APPR ADVANCING PRETRIAL POLICY & RESEARCH

Legal Landscape of Pretrial Release and Detention in Washington

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About APPR

Advancing Pretrial Policy and Research (APPR) is dedicated to achieving fair, just, effective pretrial practices, every day, throughout the nation. It works with criminal justice professionals to improve their pretrial justice systems in ways that prioritize public safety, racial justice, and the effective use of public resources. APPR is a project of the National Partnership for Pretrial Justice, with support from Arnold Ventures.

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Foreword

Advancing Pretrial Policy and Research (APPR) is supporting jurisdictions across the country as they work to improve their pretrial systems in ways that prioritize safety and promote racial equity. APPR is providing intensive research and implementation assistance in a select number of Research-Action Sites. As of January 2020, five Research-Action Sites are being supported: Catawba County, North Carolina; Fulton County, Georgia; Montgomery County, Alabama; and Pierce and Thurston Counties, Washington. APPR's assistance includes engaging key stakeholders in a data-informed, policy-driven collaborative process aimed at identifying opportunities to improve pretrial practices and their outcomes.

An essential task associated with this work is to understand and assess the national pretrial legal standards as well as the local pretrial legal framework. National pretrial standards emerge from federal constitutional principles (as interpreted by the United States Supreme Court and other federal courts) and from national bodies (such as the American Bar Association). Locally, every jurisdiction operates within a set of state and local laws and/or rules that govern who can be detained pretrial, how they can be detained, who can (or must) be released pretrial, and what conditions can be imposed on a person during pretrial release.

To assist jurisdictions in this examination, APPR sought the assistance of two national experts in pretrial law—Matt Alsdorf and Tim Schnacke—to work together to create a pretrial legal analysis for each state in which APPR is providing intensive technical assistance (Alabama, Georgia, North Carolina, and Washington).

APPR and the authors wish to note a few significant caveats to this or any pretrial legal analysis: First, the field is rapidly changing and new case law, rules, and statutes, on both the state and federal levels, may emerge between the time this report is published and when the jurisdiction reviews the analysis. Second, although the authors conducted comprehensive online research (e.g., using publicly available information found through internet searches as well as searches conducted on Lexis, Westlaw, and/or state legislative websites), it is possible that the search did not identify every relevant statute or case. Third, an analysis such as this is the start, not the end, of the process. It is incumbent upon local officials to review this analysis; consider it against local goals, values, and policies and practices; identify areas to explore more deeply; and consider the implications of the legal framework for future advancements.

Legal Landscape of Pretrial Release and Detention in Washington

The Advancing Pretrial Policy and Research (APPR) initiative provides policy guidance, research capacity, and technical assistance to jurisdictions around the country to help improve their pretrial policies and practices. This legal analysis of federal and state pretrial release and detention laws was written to assist policymakers in understanding the current legal landscape as they assess their own policies and practices and identify opportunities for improvement. This report was written by request of and in collaboration with APPR, and was supported by Arnold Ventures.

National Context

Over the past five years, there have been substantial shifts in the culture and practices surrounding pretrial release and detention. These have been spurred by a growing realization that people with a low likelihood of fleeing or being arrested again before their trials are often detained in high numbers solely because they cannot afford the financial conditions of release that have been imposed upon them (often in the form of a monetary bail bond), while individuals who have access to money but who are far more likely to miss court or be arrested again are often released. While the exact path of pretrial improvements has varied from state to state—and even from county to county—the direction has been consistent: jurisdictions across the country are moving toward a more purposeful and intentional system of pretrial release and detention. This typically means shifting from a system where financial conditions of release are the default (which results in unpredictable and somewhat arbitrary release/detention outcomes) to one where judicial officers consider more information and make more reasoned, evidence-based, and explicit decisions about who should be detained, who should be released, and under what conditions. This shift is one of the reasons that jurisdictions look to actuarial pretrial assessment tools, such as the Public Safety Assessment (PSA), to help guide their decisions.

These changes are made against the backdrop of both state and federal laws that govern what policymakers—and individual judges[1]—can and cannot do when it comes to pretrial release and detention. As jurisdictions consider the possible improvements they could make to increase the effectiveness and fairness of their pretrial system, it is important to understand the legal landscape, to reflect on whether current pretrial practices are consistent with the law (both where it is now and the direction it is presently taking), and to determine how much latitude stakeholders have to change those practices.

1 In many jurisdictions, judges are not the only ones who make decisions about pretrial release: magistrates, commissioners, justices of the peace, and other officers of the court may do so as well. For ease of reference, however, throughout this document we use "judge" to refer to *all* judicial officers who make pretrial release decisions.

This document summarizes the legal framework that governs key pretrial decisions in Washington. It is organized in the following five sections, each focusing on a central legal issue:

I. **Right to Pretrial Release:** The legal foundations and scope of the right to be free before trial.

II. **Scope of Pretrial Detention:** The limited situations under which individuals can be intentionally detained before trial.

III. **Setting Conditions of Pretrial Release:** The process and legal requirements for determining whether released individuals should be subject to conditions, and what those conditions should be.

IV. **Use of Financial Conditions of Release:** When and how financial release conditions can be imposed, and whether inability to pay can result in detention.

V. **Other Points of Intervention:** How laws impact jurisdictions' practices at other stages of the pretrial process, such as pre-arrest and pre- and post-charge.

