NOTES MEMORANDUM

To: Alternatives to Bail Committee

From: Josh Bowers & Sandy Mayson (with help from Robbie Pomeroy, Sarah Houston & Ashley Cordero)

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Re: Draft Act & Meeting Notes

INTRODUCTION

On Friday, we circulated the initial draft of the "Alternatives to Bail Act" (alternatively titled, the "Pretrial Liberty Act"). That draft will provide the basis for most of our discussions next week. In an effort to reacquaint you with previous discussions, we have included also (immediately below) a summary of the notes from our November meeting.

NOTES FROM 11/16/18

I. Scope of the Draft

a. Arguments for narrow and focused scope:
   i. The ULC prefers draft that are narrow and focused because they have a better chance of being enacted.
   ii. States prefer a more focused draft because they are invested in their own criminal procedure.
   iii. Citations are not obviously within the scope of bail reform.
   iv. Bail schedules are an alternative way to address citations.

b. Arguments for keeping it broad:
   i. A broad scope will allow the states to pick and choose what they want.
   ii. The scope should include citations and arrests as they are an important preemptive step in getting people out of the bail system.
   iii. It is important to keep the arrest within the scope of the model act because it is a part of pretrial liberty.
   iv. Much of the current litigation and criticism concerns bail schedules, and elimination of bail schedules necessitates the proposal of alternatives.

c. Consensus: The committee will not propose to eliminate money bail altogether, but a main goal in this act is to eliminate wealth-based disparities in the use of pretrial conditions.

II. Right to Counsel & Timing of Initial Hearing

a. When should the right to counsel attach?
    i. Reporters foresee the act providing for three hearings.
        1. Initial or release hearing ("first appearance")
        2. Review hearing for those not released
        3. Ultimate detention hearing for those who might be detained until trial.
    ii. The right to counsel operates along two dimensions. Constitutionally, it kicks in with commencement of a criminal case (once there's a docket number) and attaches to any critical stage of adjudication. With respect to bail, the constitutional question is open: setting of bail has never been deemed (or not deemed) to be a critical stage. However, there is relevant litigation currently in the Second, Third, and Eleventh Circuits.
    iii. It is important to distinguish between bail hearings and detention hearings (where formal remand is a distinct possibility). When there is a detention hearing, it is fairly well established that the right to counsel attaches. For our act, the right to counsel should definitely attach at the detention hearing—but maybe also earlier; perhaps as early as the initial hearing.
    iv. We could limit the fiscal impact of extending the right to counsel by having only provisional counsel present at a bail hearing—counsel for purposes of that hearing alone (without being counsel for the entire case).
    v. Fiscal impact would be borne hardest by small and rural jurisdictions.
    vi. Act should err on the side of providing counsel. If we have a set of release criteria that courts must consider, the court's evaluation cannot be robust without counsel.
    vii. Consensus: In terms of the first draft of the act, we will provide for right of counsel at the initial hearing (or, alternatively, for the review hearing, at latest), but we will keep in mind that best practices and constitutional doctrine are evolving, and, ultimately, we might choose to draft modularly.

b. Initial Hearing Timeline:
    i. *Riverside v. McLaughlin* says that post-arrest, there must be a probable cause determination within 48 hours. That time frame is presumptively reasonable, but the Court has not concluded whether longer is *per se* unreasonable.
    ii. Oftentimes, there's no evidentiary hearing at the probable cause hearing—rather, just a paper screen for probable cause.
    iii. If the draft act sets a time frame, it might deviate from states' existing timelines and frameworks, potentially carrying administrative and financial costs.
    iv. Nevertheless, we should aim to have the initial appearance occur within 48 hours, not only to avoid the costs of confinement, but also to sidestep constitutional challenges.

III. Terminology (and Hearing Structure)

a. What terms to use:
    i. In *United States v. Salerno*, the Court announced that the default should be liberty pending trial. Thus, rather than talk about conditions of release, we should be talking the language of narrow circumstances where the court is authorized to restrict or restrain liberty.
    ii. Terminology reflect presumptions—notions of where the defaults lie.
    iii. Courts tend problematically to treat pretrial conditions as though they are the same as probation conditions, as if there is no valid procedural distinction between the two, vis-à-vis presumptions of innocence and liberty.
    iv. Proposal: Act should name the first hearing a "*restraint hearing,*" rather than the "bail hearing" or "initial appearance" or "initial hearing"
        1. At this hearing, there could be a number of options available to the court.
            a. Release Order - release on recognizance with the conditions only that the defendant return to court and commit no crimes while released.
            b. Restraint Order – release on certain additional conditions, potentially even financial conditions.
            c. Temporary Detention Order – only in exceptional circumstances.
                i. In general, the burden on the state should be higher before a court decides to detain an individual, even temporarily (that is, temporarily in anticipation of a full-scale detention hearing).

