ISSUES MEMO

To: Alternatives to Bail Drafting Committee

From: Josh Bowers and Sandy Mason

CC: Lucy Grelle

Date: November 9, 2018

Re: Issues to be discussed in Washington, D.C. (11/16-11/17)

OVERVIEW

Before we explore the specific issues that require deliberation, we think it may be useful to describe the principles on which we hope there is consensus already. There are a handful of principles that are clear as a matter of constitutional law and best practices, and that should serve as the backbone of any draft act governing pretrial release and detention. To start, all accused persons have a presumptive right to liberty pending trial: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[1] It follows that the government may not restrict the liberty of accused persons more than is necessary to provide adequate assurance of (i) a defendant's future appearance, (ii) the integrity of the criminal justice system, and (iii) public safety. Put differently, a court charged with pretrial custody determinations must select the least-restrictive means to protect the state's interests in the pretrial phase. The least-restrictive-means principle requires individualized consideration. It precludes reliance on a money-bail schedule. And it prohibits the imposition of unaffordable money bail in any individual case unless there is no plausible alternative that can adequately serve the state's interests.

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[1] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

In our view, the central objective of a Uniform Act must be to clarify and operationalize the least-restrictive-means principle, guiding police and courts to make circumspect determinations about which restraints on pretrial liberty are genuinely necessary at each step along the way. To that end, we propose to structure the Act in terms of chronological stages in the pretrial phase: (1) citation/arrest; (2) for the individual who is arrested, an initial restraint hearing at which a court can order release, release with restrictive conditions, or temporary detention; (3) for the individual who is ordered released but who is nevertheless held on conditions of release (e.g., for inability to satisfy a financial bond), a prompt review hearing that must result in either release or a temporary detention order; and (4) for the individual who is temporarily detained, a full detention hearing.

Within that procedural framework, there are a set of important and complex questions that we look forward to discussing with the committee. At a high level of abstraction, they include the following:

1. **Scope of the Act:** Should the draft act include provisions governing the use of citations versus custodial arrest, as means to initiate criminal proceedings? Arrest practice is fundamentally entangled with pretrial detention and release practice. But including this subject matter enlarges the scope of the project.

2. **How to Frame Pretrial Detention and Release:** Bail reformers make plain that a central problem with current practices of pretrial release and detention is the widespread assumption that pretrial detention is the default—that the state only has to grant release at its discretion. These reformers argue that the presumption must be reversed, and that the first step toward this end involves choosing appropriately the language to refer to pretrial release and detention. On this logic, we should not frame the debate in terms of when a court should "grant release." The pertinent questions are when and whether a court is justified in restricting the liberty of an accused person.

3. **How to Define the Terms of the Least-Restrictive-Means Principle:** As mentioned, it is relatively uncontroversial that a court may not restrict a defendant's liberty more than necessary to provide adequate assurance of (i) a defendant's future appearance, (ii) the integrity of the criminal justice system, and (iii) public safety. The difficulty lies in specifying what counts as "adequate assurance," and what is encompassed by the concepts of "integrity of the criminal justice system" and "public safety." To offer any improvement on existing statutes and practice, a Uniform Act must provide greater specificity. Precisely how to do this will be a central issue for committee deliberation.

4. **Whether and How to Include a Detention Eligibility Net:** In order to eliminate functional detention via money bail, it is necessary to afford a court the authority to order detention formally and directly when a defendant poses an acute risk that cannot be managed in any less intrusive way. One central and very difficult question is whether courts should potentially have such authority as to all classes of offenses, or only for defendants charged with a defined subset of offenses.

5. **The Timing Deadlines for Each Hearing:** There is an obvious tension between the need to provide the accused individual with a prompt hearing on release or detention and the practical needs of a court to accommodate a procedurally robust proceeding and of the parties to prepare for it. We are given no clear constitutional guidance on this point. To the contrary, we find wide variation in current statutory law and court practices. A successful act will need to navigate the tension. One possibility is to provide rights to speedy hearings, but with possibilities for continuances (at least with good cause).

6. **How to Address Algorithmic Risk Assessment:** Empirical risk-assessment instruments have grown in popularity. There are advantages and drawbacks to these actuarial tools (though they are far superior to preset bond schedules). We need to determine how to define them and when and how to use them.

7. **How to Address the Right to Counsel:** There is strong suggestion that, as a constitutional matter, an indigent defendant is entitled to appointed counsel at a detention hearing. We need to discuss whether and when a defendant should enjoy appointed counsel prior to that proceeding.

ISSUES & QUESTIONS

The rest of this memo proceeds largely chronologically through a potential procedural framework for a Uniform Act. Along the way, we raise and elaborate upon discussion questions and issues of concern.

I. SHORT TITLE:

It is conventional, of course, to open with a "Short Title" for a draft act. One possibility is the "**Pretrial Liberty Act**."

***Discussion Notes*:**

- **ISSUE 1—the term "bail":** Our committee was formed to draft an "Alternatives to Bail Act." However, the term "bail" is potentially problematic—not least of all because it has different meanings. Some statutes and commentators use the term as a noun to signify a secured financial condition of release.[2] Other statutes and commentators use the term according to its historical definition, as in: "[A] process of conditional release . . . . [B]ail means release."[3] Still others build on this definition and use the term "bailable" as an adjective to signify the type of offender or offense that qualifies for release.[4] The term "pretrial liberty" would avoid the ambiguity. Moreover, it makes plain something else that bail obscures: that pretrial liberty is a presumptive right, not a privilege.
    - If the Committee is in agreement that we should avoid the term "bail," we should also consider what term to use for what might otherwise be called "conditions of bail." Possibilities are "restraints upon pretrial liberty," "restraints on liberty," or "conditions of release."

[2] TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 16 (Apr. 18, 2017) ("[M]ost of the confusion comes from the fact that many people (indeed, many courts and legislatures) define bail by one of its conditions—money.").

[3] SCHNACKE, *supra*, at 16 (contrasting bail with "no bail," which is "a process of detention with a purpose to provide a mechanism for pretrial detention").

[4] *See, e.g.*, O'Donnell v. Harris City, 2018 WL 2465481, at *12–13 (5th Cir. June 1, 2018) (describing "a state-created liberty interest in being bailable"); *see also* SCHNACKE, *supra*, at 20-21 (discussing individual "detained in Prison, in such cases where by Law they were bailable") (quoting The Habeas Corpus Act, 31 Car. 2, c.2 (1679)).

II. PURPOSES:

Likewise, it is conventional to outline the "Purposes" of a draft act.

***Discussion notes*:**

- **ISSUE 1—brainstorming purposes:** We should brainstorm what we consider to be the purposes of the draft act (or, at least, the purposes that are sufficiently important to merit explicit reference). Here is a list of potential purposes:
    - Protecting public safety.
    - Promoting the integrity of the criminal process, by avoiding obstruction of justice and minimizing the risk of flight.
    - Avoiding unnecessary restraints upon pretrial liberty.
    - Eliminating wealth-based (and other arbitrary) disparities in restraints upon pretrial liberty.
    - Specifying a presumptive right to pretrial liberty.[5]
    - Reinforcing the presumption of innocence, the burden of proof beyond a reasonable doubt, and the constitutional bar against the imposition of punishment prior to criminal conviction.[6]

[5] This is hardly radical. At present, forty-eight states expressly provide for some form of presumption of pretrial release. APPENDIX B; *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx.

