

The Evolution of Pretrial Detention Law: a Comparative Study

Compiled and Translated by Ira Belkin, Chi Yin, Allen Clayton-Greene, N. Elias Blood-Patterson



Acknowledgments

This book is the product of a multi-year project undertaken by the U.S.-Asia Law Institute at New York University School of Law to work with Chinese and international experts on criminal justice reform in China. This volume focuses on the topic of pretrial detention and release. During 2013 and 2014, we convened a series of workshops in several locations in China and invited experts from the United States and Taiwan to share their experiences with Chinese counterparts. The discussions stimulated by the workshops were valuable and important and we thought that it would be useful to share the information we learned with a broader audience. To that end, we gathered the materials in this book, translated the Chinese articles into English and the English materials into Chinese so that scholars and practitioners literate in either language could access the materials.

We could not have convened the workshops and completed this book without help from scores of partners who shared their time and their expertise with us. Space does not permit us to name all those who participated in our workshops and contributed their ideas to this project. However, we would be remiss if we did not express special thanks to the following experts who participated in our workshops and contributed to this book: Hon. Joan M. Azrack, United States District Court, Eastern District of New York; Hon. John Gleeson, United District Court (Ret.), Eastern District of New York; Hon. Steven M. Gold, United States Magistrate Judge, Eastern District of New York; Peter Kiers, Director for Operations of New York City Criminal Justice Agency (ret.); Lan Xiangdong, Chief Procurator of the Eastern District of Beijing, China; Dan Wei, Senior Researcher of the Research Institute of Prosecutorial Theories of The Supreme People's Procuratorate of People's Republic of China; Barry Weiner, Chief Federal Probation Officer, United States District Court, District of Rhode Island (ret.); Professor Song Yinghui, Vice Dean of the Criminal Law Science Research Institute of Beijing Normal University, Professor Bi Cheng, Dean, Police College of Northwest University of Political Science and Law; Professor Bi Xiqian, Vice Dean, Investigation College of People's Public Security University of China; Professor Bian Jianlin, Director Procedural Law Institute of China University of Political Science and Law; Professor Chen Guangzhong, dean emeritus China University of Political Science and Law; Professor Chen Weidong, Renmin University of China; Professor Fan Chongyi, director emeritus of the of the Procedural Law Institute of China University of Political Science and Law; Professor Feng Xue, Police College of Northwest University of Political Science and Law; Professor Gao Mingxuan, dean emeritus, Criminal Law Science Research Institute of Beijing Normal University; Professor Gu Yongzhong, Vice Dean, Procedural Law Institute of China University of Political Science and Law; Professor Jia Yu, President, Northwest University of Political Science and Law; Professor Li Ming, Vice Dean, Guangzhou University School of Law; Professor Liu Fangquan, Fujian Normal University Law School; Professor Wang Xiumei, Criminal Law Science Research

Institute of Beijing Normal University; Ms. Katherine Wilhelm, the Ford Foundation,; Professor Wu Hongyao, Procedural Law Institute of China University of Political Science and Law; Mr. Xie Pengcheng, Vice Director and Researcher of the Research Institute of Prosecutorial Theory of The Supreme People's Procuratorate of People's Republic of China; Professor Zhao Bingzhi, Dean of the Criminal Law Science Research Institute of Beijing Normal University; Professor Zuo Weimin, professor of Sichuan University Law School; Professor Yang Yujuan, Public Security University.

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Preface

Jerome A. Cohen

Like its already-published companion volume on police interrogation of criminal suspects, this innovative two-language analysis of the different ways the People's Republic of China (PRC), Taiwan and the United States have sought to cope with the dilemmas of pre-trial criminal detention focuses on some of the most fundamental problems of individual freedom. How to protect detained persons against the arbitrary exercise of government power without unduly limiting the capacity of the state to protect society against antisocial behavior is a universal challenge.

In every political system the power to detain is the power to destroy human life. Of course, the criminal process is not the only way that states exercise their detention powers. As a substitute for or evasion of criminal procedures, states often resort to administrative detention to enforce the law in fields as diverse as mental illness, immigration, drug addiction and minor misconduct. Certain civil proceedings can also result in coercive confinement. As infamous Chinese, Taiwanese and American experiences have illustrated, even in the modern era, insecure governments sometimes extend military detentions to those who are ordinarily not within military jurisdiction.