b. Arguments against using set terminology:
    i. Renaming the hearings might cause confusion. Every state calls their hearings something different. We might want to bracket the names of hearings and just insert the particular state's established names.
    ii. Better to carefully describe the substance of the hearing than to use any given preset terminology.
    iii. Consensus: Just go with "first appearance," for now. It has the virtue of being descriptive.
    iv. In the same vein, not sure the act can avoid defining bail.

c. With respect to the three potential orders . . . first, the "Release Order": basically, just a release on recognizance. The defendant is free to go with the only restraint that he returns to court and commits no crime on release.
    i. One innovation: if the defendant returns to court voluntarily on a citation (rather than arrest), the model act should be a bright-line right to a release order, leaving the defendant free on their own recognizance, since he already has demonstrated he can appear as the court requires.

d. Second, the "Restraint Order": Judge would release the defendant, subject to additional conditions.

i. Innovation: if, however, the defendant remains detained on a particular condition, then there must be a review hearing.
ii. At the review hearing, the court would revisit the condition to see whether there is a less restrictive alternative. If there is no less restrictive condition or the court is not able to alter the condition (such that the defendant gets released), then the court must convert the restraint order into a temporary detention order and schedule a detention hearing.
iii. More on the review hearing later. But just because there is a restraint hearing does not mean there will be a review hearing. The review hearing would happen only in the rare circumstances where a restraint order leads to functional detention.
iv. Possibly, the review hearing could be the stage at which the right to counsel would be implicated. Or possibly the right should be implicated earlier?

e. Temporary Detention Order: For use in exceptional circumstances where no condition of release is sufficient to address pressing risks of flight or dangerousness. More later.

f. Consensus
i. Include a rebuttable presumption of pretrial liberty
ii. Call it "first appearance"
iii. Define the term "bail"
iv. Possibly use language of "restraint" rather than "condition"

IV. How to Determine Whether a Financial Condition is Affordable

a. One possibility—affidavit:
i. Defendants fill out an affidavit of hardship, under penalty of perjury, and if they lie they are held in contempt.
ii. An affidavit of poverty or indigency should be made that is factually based and should be proven.
iii. A couple of jurisdictions have used affidavits with second look hearings to determine whether the bail was reasonable or unreasonable.
iv. Possibly under oath.

b. Other possibilities/concerns:
i. The act must also take into consideration the cost of day reporting, surveillance, and mandatory fees.
ii. Act should consider the full amount of the secured or unsecured bond amount and not just the required deposit percentage.
iii. Need to define what it means for bail to be affordable or unaffordable. Should that be:
1. If a person is loved enough, then they'll come up with money?
2. If they are desperate enough, then they will get a loan?
3. If they can come up with money two weeks later?

4. Thinking of *Brangan v. Commonwealth*, case from Massachusetts, where bail is considered unaffordable if the defendant does not have the resources immediately available.
5. We should not confuse affordability of financial condition with qualifying for a public defender.
6. In Louisiana, judges make inquiries on ability to pay picking apart what type of cellphone the defendant has, which just isn't helpful to the question at hand.
7. In North Carolina, there is a bench card that has basic categories: means-tested benefits, income-based threshold, or 200% of poverty line. If a defendant was incapacitated in some way in the past 6 months (incarcerated, hospitalized) then those categories are considered for ability to pay. You can also plead to the judge that there are extenuating circumstances.
8. One idea is to just include "immediately available resources" into draft act.

c. Consensus: There should be some language regarding inquiry into ability to pay. The defendant could sign an affidavit stating their financial situation. That ability to pay and affidavit could be revisited at the review hearing.

