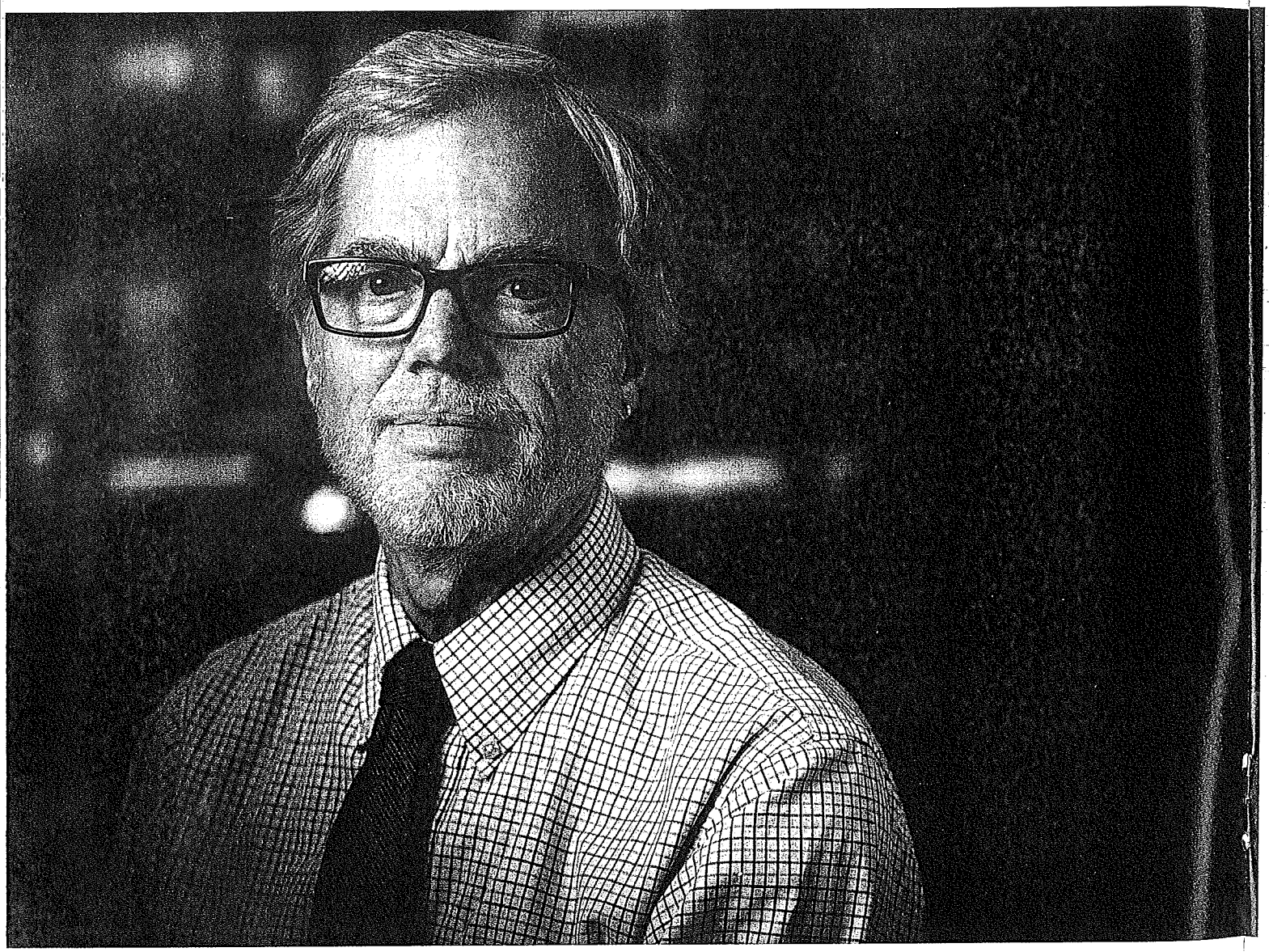
Milwaukee Moves Away From Money Bail System

Identifying defendants who are most likely to not return to court for their trials is key to reforming the bail system in Wisconsin and nationwide. Doing so will cut costs and increase public safety.



