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Sandra Guerra Thompson

DO PROSECUTORS REALLY MATTER?: A PROPOSAL TO BAN ONE-SIDED BAIL HEARINGS

*Sandra Guerra Thompson**

I. INTRODUCTION

The inspiring story of *Gideon v. Wainwright*[1] gives lawyers and law students alike the impression that indigent people will be provided with defense counsel when they are charged with a crime.[2] What few people realize, however, is that in about half the local jurisdictions in this country arrested individuals appear at a pivotal hearing—the probable cause and bail hearing—and face a judge and, in many cases, a prosecutor but with no defense counsel to speak on their behalf.[3] In those jurisdictions, prosecutors present the government's evidence of probable cause, and judges make both probable cause and bail determinations for a person who stands alone before the judge and the representative for the State.[4] What must defendants think of this proceeding? If they suspect that process is not designed to protect them, they would be right. One empirical study entitled *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail* made perfectly clear that people tend not to fare well at hearings where

* Alumnae College Professor of Law and Criminal Justice Institute Director, University of Houston Law Center; Assistant District Attorney, New York County (1988-90). The author is indebted to Mon Yin Lung, Associate Director of the O'Quinn Law Library at the University of Houston Law Center, for her research assistance.

1. Gideon v. Wainwright, 372 U.S. 335 (1963).

2. *See* Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1725 (2002).

3. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 384-86 (2011) (reporting on a national survey of pretrial practices inquiring about the appointment of counsel at bail hearings). The Supreme Court has yet to recognize a right to counsel at the bail hearing, although it found that the right to counsel "attached" at that stage, meaning that a court must not delay unreasonably in assigning counsel after the first appearance. *See id.* at 334, 383 (addressing the Supreme Court's decision in *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008)).

4. *Id.* at 334, 347.

they appear without counsel, as compared to defendants in the same jurisdiction who had the assistance of counsel.[5]

The question this Article addresses is the role of the prosecutor in a hearing where the defendant stands without counsel before the court at a bail hearing.[6] The prosecutor in our system of justice is likened to that of a "minister of justice."[7] But, can a prosecutor "do justice" within the context of a proceeding that is one-sided in not providing counsel? The ethics rules, provided in the *ABA Standards for Criminal Justice: Prosecution and Defense Function*, recognize that a relatively small number of states provide counsel at bail hearings, so there is a variance in practice, with defendants in many states appearing without counsel.[8] The drafters of the Standards thus faced a dilemma in crafting the ethical guidelines for prosecutors at bail hearings.[9] Should prosecutors be permitted to appear in jurisdictions where counsel does not appear, or should they be banned? The Standards took the position of preferring the presence of prosecutors in all cases.[10] In cases in which defense counsel is not present, the choice was made to task prosecutors with protecting the rights of the unrepresented accused, effectively casting the prosecutor as a surrogate defense attorney.[11] As such, the prosecutor is expected to serve as law enforcer and defense attorney at the same time.

This Article examines the various ways that the Prosecution Function Standards have placed prosecutors in the role of surrogate defense attorney.[12] Further, this Article argues that time has proven this approach to protecting the rights of defendants at bail hearings is unrealistic and that defendants are actually better off if prosecutors are ethically barred from participating unless defense counsel is also present.[13]

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5. *See* Colbert et al., *supra* note 2, at 1755-56.

6. *See infra* Part IV.

7. *See infra* Part II.

8. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1 (4th ed. 2015). The latest edition of the *ABA Standards for Criminal Justice: Prosecution and Defense Function* is not yet accompanied by commentary from the drafters. *See* E-mail from Kevin Scruggs, Criminal Justice Dir., Am. Bar Ass'n, to Sandra Guerra Thompson (Jan. 26, 2016) (on file with author).

9. *See infra* Part II.

10. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1(a).

11. *See id.* Standard 3-5.1.

12. *See infra* Part II.

13. *See infra* Part IV.

II. ONE-SIDED PROCEDURES BEGET ONE-SIDED ETHICAL GUIDELINES

Three sets of guidelines regulate the role of prosecutors in the criminal justice system: Rule 3.8 of the American Bar Association ("ABA") *Model Rules of Professional Conduct*, the National District Attorney Association *National Prosecution Standards*, and the Prosecution Function Standards.[14] Of these, only the Prosecution Function Standards speak specifically to the pretrial stage of the criminal justice system.[15] The *ABA Standards for Criminal Justice: Prosecution and Defense Function*, approved by the ABA House of Delegates in 2015, is designed to be "aspirational," by which the drafters mean that they represent "'best practices.'"[16] By aspirational, the drafters refer to the conduct of the prosecutors and not the settings in which they find themselves. In fact, the pretrial bail hearings in many jurisdictions would strike many non-lawyer Americans as un-American. What television show or movie ever depicts an American judicial proceeding in which a person is not represented by counsel and instead faces a magistrate and prosecutor alone?