Each section has two parts—the first focusing on federal laws and national standards (including constitutional law, recent litigation, and standards promulgated by national groups) and the second focusing on Washington law (including the state constitution, statutes, court rules, and court decisions). When relevant, the document notes if current law hinders or is consistent with the use of a pretrial assessment, such as the PSA.

The research conducted for this document included a review of federal constitutional provisions, federal statutes, and federal case law, as well as a review of Washington's constitutional provisions, state statutes, state and local court rules, state case law, and publicly available local rules and laws. The authors did not review current state or local *practices,* except to the extent that they were publicly documented.

I. The Right to Pretrial Release

The right to pretrial release has ancient roots. Indeed, the concept of bail itself began "as a device to free untried prisoners" and can be traced back to the "Anglo-Saxon period in England before the Norman Conquest."[2] Then, as now, detention before trial was meant to be rare since the accused individual was not yet convicted of a crime, and "bail" referred to the process by which an individual accused of a crime was to be released from jail. In short, if people were "bailable" or "admitted to bail," that meant they would be free pending trial. The only individuals who were to meant to be intentionally detained before adjudication were those deemed "unbailable" by law.[3]

2 *State v. Brown*, 338 P.3d 1276, 1283 (N.M. 2014) (quoting Daniel Freed & Patricia M. Wald, *Bail in the United States* 1 (1964)).

3 *See generally* Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014) [hereinafter *Fundamentals*], https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf; *see also* Timothy R. Schnacke, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention*, 18-28 (2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

While this may seem like a minor semantic point, it is critical for understanding and interpreting American laws regarding pretrial release. Throughout this document, "bail" is used, consistent with its history, to refer to the process of pretrial release. It does not refer to money bond or any other financial condition of release. Although money is one possible *condition* of bail, it is not bail itself. Here, when referring to the requirement that an individual post money in order to be released from jail, we use the term "financial condition of release," "financial release condition," "financial condition," or "money bond."

A. Federal Law and National Trends

The right to physical liberty is one of the foundational principles of the United States Constitution. Although the Constitution does not explicitly address the right to release before trial,[4] the Supreme Court and other federal courts have consistently interpreted key provisions of the Constitution, including the Due Process and Equal Protection Clauses, as well as federal statutes, to mean that the vast majority of individuals are entitled to be free while awaiting trial. The reasons for this may seem self-evident but are worth underscoring. Freedom from bodily restraint has always been at the core of the liberty interests protected by the Constitution.[5] Indeed, it is hard to conceive of any definition of "freedom" that does not include the right not to be arbitrarily detained by the government. This is why the state always bears an extremely high burden when seeking to deprive someone of their physical freedom—whether that burden is proof of guilt "beyond a reasonable doubt" in criminal proceedings or "clear, unequivocal, and convincing evidence" of likelihood to harm oneself or others when it comes to civil commitments.

These principles are of *particular* importance in the pretrial context, where people accused of a crime are presumed innocent.[6] The Supreme Court has emphasized the "fundamental nature" of an individual's interest in pretrial liberty[7] and has underscored the importance of the country's "traditional right to freedom before conviction."[8] Indeed, the Court has warned that, absent a right to pretrial release, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[9] In addition to purely legal or historical reasons for emphasizing an overall right to pretrial release, courts—including the Supreme Court—and a growing number of researchers have recognized equally important practical considerations in that pretrial detention impairs a person's ability to prepare a defense and often leads to adverse consequences, such as the loss of employment and disruption of family life.[10]

4 The United States Constitution simply requires that, when bail is set, it not be "excessive." U.S. Const. amend. VIII.

5 *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

6 *Coffin v. United States*, 156 U.S. 432, 453 (1895) (noting that the presumption of innocence is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"); *In re Humphrey* (2018) 19 Cal.App.5th 1006 (recognizing that individuals' interest in liberty is especially great before trial because they are presumed innocent).

7 *United States v. Salerno*, 481 U.S. 739, 750 (1987).

8 *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

9 *Id.*

10 *See id.*; *see also Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *Buffin v. City & Cnty. of San Francisco*, No. 15-cv-04959, 2018 U.S. Dist. LEXIS 31875 (N.D. Cal. Feb. 26, 2018); Paul Heaton et al., *The Downstream Consequences of Pretrial Detention*, 69 Stan. L. Rev. 711 (2017), https://www.stanfordlawreview.org/print/article/the-downstream-consequences-of-misdemeanor-pretrial-detention/.

Therefore, the Supreme Court has been unambiguous in stating that, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[11] While this does not provide states or counties with a precise formula for determining what percentage of their pretrial population can be detained, it makes clear that the strong default presumption is that people must be released while charges are pending—and courts and legislatures can depart from that outcome only in a relatively small number of cases with a strong justification for doing so.

B. Washington Law

While there is no federal constitutional right to bail, Article I, Section 20 of the Washington Constitution provides a broad right to "bail[] by sufficient sureties" for everyone not charged with a capital offense or an offense punishable by life in prison. As noted above, when most right-to-bail provisions were first adopted in America, "bailable" people were actually released, and so the right to bail was equated with a right to release. Consistent with this historical understanding, Washington courts have fairly consistently defined "bail" in terms of release: "[Bail's] true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the presumption under law that an accused is innocent until proven guilty."[12] For this and other reasons, it is reasonable to view Section 20 as Washington's articulation of whom it may intentionally detain before trial (certain people charged with capital or life-imprisonment crimes) and whom it must release (everyone else). This interpretation is consistent with the history of bail as well as the federal standard of liberty being the "norm" and detention being the "carefully limited exception."