Author Jeffrey A. Kremers is a Milwaukee County circuit court judge.
Photo: Kevin Harnack

BY JUDGE JEFFREY A. KREMERS

SUMMARY
Wisconsin courts tend to set bail (that is, a monetary condition of release) at a level that is tied to the seriousness of the charge and to concerns regarding public or victim safety, rather than the likelihood a defendant will make his or her court appearances. This often results in low-risk people being detained at great expense and release of high-risk individuals.

The author, a Wisconsin circuit court judge, describes the negative effects bail has on defendants and the communities in which they reside. He then discusses evidence-based pretrial release systems, including the one adopted in Milwaukee County.

Wisconsin has a crime called bail jumping,[1] which requires the state to prove that a defendant has violated the conditions of his or her bond. The media often report that a defendant has violated bail by committing a new crime. The use of the term *bail* in both circumstances is incorrect and misleading. There has been, for quite a long time, a good deal of confusion and misuse of the word bail by both the public and the media.

Even within the criminal justice system there has been a blurring of the term's meaning and its application to the decision to release and monitor people charged with, but not yet convicted of, a criminal offense.

Wisconsin Statutes on Pretrial Release

Wisconsin statutes provide that all individuals, with limited exceptions, who are arrested for a criminal offense are entitled to be released subject to reasonable conditions. This is true whether the person is arrested for a misdemeanor or a felony. Conditions of release are limited to three general purposes: to ensure the defendant's court appearance, to protect the public, and to prevent the intimidation of witnesses or victims. *Bail* is defined in the Wisconsin Statutes as the "monetary condition of release."

So bail is not the release, bail is simply the amount of money that must be posted to meet one condition of release. There may well be, and often are, other conditions of release that are equally or more important to the public's beliefs and expectations regarding the status of people who are out in the community awaiting trial. The other conditions a court might require include electronic monitoring, no-contact orders, curfews, drug or alcohol testing, and so on.

Section 969.01(4) of the Wisconsin Statutes (Considerations in setting conditions of release) provides:

"If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant. Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses."

The statute lists a variety of factors the court may consider in either setting an amount of bail or imposing other conditions of release. The statute makes clear that bail, the cash condition of release, may only be used to ensure appearance. It should not be used for any other purpose. If the court has concerns about the safety of the witnesses or the public, it can and should impose other conditions of supervision to address those issues.

Wisconsin Statutes section 969.035 allows for preventively detaining individuals who are charged with certain violent crimes. Historically, this statute has rarely been invoked in making pretrial detention decisions. This has resulted in the use of cash bail as the de facto method of preventive detention, especially in serious felony cases.

One of the major challenges in reforming the criminal justice system in Wisconsin and specifically Milwaukee is the misunderstanding and misuse of cash bail in making release decisions for people charged with but not yet convicted of a crime. For decades, courts have tended to set cash bail at a level that is tied to the seriousness of the charge and to concerns regarding public or victim safety, rather than the likelihood a

defendant would make his or her court appearances. Courts have not always considered the correct risk and to the extent they did, it was not evidence based but charge based. This has resulted in low-risk people being detained at great expense and, even more disconcerting, release of people who by any objective measure of risk should not be released.

Instead of focusing on the risks a specific individual would or would not return to court, the amount of bail was more often linked to the nature of the charge; the more serious the charge, the higher the bail. Wisconsin statutes that restrict the use of cash bail to likelihood of appearance have not been consistently followed. Courts should, per the Wisconsin Statutes, impose other conditions of release to protect the public, witnesses, and most importantly, victims.

Negative Effects of Charge-based Bail

The past practice of using a charge-based methodology of setting bail has at least three major negative consequences. Space limitations prevent a thorough discussion of these issues so only brief descriptions are presented here.