V. Presumptive Right to Pretrial Release

a. 48 out of 51 states recognize a presumptive right to pretrial release by constitution or statute.
    i. Is there only momentum to state this presumption as a policy objective, or is there momentum to establish a right?

b. Concerns with a presumptive right to release:
    i. If the focus is on enactment, judicial discretion has got to be maintained. A presumptive right is a harder sell because it reels in judicial discretion.
    ii. Whenever a drafting committee creates a rebuttable presumption, it risks heading into an evidentiary buzz saw. Instead, we could simply state the burden rests with the government to detain someone, rather than creating procedure around a presumption.

c. Support for presumptive release:
    i. Defendants are presumptively innocent. And pretrial rights and burdens flow from that presumption. A presumption of release rightly follows.

d. Consensus: Reporters will draft with the Rebuttable Presumptive Right to Pretrial Release

e. In the alternative, should there be a set of offenses/offenders/circumstances for which detention is presumed?

i. Presumptive detention provisions are problematic. They create inertia toward detention and aren't necessary to promote public safety or appearance. For instance, SB10 in California has come under attack for its presumption of detention.
ii. If we were to adopt such a provision, we could find ourselves behind the wave. Nevertheless, we do provide for something like a (slight) presumption of detention, pursuant to a temporary detention order, where a defendant is charged with a crime punishable by life or death.

VI. The Standard for Restricting Pretrial Liberty

a. Reporters proposal:
   i. It is hard to come up with the right modifiers. We propose using different terms depending upon interest at stake with the baseline being a "substantial risk."
   ii. There is a need to distinguish between "substantial risks" of intentional conduct (like absconding) and mere barriers to appearance (cognitive and socioeconomic barriers). Put simply, there's a big difference between inadvertently missing a court date and going on the lam.
   iii. With respect to failure to appear and obstruction of justice, the focus should be on intentional risk. With obstruction of justice, intentionality should be built into the definition of the conduct.
   iv. Proposed language: "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."
   v. The requirement that the condition be the "least restrictive" is important and, for that matter, conventional already.
   vi. We need to build in consideration of the likely sentence if convicted.

b. Catch-all or specificity?
   i. We should move away from detention based on a general sense that a defendant is a danger or flight risk.
   ii. Tailored risks should be preferred. We want an articulable basis, more than a mere hunch. Something articulable that's grounded in evidence.

c. What does it mean for a risk to be a "substantial risk," for a harm to be "serious"?
   i. Why does the harm have to be serious if there's also a requirement of a substantial risk?
   ii. How do you quantify substantial risk?
   iii. In some states, they don't say substantial, they say the court must determine whether the accused shows a likelihood to commit domestic violence or another violent or dangerous crime.

d. Whether and what weight to give to validated risk assessment instruments?
    i. We foresee a balance between the use of actuarial validated risk-based assessments and qualitative considerations (such as circumstances of the pending charge).
    ii. There is consensus that there are good or bad risk assessment instruments.
    iii. Issues with risk assessment instruments:
        1. Can't be mandated by law without placing undue resource burden on rural jurisdictions. Instead, we should do what we do with pretrial service agencies—specify that if you already have them or want to use them, then you can consider them.
        2. The tools run the risk of baking in bias.
        3. Judges may overweight them. If they have the tool, judges may not look beyond it. Bakes in inequities.
        4. The bail-bond industry is against risk assessment.
        5. How can one challenge a risk assessment tool? It's a black box—shielded by patent and intellectual-property law.
    iv. Can risk assessment distinguish between FTA and intentional flight?
        1. Not at present. But there needs to be a distinction. A defense lawyer can assist the court when a defendant merely fails to appear, rather than absconds.
        2. But what if someone continually fails to appear? Should he get five bites at the apple?
        3. Still, we need to distinguish between risks of flight and barriers to appearance. Judges should inquire as to barriers and perhaps provide supportive services to promote appearance.
        4. The bail-bond industry claims that this is what bail bonds do. They are tasked with finding the defendant and bringing them to court when they do not come voluntarily.

VII. Conditions of Release

a. Should the act list potential conditions/restraints? Should the list be exclusive?
    i. Consensus—should be nonexclusive.
    ii. Make clear that the conditions are within the discretion of the court.
    iii. The court should also consider conditions proposed by the defense attorney. This is yet another reason why counsel is important. Without counsel, a defendant might volunteer unnecessary conditions just to avoid jail. Also, it's difficult for defendants to synthesize relevant information and produce a cogent plan.
    iv. One idea is to get rid of the list. Just provide the standard and then leave conditions up the judge's discretion.

b. Should the conditions relate specifically to the risk?

i. The court should possibly articulate the manner by which the condition selected relates to the particular risk. Not all conditions are appropriate for all risks.
ii. The language of "if they are reasonably necessary to reduce a substantial risk to an insubstantial level" alone does not to signal to the judge that there needs to be an articulable risk. On this thinking, we would want more narrowly drafted language saying which conditions are aimed at which risks.
iii. Substance abuse:
    1. With regard to not using alcohol or substances, sometimes that is tied to appearance. Sometimes staying sober is important to make appearances.
    2. Addiction is a disease, judge ordering you not to use something to which you are addicted is unhelpful. Perhaps, make pretrial services (where available) the condition instead.

c. Should the act require the court to provide reasons/findings for imposing conditions?
    i. The present proposal is to first require reasons at review hearings and to first require fact findings at detention hearing. But maybe for certain conditions reasons/findings would be helpful at first appearance. Require the judge to put on the record why a condition is least restrictive.

