Recommendations for the Implementation of a Universal Pretrial Risk Assessment Tool

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Recommendations for the Implementation of a Universal Pretrial Risk Assessment Tool

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I will never forget this experience, and I am so proud to say I am a graduate of the University of Wisconsin – Platteville. I would recommend this program to anyone! God’s continued blessings to all of those with whom I have crossed paths over the last two years.
Abstract

Recommendations for the Implementation of a Universal Pretrial Risk Assessment Tool

Hannah Behnke

Under the Supervision of Dr. Klemp-North

Statement of the Problem

As stated in the Constitution of the United States, pretrial defendants awaiting trial are afforded certain rights such as the presumption of innocence, the right to bail that is not excessive, and the right to due process of the law (VanNostrand & Keebler, 2009). Money is a large factor in determining pretrial detention; those with money may be able to purchase their freedom, while those who are poor are more likely to remain in jail pending trial, which can sometimes last years (Pretrial Justice Institute, 2015). Over 60% of inmates in jail are awaiting trial. The average jail bed costs anywhere from $60 to $200 per day, and pretrial incarceration costs upwards of $14 billion taxpayer dollars each year. Even short stints in jail can negatively impact a defendant’s employment, education, and family (Pretrial Justice Institute, 2015).

The first pretrial service agency was established in New York City in the 1960s to assist the courts with release decisions that would uphold the rights of defendants while considering the defendant’s likelihood of appearing in court and their risk of danger to the community (Stevenson & Legg, 2010). Since that time, pretrial services and the tools used to predict pretrial risk have developed, yet there is no consistency. Risk assessments and pretrial programming vary between jurisdictions. The majority do not use risk assessments at all and instead rely on bond schedules, or preset monetary amounts based on the charge, to set bail. Many that do utilize risk assessments have not had them validated (Pretrial Justice Institute, 2015). To address the pretrial injustices that will further be explored in the research paper, a universal risk assessment
A tool that is utilized by all jurisdictions to generate unbiased, evidence-based release decisions is needed.

**Purpose of the Study**

In order to regain pretrial justice and uphold the Constitution, pretrial services, equipped with a validated risk assessment, should be expanded to every jurisdiction. The research will further explain the injustices occurring within the pretrial system to highlight the need for a risk assessment tool to aid the courts in determining a defendant’s custody status pending trial. This research will also explore various pretrial service agencies and their risk assessments tools to determine best practices and steps that can be taken toward a universal risk assessment. It will explore the theories behind the various measures included in the risk tool and state why a universal, validated pretrial assessment based on evidence is crucial to maintaining the justice in the criminal justice system.

**Methods of Approach**

Research will primarily be secondary through academic journals, textbooks, agency websites, and government-funded websites. Multiple pretrial risk assessment tools will be compared and contrasted. Theories will be used to support which factors used in the risk tools are the most relevant as well as to highlight the importance of practices founded on evidence.

**Anticipated Outcomes**

It will be apparent that there is a need for a universal pretrial risk assessment tool to begin a wave of improvements within the criminal justice system. Likely, the most important factors in a risk assessment will be identified as elements related to criminal history, the severity and type of instant offense, and other stabilizing factors, such as shelter, employment, and active drug or alcohol abuse. It is anticipated that the outcome will demonstrate the necessity of a universal risk
tool to promote equality and justice for pretrial defendants while upholding the dignity of the criminal justice system and providing for the safety of our communities.
# Table of Contents

Approval Page ................................................................. i

Title Page .................................................................................. ii

Acknowledgements ................................................................... iii

Abstract ..................................................................................... iii

Table of Contents ....................................................................... vii

I. Introduction ............................................................................. 1

II. Literature Review .................................................................... 2

A. Introduction ........................................................................... 2

B. Pretrial Statistics ................................................................. 2

C. The History of Pretrial Bond .................................................. 3

D. The Addition of Pretrial Services .......................................... 7

E. Overview of Current Pretrial Injustices ............................... 8

F. Profile of Current Pretrial Practices ....................................... 11

G. Challenges to Implementing a Universal Risk Tool .............. 19

H. Conclusion ............................................................................. 21

III. Theoretical Framework .......................................................... 21

A. Evidence Based Practices ..................................................... 21

B. The Risk Principle ............................................................... 22

C. Social Control Theory .......................................................... 24

IV. Findings and Recommendations .......................................... 25

A. Collaborative Effort ............................................................. 25

B. The Necessary Components ................................................ 27
C. Risk Prediction ........................................................................................................... 27

D. Maintaining Fidelity .................................................................................................. 29

V. Conclusion .................................................................................................................. 29

VI. References ................................................................................................................ 32
I. INTRODUCTION

Every day, judges make decisions that have major implications on the community, federal, state, and local budgets, and pretrial defendants and their families. The decision plays a role in influencing whether defendants are sentenced to jail or prison, how long they will be incarcerated, and the likelihood of these people committing crimes again in the future. This gravely important decision is determining which pretrial defendants should be released or detained while waiting for their cases to be resolved.

The majority of jurisdictions still make this decision was made one of two ways. The first approach is a money bail schedule. Judges allow defendants to be released if they can afford the fee associated with the charge. The second approach is judges making their release decisions purely based on intuition. Using their professional discretion, judges make assumptions based on their knowledge and experience. While the importance of professional discretion cannot be overlooked, there is no evidence that this produces an accurate assessment of a defendant’s risk (Pretrial Justice Institute, 2015).

The pretrial release decision needed a system that was based on more than money and intuition. Researchers advocating for pretrial justice began to study the benefits of empirically-derived pretrial risk assessment tools. These tools have been proven by research to accurately place defendants into various risk categories to show their likelihood of being successful on pretrial release; that is, whether they are capable of attending all of their court appearances and not being arrested on new charges. Research continues to show that these risk tools’ predicted success rates accurately match a released defendant’s actual success rate (Pretrial Justice Institute, 2015).