Although Washington's constitution provides for a broad right to release, courts do not always require that bail-eligible people actually be released; instead, they have upheld financial conditions of release set at levels individuals cannot afford.[13] This results in the pretrial detention of people who have been ordered released (and are presumably intended to be released) and who, consistent with Section 20, must not be detained on purpose. As further discussed in Section IV (Use of Financial Conditions of Release) below, this is legally justified by the so-called "excessive bail loophole," which allows courts to set financial conditions of release that result in the pretrial detention of bailable individuals so long as there is no express record of intentional detention.[14] This practice is common across the United States, but it is inconsistent with the historical notion of bail as a mechanism to secure release, and it has been challenged—often successfully—in lawsuits filed across the country in recent years.

11 *Salerno*, 481 U.S. at 755.

12 *State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 487 (1970).

13 *See, e.g., State v. Reese*, 15 Wn. App. 619 (1976).

14 Timothy R. Schnacke, *Changing Bail Laws: Moving from Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws*, 22 (2018), http://www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf (explaining the loophole).

Nevertheless, as in other states, judges in Washington retain wide discretion to release essentially any individual they deem appropriate. In other words, if judges wish to assure that liberty is the "norm," there is nothing in Washington law that prevents them from doing so.

II. The Scope of Pretrial Detention

The fact that pretrial liberty is one of our most jealously guarded constitutional rights does not mean that a state cannot detain *anyone*. It means, instead, that instances of pretrial detention must be the "carefully limited exception" to the "norm" of "liberty before trial."[15] The legislature and the judiciary have important—but distinct—roles in determining which individuals remain in jail while their cases are pending. The legislature (and voters) pass laws and constitutional provisions that limit the pool of people who *may* be detained; typically, they establish criteria having to do with the severity of the charge and the likelihood of flight risk or danger to the community. Judges, in turn, decide whether, in any individual case, those criteria have been met and the person *will* be detained. If either of those things is not true—in other words, if the person is not constitutionally/statutorily eligible for the denial of bail *or* if the judge does not make the required findings—the person cannot legally be detained. They must be released.

A. Federal Law and National Trends

As noted above, the U.S. Constitution requires that bail not be "excessive," but it does not explicitly address when bail can be denied altogether—that is, when a judge can order that a person be detained. Given the importance of the interests at stake, as well as the number of people affected by pretrial release decisions every day, one might expect there to be extensive case law spelling out the precise extent of—and limitations on—the government's power to deny bail. However, guidance from the Supreme Court is surprisingly limited, and the Court has not weighed in on these issues since 1987. Nonetheless, many lower federal and state courts are articulating the limited universe of situations in which courts can deny bail and hold a person behind bars until trial.[16] In brief:

(1) **Court appearance and public safety are the only valid justifications for pretrial detention.** The U.S. Supreme Court has recognized only two valid purposes for the denial of bail: (1) assuring an individual's presence in court and (2) protecting public safety.[17] No other purposes are lawful. Pretrial detention cannot be used as a punishment;[18] after all, at

15 *Salerno*, 481 U.S. at 755.

16 Some of these decisions arise when courts are asked to review state efforts to change their detention provisions, and these cases should be consulted before modifying the laws governing pretrial detention. *See, e.g., Lopez-Valenzuela v. Arpaio*, 770 F. 3d 772 (2014); *Simpson v. Miller*, 387 P. 3d 1270 (Ariz. 2017).

17 *Salerno*, 481 U.S. at 755.; *Stack*, 342 U.S. at 5. On occasion, courts acknowledge that detention can be imposed to protect victims and witnesses and to ensure the integrity of the court and the trial. These are not understood as *separate* bases for detention, however; rather, they are understood as components of the more general overall purposes of public safety and court appearance.

18 *Stack*, 342 U.S. at 4; *Ex Parte Alexander*, 61 S.W3d 398, 404-05 (Tex. Crim App. 2001) (en banc); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

this stage, the individual has not yet been found to have committed a crime. And pretrial detention cannot be used to "send a message," or because a judge believes a person is mentally ill or has a substance abuse problem. The only two factors a judicial officer can consider when deciding whether to deny bail are the likelihood that the person will abscond and the likelihood they will commit a crime while on pretrial release.

(2) **Detention should be reserved for individuals who are highly likely to flee or commit a serious or violent crime and only when no conditions of release can provide reasonable assurance that the likelihood is mitigated.** Of course, every person presents *some* risk of non-appearance and *some* risk of new arrest. Therefore, the law does not permit judges simply to detain anyone they believe *might* misbehave. Rather, there must be a strong justification for doing so. In upholding the Bail Reform Act of 1984, which authorizes pretrial detention in the federal system, the Supreme Court noted that Congress had been careful in narrowly defining which people could be denied bail: "The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."[19]

Even in systems that do not place such significant constitutional or statutory restrictions on judges' ability to deny bail altogether, courts have generally held that detention can be used only as a last resort. That is, judges can deny bail only when they find that no lawful condition of release (or combination of conditions) can provide reasonable assurance that the individual will appear in court and will not endanger the public.[20]

(3) **Detention may be imposed only after procedural safeguards have been followed.** Because pretrial incarceration is such a significant deprivation of liberty, it cannot be imposed unless a person has been provided with robust due process protections. The Supreme Court has never defined precisely what protections are required, but it has cited with approval the federal process for detention, under which:

- a person is represented by counsel;
- a person may testify on their own behalf and cross-examine witnesses as part of a "full-blown adversary hearing";
- the judicial officer considering detention is guided by statutorily enumerated factors;
- the government must prove the need for detention by clear and convincing evidence;
- the judicial officer must provide written findings of fact and statement of reasons for a decision to detain; and
- the accused person is entitled to expedited appellate review.[21]

19 *Salerno*, 481 U.S. at 750.