Yet the formal criminal process is understandably the cynosure of attention amid every country's concern for civil liberty. This volume demonstrates the critical importance of pre-trial detention in that process. It explains not only the many difficulties that pre-trial detention policies and practices have encountered in striking the right balance between individual rights and the broader interests of society and government, but also the progress that has been made in the pre-trial detention arrangements of the jurisdictions that are the main subject of discussion.

I confess to a personal interest in the national stories presented here. As a prosecutor in Washington, D.C. early in my career, it was my task to interview police and the suspects they brought in every morning in order to decide whether to recommend arrest and, if so, whether to suggest bail or detention. Later, as a teacher of comparative criminal law and procedure, I followed with great interest how the development of democracy in Taiwan resulted in shifting from the prosecution to the courts the power to approve criminal detention. I still recall, though it was years ago, attending a judicial hearing in Taiwan in which a prosecutor, a defense lawyer and a detained suspect all debated before the judge the wisdom of continuing the suspect's detention during the remainder of his trial. And, of course, as a scholar specializing in the PRC's criminal justice system, I shared my colleague Ira Belkin's excitement when we learned that the 2012 amendments to the PRC's *Criminal Procedure Law* ("**CPL**") would introduce a provision authorizing prosecutors to review the necessity of continuing the detention of newly-arrested suspects.

To be sure, as made clear by Professor Belkin's splendid introduction, Professor Dan Wei's interesting preface and the thoughtful contributions to this volume of the other respected Chinese experts, much still remains to be done in both legislation and practice to bring China's pre-trial detention procedures up to international standards. Presumably this is one of the factors that has

delayed PRC ratification of the International Covenant on Civil and Political Rights, which it signed almost two decades ago. The many decisions concerning China of the United Nations Working Group on Arbitrary Detention (“**WGAD**”) also provide an ample basis for relevant law reform.

My particular hope is that China’s National People’s Congress (NPC), in its next amendments to the CPL, will enable criminal suspects to challenge pre-trial detentions in court, especially those that rest upon erroneous interpretations of national legislation. Perhaps the most blatant distortion of legislative intent is the long-standing police practice of giving themselves the power to detain all suspects for up to thirty days before requesting procuracy approval of a formal arrest warrant.

I am confident that this book’s groundbreaking research, comprehensive commentary and imaginative proposals will stimulate further law enforcement progress in China, Taiwan and the United States. NYU Law School’s US-Asia Law Institute is pleased to sponsor its publication.

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Contributing Authors

I. CHINESE AUTHORS

BIAN Jianlin

BIAN Jianlin is the Dean of the Procedural Law Research Institute of China University of Political Science and Law (CUPL), and the supervisor for doctoral students of procedural law at CUPL. He holds a J.S.D. in procedural law obtained from CUPL. In previous years, he has also headed the Institute of Government by Law and was the Vice Dean of Graduate Affairs for CUPL. His published books include *The Criminal Justice System: Theory and Practice* (刑事起诉制度的理论与实践) and *Modern Criminal Prosecution* (刑事诉讼的现代化), among others.

CHEN Yu-Jie

CHEN Yu-Jie is a Taiwanese lawyer and a current visiting scholar at Columbia University's Weatherhead East Asian Institute. She received her J.S.D. and LL.M. degrees from New York University School of Law. She also holds an LL.M. and LL.B. from National Chengchi University in Taiwan. Yu-Jie has had extensive experience as a research scholar for the U.S.-Asia Law Institute of NYU School of Law, where she focused on criminal justice and human rights developments in Taiwan and China. Prior to that, she served as a researcher and advocate for a non-governmental organization, Human Rights in China. She has also practiced in the Taipei-based international law firm Lee and Li.

DAN Wei

DAN Wei is a professor and senior researcher of the Institute for Procuratorial Theory of the Supreme People's Procuratorate of China and a deputy editor in chief of Chinese Criminal Science Journal, deputy secretary-general of China Prosecutor's Association. Dr. Dan Wei's research focuses on the comparative study on the criminal laws. He received his J.S.D. degree from Wuhan University in 1999 and has published 5 books and 50 articles in the field of criminal justice.