Not surprisingly, then, the Prosecution Function Standards cast the prosecutor in an inquisitorial role—consistent with the idea of being a "minister of justice"—during the pretrial stage of the process, as it also does in the investigative process.[17] In this role, the prosecutor plays a dual role as law enforcer and protector of a suspect's rights. The rules envision the prosecutor alone making critical, and generally unreviewable, charging decisions.[18] For example, Standard 3-4.4 lists several factors prosecutors should consider in charging a person, that call for fairness to the accused such as avoiding disproportionate punishment due to the imposition of collateral consequences, as well as an accused's efforts at rehabilitation.[19] This makes perfect sense for the investigative stage, before a criminal proceeding has even commenced.

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14. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.8; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.2(b); NAT'L PROSECUTION STANDARDS intro. (NAT'L DIST. ATTORNEYS ASS'N 2009).

15. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1.

16. *Id.* Standard 3-1.1(b); *Criminal Justice Standards for the Prosecution Function—Table of Contents*, A.B.A. (Feb. 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html.

17. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-4.4(a)(v)–(vi).

18. *Id.* Standard 3-4.4.

19. *Id.* Standard 3-4.4(a).

The pretrial process should be different. In this phase, a person usually has been arrested and taken into custody, giving rise to a need for defense counsel, but bail hearings take one of three different forms.[20] In many jurisdictions, counsel for the prosecution and the defense appear.[21] In other jurisdictions, neither prosecutor nor defense counsel appear, a judicial officer presides without a lawyer for the state or a lawyer for the defense.[22] In a third group, a judicial officer presides and a prosecutor participates, but no defense counsel is provided.[23] A national study has provided empirical evidence that about half of the local jurisdictions nationwide do not provide counsel for indigent defendants at bail hearings.[24] However, we do not have a breakdown of how many jurisdictions have prosecutors participating versus those where a judicial officer presides without participation by either a prosecutor or defense counsel. The Prosecution Function Standards recognized the existence of this state of affairs.[25] Thus, the challenge the drafters faced was to define the role of an ethical prosecutor within a system that is not fair, at least in those jurisdictions that fail to provide counsel. The Standards take the position that defendants are better off if a prosecutor is present at the bail hearing, even if defense counsel is not.[26] On this issue, the Prosecution Function Standards state unconditionally that "[a] prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing."[27]

The reasoning for preferring one-sided hearings appears to be that prosecutors can be required to take an active role in protecting the rights of uncounseled defendants, and that this is preferable to a hearing where neither attorney is present. Before a one-sided hearing takes place, the Standards task prosecutors with being concerned about the appointment of counsel prior to the commencement of the bail hearings.[28] Standard 3-5.1(b)(1) calls on prosecutors "at *or before* the first appearance" to "consider . . . whether the accused has counsel, and

20. *See infra* text accompanying notes 21-24.
21. *See* Colbert et al., *supra* note 2, at 1723-24.
22. *See id.*
23. *Id.*
24. *Id.*
25. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1(a) (4th ed. 2015).
26. *Id.* Standard 3-5.1.
27. *Id.* Standard 3-5.1(a).
28. *Id.* Standard 3-5.1(d).

if not, whether and when counsel will be made available or waived."[29] Thus, the prosecutor's first job in the pretrial stage is presumably to take measures to prevent a one-sided hearing by at least "considering" the accused's need for counsel. The drafters surely recognized the institutional limitations on the prosecutor's ability to ensure a person actually has counsel at the bail hearing, so the drafters settled for a guideline that calls on prosecutors to "consider" the issue.[30]

The fourth edition of the *ABA Standards for Criminal Justice: Prosecution and Defense Function*, more than the previous editions, embraces the idea that prosecutors should play a protective role for defendants at hearings where defense counsel is not provided.[31] The newest edition for the first time acknowledges concerns about mentally vulnerable people who so often trudge through jails and bail hearings without defense counsel assistance.[32] To address this problem, the Prosecution Function Standards cast the prosecutor in the role of surrogate defender for people who may be mentally ill.[33] In a separate set of standards, the *ABA Standards for Criminal Justice: Pretrial Release* ("*Standards for Pretrial Release*"), the ABA advocates for the diversion of the mentally ill from jail.[34] The Prosecution Function Standards dovetails with the *Standards for Pretrial Release* by urging prosecutors to identify people who may suffer from mental illness and request that they be evaluated.[35] When prosecutors find individuals who appear to be mentally ill, Standard 3-5.1(g) also calls on prosecutors to "bring those concerns to the attention of defense counsel and, if necessary, the judicial officer."[36] Since, presumably, a prosecutor would attend a bail hearing even when counsel is absent, the prosecutor would have a greater opportunity to observe the defendant than the defense attorney who would likely meet with their client at some point after the bail hearing. Thus, when counsel later becomes involved, the Prosecution Function Standards contemplate that the prosecutor will assist defense counsel by informing counsel of his other concerns.[37]