VIII. Financial Conditions

a. As to what risks may a financial bond be imposed?
    i. The proposal (and practice in some states already) is to allow financial bond only for flight and obstruction? If someone is sufficiently dangerous, they should be temporarily detained in advance of a detention hearing. If not, they should be released (albeit, potentially, on other conditions).
    ii. With respect to financial conditions, this must be some inquiry into ability to pay. But what criteria? Those who qualify for indigent counsel? Homeless? Primary breadwinner? Other criteria?
    iii. In addition to eliminating remand on express financial conditions, we might want to waive pretrial fees and costs for indigent defendants.

b. Increased detention?
    i. Moving away from money bail potentially leads to a system that detains more frequently (but transparently), particularly in states that are right to bail.
    ii. D.C. and NJ have managed to move away from using financial conditions for functional detention, without a spike in formal detention. In both jurisdictions, the release rates are around 94 percent. NJ relies heavily on citations to make this happen.

c. Financial conditions in misdemeanors
    i. In some situations, for misdemeanors, a financial bond could be the least restrictive condition available (albeit rarely). However, there will often be

technological means (e.g., advances in electronic monitoring) that can do the job, short of detention.

ii. What about circumstances where the defendant wants to simply pay a financial condition—where the defendant perceives that to be least restrictive (and most efficient)?

iii. Perhaps, include provisions allowing financial bonds (where otherwise prohibited) in the event of repeated failures to appear.

iv. Perhaps go further in the other direction—for some low-level misdemeanors, courts should always release on recognizance.

v. A problem with any special rule for misdemeanors or subsets of misdemeanors is that states define misdemeanors differently.

d. Consensus: Some consensus for some prohibition against secured financial condition for some misdemeanors. The act could provide for specific categories where financial conditions would be permissible, such as for domestic violence (but is this just about dangerousness?) or for misdemeanants that are consistent failures to appear. The act could invite states to list the misdemeanors they want excluded.

IX. Victim-Focused Provisions

a. Can we introduce a way to think about the victim and safety planning? Something that at least requires notification and information? Or beefs up protective orders? Or some resources for a crime victim that could provide judges with more comfort with release?

X. Substance of Orders

a. Here and elsewhere, conditions should be spelled out—likewise, the consequences of violation and other relevant information. Judges should be directed to convey information in plain language. Short and direct sentences. (The draft act should likewise strive for the same clarity of prose.)

NOTES FROM 11/17/18

XI. Temporary Order of Detention

a. Definitional issues, concerning thresholds for temporary detention:

i. What is a "crime of violence"?

ii. What does it mean to allow temporary detentions if the defendant faces another "detention order"? These other orders are hard to define. And immigration detention orders present their own set of issues.

iii. Should we make crimes of domestic violence its own threshold category? If so, should we include language about "safety planning," here and elsewhere? Perhaps, just provide reference to a state's separate (and preexisting) body of law for detention in DV cases. (Many states have separate detention codes for domestic violence cases.)

b. What should we do about defendants who don't pose a risk of fleeing purposefully, but who have capacity problems or other barriers (e.g., socioeconomic) that stand in the way of appearance?
    i. Many people wait months to have mental capacity evaluated in state institutions (e.g., Bellevue Hospital in NYC).
    ii. Should we set a net here—e.g., at minimum a felony charge or felony charge of violence?
    iii. Should we distinguish between limitations on capacity and competency to stand trial?

c. Should the court be able to issue a temporary order of detention *sua sponte* or only on motion of the government? On what standard?
    i. No clear consensus on this point.
    ii. Government should bear the burden no matter what (here and elsewhere). It should have to justify even a short-term imposition.
    iii. Is "reason to believe" a sufficiently rigorous standard (here and elsewhere)? Maybe a "clear and convincing" evidence is better? Reason to believe is a pretty low standard. At the same time, perhaps we need to hold off on "clear and convincing" until we have an adversarial evidentiary hearing, with required fact findings (if this is not going to be that).
        1. Maybe require fact findings now.
        2. Forty-eight hours seems like a reasonable time to marshal evidence.
        3. Five days (the potential time before a full-scale detention hearing) seems too long.