LAN Xiang-Dong

LAN Xiang-Dong, J.S.D., is a native of Suichang township in Zhejiang Province. Currently, he is the head of the People's Procuratorate of Dongcheng District in Beijing. In 1991, LAN received his L.L.B. from the law department of Minzu University of China; after which, in 2001, he obtained an LL.M. from Peking University; ultimately earning a J.S.D. in 2015 from China University of Political Science and Law. Since he began working in the procuracy in 1991, Lan has since worked for the People's Procuracy Office in Beijing in Fengtai District, Huairou District, and most recently Dongcheng District. Over the years, he has written on criminal procedure as well as prosecutorial theory and practice in such Chinese legal publications as "Law Science Magazine," "People's Procuratorial Semimonthly," and "Chinese Criminal Law Studies," among others, collectively publishing over 20 articles. He also edited a collection of essays in translation,

titled “Excellence and Mediocrity: Research on the System of Reward and Sanction for United States Prosecutors”

WANG Ran

WANG Ran, J.S.D., is a native of Jining, Shandong province and currently heads the Research Institute of the People’s Procuratorate of Dongcheng District in Beijing.

LI Hongliang

LI Hongliang is a graduate of Southwest University of Political Science and Law (2009). Currently, he serves as a prosecutor at the People’s Procuratorate of Huadu District in Guangzhou, where he works for the Department of Investigation Supervision. In recent years, from 2011 to 2014, the Procuratorate District Office has recognized him annually for his exemplary empirical research. He was also recognized as one of the ten best prosecutors of Guangzhou in the area of investigation supervision. Many of his articles have been published by national or provincial publications.

LIN Lan

LIN Lan is Chief of Investigation Supervision Unit and Chief Procurator at People’s Procuratorate of Luogang District in Guangzhou. She once won the title of “Top Ten Public Prosecutors in Guangdong Province”, and was a candidate for the award of “National Top Ten Public Prosecutors”.

LIN Jun-Yi

LIN Jun-Yi, currently a Grand Justice of Judicial Yuan in Taiwan, received his J.S.D. degree from National Chengchi University. Previously, he served as the chief judge of Shilin District Court in Taiwan, as the head of Criminal Branch of the Judicial Yuan, and also the Justice of the Taiwan High Court (intermediate appellate court). His published works include *Introduction to Criminal Procedure Law* (刑事诉讼法概论), and *Procedural Justice and Litigation Economy*, and others.

SHANGGUAN Chunguang

SHANGGUAN Chunguang, J.S.D., is currently an Assistant Professor at the National Prosecutors College of the PRC. Previously, he was the vice director and lecturer at Zhongnan University of Economics and Law’s Research Institute on the Investigation of Criminal Abuse of Public Office. His research interests include theory and practice of the investigation of criminal abuse of public office, procuratorial theory, theory and practice of procedural law, and the law of evidence.

SONG Ying-Hui

SONG Ying-Hui is a professor and supervisor for doctoral students at the Department of Criminal Law and Science of Beijing Normal University. He holds a J.S.D. in procedural law from CUPL. He was once the vice-director and executive director of Procedural Law Institute and the chief of Criminal Procedural Law Institute at CUPL. His published works include *Purposes of Criminal*

Litigation, Introduction to Criminal Procedure Principles, etc. His major research interest is in the field of criminal procedure law and evidence.

SUN Han-Mei

SUN Han-Mei, LL.M, is the head of the Case-handling Section of Second Division of Investigation Supervision in People's Procuratorate in Guangdong Province. Through directly handling many important cases, she has a wealth of practical experience. Along with this, her research is grounded in a deep knowledge of legal theory. She has published multiple articles in several major law journals, such as *Investigation Supervision Guidelines*, *Sun-Yat-Sen University Law Review*, and *Rule of Law Studies*.

WANG Zhen-Hui

WANG Zhen-Hui, a native of Xinji township in Hebei Province, Assistant Professor of Procedural Law Institute of China University of Political Science of Law, and Research Fellow of the Collaborative Innovation Center of Judicial Civilization. He obtained his LL.B degree from Hebei University of Economics and Business, School of Law, LL.M and J.S.D. from CUPL, majored in criminal procedure law. He worked as a postdoc at Teaching and Research Center of Criminal Law. His research fields include criminal procedure law and criminal justice system.

