Preface

The future of pretrial justice in America will come partly from our deliberative focus on our judges' decisions to release or detain a criminal defendant pretrial and from our questioning of whether our current constitutional and statutory bail schemes are either helping or hindering those decisions. When I started researching bail, I wrote reams of paper on this particular decision point, only to be told by an extremely bright judge that the current Colorado statute seemed to guide him toward primarily charge and money-based decision-making process. He was right, and even though people said we could never do it, we changed the entire statute to create a legal scheme designed to help judges realize the actual release of bailable defendants by reducing the use of money and bail schedules.

Now, however, we recognize that we also need a fair and transparent scheme allowing the preventive detention of higher risk defendants without "bail," or judges will continue to be forced to use money to accomplish the same thing, albeit unfairly, non-transparently, and, some would say, unlawfully. A new group of people are now telling us that we can never change our constitution to allow the creation of this scheme, but the fact is that change is inevitable. Indeed, moving from a mostly charge and money-based bail system to one based primarily on empirically-derived risk necessarily means that virtually all American bail laws are antiquated and must be changed.

This paper is designed to show a somewhat ideal process for making a release or detain decision, but with the realization that a particular state's bail laws may hinder that ideal process to a point where best practices are difficult or even impossible to implement. Nevertheless, until we know how the pretrial decision-making process should work (i.e., an in-or-out decision, immediately effectuated), we will never know exactly which changes we must make to further the goals underlying the "bail/no bail" process.

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