The purpose of bail is to provide due process to the accused, ensure the defendant’s appearance in court, and protect victims, witnesses, and the community from any future threats.
or danger. Bail is used in an attempt to secure the release of someone who has been charged with a crime. The process begins when a person is either arrested or issued a summons to appear before a judicial officer. Judges then decide if the person should be detained or released either via financial conditions, their own recognizance, community supervision, or a combination (Mamalian, 2011).

Pretrial release is to be ordered with the least restrictive conditions, as pretrial defendants are afforded the presumption of innocence. Therefore, it is important to understand a defendant’s risk. Treating each defendant individually empowers the court to make the best decision based on a defendant’s risks and needs.

II. LITERATURE REVIEW

A. Introduction

On his show Last Week Tonight with John Oliver (2015), John Oliver devoted an episode entitled “Bail” to addressing pretrial injustices and the need for reform in pretrial release. Discussing these pretrial issues on such a large platform was not common, but it is indicative of a change that is sweeping through the criminal justice system and effecting many Americans. Although pretrial release decisions have been made since the 11th century, research that acknowledges pretrial injustices and the necessity of risk assessment tools has only recently begun to increase. Many municipalities have taken steps to create their own validated risk assessment tools, but there are barriers to overcome, and there are still more judges making a release decision without a risk assessment than with.

B. Pretrial Statistics

There are approximately 12 million jail admissions across the United States in a given year (Subramanian, Delaney, Roberts, Fishman, & McGarry, 2015). Three out of every five jail
inmates are legally presumed innocent and are awaiting trial or case resolution. The other 40% are post-conviction and are either serving short sentences or being held on warrants or probation and parole violations. Jails are only designed to be used pretrial to hold those deemed to be a danger to society or a risk of flight. However, nearly 75% of pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses. In Los Angeles County, for example, the largest group booked into their jail system was charged with traffic and vehicular offenses (Subramanian et al., 2015).

Violent and property crimes reached its peak in 1991 and have been declining ever since. Violent crime is down 49% percent from 1991, and property crime is down 44% (Subramanian et al., 2015). Even though statistics show that the nation has become safer, jail rates continue to climb. Not only are more people in jail, the length of time spent in jail immediately following an arrest has increased from an average of 14 days in 1983 to 23 days in 2013 (Subramanian et al., 2015). Arrest rates, in keeping with crime rates, have also decreased, yet bookings into jail have grown. In 1983, there were only half as many bookings as arrests, but in 2012, bookings almost matched arrests. Those who were previously being released are now being booked into jail (Subramanian et al., 2015).

C. The History of Pretrial Bond

Few changes have been made to the system since pretrial release was developed in medieval England. In the Anglo-Saxon system in the 11th century, all crimes were bailable. The bail amount was equal to the penalty for the defendant’s crime (Woelfel, 2016). At that time, crime was punishable by a simple fine, and bond was determined by having it equal to the penalty upon conviction. In doing so, defendants were essentially considered guilty from the crime’s inception, and the bond did nothing to ensure a defendant’s appearance in court; for if a
defendant ran, he or she was going to lose that money as restitution anyway (Kalhous & Meringolo, 2012).

Into the 12th and 13th centuries, corporal punishment began to be used over monetary penalties which made calculating bond more complicated. Furthermore, corrupt practices began to develop. For example, the “hue and cry” was when a defendant was arrested and executed without trial (Kalhous & Meringolo, 2012). To change this, the 29th chapter of the Magna Carta, signed in 1215, stated that, “No Freeman shall be taken, or imprisoned, or be disseised [wrongfully deprived] of his Freehold, or liberties, or free Customs, or be outlawed, or any otherwise destroyed, but by lawful Judgment of his Peers, or by the law of the Land” (Kalhous & Meringolo, 2012, p. 804).

In 1275, the Statute of Westminster was the first to classify offenses as either bailable or non-bailable. It required that judges consider the nature of the offense, the weight of the evidence, and factors related to the defendant’s characteristics to determine if bail was acceptable. The statute failed to state a time limit in which an accused person must be considered for release, which the Habeas Corpus Act of 1677 addressed. The act stated that a defendant was entitled to be seen within three days of his or her arrest (Kalhous & Meringolo, 2012). Finally, the Bill of Rights in 1689 added that “excessive bail ought not be required” (Woelfel, 2016, p. 213).

The colonists brought the laws of the British with them, including the Statute of Westminster. Massachusetts made the first change in 1641, adding that there was an “unequivocal right to bail for non-capital cases” (Woelfel, 2016, p. 213). Pennsylvania added in 1682 that “all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great” (Kalhous & Meringolo, 2012, p. 806).
The United States Constitution did not specifically address pretrial release protections; instead, pretrial protections came about through a variety of federal and state acts. The Eighth Amendment established that bail should not be excessive, and the Federal Rules of Criminal Procedure of 1946 approved a provision that judges were to take into consideration the defendant’s criminal history. Beyond that, the weight of the evidence and severity of the offense also must be considered (Kalhous & Meringolo, 2012). Twenty years later, the Federal Bail Reform Act brought about the next round of pretrial change. Its purpose was to encourage judges to release defendants without setting a monetary bond. It created a presumption of release unless the judge believed that the defendant would flee or be a danger to the community. Judges were not to detain defendants purely based on predictions of dangerousness, and they were given a formula to aid them in making informed release decisions. However, they were still lacking the factual, unbiased information to do so (Makowiecki & Wolf, 2007).

Although cash bond only pertained to detention due to risk of flight, judges were taking matters into their own hands and detaining defendants that they viewed as dangers to the community under the cloak of the risk of nonappearance. In 1982, President Reagan began a task force to develop what would become the Bail Reform Act of 1984. He addressed the nation on February 18, 1984, stating that too many citizens were living in fear of crime, and that the liberal way of coddling criminals did not work and never would. He told a story of a man charged with armed robbery who was given a low cash bond and was quickly released. Four days later, the man committed another armed robbery and a policeman was shot. President Reagan used this incendiary story to make his case for preventative detention based on danger (Kalhous & Meringolo, 2012).
Numerous House representatives debated the idea of new bail reform, noting that preventative detention may not only violate the Eighth Amendment’s right to bail, but also the Fifth Amendment’s due process requirements. Representative John Conyers stated:

“When we authorize preventive detention in an unconstitutional way to permit the Federal courts to lock up a person without a finding of guilt based on the judge’s guess about the person’s future behavior, I think we have a constitutional problem” (Kalhous & Meringolo, 2012, p. 817).