[6] As the Supreme Court has observed: "In our society, liberty is the norm, and detention prior to trial or without trial is the *carefully limited exception*." United States v. Salerno, 481 U.S. 739, 755 (1987) (emphasis supplied); *accord* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction . . . 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."). Notwithstanding this, many jurisdictions have increasingly come to rely on secured financial bonds ("money bail," or "cash bail") as the primary mechanism of pretrial bail. BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30 (indicating a fifty-percent increase in the use of cash bonds over the preceding decade); *see also* COUNCIL OF ECONOMIC ADVISERS, *supra*, at 6 (showing a two-decade increase in reliance upon money bail from 53% of felony cases to 72%). Money bail tends to result in the detention of the poor. Detention tends to make guilty pleas likelier and sentences longer. *See e.g.*, CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *Moving Beyond Money Bail: A Primer on Bail Reform* 7 (Oct. 2016) ("[T]he inability to post money bail may induce innocent people accused of relatively low-level crimes to plead guilty, simply so they can be released.").

III. DEFINITIONS:

We will need to include a "**Definitions**" section, and it is conventional to do so after the "Short Title" and "Purposes" Sections.

***Discussion notes*:**

- **ISSUE 1—brainstorming terms to define:** It does not make sense, we think, to linger on definitions too long during this initial meeting. We can turn to definitions in earnest once we have a comprehensive draft act. But, off the top of our heads, we imagine that the following terms might need illumination:

    - We should give a name for the timeframe to which the draft act applies. The most obvious and common term is "pretrial," and we use that term at various points throughout this Memo. However, it is a somewhat under-inclusive term, since the right to release continues throughout the trial. A temporal term that might be more accurate (even if clunkier) is "adjudication period," which would refer to the period of time from the first court appearance of the defendant until the final resolution of all charges (whether by dismissal, acquittal, or trial or plea conviction).

    - As suggested already, two of the core purposes of any pretrial release act are "protecting public safety" and "promoting the integrity of the criminal justice system." In some fashion, the draft act will need to define both terms, and what counts as a sufficient threat to these objectives to warrant restraint of an accused person's liberty (although the substantive measure of a sufficient threat is probably better left to the substantive portions of the draft).[7] In our view, for instance, consideration of "public safety" should certainly include consideration of the risk of serious crime (i.e. homicide, violent or sexual assault, armed robbery, and high-stakes financial crime), but should not include consideration of the risk of arrest for low-level offenses or technical violations of probation or parole, and *should* include consideration of the criminogenic effects of detention on defendants and their communities. As to "promoting the integrity of the criminal justice system," we think the phrase captures the state's interest in managing two separate threats—willful flight and affirmative efforts to "obstruct justice," including by witness intimidation or destruction of evidence. "Obstructing justice" could potentially be defined as "interfering

[7] The style rules of the Uniform Law Commission specify that provisions that state a definition must be definitional only, with the substance pertaining to the term addressed separately.

with the criminal process by influencing or impeding or endeavoring to influence or impede the due administration of justice."

- One term that must be defined if we are going to include provisions providing for its use (which we think we should, as we discuss later) is a "validated risk-assessment instrument." One possible definition could be: "an empirically tested actuarial tool that communicates the statistical likelihood of a specified future event occurring during the adjudication period."

    - This, of course, is not quite definition enough. What counts as "an empirically tested actuarial tool?" Here is a potential definition of that term:

        - "A validated risk assessment instrument must satisfy the following criteria:
            - Not less than once every five years, an independent expert shall subject the instrument to a publicly available validation study that evaluates the effectiveness of the instrument on a population dataset that is substantially similar to the population of defendants in the state;
            - The instrument must separately assess the statistical likelihood of different specified events, including but not limited to the likelihood that a defendant will fail to appear as the court requires, obstruct justice during the adjudication period, commit a criminal offense during the adjudication period, or injure a person during the adjudication period;
            - The instrument must specify the likelihood of each specified event occurring in numeric terms; and
            - The instrument must clearly communicate its statistical assessments, including the particular event(s) for which it makes statistical projections and the variables upon which its projections rely."

IV. CITATION & ARREST:

An important question for us to consider is whether the draft act should regulate what police may or must do prior to the adjudication period—specifically whether and under what

circumstances officers may or must issue citations instead of making custodial arrests. The connection between citations and pretrial release may not be intuitive. However, numerous jurisdictions and commentators have come to appreciate that the regulation of pretrial liberty begins with the actions of police officers on the beat.[8] More to the point, the Uniform Law Commission's mission statement for this Committee's project included the possibility of expanding the use of citations instead of arrest:

> The drafting committee will be tasked with drafting state legislation that will provide policy solutions to mitigate the harmful effects of money bail. The drafting committee will review critical areas of pretrial justice, such as [*inter alia*]: the encouragement of the use of citations in lieu of arrest for minor offenses.[9]

In any event, we could structure a modular set of arrest/citations provisions that a state could use-or-lose, based on whether it preferred a "pretrial liberty act" with a broader or narrower scope.

One additional plus with respect to an increased reliance upon citations over arrest: the use of citations could minimize the need for a fiscal note to attach to our draft act. It is well

[8] For instance, as part of the National Symposium on Pretrial Justice, the Bureau of Justice Assistance expressly endorsed expanding use of citations in lieu of custodial arrest. BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30. Likewise, several pretrial statutes and model standards permit or require the use of citations in some cases. APPENDIX A; *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-2.2 (providing that, except in circumscribed situations, "a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court"); TENN. CODE ANN. §§ 40-7-118, 40-7-120 (providing for a presumption in favor of citations for misdemeanors); KY. REV. STAT. § 431.015 (2012) (providing that, except under enumerated circumstances, a peace officer or other authorized official shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge); Cal. Pen. Code § 853.6 (requiring citations for misdemeanors, subject to delineated exceptions). According to the National Conference of State Legislatures, nine states have presumptions in favor of citations and the overwhelming majority of states permit citations in some types of cases. Appendix A; *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Citation in Lieu of Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[9] UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018).

understood that citations are less costly than custodial arrests. The cost savings from increased use of citations could offset the additional resources necessary to satisfy other provisions of the draft act (for instance, a more robust right to appointed counsel, to be discussed in detail below).[10]

***Discussion notes*:**

- **ISSUE 1—citations for felonies:** If we provide for the issuance of citations, we must decide for which types of offenses a citation is discretionary or required. A number of states require citations for noncriminal violations and some misdemeanors—at least under certain circumstances.[11] No state requires citations for any type of felony offense. However, at least two states (Louisiana and Oregon) expressly permit the issuance of citations for some types of felonies.[12] If we were to allow peace officers to issue citations for felonies, we would want to restrict their discretion to do so to nonviolent felony offenses.

- **ISSUE 2—citations for misdemeanors and violations:** The tougher question is whether to *require* citations for at least some types of misdemeanors and noncriminal violations. If so, which ones? Would there need to be exceptions to any such rule, and if so, what should the exceptions look like? We foresee two options:

    - We could make citations presumptively mandatory, subject to exceptions for circumstances where an arrest is necessary (a standard-based exception). Or we could make citations presumptively mandatory, subject to: (i) exceptions for circumstances where an arrest is necessary, and (ii) exceptions for specified offenses (e.g., crimes of domestic violence) (a standard-based exception coupled with a set of bright-line statutory exceptions).

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[10] JANE MESSMER, UNIFORM LAW COMMISSION, *Committee on Scope and Program: Project Proposal Form* (Dec. 13, 2013) ("The use of citations can contribute to lower jail populations and local cost savings. . . . Failing to provide counsel carries enormous costs—human and financial; far exceeding the expense of providing an advocate who can advocate viable and prudent alternatives." (citing studies)). Likewise, to the extent the draft act achieves the objective of minimizing unnecessary pretrial detention at later procedural stages, that would also produce cost savings.

[11] APPENDIX A; *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Citation in Lieu of Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[12] *Id.*

- In terms of defining the circumstances that would trigger the standard-based exception (that is, that would allow a peace officer to arrest for a misdemeanor or violation), we have developed the following list, but we welcome suggestions:

    - "The individual fails to provide adequate identification or identifying information as requested by a peace officer or other authorized official."

