The Prosecutor

Wanted: Prosecutors to Help Advance Pretrial Justice

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Prosecutors have a responsibility not only to convict law-breakers, but also to uphold the values, aims and effective operation of our justice systems.

This is an uncontroversial view held by major legal professional organizations. The American Bar Association (ABA) standards, for example, specify a duty to "seek justice, not merely to convict."[1] Similarly, standards from the National District Attorneys Association hold prosecutors responsible not only for ensuring that the guilty are held accountable, but also that "the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected."[2]

Both organizations stress the importance of a prosecutor's duty to be guided by societal interests over those of groups or individuals and, importantly, to seek reform to "improve the administration of justice." The ABA makes it clear that, "[W]hen inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."[3]

In recent months, a dismaying and seemingly endless series of news accounts have underscored how frequently current pretrial practice in the United States falls short of these ideals and how pretrial practice is an area that clearly demands remedial action and reform. Currently, pretrial systems often hinder rather than facilitate the administration of justice and the effects and outcomes of such systems fail to meet our national justice values and aims.

In short, advancing pretrial justice is an area ripe for the leadership of prosecutors, for the benefit of victims, communities, the accused, and society as a whole.

What Is the Problem?

Our current bail system fails to provide justice to victims, society or alleged offenders and it fails to keep our communities safe.

At the heart of the problem is the nearly universal use of financial conditions for pretrial release — *i.e.*, money bail. Placing a monetary value on release, mostly based on the charge, is a dangerous substitute for measuring an individual defendant's risks of flight or re-arrest. We have known this for a long time; even before 1964 when then-Attorney General Robert Kennedy said, "…usually only one factor determines whether a defendant stays out of jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?"[4]

Yet, thousands of times every day prosecutors ask for financial release conditions, defenders argue for them to be

[1] American Bar Association, "Criminal Justice Section Standards: Prosecution Function," 2014.

[2] National District Attorneys Association, "National Prosecution Standards Third Edition," 2009.

[3] American Bar Association, "Criminal Justice Section Standards: Prosecution Function," 2014.

[4] National Criminal Justice Reference Service, "Proceedings and Interim Report from the National Conference on Bail and Criminal Justice," 297 (1965), available at https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf.

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lowered, and judges feel satisfied when they make a decision to release or detain based on money. It's hardly questioned, as it's what we've always done.

In the words of Tim Schnacke, executive director of the Center for Legal and Evidenced Based Policy, "[S]etting a secured financial condition only creates an illusion of a decision, for the actual posting of that amount is now left to others —indeed, it is often left to chance — and a decision left to chance is no decision at all."[5]

Even when guided by an empirically based risk assessment tool, this process is akin to spinning a roulette wheel. Too often, those with financial means get out, even if they are dangerous, while poorer defendants, including many who will be found innocent or have their cases dismissed, remain incarcerated. All of this occurs without regard to public safety or court appearance risks. These practices have dangerous consequences regardless of whether they result in release or detention.

Who Gets Out and Who Stays In

A recent study by the Laura and John Arnold Foundation analyzed defendant characteristics and case records of more than 700,000 defendants in multiple jurisdictions. The findings showed that with nearly half of the most dangerous defendants — those assessed as most likely to skip court or get re-arrested before trial — were released pretrial without any supervision.[6] People who really ought to stay in jail were simply paying their way out because our current system doesn't allow us to adequately identify dangerous defendants and argue for their detention.

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Meanwhile, current pretrial practices keep thousands of other people in jail unnecessarily — roughly half a million on any given day — triggering a chain of unnecessary outcomes. Research shows that, controlling for other differences, defendants who are detained for most or all of the pretrial stage are convicted more and receive more and longer prison sentences.[7] Such disparity isn't fair and it isn't true justice.

A separate Arnold Foundation study showed that jailing low-risk people actually can create more crime by increasing their likelihood of future criminal activity; and it does so quickly. Even one day in detention left low-risk defendants 40 percent more likely to be re-arrested; re-arrest was 57 percent more likely after two weeks in detention.[8]

These findings are *not* counter-intuitive. People who are arrested and booked into jail but who cannot afford a few hundred dollars for bail are likely to have lives that lack stability and support. A few days behind bars can mean the loss of a job, of housing, family and caregiving disruption — all exacerbating instability. To expect that, upon release, these individuals will go back to living happy, healthy and lawful lives is a fool's errand.

Yet bail money all but ensures that many low-risk and medium-risk defendants will remain incarcerated pretrial simply because they don't have the means to pay for their release — often $500 or less.

