



Pretrial Release and Probation: What is the Same and What is Different?

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Preface

It is interesting that more people have not written extensively about the similarities and differences of pretrial release and probation. They are outwardly similar, and jurisdictions across the country have routinely turned to probation entities to house pretrial services functions, which are beginning to be seen as essential ingredients of criminal justice systems lawfully and effectively administering pretrial release and detention. Despite these similarities, however, the significant differences between pretrial release and probation, including differences in histories, purposes, legal foundations, and research, mean that we must act with caution when adding or consolidating functions. This paper is designed to be a part of the helpful literature that jurisdictions can use to develop lawful and effective pretrial systems, especially when those systems will be operating within probation entities or combined with probation functions. In my opinion, however, it is an interesting topic even for those with no intention to mix functions, as simply learning about the two fields together will be valuable to persons working in either one.

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Introduction

According to those who study evidence-based teaching methods, comparing and contrasting two different objects, persons, or even fields and disciplines, such as pretrial release and probation, can have one of the greatest effects on learning. Indeed, comparing and contrasting is considered to be one of the earliest ways that we humans begin learning (going back to how we identify things in early childhood) and makes the best use of elements necessary for all effective learning methods, each of which allows us to form relationships between constructs through reasoning. In sum, comparing and contrasting is highly valuable. Nevertheless, there are three prerequisites to any compare and contrast exercise.

The first prerequisite is that the subject must be worth learning – it must matter. In the case of pretrial release and its relationship to probation, this prerequisite is easily met. America is currently in a third generation of pretrial or bail reform, and the very foundations of our current system of bail administration are being questioned as we figure out ways to improve our release and detention processes to better reflect the law and the research. As we study these improvements, we are quickly realizing the benefits of understanding the nuances of probation – its history, laws, research, and practices – to inform the necessary changes to pretrial laws and policies. In many states, probation entities have emerged as the greatest hope for implementing proven pretrial practices in the face of scarce or declining resources. Indeed, any recognition that risk assessment and supervision are elemental to research-based pretrial practices automatically leads to discussions of whether probation entities can, as they have for decades in some jurisdictions, provide the framework and structure for effective pretrial practices in all American jurisdictions. America needs pretrial justice, and what we know about probation can help to bring pretrial justice to America. There is nothing more important than that.

The second prerequisite is that students (of any age) must understand certain aspects of one thing – in this case, either pretrial release or probation – so that they can learn about the other thing through comparing and contrasting the two things together. This prerequisite goes to the heart of learning, which

is done best when persons are able to reason their way toward linking unknown mental constructs to known constructs through time and repetition. Put another way, this prerequisite requires some general presumption that persons necessarily only really understand one of the two concepts. If people are fully informed about both concepts, there is no need to compare and contrast them; if they do not know about either, it can be fruitless to perform the exercise.

This prerequisite also appears to be easily met as the presumption that people today tend only to know about pretrial release or probation, and not both, seems well founded. Although the federal system has added pretrial to probation functions since 1982 (with most districts now combining functions into a single, consolidated office), and although more and more state pretrial functions are being housed administratively in probation departments, there are still many jurisdictions with no pretrial programs at all, and many more that are considering starting them and looking into the possibility of taking advantage of existing probation infrastructure, relationships, and knowledge of research-based practices. Finally, even in jurisdictions currently housing pretrial services within probation departments, the lack of understanding of the fundamental precepts of pretrial release leads to an unhealthy blurring of disciplines as well as pretrial services losing its identity and fidelity to its core mission. It is this author's opinion that many persons in the pretrial field do not fully understand probation, and that many persons in probation do not fully understand the fundamentals of pretrial release, and thus a comparison is warranted.

The third prerequisite is that the two concepts must be comparable (what some might call a "fair" comparison) – that is, there must be some things that are similar and some things that are different between the two concepts being studied. There would be no fairness, and thus no logic, behind comparing and contrasting an American president to a shoe, for example, and no use for a comparison of identical shoes. According to one online document, comparability allows us to identify one of four general purposes behind the comparison process generally, which is to illustrate either that: (1) two things thought to be different are actually similar; (2) two things thought to be similar are actually different; (3) two things, albeit comparable, are not equal in that one is subjectively better than another; or (4) a complex thing can be defined by comparing it to something similar and

by contrasting it to its opposite.¹ While this may seem to be the most straightforward of the three prerequisites, in the case of pretrial release and probation this prerequisite is both tricky and compelling. It is tricky because, viewed on their surface, both fields seem quite similar. Both are legal processes organized under sizable legal structures; both have histories, legal foundations, and purposes; both have bodies of research literature designed to determine what works best to achieve their purposes; both have been the subject of national best practice standards; and both involve government officials investigating facts, assessing risk, making recommendations, and sometimes supervising persons in the community.² It is also compelling, though, because in the case of probation, the sum total of these core elements results in a recognized form of punishment, albeit focusing perhaps primarily on rehabilitative rather than retributive elements of the corrective sentence. In the case of pretrial release (or, indeed, even detention) prior to a formal determination of guilt, however, if those same core elements are found to constitute punishment, they would be deemed unconstitutional.

Thus, we may deduce two things. First, the differences, though perhaps subtle, must be significant or substantively fundamental. If both fields/disciplines assess risk, for example, there must be some fundamentally different way in which risk is (or should be) assessed for pretrial release that makes it different from probation. Likewise, if both supervise people in the community, supervision as applied to pretrial release must be based on some significantly lesser or greater underlying foundation. Second, knowing that the theoretical differences are significant, they must then lead to differences

¹ See *Social Studies Strategies: When to Compare and Contrast*, found at <http://fliphtml5.com/crwm/nzph> (San Antonio Ind. Sch. Dist. 2005).

² According to the American Probation and Parole Association Position Statement on Probation, “The core services of probation are to provide investigation and reports to the court, to help develop appropriate court dispositions for adult offenders and juvenile delinquents, and to supervise those persons placed on probation.” See APPA Position Statement on Probation (1997), found at https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=dc223702-d690-4830-9295-335366a65d3e. According to the National Association of Pretrial Services Agencies Standards on Pretrial Release, “The pretrial services agency or program should provide information to assist the court in making release/detention decisions, provide monitoring and supervisory services in cases involving released defendants, and perform other functions as set forth in these Standards.” *Standards on Pretrial Release*, Nat’l Assoc. of Pretrial Servs. Agencies (Oct. 2004) Std. 1.3 (a), at 13 [hereinafter *NAPSA Standards*]; Likewise, NAPSA Standard 3.1 describes the functions of pretrial agencies and programs to include collecting and presenting information to the court, making recommendations to the court concerning strategies for release and detention, and monitoring and supervising defendants for compliance with release conditions and detained defendants to determine eligibility for subsequent release. *Id.* Std. 3.1, at 53. For a variety of reasons, this paper is only concerned with the adult criminal justice system and should not be seen as commenting on either the pretrial release or probation of juvenile defendants. At the time of this writing, the NAPSA Standards were in the process of revision.

in our behaviors. Specifically, we must keep them in mind, constantly referencing them so that pretrial release can never be confused with a recognized form of punishment.³

That is the criteria that we will use throughout this paper. And thus, for each seemingly similar element, we will ask the question, “What is fundamentally different about this element that must be highlighted so as to emphasize pretrial release’s unique constitutional nature? How can we emphasize certain aspects of whatever element is under study so as to avoid confusing pretrial release with the punitive aspects of probation?” In doing so, we will focus on number two of the purposes for comparison enumerated above, in which it will be generally illustrated that though pretrial release and probation might be superficially similar, there are differences that must be highlighted and emphasized so that pretrial release can be rightfully viewed as a right to freedom before conviction and in no way a form of punishment.

This paper follows, in the main, the structure of the earlier National Institute of Corrections paper, *Fundamentals of Bail*, which discusses bail or pretrial release’s nature through its definitions, legal foundations, history, research, and national best practice standards.⁴ It will focus on fundamental differences – differences that must be recognized and highlighted whenever possible so as to avoid confusion between the fields. At the end of the paper, it will try to take this knowledge to begin crafting a set of recommendations for all persons interested in pretrial release and probation, but especially for persons intending to combine functions so as to help the cause of pretrial justice in America.

This paper is not intended to be exhaustive; indeed, a single section merely summarizing the legalities of the sentence of probation could easily take hundreds of pages. Instead, it is intended to compliment the current literature on pretrial and probation services, especially that found in *Pretrial Services*

³ To many, pretrial release is already administered in ways that lead to confusion. In recent studies, for example, researchers have found a high number of persons who are seemingly deemed too risky for pretrial release, but who nonetheless are swiftly released to community supervision (including probation) only after they admit to committing the crime. See, e.g., Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, at 17 (PJI 2013) (showing 50% of defendants released into the community after being detained for the full period of the pretrial period).

⁴ See Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC 2014) [hereinafter *Fundamentals*]. Through historical and legal analysis, the *Fundamentals* paper makes the case for why the term “bail” should equal the term “release,” which is different from many states that define bail as money. The instant paper will also use the terms bail and pretrial release interchangeably.

*Program Implementation: A Starter Kit*⁵ (which provides crucial information about how to implement or enhance pretrial services functions), and *Promising Practices in Providing Pretrial Services Functions Within Probation Agencies: A Users Guide*⁶ (which provides an overview of the advantages and challenges in combining pretrial and probation services. Finally, this paper is designed to continue a conversation, begun many years ago and recently summarized and presented in various forums by the National Institute of Corrections, so that both pretrial and probation practitioners have a basic understanding of the issues – both broad and narrow – that exist when the two fields must be considered together.

⁵ *Pretrial Services Program Implementation: A Starter Kit*, found at <https://www.pretrial.org/download/pji-reports/Pretrial%20Services%20Starter%20Kit%20-%20PJI%202010.pdf>, (PJI 2009).

⁶ *Promising Practices in Providing Pretrial Services Functions Within Probation Agencies: A Users Guide*, found at <http://www.pretrial.org/download/pji-reports/Pretrial%20Services%20within%20Proation%20-%20APPA%202011.pdf> (APPA/PJI 2011) [hereinafter *Promising Practices*].

Chapter 1. Definitions/Purposes

Probation

The definition of probation is fairly straightforward, although it has been used differently among the states. The term derives from the Latin, *probatio*, which means a period of proving or testing. Black's Law Dictionary has defined probation as "a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison."⁷ The United States Supreme Court has said that "probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty."⁸ Probation is "one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."⁹

The notion of probation existing on a continuum of punishments has become somewhat more nuanced over the last forty years. In 1970, in its Standards Relating to Probation, the American Bar Association (ABA) defined probation to mean, "A sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if he [or she] violates the conditions."¹⁰ Today, however, the ABA, through its Criminal Justice Sentencing Standards, includes probation among a variety of "compliance programs" (including parole, intensive supervision probation, drug, alcohol, sex offender, and other treatment programs, family counseling, etc.) which, as the ABA explains, find commonality through their individual purpose to "promote offenders' future compliance with the law" and "whose primary design is rehabilitative."¹¹ Indeed, within a traditional sanctions array, the

⁷ Black's Law Dictionary 1322 (9th ed. 2009).

⁸ *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)) (further quotation omitted).

⁹ *Id.*

¹⁰ *American Bar Association Standards for Criminal Justice, Standards Relating to Probation*, Std. 1.1, at 9 (1970) [hereinafter *1970 ABA Probation Standards*]. See also *American Bar Association Standards for Criminal Justice, Sentencing*, Std. 18-2.3 (a) (2nd ed. 1979) (also defining probation as a sentence "not involving confinement").

¹¹ *American Bar Association Standards for Criminal Justice, Sentencing*, Std. 18-3.13, commentary at 97 and note 1 (3rd ed. 1994) [hereinafter *ABA Sentencing Standards*]. Thus, the term "probation" today can be misleading due to many areas of overlap with other concepts, including sentences and diversionary techniques that involve aspects similar to traditional probation, such as in drug courts or boot camp. In the federal system (and possibly other state systems), there is also "supervised release," which is essentially a

ABA places standard probation at the “polar extreme” of a spectrum of sanctions because it is “usually a low cost and low intervention strategy.”¹² Even fairly current college textbooks tend to focus on probation as part of a larger continuum of community-based corrections.¹³

The United States Supreme Court has said that the purpose of probation is “to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity.”¹⁴ According to the ABA’s 1970 Standards,

The basic idea underlying a sentence to probation is very simple. Sentencing is in large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against. Probation proceeds on the theory that the best way to pursue this goal is to orient the criminal sanction toward the community setting in those cases where it is compatible with the other objectives of sentencing. Other things being equal, the odds are that a given defendant will learn how to live successfully in the general community if he is dealt with in that community rather than shipped off to the artificial and atypical environment of an institution of confinement.¹⁵

term of community supervision after imprisonment, rather than in lieu of it. Moreover, jurisdictions have used a variety of probation-like sentences, such as suspended sentences, split sentences and so-called “shock probation,” intensive supervised probation, day reporting, and home confinement. Some jurisdictions have structured whole sentences out of what may have been previously considered to be conditions of probation, such as community service. Many of these community correction sanctions are called intermediate sanctions because they “lie somewhere between prison and routine probation with respect to their harshness and restrictiveness.” Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* (4th ed.) Vol. 6 (Sentencing Procedures) at 687 (quoting J. Petersilia et al., Introduction, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, ix (J. Byrne et al. eds., 1992)).

¹² *ABA Sentencing Standards*, *supra* note 11, at 19.

¹³ See, e.g., Gerald Bayens & John Ortiz Smykla, *Probation, Parole, & Community-Based Corrections: Supervision, Treatment, & Evidence-Based Practices*, at 188, 384 (McGraw Hill 2013) [hereinafter Bayens & Smykla].

¹⁴ *Roberts v United States*, 320 U.S. 264, 272 (1943) (construing the Federal Probation Act).

¹⁵ *1970 ABA Probation Standards*, *supra* note 10, at 1.

Thus, although it is a criminal sanction, its focus on placement in the community makes it a desirable sentencing alternative for a number of reasons, including the following:

It maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law; it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts; it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community; it greatly reduces the financial costs to the public treasury of an effective correctional system; and it minimizes the impact of the conviction upon innocent dependents of the offender.¹⁶

Because probation is a creature of statute, one may find a variety of terms, definitions, and statements of purpose among the relevant American laws and court opinions interpreting those laws.¹⁷ Indeed, although compliance programs are defined by the current ABA Sentencing Standards as those that promote future compliance with the law and that have rehabilitation as their principle design, those Standards recommend not to use rehabilitation, standing alone, as a basis for imposing a particular sanction “or a sanction more severe than otherwise justified,”¹⁸ and thus they leave it to the various legislatures to choose relevant societal purposes (including general and specific deterrence, incapacitation, retribution, restitution, restoration, or rehabilitation, or some combination of these purposes) for any particular

¹⁶ *Id.*, Std. 1.2 at 10, 27 (quoted in Robert J. Dieter, *Colorado Criminal Practice and Procedure*, at 697 (2nd ed., Thomson West 2013)). In 2013, the United States Courts reported that “the annual cost of placing an offender in a Bureau of Prisons institution or federal residential reentry center was roughly eight times the cost of placing the same offender under post-conviction supervision by a federal probation officer.” See *Supervision Costs Significantly Less Than Incarceration in Federal System* (July 18, 2013), found at <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system>.

¹⁷ Sometimes these variances can cause confusion. For example, in Massachusetts, there exists a procedure known by many as “pretrial probation,” which, as currently defined, is likely more appropriately labeled a nuanced form of pretrial diversion. If probation suffers from linguistic confusion, however, pretrial release likely suffers from more. Indeed, confusion caused by the inconsistent or improper use of terms and phrases at bail was the catalyst for writing the *Fundamentals* document, *supra* note 4, which was published by the NIC in 2014. As noted in that paper, states across America define terms associated with bail differently, and they sometimes create definitions or use those terms in ways that vary within their own jurisdiction or even within the same source.

¹⁸ *ABA Sentencing Standards*, *supra* note 11, Std. 18-3.12 (a) (iii) (commentary), at 89.

sentencing scheme.¹⁹ Accordingly, depending on the jurisdiction, probation may serve any number of relevant purposes.

Nevertheless, most jurisdictions would find commonality with the following statement: although it is a criminal sanction, traditional probation is, essentially, release into the community with conditions. And those conditions, according to the United States Supreme Court, are meant to assure the societal goals for the sentence of probation as articulated by the state.²⁰ In most states, those goals will include public safety and rehabilitation, but many state statutes allow consideration of a variety of relevant purposes for sanctions, including retribution or punishment for its own sake. The American Probation and Parole Association (APPA) likewise defines probation in terms of conditional release, and states that the primary purpose of probation is to “assist in reducing the incidence and impact of crime by probationers in the community” premised, in part, on a belief in rehabilitation and behavioral change.²¹ An APPA Position Statement notes that although “[p]robation philosophy does not accept the concept of retributive punishment,” it nonetheless recognizes the sentence itself is, by its very nature, a punishment.²²

Pretrial Release

Pretrial release, too, is release into the community with conditions. Technically, pretrial release is the end result of a process of bail. The word bail itself comes from the French word, *baillier*, which meant to hand over, or to deliver, which historically involved the delivery of the defendant to one or more sureties for supervision in the community. The history of bail, the legal foundations intertwined with that history, the pretrial research, the national best-practice pretrial standards, and the definitions advanced by scholars, Supreme Court Justices, and an increasing number of

¹⁹ *Id.* Std. 18-2.1, at 9-13.