20 *See, e.g., In re Humphrey*, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018); *see also Salerno*, 481 U.S. at 750 (endorsing statutory scheme requiring "clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person").

21 *Salerno*, 481 U.S. at 751-52. *See also* Schnacke, *Fundamentals*, *supra* note 3, at 43-44.

B. Washington Law

As noted above, Article I, Section 20 of the Washington Constitution carefully limits which individuals can be intentionally denied bail (i.e., be detained)—namely those accused of crimes that carry a potential penalty of death (i.e., capital offenses) or life imprisonment.[22] But even in those cases—and as in all states—the state constitution and statutes require judges to make additional findings before detaining someone pretrial:

- For capital crimes, the constitution limits detention to cases where "the proof is evident or the presumption great."[23]
- For life-imprisonment crimes, the constitution limits detention to cases where a showing has been made "by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons."[24]
- In addition to the above, Washington statutes require judges to *also* find that "no condition or combination of conditions will reasonably assure the safety of any other person and the community" before detaining the person.[25]

With respect to the procedure for denying bail—and, again, consistent with federal law—Washington law provides a number of specific safeguards for individuals who are subject to potential detention:[26]

- A hearing must be held "immediately upon a defendant's first appearance."
- Individuals must be represented by counsel (including court-appointed counsel).
- Individuals have a right to present evidence, testify, and cross-examine witnesses.
- Judges must make written judicial findings to justify detention, as described above (i.e., based on the propensity for violence and the insufficiency of conditions).

The above requirements establish a floor, not a ceiling, for procedural due process. In other words, local jurisdictions are free to institute additional safeguards, including those enumerated in *Salerno*, to ensure the protection of people's rights when facing potential detention through the denial of bail or the setting of unattainable financial release conditions.

22 Wa. Const. art. I, § 20. Interestingly, the relevant Washington court rules would appear to narrow the "detention eligibility net" even further, to include *only* offenses punishable by death: the rules state that "any person, other than a person charged with a capital offense, shall…be ordered released." While the rules go on to require and allow other conditions of release, they only discuss outright detention for capital cases. *See* CrR. 3.2(g); CrRLJ 3.2(g).

23 Wa. Const. art. I, § 20.

24 *Id*.

25 RCW § 10.21.040.

26 RCW § 10.21.060.

III. Setting Conditions of Release

When making the pretrial release decision, judges must also decide whether they should subject the person to conditions of release. Many people can be released on their own recognizance—with no conditions other than a promise to return to court and not to commit any crimes while on release. Judges do, however, have the option of imposing conditions aimed at mitigating the risk that an individual will miss court or be rearrested. The conditions available to judges vary widely from county to county, and may include court date reminders, telephone or in-person check-ins with pretrial supervisors, GPS monitoring, and/or money bond, among others.

A. Federal Law and National Trends

(1) **The conditions imposed must be the least restrictive necessary.** In *Salerno*, the United States Supreme Court held that conditions of bail must be set at a level designed to assure a constitutionally valid purpose "and no more."[27] This is one way of expressing the legal principle that courts must impose the "least restrictive conditions" necessary to provide a reasonable assurance of appearance and public safety. "Least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association (ABA) best practice standards on pretrial release, and other state statutes based on those standards (or a reading of *Salerno*).[28] And the concept has been adopted in various state high court rulings articulating, for example, that bail may be met only by means that are "the least onerous" or that impose the "least possible hardship" on the accused. In many cases, the "least restrictive conditions" will be no conditions at all, beyond the promise to return to court and not engage in illegal conduct—in other words, release on recognizance: "It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense."[29] Commentary to the ABA Standard recommending release under the least restrictive conditions states the following:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally...The presumption constitutes a policy judgment

27 *Salerno*, 481 U.S. at 754.

28 This is also consistent with best practices established by the National Institute of Corrections (NIC) and the National Association of Pretrial Services Agencies (NAPSA). *See* National Institute of Corrections, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, 10 (2017), https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf (endorsing a "presumption of nonfinancial release on the least restrictive conditions necessary to ensure future court appearance and public safety"); National Association of Pretrial Services Agencies, *Standards on Pretrial Release* (3rd ed. 2004), Standard 1.2, https://info.nicic.gov/nicrp/system/files/napsa-standards-2004.pdf ("Presumption of release under least restrictive conditions and other alternative release options").

29 American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release* (3rd ed. 2007), Standard 10-5.1(a). *See also id.*, Standard 10-1.4(c), commentary ("[w]hen financial conditions are warranted, the least restrictive conditions principle requires that unsecured bonds be considered first").

that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[30]

(2) **Judges must make individualized findings regarding the risks a person poses before determining release conditions or detention.** Most states' laws or regulations require that judges look at certain factors when deciding what—if any—conditions to impose on a person's release. The underlying principle is that these decisions must avoid arbitrariness by being individualized—that the judge must look at the person before them and decide whether conditions of release are necessary, and, if so, what those conditions are.[31] In other words, conditions—including financial conditions—should not be imposed categorically or simply based on charge. Rather, the judge must determine whether the person requires release conditions in order to reasonably assure they will return to court or avoid a new arrest.