Jailing unconvicted people because of their poverty is unnecessarily expensive, costing taxpayers $14 billion a year.[9] It is also almost certainly unconstitutional. The Department of Justice recently issued a rare Statement of Interest in *Varden v. City of Clanton*, stating that, "any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the 14th Amendment's Equal Protection Clause, but also constitutes bad public policy."[10]

5 Schnacke, T., "Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial" (U.S. Department of Justice, National Institute of Corrections, 2014) 38.

6 Laura and John Arnold Foundation, "Developing a National Model for Pretrial Risk Assessment: Research Summary," (2014) 1.

7 Laura and John Arnold Foundation, "Pretrial Criminal Justice Research: Research Summary" (2013) 3.

8 Arnold Foundation, "Pretrial Criminal Justice Research" (2013) 5.

9 Sixty-two percent of jail inmates are convicted, according to: Minton, T. and Zeng, Z., Ph.D, "Jail Inmates at Midyear 2014" (Washington, DC: Department of Justice, 2015) 4. For the U.S. government's $22.2 billion estimate of the cost of local correctional institutions (jails) in 2011, *see* Kyckelhahn, T., Local Government Corrections Expenditures, FY 2005–2011, (Washington, DC: Department of Justice, Bureau of Justice Statistics, 2013), 3.

10 U.S. Department of Justice, "Statement of Interest of the United States, Case 2:15-cv-00034-MHT-WC" (Washington, DC: Department of Justice, 2015).

What Prosecutors Can Do

There are a number of ways that prosecutors can take a leadership role in advancing pretrial justice.

First, they can advocate for clear preventive detention statutes at the state level. Many states have a so-called "right to bail" as part of state statute. These statutes prohibit or greatly limit the court's ability to detain the most dangerous defendants in the interest of public safety and hinder the prosecutor's ability to argue for preventive detention. They force the system to gamble on a defendant's ability to raise enough money for bail. But how much is enough for a person we are truly afraid of? One million dollars? Two million dollars? If the court finds, through the use of an empirically based risk assessment tool and professional discretion, that an individual poses too much risk to release, we should be honest about our intentions and have the ability to detain.

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In some places, authorizing preventive detention may require an amendment to the state constitution. In 2014, New Jersey passed a constitutional amendment to allow for preventive detention as part of sweeping pretrial reform, and several other states are moving toward doing the same. Preventive detention — with appropriate provisions for due process — is a tool to be reserved for those who are a clear threat of flight or violence, but a necessary one for keeping the public safe.

Second, prosecutors can provide more early screening of cases. The 2011 National Symposium on Pretrial Justice, convened by former Attorney General Eric Holder, recommended, among other things, that experienced prosecutors screen criminal cases before each defendant's first appearance.[11] Such practice has threefold benefits. First, it allows the court to sift out meritless cases, preventing clogged dockets and reducing the number of people who are unnecessarily pulled deeper into the system. As discussed earlier, even short periods of detention can increase the likelihood of future criminal behavior. Second, early screening allows prosecutors to more quickly ensure that the charge in place is the charge that will be pursued, improving case processing and system flow. Finally, an early understanding of the charge, the weight of evidence and the circumstances of the defendant and any victims creates more opportunity for the use of alternate proceedings such as diversion or problem-solving courts.

Third, prosecutors should support the use of pretrial decisions informed by validated, empirically based risk assessment instruments, which are more sound than those based on gut instinct or charges alone. Risk scores also give prosecutors more confidence in their recommendations of detention, release with non-financial conditions, or release on recognizance. If such tools are not used in your jurisdiction or are used but not based on data or are not validated, you can play an active role in obtaining and testing them.

These tools also give prosecutors confidence in their arguments to release or detain. As Thomas Wine, Commonwealth's Attorney for Jefferson County, Kentucky, puts it: "Our prosecutors should not have to argue for release or detention without knowing the actuarial risk of a defendant. Without that information, we're all just guessing and keeping our fingers crossed."

Finally, examine what your colleagues are doing in other jurisdictions. There are a number of prosecutors across the country that either currently work in pretrial systems employing legal and evidence-based practices or who are involved in initiatives that are taking them through that process now. Jurisdictions like Mesa County, Colorado, Washington DC, Mecklenburg County, North Carolina, Milwaukee County, Wisconsin, and Louisville, Kentucky, are just a few places where prosecutors are actively involved in improving pretrial justice and incorporating risk assessment when making decisions.

There is currently national dialogue about the myriad problems facing our criminal justice systems — from policing to parole — and pretrial is a critical part of that discussion. Prosecutors have a responsibility and an opportunity to advance pretrial justice to meet professional standards, justice values and desired outcomes. For more information advancing pretrial justice, visit www.pretrial.org.

[11] Pretrial Justice Working Group, "Recommendations of the 2011 National Symposium on Pretrial Justice" (Washington, DC: Pretrial Justice Institute, 2012). http://bit.ly/1DVzQA4.