²⁰ See *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

²¹ See *Probation and Parole FAQs*, found at https://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VB_FAQ#6; *Position Statement on Probation*, found at https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=dc223702-d690-4830-9295-335366a65d3e.

²² *Id.* (*Position Statement*); see also *ABA Sentencing Standards*, *supra* note 11, Std. 18-3.12, at 85 (recommending that agencies providing guidance to sentencing courts should realize “that (i) Every criminal sanction is a deprivation of liberty or property and has the effects of punishing offenders, deterring criminal conduct and fostering respect for the law [and] (ii) Sanctions other than total confinement may serve to punish and incapacitate offenders”).

knowledgeable national organizations define bail as a process of conditional release.²³ The constitutionally valid purposes for imposing those conditions are public safety and court appearance.²⁴ These purposes are significantly limited as compared to the potential purposes underlying probation. Accordingly, beyond protecting the public while an individual under state control lives in the community during the pretrial phase of a criminal case, the traditional purposes underlying criminal sanctions, including retribution, rehabilitation, and even restitution, simply do not apply to the pretrial release process.

Moreover, the notions underlying release at bail are founded on more than mere desirability. In most states, bail is a constitutional right, and in many other states it is a right conferred by statute. The United States Supreme Court has equated the right to bail with “the right to release before trial” and “the right to freedom before conviction,”²⁵ and has said that “in our society, [pretrial] liberty is the norm,”²⁶ and thus the idea thatailable defendants should actually obtain release through the bail process is paramount.

Indeed, because of this importance, it may be said that the legal and historical purposes underlying the bail process are threefold: maximizing release while simultaneously maximizing public safety and court appearance. Not coincidentally, this is strikingly similar to statements of purpose set forth by pretrial researchers and bail historians.²⁷ Likewise, the American Bar Association Standards on Pretrial Release state that the purposes of the pretrial release decision “include providing due process to those accused of crime [e.g., protecting one’s liberty interest], maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference.”²⁸ Thus, unlike probation, release rates at bail demand consideration during all aspects of the pretrial process. Indeed, at bail, whenever a jurisdiction has high court appearance and public safety rates (i.e., the conditions or limitations on pretrial freedom are doing what they

²³ See *Fundamentals*, *supra* note 4, *passim*.

²⁴ *Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Salerno*, 481 U.S. 739 (1987).

²⁵ *Stack*, 342 U.S. at 4.

²⁶ *Salerno*, 481 U.S. at 755.

²⁷ See Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial*, at note 127 and accompanying text (NIC 2014) [hereinafter *Money*].

²⁸ *American Bar Association Standards for Criminal Justice, Pretrial Release*, Std. 10-1.1, at 1, 36 (3rd ed. 2007) [hereinafter *ABA Pretrial Release Standards*].

are supposed to do), the law demands that jurisdictions embrace the risk inherent in bail by at least considering releasing more defendants.

Crucial Differences – (1) Purposes

Accordingly, we see two crucial definitional differences between pretrial release and the sentence to probation. First, while both are types of conditional release, because probation is a correctional sentence, it has fundamentally different purposes from those allowed when considering pretrial release. Thus, conditions at probation may be set with a focus on public safety and rehabilitation as well as other relevant goals – including punishment for its own sake – enacted as the correctional philosophy of any particular jurisdiction. When working within pretrial release, however, there are only two constitutionally valid purposes for limiting pretrial freedom – public safety and court appearance during the pretrial period. There is no focus on rehabilitation, and indeed, even articulating a purpose normally associated with punishment, such as deterrence, retribution, or incapacitation (for example, through setting a release condition with the intent to detain a bailable defendant pretrial) would likely be considered an unconstitutionally improper purpose. As we will see later, this requires persons overseeing a defendant pretrial to understand and pay special attention to certain fundamental legal principles associated with the defendant’s un-convicted legal status, such as the presumption of innocence, due process, excessive bail, and the concept of least restrictive conditions, most of which require the government to articulate a proper purpose for its action.

Moreover, proper purposes are foundational to implementing evidence-based practices in either discipline. Simply put, following evidence-based practices involves determining what works to achieve the lawful purposes of a particular discipline – essentially asking the question, “What works to achieve our purposes or goals?” Accordingly, because the purposes of pretrial release and probation are different, pretrial and probation programs necessarily must differ in their strategies to achieve those goals. As explained by author and eminent pretrial researcher Marie VanNostrand,

[P]retrial and post-conviction programs differ in their intended outcomes. Evidence-based practices are considered effective for the post-conviction (community corrections) field when they reduce offender risk and subsequent recidivism and as such

make a positive long-term contribution to public safety. The intended outcome of pretrial services programs is to reduce pretrial failure (failure to appear and danger to the community) pending trial. The post-conviction field seeks to impact long-term criminal behavior while the pretrial field is limited to impacting criminal behavior and court appearance solely during the pretrial stage.²⁹

Thus, for example, in a jurisdiction in which rehabilitation is a proper purpose for conditioning a sentence to probation, programming that attempts to rehabilitate an offender is lawful. During pretrial release, however, that same programming, no matter how desirable or even potentially effective, might be deemed unlawful for lack of a proper purpose when mandatorily applied to any particular defendant.

Crucial Differences – (2) Privilege versus Right

Second, while release to probation might be desirable,³⁰ or even occasionally created statutorily as a “presumptive right” in certain cases, it is typically articulated as a privilege available through the discretion of the sentencing judge. Pretrial release through the bail process, on the other hand, is significantly weightier because it is typically based on some absolute constitutional or statutory right. In fact, a process of bail or pretrial release is demanded by our American system of justice, which promotes liberty and which places heavy burdens on the government to keep it from unnecessarily eroding that liberty. The importance of bail itself is why America – at least until the mid-1900s – equated the term with actual release. Only in the last 50 years have we grown accustomed to a bail process that, in fact, leads to detention.

Formally equating bail with release was begun with England’s Statute of Westminster in 1275, and continued through the history of England, which often enacted remedies to any abuses interfering with the release of bailable

²⁹ Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services*, at 11-12 (CJI/NIC 2007) (internal footnote omitted) [hereinafter VanNostrand]. Of course, certain treatments lawfully administered to impact criminal behavior during the pretrial phase can overlap with the post-conviction period and ultimately lead to longer-term benefits to both society and the defendant.

³⁰ The 1970 Standards state that, “Probation proceeds on the simple formula that taking a man out of society is not the best way to help him learn to live in society.” *1970 ABA Probation Standards*, *supra* note 10, at 6.

defendants. The notion also followed into the American Colonies, which broadened and emphasized liberty and the right to bail from England's system. Indeed, bail as release is a concept clearly understood and accepted by the United States Supreme Court, as seen from its early opinions in the late 1800s to the following seminal statement about bail from *Stack v. Boyle* in 1951:

From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. 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.³¹

In sum, pretrial release and probation have critical differences in definitions and purposes, and fully understanding those differences should lead to clearly recognizable differentiation in operational practices, especially in those entities that endeavor to combine pretrial and probation functions. Moreover, fully understanding pretrial release as a fundamental American right should help persons to perhaps change the mistaken notion that has been variously articulated through statements such as, “pretrial services officers are inferior to probation officers,” or that a probation office has a “higher status” than a pretrial office.³² If anything, the emphasis that we place on pretrial release should be paramount and crucial to our identity as Americans, who cherish liberty and freedom, fairness and transparency, and the rule of law. The fundamental point is that while both pretrial services and probation have purposes underlying their processes, the purposes of bail – to maximize release while maximizing public safety and court appearance rates – have emanated from rights rooted in historical and legal notions that go to the heart of our founding documents and our identity as Americans. Remembering these purposes is critical to performing our day-to-day operations in either field.

³¹ 342 U.S. 1, 4 (1951) (internal citations omitted) (emphasis added); The Court also equated the right to bail to “the right to release before trial.” *Id.*

³² See, e.g., *Promising Practices*, *supra* note 6, at 15 (“Participants in both the workshop and the focus group noted that a perception may exist in many places, correctly or not, that a probation officer is seen as a higher status, or at least more desired, position than a pretrial services officer.”).

Chapter 2. History

Comparing and contrasting the histories of pretrial release, also known as bail, and probation raises an interesting “which came first” issue. Researchers have noted that antecedents to both pretrial release and probation date as far back as biblical times. In a broader sense, punishment for wrongs against others clearly preceded any mechanism for release while awaiting adjudication or punishment; indeed, historians have documented the creation of a monetary system of punishments coupled with bail as a replacement for (and thus coming after) the punishment of death by blood feuds for private crimes.³³ Nevertheless, looking only at modern concepts of probation and pretrial release (that is, viewing procedures that show significant similarities to the bail and probation processes of the present day), it is fairly clear that pretrial release, or bail, came first.

The History of Pretrial Release

The history of pretrial release, also known as bail, may either be recounted chronologically as a series of singular events or as phenomena or threads shaping the way we administer bail today. There are good reasons for understanding the singular events, including the fact that commercial bail industry lobbyists often skew those events to further the use of for-profit bondsmen. But understanding the historical phenomena or threads helps most when comparing the history of bail to that of probation. Thus, viewed through the lens of historical threads running through pretrial release, we see two: (1) the move from a system of bail using mostly unsecured bonds administered primarily by personal sureties to a system using mostly secured bonds administered primarily by commercial sureties; and (2) the creation and nurturing of a “bail/no bail” or “release/detain” dichotomy in England and America.³⁴

³³ See Timothy R. Schnacke, Michael R. Jones, & Claire M.B. Brooker, *The History of Bail and Pretrial Release*, 1-2 (PJI 2010).

³⁴ Much of this section of the paper is based on the research used to create *The History of Bail and Pretrial Release*, *id.*, and *Fundamentals*, *supra* note 4. As in those documents, unattributed statements are derived primarily from the following sources: William Blackstone, *Commentaries on the Laws of England* (Oxford 1765-1769); June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517 (1983); Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement*, 1 *Res. in Corr.* 3:1 (1988); Comment, *Bail: An Ancient Practice Reexamined*, 70 *Yale L. J.* 966 (1960-61); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); F.E. Devine,

The Move From Unsecured Bonds/Personal Sureties to Secured Bonds/Commercial Sureties

For hundreds of years, both England and America administered what we know today as bail or pretrial release through the “personal surety system.” Under that system, whenever aailable defendant was presented before a bail setting official, that official would release the defendant to a person or persons as sureties under a theory of continued custody, often with the sureties called “private jailers” or “jailers of [the accused’s] own choosing.”³⁵ The personal surety system had three primary requirements to function properly: (1) a reputable person or persons (the surety, sometimes called the “pledge” or the “bail”); (2) this person’s willingness to take responsibility for the accused under a private jailer theory and with a promise to pay any required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person’s willingness to take the responsibility without any initial remuneration or even the promise of any future payment if the accused were to forfeit the financial condition of bail or release.

Commercial Bail Bonding: A Comparison of Common Law Alternatives (Praeger Pub. 1991); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731 (1996-97); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33 (1977-78); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959 and 1125 (1965); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper & Rowe 1965); James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 Fordham L. Rev. 387 (1937); William Searle Holdsworth, *A History of English Law* (Methuen & Co., London, 1938); Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 Temp. L. Q. 475 (1977); Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming* (Pretrial Servs. Res. Ctr. 1999); Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139 (1971-72); Gerald P. Monks, *History of Bail* (1982); Luke Owen Pike, *The History of Crime in England* (Smith, Elder, & Co. 1873); Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* (1898); Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release* (PJI 2010); Wayne H. Thomas, Jr. *Bail Reform in America* (Univ. CA Press 1976); Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 New Eng. J. on Crim. & Civ. Confinement 267 (1993); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 320 (1987-88); *United States v. Edwards*, 430 A. 2d 1321 (D.C. 1981) (en banc); *State v. Brooks*, 604 N.W. 2d 345 (Minn. 2000); *State v. Briggs*, 666 N.W. 2d 573 (Iowa 2003).
³⁵ *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

This last requirement addressed the concept of indemnification of sureties, which was declared unlawful by both England and America as being against the fundamental public policy for having sureties take responsibility in the first place. In both England and America, courts repeatedly articulated (albeit in various forms) the following rationale when declaring surety indemnification unlawful: once a surety was paid or given a promise to be paid the amount that could potentially be forfeited, that surety lost all interest and motivation to make sure that the condition of release was performed. Thus, a prohibition on indemnifying sureties was a foundational part of the personal surety system. Along with requiring financial conditions to be paid, if at all, only in the event that the defendant did not show up to face justice (what we would now call unsecured financial conditions), forbidding indemnification and profit from bail precluded commercial interest in the enterprise and helped assure that virtually all bailable defendants in England and Colonial America actually obtained release.

Unfortunately, for a variety of reasons in the 1800s, both England and America began to experience a lack of persons willing to take on the great responsibilities of being personal sureties without remuneration. This led to numerous bailable defendants being detained, a problem that, historically speaking, has demanded correction in the way of bail reform.³⁶ England addressed the problem through legislation, which allowed judges to release defendants without sureties if justice so required. America, on the other hand, began chipping away at laws forbidding profit and indemnification at bail. This, in turn, ushered in the commercial surety system in America starting in 1898.

More importantly, however, these new laws allowing profit and indemnification fostered the greatly increased use of secured versus unsecured financial conditions. As previously mentioned, for hundreds of years in both England and America, whatever financial condition might be attached to any particular bail bond was what we would call today an “unsecured” financial condition – like a debenture, which is secured only by the general credit of the personal surety. It was a debt that would be owed

³⁶ For a more in-depth discussion of this historical phenomenon, see *Fundamentals*, *supra* note 4; *Money*, *supra* note 27. Simply put, the history of bail shows the creation and nurturing of a bail/no bail, or release/detain system, through which bail (or release) for centuries in both England and America was administered through personal sureties. Historically, and as more fully explained *infra*, whenever anything interfered either with: (1) bailable (or those who we think should be bailable) defendants actually being released; or (2) unbailable defendants (or those who we think should be unbailable) actually being detained, history has demanded reform or correction.

only if the accused did not appear for court; accordingly, no amount of money stood in the way of the defendant being released immediately from jail. Secured financial conditions, on the other hand, require some amount of money to be paid up-front by a defendant (or his or her family) or specific collateral to be pledged or obligated in the form of what we now call “cash bonds,” “surety bonds,” “deposit bonds,” and “property bonds” before that defendant can be released from jail. The requirement for up-front money virtually guarantees that some defendants will ultimately be detained for lack of money, but it is unclear from historical documents that anyone in America fully understood that allowing sureties to profit from bail would result in exacerbating the very problem that led to their creation.

This thread of history, the movement from mostly unsecured bonds administered primarily by personal sureties to mostly secured bonds administered primarily by commercial sureties, might not have been perceived as problematic but for the second historical thread: the creation and nurturing of a “bail/no bail,” or “release/detain” dichotomy. To explain that thread, we must refer back to England in the Middle Ages.

The Creation and Nurturing of the “Bail/No Bail,” or “Release/Detain” Dichotomy

Bail was initially created in England to avoid blood feuds between families. Personal sureties took responsibility for seeing to it that persons paid the debts they owed for whatever wrongs they committed against others, thus avoiding private wars. However, as time passed and the Anglo Saxon justice system evolved, and especially as more and more jails were built to house offenders, bail became a way to keep those merely accused of crimes from being held in jail, and thus the purpose of bail quickly evolved from avoiding feuds to providing a mechanism of release prior to adjudication. Historically in England, custom, or what we might today call the common law, decided who was bailable and who was unbailable. Thus, as persons were arrested, they were classified as either bailable or unbailable based on that custom; bailable defendants were expected to be released through the personal surety system, and unbailable defendants were expected to be detained.

In 1274, however, King Edward I became aware that many bailable defendants were actually being detained and many unbailable defendants

were actually being released. This led Parliament to enact the Statute of Westminster in 1275, likely the first legislatively enacted articulation of a “bail/no bail” dichotomy. The Statute enumerated bailable and unbailable offenses and persons, and forbade officials from either detaining bailable defendants or releasing unbailable ones. Indeed, to do so was a crime. Thus, the idea of a “bail/no bail” dichotomy necessarily includes the notion that if one is bailable, he or she must be released. Concomitantly, if one is unbailable, he or she must be detained. Accordingly, the “bail/no bail” dichotomy is also accurately labeled a “release/detain” dichotomy, and this dichotomy has existed from 1275 to the present day in America. Virtually every bail scheme in America today reflects the “bail/no bail” dichotomy.