B. Washington Law

The Washington statutes address pretrial conditions to a limited extent.[32] For a number of reasons—including, notably, that the Washington Supreme Court has held that rules regarding court processes apply even when contrary to the statutes[33]—the topic is primarily governed by court rules.

The Superior Court Criminal Rules set forth a presumption that all individuals accused of a non-capital offense are released on personal recognizance. Conditions of release are permitted *only* if the court finds that (1) recognizance release will not reasonably assure the individual's appearance or (2) there is a "likely danger" that the person will commit a violent crime, intimidate witnesses, or interfere with the administration of justice.[34] If such findings are made, the court is authorized to impose the "least restrictive" conditions that will reasonably assure appearance, as well as other conditions necessary to mitigate the risk of violence, witness intimidation, or obstruction of justice.[35]

Neither state statutes nor the Rules establish substantial due process protections for people during the release conditions-setting process (unless, as noted above, they are subject to potential detention under Article I, Section 20 of the state constitution). Nevertheless, through

30 *Id*., Standard 10-1.2.

31 *Stack*, 342 U.S. at 5-6 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that defendant*." (emphasis added)).

32 *See, e.g.,* RCW § 10.21.020-.055.

33 *Marine Power & Equipment Co. v. State*, 687 P2d 630 (1984).

34 CrR 3.2 (a).

35 CrR 3.2 (b), (d). For a discussion of the conditions that may be imposed upon such findings, *see* Section IV, "Use of Financial Conditions of Release."

case law, Washington requires that the judicial determination of release "must be made as soon as possible, no later than the probable cause determination [i.e., within 48 hours]."[36] In addition, the Rules suggest that individuals have the right to counsel at first appearance.[37]

The Rules do set forth a list of factors that judges "shall" consider when assessing future court appearance and "substantial danger" (e.g., criminal history, history of missed court dates, nature of the charges, community ties). However, this list is non-exclusive, and judges can take into account any information relevant to the determination.[38] As such, there is nothing in Washington law that would appear to hinder a court's ability to consult a pretrial assessment, such as the PSA, when setting release conditions.

IV. Use of Financial Conditions of Release

Across the country, financial conditions of release have become so common that many confuse the term "bail" with those conditions. As noted above, using money to determine who is released and who is detained before trial has yielded outcomes that are not desirable from the standpoint of public safety, fairness, or cost.[39] As a result, many jurisdictions—including, most notably, New Jersey and New Mexico[40]—have engaged in efforts to reduce their reliance on financial conditions and to encourage judges to make more purposeful release/detention decisions. And in other states—including, most notably, Texas and California—litigation is moving pretrial systems in the same direction. While the precise role that financial release conditions will play in the future in the pretrial system remains to be determined, it seems likely that their role will be significantly reduced.

A. Federal Law and National Trends

In recent years, multiple groups have filed a string of lawsuits challenging various aspects of the use of financial conditions of release, forcing increased state and federal scrutiny of

36 *Westerman v. Cary*, 892 P.2d 1067, 1075 (Wash. 1994).

37 CrR 3.1 requires that a lawyer be provided at every stage of the proceedings, CrRLJ 3.1 requires defense counsel at "critical stages" of the criminal proceedings, and both CrR 3.2.1 and CrRLJ 3.2.1 provide that at the preliminary appearance "the judge shall provide for a lawyer." While "critical stage" has been defined by Washington courts in ways that seem to include the bail hearing (*see, e.g., State v. Agtuca*, 12 Wash. App. 402, 40 (1974)), there does not appear to be any case specifically articulating that the bail hearing is a "critical stage."

38 *See, e.g.,* CrR 3.2 (c), (e).

39 *See, e.g.,* Texas Judicial Council, *Criminal Justice Committee Report & Recommendations* (2016), https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf; California Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (2017), https://www.courts.ca.gov/documents/PDRReport-20171023.pdf; Luminosity, *New Jersey Jail Population Analysis* (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cd0d8307-d9cb-beb0-d160-a3b5e60ddbfa&forceDialog=0.

40 *Collins v. Daniels*, 916 F.3d 1302 (10th Cir. 2019) (upholding New Mexico's law); *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018) (upholding New Jersey's law).

these release conditions.[41] Plaintiffs in these suits are typically individuals who are detained in jail because they cannot afford to pay their financial conditions but who would have been released if they had access to money. While the U.S. Supreme Court has yet to weigh in, a number of lower courts have ruled on critical issues related to the use of financial conditions. In most cases, the courts have ordered that jurisdictions make significant changes to their use of financial release conditions at the pretrial phase.

Although the decisions—and the legal rationales—are varied, a few key principles have emerged: (1) judges cannot use financial release conditions to *intentionally* detain a person; (2) if a person remains in jail because they cannot pay a financial condition, the judge's bail decision will be subject to heightened scrutiny; and (3) a person is entitled to individualized determinations about their ability to pay a financial condition. These principles have not been adopted by *all* courts, nor have they been articulated in the exact same way in each opinion, but they represent the direction in which the jurisprudence is clearly moving. These principles, and related case law, are discussed below.