WU Ming-Lai

WU Ming-Lai, LL.M, is a member of the Procuratorial Committee of People's Procuratorate of Guangdong Province and the head of the Second Division of Criminal Investigation. Previously, he has led the Second Division of Prosecution and, subsequently, the Second & First Division of Investigation Supervision. Across his career, he has accumulated extensive experience in handling procuracy work and is an expert in legal theory. He is also the executive member of the council for Guangdong Province Law Society and has published multiple articles in several core law journals.

II. ENGLISH-LANGUAGE AUTHORS

Claire Brooker

Claire Brooker is a criminal justice system analyst specializing in pretrial justice. She served for nearly eight years as staff to the Jefferson County, Colorado Criminal Justice Coordinating Committee. Ms. Brooker's work has primarily focused on helping criminal justice decision makers understand and improve bail administration and pretrial processes to better align them with legal and evidence-based practices.

Michael Jones

Dr. Jones is the Director of Implementation for the Pretrial Justice Institute (PJI), where he has worked since 2010. At PJI, he directs the Bureau of Justice Assistance's Smart Pretrial Demonstration Initiative, assists states and local jurisdictions in understanding and implementing

more legal and empirically-based pretrial policies and practices by designing strategic, system-change initiatives. Mr. Jones also works as a technical resource provider for the National Institute of Corrections, and previously served as the Criminal Justice Planning Manager for Jefferson County, Colorado for nine years.

Peter Kiers

Peter Kiers is the recently retired Director of Operations for the New York City Criminal Justice Agency (CJA), the pretrial agency for the five boroughs of New York City. Mr. Kiers is the immediate past-President of National Association of Pretrial Services Agencies, and has served on the NAPSA Board in various capacities since 2000. He also served as the Chairman of the NAPSA Education Committee.

Christopher T. Lowenkamp

Christopher Lowenkamp is the Social Science Analyst at Administrative Office U.S. Courts, and the Lecturer at University of Missouri-Kansas City. He was once the Director of Center for Criminal Justice Research in University of Cincinnati, and the Probation Administrator at Office of Probation and Pretrial Services.

Mike McConville

Mike McConville is an Emeritus Professor at the Chinese University of Hong Kong, where he is a leading socio-legal scholar specializing in empirical research. In the course of his career, he has researched and written on such topics as police interrogation, legal aid and assistance, plea bargaining, trial by jury, the working practices of estate agents, and legal history. He has also undertaken advisory work in countries undergoing major social transition such as Latvia, Malawi, Turkey, and Peru.

Timothy Schnacke

Timothy Schnacke is the Executive Director of the Center for Legal and Evidence-Based Practices. It's an institute focuses on research and education about pretrial release and pretrial detention. Mr. Schnacke used to work to improve the administration of bail in Colorado, starting with the Jefferson County Bail Project, and ultimately helping with the enactment of a new criminal bail statute based on best practices for achieving pretrial justice.

Barry Weiner

Barry Weiner is the Assistant Director of Rehabilitative Services at Rhode Island Department of Corrections (RIDC). He was once the Associate Director of Community Corrections at RIDC, the Court Appointed Special Advocate by Rhode Island Family Court. He was also a Subject Matter Expert of Yale Law School and NYU Law School to conduct bail reform workshops in various cities in China.

Marie VanNostrand

Marie VanNostrand is the Justice Project Manager at Luminosity, a criminal justice consulting firm. Before cofounding Luminosity, Ms. VanNostrand gained 15 years of experience serving as a probation and parole officer, a pretrial services agency manager and a criminal justice analyst. Her goal was to reshape the pretrial justice system by developing both risk measurement and risk management strategies to ensure equal justice for all.

Organizations

The Laura and John Arnold Foundation (LJAF)

LJAF's core objective is to address our nation's most pressing and persistent challenges using evidence-based, multidisciplinary approaches, in order to create functional solutions that target the root causes. Its strategy is to systematically examine areas of society in which barriers to human progress and achievement exist, and then applies a rigorous and comprehensive entrepreneurial problem-solving approach to these areas. LJAF's Criminal Justice initiative aims to reduce crime, increase public safety, and ensure the criminal justice system operates as fairly and cost-effectively as possible.