Regardless, the House passed the bill which the Senate then approved with more enthusiasm, citing public concerns over increased crime committed by people on pretrial release. Senators Joe Biden and Edward Kennedy hailed the bill as a bipartisan effort that was far-reaching and urgently needed (Kalhous & Meringolo, 2012). Ultimately, the act stated that the court:

“shall order the pretrial release of [a defendant] on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the [court] determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community” (Kalhous & Meringolo, 2012, p. 822).

From that point on, judges were to determine that no condition or combination of conditions could reasonably ensure the safety of the community or the defendant’s appearance in court. The act favored pretrial release and provided for only a few extreme charges where the presumption would be detention. However, there were still no provisions as to how judges were to make these determinations.
D. The Addition of Pretrial Services

As bail reform began to shift, independent companies began exploring the idea of pretrial justice. Herbert Sturz, a journalist, and Louis Schweitzer, a wealthy businessman, began the Vera Foundation in the late 1960s after having visited a Manhattan prison. They realized that many pretrial defendants were in jail simply because they could not afford to pay. The two began to research ways to assist judges in determining if a defendant should be released on bond (McElroy, 2011).

Using a points system based on risk factors, the Vera Foundation calculated employment, family ties, and prior criminal history for each defendant. If the defendant did not seem likely to bail jump, staff recommended the defendant’s release, as well as conditions to ensure their appearance in court. They also called defendants to remind them of upcoming court dates and even personally brought some of them to court. This research became known as the Manhattan Bail Project, and after three years of research, 3,505 defendants were released as a result of the foundation’s recommendations. Only 1.6% failed to appear. As there were experimental and control groups, 60% of the experimental group were released, but only 14% of the control group. The Manhattan Bail Project proved to be an influential first step in the bail reform movement, proving that many defendants were spending weeks and months in jail unjustifiably (McElroy, 2011).

Building off of the Manhattan Bail Project and the judges’ need for factual, unbiased information regarding defendants, the federal criminal justice system created positions for 100 U.S. Pretrial Services Officers in 1976 (Makowiecki & Wolf, 2007). These 100 officers provided services to the courts that had never before been offered. Not only were they navigating unchartered territory, but they also had to try to convince other parts of the justice system that
this information was necessary. Critics wondered why these services needed to be added, as release decisions had been made for 200 years without them (Makowiecki & Wolf, 2007).

In 1982, President Regan signed into law a bill which transferred pretrial service agencies from an experimental project to a permanent part of the federal criminal justice system. By 1998, pretrial services was able to complete an investigation and make a bond recommendation on virtually every case that came through the federal court system. The goal of getting judges factual, unbiased information on which to base their release decision was met. However, pretrial detention rates are again on the rise, reaching an unprecedented high in 2004 when 60% of pretrial defendants were detained (Cadigan, 2007).

E. Overview of Current Pretrial Injustices

As stated in the Constitution of the United States, pretrial defendants awaiting trial are afforded certain rights such as the presumption of innocence, the right to bail that is not excessive, and the right to due process of the law (VanNostrand & Keebler, 2009). Money is a large factor in determining pretrial detention; those with money may be able to purchase their freedom, while those who are poor are more likely to remain in jail pending trial, which can sometimes last years (The Problem, 2016). Over 60% of inmates in jails across the nation are awaiting trial. Jails have become less of a place for convicted criminals to serve their sentences, and more of a place to hold pretrial defendants. The average jail bed costs anywhere from $60 to $200 per day, and pretrial incarceration costs upwards of $14 billion taxpayer dollars each year (The Problem, 2016). New facilities are also being built at the hands of taxpayers. For example, 90% of the population at the Baltimore City Detention Center is comprised of women awaiting trial. A new $181 million facility was recently built to accommodate more inmates (Wiseman,
From 1982 to 2011, local spending on corrections (primarily building and running jails) increased nearly 235% (Subramanian et al., 2015).

The financial equities of pretrial defendants vary greatly depending on the person. Money bail is increasingly being used not as an alternative to pretrial detention, but rather as an impediment to being able to obtain freedom. Bond is not meant to prevent release; rather, it is meant to prevent failure to appear (Wiseman, 2014). Those who are detained simply due to their inability to pay bond face the heavy burdens of pretrial detention. Although detaining people due to their inability to afford bail is unconstitutional, judges in many states continue to do exactly that (Wiseman, 2014). Thirty-eight percent of felony defendants will spend their entire pretrial period incarcerated. However, only one in ten of these defendants is denied bail with no possibility of release. The rest are given a bail that they simply cannot pay (Subramanian et al., 2015). In 2013 in New York City, 54% of defendants held in custody for their entire pretrial period remained there because they could not pay bail of $2,500 or less. Thirty-one percent of the non-felony defendants were held on bail amounts of $500 or less (Subramanian et al., 2015).

While pretrial detention is supposed to increase the likelihood of a defendant attending his or her court hearings, it actually can have the opposite effect. Prosecutors and attorneys often forget to produce writs to ensure the defendant’s appearance, or transportation falls through. Properly preparing for trial is also harder while detained. Viewing discovery and meeting with attorneys requires going to additional lengths (Woelfel, 2016). The difficulty in preparing for a defendant’s defense lowers the likelihood of success at trial. Faced with these difficulties, many pretrial defendants opt to accept plea bargains. Sometimes the amount of time spent waiting in jail for trial is even longer than what the potential sentence could be if found guilty, so a plea is viewed as an easier option (Wiseman, 2014).
Many detained defendants have been accused of low-level or nonviolent crimes, yet they are housed with convicted criminals and potentially violent offenders. Being incarcerated among these people can lead to learning new criminal behavior. Even if purely for self-preservation, violence may be learned (Wiseman, 2014). While results vary based on the length of detention and risk level, overall there are greater negative outcomes on defendant success and public safety when defendants are not released within a 24 hour window. Those detained longer are more likely to be rearrested before trial, be sentenced to prison, and to recidivate upon release. This is especially true for low-risk individuals who are held their entire pretrial period. In comparison with low-risk defendants released prior to trial, low-risk defendants detained are four times more likely receive a sentence of imprisonment that was three times longer. They are also 56% more likely to be rearrested after trial and 51% more likely to recidivate while on probation or supervised release (Subramanian et al., 2015).