    - "The peace officer or other authorized official has probable cause to believe that the individual currently (i) is violating a court order or condition of probation, parole, or release for a criminal charge or conviction; or (ii) is facing an open order of detention from any jurisdiction, including but not limited to an arrest warrant, immigration detainer, or order of revocation of probation, parole, or release for a criminal charge or conviction."

    - "The peace officer or other authorized official has reason to believe the individual poses a substantial risk of failing to appear as a citation requires, obstructing justice prior to appearance, or seriously harming a person prior to appearance."

    - "The peace officer or other authorized official has reason to believe an arrest is necessary to conclude the interaction safely or to carry out a lawful investigation."

- **ISSUE 3—the substance of the citation and the consequences of noncompliance:** If we go the "citations" route, we need to specify what the citation would require, and what the consequences would be for noncompliance with those requirements.

    - With respect to requirements, the issuance of a citation would need to be premised on probable cause, just like a full-custodial arrest.

    - Beyond that, we would think the citation should include: (i) the time and place the individual shall appear; and (ii) the consequences of failing to appear as the citation requires, obstructing justice prior to appearance, or committing a criminal offense prior to appearance. Anything else?

    - With respect to the consequences of noncompliance, the most obvious repercussion would be immediate issuance of an arrest warrant. Perhaps language to this effect:

- "If an individual fails to appear as a citation requires, obstructs justice prior to appearance, or commits a criminal offense prior to appearance, the court may issue an arrest warrant. Nothing in this subparagraph shall interfere with or prevent arrest, charge, conviction, or punishment for contempt or another criminal or noncriminal offense."

V. PRETRIAL RESTRAINT HEARINGS:

As we explained, the task of crafting rules for a sequence of procedural stages where each stage impacts the next presents something of a puzzle. At present, we think the most viable approach is to subdivide sections of a draft act into separate hearings, linked together by the manner in which one hearing does or does not trigger the next.

The first hearing we have in mind is what has frequently been called a "bail hearing" or "initial appearance," but which we propose to call a "**Restraint Hearing**" (although another designation could do). This is the first time an arrestee appears before a judicial officer, and the hearing in which the court must determine which restraints on the arrestee's pretrial liberty, if any, are necessary to provide adequate assurance of future appearance, integrity of the criminal justice system, and public safety. In terms of the timing of this hearing, we foresee it coinciding with the probable cause hearing, which (pursuant to *County of Riverside v. McLaughlin*) must occur within forty-eight hours of arrest.[13] (Of course, the time frame might be different if an

[13] 500 U.S. 44 (1991). Many jurisdictions already couple the release decision with the probable cause hearing. APPENDIX B; NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (specifying states' time frames).

individual wasn't arrested, but rather voluntarily returned as a citation required. In that case, the restraint hearing would just be held on the date of the individual's first appearance.)

***Discussion notes*:**

- **ISSUE 1—a right to counsel at a restraint hearing:** A central question is whether and when to provide a statutory right to appointed counsel. Although we believe strongly that best practices demand participation by counsel as early as possible (indeed, this is the law already in many states[14]), we are not sure that our draft act should *require* counsel at this initial procedural stage (the "restraint hearing"). Rather, we envision an expeditious "review hearing" (described below) for any defendant who remains detained some days after the restraint hearing. We think the review hearing is the right stage to first statutorily require counsel. In this way, we propose a compromise approach. The Committee should discuss whether this approach strikes the right balance, especially in light of recent judicial decisions suggesting that counsel should get involved from the beginning (see "Case Compendium").

- **ISSUE 2—the options available to the court at a restraint hearing:** We envision three broad choices available to a court at a restraint hearing. The court could: (1) release the defendant on personal recognizance (a "release order"); (2) release the defendant subject to additional conditions (a "restraint order"); or (3) detain the defendant until a detention hearing (a "temporary detention order"). Anything else? Or anything different?

- **ISSUE 3—what to do with defendants who voluntarily appear as a citation requires:** If an individual voluntarily appears as a citation requires, we see no good reason why a court should fail to issue a release order (which would result in the defendant's release on personal recognizance).[15] However, if you all feel differently, we should discuss. (And, again, this all depends on us going the citations' route in the first place.)

- **ISSUE 4—a rebuttable presumptive right to pretrial release:** Consistent with a presumptive right to pretrial release, several jurisdictions expressly spell out a rebuttable presumption that a defendant is entitled to release on recognizance.[16]

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[14] APPENDIX E; *see, e.g.*, 39 DEL CODE. § 4604 (requiring the appointment of counsel "at every stage of the proceedings following arrest").

[15] From this point forward, we use the term "defendant," because we are now within the adjudication period.

[16] Almost all states provide for a constitutional and/or statutory presumption in favor of release on personal recognizance (or, at most, an unsecured appearance bond). APPENDIX B; *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-

Thereafter, conditions of release (beyond what release on recognizance demands) are imposed only where reasonably necessary (see the standard, immediately below). We should discuss whether to expressly provide for such a presumptive right to release.

- **ISSUE 5—the standard for restricting pretrial liberty:** One of the most critical parts of any pretrial release statute is specifying the nature and degree of risk that justifies restrictive conditions of release. Unfortunately, many statutes just speak in (relatively unhelpful) terms of "risk of danger" or "risk of flight." The problem with such terms is that, any time there is probable cause that a person has committed a crime, some risk exists of danger or at least flight.[17] Indeed, all of us pose some amount of risk to each other every time we leave our homes. We think it necessary, then, to offer more concrete standards for when a risk is too big of a risk. We have brainstormed a few possible terms—any or all of which might be used in different portions of a draft act. One term is "substantial risk." In other contexts, an act might demand something more, either in terms of significance of the risk ("serious") or immediacy of the risk ("imminent"). Again, whatever the qualifier, we believe that some set of modifiers is necessary to get beyond the reality that almost any defendant poses *some* risk of failing to appear or even harming a person.[18] In a liberal order, detention (either by arrest or judicial decision) ought to demand more significant and articulable risks. For our immediate purposes, one possible formulation follows:

    - "If the court finds that a defendant poses a substantial risk of intentionally failing to appear as the court requires, intentionally obstructing justice during the adjudication period, or seriously harming a person during the adjudication period, the court shall issue an order of pretrial restraint and release the defendant subject to the least restrictive condition or combination of conditions reasonably necessary to reduce the risk to an insubstantial level."

        - Notice that in the quoted text immediately above, we offer the potential language: ". . . least restrictive condition or combination of conditions reasonably necessary to reduce the risk to an insubstantial level." This is a bit of a mouthful, we know. And we are, of course,

eligibility.aspx. By way of example, Kentucky adopts a particularly strong presumption in favor of pretrial release on personal recognizance. KY. REV. STAT. §§ 431.520, 431.066; *see also* COLO. REV. STAT. §§16-4-103, 16-4-113.

[17] As Justice Jackson observed: "Admission to bail always involves a risk that the accused will take flight. That is a calculated the risk which the law takes as a price of our system of justice." Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., dissenting).