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29. *Id.* Standard 3-5.1(b)(i).
30. *Id.*
31. *Id.* Standards 3-1.2(b), -3.4(i)–(j), -4.3, -5.1.
32. *Id.* Standard 3-5.1(g).
33. *Id.*
34. ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.5 (2007).
35. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1(b)(ii).
36. *Id.* Standard 3-5.1(g).
37. *Id.*

Three other provisions call on prosecutors to act affirmatively on behalf of an accused. First, Standard 3-5.1(e) requires prosecutors to assist uncounseled defendants to obtain counsel.[38] A prosecutor should "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel."[39] How should this work in practice? Seemingly, a prosecutor asks the magistrate or the court clerk to advise the accused of the right to counsel and the procedure to obtain counsel. A prosecutor is not permitted to speak directly to uncounseled defendants, so the most a prosecutor can do is to ask others to assist them.[40]

Second, Standard 3-5.1(d) calls on the prosecutor to "ask the court not to engage in substantive proceedings, other than a decision to release the accused" for defendants who appear without counsel.[41] It is interesting that the Prosecution Function Standards use the language "other than" in this provision. In doing so, the provision recognizes that a bail hearing is a substantive proceeding, which it most certainly is.[42] The decision that determines whether a person will be detained or released is for most people the substantive decision that is determinative of "mostly everything" that follows.[43] So, the Standards, bowing to the status quo in most jurisdictions, acknowledge that bail hearings usually proceed without defense counsel and put on prosecutors the task of asking the court not to do anything more than set bail.[44] The Prosecution Function Standards also explicitly prohibit prosecutors from taking advantage of uncounseled defendants themselves by obtaining a waiver of "other important pretrial rights, such as the right to a preliminary hearing" from an uncounseled person who has not been judicially authorized to proceed pro se.[45]

Most importantly, the Prosecution Function Standards now place an affirmative duty on prosecutors to decide whether they believe a person should be released pretrial, and, if release is appropriate or the court orders it, prosecutors should "cooperate in arrangements for release

38. *Id.* Standard 3-5.1(e).

39. *Id.*

40. The Prosecution Function Standards make clear that prosecutors should not speak directly or otherwise "communicate" with an uncounseled defendant absent a valid waiver. *Id.*

41. *Id.* Standard 3-5.1(d).

42. *Id.*

43. *See infra* note 72 and accompanying text.

44. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1.

45. *Id.* Standard 3.5-1.

under the prevailing pretrial release system."[46] The *Standards for Pretrial Release* favor release of arrestees on their own recognizance and allow for the imposition of conditions, such as financial conditions, only when necessary and in the least restrictive manner necessary.[47] Taken together, the Standards contemplate that prosecutors should "cooperate" with the courts (whether defense counsel is present or not) in obtaining pretrial release for all of those people arrested who can be safely released.[48]

In these ways, the Prosecution Function Standards place prosecutors in the odd position of serving as quasi-defense counsel at bail hearings. They are expected to be solicitous of an uncounseled person's rights and not seek to obtain a waiver of those rights, to observe the person for signs of mental illness and take steps to obtain medical evaluation and release from detention, and to act on the person's behalf in requesting the court to inform the person of his or her rights, to ask the court to refrain from conducting substantive business other than determining bail, and most importantly, to work cooperatively with the court to get arrestees out of jail whenever appropriate.[49] Given the status quo of one-sided bail hearings, the Prosecution Function Standards chose to protect the rights of the accused by assigning the defense task to prosecutors.[50] Time has shown prosecutors unwilling—or more likely—institutionally incapable of protecting the rights of defendants.

III. BAIL HEARINGS FAIL TO PROTECT DEFENDANTS' RIGHT TO BAIL

Since 1990, as crime rates and arrest rates have both fallen, jail bookings have increased.[51] Why? The number of people detained pretrial has skyrocketed. From 1996 to 2014, the number of un-convicted people

46. *Id.* Standard 3.5-1(f).

47. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4 (2007).

48. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1(f); ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4.

49. *See id.* Standard 3-5.1.

50. *See id.* Standard 3-5.1(d)–(e).