Pretrial defendants who are incarcerated awaiting trial are presumed innocent. Yet the hardships placed on them are akin to someone who is viewed as guilty. Even if jailed only for a short time, detainees are likely to lose their jobs. Without income, the stabilizing factors that had been in a defendant’s life prior to his or her arrest, such as housing, transportation, and other basic necessities, are taken away (Wiseman, 2014). A survey in Baltimore showed that those who spent time in jail were less likely to hold a lease or mortgage after their release than they were prior to their arrest. Another study showed that those who were incarcerated pretrial were far more likely to be homeless upon release, even if their case was dismissed (Subramanian et al., 2015).

Public benefits such as Medicaid or food stamps may also be suspended or terminated. While suspended benefits may be easier to restart upon release, terminated benefits can take
years to regain. Even a short gap in benefits can be detrimental for those who are not working or have persistent mental health or physical ailments (Subramanian et al., 2015).

F. Profile of Current Pretrial Practices

There are very reliable factors to help assess risk in pretrial defendants. One factor that has proven to not be a strong predictor of pretrial success is the financial means to pay bail. Bail amounts are increasing, but pretrial failure rates remain at approximately 30% (Subramanian et al., 2015).

The pretrial release decision is usually made by a judge, magistrate, or bail commissioner. There is a presumption that the defendant will be released unless he or she poses a danger to the community or is likely to flee. Yet, six out of 10 people in jail are pretrial detainees. In 1990, the majority of felony defendants were released on conditions not requiring a cash bond. In 2009, only 23% of felony defendants were released on their own recognizance. Another 15% were released on another form of non-financial bail, and the remaining 61% were required to pay a cash bond. These defendants either had to pay the fee, put down the amount in collateral, or hire a bail bondsman in order to be released. Bail is being ordered more frequently, and the cost of bail is also going up. Taking into account inflation, the average bail amount in a felony case has increased 43% from 1992 ($38,800) to 2009 ($55,400). Many defendants remain in jail because they cannot afford to get out (Subramanian et al., 2015).

Data from 1990 to 2004 of the 75 largest counties in America show that 62% of felony defendants were released prior to the disposition of their case. Since 1998, pretrial releases requiring the posting of money have been more prevalent than non-monetary bonds. Those less likely to be released had either a prior arrest or conviction, were presently on probation or parole, or had a history of missed court appearances. Despite the accuracy of risk assessments, only
approximately 1,000 of the nation’s 3,000 counties have pretrial programs that offer release information. There are 200 to 300 pretrial programs working for these 1,000 counties. This means that in approximately 2,000 counties, defendants are not having their risk assessed, and judges are not receiving all the information they need to make a release decision (Mamalian, 2011).

Of those 200 to 300 pretrial programs, only 48% report using a pretrial risk assessment tool that has been validated. To be effective, risk tools need to be validated and empirically proven reliable for the population they deal with. However, even for those tools that are validated, there is no standard method being used. While a few programs have validated their risk assessments for their specific jurisdiction, states like Virginia, Ohio, and Kentucky created risk tools that are validated for pretrial services agencies across their entire state. Other states, such as Florida, are looking to follow suit (Mamalian, 2011).

Over the past 30 years, there have been certain components that became a staple in pretrial risk assessments: current charge, pending charges at time of arrest, history of criminal arrests and convictions, active community supervision at time of arrest, history of failure to appear, residence stability, employment stability, community ties, and substance abuse (VanNostrand & Rose, 2009). Virginia, Ohio, Florida, Kentucky, and the federal system have been at the forefront of pretrial risk assessment research, and their tools all employ a sampling of the aforementioned components.

**Virginia.** Virginia was one of the first states to employ a risk assessment tool. Between July 1, 1998 and June 30, 1999, 1,971 adult cases were followed through the criminal justice system. Their demographics varied based on their community of residence, sex, race, income, and education. Each defendant was charged with one or more offenses that could result in a
sentence of imprisonment. The dependent variable was pretrial success or failure. Pretrial failure was defined as failing to appear for court or being arrested for a new crime. Fifty variables were identified as possible risk factors (VanNostrand & Rose, 2009).

Analysis showed nine risk factors most accurately predicted pretrial failure:

- Primary Charge: Defendants charged with a felony were more likely to fail pending trial than those with a misdemeanor offense.
- Pending Charges: Defendants with pending charges at the time of their arrest were more likely to fail pending trial.
- Outstanding Warrants: Defendants who had outstanding warrants in other court systems for charges unrelated to the current offense were more likely to fail.
- Criminal History: Defendants with at least one prior conviction, misdemeanor or felony, were more likely to fail.
- Failure to Appear: Defendants who have failed to appear to court two or more times previously were more likely to fail.
- Violent Convictions: Defendants with two or more violent convictions were more likely to fail.
- Length at Current Residence: Defendants who have lived at their current address for less than one year were more likely to fail.
- Employment: Defendants who have not been employed continuously during the two years prior to their arrest, or who are not a primary caregiver for a child at the time of their arrest, were more likely to fail.
Drug Abuse: Defendants with a history of abusing drugs were more likely to fail.

Each factor was assigned one point, aside from previously failing to appear in court which was given two points due to its predictive strength. Each defendant was interviewed and given a score from 0 to 10, and then were categorized as low, below average, average, above average, or high risk. The risk assessment instrument was implemented in all Virginia pretrial service agencies by 2002 (VanNostrand & Rose, 2009).