First, because the focus is on the charge and not the individual, defendants who have access to money, their own or others', will be released regardless of the defendants' propensity to return to court. Defendants without money, who give every indication they will come to court, and probably have less ability to flee, often end up being held in custody at great public expense. This is true for both categories, released and detained, irrespective of the seriousness of the crime they are facing.

This leads to the second problem. In many communities, certainly Milwaukee, minorities are a higher percentage of the "poor" and hence a higher percentage of the detained pretrial-defendant population. It is possible then to see the beginnings of what has contributed to the racial disparities in jail populations. Focusing bail amounts on the seriousness of the charge has resulted in more people being held on a pretrial basis than evidence-based assessments of their risk to miss court would justify. While this significantly raises the costs for the community, it is not the most important damage caused by this practice.

The third issue is the harm done to defendants, from even short stays in jail. There is a significant and growing body of research that shows that pretrial incarceration, even for people who are ultimately acquitted, can lead to serious negative consequences. These include the loss of jobs, housing, benefits, and placement of children and even higher rates of recidivism.

Research conducted by the Laura and John Arnold Foundation found that low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their case was pending but also years later. The research also found that, when held two to three days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants who were held no more than 24 hours.

The study indicated that the correlation generally escalates as the time behind bars increases: low-risk defendants who were detained for 31 days or more offended 74 percent more frequently than those who were released within 24 hours. A similar pattern held for moderate-risk defendants, although the percentage increase in rates of new criminal activity is smaller.[2] For a system premised on the presumption of innocence, this is unjust.

Evidence-based Pretrial Release Systems

Milwaukee has, over the last five years, been moving toward an evidence-based pretrial release system that, for purposes of setting cash bail, focuses on the specific risk a defendant presents to not return to court and a separate assessment to determine risk of harm to the community or witnesses to support the imposition of other conditions of release. The goal is to detain those who cannot be safely managed in the community and release the rest without negatively affecting community safety.

The key to maximizing community safety, individual liberty, and court-appearance rates for pretrial defendants is the ability to accurately identify individuals who are low, moderate, and high risk for failure to appear and potential to engage in additional criminal activity as well as those who pose an increased risk to commit a new violent criminal act if released. Judicial officers are often faced with making critical pretrial release decisions with little more than the nature of the offense and limited criminal-history information. Decisions based primarily on charge and without an actuarial assessment of an individual's pretrial risk can lead to the release of high-risk and dangerous defendants and the costly and harmful detention of low-risk individuals who could be safely released to the community.

Research has shown that subjective risk assessment used in conjunction with objective actuarial risk instruments leads to better outcomes.[3] The first pretrial risk assessment in the United States was developed more than 50 years ago by the Vera Institute. Yet only approximately 10 percent of courts across the country use evidence-based pretrial risk assessment instruments to assist judicial officers in determining bail and pretrial release conditions. Milwaukee County is one of those jurisdictions. Recognized nationally as having a high-functioning pretrial services operation, the county has been a leader in implementing evidence-based pretrial practices.

Milwaukee's Pretrial Release System

In 2011, as part of Milwaukee County's participation in the National Institute of Corrections' Evidence-Based Decision Making Initiative, the Milwaukee County Pretrial Risk Assessment Instrument (MCPRAI) used by the pretrial supervision programs was validated and reconstructed using local data. The resulting instrument, the MCPRAI-Revised,

contained six risk factors found to be predictive of pretrial failure: number of cases filed; prior failure to appear in court; arrested while out on bond; employed or primary caregiver; amount of time at residence; and the score on a substance-abuse screener. These factors resulted in a numerical score from zero to nine, with zero representing the lowest risk, and placement into one of four risk categories.

In addition to the validation and reconstruction of the MCPRAI, a collaborative group of key Milwaukee County justice system stakeholders, including the chief judge, the public defender, the district attorney, pretrial program staff, the county pretrial operations manager, the court commissioner, and the victim witness specialist, worked with nationally recognized pretrial researchers to develop a pretrial praxis. The praxis is essentially a decision-making framework that combines the defendant's identified risk for failure to appear and new criminal activity with the nature of the criminal charges to formulate recommendations for bail and pretrial release conditions.