51. For a discussion of the dramatic drop in crime rates since 1990, see Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, ATLANTIC (Feb. 11, 2015), http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364. For a chart of total arrests in the United States from 1990 to 2014, see *Arrest Rate for All Offenses in the United States from 1990-2014 (Arrests per 100 People)*, STATISTA, http://www.statista.com/statistics/191267/arrest-rate-for-all-offenses-in-the-us-since-1990 (last visited July 24, 2016). For a chart of the number of local jail inmates in the United States from 1980 to 2013, see *Key Statistic: Jail Inmates*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=kfdetail&iid=489 (last visited July 24, 2016).

in U.S. jails has increased by fifty-nine percent, accounting for ninety-nine percent of the total increase in jail populations.[52] Nationally, unconvicted people make up over sixty percent of the total jail population, totaling almost half a million people.[53] In some places, like Harris County, Texas, pretrial detainees comprise seventy-six percent of the total jail population.[54]

Increases in the imposition and the amount of secured commercial bail bonds account for the rise. Adjusted for inflation, the average money bail has increased forty-six percent for felony defendants in the seventeen years from 1992 to 2009.[55] At the same time, the use of nonfinancial release ("personal release bonds" or release on a person's own recognizance) has dropped.[56] Quite simply, judges have not taken defendants' ability to pay bail money into account, nor have they taken into account other factors that may favor a person's pretrial release.[57] Indeed, they do not seem to understand that the purpose of the bail hearing—as articulated in the *Standards for Pretrial Release* and reflected in state bail laws—is to determine the conditions that would enable the court to release a person.[58] The law presumes that the person should be released, and this presumption can only be overcome by special circumstances.[59] As the Supreme Court stated in *United States v.*

52. COUNCIL OF ECON. ADVISERS, ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 7 (2015), https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

53. U.S. DEP'T OF JUSTICE, NCJ BULL. NO. 248629, JAIL INMATES AT MIDYEAR 2014, at 4 tbl.3 (2015), http://www.bjs.gov/content/pub/pdf/jim14.pdf.

54. OFFICE OF CRIMINAL JUSTICE COORDINATION, HARRIS COUNTY, TEX., JAIL POPULATION NOVEMBER 2015 REPORT 1 (2015) ("Comparison of Daily Average Jail Population.").

55. COUNCIL OF ECON. ADVISERS, *supra* note 52, at 6-7.

56. *Id.* at 6 (reporting a drop from about thirty-nine percent of felony defendants released on nonfinancial conditions in 1990 to only twenty-five percent in 2008 in the seventy-five largest counties).

57. *See* Colbert et al., *supra* note 2, at 1726-27, 1749 (reporting on a study of Baltimore courts that do not provide counsel at bail hearings and finding that the courts make decisions without "verified information about an accused's reliable ties to the community" and "set bail conditions beyond what the individual can afford"). National statistics about the number of unconvicted people being held in custody for inability to afford bail would further confirm that bail amounts are set without regard to a person's risk if released and the person's ability to pay a bail amount. *See* COUNCIL OF ECON. ADVISERS, *supra* note 52, at 7.

58. ABA STANDARDS FOR CRIMINAL JUSTICE STANDARDS: PRETRIAL RELEASE, Standard 10-1.1 (2007).

59. The decision to deny bail and detain a person in custody pretrial must be based on valid considerations of public safety to satisfy due process. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding preventive pretrial detention of "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel"); *see also Pretrial Preventive Detention by State Court*, 75 A.L.R.3d art. I § 2[a] (1977).

Salerno,[60] "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[61] American states have recognized the right to be considered for bail since the earliest days of the Republic,[62] but today's practices seem to have lost sight of this basic premise and of the presumption of innocence.

In many jurisdictions, magistrates, and prosecutors do not even recognize the need for an individualized hearing that considers the ability to pay.[63] Rather, they are guided by "bail schedules," which are tables that set bail conditions based on the charged offense type and prior criminal history.[64] Decisions based on bail schedules create a quick and predictable process.[65] The condition for release is almost always money bail or the denial of bail outright, and a defendant's ability to pay is not a factor in money bail amounts.[66] The speed with which bail decisions can be made under this system enables people with financial means to gain their freedom as expeditiously as possible.[67] A money bail is set based on the bail schedule, and the defendant's friends or family pay a fee to a bondsman who arranges the person's release.[68] However, this system also keeps the poor in jail because it does not allow the decision-maker to consider other circumstances relevant to the bail decision, such as actual risk of flight or danger to the community or ability to pay a financial condition. Traditional bail law requires consideration of a person's ability to pay any money bail that may be set.[69] Yet, in many jurisdictions, the law is simply not followed.[70] Bail decisions based on a bail schedule, by definition, fail to account for a

60. 481 U.S. 739 (1987).

61. *Id.* at 755.

62. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1129 (2005).