The idea that “bail” should equal release continued through the history of England and was adopted by the American Colonies. It is reflected not only in colonial bail practice, but also in our earliest constitutions and statutes (most of which enshrined bail as a matter of right), the language of bail scholars, and the opinions of the United States Supreme Court. Indeed, the notion that “bail” should equal release and that “no bail” should equal detention was so strong in both England and America that, historically speaking, every time anything interfered with the dichotomy – that is, anytime bailable defendants (or those who we feel should be bailable) were detained or unbailable defendants (or those who we feel should be unbailable) were released, history demanded correction in the way of bail reform. This dynamic is forceful, and explains how we got such momentous legal principles as Habeas Corpus, the Excessive Bail Clause, the rule requiring arrestees to be charged, and other, lesser known reforms surrounding detention.³⁷

Most importantly, and considering again the first historical thread, it also explains why America has needed bail reform throughout the Twentieth and now into the Twenty-First Century. When America moved to using mostly secured bonds to be administered by a commercial surety system, it saw as one result the unnecessary detention of bailable defendants who could not pay the up-front money required to obtain release. This led to the so-called first generation of American bail reform, in which the country sought

³⁷ Historically, the great majority of reforms were due to bailable defendants being detained rather than unbailable defendants being released. In America, the notion that bailable defendants must be released and unbailable defendants must be detained has been eroded in the last 150 years, to the point where virtually no one alive in America today can remember a time in which the system operated as designed. Nevertheless, the notion serves as a constant source of pressure leading to correction, including in this current generation of bail reform.

alternatives to what was considered to be the “traditional money bail system” (or sometimes the “surety bail system”) mostly by thinking of ways to release bailable defendants without using money. Later in the Twentieth Century, we saw a population of dangerous persons who should have been, but were not, detained due to inadequacies in our laws. This led to the so-called second generation of bail reform, in which we legitimized public safety as a constitutionally valid purpose for limiting pretrial freedom, and we created fair and transparent ways to detain persons in extreme cases of pretrial risk.

One might think that if America has undergone two generations of bail reform – one dealing with “bail,” or release, and one with “no bail,” or detention – that it would not need a third. But America is currently in a third generation of bail reform for three reasons: (1) states only partially implemented the reforms learned in previous generations; (2) the current pretrial research has given us a superior method of administering bail based on pretrial risk, and thus most states have realized that their bail schemes, which are often premised on the presumed risk associated with top charge, are inadequate; and (3) money continues to be used in virtually all jurisdictions, and yet the cavalier use of money at bail leads to bailable defendants being unnecessarily detained and unbailable defendants (or those who we feel should be unbailable) to be released. This last notion represents interference with the notion of a bail/no bail dichotomy, and, as mentioned previously, if there is any interference with that dichotomy, history demands correction through bail reform. The importance of pretrial release, or bail, is such that reform is inevitable to maintain its essential character.

The history of pretrial release is largely misunderstood, and is often mistakenly thought to have begun in the 1960s, when pretrial services entities were first created. As previously (and repeatedly) mentioned, however, pretrial release is simply another term for bail, which is a process of releasing defendants pretrial with conditions designed to provide reasonable assurance of the constitutionally valid purposes for limiting pretrial freedom. And the history of bail illustrates the following fundamental points: (1) the pretrial release and detention system that worked effectively over the centuries was a purposeful “bail/no bail” system, in which bailable defendants (or those who society deemed should be bailable) were expected to be released and unbailable defendants (or those who society deemed should be unbailable) were expected to be detained; (2) the bail side of the dichotomy functioned most effectively through an

uncompensated and un-indemnified personal surety system based on unsecured financial conditions; (3) what we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties – is, historically speaking, a relatively new system that was encouraged to solve America’s dilemma of the unnecessary detention of bailable defendants in the 1800s; and (4) the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction: (a) the unnecessary detention of bailable defendants, who we now often categorize as “lower risk;” and (b) the release of those persons who we feel should be unbailable defendants, and who we now often categorize as “higher risk.”

The History of Probation

By comparison, the history of probation is more recent, and changes over time have been driven less by straying from concrete notions about its character, as in bail, and more by fluctuating attitudes toward sentencing in general, with periods of expanding probation practices coming as a result of periods in which persons sought more generally to mitigate the harshness of the criminal law.³⁸ Historians trace probation first to the English practice of “benefit of clergy” (from the 1200s to the 1800s), in which a member of the church could gain leniency from an otherwise harsh sentence through a process that favored defendants by allowing only evidence favorable to the accused at trial. Later, it was extended to non-clerics who could read, as the process required them to recite the text of Psalm 51 in court to obtain leniency. More closely resembling probation is the English common law device of “judicial reprieve” (used during the Nineteenth Century), in which a judge could suspend the imposition of sentence for some period of time conditioned on the good behavior of the offender, and typically so that the

³⁸ Sources for this section include the following: Howard Abadinsky, *Probation and Parole, Theory and Practice* (11th ed.) (Pearson Education/Prentice Hall 2012); Harry E. Allen, Chris W. Eskridge, Edward J. Latessa, & Gennaro F. Vito, *Probation and Parole in America* (NY: MacMillan/The Free Press 1985); Gerald Bayens & John Ortiz Smykla, *Probation, Parole, & Community Based Corrections; Supervision, Treatment & Evidence-Based Practices* (McGraw Hill 2013); *Beginnings of Probation and Pretrial Services*, United States Courts website, found at <http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/History.aspx>; Dean J. Champion, *Probation, Parole, and Community Corrections* (2nd ed.) (NJ: Prentice Hall/1996); Todd Clear, George Cole, Michael Reisig, & Carolyn Petrosino, *American Corrections in Brief* (2nd ed.) (Wadsworth/Cengage Learning 2012); Robert J. Dieter, *Colorado Criminal Practice and Procedure* (Vol. 14, Ch. 6, Pretrial Release) (West 2004); *The History of Probation and Parole*, APPA found at <http://www.appa-net.org/PPP-Supervision-Week/get-the-facts.htm>, and Joan Petersilia, *Probation in the United State Part I*, found at <https://www.appa-net.org/PPP-Supervision-Week/files/Per-sp98pers30.pdf>.

person could seek a pardon. Used increasingly in the United States in the 1800s, this concept was adopted as a mechanism with no limits – the sentence was suspended indefinitely – a practice that was ultimately declared unconstitutional as impinging on legislative and executive powers.³⁹

In other cases, judges altered judicial reprieve not by technically suspending the sentence, but by sentencing the offender to his or her “own recognizance,” using a term associated with bail release and applying it to the post-conviction process. Later, the practice even evolved to allow judges to order money sureties as a condition of release. The practice of ordering a “performance bond” as some additional assurance of an offender’s good behavior while on probation has nearly disappeared, but in 1970 it was still used in enough jurisdictions to warrant the American Bar Association Standards on Probation to recommend abolishing it. According to those Standards:

The posting of a bond or other surety as a condition of probation seems to stem from the fact that, in early years when probation was without statutory sanction, the nonappearance of violators left the court open to charges of acting extra-legally. Much as with the development of the bail system, the posting of money bond was seen as additional assurance that the offender would comply with the conditions of his release.

The fact remains, however, that the relationship of the prospective probationer’s ability to procure a money bond to the desirability of probation is likely to be very small indeed, and indeed so irrelevant as to lead the Advisory Committee to recommend that bonds never be employed. To the extent that financial sanctions are appropriate to the ends of probation, fines, restitution, family support, and other similar devices can perform the function. To the extent that the need is for assurance that the probationer will not violate his probation, a sophisticated system of supervision, combined with reports and

³⁹ See *Ex Parte United States*, 242 U.S. 27 (1916) (also known as the “Killits” decision, named after the presiding trial judge in the case).

visits, should obviate the need for additional financial inducements.⁴⁰

Nevertheless, it was during the mid-1800s, at a time when probation, suspension of sentences, and bail were still somewhat intertwined, that a Boston shoemaker, John Augustus, undertook an exploration of alternatives to harsh punishments and became the innovative founder of modern American probation practices.

In addition to his vocation, Augustus was interested in the courts, and his involvement in the temperance movement led him to grow especially concerned with people with alcohol problems being sentenced to jail for violating alcohol laws. Starting in 1841, Augustus began asking courts to suspend the sentences of convicted offenders and to release those offenders to the care and supervision of Augustus, who would help those persons to stay away from alcohol, find work and housing, go to school, and generally stay out of trouble and better their lives. Augustus's daily work is illustrated by an excerpt from one of his early journal entries, as quoted by scholars Gerald Bayens and John Ortiz Smykla:

In the month of August, 1841, I was in court one morning . . . in which [a] man was charged with being a common drunkard. The case was clearly made out, but before sentence was passed, I conversed with him for a few moments, and found that he was not yet past all hope of reformation . . . He told me that if he could be saved from the House of Corrections, he never again would taste intoxicating liquors; there was such an earnestness in that one, and a look of firm resolve, that I determined to aid him; I bailed him, by permission of the Court. He was ordered to appear for sentence in three weeks; at the expiration of this period of probation, I accompanied him into the courtroom . . . The judge expressed himself much pleased with the account we gave of the man, and instead of the usual penalty – imprisonment in the House of Correction – he fined him one cent and costs, amounting in all to \$3.76, which was immediately paid. The man continued industrious and sober,

⁴⁰ 1970 *ABA Probation Standards*, *supra* note 10, Std. 3.2 (e) at 49. The rationale is adaptable to pretrial release, and, theoretically, a similar system of universal supervision (at varying levels) across America should obviate the need for financial bail altogether.

and without doubt has been by this treatment, saved from a drunkard's grave.⁴¹

By all historical accounts, Augustus's work until his death in 1859 was foundational to virtually all aspects of probation as we know it today. Todd Clear, et al., writes the following:

Besides being the first to use the term *probation*, Augustus developed the ideas of the presentence investigation, supervision conditions, social casework, reports to the court, and revocation of probation. He screened his cases 'to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded.' His methods were analogous to casework strategies: he gained offenders' confidence and friendship, and by helping them get a job or aiding their families in various ways, he helped them reform.⁴²

Unlike pretrial release, or bail, which had an established legal structure when it was adopted by the Colonies, and which rested upon legal pillars of constitutional weight, probation struggled even to find its start. In the federal system, judges used a variety of methods to demonstrate leniency in appropriate cases, including using recognizances and suspending sentences for indefinite periods of time; but, as mentioned previously, in 1916 the United States Supreme Court invalidated the practice (despite its benevolent rationales) as interfering with legislative and executive powers.⁴³ Nevertheless, the Supreme Court also suggested that probation legislation would provide a lawful remedy and Congress responded (albeit somewhat slowly and with some aggravation) with the first federal probation statute in 1925.

⁴¹ Bayens & Smykla, *supra* note 13, at 193.

⁴² Todd R. Clear, George F. Cole & Michael D. Reisig, *American Corrections* (10th ed.) at 189 (CA: Wadsworth, 2013) (quoting *John Augustus, First Probation Officer* (New York, Prob. Ass'n, 1939), 34, first published as *John Augustus, A Report of the Labors of John Augustus, for the Last Ten Years, in Aid of the Unfortunate* (Boston: Wright & Hasty, 1852)).

⁴³ See *Ex Parte United States*, 242 U.S. 27 (1916); see also Richard A. Chappel, *Courts Interpret the Federal Probation Act*, 29 J. of Crim. L. & Criminology 708, (Winter 1939).

In the states, Massachusetts was first to pass a probation statute in 1878, largely due to the efforts of John Augustus and those who continued his work after his death in 1859. The law only applied to one county, but other statutes followed, both in Massachusetts and other states, and by 1922, twenty-two states had probation statutes. By 1956, probation for adults was formally available in every state.

Typical state probation statutes allow probation for certain offenses, but it appears that none allow it for all offenses. They also often contain statutory prohibitions on probation for certain offenses, but in this respect the laws, like probation entities themselves, vary widely in their scope.⁴⁴ In addition to providing criteria concerning the grant or denial and length of probation, these statutes in varying degrees: (1) typically set forth who administers probation; (2) occasionally provide preferences for sentencing alternatives; (3) include provisions on terms and conditions (including standard conditions); (4) provide provisions on modification and revocation of probation; (5) provide provisions dealing with victims and victim notification; and (6) occasionally set forth various provisions allowing and defining other community-based sanctions.

Unfortunately, a thorough reading of these statutes and the various restrictions placed on the sentence suggests that probation itself is still often viewed by many as a lenient response to crime, and in that respect it shares this misunderstanding with the kind of pretrial release that does not include financial conditions of bond, such as “own” or “personal” recognizance. These misunderstandings have been reported in the literature at length, but their continuation requires the repetition of what should by now be a well-known precept of criminal justice. That is, when ordered, both probation and pretrial release without financial conditions are not lenient responses to crimes, but rather the most appropriate responses given the law and the research as to what works to achieve our societal goals. Likewise, these options should never be considered “alternatives” to incarceration. Instead, in America, where our notions of liberty are rooted in our founding documents, we should always consider the more severe restrictions, such as

⁴⁴ In Howard Abadinsky’s textbook, the author quotes William D. Burrell, who states that “[t]he phrases probation and parole [and] or community corrections are used routinely and would imply a single or unified system. Nothing could be further from the truth. Probation and parole agencies are a fragmented, heterogeneous collection of organizations found at the federal, state, county, and municipal levels, housed in the judicial and executive branches.” Howard Abadinsky, *Probation and Parole, Theory and Practice*, at 23 (11th ed. Prentice Hall 2012) (quoting William D. Burrell, *Trends in Probation and Parole in the States*, found at <http://appaweb.csg.org/eweb/docs/appa/pubs/TPP.pdf>).

incarceration (and its documented history of negative effects), to be “alternatives” to our normal state of freedom, both in sentencing and pretrial release.

The perceived leniency of probation is linked somewhat to its statutory nature, which lends itself to dramatic shifts based on prevailing criminal justice philosophies and on which “model” of professional orientation best suits the goals of probation at any particular time. Although originating at a time when America was focused on rehabilitation, it is safe to say now that the pure rehabilitative model of probation has been gradually replaced by a hybrid model that infuses a great degree of offender control. Of course, the move toward evidence-based practices is especially important in that those practices are only relevant to the valid goals of a given discipline. Thus, unlike pretrial release, in which we have fairly clear articulations of the purposes of bail as well as the constitutionally valid purposes for limiting pretrial freedom, the underlying purposes of probation may be different for any particular jurisdiction, and are likely to shift with some frequency based on each jurisdiction’s perceptions of other aspects of criminal justice.

Accordingly, probation, unlike pretrial release, has no fundamentally weighty basis that necessitates “reform” whenever we stray from it. Probation is a chameleon, which shifts to resemble our jurisdictional philosophy and predilections. Probation is exceedingly important; indeed, with nearly four million adults on probation it is the most commonly used correctional process in America,⁴⁵ and what we do with these persons has critical ramifications for all of society. But probation does not have the rich history of bail – a history that illuminates the importance of the pillars of pretrial release and the historical correction demanded whenever these pillars are shaken.

In sum, both probation and pretrial release have histories tied to the English common law. But only pretrial release has evolved to become a fundamental precept of American jurisprudence, a right enshrined in our state constitutions or statutes to be protected with vigor, and historically a process that occasionally must be “reformed” to meet certain universal principles in spite of prevailing philosophies of criminal justice. This historical distinction

⁴⁵ See Danielle Kaeble, Laura M. Maruschak, Thomas P. Bonczka, *Probation and Parole in the United States*, 2011 (BJS 2015).

must be recognized and woven into our pretrial practices, especially when those practices are undertaken by probation entities.

Chapter 3. Legal Principles

As legal processes, both pretrial release and probation are girded by fundamental legal principles, and it is critical that those working in either field have at least some passing familiarity with them. The fundamental legal principles underlying pretrial release and probation should not be considered complicated and inaccessible academic notions fit only for judges to consider. Indeed, all practitioners should keep these principles foremost in their minds, and should constantly refer to them as rods by which to measure their daily practices. Until those practitioners know the broader legal framework, however, they cannot begin to understand whether their practices or even their local laws line up with that framework.⁴⁶

Comparing and contrasting the legal principles underlying pretrial release and probation can be difficult, but it is not impossible. The difficulty arises from at least four reasons. First, every jurisdiction has a unique mix of relevant sources of law, which informs where any particular legal principle lies on the spectrum of relevance, and which ultimately guides that jurisdiction's policies and practices. Whether analyzing pretrial release or probation, practices may be held up to a variety of legal principles emanating from multiple sources such as the U.S. Constitution, the state constitution, federal and state statutes, federal and state case law, municipal ordinances, court rules, and even administrative regulations. Indeed, due to this mix, any particular legal claim concerning bail or probation might be based on a number of complex and sometimes subtly overlapping legal theories, each of which may or may not serve as the basis for a legal opinion.

⁴⁶ Sources for this section include the following: 8A Am. Jur. 2d, *Bail and Recognizance* (West 2009); 21A Am. Jur. 2d *Criminal Law* (Thomson/West 2008, & Supp. 2013); Black's Law Dictionary (9th ed. 2009); Arthur W. Campbell, *Law of Sentencing* (2d ed. 1991) (Clark Boardman Callaghan of Thompson Legal Publishing); Robert J. Dieter, *Colorado Criminal Practice and Procedure* § 20.1 (sentencing) [hereinafter Dieter]; Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (4th ed. 2015) (Ch. 12, Pretrial Release) [hereinafter LaFave *Pretrial Release*]; Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* (Ch. 26 sentencing procedures) [hereinafter LaFave *Sentencing*]; Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); 3B Charles Allen Wright & Peter J. Henning, *Federal Practice and Procedure* §§ 761-87 (2013); Charles Alan Wright and Sarah N. Welling, *Federal Practice and Procedure* (4th ed.) (sentencing and judgment).

Second, and somewhat related, some jurisdictions have bodies of law that create what one might call a “fundamental legal principle” that other jurisdictions do not necessarily share. For example, in some jurisdictions, using money to protect the public at bail is expressly against the law. In those states, the prohibition is so important (and the ramifications of violating it so significant), that it rises to the level of other fundamental legal principles such as the right to bail or the presumption of innocence. Other states not sharing the express prohibition of using money for public safety may find it more complicated to address legal complaints on the practice.