In 2007, it was again researched for revalidation. This sample included 7,174 defendants from January 1, 2005 to December 30, 2005. The instrument was revised to only include eight factors; outstanding warrants was no longer found to be statistically significant. Therefore, the point system changed to a scale from 0 to 9. Pretrial success varied based on risk level, as demonstrated by the statistics of all defendants released on bond in this study (VanNostrand & Rose, 2009).

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Success</th>
<th>Failure to Appear</th>
<th>New Arrest</th>
<th>Technical Violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>92.9%</td>
<td>3.7%</td>
<td>1.2%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Below Average</td>
<td>87.5%</td>
<td>5.6%</td>
<td>1.6%</td>
<td>5.3%</td>
</tr>
<tr>
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<td>82.2%</td>
<td>6.7%</td>
<td>2.7%</td>
<td>8.4%</td>
</tr>
<tr>
<td>Above Average</td>
<td>76.3%</td>
<td>7.0%</td>
<td>4.2%</td>
<td>12.5%</td>
</tr>
<tr>
<td>High</td>
<td>68.0%</td>
<td>7.8%</td>
<td>6.2%</td>
<td>18.0%</td>
</tr>
<tr>
<td>Total</td>
<td>82.0%</td>
<td>6.2%</td>
<td>2.9%</td>
<td>8.9%</td>
</tr>
</tbody>
</table>

Ohio. At one time, counties in Ohio were using different methods to assess pretrial risk making release practices very inconsistent. Researchers selected 452 pretrial cases from 29
different locations to assess their pretrial standing first between September 2006 and June 2007, and then again from October 2008 to March 2009. To be included in the research sample, the defendant had to be an adult referred to pretrial services during the period of data collection.

Over 100 potential predictors for recidivism were studied (Latessa, Smith, Lemke, Makarios, & Lowenkamp, 2009). Seven items were found to be most related to recidivism and were factored into a risk assessment tool:

- Was the defendant older or younger than age 33 at the time of his or her first arrest?
- How many times has the defendant failed to appear for court in the last 24 months?
- Has the defendant been incarcerated three or more times?
- Was the defendant employed at the time of his or her arrest?
- Has the defendant lived at his or her current residence for the last six months or longer?
- Has the defendant used any illegal drugs in the last six months?
- Does the defendant have a severe drug use problem?

Defendants were divided between low, moderate, and high risk based on their score. Five percent of low risk cases were arrested while out on bond, compared to 18% of moderate risk defendants and 30% of high risk defendants. Shortly after its adoption in Ohio in 2010, Indiana began using the same risk tool (Latessa et al., 2009).

**Florida.** In 2010, the Florida Justice Association Institute conducted a study of a risk assessment used in six Florida counties. They were able to validate the 11 factors used to determine pretrial success. These factors included the age of the defendant, the current most
serious charge, employment status, marital status, possession of a telephone, length of time at current residence, history of substance abuse and mental health, previous missed court appearances, and previous felony and misdemeanor convictions. Florida statutes list specific violent charges that require pretrial detention, which the risk assessment also took into consideration. The findings showed an 87% pretrial success rate when the risk assessment was used. Furthermore, researchers determined that in Broward County, Florida, the cost of supervising a defendant on pretrial release costs $1.48 per day, compared to a daily cost of $107.71 for housing a defendant at the Broward County Jail (Austin, Bhati, Jones, & Ocker, 2012).

**Kentucky.** In July of 2013, all 120 counties in Kentucky began using a new data-driven pretrial risk assessment. They had previously been using a 13 question risk tool that required a time-intensive interview process. Up until the development of this tool the face-to-face interview process was a necessity, and it still is for many pretrial agencies. To validate the new tool called the PSA-Court, researchers analyzed 56,866 defendants who were booked and released in Kentucky from July to December 2013 (The Arnold Foundation, 2014). Researchers looked at nine key factors to predict new crime, new violence, and failure to appear:

- Current violent offense
- Pending charges at the time of the offense
- Prior misdemeanor conviction
- Prior felony conviction
- Prior violent conviction
- Prior failure to appear in the past two years
- Prior failure to appear older than two years
- Prior sentence to incarceration
- Age at current arrest

They also looked at multiple interview-based factors such as employment, drug use, and length of time at residence. It was discovered that, when all nine factors were accounted for, none of the interview-based questions impacted the predictive validity of the risk assessment. Therefore, at a minimal expense and with minimal time, and using nine factors easily available by examining criminal history, pretrial success can be predicted (The Arnold Foundation, 2014).

Since implementing the PSA-Court, crime committed by defendants on pretrial release in Kentucky has dropped almost 15%, and their release rate is at an all-time high of 70%. Kentucky is detaining more high risk and violent defendants, releasing those who are low-risk, and reducing crime (The Arnold Foundation, 2014).

As of June of 2016, 29 jurisdictions have adopted the PSA-Court including four entire states (Arizona, Kentucky, New Jersey, and Kentucky), and three of the nation’s largest cities (Chicago, Charlotte, and Phoenix). The creators of the PSA-Court plan to make the assessment available to every interested jurisdiction free of charge within the next few years (The Arnold Foundation, 2015).

**Federal.** Within the federal system, pretrial risk assessments have only been in formal use since 2009 (Cadigan, Johnson, & Lowenkamp, 2012). The federal system determined it needed its own tool, primarily due to the large number of immigration cases it sees in comparison to state courts. Their risk tool, the Pretrial Services Risk Assessment (PTRA), focuses on the following 11 items which are scored and assigned a risk category:

- Number of felony convictions
- Prior failures to appear
• Pending felonies or misdemeanors
• Current offense type (theft/fraud, violent, and other score no risk points, while drugs, firearms, and immigration score one point)
• Offense class
• Age at interview
• Highest education
• Employment status
• Residence (owning scores no risk points, while renting or homeless scores one)
• Current drug problem
• Citizenship status

PTRA scores are used alongside a full investigation completed by pretrial services prior to the defendant’s initial appearance. The investigation is a written report which contains information about the defendant’s social history (family ties, residence, physical and mental health, substance abuse, financial resources, and employment) and criminal history. The pretrial services officer lists at the end of each report the defendant’s risks of nonappearance and danger to the community and concludes with a recommendation for release or detention. If release is selected, the officer also must list release conditions to mitigate whatever risk factors he or she had identified (Cadigan et al., 2012).