(1) **Money may not be used to intentionally detain.** From the start, financial conditions of release were meant to provide greater assurance that released individuals would return to court, and, because they were typically set in unsecured form, they did not lead to detention.[42] As secured bonds grew in America, they were still not intended to be used as a mechanism to keep individuals in jail. If a judge wished to detain a person, the appropriate method for doing so would be to deny them bail (i.e., deny them release) altogether. Every state has the ability to permit this sort of "preventive detention" in at least some cases—although many state constitutions and statutes strictly limit the pool of individuals for whom a denial of bail is permitted (e.g., only those charged with a capital offense or a violent felony)—and to impose some heightened evidentiary standard on those arguing for detention (e.g., the proof must be "evident" and the "presumption great," or there must be "clear and convincing evidence" that the individual poses a significant risk of a serious or violent crime).

Today, however, the majority of people in jail before trial have not been preventively detained. Rather, they have been detained because their financial conditions of release have been set at levels they cannot afford. Appellate courts have not generally held that the Excessive Bail Clause of the Eighth Amendment entitles individuals to affordable bail.[43] But every court to address the issue has ruled that judges cannot set high financial conditions *in*

41 *See, e.g., O'Donnell v. Harris County*, 892 F.2d 147, 158 (5th Cir. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App. 2018), *appeal pending*, 417 P.3d 769 (Cal. 2018); *Shultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018).

42 *Stack*, 342 U.S. at 5 ("[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."). With an unsecured bond, a person pledges to pay an amount of money set by the judicial officer or unsecured property if they do not appear in court as scheduled. The person does not pay any money or pledge property prior to their pretrial release from jail. If the person does not appear in court, the full monetary amount may be forfeited. For a longer explanation of the history of bail, *see* Schnacke, *Fundamentals*, *supra* note 3; Schnacke, *supra* note 14.

43 *See, e.g., United States v. James*, 674 F2d 886, 888 (11th Cir. 1982); *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988).

order to detain a person.[44] In other words, if, through its constitution and/or statutes, a state has defined which people can be denied bail and has set forth a process by which to do so, judges cannot circumvent that system by using financial conditions to detain; after all, if they were able to do so, it would effectively negate the state's laws regarding pretrial detention.

Until recently, though, the practical impact of this principle was quite limited. Because appellate courts typically struck down unaffordable bail only if the judge made an express record of intentional detention (i.e., if the judge explicitly said the amount of the financial condition was designed to detain), judges could effectively detain anyone they wanted to simply by remaining silent about—or articulating another justification for—the amount of the money bond.[45] As discussed below, this is beginning to change, as appellate courts are starting to look more carefully at the justifications for (and consequences of) financial conditions of release, and as jurisdictions begin to make more purposeful decisions about pretrial release and detention. But in the meantime, it is worth underscoring that, in accordance with the U.S. Constitution, *intentionally detaining a bailable defendant by using financial conditions is impermissible*.

(2) **Unaffordable financial conditions will be subject to increased scrutiny.** There is an emerging stream of federal and state cases in which plaintiffs claim that *any* detention resulting from the use of financial release conditions—whether intentional or not—violates the Equal Protection and/or Due Process Clauses of the U.S. Constitution. The legal arguments are nuanced, but essentially amount to the following:

(a) Detaining an indigent person when a similarly situated non-indigent person would be released is a violation of Equal Protection.

(b) Detention is the deprivation of a fundamental right and therefore can be imposed in only very limited circumstances and after thorough due process. Current bail systems typically fall far short of the mark.

The criminally accused have prevailed in the significant majority of these types of recent cases. While courts offer somewhat varied rationales for their opinions, the upshot of this line of cases is clear: if individuals are detained because financial conditions of release are set at levels they cannot afford, courts' decisions will be subject to more searching review on appeal. The technical level of legal scrutiny ("strict," "heightened," "intermediate," etc.) and when, precisely, these levels are triggered remain the subject of some debate the subject of some debate among federal circuit courts,[46] but it is apparent that appellate

44 The idea that bailable individuals should not be detained using money on purpose was first articulated in 1951 by the Supreme Court, which wrote that using money not to provide reasonable assurance during release but instead to provide assurance that individuals remain in jail was "contrary to the whole policy and philosophy of bail." *Stack*, 342 U.S. at 10. *See also Bandy v. United States*, 81 S.Ct. 197, 198 (Douglas, Circuit Justice 1960) ("It is unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."); *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent a person from posting bail)); *O'Donnell*, 892 F.2d at 158 ("[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused.").

45 This is referred to as the "excessive bail loophole" and is discussed in greater detail in Schnacke, *supra* note 14.

46 For the most recent analysis of the cases and arguments, *see* Kellen Funk, *The Present Crisis in American Bail*, Yale L. J. Forum (April 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376045.

courts are no longer likely simply to defer to the lower courts' discretion in establishing the amount of a financial release condition, particularly if that amount results in pretrial detention.[47] Indeed, there has been a move among many courts to treat unaffordable bail as being akin to a denial of bail altogether—in other words, to review such rulings as if the judge had ordered the person detained.[48] According to these decisions, the circumstances in which such orders may be allowed are narrowly circumscribed, and those who are accused must be provided with robust procedural protections.

(3) **A person's ability to pay must be assessed before setting the amount of a financial release condition.** In many jurisdictions, fixed bond schedules are used to set the financial release condition. While judges are typically free to deviate from the pre-set amount in any given case (and have a choice of ordering a secured or unsecured bond), they often simply default to the bond schedule. It is precisely this lack of individualization that leads to the outcomes that appellate courts have deemed constitutionally problematic—namely, people being detained based not on how likely they are to succeed or fail on pretrial release but on their access to money.