For more information, see:

[<http://www.arnoldfoundation.org/about/>
<http://www.arnoldfoundation.org/initiative/criminal-justice/>]

Pretrial Justice Institute

The Pretrial Justice Institute's core purpose is to advance safe, fair, and effective juvenile and adult pretrial justice practices and policies that honor and protect all people. Institute works to achieve its core purpose by moving policymakers and justice system stakeholder to adopt and implement practices and policies through: educating key stakeholders, moving stakeholders to action, working in key states to advocate for change, developing messages, stories, and media coverage in support of change, and connecting local jurisdictions to assistance.

For more information, see:

[<http://www.pretrial.org/about/>]

Vera Institute of Justice

Vera Institute of Justice work to tackle the most pressing injustices of our day - from the causes and consequences of mass incarceration, racial disparities, and the loss of public trust in law enforcement, to the unmet needs of the vulnerable, the marginalized, and those harmed by crime and violence. Vera embraces new tools—like the power of mining big data to unearth injustice, the potential of competitions to seek out the most motivated leaders, and the importance of communications. Underlying this unique approach is an abiding optimism that even the most troubled systems can transform. The result: Justice systems that ensure fairness, promote safety, and strengthen communities.

For more information, see:

[<https://www.vera.org/about>]

Contents

Acknowledgments

Preface — Jerome Cohen

Biographical Information of Contributing Authors

Table of Contents

Explanatory Notes on the Translations

Introductions

Ira Belkin

Dan Wei

I. U.S. Pretrial Release History and Practice

Chapter 1. The History of Bail and Pretrial Release, by Pretrial Justice Institute

Chapter 2. Fair Treatment for the Indigent: The Manhattan Bail Project, by VERA Institute of Justice

Chapter 3. History of Bail in the United States and Risk Assessment in Bail, by Peter Kiers

Chapter 4. Pretrial Investigation and Pretrial Service Supervision, by Barry Weiner

Chapter 5. Assessing Pretrial Risk Without a Defendant Interview, by Arnold Foundation

Chapter 6. Laws and Cases

6.1. NYS CPL 510

6.2. Federal Rule 5: Initial Appearance

6.3. Federal Statute: Section 3142, 3145, 3146, 3147, 3156

6.4. U.S. v. Salerno

6.5. N.Y. v. Michele Maxian

II. Taiwan Pretrial Release History and Practice

Chapter 7. Detention Reform: Taiwan's Experience, by Chen Yu-Jie

Chapter 8. Judicial Protection of Criminal Defendants' Human Rights Following the Reform of Taiwan's Detention System, by Lin Jiun-Yi

Chapter 9. Laws and Cases:

9.1: The Taiwan Code of Criminal Procedure

9.2. The Criminal Speedy Trial Act

9.3: Taiwan Law of Compensation for Wrongful Detentions and Executions

9.4: Matters for Prosecutors to Consider in the Conduct of the Criminal Procedure Law

9.5. Matters for the Court to Consider When Implementing the Code of Criminal Procedure

9.6: Matters for Courts to Consider in the Conduct of the Criminal Procedure Law Amendments Pertaining to Enforcing and Terminating Pretrial Detention

9.7. Taiwan Judicial Yuan Decision No. 329

9.8. Taiwan Judicial Yuan Decision No.665

III. China Pretrial Release History and Practice

Chapter 10. “The Problem of Pretrial Detention” , excerpt from Criminal Justice in China – An Empirical Study, by Mike McConville, Satnam Choongh, and etc.