63. *See* COUNCIL OF ECON. ADVISERS, *supra* note 52, at 7.

64. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12, 13-14.

65. *Id.* at 14.

66. *See* COUNCIL OF ECON. ADVISERS, *supra* note 52, at 1; Associated Press, *A California Lawsuit over the Cash Bail System Could Prompt Changes Across the U.S.*, L.A. TIMES (Dec. 26, 2015, 8:49 AM), http://www.latimes.com/local/california/la-me-bail-bond-lawsuit-20151226-story.html.

67. Carlson, *supra* note 64, at 15.

68. *See* Lydia D. Johnson, *The Politics of the Bail System: What's the Price for Freedom?*, 17 SCHOLAR 171, 183-84 (2015).

69. Such a requirement is inherent in the Eighth Amendment Excessive Bail Clause for federal purposes, and most states have similar provisions. *See Annotation 1–Eighth Amendment: Excessive Bail*, FINDLAW, http://constitution.findlaw.com/amendment8/annotation01.html (last visited July 24, 2016).

70. Associated Press, *supra* note 66.

person's ability to pay, with the consequence that the poor too often sit in jail while those with money do not.[71]

The pretrial detention of an arrestee has many unfortunate consequences. In 1956, Professor Caleb Foote famously wrote, "Pretrial decisions determine mostly everything."[72] Research by the Laura and John Arnold Foundation ("LJAF") has confirmed his findings from sixty years ago.[73] LJAF's studies have found that pretrial detention has serious negative consequences for people in terms of the criminal justice outcomes at sentencing.[74] In a study of over 60,000 defendants, the LJAF research showed that people detained pretrial are four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than similar people released pretrial.[75] Additionally, when jail or prison time is imposed, people in custody pretrial receive longer sentences.[76] Jail sentences are nearly three times as long, and prison sentences are more than twice as long for people detained pretrial.[77]

In a separate study, LJAF research made a more startling discovery: pretrial detention correlates with an increase in recidivism.[78] In other words, "the pretrial phase of the system is actually helping to create new repeat offenders."[79] The study examined the recidivism rates of 66,014 defendants considered to present "low risk" if released pretrial, comparing among them who were released pretrial and those who were detained and controlling for other known variables.[80] The research summary states, "[t]he study found that when held two to three days, low-risk defendants were almost forty percent more likely to commit new crimes before trial than equivalent defendants held no more than

71. Johnson, *supra* note 68, at 196.

72. *See* Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 135-37 (2007).

73. *See* CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10 (Laura & John Arnold Found. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

74. *See id.*

75. *See id.* at 3, 10.

76. *Id.* at 10.

77. *Id.*

78. LAURA & JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

79. *Id.*; *see also* Leipold, *supra* note 62, at 1131 n.27 (citing a Bureau of Justice Statistics study showing that "[s]eventy-seven percent of the defendants who were detained until case disposition were eventually convicted of some offense, compared to [fifty-five percent] of those released pending disposition").

80. LAURA & JOHN ARNOLD FOUND., *supra* note 78, at 4.

twenty-four hours."[81] The longer a person was held the greater the likelihood of recidivism, and similar increases in recidivism were found for medium-risk defendants.[82] The study cannot explain why people held in custody, even for only a couple of days, will be more likely to commit crimes in the future, but it is fair to say that, not surprisingly, jail has a destabilizing, negative effect on people's lives.

The use of money bonds has become so pervasive and so destructive that civil rights groups have taken notice, filing civil lawsuits around the country challenging its use as violating a defendant's equal protection rights—and they have won.[83] A civil rights group, Equal Justice Under Law, has filed nine class action lawsuits in seven states, with its latest in San Francisco, California, the largest jurisdiction to be challenged to date.[84] The group has settled four cases, persuading jails in some Southern states to eliminate the cash bail system for most offenses.[85] In some cases, state legislatures have enacted sweeping reform, with legislation in New Jersey and Colorado in 2014,[86] and other jurisdictions making a variety of improvements as well.[87] Sixty years after Foote's pronouncement that the pretrial process was broken,[88] some jurisdictions have finally changed their ways.

IV. PROSECUTORS ARE THE OPPOSITE OF DEFENSE ATTORNEYS

The Prosecution Function Standards prefer the presence of a prosecutor at bail hearings to hearings with only judicial officers and defendants, and they apparently do so for the purpose of having a lawyer who will intervene on behalf of the defendant.[89] Does it work? Does the presence of prosecutors in the absence of defense attorneys help to protect the rights of defendants? To date, we do not have a controlled

81. *Id.*

82. *Id.*

83. *See, e.g.*, Walker v. City of Calhoun, No 4:15-CV-0170, 2016 WL 361612, at *11 (N.D. Ga. filed Sept. 8, 2015).

