uniform, statewide data collection systems or to improve or modify existing systems. First, and perhaps most important, accurate and up-to-date data is necessary for accurate and up-to-date pretrial risk assessments.[160] These assessments rely on data that resides within systems maintained by the courts, systems maintained by the executive branch, and systems maintained by the counties. It is essential to make sure these systems collect the right data in the right way. Additionally, accurate data from all stakeholders is necessary to measure our progress and the effectiveness of the changes we recommend. Adhering to evidence-based practices requires periodic review of how well those practices are performing. Identifying the particular changes that need to be made in this regard is beyond the

[160] As one example, a critical item necessary for a risk assessment is accurate information concerning prior failures to appear. Our system does not track this information as precisely as would be ideal.

scope of this report. We recommend that the pretrial release and supervision practices committee be tasked with identifying the shortfalls in existing data systems and making recommendations to fix them. This will allow all participants in the process to remain accountable.

11. ***Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices.***

The changes in pretrial release and supervision practices recommended in this report represent, for some, a very different way of doing business, and training for all participants in the process to help them understand the principles behind these efforts will be critical. Judges and lawyers need to understand how evidence-based practices bear on the pretrial release decision, the utility and limits of the assessments we recommend, and how best to approach these important decisions. Without training, these changes will not take hold in an effective, uniform way.

12. ***The public in general and the media in particular should be educated about pretrial release and supervision practices issues.***

Because the public and the media tend to use the amount of monetary bail "as a sort-of barometer of the justice system's sense of severity of the crime,"[161] it will be important to educate them on the principles behind pretrial release and supervision practices and the difficult decisions judges sometimes have to make. Judges strive to make sound pretrial release decisions, ones that do not result in harm to the public. Because pretrial release practices should derive from evidence-based risk assessments, coupled with the sound exercise of discretion, the "baramoter" the media and public are accustomed to using for gauging the severity of the crime will, in many cases, no longer fit. As such, the goal of education should be to help the public understand the principles behind these decisions.

Conclusion

The committee appreciates the opportunity to address the Judicial Council on this important issue. This report is just the beginning and only scratches the surface. Long-term, dedicated efforts are needed if we are going to get pretrial release and supervision practices right in Utah.

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[161] SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, at 115.

Appendices

Appendix A: Memorandum from the Board of District Court Judges to Chief Justice Matthew B. Durrant Regarding Recommendations for a Uniform Process for Setting Bail (May 29, 2015)

Appendix B: Information on County Jails' Occupancy and Pretrial Detainees (June 1, 2015)

Appendix C: Survey of District and Justice Court Judges Regarding Pretrial Release Practices (March 25, 2015)

Appendix D: Case Initiation by Warrantless Arrest Diagram

Appendix E: Case Initiation by Filing Information Defendant not in Custody Diagram

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E