Third, as a correctional sentence, probation naturally has generated a large body of case law and legal literature discussing it. Indeed, by comparison, the number of cases or law review articles discussing bail is anorexic, which, in turn, makes a deeper analysis of the existing law in that field paramount. Moreover, determining the boundaries of any particular legal principle can be made difficult by the sheer number of cases in which a constitutional claim is rejected. Thus, even in an area of significant legal overlap, such as the Due Process Clause, it would necessarily take a great deal of research to come to anything but cursory conclusions of the nuances of similarities or differences between pretrial release and probation.

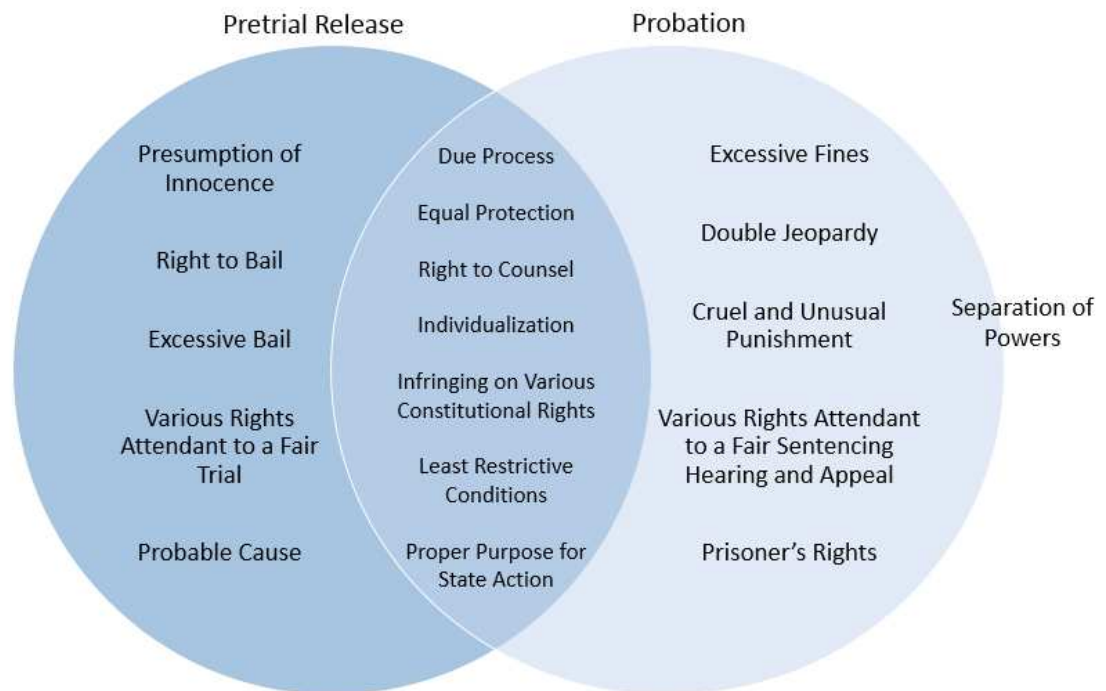
Fourth, the legal principles typically manifest in a myriad of discreet claims, which sometimes cloud the basis for the claims themselves. For example, a defendant’s claim on appeal that a sentencing judge improperly considered acquitted conduct unrelated to the crime of conviction is seemingly related to due process, but has been analyzed under the Double Jeopardy Clause. Similarly, in bail, the same discreet claim might lead to analysis under multiple legal theories and foundations.

Accordingly, this document will present basics – discussing only in a relatively cursory fashion which legal principles are shared by pretrial release and probation, and which are unique to either discipline. Within this broad discussion, however, the probation and pretrial practitioner can begin to see which legal principles affect which practices more directly than others.⁴⁷ Moreover, knowing that America is currently in a period of pretrial

⁴⁷ Indeed, looking at fundamental legal principles for pretrial release broadly has been especially helpful during this generation of bail reform. As an example, much of the case law dealing with excessive bail has been focused on particular amounts of money, and comparing those largely arbitrary amounts to other equally arbitrary amounts to attempt to discern whether they are appropriate (and thus non-excessive) bail amounts based on the particular facts of the relevant cases. A broader and more basic look at the test for excessive bail, however (a balancing test that focuses on the ends and means employed by the government),

reform that extends even to questioning how we can lawfully set bail, practitioners will hopefully see which particular legal principles unique to bail or pretrial release must be emphasized so as to create a fair and transparent system of bail in America.

The following diagram depicts legal principles that are somewhat unique to each discipline and principles that tend to overlap.



The diagram is very basic, somewhat subjective, and does not completely reflect the complexity of the interplay between legal principles underlying each discipline. Accordingly, practitioners who want to know more detail concerning the principles, their elements, and their relationship to one another, should consult the various references provided within this paper, more general legal resources, or with local counsel. The diagram is designed merely to illustrate the overlapping nature of pretrial release and probation, with certain fundamental legal principles more prominently associated in one field over another. Nevertheless, even in this most basic of forms, the diagram illustrates a few essential points.

coupled with pretrial research that is beginning to show that money is an illogical or harmful and thus an unreasonable response to risk, has caused many persons to re-think the body of law surrounding “excessive bail” that reflects a system over-reliant upon money.

Overlapping Principles

First, there are many areas that overlap. Due process, for example, refers generally to upholding people’s legal rights and protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar or equivalent state provisions). The Fifth Amendment provides that, “No person shall be . . . deprived of life, liberty, or property, without due process of law.”⁴⁸ The Fourteenth Amendment places the same restrictions on the states. As a rule of thumb, due process refers to fundamental fairness, and so anything that is, or appears to be, unfair in either pretrial release or a sentence to probation would be susceptible to a due process claim. Because of this, the Due Process Clause is often a workhorse not only in bail cases, but also in appeals of sentences, including probation.

Within the overlapping areas, however, some principles simply do not arise as often as others. Equal protection, for example, is concerned with treating similar persons similarly under the law. It is relevant to both pretrial release and probation and would likely find traction in egregious cases of discrimination, but courts have relied on equal protection relatively infrequently (and, until only recently, extremely infrequently in bail) as the basis of opinions in either discipline.

Other areas that overlap come up frequently in both pretrial release and probation, but are especially acute in only one. An example is the notion of individualization, which is relevant to both disciplines,⁴⁹ but which is especially acute in bail due to courts straying from the principle by using blanket conditions and monetary bail bond schedules to a degree now requiring nationwide correction. Likewise, the notion that both pretrial and probation conditions must only be set to further legitimate purposes (discussed below) seems particularly acute in bail, as judges are often setting conditions of pretrial release that exceed the somewhat limited purposes of attaining reasonable assurance of public safety and court appearance.

⁴⁸ U.S. Const. amend. V.

⁴⁹ In sentencing, it is the notion that the personal circumstances of each defendant should guide judges in setting the sentence; in bail, it is the notion that those circumstances should also guide them in setting conditions of release or detention. Individualization is discussed in *Stack v. Boyle*, 342 U.S. 1 (1951), contained in both the ABA’s Standards on Sentencing and on Pretrial Release, and is arguably tied to any constitutional right designed to prevent arbitrary government action.

Another category of overlapping principles, broadly categorized as “infringing on various constitutional rights,” involves situations when either probation or pretrial release is administered or structured in a way that unlawfully impinges upon various other constitutional rights of persons, for example, through conditions that keep people from exercising their First Amendment rights to speak or their Fifth Amendment right to remain silent. While overlapping, there is a crucial difference between the disciplines that affects how we respond to perceived violations based on these principles. That difference (also discussed further below) is based on the fact that convicted persons, including probationers, are considered fundamentally different from those who are not yet convicted and awaiting trial. Specifically, once convicted, defendants become offenders and are afforded fewer constitutional protections than ordinary citizens. The issue occurs most frequently when assessing conditions of probation or pretrial release, and has been litigated most aggressively in cases looking at conditions affecting the Fourth Amendment’s right to be free from unreasonable searches and seizures. The important thing to remember is that the difference in status between a convicted versus an un-convicted person can affect the analysis and outcome of any particular case alleging constitutional deprivations.

Principles Relating Primarily to Probation

Second, because it is a form of punishment, there are a few fundamental legal principles that relate primarily to probation. The most obvious are the “Excessive Fines” and “Cruel and Unusual Punishment” clauses of the Eighth Amendment to the United States Constitution, or similar or equivalent state provisions.⁵⁰ Compared to the Excessive Bail Clause, the body of law devoted to the Cruel and Unusual Punishment clause is large, and, although often focusing on more severe punishments, cases under either the Cruel and Unusual Punishment Clause or the Excessive Fines Clause occasionally arise in the context of probation.⁵¹ Another principle relating

⁵⁰ The Eighth Amendment reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

⁵¹ See e.g., *Thompson v. Eubanks*, 2014 WL 629624 (11th Cir. 2014) (defendant arguing that banishment as a condition of probation was cruel and unusual punishment); *People v. Pressley*, 172 Cal. App. 3d 1001 (Cal. Ct. App. 1985) (defendant arguing that prohibition of probation for the crime of selling methamphetamine was cruel and unusual punishment); *United States v. Feldman*, 853 F. 2d 648 (9th Cir. 1988) (defendant arguing that an approximately \$2 million amount of restitution as a condition of probation

primarily to punishment is double jeopardy, which forbids retrying a defendant for the same offense after either an acquittal or conviction, and which forbids multiple punishments from the same offense.⁵²

Of the legal principles relating primarily to probation as a correctional sentence, the notion of separation of powers as a limiting factor is most interesting. Separation of powers is based on the government's division into three branches through Articles I-III of the United States Constitution – legislative, executive, and judicial. “Under this constitutional doctrine of ‘separation of powers,’ one branch is not permitted to encroach on the domain or exercise the powers of another branch.”⁵³ It is interesting because although it is occasionally raised in sentencing – indeed, the doctrine formed the basis of the Supreme Court's decision forbidding judges from imposing indefinite suspended sentences, which was a catalyst for probation statutes – it is rarely, if ever, raised in bail. This is somewhat surprising given the fact that judges in America today routinely detain persons pretrial who are technically not detainable through the lawfully enacted bail laws, essentially deciding judicially, rather than legislatively, who should and should not receive a right to bail. It is the complete lack of court decisions applying the separations of powers doctrine to bail, however, that leads this author to include it in that category of principles primarily associated with probation.

Principles Relating Primarily to Pretrial Release

Third, there are likewise a few fundamental legal principles that are associated primarily with pretrial release. Indeed, three particular principles provide the bases for understanding the majority of significant legal differences between pretrial release and probation; accordingly, it is crucial for pretrial practitioners to understand these three principles above all others. Making sure that these three principles have meaning, along with maintaining the distinctions between disciplinary purposes, is the key to assuring that pretrial release may never be confused with punishment.

was excessive); *People v. Martin*, 9 Cal. 3d 687 (Cal. Sup. Ct. 1973) (defendant arguing that a \$10,000 fine as a condition of probation was excessive).

⁵² The Fifth Amendment to the U.S. Constitution states, *inter alia*, “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Double jeopardy has been applied to the States through the Fourteenth Amendment and may also exist in similar or equivalent form in state constitutions.

⁵³ Black's Law Dictionary 1365 (9th ed. 2009).

Excessive Bail

The first legal principle unique to pretrial release is the principle of excessive bail. Excessive bail is a legal term of art used to describe bail that is unconstitutional pursuant to the Eighth Amendment to the United States Constitution (and similar or equivalent state provisions). The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵⁴ The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. Indeed, historians note that justices began setting high amounts on purpose after King James failed to repeal the Habeas Corpus Act, and the practice represents, historically, the first time that a condition of bail, rather than the actual existence of bail, became a concern. The English Bill of Rights of 1689 first used the phrase, “Excessive bail ought not to be required,” which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and most state constitutions. Excessiveness must be determined by looking both at federal and state law, but a rule of thumb under current law is that the term relates overall to reasonableness.

“Excessive bail” is, in fact, a misnomer, because bail more appropriately defined as a process of release does not lend itself to analysis for excessiveness. Instead, since it was first uttered, the phrase excessive bail has always applied to conditions of bail or limitations on pretrial freedom. The same historical factors causing jurisdictions to define bail as money are at play when one says that bail can or cannot be excessive; hundreds of years of having only one condition of release – return to court or pay money – has caused the inevitable but unfortunate blurring of bail and one of its conditions. Accordingly, when we speak of excessiveness, we now more appropriately speak in terms of limitations on pretrial release or freedom.

The current federal test for excessiveness from the United States Supreme Court is instructive on many points. In *United States v. Salerno*, the Court wrote as follows:

The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or

⁵⁴ U.S. Const. amend. VIII.

detention not be ‘excessive’ in light of the perceived evil. Of course, to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle*, *supra*. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.⁵⁵

Thus, as explained in *Galen v. County of Los Angeles*, to determine excessiveness, one must:

look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests . . . nor in an amount that is excessive in relation to the valid interests it seeks to achieve.⁵⁶

Salerno thus tells us at least three important things about excessive bail. First, the government must have a valid purpose for limiting pretrial freedom and, so far, the only constitutionally valid purposes for limiting pretrial freedom are public safety and court appearance. Accordingly, bail set with any other purpose – for example, to punish a defendant or to enrich the treasury – is unconstitutional. But the notion of a valid purpose is especially important because scholars and courts (as well as Justice Douglas, sitting as circuit justice) have indicated that setting bail with a purpose to detain an otherwise bailable defendant would be unconstitutional because detention is not a valid purpose when the state provides a lawfully enacted procedure for denying bail altogether without the use of unattainable release conditions. This is important and bears repeating. Setting bail to detain (that is, ordering the release of a defendant with conditions designed to keep that defendant in jail even ostensibly to protect the public) should be considered

⁵⁵ 481 U.S. 739, 754-55 (1987).

⁵⁶ 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).

unconstitutional. Nevertheless, in states where the bail/no bail dichotomy has been inadequately crafted, judges are doing precisely that.

Second, *Salerno* indicates that the law of *Stack v. Boyle* is still strong: when the state's interest is assuring the presence of the accused, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”⁵⁷ The idea of “reasonable” calculation necessarily compels us to assess how judges are typically setting bail in America today, which might be arbitrarily (such as through a bail schedule) or irrationally (such as through setting financial conditions to protect the public when those conditions cannot be forfeited for breaches in public safety, or when they are otherwise not effective at achieving the lawful purposes for setting them, which recent research suggests). A return to the fundamentals of bail means taking special care to analyze conditions of bail (including financial conditions) for their “reasonableness” through the law and the pretrial research. When the research or even common sense suggests that a condition of release is irrational or arbitrary, then it cannot be reasonable, and is thus likely excessive.

Third, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release (or detention), including a nonfinancial condition, that has no relationship to mitigating an identified risk, or that exceeds what is needed to assure the constitutionally valid state interest, might be deemed constitutionally excessive.

Following the premise of this paper, to adequately distinguish pretrial release from the punishment of probation, the differences must be meaningful. When it comes to excessive bail, making it meaningful necessitates two things. First, it is important to look at the clause somewhat differently than before. Previously, courts have examined excessive bail claims by merely looking at mostly arbitrary amounts of money and determining reasonableness based mostly on comparisons to other equally arbitrary amounts of money. Today, we must dig deeper into the test of excessiveness and question what makes money reasonable to begin with. If money does not further a constitutionally valid purpose of bail, or if it leads to results that are the opposite of those purposes, money should be abandoned.

⁵⁷ 342 U.S. 1, 5 (1951).

Second, conditions of release, and especially financial conditions, must never stand in the way of release. Conditions of release have no distinction from punishment whatsoever when they lead to pretrial detention. Americans have ignored this fact for too long, and over the course of 100 years we have allowed courts to condone detention based on unattainable financial conditions with no hearing and no individualization, and often outside of the lawful process for detention as enacted by any particular state.

The Right to Bail

The second area unique to pretrial release is the right to bail. *When granted by federal or state law*, the right to bail should be read as a right to release through the bail process. It is often technically articulated as the “right to non-excessive” bail, which goes to the reasonableness of any particular conditions or limitations on pretrial release. This is a critical distinction between pretrial release and probation. Pretrial release expressed as bail is virtually always a matter of some constitutionally protected or statutorily articulated right; probation, on the other hand, is typically considered to be a privilege.

The preface, “when granted by federal or state law” is crucial to understand because we now know that even though states may not do away with pretrial release altogether, the “bail/no bail” dichotomy is one that legislatures or the citizenry are free to make through their statutes and constitutions. Ever since the Middle Ages, there have been certain classes of defendants (typically expressed by types of crimes) that have been refused bail – that is, denied a process of release altogether. The bail/no bail dichotomy is exemplified by the early bail provisions of Massachusetts and Pennsylvania, which granted bail to some large class of persons “except,” and with the exception being the totality of the “no bail” class. These early provisions, as well as those copied by other states, were technically the genesis of what we now call “preventive detention” schemes, which allow for the detention of extremely high risk defendants – the risk at the time primarily being derived from the seriousness of the charge, such as murder or treason.