The PTRA was initially validated based on archival information collected from 2000 to 2007. All 94 federal districts were not using the PTRA until 2011, so the PTRA’s re-validation research contained information from 32,455 defendants who had PTRAs completed on them in 2011. Only 5,077 of the defendants from that pool had their case resolved by the time this study began, so the sample was relatively small. Regardless, the re-validation results stayed true to the
initial data. Only 4.5% of the 5,077 defendants released failed to appear for court or were rearrested pending the outcome of their cases (Cadigan et al., 2012).

G. Challenges to Implementing a Universal Risk Tool

Pretrial risk assessment tools have been in existence since the Manhattan Bail Project in the early 1960s. Yet, although having existed for over half of a century, only approximately one third of the nations’ courts utilize them. Therefore, it is not unexpected that there are challenges to implementing a pretrial risk tool.

The pretrial process from arrest to the initial appearance before a judge moves quickly. The pretrial system receives a high volume of cases compared to the relatively few staff members, if any at all, dedicated to conducting risk assessments. These assessments are to be conducted prior to the initial hearing; however, in many districts they are not. Judges also have a very short amount of time to view each case, so even with a recommendation, the decision can still be rushed (Mamalian, 2011).

Money bail schedules are another large hurdle to pretrial risk assessments. These bail schedules are instruments that attach a specific bail amount to a specific charge. For example, in Los Angeles County, a first-degree robbery charge is assigned a bail of $100,000. A benefit of the bail schedule is that if a defendant’s financial situation allows, a defendant is able to pay the scheduled amount of bail for his or her specific charge and be released prior to seeing the judge. In this regard, the defendant’s release is based only off of their charge. The controversy of bail schedules is created when judges continue to use the bail schedule amount, even when additional information obtained from a risk assessment, such as the defendant’s employment, criminal history, residence, and prior missed court appearances, are available to the judge. Relying solely on the bail schedule when other information is available is not the correct intention. It is more
likely to lead to the detention of those who may be good risks for release but are unable to pay the scheduled amount. In a 2009 survey of 112 counties across the nation, 64% of the counties stated that they used bail schedules in their jurisdictions, and 51% indicated that they used the schedule at the initial appearance as well (Mamalian, 2011).

While working toward the goal of a universal risk assessment instrument, it is necessary to honestly consider whether it is realistic to expect every community in the U.S. to validate its own tool. Only 41% of jurisdictions presently using pretrial risk tools have been validated within the last five years, and one third of pretrial programs are not using tools specifically developed for them. There is also a large percentage of programs that frequently override their risk tool results (Mamalian, 2011).

Sixty-four percent of pretrial programs use a combination of objective and subjective criteria to complete their risk assessment. Twelve percent rely only on subjective criteria, meaning they rely solely on professional experience and their gut feeling. Only 24% of programs use objective information that can be scored, such as housing stability, prior criminal history, and previous court nonappearances (Mamalian, 2011).

Court culture is another concern. Some judges may be basing their release decisions already thinking about the final disposition as opposed to exclusively considering their risk of danger and nonappearance. The prosecutor’s bail request was found to have the strongest influence on whether or not a defendant was released and if he or she was ordered to pay bail. In order to make a pretrial risk tool part of the court culture, all of the stakeholders (judges, attorneys, prosecutors, law enforcement, and the community) need to be well-informed and in agreement (Mamalian, 2011).
H. Conclusion

The statistics and literature demonstrate a growing injustice in the way pretrial cases are handled. Cash bond is being consistently doled out in a manner contrary to the eighth amendment, and many defendants that do not pose a danger to the community or a risk of flight are spending their pretrial period incarcerated. This is detrimental to communities and the defendants. Currently, many judges are making their release decisions based on their gut and intuition. With this method, some high-risk defendants are set free, and many low-risk defendants remained incarcerated for long periods of time (Mamalian, 2011). It is a systemic issue that not only puts the community at risk, but also places an unnecessary strain on budgets, jails, correctional and police officers, families, and the community.

Research has shown that, when a risk assessment tool is used, more defendants are released on less-restrictive conditions with no increase in missed court appearances and rearrest rates (Cadigan et al., 2012). Pretrial risk assessments are a cost-effective, quick, and reliable way to better identify which defendants are good candidates for release. Judges can then use this information to make an informed decision, restoring justice to the system and maintaining safety in communities.

III. THEORETICAL FRAMEWORK

A. Evidence Based Practices

Evidence based practices (EBPs) have become the focal point of pretrial service agencies across the country. They have already found their use in post-conviction supervision, where EBPs are used to assess risk and reduce long-term recidivism rates. Pretrial services are working to use evidence to fit into the pretrial context of being least-restrictive and necessary to ensure a
defendant’s appearance in court and the safety of the community (Cadigan, 2008). In creating pretrial risk assessments, they must be in line with EBP (VanNostrand & Rose, 2009).

In order to create a pretrial risk assessment that is consistent with the legal rights given to defendants, there are guiding practices to follow. First, the risk assessment should be proven through research to predict risk of failure to appear and danger to the community pending trial. It should then be validated to ensure it is an accurate predictor specific to the area it is being used. Next, the assessment should be inclusive of all defendants, regardless of their gender, race, ethnicity, or economic situation. An assessment that is able to predict the likelihood of failure to appear, but also places certain groups in higher risk categories than necessary, is not a valid assessment. It results in unfair and unequal treatment of certain groups (usually minorities and the poor). A valid risk assessment should be able to equally classify all defendants without bias. Finally, the factors used in the assessment should be consistent with state or federal statutes. Factors considered for the bail recommendation should be legally allowable (VanNostrand & Rose, 2009). When these three practices are followed, any pretrial services officer in any courtroom should be able to create a report for any judge that is nationally consistent and backed by evidence.