Chapter 11. Unresolved Questions Regarding Pretrial Detention and Reforming the Role of Detention Center-Based Prosecutors: Establishing a System to Review the Necessity of Pretrial Detention, by Dan Wei

Chapter 12. On Improving the Pretrial Detention System in China, by Bian Jianlin

Chapter 13. Alternatives to Detention and Support Systems for Juveniles Awaiting Trial — An Empirical Study, by Song Yinghui, Shangguan Chunguang, Wang Zhenhui

Chapter 14. Prosecutorial Review of the Necessity of Pretrial Detention, by Lan Xiangdong, Wang Ran

Chapter 15. Consideration of “Danger to the Community” as a Factor in Approving Daibu: An Empirical Analysis of its Effectiveness and Some Relevant Policy Proposals, by Li Hongliang

Chapter 16. Redefining the Power of Daibu: Improving the System of Checks and Balances in the People’s Republic of China, by Lin Lan

Chapter 17. An Empirical Analysis of the Review of “the Necessity of Detention”, by Wu Minglai, Sun Hanmei

Chapter 18. Laws:

18.1. Articles 93, 94 of the 2012 CPL

18.2. SPP Litigation Rules of the People’s Procuratorate (Excerpt)

18.3. SPP’s provisional guidelines On Handling Cases of Reviewing the Necessity of Detention

Explanatory Notes Regarding the Translation of Chinese Legal Terms

Balancing leniency and severity 宽严相济 (kuānyánxiāngjì)

The phrase, “balancing leniency and severity,” represents a key crime control policy of the Chinese Communist Party. The phrase is partially explained by reference to its counterpart: “strike hard” (严打), in which particular classes of crime or criminals are singled out for widespread, swift and severe punishment. So-called ‘strike hard’ campaigns were historically a core component of the CCP’s approach to crime, until the 2000s when the CCP, led by Hu Jintao, began to place greater emphasis on achieving a “harmonious society” (和谐社会), and the phrase “balancing leniency and severity” was adopted to demand greater nuance and discrimination in the application of criminal punishment. As elucidated in opinions issued by the Supreme People’s Procuratorate and the Supreme People’s Court, crimes and offenders subject to lenient treatment include crimes committed by juveniles, young adults or elders, amongst others. Crimes and offenders subject to severe punishment include crimes against state security, public safety, as well as crimes committed by terrorist or organized crime groups, etc.¹

Dàibǔ 逮捕

Dàibǔ, often translated as “arrest,” is in fact a procedure unique to Chinese criminal procedure. In daibu, Chinese prosecutors confirm, with respect to a person who is usually already in police detention, that there is sufficient evidence to charge the suspect with a criminal offense. As a result, that person therefore continues to be detained. Under Article 93 of the 2012 amendments to China’s *Criminal Procedure Law* (“CPL”), once dàibǔ has been approved, the prosecutor may review the necessity of detention and recommend a release, either with a guaranty pending trial (see further below) or to residential surveillance (see further below). Dàibǔ is explained in more detail in the Introduction to this volume. As Professor Bian Jianlin explains in Chapter 12, the term is further clouded by confusion within China about the meaning of “dàibǔ,” with some people conflating it with detention and others using it in a manner closer to the sense of an “arrest.” In this book, because of its unique nature and the fundamental difference between it and the concept of “arrest” in Anglo-American jurisprudence, we have chosen to simply use the Chinese word, “dàibǔ,” rather than provide an inaccurate and potentially misleading English language translation.

Jūliú 拘留

Jūliú is a compulsory measure the investigating agency may use to keep a criminal suspect in custody for up to 37 days following the initial interrogation of the suspect. Jūliú is most often translated as “detention” or “criminal detention.” When necessary for clarity, this book translates “jūliú” as detention. The Chinese word, jīyā (羁押) is not used in the CPL but colloquially means detention or custody. This book uses both “detention” and “custody” to refer to jīyā. When it is

¹ For a more detailed treatment, see, e.g. Margaret Lewis, “Leniency and Severity in China’s Death Penalty Debate,” (2011) 24(2) *Columbia Journal of Asian Law*, p.303.

important to distinguish between jūliú and jīyā we use the Chinese word “jūliú” for the compulsory measure authorized by the CPL and “detention” for the state of being detained or in custody.

Ǒu fàn (偶犯)

Usually translated as “casual offender,” this phrase refers to first time offenders who commit a crime because an opportunity emerged, and they took advantage of it. The phrase might be understood in contradistinction to a phrase like (惯犯) which refers to a “habitual offender”. For example a person who uses a malfunctioning ATM to withdraw more money than they requested would be an 偶犯.