How a particular state has defined its “bail/no bail” dichotomy is largely due to its constitution, and arguably on the state’s ability to easily amend that constitution. According to legal scholars Wayne LaFare, et al., in 2015 twenty-three states had constitutions modeled after Pennsylvania’s 1682

language that guarantees a right to bail to all except those charged with capital offenses, where proof is evident or the presumption is great.⁵⁸ It is unclear whether these states today choose to remain broad “right-to-bail” states, or whether their constitutions are simply too difficult to amend. Nevertheless, these states’ laws likely contain either no, or extremely limited, statutory pretrial preventive detention language.

Nine states had constitutions mirroring the federal constitution – that is, they contained an excessive bail clause, but no clause explicitly granting a right to bail. The United States Supreme Court has determined that the federal constitution does not limit Congress’ ability to craft a lawful preventive detention statute, and these nine states likewise have the same ability to craft preventive detention statutes (or court rules) with varying language. Despite having no constitutional right to bail, these states nonetheless have provisions that ultimately place defendants in categories reflecting their bailability (or release-ability), and thus, even when not articulated as a right to bail, the varying processes reflect a desire to detain some defendants and to release most others.

The remaining 18 states had enacted in their constitutions relatively recent amendments describing more detailed preventive detention provisions. As LaFave, et al., correctly note, these states may be grouped in three ways: (1) states authorizing preventive detention for certain charges, combined with the requirement of a finding of danger to the community; (2) states authorizing preventive detention for certain charges, combined with some condition precedent, such as the defendant also being on probation or parole; and (3) states combining elements of the first two categories.⁵⁹

Nevertheless, for purposes of this paper, there are two fundamental points about the right to bail. The first is that when bail exists, it is nearly always an unequivocal right, and not a privilege, and thus recognizing it as a right and

⁵⁸ See LaFave *Pretrial Release*, *supra* note 46, at § 12.3(b). Some states have added additional classes of crimes to these so-called “categorical” no bail provisions, which causes confusion with classes added under more typical preventive detention provisions.

⁵⁹ *Id.* Readers should be vigilant for activity changing the numbers for the listed categories. For example, the 2010 constitutional amendment in Washington State likely adds it to the category of states having preventive detention provisions in their constitutions (even though it added what is commonly called a “categorical” no bail provision), and, most recently, New Jersey added preventive detention language to its previously broad right to bail provision. Accordingly, depending on how one reads the South Carolina constitution, the counts may, in fact, reveal 9 states akin to the federal scheme, 20 states with traditional right to bail provisions, and 21 states with more recent preventive detention amendments.

making that right meaningful are crucial to differentiating pretrial release from probation.

The second is that to make any right to bail meaningful, we must remember to administer bail so that it actually equals release. As explained more fully in the two previous NIC papers dealing with pretrial release,⁶⁰ America has slowly grown accustomed to incorrectly defining bail as amounts of money (technically only part of a condition of bail) rather than correctly as a process of conditional release. Nevertheless, bail as a process of release is the only definition that: (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from *United States v. Barber*⁶¹ and *Hudson v. Parker*,⁶² to *Stack v. Boyle*⁶³ and *United States v. Salerno*.⁶⁴

Bail as a process of release accords not only with history and the law, but also with scholar's definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."⁶⁵ States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),⁶⁶ Colorado (which defines bail as security like a pledge or a promise, which can include release without money),⁶⁷ and Florida (which

⁶⁰ See generally *Fundamentals*, *supra* note 4; *Money*, *supra* note 27.

⁶¹ 140 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 . . .").

⁶² 156 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 . . . be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . .").

⁶³ 342 U.S. 1, 4 (1951) ("[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction . . .").

⁶⁴ 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm . . .").

⁶⁵ *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).

⁶⁶ Va. Code. § 19.2-119 (2016).

⁶⁷ Colo. Rev. Stat. § 16-1-104 (2016).

defines bail to include “any and all forms of pretrial release”)⁶⁸ have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,⁶⁹ Florida,⁷⁰ Connecticut,⁷¹ and Wisconsin,⁷² have constitutions explicitly incorporating the word “release” into their right to bail provisions.

To make the right to bail meaningful, bail must equal release in both law and practice. Judges could make bail equal release simply by setting release conditions that are attainable. If they do not, we are left with two alternative courses of action: (1) force judges to follow the law by releasing bailable defendants under the assumption that the relevant “bail/no bail” dichotomy in any particular jurisdiction is appropriate; or (2) change the “bail/no bail” dichotomy (within constitutional boundaries) so that few if any bailable defendants are ultimately detained. The second course of action can be complex, and may take states a great deal of work to restructure their statutes and even constitutions to result in a fair and transparent release and detention scheme. Nevertheless, it is not novel; indeed, many American states have already gone through the process of changing their dichotomies in the second generation of bail reform in the Twentieth Century.

The Presumption of Innocence

The third area unique to pretrial release is the presumption of innocence, which, technically speaking, is the principle that a person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, and without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court’s opinion in *Coffin v. United States*, in which the Court wrote: “a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”⁷³ In *Coffin*, the Court traced the presumption’s origins to various extracts of Roman law, which included language similar to what is known as William Blackstone’s ratio: “it is better that ten guilty persons

⁶⁸ Fla. Stat. § 903.011 (2016).

⁶⁹ Alaska Const. art. I, § 11.

⁷⁰ Fla. Const. art. I, § 14.

⁷¹ Conn. Const. art. 1, § 8.

⁷² Wis. Const. art. 1, § 8.

⁷³ *Coffin v. United States*, 156 U.S. 432, 453 (1895).

escape than that one innocent suffer.”⁷⁴ The importance of the presumption of innocence has not waned, and the Court has quoted the “axiomatic and elementary” language in just the last several years.

Though sometimes misunderstood, the presumption of innocence has everything to do with bail, at least so far as making sure that the right to bail exists, in determining which classes of defendants are bailable, and in evaluating the constitutional and statutory rights (such as actually being released) flowing from that decision. And indeed, the presumption has been associated with the right to bail in numerous court opinions, including state supreme court and other appellate opinions, and even in the Supreme Court’s opinion in *Stack v. Boyle*, in which the Court wrote, “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.”⁷⁵

As explained by the Court in *Taylor v. Kentucky*, the phrase is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, “it is better characterized as an ‘assumption’ that is indulged in the absence of contrary evidence.”⁷⁶ Moreover, the words “presumption of innocence” themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor* suggests an appropriate way of looking at the presumption as “a special and additional caution” to consider beyond the notion that the government must ultimately prove guilt. It is the idea that “no surmises based on the present situation of the accused” should interfere with the jury’s determination.⁷⁷ Applying this concept to bail, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

⁷⁴ William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769). The statement had been articulated in various ways and in varying ratios by a number of persons, but Blackstone’s *Commentaries* were most influential to America’s founding fathers. It is a seminal statement of risk in criminal justice, and has particular relevance to bail, which requires us to embrace the risk of release and to mitigate that risk to reasonable rather than absolute levels.

⁷⁵ 342 U.S. 1, 4 (1951) (internal citation omitted).

⁷⁶ *Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12 (1978).

⁷⁷ *Id.* at 485 (quoting 9 J. Wigmore, *Evidence* § 2511, at 407 (3d ed. 1940)).

All of this directs us to a fundamental difference between pretrial release and probation, which is that defendants on pretrial release are considered innocent and offenders on probation are guilty. This distinction in legal status is more than academic, and practitioners should avoid the kind of thinking that erodes the differences. Indeed, it is helpful to simply think of all defendants as being in the one to two percent of defendants who are ultimately acquitted, or in the roughly twenty-five percent of defendants who might have their cases dismissed.⁷⁸ Since we often cannot tell in advance who these defendants might be, erring on the side of protecting innocence for all, via thinking akin to Blackstone’s ratio, mentioned above, seems infinitely reasonable.

Legal status should inform everything at bail. It should remind us that the defendant’s constitutional rights are intact. It should caution judges not to stray from the constitutionally valid purposes for limiting pretrial freedom. It should lead to the immediate release of bailable defendants after arrest on the least restrictive conditions necessary to achieve those valid purposes. It should force judges and others to question the use of money whenever the use of money interferes with the bail (release), or no bail (detention) process. Finally, it should require that our procedures for pretrial detention are used not only sparingly, but also carefully through a due process-laden scheme like the one approved by the United States Supreme Court in *United States v. Salerno*.⁷⁹

Setting Conditions to Further Lawful Purposes

These considerations come together most acutely in the setting of conditions.⁸⁰ Generally speaking, conditions of either probation or pretrial release must be reasonably related to the offense and be the least restrictive conditions to further the valid underlying purposes of either discipline. For pretrial release, there are only two constitutionally valid purposes for limiting pretrial freedom – public safety and court appearance during the pretrial phase of the case. Probation conditions, on the other hand, “must be reasonably related to the offense involved, the rehabilitation of the

⁷⁸ See, e.g., Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, at 22 (BJS 2013).

⁷⁹ See 481 U.S. 739 (1987) (reviewing the federal detention provisions of the Bail Reform Act of 1984).

⁸⁰ As in pretrial release, most state probation statutes include certain mandatory conditions, and then provide a nonexclusive list of optional conditions. See LaFave *Sentencing, supra* 46, at 860-861.

defendant, the protection of the public, or another legitimate punitive purpose,”⁸¹ which can be varied. The fact that conditions may be set in probation to further “other legitimate punitive purposes” requires practitioners to know and understand the purposes articulated for either discipline in their jurisdictions, and to continually hold up conditions to their respective articulated, lawful purposes. Depending on the jurisdiction, conditions of probation might be justified upon many more lawful purposes than those available for pretrial release. Accordingly, and quite simply, a condition that is lawful for probation may be clearly unlawful for pretrial release.

A simply illustration of this principle involves requiring persons on probation to pay restitution, which in virtually all jurisdictions would be deemed reasonably related to the punitive purposes of restitution, retribution, restoration, and even deterrence. Such a condition of pretrial release, however, should be declared unlawful as bearing no rational relationship to either public safety or court appearance, and would more resemble punishment, which is unlawful under the Due Process Clause.

Recognizing these bright lines between purposes can bring clarity to situations in which the lawfulness of any particular condition is based on subtleties. For example, it would be clearly unlawful for a judge to set a condition of pretrial release while expressly articulating his or her intent on the record that the amount was based on a desire to help pay for government services or restitution. Does that mean, then, that it would be unlawful for a legislature to require that financial conditions of bail pay for costs, fees, and restitution after conviction? Does that lead, even subconsciously, to judges setting financial conditions for the purpose of ultimately paying for things like restitution? In at least one jurisdiction that this author has visited, the judges there argued for retaining a mostly money-based bail system because they believed that many programs that were funded with bail money would fail without it. Unfortunately, this represented a blurring of the lawful purposes of pretrial release with the lawful purposes of punishment.

Another example concerns conditions involving various programs of treatment. Such conditions are fairly straightforward attempts to alter the long-term behavior of an offender, and thus they are typically upheld for probationers as furthering the purposes of rehabilitation in addition to public

⁸¹ *Id.* at 864.

safety by reducing long-term recidivism. In the context of pretrial release, however, long-term behavioral change is technically not the goal, and treatment programs, even ordered benevolently (as opposed to the perhaps subtle distinction of presenting them to defendants, who may voluntarily choose to engage in them) to help any particular defendant to begin a process of reform, would exceed the lawful purposes of pretrial release.

Given the importance of the right to bail and the presumption of innocence, which together should provide an even more particularized caution for judges to order only conditions that are likely to further the purposes of pretrial release as well as to lead to actual release, it is interesting that financial conditions are still used in bail at all. As noted previously, despite having a broader array of legitimate purposes for imposing conditions, financial conditions (as opposed to fines) in probation have been gradually but nearly completely phased out over the last four decades as being unfair, unnecessary, and irrational for a number of reasons, including the fact that money: (1) has nothing to do with public safety; and (2) is incapable of adequately furthering any punitive purpose of probation, especially when compared to traditional supervision.⁸² Financial conditions of pretrial release are equally unfair, unnecessary, and irrational, and yet, curiously, judges across America have been slow to reject them.⁸³

Recently, however, new research has shown that when judges set secured financial conditions resulting in the short-term (over 24 hours) detention of defendants, that detention actually causes lower risk defendants to become higher risks to public safety and for failure to appear for court than those who are released immediately.⁸⁴ This research suggests that when judges set unattainable secured money conditions at bail for certain defendants, those judges may get results that are the *opposite* of what they intended and the

⁸² See *American Probation and Parole Association Position Statement on Conditional Early Release Program* (APPA 1998) (arguing against using financial conditions and bondsmen “supervision” for convicted offenders) found at https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=cc90f473-11fa-4b1e-8907-260a9c0a7ff0.

⁸³ Since 1968 the American Bar Association’s Standards on Pretrial Release have recommend drastically reducing, if not eliminating the use of secured money bonds, a recommendation based on both pretrial research and fundamental legal principles.

⁸⁴ See Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (LJAF 2013). Another study suggests that judges needn’t abandon money altogether to avoid these costs. In his study of pretrial releases in Colorado, Dr. Mike Jones showed that judges could attain the same public safety and court appearance rates without the resulting unnecessary detention by simply using unsecured versus secured financial conditions. See Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI 2013).

opposite of the constitutionally valid purposes of bail. Essentially, they would be setting financial conditions to reduce or mitigate risk but, in fact, would be increasing the risk of pretrial misbehavior. Such a phenomenon strongly suggests that judges should follow the lead of probation and cease using secured financial conditions in the field of pretrial release altogether.

The legal status of defendants as well as the considerations arising as a result of that status should also necessitate looking at violations of pretrial conditions differently from probation conditions. Take, for example, a condition that both an offender and a defendant are ordered to periodic drug and alcohol monitoring. Each condition must be held up independently to its purpose, and thus the monitoring might be ordered in probation to assure not only public safety, but also some degree of retribution, deterrence, and perhaps long-term rehabilitation. When an offender has violated that condition by not showing up for a test, then it is a straightforward instance of thwarting the very purposes the criminal justice system sought to attain. But in the context of pretrial release, a defendant may only be ordered to such monitoring if it is reasonably related to the purposes of public safety and court appearance during the pretrial period. Accordingly, if a defendant fails to show up for a scheduled test, but has not yet missed court or committed a new offense, he has not thwarted the purposes. Indeed, it could be argued that the technical violation itself illustrates that the condition was unnecessary to achieve those purposes to begin with. Accordingly, the legal status of pretrial defendants must cause us to pause not only when we set conditions, but also when we react to violations of those conditions.

Other Rules for Setting Conditions

There are typically other “rules” for conditions in both disciplines beyond the need to relate to lawful purposes, including the rule that the conditions may not be vague, that they should be written down, that they should not exceed the probation term or the period of pretrial release (although, in probation, a violation of a condition might toll the probationary period), and that they should be set by the judge (unless lawfully delegated through appropriate guidelines), as well as a variety of rules articulated in statutes and court opinions.

In addition, and as briefly mentioned above, there is an abundance of literature (albeit less so with bail) concerning the issue of whether a

condition may impinge upon one's ability to exercise constitutionally protected rights, such as the Fifth Amendment privilege against self-incrimination, the First Amendment rights of religious exercise, speech, and association, or the Fourth Amendment right to be free from unreasonable searches or seizures. Generally speaking, "A probation condition is not invalid for lack of a reasonable relationship merely because it affects the probationer's ability to exercise constitutionally protected rights, but such a condition requires 'special scrutiny.'"⁸⁵ "Instead, the court is required to look to the purposes sought to be served by probation, the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers, and the legitimate needs of law enforcement."⁸⁶ The condition is impermissible "if the impact upon the probationer's rights 'is substantially greater than is necessary to carry out the purposes' of probation."⁸⁷ This balancing test is sometimes expressed as one requiring the use of least restrictive conditions of probation.⁸⁸

Unfortunately, this is an area of the law that is not fully developed in bail or pretrial release. Unlike probationers, criminal defendants who are presumed innocent enjoy constitutional rights to a far greater extent. The notion is confused somewhat by the fact that the United States Supreme Court has allowed pretrial *detention* on the grounds of dangerousness, leading some to believe that other highly restrictive conditions, including those that equally impinge upon constitutional rights, are lawful.⁸⁹ But that is not, or, at least, should not be the case. Nevertheless, pretrial release lacks the volume of court opinions that probation has to flesh out the boundaries of conditions. Indeed, due to its ability to easily detain defendants regardless of pretrial risk, most court cases in pretrial release deal primarily with financial conditions, or money.⁹⁰ And yet, when it comes to money, the courts are woefully behind in developing a meaningful body of jurisprudence that accounts for everything we know about bail today, which includes the extent to which nonfinancial conditions of the type used in probation are superior to money. Overall, when addressing conditions, the courts appear content to

⁸⁵ LaFave *Sentencing*, *supra* note 46, at 865.

⁸⁶ Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure*, at 273 (4th ed. 2011) (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975)).

⁸⁷ LaFave *Sentencing*, *supra* note 46, at 865 (quoting *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975)); *Higdon v. United States*, 627 F.2d 893 (9th Cir. 1980).

⁸⁸ See e.g., Dieter, *supra* note 46, at 681.

⁸⁹ See *United States v. Salerno*, 481 U.S. 729 (1987). In *Salerno*, the Supreme Court made it clear that its approval of the federal detention scheme was due, in large part, to that scheme's "numerous procedural safeguards" designed to make sure that a defendant's rights were protected. *Id.* at 755.

⁹⁰ See generally LaFave *Pretrial Release*, *supra* note 46.

keep pretrial release and probation separate and distinct, with little discussion of how analysis of either discipline might affect the other.