B. The Risk Principle

The risk principle is a concept which stems from EBPs. Risk assessments, which are to be objective and research-based, are intended to identify risk level: low risk defendants who can safely be released into the community with few or no conditions pending trial, moderate and higher risk defendants whose risk can be minimized by means of conditions and community resources, and the highest risk defendants, or those for whom there are no conditions or
combination of conditions that can reasonably assure their appearance in court or the safety of the community, so they must be detained (VanNostrand & Rose, 2009).

The risk principle is already commonly used in the post-conviction field. Offenders are supervised based on risk. More time and resources are directed toward higher risk offenders and limited for those who are lower risk. This ensures a safe community while being wise with limited budget, treatment, and supervision resources (VanNostrand & Rose, 2009). The same principle can be applied to pretrial release recommendations.

Low risk defendants are the most likely to succeed if released pending trial. Low risk defendants who are released and are required to participate in programming and alternatives to detention are more likely to fail pending trial. Moderate and higher risk offenders who participated in similar programming are more likely to succeed pending trial (VanNostrand & Rose, 2009). For example, in one study, low risk defendants who were released on location monitoring were 112% more likely to fail than if they were not on this type of monitoring. Those placed in substance abuse testing and treatment were 41% more likely to fail. Therefore, the intensity of the program should be adapted to match the risk level of the defendant (Cadigan & Johnson, 2012). Moderate and high risk defendants likely need additional structure and guidance, whereas low risk defendants already have many prosocial options in place. Unnecessary conditions only disrupt these prosocial networks and potentially exposes them to higher risk defendants (Latessa et al., 2009). Adding conditions can create complications for low risk defendants who then may be forced to choose between things like employment and a drug test.

The pretrial risk assessment serves as the foundation for a bail recommendation. Pretrial services agencies do not only conduct the assessment, but they also recommend conditions for release that would be appropriate for each defendant based on his or her risk. These risk-based
conditions not only increase the likelihood of defendants appearing in court and preserving the safety of the community, but also aid in setting the defendant up for pretrial success.

C. Social Control Theory

Even defendants who pose some risk of danger or nonappearance may have these risks mitigated if they have strong ties to the community. Community ties through family and work are strong predictors of success (Subramanian et al., 2015). It is not uncommon for judges to ask how long a defendant has resided in their community of residence. Family members appearing at the court hearing also send a strong message to the judge. Judges may ask in court if family members or friends are willing to serve as a third-party custodian, or someone appointed by the judge to assume responsibility for the supervision of the defendant by reporting back any issues to the defendant’s pretrial services officer and the court (VanNostrand & Keebler, 2009).

The social control theory focuses on one’s peers and peer groups and is generally broken down into four different elements. Attachment is the level of values and norms that a person maintains in society. One’s classmates, coworkers, friends, and family members can greatly influence attachment levels. Commitment is the level of dedication a person has to abide by the law. This commitment is formulated at a very young age, which then influences the third element, or a person’s choice of being involved in conventional versus deviant behavior. If a child is not taught the basic rules of right and wrong, the likelihood of the child not becoming a law-abiding adult increases. Finally, the common values of the specific society in which a person lives can also impact a person’s social situation (Tibbetts & Hemmens, 2010).

Defendants on pretrial release can increase their success by surrounding themselves with people and activities that support a prosocial lifestyle. Recommending conditions of release that support this, such as third-party custodians, mental health and substance abuse treatment, and
forbidding contact with co-defendants, can reinforce a defendant’s attachment, commitment, decision making, and values. Cognitive behavior therapy, or the process of changing the thinking patterns and behavior that lead to criminal activity, can also be utilized.

Research has demonstrated the importance of ties to the community, such as employment and residence status. A study of 565,178 federal defendants found that defendants who were unemployed at the time of their arrest were 21% more likely to fail pending pretrial. Defendants who did not own homes were also more likely to be unsuccessful on pretrial: renting, 65% more likely; living somewhere but not making a financial contribution, 74% more likely; and no place to live, 110% more likely (VanNostrand & Keebler, 2009). Releasing moderate and high risk defendants to some type of alternative to detention that specifically targets a risk factor, such as substance abuse treatment for a defendant with a drug abuse issue, generally increases pretrial success (VanNostrand & Rose, 2009).

Utilizing pretrial risk assessment tools rooted in evidence based practices ensures that recommendations are supported by evidence. The risk principle guides the process of recommending release or detention. Efforts should be made to either keep defendants integrated in their already existing prosocial networks, or to give them the opportunity to create new social bonds that will encourage compliance.

IV. FINDINGS AND RECOMMENDATIONS

A. Collaborative Effort

In order for pretrial risk assessments to become the accepted norm across the nation, there are many stakeholders that must buy in to the practice. Even skeptics can be helpful in enhancing practices and accelerating changes. Starting at the beginning of the criminal justice process with law enforcement, in 2012 the National Sheriffs’ Association passed a resolution that
“supports and recognizes the value of high-functioning pretrial services agencies to enhance public safety; promote a fair and efficient justice system; provide assistance to sheriffs in administering of a safe jail and reducing jail crowding; and help relieve the financial burden on taxpayers. [Most pretrial inmates] are incarcerated not because of their risk to public safety or of not appearing in court, but because of their inability to afford the amount of their bail bond” (Raney, Hilkey, & Arthur, 2014, p. 21).

The International Association of Chiefs of Police has also expressed its support of more informed and fair pretrial decision-making. Law enforcement empowering pretrial services can help to attain the shared goals of community safety and a fair criminal justice system.

To further better pretrial services, defendants may be helpful in determining which criteria are most effective at predicting risk. Asking a pretrial defendant why they failed to appear for court or were rearrested could aid in identifying new risk factors. Gathering information on whether or not paying a cash bond while on pretrial influenced their decision-making could also be beneficial. Finally, asking the impact of their release conditions and if anything could be improved may help refine release conditions (Mamalian, 2011).

Speaking with judges regarding their opinions of the pretrial release process is also important. They are the ones making the decision, so it should be noted what they are most interested in predicting. It is imperative that judges see the value in making an evidence-based release decision and understand that they are not giving up their authority to come to a conclusion, but rather are given verified evidence to help support it. Prosecutors fall into the same category, as they play a significant role with their bail recommendations.