Prosecutors 检察院 (jiǎncháyuàn)

In this book, we use the term “prosecutor” or “prosecutor’s office” for the Chinese terms jiǎncháguān (检察官) and jiǎncháyuàn (检察院), respectively. “Procurator” or “Procuracy” or “procuratorate” is the more common translation. However, since this nomenclature is unfamiliar to most English language speakers, we have chosen to use the more familiar terms. Two of the main differences between Chinese procurators and prosecutors in Western jurisdictions are: 1) Chinese prosecutors have the responsibility to investigate public corruption and other cases involving government officials’ wrongdoing; and 2) in theory, at least, Chinese prosecutors are responsible to “supervise” other government agencies to make sure they comply with the law. This includes the courts themselves. Chinese prosecutors are posted at detention centers to ensure the detention center comply with the law. We refer to this group of prosecutors as “detention center-based prosecutors” or “the prosecutor’s detention center supervision division.”

Political-Legal Commissions of the Chinese Communist Party 政法委 (zhèngfǎwěi)

At every level of government there is a political-legal committee of the CCP that oversees the work of law enforcement and judicial authorities. As the name suggests, political legal committees are party organs not government agencies. In the Chinese system, these party committees have the authority to direct government authorities, including courts, to take actions, including deciding case outcomes if the committee deems it appropriate.

People’s Monitors 人民监督员 (rénmínjiāndūyuán)

People’s monitors are a relatively new innovation and they are usually appointed by prosecutors and charged with reviewing individual criminal investigations by prosecutors, usually for corruption offenses.

Residential surveillance 监视居住 (jiānshìjūzhù)

“Residential surveillance” is a form of compulsory measure that is similar to house arrest. Under Article 73 of the CPL, residential surveillance may be carried out at a designated place for those who have no fixed residence (for example their official designated address does not match their current address) or who are suspected of three categories of specific serious crimes: corruption, terrorism or endangering state security.

Release with a Guaranty Pending Trial 取保候审 (qǔbǎohòushěn)

“Release with a guaranty pending trial” is a form of compulsory measure under the CPL which a public security officer, a prosecutor, or a court may impose on criminal suspects while the case is pending trial. Two forms of guaranty are acceptable under the CPL: 1) a surety offered by the suspect/defendant; or 2) a bond paid by the suspect/defendant. The term of this particular compulsory measure is 12 months, and although sometimes translated as bail, it is sufficiently distinct from bail that we have chosen to translate it as “release with a guaranty” or “release with a guaranty pending trial.”

Introductions

Introduction

Ira Belkin²

This book is the product of a multi-year project undertaken by the U.S.-Asia Law Institute at New York University School of Law to work with Chinese and international experts on criminal justice reform challenges suggested by China's 2012 amendments to its *Criminal Procedure Law* ("CPL"). This volume focuses on the topic of pretrial detention and release, one of the primary concerns addressed by the amendments.

One of the fundamental challenges for any criminal justice system is how to deal with individuals suspected of a crime before there has been an adjudication of guilt or innocence. The power of the state to detain an individual on suspicion of committing a crime is one of the greatest powers the state has over an ordinary citizen. Under principles of international human rights and fundamental fairness, individuals who have not been convicted of a crime should be presumed innocent and not subject to any form of punishment, including incarceration, unless and until an appropriate tribunal has considered their case and determined that they are guilty and deserving of punishment. At the same time, there is a real risk to the judicial process and society when a potentially dangerous individual is released from custody. It is certainly foreseeable that some of the individuals suspected of criminal activity will abscond before their case is decided; some may even interfere with the legal process by destroying evidence or intimidating witnesses and some may commit new crimes if released while awaiting trial. Accordingly, every criminal justice system needs to have a process to determine which defendants can be released while awaiting trial, and under what conditions, and which defendants must be held in detention until their adjudication is final. The question we address in this book is how to strike the appropriate balance among these competing concerns.

The chapters in this book tell the story of how two different criminal justice systems, those in the United States, Taiwan and the People's Republic of China, address this challenge. The reason we chose to focus on this issue at this time is because China recently enacted a significant reform concerning pretrial detention as part of the 2012 amendments to the CPL. The amended CPL requires Chinese prosecutors to determine whether pretrial detention of a criminal suspect is "necessary."³ There is no question that this reform is a step forward but, as with any new legislation, it is not entirely clear how the new law will be implemented.