[18] TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 13, 25 (Apr. 18, 2017) ("[O]ne can literally go out on the streets of any city and show that 100 random pedestrians are all risky. . . . [S]ince everybody is already risky . . . where do we draw the line? . . . [R]isk is inherent to bail . . . . [W]e cannot, consistent with fundamental American principles, be risk averse.").

open to more elegant formulations. But, importantly, there is nothing new to this notion of requiring "least restrictive conditions." To the contrary, the majority of pretrial release statutes contain some such language.[19]

- **ISSUE 6—determining the "least restrictive conditions" of release:** We must provide the court with guidance to determine the "least restrictive condition or combination of conditions reasonably necessary to reduce [a relevant] risk to an insubstantial level." On this score, the committee should consider how much weight to give qualitative considerations (like the circumstances of the pending charge) and how much weight to give quantitative considerations (like a defendant's score, pursuant to a validated risk-assessment instrument). There is a significant question as to when, whether, and to what degree pretrial release should depend upon risk-assessment instruments. These instruments are products of reform efforts.[20] But there is an emerging concern that they may unnecessarily widen the net of defendants who are subject to detention and onerous conditions of release.[21] One thing is certain, however: validated risk-assessment instruments are far superior to preset bond schedules, which are over-inclusive and fail to meaningfully distinguish between offenders and offenses. For this reason, the American Bar Association and the Bureau of Justice Assistance have endorsed risk-assessment instruments and have cautioned against using preset bond schedules.[22] Ultimately, we believe not only that a well-constructed risk-assessment instrument provides worthwhile quantitative guidance, but also that qualitative human evaluation is indispensable.[23] Thus, we

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[19] *See* APPENDICES B & C (citing statutes)

[20] Fifteen states currently require courts to use risk assessment instruments in at least some cases. NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*, http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx; *see e.g.*, KY. REV. STAT. §§ 431.520, 431.066; *see also* COLO. REV. STAT. §§16-4-103, 16-4-113. *See generally* APPENDIX H (detailing California reform efforts and discussing when and how to use risk-assessment instruments).

[21] Indeed, a number of reformers have rejected the use of these tools altogether. *See, e.g.*, HUMAN RIGHTS WATCH, PRESERVING THE PRESUMPTION OF INNOCENCE: A NEW MODEL FOR BAIL REFORM (on file with reporters) (rejecting use of risk assessment instruments); THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS (2018), http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf (statement signed by more than 100 civil rights groups urging rejection of pretrial risk-assessment tools).

[22] BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30; *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e) ("Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and *should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge*." (emphasis supplied)).

[23] TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 27 (Apr. 18, 2017) ("[T]he answer is . . . not as simple as using

think the right balance is to require courts to consider both—to use risk-assessment instruments, but only as part of the evaluation. Here is one option:

- "The court shall rely in part upon a validated risk-assessment instrument and in part upon an evaluation of the following considerations:
  - the nature, seriousness, and circumstances of a charge and alleged offense;[24]
  - the nature and severity of the danger defendant poses to the public or a person;
  - the weight of evidence against the defendant;
  - the background and characteristics of the defendant, including physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, and history of criminal conduct, drug abuse, or failing to appear as a court requires;
  - whether, at the time of a charge, alleged offense, or arrest in the current case, the defendant was released:
    - pending trial for a prior criminal charge;
    - pending imposition, execution, or completion of a sentence or appeal of a sentence or conviction for a criminal offense; or
    - on probation or parole for a criminal conviction; and
  - whether the defendant has proposed a practical condition or combination of conditions of release, including but not limited to therapeutic or social services, that is designed to reduce a substantial risk to an insubstantial level."

- We are not wedded to the wording with respect to any of the criteria outlined above. Perhaps some of the language should be altered or eliminated. And, undoubtedly, there are considerations that we have wholly omitted. But

actuarial pretrial risk assessment instruments alone to release all 'low risk' defendants and to detain all 'high risk' ones. In fact, the answer lies somewhere in the middle.").

[24] Because sound release decisions depend upon distinguishing between specific offenders and offenses, the draft act should probably direct courts to consider not only the nature and seriousness of the statutory charge but also the particular circumstances that describe the particular alleged offense. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e) (suggesting that a release or detention decision must be individualized). If the Committee is in agreement, we should discuss how explicit we should make this distinction between consideration of the offense generally and the particularities of incident and the alleged offender.

On the same score, we have definitional work to do. We should aim to use terms carefully according to refined and described meanings. So, for instance, we might use the term "charge" to refer to a current statutory charge, "alleged offense" to refer to the particular facts and allegations that support the current charge, and "preexisting charge" to refer to a pending case. But these refinements can wait for future meetings.

please know that almost nothing we include is all that innovative. These are all standard considerations.[25]

- **ISSUE 6—potential conditions of release:** Statutes typically describe a nonexclusive list of potential conditions of release. We'll probably need do the same. To that end, the committee should think carefully about what should be added or removed from the proposed list below. (Also, we should consider whether we want to expressly categorize conditions from least-to-most restrictive. To our thinking, this is something of a fool's errand, because the degree to which a particular condition is restrictive is very much context-dependent.) Here's our proposed language:

    - "The court may impose any of the following conditions if they are reasonably necessary to reduce a substantial risk to an insubstantial level:
        - limiting or avoiding communication, contact, or conduct with a person or persons;
        - limiting or avoiding travel to a specified place or within or beyond a specified geographic area;
        - limiting or avoiding possession or use of alcohol, marijuana, controlled substances, or other intoxicant, without a prescription from a licensed medical practitioner;
        - limiting or avoiding possession or use of a firearm or dangerous weapons or devices;
        - limiting or avoiding particular conduct or activities;
        - seeking or maintaining employment, education, or therapeutic or social services;
        - submitting to the supervision of a law enforcement agency or pretrial services agency;[26]
        - submitting to the supervision of a third party or organization;
        - submitting to a curfew;
        - submitting to electronic monitoring;
        - submitting to medical, psychological, or psychiatric treatment;
        - submitting to house arrest;
        - executing an unsecured appearance bond;

[25] The one exception might be the last provision (pertaining to defendant-proposed conditions). This consideration is of our own invention, but we think it is advisable (and has little to no downside). Already, courts do and should consider defense proposals (like proposals to utilize therapeutic or social services) that are designed to address flight risk or dangerousness. We see no harm in requiring courts to at least consider these defense-initiated proposals, should they arise.

[26] The participation of pretrial services agencies is fairly unobjectionable. A question, however, is whether a draft act should require their participation. We think not. At present, only some states have pretrial services agencies. APPENDIX C. It is simply beyond the scope of this act (and wholly unrealistic) to compel states that do not currently have such agencies to establish them. Instead, we think it would be better to just include reference to compliance with a pretrial services agency as one available condition of release (should such an agency exist already).

- executing an appearance bond, secured by cash, property, or solvent surety;
- submitting to any other nonfinancial condition that is reasonably necessary to reduce a substantial risk."

- **ISSUE 7—financial conditions:** You will notice that the above-quoted language allows for secured and unsecured financial conditions. This is obviously a *huge* question for us: Do we want to eliminate money bail altogether? Or do we want to permit financial conditions and then provide robust safeguards against the detention of defendants based only on their inability to pay bail? We think the latter. Consistent with the mission statement for this project, we think the principal objective is to "prohibit the use of money bail *as a mechanism to trigger preventative detention*."[27] But (as we explain throughout the rest of this memo) in order to achieve this objective, we need not eliminate money bail altogether. Again, we envision a pragmatic middle-ground approach. (Likewise, we need not eliminate the use of *commercial* bail bonds—a politically costly move, considering the power of the bail bond industry, and the fact that, to date, only four states have prohibited commercial bail bonds outright).[28]

    - What kinds of safeguards are potentially available to us? We envision a series of procedural, evidentiary, and substantive mechanisms. Specifically, in the pages that follow, we describe layers of procedural review that would remain available for defendants who are held on financial conditions. More on that as we move forward. For now (while we're still at the restraint hearing), we envision one potential substantive safeguard and two evidentiary safeguards: (i) limitations on the permissible bases for imposing financial conditions; (ii) a heightened standard that a court must meet before imposing a financial condition; and (iii) a required inquiry into the defendant's ability to satisfy a secured financial condition. Here is proposed language for all three of these potential safeguards:

        - The substantive safeguard:

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[27] UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) (emphasis added).