d. More on timing:
    i. Can we combine the first appearance with the detention hearing? Would that be more efficient?
        1. Judges would have to release the person or show requisite findings of facts at this hearing.
        2. Judges might be incentivized to just detain at first appearance, because no obvious opportunity for a second look. Put differently, judges might err on the safe side, to avoid bad publicity in the event of new crime, even if no real reason to believe the defendant poses an exceptional risk of danger.
        3. Might not be enough information yet do an appropriate fact-finding. But perhaps we could just provide for a possible continuance of not more than 48 hours.
        4. Might not be enough lawyers to staff and carry out a rigorous detention hearing at the first appearance.
    ii. A possible third way:
        1. Keep proposed time line (with a separate detention hearing), but invite courts to conduct the detention hearing immediately if, administratively, they can do so and no additional relevant facts/evidence is likely to be developed in the intervening days.

e. An "imminent" risk?
    i. No clear consensus for or against using this term (here and elsewhere).
    ii. Some are concerned that it is not sufficiently qualitative in terms of degree; just a question of time.
    iii. Perhaps, try to find another word that is different than imminent. Or try to determine whether other statutes use the term "imminent." If not, what is the conventional parlance? Consider alternative modifiers, like "substantial," "serious," or "grave."

XII. Review Hearing

a. After the first appearance, there should be a review hearing within three days for a defendant who remains detained on conditions of release.

b. Right to counsel:
    i. The proposal is to guarantee counsel for the first time at this hearing.
    ii. A good middle of the road proposal—between providing counsel at the first hearing and, alternatively, only providing counsel at an ultimate detention hearing.
    iii. In the event the court cannot provide counsel, the court should release the defendant (since the objective of the hearing, in any event, is to guarantee release or to hold the case over for a full-scale detention hearing).
    iv. What do we mean by "fails to appoint counsel"?
        1. What if the public defender's office fails to adequately staff, such that the fault cannot be ascribed to the court?
        2. The draft act should give leeway, where warranted, for a continuance.
        3. Need to avoid framing release as a sanction on the court.

c. Issues with forum/judge shopping:
    i. May need a mechanism to avoid it.
    ii. But it's unlikely that a defendant will voluntarily continue the case (in detention) in an effort to get before a different judge.

d. Presumption that a defendant held on a financial condition cannot afford that condition:
    i. The operating premise is that no defendant will remain detained on a financial condition he can satisfy, just in the hopes of getting the condition reduced or eliminated at the review hearing.
    ii. Moreover, the defendant runs the risk that the court may just convert the condition into a temporary order of detention and hold the case over for a full-scale detention hearing.
    iii. If a defendant can satisfy the condition, he almost certainly will.

e. Substance of potential court orders at review hearing:

i. A new restraint order would include the usual requirements: the time and place of the next appearance, the conditions of release, and the consequences of noncompliance.
ii. If the court decides to continue a condition that results in detention, the court must convert the earlier restraint order into a temporary detention order, hold the case over for a detention hearing, and provide a written statement of the reasons for the continued detention.
iii. Since detention will be reviewed expeditiously at the detention hearing, we do not need to provide for any other intermediate review (e.g., interlocutory appeal of the review hearing).

XIII. Detention Hearing

a. Timing:
    i. Not longer than three days after the first appearance or, where applicable, the review hearing.
    ii. Defendant should have a right to a continuance to develop evidence/arguments, if he sees fit. (He'll remain detained in the interim.)
    iii. However, the government or court should get a continuance only for good cause, since even a short term of detention may carry lasting consequences.

b. Rights and standards:
    i. We have a fairly comprehensive constitutional roadmap for detention hearings—based on the Supreme Court's decision in *United States v. Salerno* (and the Bail Reform Act's provisions, which were at issue in that case).
    ii. The draft act will largely track those protections and standards, including a "clear and convincing" standard.
    iii. "Clear and convincing" evidence of what?
        1. Delete "intentionally" from "intentionally obstruct."
        2. Consider eliminating the term "eliminate," since no risk is ever eliminated entirely.
        3. Aim for one way to describe degree of risk, across the relevant risks.
        4. What risks?
            a. "Harm" seems vague. What do we mean?
                i. Serious bodily injury or just bodily injury?
                ii. Non-bodily harm?
                    1. What about destruction of property? An arsonist who is more likely to destroy someone's car than attack the person?
                    2. Maybe property damage can be covered through language about "danger to the community."