Overall, it is necessary that everyone involved in the pretrial process are well-informed and willing to work toward the common goals of releasing more defendants while ensuring their
appearance in court and increasing community safety. Even those who may not currently be in agreement can provide thought-provoking research questions to help fine-tune what is already in place.

**B. The Necessary Components**

Many individual jurisdictions do not have the money and resources to develop their own validated risk assessment tool. Creating a universal tool would aid jurisdictions that could never have developed an assessment on their own. However, a universal tool would not be locally validated. Thus it must be considered if it is worse to not use a tool at all than it is to not use a tool specific to the jurisdiction in which it is used. Looking to preexisting risk assessments for examples, the federal tool is used in all 92 federal districts, and the Ohio instrument is used in every county in Ohio as well as Indiana.

A straightforward risk assessment template needs to be created that includes a few easy to manage, empirically proven risk factors. The template should primarily contain questions that can be answered without interviewing the defendant in the interest of time, but may include some pertinent interview questions as well. The template could then be tested in each jurisdiction in conjunction with training and technical assistance (Mamalian, 2011).

**C. Risk Prediction**

When reviewing pretrial risk assessment research to determine which factors most likely predict risk, one factor that is consistently not a strong predictor is the financial means to pay bail. Felony bail amounts increased from 43% from 1992 to 2009, yet pretrial failure rates remained the same at approximately 30% (Subramanian et al., 2015). Kentucky’s risk assessment has led to the release of 70% of all pretrial defendants, and only four percent were required to pay bail. Only eight percent of the released defendants were rearrested, and 10%
missed a court date. The national rearrest average is 16% with 17% missing court dates (Subramanian et al., 2015).

By studying various validated pretrial risk assessment tools such as Virginia, Ohio, Florida, Kentucky, and the federal system, patterns emerge as to which factors evidence has shown to be most effective for predicting risk. All five risk tools consider whether or not the defendant has previously failed to appear for court and research and code the defendant’s previous criminal history. Four out of the five also consider employment, residence, age, substance abuse issues, and the severity of the current charge. The majority of these factors can be identified without having to conduct a time-consuming interview. Questions regarding employment, residence, and substance abuse can be obtained while meeting with the defendant to collect collateral contact information. Speaking with collaterals is an important step in the process, because if the information in the pretrial recommendation has not been verified, judges are not able to make educated and confident decisions.

Much research already exists that empirically attests to which factors may be most effective in predicting risk. However, the pretrial release period is usually rather short: only three to six months on average. Studies are designed to assess defendants and then appropriately release or detain them, all while keeping the community safe and ensuring the defendants attend court. The assessment process, although empirically grounded, cannot always foresee every risk. Humans have free will, and it is impossible to predict future risk without acknowledging that there could be errors (Mamalian, 2011). Although jurisdictions that utilize pretrial risk tools are reporting higher release rates coupled with lower noncompliance, violations and missed court appearances are still occurring. Risk assessments cannot specifically say who is going to be
released and hurt someone or flee before court. They can, however, create an educated recommendation.

**D. Maintaining Fidelity**

In 2009, Marie VanNostrand and Kenneth Rose created the three components that should guide every pretrial risk assessment. The assessment should be proven through research to predict risk, it should be inclusive of all defendants, and the factors used should be consistent with state or federal statutes. The federal government could provide data collection systems to gather information and produce reports to help the pretrial experts determine what is working and if the assessments are remaining in line with evidence-based practices (Mamalian, 2011).

Training and technical assistance are crucial, not only for line staff who may be working directly to create bond recommendations, but also for law enforcement officials, judges, defense attorneys, prosecutors, and the community. Training will increase the confidence of stakeholders in using this new instrument. This, along with follow-up training and quality assurance checks, will also ensure that the tool is being used consistently and in line with EBP (Mamalian, 2011).

**V. CONCLUSION**

Transforming the criminal justice system to improve pretrial justice will continue to face many challenges. However, many successes have already been achieved to help this movement gain momentum. There are many evidenced-based examples of pretrial risk assessment tools that can be analyzed to determine best practices. There are jurisdictions throughout the country that have made pretrial justice important and are continuing to be examples for the rest of the nation. There is an understanding that although pretrial tools are good predictors of pretrial success, judges are still encouraged to use their professional discretion when deviations are believed to be necessary.
Risk tools are a good starting point to ensure that defendants are receiving the treatment and programs they need to be successful beyond their short period of time spent pretrial. A large majority of pretrial defendants will at some point be released back into society. The pretrial process is the beginning of preparing defendants for reintegration and impacting their behavior and future recidivism.

The pretrial system has been slowly developing for the last fifty years. Stakeholders are increasingly seeing the value of EBPs in allowing for greater efficiency and effectiveness in the pretrial process. They are asking for less costly and more effective practices, moving away from solely relying on money bonds and intuition, and moving toward pretrial risk assessment tools. Risk predictors have been found that can be validated and implemented across the country (Mamalian, 2011).

The goals of pretrial reform are simple, yet important. First, pretrial reform sets out to improve adherence to the constitution and statues. It looks to increase the number of defendants being objectively and comprehensively assessed. As applicable, low-risk defendants should be released on their own recognizance. Moderate-risk defendants can be released on non-financial conditions and appropriately supervised in the community and introduced to treatment and programs as needed. Those defendants who are assessed and found to have no conditions that can reasonably assure their appearance in court and the safety of the community are to be detained. However, pretrial reform aims to reduce unnecessary pretrial detention while maintaining community safety and the integrity of the criminal justice system. Finally, these reforms should save taxpayers and jurisdictions money by more effectively utilizing jail space (Mamalian, 2011).
The ultimate goal is for every judge in America to have data-driven, objective risk assessments in their hands at the time of the release decision. Through grants and government support, pretrial services can provide these services to judges. Using pretrial risk assessment tools keeps communities strong and safe, reduces budgets, and maintains the original spirit of the pretrial reform movement which sought to protect the rights of citizens and use empirically proven factors to carry out its mission.
VI. REFERENCES


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