84. *See* Associated Press, *supra* note 66.

85. *Id.*

86. *See* Alexandra Staropoli, *Commentary: NJ Ahead of Curve on Bail Reform*, COURIER-POST, (Oct. 18, 2015, 12:11 AM), http://www.courierpostonline.com/story/opinion/readers/2015/10/18/commentary-nj-ahead-curve-bail-reform/74078306 (discussing bail reform in New Jersey); NAT'L CONFERENCE OF STATE LEGISLATURES, AN OVERVIEW OF COLORADO'S PRETRIAL RELEASE REFORMS 1-2 (2013), http://www.ncsl.org/Documents/CJ/ColoradoPretrialRelease.pdf (addressing changes made by H.B.12-1236 enacted on May 11, 2013).

87. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 86, at 1.

88. *See* McCoy, *supra* note 72, at 135.

89. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-5.1 (4th ed. 2015).

study to determine whether defendants are better off having prosecutors at bail hearings where defense counsel is absent versus hearings with neither side represented. Nonetheless, there is reason to doubt that the presence of prosecutors has either substantive or perceived benefits to defendants. Indeed, the presence of prosecutors at bail hearings, when defense counsel is not present, may make matters worse for defendants both substantively and in terms of defendants' perceptions of fairness.

There is some evidence that the presence of prosecutors has not improved the pretrial process for poor defendants based on the fact that pretrial outcomes have deteriorated in the past thirty years, even as the Prosecution Function Standards have increasingly tasked prosecutors with pursuing pretrial justice for defendants.[90] In part, it is possible that prosecutors are not familiar with the pretrial provisions of the Prosecution Function Standards. Few law school courses would introduce future prosecutors to these Standards, and few District Attorney's Offices or CLE programs would teach about this part of prosecutorial ethics, usually focusing instead on other areas where they might run into trouble with a court such as discovery or relations with the court and the media.[91]

Moreover, most of the functionaries in the pretrial process—magistrates, jailers, and prosecutors—have probably not considered the unfairness of locking up people solely on account of poverty, especially when those people are so often mentally and physically ill (which is again often a function of poverty as well).[92] A more cynical view of the process is one in which these functionaries, while recognizing the harsh consequences for the poor, might be motivated by a concern about the effects that a higher rate of pretrial release would have on court dockets and prosecutor's conviction rates. Nothing encourages (one might say, coerces) people to plead guilty like pretrial detention, especially when a

90. *Id.*; COUNCIL OF ECON. ADVISERS, *supra* note 52, at 6-7.

91. A review of the training courses offered by the National Association of District Attorneys found no upcoming courses offered in neither ethical training nor any category of courses dedicated specifically to ethical training. *See All Upcoming Courses*, NAT'L DISTRICT ATTORNEYS ASS'N, http://www.ndaa.org/upcoming_courses.html (last visited July 24, 2016). The Association of Prosecuting Attorneys offers an upcoming course on "Ethical Issues in Handling a High Profile Case" but no other ethics course. *See Events and Training*, ASS'N PROSECUTING ATTORNEYS, http://www.apainc.org/events-and-training (last visited July 24, 2016); *see also* Jamien A. Arvie, *Prosecutorial Misconduct: When Justice Is Seen as a Chess Game, the Pawns of Professional Responsibility and Ethical Standards Are Sacrificed*, 40 S.U. L. REV. 185, 191 (2012) (noting that few law schools offer courses on prosecutorial ethics).

92. David Templeton, *Evidence Mounting That Poverty Causes Lasting Physical and Mental Health Problems for Children*, PITT. POST-GAZETTE (Nov. 24, 2013, 11:39 PM) http://www.post-gazette.com/news/health/2013/11/25/CHILDREN-and-POVERTY/stories/201311250024.

guilty plea will result in immediate release on "time served."[93] The coercive and depressing effect of being held in jail can also cause even innocent people to plead guilty[94] or to face such obstacles to assisting in their defense that they are wrongly convicted.[95]

Foote believed such coercive effects were not intended consequences but also not exactly unforeseen.[96] Prosecutors may simply be unfamiliar with the protective role expected of them by the Prosecution Function Standards, or they may be motivated by institutional concerns or inertia. Either way, there are reasons to believe most prosecutors do not see protecting the defendant's rights and promoting pretrial release as matters of their concern.[97]