Occasionally, however, a court will wrestle with the interplay between conditions at probation and conditions at bail. One example, coincidentally concerning the well-litigated (in probation, not pretrial release) and somewhat still controversial issue of conditions infringing on a defendant's Fourth Amendment rights, is the Ninth Circuit's opinion in *United States v. Scott*.⁹¹ In that case, defendant Scott's release from jail was conditioned on him consenting to random drug testing "anytime of the day or night by any peace officer without a warrant,"⁹² to having police search his home for drugs anytime without a warrant, and to not possessing a firearm.⁹³ Apparently, the conditions were "merely checked off by a judge from a standard list of pretrial release conditions," and were ordered without any hearing or findings.⁹⁴ After receiving a tip that Scott possessed both firearms and drug manufacturing paraphernalia, law enforcement entered Scott's home, administered a urine test, and found a shotgun.

Scott was charged in federal court with unlawfully possessing a weapon. Scott moved to suppress the evidence against him, claiming that the search was illegal. The district granted the motion, finding that law enforcement needed, but did not have, probable cause to search Scott's home. Because there was no probable cause, the district court reasoned, the search violated Scott's Fourth Amendment rights. A panel of the Ninth Circuit affirmed.

The appellate opinion details the reasoning employed by the circuit court panel, but for purposes of this paper it is more important to highlight that particular part of the opinion comparing the rationales of probation cases with the instant case involving pretrial release. In reviewing the relevant cases that had upheld warrantless searches of persons on probation, the dissent argued that the analyses in those cases were applicable to defendant Scott, and that the distinction between Scott and someone on probation "[was] not constitutionally relevant."⁹⁵ Responding to this argument, the majority in *Scott* wrote as follows:

⁹¹ *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006).

⁹² *Id.* at 865.

⁹³ *See id.* at 875.

⁹⁴ *Id.* at 865 (internal quotation omitted).

⁹⁵ *Id.* at 883.

The dissent's inability to see a 'constitutionally relevant' distinction . . . between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent, overlooks both common sense and our caselaw.

For our purposes, the lesson [from the probation cases is this]: Probationers are different. Like [the probationer in one of those cases], Scott had a reduced expectation of privacy because he had signed a form that, on its face, explicitly waived the warrant requirement and implicitly (through the use of the word 'random') waived the probable cause requirement for drug testing. But Scott, far from being a post-conviction conditional releasee, was out on his own recognizance before trial. His privacy and liberty interests were far greater than a probationer's. Moreover, the assumption that Scott was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence: That an individual charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.⁹⁶

The majority also dismissed the argument that the Supreme Court's approval of the federal pretrial detention scheme necessarily permits conditions short of detention that nonetheless infringe on constitutional rights. Indeed, the court noted, *Salerno's* requirement of extensive due process safeguards prior to detention means that conditions designed to protect the community "must be justified by a showing that defendant poses a heightened risk [as demonstrated on an individualized basis and beyond mere arrest] of misbehaving while on bail."⁹⁷

⁹⁶ *Id.* at 873-74.

⁹⁷ *Id.* at 874.

The issue is more complex than it seems, and there are problems with both the majority's and the dissent's analyses in *Scott*,⁹⁸ as well as the cases cited for support, and thus the opinion is unlikely to be followed wholesale among the circuits, thus making the issue also far from settled.⁹⁹ Indeed, a recent Westlaw search of cases shows both federal and state courts distinguishing *Scott*,¹⁰⁰ but occasionally relying upon it in similar, difficult cases.¹⁰¹

The gist of *Scott* and cases like it, however, indicates that defendants released pretrial are clearly different from persons sentenced to probation, who have diminished constitutional rights. But defendants are also different from ordinary citizens, who enjoy the full panoply of constitutional rights. Unfortunately, courts have not yet adequately made these distinctions or articulated in detail the proper boundaries.

In sum, pretrial release and probation share certain foundational legal principles, such as due process, equal protection, the right to counsel, individualization, etc., but three principles associated with pretrial release – excessiveness including the notion of least-restrictive conditions, the right to bail, and the presumption of innocence based on legal status – force us to stress those aspects of American law that these principles seek to uphold. Above all others, these principles must be especially emphasized to ensure that pretrial release may never be confused with the punishment of probation.

Specifically, the right to non-excessive bail and the presumption of innocence based on the difference in legal status must lead to some equally meaningful difference between probationers and those released pretrial. When it comes to conditions of release, all things being equal, it is critical that the difference lead, at least, to a heightened initial scrutiny for conditions of bail than for conditions of probation. Until the appellate courts are clear about the boundaries, however, judges and practitioners should err on the side of setting conditions that clearly do not implicate constitutional rights, including the right to liberty before trial.

⁹⁸ While the dissent would draw no distinction between probationers and those on pretrial release, the majority would similarly draw no distinction whatsoever between defendants and ordinary citizens and would also seem to erode public safety as a legitimate purpose for limiting pretrial freedom.

⁹⁹ Nevertheless, all states, and especially those in the Ninth Circuit, should closely examine the decision for its perhaps unintended consequences.

¹⁰⁰ See, e.g., *Norris v. Premier Integrity Solutions*, 641 F.3d 695 (6th Cir. 2011).

¹⁰¹ See, e.g., *State v. Hayes*, 809 N.W.2d 309 (N.D. 2012).

Moreover, as previously mentioned, there must also be some meaningful difference between pretrial release and probation in how we respond to violations of conditions. Given the right to non-excessive bail, the presumption of innocence based on legal status, and the purposes underlying the pretrial process, a violation of anything but the two primary conditions – come to court when ordered and do not commit any new crimes – should lead to re-releasing a defendant on revised conditions rather than pursuing revocation.¹⁰² We must look especially hard at conditions that are set “just to make sure” that a primary condition is met, such as, for example, requiring a defendant to submit to alcohol testing (detecting, at best, a lawful activity) to keep the defendant from driving while impaired.

Finally, in pretrial release judges and others involved in the pretrial process should also be mindful of the need to “ratchet back” or to remove conditions when it appears that they are unnecessary. In bail, the law requires us to embrace the risk of release, and allows us to place least restrictive conditions on that release to mitigate pretrial risk only to reasonable, rather than to absolute levels. Accordingly, there is a constant pressure – based on fundamental precepts of American law – pushing us toward releasing people, toward imposing least restrictive conditions, and toward removing those conditions when, over time, we recognize that they are not needed. Melding these last two concepts together, in bail we must embrace a somewhat counterintuitive recognition that a so-called “technical violation” – a violation of a condition of bond short of violating the two primary conditions of showing up for court and not committed any new crimes – requires us not to reflexively add more conditions, but rather to question whether the violated condition was ever necessary at all.

Chapter 4. Research and Risk

Using Research

Whether analyzing pretrial release or probation, research advances the field. And while that advancement may come through varying strands of relevant criminal justice research, including historical, legal, empirical, or even opinion research, it is not surprising that social science research is the strand

¹⁰² The American Bar Association Standards create a fairly clear preference for setting new or additional conditions over revocation. See *ABA Pretrial Release Standards*, *supra* note 28, Std. 10-5.6, at 116-17.

that we currently use the most. According to noted sociologists Earl Babbie and Lucia Benaquisto, social research is important because we often already know the answers to life's most pressing problems, but we are still unable to solve them. Social science research provides us with the solutions to these problems by telling us how to organize and run our social affairs by analyzing the forms, values, and customs that make up our lives.¹⁰³ By continually testing theories and hypotheses, social science research finds incremental explanations that simplify a complex life, and thus allows us to find answers to confounding questions such as how to reduce recidivism or unnecessary pretrial detention. Social science research is crucial to both pretrial release and probation because both fields work with the complexities of human behavior, the vagaries of prediction, and the nuances of discreet treatments designed to affect outcomes. All research is important, but social research is clearly a workhorse in both pretrial release and probation.

Social science research is especially important when it shows us what works to accomplish our goals. Indeed, finding what works to accomplish one's goals is the essence of evidence-based decision making, and it requires us merely to ask the question, "What works to [insert goal]?" in an attempt to apply the research to those goals. Accordingly, to properly ask the question, we must first know and understand our goals. So, for example, in the medical field, one would ask what works to achieve better hospital stays, eradicate disease, or to best treat certain medical conditions, etc., all valid goals for that field. A police agency might ask what works to predict criminal behavior, prevent criminal activity, or reduce crime in crime-prone areas. In probation and pretrial release, we must likewise ask what works to accomplish each field's respective goals. Because each field has different goals, our definitions of evidence-based practice, and thus our reflections on the research literature, are also different.

In 2004 and 2009, the Crime and Justice Institute and the National Institute of Corrections published documents describing and explaining how to implement the evidence-based principles surrounding community corrections. The documents were part of a set of papers designed to illustrate how communities can reduce recidivism through integration of evidence-

¹⁰³ See generally, Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research: Second Canadian Edition* (Cengage Learning 2009).

based practices in adult community corrections settings.¹⁰⁴ According to the later edition, evidence-based practice is defined as “the objective, balanced, and responsible use of current research and the best available data to guide policy and practice decisions, such that outcomes for consumers [which include offenders, victims and survivors, communities and other key stakeholders] are improved.”¹⁰⁵ More specifically,

It is the body of research and replicable clinical knowledge that describes contemporary correctional assessment, programming and supervision strategies that lead to improved correctional outcomes such as the rehabilitation of offenders and increased public safety . . . It is based on the notion that interventions within corrections are considered most effective when they reduce offender risk and subsequent recidivism and therefore make a long term contribution to public safety.¹⁰⁶

Rehabilitation and public safety are the most widely accepted goals of community corrections generally, and probation in particular, but there are other equally valid purposes of punishment that open the door for research analyzing what works to achieve those purposes as well. For example, an equally valid area of research for post-conviction purposes involves incarceration (which might be used as a condition of probation) and its impact on crime through the goal of incapacitation.¹⁰⁷ In short, it is the goals of a discipline that make the evidence in “evidence-based practices” relevant, and so knowing the discipline’s goals is critical.

In pretrial release and probation, to know one’s goals means, once again, to fully understand how significantly different their purposes are. Indeed, in 2007, Dr. Marie VanNostrand analyzed the use of evidence-based practices in community corrections and, based on fundamental differences between that field and pretrial release, including (1) the status of the persons served by each process, (2) their intended outcomes, and (3) their legal foundations,

¹⁰⁴ See *Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention* (NIC/CJI 2004); *Implementing Evidence-Based Policy and Practice in Community Corrections* (2d ed.) (NIC/CJI 2009) [hereinafter *Implementing EBP 2009*].

¹⁰⁵ *Id.* (09) at ix.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ See, e.g., Roger Przybyiski, *What Works: Effective Recidivism Reduction and Risk-Focused Prevention Programs* (RKC Group 2008) (noting an array of evidence-based and best practices, from prevention programs to incarceration) [hereinafter *Przybyiski*]; see also *What Works in Community Supervision* (WSIPP 2011) (describing effective interventions based on the changing goals of offender supervision).

coined the term “legal and evidence-based practices” when applying the concept to pretrial release.¹⁰⁸ According to Dr. VanNostrand, the term “legal and evidence-based practices,”

is defined as interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles.¹⁰⁹

This definition is rooted in everything discussed in this paper so far. The historical and legal purpose of bail is to release people, and the United States Supreme Court says that release must be the norm. The only constitutionally valid purposes for limiting that pretrial liberty are court appearance and public safety. Thus, when trying to determine “what works” in bail, we are trying to determine “what works” to simultaneously maximize release, maximize public safety, and maximize court appearance.¹¹⁰ Unlike probation, where individual goals may stand independently, and where multiple goals do not necessarily compete with one another, the goals of pretrial release must almost always be considered together and are sometimes in direct competition with one another. The goals of pretrial release, or bail, reflect a balance that has been molded through the history and the law, and that forms the basis for the national best standards on pretrial release.¹¹¹

As it applies to pretrial research, this balance means that we must continually assess that research for how it affects each of these three interrelated goals of maximizing release while maximizing public safety and court appearance. Research (and practices based on that research) that

¹⁰⁸ VanNostrand, *supra* note 29, at 12.

¹⁰⁹ *Id.*

¹¹⁰ See generally *Fundamentals*, *supra* note 4, *passim*.

¹¹¹ The American Bar Association describes the purpose of the pretrial release decision as a balance between providing due process to those accused of crime while maintaining court appearance and public safety rates. See *ABA Pretrial Release Standards*, *supra* note 28, Std. 10-1.1, at 1, 36.

addresses all three of these goals is superior to research that does not;¹¹² indeed, research that does not address all three goals may be fatally flawed. For example, studies showing the effectiveness of release pursuant to a commercial surety bond only for ultimately reducing failures to appear (whether true or not) are flawed when they do not show how those bonds do or do not affect public safety and tend to detain otherwise bailable defendants. Indeed, given what we know about how surety bonds tend to cause detention as well as the fundamental problems associated with a system of bail that in no way addresses public safety, we might say that such studies should be discarded altogether.

In short, we must constantly consider the balance. It is helpful to know that pretrial detention causes negative short- and long-term effects on defendants; it is more helpful to learn how to reduce those effects while simultaneously keeping the community safe. It is helpful to know a defendant's risk empirically; it is more helpful to know how to best embrace risk so as to facilitate release and then to mitigate known risk through evidence-based supervision techniques to further the constitutionally valid purposes for limiting pretrial freedom.

The overall notion of assessing pretrial research in this way is substantially different from how we may assess research dealing with community corrections, in general, and probation in particular. Whatever the purposes may be underlying probation in any particular jurisdiction, each may stand on its own.¹¹³ Indeed, each purpose may serve as an independent basis for the sentence, and because release on probation is typically a privilege and not a right, the need to balance one or more competing interests against any right is not required.

In pretrial release, however, we must always be mindful of the notion that risk is inherent in our system of justice, and that to be an American means to embrace the risk of releasing people at bail.¹¹⁴ This is not necessarily true for

¹¹² See e.g., John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, Topics in Comm. Corr. (NIC 2008) (“Both sides of the balance must be considered. For example, pretrial programs that focus on the goal of minimizing failure at the expense of maximizing release, by working only with low-risk defendants, will not contribute much to the research on evidence-based practices.”).

¹¹³ Although, for practical purposes, the ABA cautions against using rehabilitation alone as the basis for a sentence as doing so may lead to longer than necessary periods of punishment.

¹¹⁴ In 1951, Justice Robert H. Jackson succinctly wrote, “Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice.” *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

probation, which is in nearly all cases considered to be a statutorily-created privilege and not a right. Theoretically and for purposes of illustration only, if community corrections research demonstrated that only one intervention was successful in achieving only one goal of probation, but that using that one intervention would lead to a substantially decreased number of persons would be released on probation, we could still use the intervention despite its overall negative effect on using probation as a whole. In short, the effects of reduced release in probation, unlike bail, would not trigger constitutional analysis.

Fortunately, since the early 1970s we have amassed an impressive array of research showing what works best to achieve many of the lawful post-conviction goals as well as illustrating the advantages of community corrections as a sentencing option over incarceration in many cases.¹¹⁵ By comparison, however, research specifically addressing issues surrounding pretrial release is growing, but is substantially less than the body of literature directly applicable to probation. Because of this, it is still somewhat tempting to apply post-conviction research to the pretrial stage. As author Timothy Cadigan explains, however, such application can be complex:

There are significant issues to consider: Do post-conviction evidence-based practices that were developed to reduce long-term recidivism rates impact these unique pretrial outcomes [court appearance and public safety while released during the pretrial phase of the case]? And does the application of post-conviction supervision EBPs infringe on the constitutional rights of individuals not convicted of a crime?

The numerous potential problems of applying post-conviction EBPs in a pretrial setting are easy to envision: an officer places a defendant in a post-conviction EBP program and subjects the defendant to situations where he or she must admit to criminal behavior or risk program failure; an officer employs motivational interviewing in an effort to resolve the defendant's ambivalence about his or her drug use, resulting in the

¹¹⁵ Przybylski, *supra* note 107, at 36 (“In short, the scientific evidence is unmistakably clear. A variety of programs, properly targeted and well-implemented, can reduce recidivism and enhance public safety.”); see also *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (WSIPP 2006) at 16 (“We find that there are economically attractive evidence-based options in three areas: adult corrections programs, juvenile corrections programs, and prevention.”).

defendant's admission of heroin use, which was previously undocumented. Given possible scenarios such as these, the carte blanche application of post-conviction supervision EBP strategies in pretrial services may be dangerous.¹¹⁶

These issues are due not only to the differences in the purposes (and thus related outcomes) underlying each discipline. They are due also to other fundamental differences, including their average lengths of time, their success rates, and their associated risks.¹¹⁷ Accordingly, criminal justice researchers urge great caution when attempting to apply post-conviction research to the pretrial field. Nevertheless, due to the substantial areas of overlap, in some ways we can use (albeit cautiously) the post-conviction research – in particular, research associated with the eight evidence-based principles for effective intervention in community corrections¹¹⁸ – to guide pretrial practices, supplementing that knowledge with pretrial-specific knowledge when it becomes available.