[28] WISCONSIN STAT. § 969.12; OREGON STAT. §§ 135.255, 136.260, 135.265; KY. REV. STAT. § 431.510; 725 ILL. STAT. §§ 5/103-9, 5/110-7, 5/110-8. However, as is well known, judges in Washington, D.C, have effectively eliminated the use of money bail. Likewise, litigation brought by a nonprofit has effectively "brought an end to money bail" in seven different jurisdictions in the states of Alabama, Louisiana, Mississippi, Missouri, and Kansas. EQUAL JUSTICE UNDER LAW, *Ending the American Money Bail System*, https://equaljusticeunderlaw.org/money-bail-1/. And California recently enacted legislation that, if implemented, will eliminate money bail in that state. California Bail Reform Act, S.B. 10, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10.

- "The court may impose a financial bond only if a defendant poses a substantial risk of intentionally failing to appear as the court requires or intentionally obstructing justice during the adjudication period, and no less restrictive condition is available to reduce the risk to an insubstantial level. A court may not impose a financial bond for another purpose."

    - We think it extremely important to include a limitation of this sort (that is, a requirement that a court may impose a financial condition only if "no less restrictive condition is available"). A key purpose behind the draft act is to minimize wealth-based disparities in pretrial release, and financial conditions are prime drivers of these disparities. In any event, this is not even an atypical requirement; current statutes sometimes include a limitation that a court may not impose a financial condition unless "no less restrictive condition" will reasonably protect against risk of flight or obstruction of justice.[29]

    - With respect to the requirement that a court may not impose a bond for a purpose other than flight or obstruction of justice, the idea here is that financial conditions are inappropriate for managing a threat to public safety. Put differently, if a defendant is sufficiently dangerous, he should be detained—full

[29] Specifically, around twenty states either expressly or implicitly require that conditions of release (especially secured financial conditions) must be evaluated to determine whether they are the least restrictive to reasonably assure that a legitimate governmental purpose is served. NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*, http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx *See, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101; FLA. R. CRIM. P. RULE 3.131 ("[T]here is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release."); *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("Financial conditions other than unsecured bonds should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court."); *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.2 ("[T]he court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process.").

As former Attorney General Eric Holder has observed, with technological developments, "[a]lmost all of these individuals could be released and supervised in their communities—and allowed to pursue and maintain employment and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice." BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30.

stop. This is the position already of the American Bar Association and some jurisdictions.[30]

- Second, the evidentiary safeguard:

  - "The court may not impose a secured bond unless:
    - a validated risk assessment instrument classifies a defendant as at least a moderate risk of failing to appear as the court requires or obstructing justice during the adjudication period; and
    - the defendant currently faces at least one felony charge in the current case."

- Third, the required inquiry:

  - "Before the court imposes a secured bond, the court shall inquire as to the resources available to a defendant and, unless impractical, shall impose a secured bond in an amount no greater than the defendant is able to satisfy."[31]

- **ISSUE 8—the substance of a release or restraint order:** Here's a potential formulation:

  - "When the court issues an order of pretrial restraint, the order must specify in writing:
    - the time and place the individual shall appear next;
    - the conditions of the order of pretrial restraint, including the requirements that the defendant shall return to court and may not obstruct justice or commit a criminal offense during the adjudication period; and
    - the consequences of violating the order of pretrial restraint."

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[30] AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person."); *see e.g.*, D.C. CODE § 23-1321(b)(3) ("A judicial officer may not impose a financial condition . . . to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person.").

[31] This inquiry is consistent not only with our mission, but also the modern reformist trend. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay."); *cf.* KANSAS STAT. § 22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance"); D.C. CODE § 23-1321(b)(3).

- **ISSUE 9—the consequences of noncompliance:** Again, the principal repercussion for noncompliance should be immediate issuance of an arrest warrant. Where the court has imposed a financial bond (secured or unsecured), forfeiture is another potential repercussion. (We discuss forfeiture at the end of this memo). Other repercussions? For now, this language might do the trick:

    - "If the court has probable cause to believe that a defendant has failed to appear as the court requires, obstructed justice during the adjudication period, committed a criminal offense during the adjudication period, or violated a condition of release during the adjudication period, the court may issue an arrest warrant and may reopen a restraint hearing. Nothing in this paragraph shall interfere with or prevent arrest, charge, conviction, or punishment for contempt or another criminal or noncriminal offense."

    - One additional question for us to consider is whether to include any requirement or suggestion that, in the case of failure to appear, the court should first attempt to notify the defendant of the missed date and provide a second opportunity to appear before an arrest warrant is issued.

- **ISSUE 10—the standard for a temporary order of detention:** This is likewise a very big issue for us. As jurisdictions like Washington, D.C. have made plain, a court system cannot abandon money bail without providing a mechanism to detain defendants who pose genuinely serious risks of flight, obstruction of justice, or danger to the community.[32]

    - Surprisingly, then, one issue with our draft act is that it will require some states to amend their constitutions to allow *more* pretrial detention. Why? Because several states constitutionally allow pretrial detention in only very serious felonies cases (in some states, only capital cases).[33] These states manage to rely upon such narrow detention provisions because they use prohibitively high money bail as a backstop to functionally remand defendants charged with non-detention-qualifying crimes. Again, one of our core objectives is to abandon this problematic practice—the practice of using money bail as a means to preventatively detain. But, in doing so, we are going to need to provide a viable (and procedurally robust) mechanism for detention that would apply to a broader set of crimes.

    - A procedurally robust detention hearing cannot, of course, happen immediately. Consequently, our draft act has to include provisions to

[32] D.C. CODE § 23-1322 (provisions for pretrial detention).

[33] APPENDIX D; *see also infra* (discussing the same point).

empower a court to detain a defendant for a short period prior to the detention hearing. That's where a *temporary* order of detention comes in. Here's our idea for a standard for a temporary order of pretrial detention:

- "Upon oral or written motion of the government or by the court *sua sponte*, the court may issue a temporary order of pretrial detention and detain the defendant until at least completion of a detention hearing, if:
    - the defendant faces an open order of detention from any jurisdiction, including but not limited to an arrest warrant, immigration detainer, or order of revocation of probation, parole, or release for a criminal charge or conviction;
    - the government charges the defendant in the current case with a felony offense that provides for a maximum penalty of death or term of imprisonment for life;
    - the court has reason to believe the defendant poses an imminent risk of intentionally failing to appear as the court requires, intentionally obstructing justice during the adjudication period, or seriously harming a person during the adjudication period;
    - the court has reason to believe:
        - the defendant poses an imminent risk of failing to appear as the court requires or obstructing justice during the adjudication period; and
        - the defendant is addicted to alcohol or drugs or is incompetent to stand trial, and the court detains the defendant for the purpose of psychological, medical, or therapeutic examination or treatment; or
    - the defendant faces a felony charge of violence in the current case, and the court has reason to believe:
        - the defendant poses a substantial risk of failing to appear as the court requires, obstructing justice during the adjudication period, or seriously harming a person during the adjudication period; and
        - at the time of a charge, alleged offense, or arrest in the current case, the defendant was released:
            - pending trial for a prior criminal charge;
            - pending imposition, execution, or completion of a sentence or appeal of a sentence or conviction for a criminal offense; or
            - on probation or parole for a criminal conviction."

- With respect to the above-quoted language, you might notice that the substantive standard is higher than the standard for orders of pretrial restraint. *To wit*—earlier, we specified that a court could impose conditions of release as reasonably necessary to avoid a "*substantial risk*" of failure to appear, obstructing justice, or serious harm to a person. With detention, however, we think a "substantial risk" is typically not enough (unless the immediate charges are punishable by life or death, or the defendant already faces an order of detention or is, at least, under criminal justice supervision).[34] Instead, the court should be required to determine that a defendant poses some qualifying form of *imminent* risk. Without that imminent risk, a restraint order probably suffices, and the defendant should be released (albeit possibly with conditions of release imposed).