The reliance on bond schedules is increasingly being questioned and undercut by recent court decisions.[49] Courts in these cases are holding that judges must provide a rationale for setting financial release conditions at a particular level—or setting financial release conditions at all.[50] First, the amount must be connected to the risk they are hoping to mitigate, since setting financial release conditions for the purpose of detention is legally impermissible. Second, the amount must take into account the individual's ability to pay.[51] After all, a $1,000 bond could be a detention order for one person but be readily paid by another. Therefore, it is only by taking into account a person's ability to pay that a judge can make a legally justifiable decision about the level of the financial condition—if any. The ABA Standards go even farther, stating that no individual should have financial release conditions set at a level that "results in the pretrial detention of the defendant solely due to an inability to pay."[52]

47 In a recent ruling, the 11th Circuit endorsed a more lenient standard of review to unaffordable bail. *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018). However, that court's holding pertained to the use of a standing bond schedule to establish money bond amounts during the first 48 hours post-arrest, after which a person who could demonstrate indigency was *entitled* to release on recognizance. It is not entirely clear what implications this ruling might have for a bail system with longer periods of detention or without a guarantee of release.

48 *See, e.g., O'Donnell*, 892 F.2d at 158; *Schultz v. Alabama*, 330 F. Supp 3d 1344, 1358 (N.D. Ala. 2018). These decisions are consistent with circuit court interpretations of the Federal Bail Reform Act, which have required the same procedural protections for individuals subject to unaffordable bail as for those denied bail outright. *See e.g., United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991); *United States v. McConnell*, 842 F.2d 105, 108-10 (5th Cir. 1988).

49 Most recently, a federal district court applied strict scrutiny to Equal Protection and Due Process claims arising from the use of a money bond schedule and ruled that the use of a bail schedule "significantly deprives plaintiffs of their fundamental right to liberty." *Buffin v. San Francisco*, No. 15-cv-04959-YGR, slip op at 40 (N.D. Cal., March 4, 2019).

50 *See, e.g., O'Donnell* at 160 (requiring judicial officers to "specifically enunciate their individualized, case-specific reasons" for imposing financial release conditions on indigent people).

51 *See, e.g., Caliste v. Cantrell*, 329. F.Supp. 3d 296 (E.D. La. 2018) (requiring "an inquiry into the arrestee's ability to pay" and "consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release"); *Humphrey*, 19. Cal. App. 5th at 1041 (requiring bail determinations to be based upon consideration of individual criteria, including ability to pay).

52 *ABA Standards*, *supra* note 29, Standard 10-5.3. Even more forcefully, the federal statute governing pretrial release strictly forbids any money-based detention: a judge "may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

B. Washington Law

Financial conditions of pretrial release are not mandated by Washington law—and, in fact, there are presumptions against their use in the Superior Court Rules. Yet, as in many states across the country, financial release conditions are used quite frequently and, because they are often set at levels that people cannot afford, they frequently result in pretrial detention.

Superior Court Criminal Rules list financial conditions (secured or unsecured) among the many conditions judges can use to assure the *future court appearance* of an individual (provided, however, that the court first finds that the accused is not likely to appear if released on personal recognizance).[53] However, according to the Rules, courts must impose the "least restrictive" of the available conditions, which also include pretrial supervision; restrictions on travel, association, or living arrangements; electronic monitoring; and any other condition "deemed reasonably necessary."[54] Further, if the court determines that a person must post a money bond, the court must consider the person's financial resources when setting the amount.[55]

Monetary bond (secured or unsecured) may also be imposed if the court first finds that (1) there is a substantial danger that the accused will commit a *violent* crime, or will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice *and* (2) no less restrictive condition or combination of conditions would reasonably assure the safety of the community."[56] The Rules explicitly list nine other conditions (along with a catch-all) that a judge should consider, including pretrial supervision, prohibiting possession of dangerous weapons or firearms, place-based restrictions, and electronic monitoring. Further, as with monetary bond set in order to assure court appearance, judges must consider a person's financial resources when setting the bond amount.[57]

Despite the Rules' reference to money set for purposes of public safety, in Washington—as in virtually all other states—failure to appear for court appears to be the only event that can lead to forfeiture of money on a monetary bond (though Washington's law is not entirely clear on this point). Thus, when a person is arrested on a new crime while on pretrial release, any money previously posted by the person cannot be forfeited. At least one federal district court has held that it is irrational (and thus unlawful) to set money to disincentivize crime if the bond will not be forfeited upon a new arrest.[58]

Bond schedules are referenced nowhere in Washington law or Superior Court rules; however, the Rules for Courts of Limited Jurisdiction permit them, but leave "the adoption of such a schedule, or whether to adopt a schedule, [to] the discretion of each court of limited

53 CrR 3.2(b).

54 *Id*.

55 CrR 3.2(b)(7).

56 CrR 3.2(d). *See also State v. Huckins*, 5 Wn. App. 2d 457, 426 P.3d 797 (2018) (finding "abuse of discretion" when the court required a $1,000 money bond without considering less restrictive conditions, as required by law).

57 *Id*.