Assessing Risk

An example is found in risk assessment, or, as it is often called in the corrections literature, risk and needs assessment. Actuarial risk instruments, which apply mathematics and statistical methods to assess risk, began in the corrections field in the 1920s, and evolved through periods in which correctional practitioners used somewhat subjective criteria, to periods using more objective static risk factors (those that do not change over time, such as age at first arrest or history of convictions), to periods using a mix of static and dynamic factors (those that can change over time, such as having a job or possessing certain attitudes and personality factors and that help to identify what should be targeted to reduce reoffending), to most recently using assessments that translate complex and abstract factors into simplified

¹¹⁶ Timothy P. Cadigan, *Evidence-Based Practices in Federal Pretrial Services*, 72 Fed. Probation 87 (2008) (internal footnote omitted). Indeed, the purpose of motivational interviewing is to strengthen a person's motivation and commitment to change, but a meaningful application of the presumption of innocence, in which we set aside all negative surmises based on arrest, should cause us to question whether behavioral change, and thus a procedure to help move toward change, is even necessary.

¹¹⁷ See e.g., James Austin, *NIJ Pretrial Research Meeting, What Can We Learn From Parole and Probation Supervision*, found at <http://www.nij.gov/topics/courts/pretrial/documents/austin.pdf>.

¹¹⁸ See *Implementing EBP 2009*, *supra* note 104, at 11-20. The eight principles include: (1) assess actuarial risk/needs; (2) enhance intrinsic motivation; (3) target interventions using risk, needs, responsivity, dosage, and treatment; (4) skill train with directed practice; (5) increase positive reinforcement; (6) engage ongoing support in natural communities; (7) measure relevant processes/practices; and (8) provide measurement feedback.

instruments that help with case planning.¹¹⁹ The various elements incorporated for use in these post-conviction instruments have been found by research to be closely associated with criminal behavior, and using an actuarial instrument to assess offender risk and needs as a guide to alter criminal conduct through effective interventions is considered an evidence-based practice.¹²⁰

Likewise, in pretrial release, using actuarial risk assessment instruments has become an evidence-based practice, especially when validated on similar populations.¹²¹ There is a critical difference between these instruments, however, and those used in corrections: “Unlike other risk/needs assessments, the pretrial risk assessment instrument contains factors that are associated with increased chances of only two types of failure during a short period of time: failure to appear for all court hearings and rearrest on a new charge.”¹²²

¹¹⁹ See Bayens & Smykla, *supra* note 13, at 96-101.

¹²⁰ Dynamic risk factors include: (1) antisocial personality pattern; (2) pro-criminal attitudes; (3) social supports for crime; (4) substance abuse; (5) poor family/marital relationships; (6) school/work failure; and (7) lack of prosocial recreational activities. See *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* (PEW 2011) at 3, found at <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2011/09/20/riskneeds-assessment-101-science-reveals-new-tools-to-manage-offenders>. These factors were listed in Bayens & Smykla’s text and were attributed to D.A. Andrews and James Bonta. See Bayens & Smykla, *supra* note 13, at 95. Depending on how they are operationalized and tested in the instrument, the titles for these factors can vary somewhat, such as by using terms like “social networks” or “education/employment.” Depending on the instrument, static factors often include age at first arrest, current age, gender, prior supervision, mental health, current offense, and previous alcohol or substance abuse. See James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 Fed. Sent. Repr. 1 (2004). Today there are many correctional risk and needs assessment instruments, including many targeting special populations, such as sex offenders or persons convicted of domestic violence.

¹²¹ Identifying statistical predictors of pretrial success and failure empirically has a similarly long history, see *ABA Pretrial Release Standards*, *supra* note 28, Std. 10-1.10, at 57 note 22, but has been somewhat slower to spread across the country. In this author’s opinion, this slower development is due, in part, to the nation’s reluctance to change from its familiar system of bail that equates risk primarily with top charge, the relatively small number of pretrial services agencies who would administer risk instruments, and, most recently, to opposition from the commercial bail bonding and insurance industry, which, ironically, sees risk identified through actuarial instruments to be a threat to its profits.

¹²² *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants*, at 2 (PJI/BJA 2011). As with post-conviction assessments, the factors identifying pretrial success or failure, as well as the weight to attribute to each factor, will vary by jurisdiction based on its unique laws and population, the quality of its data, and available risk mitigation strategies. See *id.* In 2011, PJI and BJA published a document listing the six most common validated pretrial risk factors: (1) prior failures to appear for court; (2) prior convictions; (3) present charge a felony; (4) being unemployed; (5) history of drug use; and (6) having a pending case. See Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment*, at 9 (PJI/BJA 2011). The federal tool, the Federal Pretrial Risk Assessment Instrument, or PTRAI, includes 11 scored and 9 unscored items. See *Federal Pretrial Risk Assessment User’s Manual and Scoring Guide* (Office of Prob. and Pretrial Servs. (2010), found at <http://www.pretrial.org/download/risk-assessment/Federal%20Pretrial%20Risk%20Assessment%20Instrument%20User's%20Manual%20and%20Scoring%20Guide%20-%202010.pdf>.

Thus, like other areas in which pretrial release and probation practices differ based on legal status and the underlying purposes, risk assessment is naturally limited and therefore designed to achieve different goals. According to Dr. Marie VanNostrand,

A pretrial risk assessment instrument should meet the following criteria: (1) be proven through research to predict risk of failure to appear and danger to the community pending trial; (2) equitably classify defendants regardless of their race, ethnicity, gender, or financial status; (3) only utilize factors which are consistent with applicable state statutes; and (4) only utilize factors that relate either to risk of failure to appear or danger to the community pending trial.¹²³

No matter how accurately any particular factor may predict post-conviction failure, that factor is simply irrelevant in the pretrial field unless and until it is also shown to accurately reflect pretrial success or failure. Accordingly, while it is sometimes acceptable for a jurisdiction to “borrow” a pretrial risk assessment instrument until that jurisdiction can validate it to its own population, it would be inadvisable to borrow a correctional risk and needs assessment, no matter how similar one believes the various risk factors to be. Correctional risk and needs instrument factors believed to have an impact on post-conviction behavior are tested primarily by looking at future and often long-term criminal behavior by persons convicted of crimes, and are thus simply often inapplicable and potentially misleading if used for defendants awaiting trial.

Mitigating or Managing Risk

Another area requiring caution when applying post-conviction research to the pretrial field involves research targeting interventions through conditions. Like risk assessment, risk mitigation or management applies to both fields but fundamental differences between the fields require substantial modification of practices from corrections to pretrial release. For example, the third overarching principle of evidence-based community corrections involves targeting correctional interventions through incorporation of the risk principle (by prioritizing treatment toward higher risk persons), the need

¹²³ VanNostrand, *supra* note 29, at 26.

principle (by basing intervention on criminogenic needs), the responsivity principle (by tailoring those interventions to individual defendants' attributes), the idea of dosage (by providing appropriate quantities of services based on risk, with higher risk persons receiving more initial structure and services than lower risk persons), and the treatment principle (by applying and integrating treatment into the sanction).¹²⁴ To be applied to pretrial release, however, most of these sub-principles of targeting interventions must be modified due to the difference in purposes and legal foundations associated with bail. For example:

The application of [the community corrections principle of targeting interventions] should be modified due to the pretrial legal foundation. Remember that conditions of bail should be related to the risk of failure to appear or danger to the community posed by the defendant during the pretrial stage, be the least restrictive reasonably calculated to assure court appearance and community safety, and be related to the risk posed by an individual defendant and intended to mitigate pretrial risk.

The application of the *risk principle* to pretrial services, prioritizing supervision and treatment resources for higher risk defendants, is consistent with the intended outcome. Modifications to the application of the *need principle* are recommended for pretrial services to ensure the principle does not violate the pretrial legal foundation. Conditions of bail, including supervision and treatment, must relate to the risk of pretrial failure. Criminogenic needs should be targeted only when they are related to a risk of pretrial failure. This qualification is necessary because of the distinctions between the intended [purposes and] outcomes of pretrial services and community corrections. It appears that the *responsivity principle* is generally applicable to pretrial services. The *dosage and treatment principles* must be modified due to the general length of the pretrial stage, the purpose of pretrial supervision and the legal rights of the defendant. Treatment should be required and a defendant's time structured based on the specific

¹²⁴ See *Implementing EBP 2009*, *supra* note 104, at 11, 13-15.

risk posed and be the least restrictive reasonably calculated to assure court appearance and community safety pending trial.¹²⁵

This pattern repeats for each of the remaining principles for evidence-based practice in community corrections, and it applies when assessing the implications of more discreet research studies describing “what works” in criminal justice.

Accordingly, both the principles and the underlying research regarding what works in community corrections must be continually assessed against the unique nature of pretrial release to determine applicability. When it comes to research generally, practitioners should fully understand the critical differences in the legal foundations (including those affecting rules for confidentiality), purposes, status, and outcomes between pretrial release and probation when assessing what works to achieve the unique societal goals underlying each field. These differences mostly caution us to constantly err on the side of forgoing ordering treatments for defendants – to avoid conditions and supervision strategies that, although superficially desirable, impinge on the legal foundations of pretrial release and are not linked specifically to failure during the relatively short period of the pretrial phase.¹²⁶

In sum, we can say with confidence that both pretrial release and probation have their respective bodies of research literature. Technically, the research surrounding probation is more plentiful and more developed, and thus it is tempting to use that research in the pretrial setting. But because it is based on attributes of a field that has fundamental differences from pretrial release, such as its underlying purposes, outcomes, and legal principles, we must take great care in extrapolating any post-conviction findings to pretrial practice. Overall, applying research based on the general principles of evidence-based practices in community corrections (or even discreet studies seemingly disassociated with those principles) to pretrial release is possible, but only if one continually assesses the research and those principles against the unique nature of pretrial release. The best research for use in pretrial

¹²⁵ VanNostrand, *supra* note 29, at 27.

¹²⁶ See Barbara M. Hankey, *Pretrial Defendants: Are They Getting Too Much of a Good Thing?* 18 Topics in Comm. Corr. 21 (2008) (“According to the Standards of the National Association of Pretrial Services Agencies (NAPSA), conditions which address clinical and social needs of clients that are not linked to pretrial failure go beyond the purpose of bail and may be considered excessive.”). Again, there may be benefits associated with suggesting, rather than ordering or in any other way forcing, treatments affecting primarily long-term behavioral change that do not impinge on constitutional rights.

release is research specifically measuring treatments during the pretrial phase, applied against the backdrop of the pretrial legal foundations, and assessed for how it affects the three underlying purposes of bail: (1) maximizing release; (2) maximizing public safety; and (3) maximizing court appearance. This sort of pretrial-specific research is growing and may one day be so plentiful as to provide explicit and definitive guidance and perhaps even an agreed-upon integrated model for practitioners, thus enabling those practitioners to see and evaluate even the most subtle nuances between fields.

Chapter 5. National Standards

An area of obvious difference between pretrial release and probation is the level to which each field has recognized national standards governing best practices covering all of the relevant issues. Interestingly, at one time, each field was somewhat similarly situated, at least in the sense that each was covered in some detail by the American Bar Association's (ABA) Criminal Justice Standards. Now, however, pretrial release has two major sets of national standards – the ABA Standards on Pretrial Release,¹²⁷ and the National Association of Pretrial Services Agencies' (NAPSA) Standards on Pretrial Release.¹²⁸ Recommendations concerning probation, on the other hand, have been subsumed into the larger set of ABA recommendations dealing with sentencing, leaving more detailed recommendations concerning probation administration, personnel, and practices left to a variety of discreet sources.

Pretrial Release

In 1964, the American Bar Association (ABA) embarked on its ambitious “Criminal Justice Standards Project,” designed to bring comprehensive knowledge and common goals to virtually all parts of the criminal justice system. In 1968, the ABA combined the existing law, the history of bail, and the existing pretrial research to create its first edition of *Standards Relating to Pretrial Release*,¹²⁹ which contained specific recommendations on

¹²⁷ See *ABA Pretrial Release Standards*, *supra* note 28.

¹²⁸ *NAPSA Standards*, *supra* note 2. At the time of this writing, these standards were in the process of being updated, and will likely be combined with NAPSA's pretrial diversion standards into a single set of recommendations covering the pretrial field.

¹²⁹ American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release - Approved Draft*, 1968 (New York: American Bar Association, 1968).

virtually every criminal pretrial issue designed to help decision makers lawfully and effectively administer bail. The second edition standards, approved in 1979, were written, in part, “to assess the first edition in terms of the feedback from such experiments as pretrial release projects . . . and similar developments that had been initiated largely as a result of the influence of the first edition.”¹³⁰ The second edition was revised in 1985, “primarily to establish criteria and procedures for preventive detention in limited categories of cases.”¹³¹ Among other things, the most recent edition, approved in 2002 and published with commentary in 2007, includes discussion of public safety in addition to court appearance as a valid constitutional purpose for limiting pretrial freedom. In addition, it addresses pretrial release and detention in the wake of the United States Supreme Court’s opinion in *United States v. Salerno*, which upheld the federal detention scheme against facial due process and Eighth Amendment claims.¹³²

Likewise, the National Association of Pretrial Services Agencies (NAPSA) has its own set of standards relating to pretrial release and detention. The first edition standards, titled *Performance Standards and Goals for Pretrial Release*,

articulated clear goals for pretrial release/detention decision-making and provided guidance for pretrial services program personnel, judges, and other practitioners in developing fair and effective pretrial processes. They also provided a sound framework for organizing pretrial release programs and for conducting basic operations including gathering information about detained persons, monitoring released defendants’ compliance with release conditions, and responding to violations of conditions.¹³³

Like the ABA Standards, the NAPSA Standards are currently in their third edition, and, due to the rapid pace of pretrial research, law, and overall reform, are scheduled to be updated again in the near future. The current

¹³⁰ Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 *Crim. Just.* 2-3 (2009). This article also illustrates the ABA Standards as important sources of authority by courts (including the United States Supreme Court and numerous state supreme courts) and legislatures across the country.

¹³¹ *ABA Pretrial Release Standards*, *supra* note 28, at 30 n. 3.

¹³² *Id.*, *passim*.

¹³³ *NAPSA Standards*, *supra* note 2, at 1.

edition is substantially similar to many aspects of the ABA Standards, and on certain issues intentionally uses identical language. Nevertheless, “because a primary purpose of [the NAPSA Standards] is to provide guidance to pretrial services program directors and staff, they address the organization and operation of pretrial services agencies and programs in much greater depth than do the ABA Standards.”¹³⁴ Thus, the NAPSA Standards contain specific recommendations concerning “the role, purposes, and functions of pretrial services agencies and programs,”¹³⁵ which include: (1) the core pretrial agency functions of gathering information and assessing defendants for pretrial risk, making recommendations to the courts, supervising defendants when necessary to mitigate or manage risks to public safety or for failure to appear for court, and monitoring detained defendants and to provide relevant information that might lead to their release from confinement; (2) the organization and optimal operation of pretrial services agencies and programs, including their goals, policies, and procedures; (3) policies concerning confidentiality and access to records; (4) recommendations for re-examination of release and detention decisions and policies and practices surrounding responses to violations.¹³⁶

Also like the ABA Standards, the NAPSA Standards recommend that all jurisdictions have a pretrial services agency or program, but understand that those agencies or programs may vary in their organizational structure. According to commentary to NAPSA Standard 1.3:

Pretrial services agencies and programs function under a variety of different organizational arrangements. They may, for example, operate as an arm of the court, as a unit of the local corrections or probation department, or as an independent non-profit organization. Importantly, these Standards contemplate that, regardless of the organizational arrangements, the pretrial services agency or program will help support the release/detention decision-making process. Thus, for example, although a pretrial services program may be organizationally housed within a probation department, sheriff’s office, or local corrections department, it should function as an independent entity in providing information to the court and in monitoring and supervising defendants released on nonfinancial conditions.

¹³⁴ *Id.* at 4.

¹³⁵ *Id.* at 5.

¹³⁶ *See generally id.*, Part III.

The host agency should recognize and support the unique mission and role of pretrial services, which in some instances may not be congruent with the mission and role of the host entity [which can be the case when the pretrial services function is embedded within an agency focusing solely on public safety, for example]. The leadership and staff of the pretrial services agency or program should be committed to minimizing unnecessary detention, assisting judicial officers in making fair and effective decisions concerning the release of defendants, and providing essential monitoring and supervisory services. Their role in obtaining information about the backgrounds, community ties, and other characteristics of arrested defendants is especially important. Lack of reliable information about defendants can lead to either of two undesirable outcomes: the unnecessary detention of defendants who pose no significant risk of nonappearance or dangerousness or, conversely, the release – without appropriate conditions – of defendants who do pose such risks.¹³⁷

Part III of the NAPSA Standards expands somewhat on this issue in its discussion of the purposes of pretrial services agencies or programs:

This Standard [3.1] provides a general overview of the purposes of pretrial services agencies and programs, and of the role that they play in local criminal justice systems across the United States. The purposes described are ones that are integral to the effective functioning of courts and criminal justice systems. They are essential to the achievement of the central goal of a fair and effective pretrial release/detention policy: to minimize unnecessary detention by releasing as many defendants as possible who are likely to appear for scheduled court dates and refrain from criminal behavior while on release.