- **ISSUE 11—the substance of a temporary order of pretrial detention and other procedural requirements:** At a restraint hearing, a court should not be required to issue the kinds of evidentiary findings that characterize a procedurally robust detention hearing (e.g., fact findings, subject to a clear-and-convincing standard of proof). Still, the court should perhaps be required to provide a bit more basis for a temporary order of pretrial detention, as compared to an order of release or restraint. To this end, we propose that a temporary order of pretrial detention include a "written statement of the reasons" for the detention.

VI. REVIEW HEARINGS:

Once we decide not only to permit financial conditions but also to bar the use of prohibitively high secured bonds in lieu of detention, we face the conundrum of how the draft act can successfully achieve these often-contradictory objectives. The most sensible way (indeed, the only option of which we can conceive) is an expeditious "**Review Hearing"** for any defendant who remains detained a set period of time after the initial restraint hearing (for any reason other than issuance of a temporary order of detention).

[34] Indeed, as our draft detention provisions makes plain, the court would not even need to determine that a defendant poses a "substantial risk" where the defendant currently faces an open detention order or a capital/life-eligible charge. Under such circumstances, the mere existence of the detention order or capital/life charge would be sufficient to authorize temporary detention.

We can discuss the timeframe for such a review hearing. There is no clear constitutional guidance. But it would seem that the hearing should happen within a few days of the restraint hearing (or another hearing at which the court imposes a new condition of release that results in detention[35]). The need for speedy review is important, considering recent studies that have found that even short terms of detention may correlate with increases in recidivism and failure to appear.[36] Indeed, a number of jurisdictions already provide for such review of release conditions that result in detention. In some jurisdictions, the review is even speedier than what we have in mind.[37]

What exactly do we have in mind? Our first thought is to require a court to conduct a review hearing within three days, but also to allow for a continuance upon the motion of defendant or, with good cause, upon the motion of the government or by the court *sua sponte*. This would provide enough time for defendants and their families and communities to meet

[35] The language in the parenthetical might sound confusing. Under what circumstances might a court impose a new condition of release at a hearing other than at the initial restraint hearing? Imagine that a court conducts a full detention hearing, following issuance of a temporary order of pretrial detention. At the detention hearing, if the court does not permanently detain the defendant pretrial, it would likely impose conditions of pretrial release (the only other option is release on personal recognizance). Once a court imposes new conditions of release, the possibility exists that these new conditions could result in detention, thereafter necessitating a review hearing.

[36] STATE OF UTAH OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, *Report to the Utah Legislature: A Performance Audit of Utah's Monetary Bail System* 19 (Jan. 2017) ("Low-risk defendants who spend just three days in jail are less likely to appear in court and more likely to commit new crimes because of the loss of jobs, housing, and family connections."); PRETRIAL JUSTICE INSTITUTE, *Pretrial Justice: How Much Does It Cost?* 4-5 (Jan. 2017) (finding increases in re-arrest and conviction for those detained even a short time beyond first appearance). Because jail may be criminogenic, some commentators have begun to argue that detention poses its own threats to public safety and order. *See, e.g.*, David Ball, *Amicus Brief*, In re: Humphrey, No. S247278 (Cal. Sup. Ct. 2018). On this reading, the dangers and risks of release must be weighed against the dangers risks of detention.

[37] APPENDIX D (detailing time frames typically in the 24-72 hour range); *see, e.g.*, D.C. CODE § 23-1321(b)(4) ("A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them.").

financial and other conditions, without allowing too much time to pass before the detained defendant gets review.

What would the court be empowered or required to do at a review hearing? We envision three basic options: (i) continue a condition of release that results in detention, (ii) amend it, or (iii) eliminate it. That much is clear-cut. The bigger questions concern the safeguards available to the defendant and the scope and standards of review.

Discussion notes:

- **ISSUE 1—the right to counsel at a review hearing:** As mentioned above, there is a balance to be struck between the benefits of extending a right to counsel to pretrial release hearings[38] and the practicalities and costs of extending the right. We think a good middle-ground is to guarantee the right at the Review Hearing, but not before then. We like this compromise approach, because it would entail a less substantial investment of resources, if any. Specifically, the system would only have to provide counsel for those defendants who needed review hearings—in other words, the small fraction of defendants who remained detained (after a few days) on conditions of pretrial release.
    - An additional option is to expressly provide for a remedy in the event a court still cannot appoint counsel in time for a review hearing. Perhaps something like:
        - "If the court fails to appoint counsel, the court shall amend, by mitigating or eliminating, all existing conditions of release that result in detention; and may not continue or impose a condition that results in detention."
- **ISSUE 2—the options available to the court at a review hearing:** As mentioned, the court's choices are to continue, amend, or eliminate a condition of release that results in detention. The sub-questions are what scope and standards the court should apply to the determination (at least with respect to continuing a condition that results in detention).

[38] The Bureau of Justice Assistance has deemed the right integral, as applied to release hearings. BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30.

- First, we should again discuss the considerations that should be taken into account and the role, if any, to be played by validated risk-assessment instruments. As with the restraint hearing, we think it makes sense for the court to rely in part (but not wholly) upon such instruments. What other considerations should the court consider? We could just incorporate here the same qualitative considerations we discussed in the previous section (e.g., "the nature, seriousness, and circumstances of a charge and alleged offense").

- Second, to avoid the review hearing operating only as a rubber stamp for the restraint hearing, we think additional questions should be taken up and additional substantive and evidentiary safeguards observed.

    - Remember, a core purpose of our work is to prevent courts from using money bail as a means to preventatively detain. To that end, we suggested already that (consistent with emerging practice) "the court shall inquire [at the restraint hearing] as to the resources available to a defendant and, unless impractical, shall impose a secured bond in an amount no greater than the defendant is able to satisfy." This inquiry at the restraint hearing seeks to avoid detention (and the need for a review hearing). However, if the defendant nevertheless remains detained, it would seem that it's time to give teeth to the draft act's protections against money-bail-as-detention. We propose a provision such as the following:

        - "At a review hearing, the court may not continue a secured bond that the defendant is unable to satisfy."[39]

    - Such a provision, in turn, raises two sub-questions:

        - First, how can we know that a defendant who has not satisfied a financial condition *cannot* satisfy the condition? The truth is that we cannot know this. The possibility always exists that a

[39] As stated, this provision gets to the heart of wealth-based disparities in pretrial release. The idea, here, is not to eliminate reliance upon financial conditions, but rather to ensure that these conditions do not result in preventative detention by another name (but without attendant procedural protections). This provision largely tracks the approach of Washington, D.C.: "A judicial officer . . . may impose . . . a financial condition to reasonably assure the defendant's presence at all court proceedings *that does not result in the preventive detention of the person*, except [after a procedurally robust detention hearing] as provided by [separate detention provisions]." D.C. CODE § 23-1321(b)(5) (emphasis supplied); *cf.* State v. Briggs, 666 N.W.2d 573, 583 (Iowa 2003) (noting that, in certain circumstances, where a defendant cannot satisfy a secured bond condition, "a court is constitutionally bound to accommodate the accused's predicament").

defendant might choose voluntarily to wait out a bond that he has the resources to satisfy. But, in the main, we think this is an unlikely scenario. In our experiences, a paramount concern of recently charged defendants is to get home as soon as possible. When, after some number of days, a defendant remains detained on a financial condition, the most likely explanation is that he cannot satisfy that condition. Thus, we think it is warranted to take a rebuttable presumption that an unsatisfied financial condition is, in fact, unable to be satisfied. If you agree that we should include such a rebuttable presumption, here is proposed language:

- "If a secured bond remains the only condition on which the defendant is detained at the time of the review hearing, the court shall take a rebuttable presumption that the defendant is unable to satisfy the bond."[40]

- Second, what should the court do if: (i) a defendant cannot satisfy a financial (or other) condition that has resulted in detention; (ii) there still exists "a substantial risk" of flight, obstruction of justice, or serious harm to a person; and (iii) no lesser condition or combination of conditions of release would suffice to address the risk and guarantee release? We think the answer is obvious—issue an order of temporary detention and schedule a detention hearing. Just because we intend to prohibit the use of financial conditions as a means to preventatively detain, it does not follow that preventative detention is not warranted. Some possible statutory language is:

  - "If the court continues a condition of release that results in detention, the court shall issue a temporary order of pretrial detention and conduct a detention hearing."