c. Detention-eligibility net?
    i. States have a tendency to widen the net, so the draft act should aim for narrowness, with the understanding that states will expand eligibility, as they think required.

ii. Detention only for crimes of a certain level of seriousness? Presumption of detention for certain crimes?
    1. A presumption of detention runs counter to a presumption of innocence. We should not preventively detain defendants unless they are shown to pose a sufficient risk.
    2. Perhaps we shouldn't define charges that require detention, but invite states and courts to do so.
    3. Perhaps we should consider the harm against the severity of likely sentence and the economic and social costs of detention. For example, someone who is charged with shoplifting and is very likely to fail to appear, but who would likely face a sentence of no more than a few weeks in jail.
    4. Overarching question—standards versus rules:
        a. We could use both:
            i. A rule-based detention-eligibility net (only crimes of sufficient severity), unless . . .
            ii. . . . some catch-all standard is met (e.g., long-time recidivists, with long history of failure to appear).
    5. Maybe try to make clear that detention is unlikely to be warranted for low-level crimes, especially for certain risks (e.g., socioeconomic or cognitive barriers to appearance) and especially where technological means (e.g., electronic monitoring) are also available.
        a. Maybe use the commentary to make much of this clear.

d. Permanent order of detention:
    i. Detention hearing should require full findings of fact and an accompanying statement of reasons for the court's decision. Indeed, this might be constitutionally required.
    ii. "Permanent" sounds strange. Edit it out?

XIV. Miscellaneous/Stray Matters

a. Forfeiture:
    i. There is difference between intentional flight and failure to appear.
        1. It seems that failure to appear should not trigger forfeiture.
        2. We are talking about a taking of property here. Due process is needed.
    ii. What should be the rights at a forfeiture hearing?
    iii. What should be the big steps that trigger a forfeiture?
    iv. Consensus: This question is beyond the scope of the act (indeed, it might implicate states' insurance codes); we should just leave forfeiture up to the states.

b. Motions to re-open/motions to appeal:
    i. Proposal with respect to restraint orders: the defendant may move to reopen a restraint hearing to amend the order at any time. But the government may move to re-open only if there is a material change in conditions.

ii. Proposal with respect to detention orders: because they are products of a more procedurally rigorous process, we can have more confidence in the decisions (and it would be more administratively burdensome to reopen). Thus, both parties should have to show a material change in circumstances to re-open a detention hearing.
iii. Overarching concern: forum shopping.

c. Appeals:
    i. We propose a bilateral right to interlocutory appeal of a court's decision at a detention hearing, but not the decision at the restraint hearing or the review hearing (since these hearings either result in release or initiate a detention hearing—and since either party may move to revisit the conditions of a restraint order, in any event).
    ii. Such a bilateral right to interlocutory appeal are fairly well established in state law (and ABA standards).

d. Data:
    i. Do we need a provision mandating the collection and dissemination of data on pretrial release, restraint, detention, and use of financial conditions? Should such a provision be in the text of the act or only the commentary?

XV. Returning to Arrest/Citations:

a. Is there anything more we can do to promote release during the first 48 hours?
    i. Again, we could mandate (or, at least, provide the discretion) for citations in some cases (see first day's discussion).
    ii. The act could invite legislatures to delegate release authority to sheriffs and police chiefs at the precinct.
        1. On this score, there is currently litigation all over the country, against the use of pre-set bond (based upon money-bond schedules). Lawsuits have successfully argued that these bond schedules are insufficiently tailored and violate equal protection. But perhaps we can use them to provide an opportunity for release from a police precinct on unsecured financial conditions, set pursuant to a bond schedule. Since the condition would be unsecured, all defendants (who are provided this opportunity) could achieve release. Here, the act could offer an intervention before even the first appearance.
            a. "Nothing shall prohibit a judge from entering a standing order that authorized release on financial conditions prior to first appearance."
            b. Or if we want to be more ambitious and specifically select categories of criminals that are to be released from the precinct, judges may embrace the fewer number of hearings that result.
            c. This isn't intruding on prosecutorial or judicial discretion. It's about giving officers more discretion to let people go.

    d. But we do need to be mindful of evolving constitutional doctrine on money bail schedules.
2. A citation doesn't have to happen in the field. We could specify that it could happen after arrest, at the precinct. Perhaps we do this through the commentary.