The phrase “agency or program” is used because the drafters recognize that the functions described in these Standards are often performed by staff who are administratively housed in an agency or organization that is also responsible for other functions not involving pretrial release. While some pretrial

¹³⁷ *Id.* Std. 1.3 (commentary), at 14-15 (footnote omitted).

services agencies are independent entities, it is not uncommon for them to be an arm of the court or to be located in a probation department, sheriff's office or jail. A pretrial services agency or program (the terms are sometimes used interchangeably in this commentary) is considered to be any organization or individual whose purposes include providing information to assist a court in making pretrial release/detention decisions and/or monitoring and supervising released defendants prior to trial. The Standards are intended to be applicable to the organization and operation of all pretrial services agencies or programs, regardless of their size or administrative location.

Not all pretrial services agencies or programs perform all of the functions described in this Standard, though some agencies and programs meet this description. The Standard is meant to serve as a general guide or "mission statement" outlining what should be accomplished by pretrial services agencies or programs in all jurisdictions.¹³⁸

Probation

In 1970, the American Bar Association believed probation to be an important enough sentencing alternative to warrant its own set of best-practice standards. Its initial publication, titled *Standards Relating to Probation* was, in many ways, similar to its document concerning pretrial release, with discussion of broad foundational issues such as the nature and desirability of probation, the purpose and content of pre-sentence investigations, conditions of probation, and termination and revocation.¹³⁹ Moreover, like the later adopted NAPSA Standards, the 1970 ABA Probation Standards contained a relatively detailed section addressing probation department administration, services, and personnel,¹⁴⁰ which included recommendations and commentary on such issues as placement of

¹³⁸ *Id.* Std. 3.1 (commentary), at 53-54 (internal footnotes omitted).

¹³⁹ See 1970 ABA Probation Standards, *supra* note 10. Due to this breadth, this document is still cited and quoted in a variety of secondary sources discussing probation today.

¹⁴⁰ See *id.*, at pp. 71-102.

probation services, establishing minimum standards for supervision and records and statistics, probation officer qualifications, and even salaries.¹⁴¹ Over time, the ABA's probation standards were subsumed by the ABA's *Sentencing Alternatives and Procedures* (1979), and then were combined with its *Appellate Review of Sentences* (1980) to create the 1995 Third Edition of *Sentencing*, which gives comprehensive recommendations on virtually all aspects of sentencing, including sentences to probation.¹⁴² As noted previously, the Sentencing Standards place traditional probation into the category of "compliance programs," which have a primary purpose of "promot[ing] offenders' future compliance with the law."¹⁴³ This consideration of probation within the broader context of general sentencing principles means that much of the operational detail that was previously found in the 1970 recommendations is not included.

While the current Sentencing Standards undoubtedly contain valuable information that can help probation practitioners with understanding their roles through generalized discussion of broader principles of sentencing, more detailed operational recommendations, such as those for pretrial services agencies contained in the current edition of the NAPSA Standards, are found elsewhere. These sources can include not only state and federal probation statutes or court rules, but also professional development programs administered by probation departments,¹⁴⁴ formal statewide probation programs,¹⁴⁵ websites run by state criminal justice entities,¹⁴⁶ training programs and position papers created by state probation

¹⁴¹ *Id.* Perhaps foretelling future events, the 1970 Standards recommend that probation departments be prepared to provide additional "collateral" services, including, for example, "the preparation of reports to assist courts in making pretrial release decisions and assistance to prosecutors in diverting selected charged-individuals to appropriate noncriminal alternatives." *Id.* at 88.

¹⁴² See *ABA Sentencing Standards*, *supra* note 11.

¹⁴³ *Id.* at 97.

¹⁴⁴ See, e.g., Colorado, Professional Development and Training, found at <http://www.courts.state.co.us/Administration/Unit.cfm?Unit=profdev>.

¹⁴⁵ See, e.g., *Indiana Probation Standards* (2014), found at <http://www.in.gov/judiciary/probation/files/prob-standards-standards.pdf>; *Adult Probation Officer Training Program* (Ohio) (2012-13) found at <https://www.supremecourt.ohio.gov/Boards/judCollege/probationTraining/>; *CCCA & PSA Minimum Standards* (Va. DCJS) found at <https://www.dcjs.virginia.gov/correctional-services/programs/comprehensive-community-corrections-act-ccca-pretrial-services-act/ccca-psa-minimum-standards>.

¹⁴⁶ See, e.g., Florida Department of Law Enforcement Correctional Probation Officer Ethical Standards of Conduct, found at <http://www.fdle.state.fl.us/cms/CJSTC/Officer-Requirements/CPO-Ethical-Standards-of-Conduct.aspx>.

associations,¹⁴⁷ organizations focusing on county and municipal probation,¹⁴⁸ research compiled by the National Institute of Corrections,¹⁴⁹ accreditation standards published by the American Correctional Association,¹⁵⁰ and various papers, resolutions, and position statements issued by the American Probation and Parole Association (APPA).¹⁵¹ In the federal system, a monograph issued through the government's Guide to Judiciary Policy Series provides guidance on supervision of federal offenders.¹⁵²

In particular, the APPA has published a substantial amount of information on its website concerning probation operations. In addition, it has weighed in on pretrial release and supervision through the following resolution:

WHEREAS, pretrial supervision services exist to evaluate the jail population to ensure those who should be in custody remain in custody and those who do not pose a significant risk to the community can be released, allowing for better utilization of our justice resources;

WHEREAS, a vast majority of pretrial supervision activities are carried out as subdivisions of state or local probation agencies, while depending on jurisdiction, others are standalone agencies;

WHEREAS, the bond industry serves as the de facto decision maker of who is released from jail and these decisions are based on monetary considerations whereby pretrial supervision agencies' decisions are based on likelihood of court appearance and community safety considerations.

¹⁴⁷ See, e.g., New York State Probation Officers Association, Inc., found at <http://nyspoa.com/training.htm>; California Probation, Parole, and Correctional Ass'n., found at <http://www.cppca.org/about-us/position-papers>.

¹⁴⁸ See e.g., Georgia Adult Misdemeanor Probation Oversight, found at <https://dcs.georgia.gov/adult-misdemeanor-probation-oversight>.

¹⁴⁹ See generally NIC website and library, found at <http://nicic.gov/library/topic/451-probation>.

¹⁵⁰ See *Performance-Based Standards for Adult Probation and Parole Field Services* (4th ed.) (ACA 2002) found at http://www.aca.org/aca_prod_imis/ItemDetail?iProductCode=681&Category=PUBS-STAND&WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51.

¹⁵¹ See generally, Where We Stand, American Probation and Parole Association, found at http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=IB_Stances.

¹⁵² *Guide to Judiciary Policy, Vol. 8, Probation and Pretrial Services, Pt. E. Supervision of Federal Offenders (Monograph 109)*. This monograph, and the companion guide dealing with supervision of federal defendants (monograph 111) are curious documents. In some ways, they are extraordinarily detailed, providing guidance on aspects of federal supervision tied directly to the federal statute, but in other ways they lack comprehensive rationales through legal and evidence-based practices for their recommendations. These monographs are also not always easy to find publicly, and their prevalence and use in the federal system, at least as compared to the NAPSA or ABA Standards, is not completely known.

WHEREAS, the majority of our jails are filled with those awaiting trial with a large percentage of these crimes being misdemeanors and low-level nonviolent felonies while the cost for housing these individuals is borne by taxpayers;

WHEREAS, pretrial supervision has been proven a safe and cost effective alternative to jail for many individuals awaiting trial;

WHEREAS, pretrial supervision divisions in the United States employ professionally trained officers who use tools to assess the risk of offenders prior to release from jail and make recommendations for release to the appropriate court or office;

WHEREAS, pretrial supervision officers conduct assessments to determine the need for treatment (i.e., substance abuse, mental health) and help offenders access these services more quickly thereby reducing costs associated with jail incarceration and potential future crimes;

WHEREAS, pretrial supervision officers compile reports on those they supervise noting compliance with conditions that can be useful to the court if individuals convicted are then released on probation;

NOW THEREFORE BE IT RESOLVED, that the Board of Directors of the American Probation and Parole Association supports the role of pretrial supervision services to enhance both short-term and long-term public safety, provide access to treatment services and reduce court caseloads, and submit that such a role cannot be fulfilled as successfully by the bail bond industry.¹⁵³

Overall, it appears that pretrial release and probation do not differ so much in whether they have uniform standard best-practices, but they do differ substantially in where those standards might be found. While the pretrial services field relies heavily on the ABA and NAPSA Standards as fundamental best-practice recommendations, probation practitioners appear to rely on a variety of sources for practices and procedures, including laws, associations, and various government agencies. This is surprising only in the sense that one would think that probation entities, being more prevalent than pretrial services, would be more likely to have clearly established national best-practice standards such as those provided by the ABA and NAPSA.

In sum, wherever they are found, best practice standards and recommendations tend to bring practical solutions to discreet operational issues. Their value to either field, however, is based on how well they fit the

¹⁵³ *Resolution on Pretrial Supervision* (APPA June 2010) Found at https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259.

underlying purposes and legal foundations of pretrial release and probation. In particular, the ABA and NAPSA Standards are designed with these considerations in mind, and any jurisdiction contemplating consolidating pretrial services functions into an existing entity, such as a probation office, must read and digest these Standards with an eye toward their complete implementation on the relevant population. This necessarily adds complexity to “mixing” populations of pretrial and convicted persons, and thus, as with assessing best-practice research, organizations should exercise extreme caution when contemplating adapting recommendations from one field to another. Some strategies, including supervision strategies, might be lawful and effective for both fields. Others, however, may have apparent justification only through punitive purposes, and must therefore be questioned or avoided altogether on pretrial defendants, given the limited lawful purposes for restricting pretrial freedom.

Chapter 6. Application: Defendants or Offenders?

As illustrated by the previous chapters, although pretrial release and probation may seem outwardly similar, there are significant differences in their definitions and purposes, their history, their fundamental legal foundations, their research, and their best-practice standards as to warrant some recommendations for practitioners working in jobs where the two disciplines intersect. This task, however, is much harder than it appears. After meeting with numerous pretrial and probation practitioners, and especially those who have grappled with integrating or consolidating pretrial functions into probation offices, this author has found the answers to be neither simple nor uniform.

Nevertheless, everyone to whom this author has spoken agreed on one thing: the fundamental differences between pretrial release and probation compel us to avoid blurring functions related to either field by creating some purposeful separation between the two disciplines. That separation, in turn, can exist on a continuum from what might be ideal to what might be practical, and is largely based on focusing on two areas: (1) physical separation; and (2) mental separation.

An ideal system administering both pretrial release and probation would likely have complete separation between the two disciplines. A free-standing pretrial services program or agency of the type recommended by the NAPSA

and ABA Standards would exist independently of all other criminal justice agencies, have its own mission statement and goals, and have a separate identity that is recognized for performing its critical functions much like we might recognize a prosecutor's office to independently handle all of the functions of prosecution. This ideal structure follows from the importance of bail, which in most states is a constitutional right, and it makes a statement to the citizenry that government leaders understand this importance and the fact that an independent pretrial services program is the best way to further what we know to be pretrial justice.

Unfortunately, in many jurisdictions this is simply not possible, and some jurisdictions struggle even to find the money to create minimally viable pretrial services functions. Moreover, in the federal system, pretrial release and probation are already paired in a single system – indeed, they have been so since 1982 – and, if anything, the trend today appears to be toward office consolidation, and not separation, of pretrial services with probation. Accordingly, for these jurisdictions, the recommendations must be more practical. Additionally, and as mentioned previously, there are certain advantages to providing pretrial services within another pre-existing criminal justice entity, and especially within probation, including taking advantages of existing infrastructure, relationships, data sharing, and staff.¹⁵⁴

Practically speaking, then, organizations seeking to perform both pretrial and probation functions may do so as long as they effectively avoid “discipline blurring.” To succeed, those jurisdictions must focus on making certain physical and mental distinctions.

Entities having success in avoiding the blurring of pretrial release and probation have sometimes focused on keeping the functions as physically separate as possible. If not housed in separate buildings, then they are housed in separate wings or even hallways. When possible, officers work either for probation or pretrial services, not both. Caseloads are separate. Supervisors are separate. Training is separate (although cross-training would be acceptable and likely beneficial to provide better understanding of the different functions and purposes). Titles, uniforms (if any), business cards, and letterheads reinforce the separation. If there is a single entryway, both the terms “pretrial services” and “probation” exist independently on floor mats, logos, and signs. Physical separation helps everyone to readily see that

¹⁵⁴ *Promising Practices*, *supra* note 6, at 10-12.

there are differences between pretrial release and probation that are significant enough to warrant the effort of separation.

At times, however, this ideal level of physical separation cannot be achieved. It is simply a reality today that some jurisdictions will be forced to mix caseloads, require a supervisor to oversee both functions, or to keep everyone in the same office space. In those cases, the second focus – on mental separation – becomes paramount.

Making changes designed to assure that any particular officer does not mentally blur the distinction between pretrial release and probation is crucial no matter how much physical separation exists. Indeed, there is no reason to shun mixing pretrial and probation caseloads so long as the officer is cross-trained so as to be purposefully mindful of the significant differences between the disciplines and how those differences manifest into daily operations. This mental separation can be bolstered by physical separation, but it must exist in any event. The key to mental separation is to train officers to know and understand the fundamental differences between pretrial release and probation, so that those officers inwardly question each of their actions based on those differences, and can confidently articulate the rationales for their likely differing actions when speaking to internal and external stakeholders.

This mental separation will allow the typical probation officer to shift his philosophical mindset from “offender” to “defendant” and back again throughout the day.¹⁵⁵ To achieve the knowledge to support the mental separation, the officer dealing with pretrial release should be trained on the need for pretrial justice, including the often-forgotten notion that American bail demands that we embrace the risk of release to uphold our notions of fairness.¹⁵⁶ The officer should be trained on the history of bail, the

¹⁵⁵ Occasionally, it will require an officer to shift his or her mindset even within the same case, as when a person currently on probation is arrested and freed through the pretrial process.

¹⁵⁶ In 1951, Judge Learned Hand was quoted as saying, “If we are to keep our democracy, there must be one commandment: we must not ration justice.” See The Legal Aid Society website at <http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx>. This particular quote dealing with fundamental fairness became a favorite of Attorney General Robert Kennedy when discussing the need for bail reform, and it became a foundational quote in the so-called “Allen Committee” report, the document from the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice that provided a catalyst for the first National Conference on Bail and Criminal Justice in 1964. Indeed, Judge Hand’s quote became a rallying cry for the first generation of American bail reform, and it remains poignant today, for in no other area of criminal procedure do we so blatantly restrict allotments of our fundamental legal principles.

fundamental legal foundations underlying bail, the pretrial research, the national best-practice standards, and the proper use of terms and phrases at bail, all of which point to treating the defendant in ways that uphold our foundational American traditions of freedom and liberty. The officer should be constantly aware of the presumption of innocence and how it applies at least philosophically to bail; to constantly think of the defendant standing in the office as being one who might ultimately be acquitted or have his or her case dismissed.

When officers have this mental separation, their actions will reflect it. Broadly, they will understand that their actions do not derive from *their* status or scope of authority as either a probation or pretrial officer, but from the status of the person before them. More specifically, they will perform risk assessment with the knowledge of the threefold purposes of bail: maximizing release while maximizing public safety and court appearance. They will make recommendations to the court that follow the law concerning both release and detention, making sure that those defendants are not unnecessarily detained, are not detained for improper purposes, and are not detained outside of the normal legal detention mechanism enacted by any particular state. They will be conversant in the latest pretrial research, understanding that conditions of release must be both lawful and effective, and that the ineffectiveness of any particular condition might cause it to become unlawful. They will take special care in recommending and supervising conditions; indeed, their mindset for defendants will cause them to avoid conditions of release altogether unless those conditions are absolutely necessary to achieve proper purposes, and to remove conditions when they appear to unduly restrict defendants or when there is doubt as to their effectiveness. They will never recommend conditions of release “just in case,” and when defendants violate conditions, the officers will question the legitimacy or effectiveness of those conditions in the first place.

This shift in mindset does not require officers to forget certain realities of the criminal justice system. Moreover, it does not require them to draw such bright lines between defendants and offenders that the officers would be precluded from seeking ways to help defendants through, for example, voluntary treatment for objectively manifested conditions tending to foster recidivism. It does, however, require them to make decisions that do not blur the distinction between defendants and offenders, between the process of pretrial release and the punishment of probation. Most importantly, it forces them to recognize that we are born with freedom and liberty as our natural

American state, and that altering that state, especially before conviction, should be done only with extreme caution.

Conclusion

While pretrial release and probation at times seem outwardly similar – both involve conditional release and supervision of persons in the community by a government entity through a legal process – there are certain fundamental differences between the two processes that compel us to change our practices and philosophical mindset when working between defendants and offenders. In particular, differences in definitions and purposes, in history, and in legal principles require us to maintain laws, policies, and practices so that the two populations and the rights that they retain are never blurred. They force us to assess the research differently, and they require that we fully comprehend why our best practice standards differ in fundamental ways.

Maintaining separation is the challenge of any organization trying to perform both probation and pretrial release functions. Physical separation, while admirable, is likely secondary to mental separation, in which officers have a clear understanding of the fundamental differences between pretrial release and probation so that officer actions manifest in ways demonstrating that understanding. In short, pretrial release and probation are both important to our system of criminal justice, but their significant differences compel us to operate within each field with knowledge and purpose. Knowing those differences is essential not only to becoming a good and effective pretrial or probation officer or supervisor. It is essential for pretrial justice itself, and critical to maintaining the foundational pillars of our American system of justice.