- There is an added virtue to this procedural mechanism: Imagine the solvent defendant who's playing games (choosing not to satisfy an affordable financial condition in the hopes that the court reduces or eliminates it at the restraint hearing). This

[40] The logic is simple: if a defendant remains behind bars some days after a financial condition is imposed, then we think it fair to conclude that, for him, the secured bond condition is tantamount to remand. As such, the bond condition should be amended or (pursuant to the analysis below) converted into a temporary detention order, which would be subject to the attendant procedural protections of a detention hearing.

defendant might not get his wish. Instead, the court may choose to issue a temporary order of detention, at which point the defendant *must* be detained until at least the detention hearing (several days later). At the detention hearing, the possibility exists that, following the presentation of evidence, the court might impose additional conditions or even issue a permanent order of pretrial detention. The risk is clear: By choosing not to satisfy an affordable financial condition, the game-playing defendant is putting his pretrial liberty at risk.

- **ISSUE 3—the substance of a court order at a review hearing:** As with the restraint hearing, we feel a court at a review hearing should still not be compelled to issue the kinds of evidentiary findings that characterize a detention hearing (e.g., fact findings and a clear-and-convincing standard of proof). Instead, if the court issues a new restraint or release order at the review hearing, then that order should only have to include the same information that we covered above (the time and place of next appearance, the conditions of release, and the consequences of noncompliance).[41] We do think, however, that it might make sense to add one additional requirement should the court continue a condition of release that results in detention. Specifically, under such circumstances, the court should provide a written statement of the reasons for the continued detention.[42]

VII. DETENTION HEARINGS:

Thus, we come to the "**Detention Hearing**." Even though detention is a primary focus, the roadmap here is somewhat clear. We imagine a detention hearing looking a lot like detention

[41] Also, if a court issues a new order with new or amended conditions of release, the new order (like the initial order) should be made to trigger a new review hearing five days later, if the defendant somehow remained detained at that time.

[42] This approach is consistent with the practice in some jurisdiction—that if conditions that result in detention are not modified, the court must record its reasons for continuing the conditions. D.C. CODE § 23-1321(b)(4) ("Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."); *cf.* O'Donnell v. Harris City, 2018 WL 2465481, at *12–13 (5th Cir. June 1, 2018) ("If the decision-maker declines to lower bail from the prescheduled amount to an amount the arrestee is able to pay, then the decision-maker must provide written factual findings or factual findings on the record explaining the reason for the decision, and the County must provide the arrestee with a formal adversarial bail review hearing before a County Judge.").

Because a review hearing does not entail or require evidence gathering and presentation, it seems inappropriate to require the court to do anything further—that is, to make fact findings, as a court must do at a detention hearing.

hearings already do (and what the federal Constitution arguably requires). That said, the nuts and bolts will undoubtedly take some working out. One key question is the timing of the hearing. Perhaps it makes sense to require the same time frame as between the restraint and review hearings—three days after issuance of a temporary detention order with the possibility of a continuance upon the motion of defendant or, with good cause, upon the motion of the government or by the court *sua sponte*.

Discussion notes:

- **ISSUE 1—the procedural rights and evidentiary standards at a review hearing:** This much is clear-cut; the following procedural safeguards for detention hearings will generally be sufficient to satisfy due process:[43]
    - The right to be represented by counsel and, if financially unable to obtain adequate representation, to have the court appoint counsel;
    - The right to testify;
    - The right to present witnesses and cross-examine witnesses; and
    - The right to present evidence and proffer information, subject to evidentiary rules for pretrial proceedings.
    - The court must find facts that show by clear and convincing evidence that detention is warranted.
    - Any defendant ordered detained must have a right to immediate appeal (which we discuss in more detail below).
    - The trick is to determine how a draft act would articulate these rights and corresponding remedies for violations.
        - With respect to the right to counsel, we think it makes sense to provide for the same remedy that we referenced for review hearings:

[43] *United States v. Salerno*, 481 U.S. 739 (1987).

- "If the court fails to appoint counsel or grant a continuance, the court shall issue an order of pretrial release and may not impose a condition of release that results in detention."

- With respect to a defendant's right to testify, we think it's important to keep that testimony from becoming evidence of guilt at trial:

  - "If the defendant testifies, the court may not admit the testimony of the defendant at trial on the question of guilt for a charge in the current case or a related case. The court may admit the testimony of the defendant at trial for the purposes of impeachment, or may admit the testimony of the defendant in a subsequent prosecution for perjury."[44]

- **ISSUE 2—the options available to the court at a detention hearing:** At a review hearing, the court could order pretrial release or restraint (pursuant to the standards and conditions detailed above, in the provisions regulating restraint hearings). Or the court could issue a "permanent order of pretrial detention," which would result in detention of the defendant until the end of the adjudication period (or until a court modified the order).

  - Again, the sub-questions are the scope and standard of the decision whether to issue a permanent order of pretrial detention.

    - Likewise, here, we believe the court's analysis should be guided by a mix of quantitative and qualitative considerations—specifically, a validated risk-assessment instrument coupled with the considerations described in the provisions regulating restraint hearings, above (e.g., "the nature, seriousness, and circumstances of a charge and alleged offense").

  - In terms of the evidentiary and substantive standards to be applied, we propose to borrow the clear-and-convincing evidence standard of proof already sanctioned by the Supreme Court,[45] along with whatever substantive standard we articulate ("imminent risk," "substantial risk," etc.) in other parts of the statute. Here's some prospective language, which is obviously up for discussion and debate:

[44] *See, e.g.*, D.C. CODE § 23-1322.

[45] *United States v. Salerno*, 481 U.S. 739 (1987).

- "The court may not issue a permanent order of pretrial detention or continue a condition of release that results in detention unless the court finds by clear and convincing evidence that:
    - the defendant poses an imminent risk of failing to appear as the court requires or obstructing justice during the adjudication period; or
    - the defendant poses a substantial risk of intentionally failing to appear as the court requires, intentionally obstructing justice during the adjudication period, or seriously harming a person during the adjudication period;
    - and no condition or set of conditions of release is available to eliminate the imminent risk or reduce the substantial risk to an insubstantial level."

- **ISSUE 3—whether and how to include a "detention eligibility net":** A core question for the draft act is whether to limit detention eligibility to people charged with certain offenses—what some commentators call a "detention eligibility net."[46] Currently, 43 states have constitutional provisions that categorically limit detention to a set of very serious felony offenses.[47] These rules do not necessarily signal success at restricting pretrial detention. Rather, they tend to signal that the states are using money bail as a functional stand-in for formal detention.[48] Nonetheless, there are compelling reasons to include a detention eligibility net in a uniform act. If a defendant is charged with an offense for which he cannot be sentenced to incarceration, for instance, it is extremely difficult to imagine how pretrial detention could be justified. Without a limited eligibility net, there is real concern that detention might become the norm rather than a carefully limited exception. And including some eligibility net is mostly consistent with positive law and current practice. On the other hand, offense categories do not correspond cleanly with risk, and experience has shown that when detention eligibility is narrowly limited, courts resort to setting unaffordable bail and other workarounds. Whether to include a detention eligibility net—and how to craft it—is an issue the committee should consider carefully, with input from affected stakeholders.