58 *Reem v. Hennessy* (N.D. Cal. Dec. 21, 2017, Case No. 17-cv-06628-CRB) 2017 U.S. Dist. LEXIS 210430, *8-*13.

jurisdiction."[59] There would also appear to be no reason why any bond schedule would have to use secured, as opposed to unsecured, money bonds.

In summary, very little of the current reliance on secured money bond appears to be required by state law or court rules. Judges are free *not* to impose financial conditions of release—or any other conditions of release—when they deem it suitable.[60]

V. Other Points of Intervention

While the pretrial release decision has important impacts on the course of a case, there are many other points during the pretrial phase at which different decisions might affect critical outcomes. Some of the most important are when a law enforcement officer decides whether or not to arrest an individual, when a prosecutor decides to charge someone or divert them to a diversion program, and when a judge delegates release authority to another agency that can process release more expeditiously.

A. Federal Law and National Trends

Beyond the broad constitutional requirements set forth in the Bill of Rights, federal law has little to say about how these other early decisions are made. However, other bodies, like the American Bar Association and the U.S. Department of Justice, have promulgated various standards to govern these decision points. And while the standards are varied, the intent seems consistent: to identify and release people charged with low-level offenses—as well as those individuals who are most likely to succeed outside of the criminal justice system—as early in the process as possible.

As the National Institute of Corrections has stated: "Early release of lower-risk arrestees redirects law enforcement and corrections resources at arrest and booking to individuals whose risk level requires a judicial officer's determination of release or detention. Release in lieu of arrest has the added benefit of keeping an arrest from a person's criminal record, and less chance of the collateral consequences that incur."[61] The ABA Standards echo this, saying that citations in lieu of arrest should be issued "to the maximum extent consistent with the effective enforcement of the law."[62] In addition, the ABA Standards recommend the development of "diversion and alternative adjudication options, including drug, mental health, and other

59 CrRLJ 3.2(b)(7).

60 To the extent Washington courts have traditionally used unattainable financial conditions of release to detain individuals before trial, the 2014 case of *State v. Barton*, 331 P. 3d 50 (2014) has complicated matters. According to the *Barton* opinion, as well as court rule amendments that followed in the wake of *Barton*, judges cannot use the "ten-percent bond option" (which allows release only upon the payment to the court of ten percent of the overall financial condition) without *also* permitting an individual to post the bond via a surety (CrR 3.2(b)(4); CrRLJ 3.2(b)(4)).

61 NIC, *supra* note 28, at 20.

62 *ABA Standards*, *supra* note 29, Standard 10-2.1.

treatment courts."[63] Additionally, both NIC and NAPSA endorse courts permitting corrections or pretrial staff to release certain individuals prior to an initial court appearance (known as "delegated release authority"), as long as that pool is limited to individuals facing lower-level charges and having a low likelihood of failing to appear in court pretrial or being arrested on a new offense while on pretrial release.[64]

B. Washington Law

(1) Citations/Summonses

Washington law is largely silent on the subject of issuing citations in lieu of arrest. Statutes give law enforcement broad authority to arrest individuals without a warrant, though they do not appear to *require* custodial arrest in most circumstances.[65] The law enumerates occasional situations in which officers "shall" make a custodial arrest—for example, in certain instances of domestic violence or DUI, or when an individual has violated certain restraining orders or protective orders[66]—but there is no apparent prohibition on the use of citations for the significant majority of possible charges, which leaves jurisdictions with substantial discretion to craft local citation policies.

(2) Diversion

Washington law provides for a handful of optional diversion programs, including deferred prosecution for courts of limited jurisdiction,[67] and it provides explicit authority to create a large number of therapeutic courts (with certain restrictions on individuals' eligibility for these programs).[68] There do not appear to be legal limitations on local jurisdictions' abilities to create other diversion programs beyond the statutorily enumerated ones.

(3) Delegated Release Authority

The most common form of delegated release authority (typically given to the sheriff or a pretrial services agency) across America is the bond schedule, and, to a lesser extent, warrants that provide for a quick release if a financial condition is met. Delegated release authority appears to be authorized under Washington law. Both Washington statutes and rules appear to contemplate pretrial services programs or functions.[69] There does not seem to be anything in Washington state laws or court rules that hinders the creation of a delegated release option using release matrices and pretrial assessment scores, as opposed to charge and money.

63 *Id*., Standard 10-1.5.

64 NIC, *supra* note 28, at 21; *NAPSA Standards*, *supra* note 28, Standard 1.9.

65 R.CW § 10.31.100

66 R.CW § 10.31.100 (2), (16).

67 R.C.W. § 10.05.

68 RCW § 2.30.010.

69 RCW § 10.21.015 (directly) and CrR 3.2 (referring to agency supervision as a condition of release).

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Matt Alsdorf is president and founder of Pretrial Advisors, an organization that advises state and county governments on pretrial policy and bail reform. Until November 2017, he was Vice President of Criminal Justice at the Laura and John Arnold Foundation (LJAF), where he had primary responsibility for strategy and giving at one of the country's largest criminal justice funders. With grants of more than $40 million in 2016, his team's work covered critical areas including policing, forensic science, bail, and criminal justice debt. Over his six years at LJAF, Matt's leadership was central to the development and expansion of the Foundation's most prominent initiative: reforming pretrial justice across the U.S.

Matt has worked with dozens of jurisdictions nationally on improving pretrial release policies and practices, and he speaks frequently on these issues before judicial, legislative, and executive-branch audiences, as well as leaders in business and technology.

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