This is not to say that prosecutors do not view themselves as "ministers of justice," which they surely do. However, they may view as primary responsibilities their role protecting victims and keeping the public safe, as well as obtaining punishment for wrongdoers. They may view pretrial detention as a helpful tool in obtaining those objectives. Money bonds are assumed to create incentives for a defendant to return to court, so cash bail is viewed as a logical tool to prevent a person from fleeing.[98] Thus, a person with the money to gain freedom is incentivized to return for fear of incurring a huge financial liability.[99] Releasing a defendant absent a money bond, according to the common reasoning, provides no incentive for that person to return to court. This logic fails to take into account that the failure to appear for court will result in the issuance of a warrant and greater punishment upon re-arrest, which is a considerable deterrent.)[100]

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93. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84-85 (2011) (addressing prosecutorial overcharging as a means of coercive plea bargains); *see* Colbert, *supra* note 3, at 387-88; *see also* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 155, 164-65 (2012) (discussing the right to counsel in plea negotiations and noting that prosecutors have incentives to persuade defendants to accept guilty plea offers).

94. Meagan Flynn, *Harris County Leads Country in Exonerations Again*, HOUS. PRESS (Feb. 3, 2016, 12:05 PM), http://www.houstonpress.com/news/harris-county-leads-country-in-exonerations-again-8125943; *see also* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty (arguing that the plea bargaining system itself is "one-sided" and noting the disadvantage faced by defense counsel whose clients are detained on high bail amounts, including "limited visiting hours and other arduous restrictions imposed by most jails").

95. *See* Leipold, *supra* note 62, at 1130.

96. *See* McCoy, *supra* note 72, at 138.

97. *See infra* text accompanying notes 107-10.

98. *See* McCoy, *supra* note 72, at 139.

99. *Id.*

100. *Id.*

If one operates under the traditional logic of a money-based regime, then it seems rational to require a low money bond for a minor offense, while a serious offense justifies a high money bond. All defendants are treated equally when bond is set according to a bail schedule—the same amount of money will be set on all defendants with the same profile of charged offense and criminal history, or so the logic goes.

In some cases, prosecutors argue for higher money bonds in cases they consider more serious, not because they believe that amount of money will ensure the defendant will return to court but as a means of pricing a person out of gaining his or her freedom.[101] This, of course, turns the bail process on its head. Rather than determining the conditions on which a person may be safely *released*, the prosecutor, as well as the judge, may actually seek to determine a bond amount that will keep a person *in custody*.[102] The detention of over 170 defendants on $1,000,000 bonds in the Waco biker case is a stark example of this practice,[103] but it happens every day in courtrooms around the country. Preventive detention may in fact be warranted in some cases, but setting a money bond of any amount is not an effective tool for preventive detention. The setting of a money bond is a conditional order of release upon payment, and rich defendants can gain their release even when the bond is set very high, as was true in the case of the multi-millionaire and accused murderer, Robert Durst.[104] Thus, using high money bonds as a means of preventive detention exposes the public to risk by allowing defendants with financial means to be released despite their possible danger to the community.[105] The point here, however, is that prosecutors

101. COUNCIL OF ECON. ADVISERS, *supra* note 52, at 1, 7.

102. *Id.* at 7.

103. *See* Naomi Martin, *Bail Set at $1 Million for Waco Biker Gang Shooting Suspects*, DALL. MORNING NEWS (May 18, 2015, 7:01 AM), http://crimeblog.dallasnews.com/2015/05/in-waco-shooting-192-accused-biker-gang-members-arrested.html.

104. *See* Polly Mosendz and Reuters, *Robert Durst's History of Skipping Bail Comes Back to Haunt Him*, NEWSWEEK (Mar. 23, 2015, 2:16 PM), http://www.newsweek.com/robert-durst-jinx-denied-bail-316108 (noting that in an HBO documentary, *The Jinx*, Durst is filmed saying $250,000 in bail, which he forfeited when he fled, was "chump change"); Catherine E. Shoichet & Elliott C. McLaughlin, *Robert Durst Denied Bail; New Details Emerge in Case*, CNN (Mar. 24, 2015, 4:26 PM), http://www.cnn.com/2015/03/23/us/robert-durst-investigation (showing, in the HBO documentary, Durst say, "[y]ou can't give someone charged with murder bail because they're going to run away, of course[,] . . . [g]oodbye, $250,000[,] . . . [g]oodbye, jail[,] . . . I'm out").