    - You may also notice that we do not include a list of charges for which a presumption attaches that permanent detention is warranted. We think these over-inclusive presumptions are problematic and unnecessary. Rather than adopt a presumption of permanent detention (even for very serious charges),

[46] *E.g.* Schnacke, *supra* note 1, at 129-37; 172-82.

[47] APPENDIX D; *see, e.g.*, Alabama Const. art I § 16; Alaska Const. art I § 11.

[48] It is no surprise, then, that Washington, D.C.—a jurisdiction that has practically eliminated secured bond conditions—has a more expansive detention provision. D.C. CODE § 23-1322 (provisions for detention).

we believe strongly that the presumption should remain always in favor of release. If a defendant needs to be detained, a court has ample opportunity to do so under the detention standards as we articulate them. Still, we should discuss this matter.

- **ISSUE 4—the substance of a permanent order of pretrial detention:**
    - With respect to temporary orders of detention, we suggested that a "statement of reasons" could be enough. Here, we need more—not only as a matter of best practices but also (most likely) constitutional law. Specifically, if the court decides to issue a permanent order of detention, it must include findings of fact to support and accompany a statement of reasons.[49]
        - If, however, the court chooses not to issue a permanent order of detention, it would likely impose conditions of release. Thereafter, if any of those conditions result in detention, the defendant should be entitled to a review hearing. In this way, we're still keeping an eye on our core objective: to avoid the use of prohibitively onerous financial conditions (or other release conditions) as a stand-in for remand (and the procedural and substantive protections that go along with a detention hearing).
- **Issue 5—what comes next:** We think it may be appropriate to expedite trial of any defendant for whom a court orders permanent detention. Some jurisdictions do this already.[50] Here is one possibility, which we think would not be overly stringent:
    - "If the court issues a permanent order of pretrial detention or continues a condition of release that results in detention, the court shall expedite the trial of the defendant. The government must try the defendant not later than 90 days after the date of conclusion of the detention hearing, except the court may grant one or more continuances, each of which may not exceed 30 days, upon oral or written motion of defendant or, with good cause, upon oral or written motion of the government or by the court *sua sponte*."

VII. STRAY MATTERS:

[49] *United States v. Salerno*, 481 U.S. 739 (1987).

[50] *See, e.g.*, D.C. CODE § 23-1322.

Some loose ends remain. One issue is **forfeiture** (should a court impose financial conditions, and should a defendant thereafter fail to meet the requirements of the restraint order). We believe that the draft act must address this question. Another issue is the possibility of allowing parties to **move to reopen or to appeal** a court's release, restraint, or detention decision. We favor allowing both parties to move to reopen and to appeal lower court decisions (albeit with different standards for defendants and prosecutors). The committee should discuss whether it also feels that both mechanisms should be made available (and, if so, under what circumstances).

- **ISSUE 1—the standard for a forfeiture hearing:** A difficulty is that a defendant might miss a court date for innocent (or, at least, not entirely culpable) reasons. This is especially true considering the trying social circumstances many indigent defendants face. Although it may well be warranted to issue a warrant for a missed court date (and to subsequently have the court reconsider release conditions), it seems extreme to immediately proceed to a forfeiture hearing. Likewise, forfeiture seems unfair where a defendant inadvertently contacted a witness or otherwise inadvertently obstructed justice.[51] Thus, as a threshold matter we would require probable cause that the defendant *intentionally* failed to appear or to obstruct justice. Perhaps something like this:
    - "If the court has probable cause to believe a defendant intentionally failed to appear as the court required or intentionally obstructed justice during the adjudication period, the court may conduct a forfeiture hearing, upon oral or written motion of the government or by the court *sua sponte*."
- **ISSUE 2— the options available to a court and the procedural rights and evidentiary standards at a forfeiture hearing:** There are many ways to structure a forfeiture hearing—in terms of rights, remedies, evidentiary standards, and substantive standards. As a baseline, we believe the court should be made to honor the same kinds of procedural rights and evidentiary standards that characterize a detention hearing. Not only does forfeiture entail the taking of property, it often leads inevitably to detention. As a starting point, here's what we envision:

[51] Remember, we would not allow financial conditions to address dangerousness. If a defendant poses sufficient danger to public, he should be detained.

- "At a forfeiture hearing, the court shall decide whether to order, in whole or in part, permanent forfeiture of property or money, paid or promised by a defendant or a surety, pursuant to a bond,
    - The defendant has a right:
        - to be represented by counsel and, if financially unable to obtain adequate representation, to have the court appoint counsel;
        - to testify;
        - to present witnesses and cross-examine witnesses; and
        - to present evidence and proffer information, subject to evidentiary rules for pretrial proceedings.
            - If the defendant testifies, the court may not admit the testimony of the defendant on the question of guilt for a charge in the current case or a related case. The court may admit the testimony of the defendant for the purposes of impeachment or a subsequent prosecution for perjury.
    - The court may not order forfeiture, in whole or in part, unless the court finds by clear and convincing evidence that the defendant intentionally failed to appear as the court required or intentionally obstructed justice during the adjudication period.
    - A forfeiture order must include findings of fact and a written statement of the reasons for forfeiture."

- **ISSUE 3—motions to reopen:** We think a defendant, at any time, should be able to move to reopen a restraint hearing and amend an order of pretrial restraint. The government or the court, on the other hand, should only be able to move for increased conditions of release in the event that there is a material change in conditions (most obviously, a defendant's failure to comply with conditions of release). Our approach is asymmetric for a good reason: a court should not be allowed to further restrict a defendant's liberty unless a change in conditions merits the new restrictions. We take a somewhat different approach with respect to reopening detention hearings. Because the detention hearing is procedurally robust, we are less concerned about unfairness to the defendant (and more concerned about systemic burdens); thus, we would require either party to identify a material change in conditions before the court could or should reopen the detention hearing. Here's potential text:

    - "At any time, upon oral or written motion of the defendant, the court may reopen a restraint hearing and amend an order of pretrial restraint, by mitigating or eliminating a condition of release.
    - If new information is discovered that has a material bearing upon a condition of release, upon oral or written motion of the government or by the court *sua sponte*, the court may reopen a restraint hearing and:

        - amend an order of pretrial release or restraint, by supplementing or adding a condition of release; or
        - issue a temporary order of pretrial detention, subject to subparagraph (d)(10) of Section 4.
    - If new information is discovered that has a material bearing upon a permanent order of pretrial detention or a condition of release that results in detention, upon oral or written motion of a defendant or the government or by the court *sua sponte*, the court may reopen a detention hearing:
        - issue or vacate a permanent order of pretrial detention; or
        - issue or amend an order of pretrial release or restraint, by mitigating, supplementing, adding, or eliminating, a condition of release; or
        - both.
    - When a different judicial officer reopens a restraint or detention hearing, the court shall apply a *de novo* standard.

- **ISSUE 4—motions to appeal:** We do not believe that either party should be able to appeal a restraint order. If nothing else, the restraint hearing and the review hearing (as we conceive them) would not produce the kind of record that could support an appeal. Instead, we favor a bilateral right to interlocutory appeal of *only* a court's decision at a detention hearing.[52] Here's a possible formulation:

    - At any time, a defendant or the government may appeal the decision of the court at a detention hearing. The appellate court shall expedite review and shall apply an abuse of discretion standard.

[52] The opportunity for interlocutory appeal is especially important in situations where the harm of an erroneous decision is experienced immediately.