After testing these instruments in 2011, Milwaukee County fully funded and implemented a new pretrial screening program in 2012. This change marked a shift in the focus in bail decisions from the seriousness of the charge the defendant is facing to the *risk* that the defendant, if released from custody, will commit a new crime or fail to appear in court. In conjunction with their experience and professional judgment, judicial officers now had an objective, actuarial assessment of a defendant's pretrial risk to inform their critically important pretrial release decisions.

Around the time Milwaukee County piloted its new pretrial screening program, the Laura and John Arnold Foundation assembled a team of leading national criminal justice researchers and launched a large-scale research project "focused on the role that data and analytics can play in helping judges determine what risk defendants who have been arrested pose to public safety and whether they should be detained in jail or released prior to trial."[4]

Extensive research using data from 750,000 cases from 300 jurisdictions across the United States was analyzed to identify factors that are the best predictors of whether a person will fail to appear in court, commit new criminal activity, or commit new violent criminal activity during the pretrial period. Hundreds of factors were analyzed.

The research determined that the strongest predictors of pretrial risk were the following: 1) the current offense is violent; 2) the person had a pending charge at the time of the current offense; 3) the person has a prior misdemeanor conviction; 4) the person has a prior felony conviction; 5) the person has prior convictions for violent crimes; 6) the person's age at the time of arrest; 7) the number of times the person failed to appear at a pretrial hearing in the last two years; 8) the person failed to appear at a pretrial hearing more than two years ago; and 9) the person has previously been sentenced to incarceration.

The foundation's research resulted in the development of the public safety assessment (PSA). The PSA separately assesses a defendant's risk for failure to appear in court and new criminal activity during the pretrial period. Scores fall on a scale of one to six, with higher scores indicating a greater level of risk. The tool also flags individuals who have an elevated risk of committing new violent criminal activity. The separate risk scales and violence flag allow jurisdictions to better deploy available pretrial interventions.

Other significant advantages of the PSA are that unlike the MCPRAI-R, it does not consider factors that could be discriminatory, such as race, sex, level of education, socioeconomic status, and neighborhood. Also, because the PSA does not require an interview, it is far less expensive and requires fewer resources to administer than previous risk assessments.

Seeing an opportunity to continue its efforts to enhance public safety and its pretrial release decision, as well as to make better and more targeted use of available pretrial services, Milwaukee County sought and received permission from the LJAF to become a PSA site. After extensive technical assistance from the foundation and local stakeholder collaboration in developing a new pretrial decision-making framework to replace the praxis, the PSA was fully implemented last June.

Conclusion

Honoring defendants' constitutional rights, such as the presumption of innocence and the right to reasonable bail before trial, requires society to accept that pretrial release decisions might unintentionally result in harm to the public. Enhancing public safety requires us to manage release and detention based on risk. So the question is not whether courts take risks but whether they take the right risks and measure and manage risk appropriately. The justice system's goal is to balance defendant's rights with the need to protect the community, maintain the integrity of the judicial process, and ensure court appearance.

"In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception."[5]

We believe Milwaukee is much closer to the ideal with less risk to public safety, less harm to individuals, and less cost to the taxpayers. **WL**

Jeffrey A. Kremers, U.W. 1975, is a Milwaukee County circuit court judge.
jeffrey.kremers@wicourts.gov

ENDNOTES

[1]*See* Wis. Stat. § 946.49.
[2]*See* W.M. Grove & P.E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, Psychology, Public Policy, and Law, 2: 293-323 (1996).
[3]*Id.*
[4]www.arnoldfoundation.org/laura-john-arnold-foundation-develops-national-model-pretrial-risk-assessments/.
[5]*United States v. Salerno*, 481 U.S. 739 (1987). **WL**