105. A man accused of murdering his girlfriend in view of her children in Houston, Texas, gained pretrial release in a matter of hours after his arrest when his family posted a $50,000 bond by paying a bondsman about ten percent. Within two weeks, the man had been rearrested for allegedly killing his aunt, who had posted his bail, and shooting his cousin in the head. *See* Stacy Morrow, *Attorney for Suspect in Willowbrook Mall Shooting to Withdraw from Cases*, KHOU (Feb. 16, 2015, 6:48 PM), http://www.khou.com/story/news/crime/2015/02/16/attorney-for-suspect-

have grown accustomed to seeking money bonds on a scale of low to high according to their intuitions about risks, without necessarily considering the implications of this practice.[106]

The presence of prosecutors who may seek prohibitively high money bonds as a means to attempt preventive detention put political pressure on judges to agree. According to Chris Flohr, the Director of the Lawyers at Bail Project in Baltimore, Maryland, when prosecutors are present at busy bail dockets, they rarely speak out.[107] "However, when they do," says Flohr, "it often puts the judge in a difficult position because they typically are concerned with a criminal defendant getting out and doing more harm."[108] A judge who disagrees and imposes a bail amount the person can afford runs the risk that the defendant will in fact commit a violent act while out on release.[109] Says Flohr, "[i]f that does happen, then someone will look at the record and see that the judge did not agree with the Prosecutor's recommendation."[110]

The spectacle of a judge and prosecutor deciding a person's fate—passing on the issue of probable cause and how much money it will cost to go free—without any attorney there to defend the person must be disheartening. One-sided bail hearings must lead people to believe the criminal justice system is stacked against them. One controlled study gives us some insight on bail hearings with and without defense attorneys.[111] It found that defendants who were provided counsel at bail hearings (where prosecutors rarely participate) fared significantly better than a similar group of defendants who are not provided with counsel.[112] One interesting aspect of this study, however, was that defendants who had counsel also reported greater satisfaction with the process, including a sense that they were treated respectfully by the judge, and that the judge had considered a great deal of information in making the bail decision.[113] This stands to reason since lawyers facilitate communication with a judge, and such effective communication between an unrepresented person and a judge does not and should not (for fear of unintentional self-incrimination)

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106. COUNCIL OF ECON. ADVISERS, *supra* note 52, at 7, 8.

107. Email from Chris Flohr to Sandra Guerra Thompson (Feb. 14, 2016) (on file with author).

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* Colbert et al., *supra* note 2, at 1749.

112. *Id.* at 1752-56.

113. *Id.* at 1758-61.

occur.[114] Having prosecutors at a bail hearing does not improve the communication between the defendant and the judge, as prosecutors are ethically barred from speaking directly to an unrepresented defendant.[115] At a one-sided hearing with a prosecutor and no defense attorney, defendants with relevant information for the judge can do one of two things: either the judge does not hear the defendant's relevant information, or the defendant attempts to communicate with the judge directly, often making incriminating statements.[116] The presence of prosecutors at a hearing at which defendants will frequently incriminate themselves in an attempt to act on their own behalf underscores the patent unfairness of a one-sided hearing.[117]

In contrast, a bright-line rule barring prosecutors from bail hearings in the absence of defense counsel might push jurisdictions in the direction of providing counsel at bail hearings, which has been shown to have beneficial effects for defendants and the entire justice system.[118] Moreover, prosecutors' offices will likely provide training for new prosecutors on ethical mandates (such as the *Brady* rule) and ethical prohibitions such as this, whereas other general guidelines outlining proper considerations may not be taught in training courses.[119] As a practical matter, in jurisdictions in which defense counsel is not provided for indigent defendants at bail hearings, prosecutors will simply not be assigned to work at those hearings, so there is little risk of violating the rule.

V. CONCLUSION

The idea that prosecutors can act as surrogates in protecting the pretrial rights of the unrepresented accused has proven to be a fallacy.[120] The same document cannot pronounce that prosecutors have an ethical duty to ensure the fair administration of justice *and* that it is ethical for prosecutors to participate in a patently unfair hearing. The ABA would do well to consider amending the Prosecution Function

114. *See id.* at 1760 ("One advantage of having a lawyer at the bail review hearing is that the lawyer is the conduit through which information flows to the court.").

115. *See supra* note 40 and accompanying text.

116. *See* Colbert et al., *supra* note 2, at 1726.

117. *Id.* at 1726-27.

118. *See id.* at 1752-57 (citing a reduced demand for jail bed space as a result of the improved outcomes for defendants).

119. *See, e.g.*, COMM. ON THE FAIR & ETHICAL ADMIN. OF JUSTICE, DIST. ATTORNEYS ASS'N OF THE ST. OF N.Y., THE RIGHT THING 15-17 (2015), http://www.daasny.com/wp-content/uploads/2015/07/2015-Ethics-Handbook.pdf.

120. *See supra* Part IV.

Standards. Defendants may be better served at bail hearings where only a magistrate is present, as compared to one where a magistrate and a prosecutor are present but defense counsel is absent. Ideally, all jurisdictions would provide counsel at bail hearings to all defendants, in which case it would be appropriate for prosecutors to appear as well. Until then, however, the Prosecution Function Standards should take a more realistic view of the travesty of one-sided bail hearings and ban this practice.

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