² Executive Director, U.S.-Asia Law Institute, NYU School of Law.

³ China is currently considering another amendment. Without commenting more broadly on the PRC's proposed *Detention Center Law* — issued for public comment by the Ministry of Public Security on June 15, 2017 — it is promising that Article 34 of the draft would create a specific mechanism for reviewing the necessity of detention.

When we at the U.S-Asia Law Institute first learned of the 2012 reforms concerning pretrial detention and release, we thought that there was an opportunity for criminal justice experts to share information about how different criminal justice systems resolve this common challenge and that we might be able to serve as a bridge between Chinese legal experts and their counterparts in other jurisdictions. During 2013 and 2014, we convened a series of workshops in several locations in China and invited experts, including judges, prosecutors, pretrial service officers, defense lawyers and academics from the United States and Taiwan to share their experiences with Chinese counterparts. During these workshops, we also demonstrated how federal pretrial service officers in the United States conduct pretrial investigations to determine the risk of flight and risk of dangerousness posed by individual defendants. We also demonstrated a mock detention hearing conducted under U.S. federal law. At the same workshops, Taiwanese experts discussed how pretrial detention decisions are made there. Chinese prosecutors, judges and other experts shared their experience implementing the new CPL.

The discussions stimulated by the workshops were valuable and important and we thought that it would be useful to share the information we learned with a broader audience. To that end, we gathered the materials in this book, translated the Chinese articles into English and the English materials into Chinese so that scholars and practitioners literate in either language could access the materials.

Chapters 1 through 6 tell the story of how, beginning in the 1960's, American legal experts began to question whether American courts were living up to the ideals of the American Constitution and the public's perception of the meaning of "presumption of innocence" and equal treatment under the law as it related to pretrial detention. In what came to be known as the "Manhattan Bail Project," researchers used a new set of empirical research tools to discover and report on how laws and procedures worked in practice. What they discovered was that poor people, and people who were members of racial and ethnic minorities, were detained in disproportionate numbers and with no apparent consideration of their risk of flight or risk of dangerousness to society. The study led to changes in the laws and procedures governing pretrial detention and release and also led to the greater use of empirical research methods to promote criminal justice reform.

Over time, United States courts and legislatures have redefined the challenge of balancing the risk that those charged with criminal offenses abscond or commit additional crimes against the presumption of innocence and the social and financial burdens of pretrial detention. In many parts of the United States, courts and the agencies that serve them, conduct evidence-based risk assessments to determine whether an individual defendant is likely to flee or commit another crime if released. The risk assessment tools are constantly updated and improved. At the same time, American courts and law enforcement agencies have developed alternatives to pretrial detention, such as electronic surveillance and monitoring by probation officers. These alternatives provide greater freedom to individuals charged with crimes while, at the same time, substantially reducing

the high financial and social costs of detention. Those who present little or no risk can be released without any restrictive conditions and continue to work, help their families and assist in their own defense. Those who present some risk may be released under some restrictive conditions such as wearing an electronic monitoring device. Only those defendants who present the greatest risk need to be detained.

Using New York City as an example, studies show that the risk assessment tool used there is 90% accurate, meaning that of the defendants released, only 10% either fail to appear in court as scheduled or commit a crime while released.⁴ New York City's approach has been replicated in some but not all of the jurisdictions in the United States. As the Arnold Foundation reports in a study reproduced in Chapter 5 reflects, not every city or state in the United States has the financial resources to hire professionals to interview every arrestee and use the kind of risk assessment tools used by New York City courts. The single greatest expense in that process is the costs associated with having a face-to-face interview with every criminal defendant to assess their risk of flight and danger to society. To remedy this cost issue, the Arnold Foundation has developed a risk assessment tool that can be used without an in-person interview of the defendant. According to this tool, the defendant's criminal history, family circumstances, employment and education circumstances and other factors have a predictive effect on whether that person will likely abscond or commit another crime if released.

With this information in hand and compared to historical empirical evidence, judges can make evidence-based decisions about whether to detain or release a defendant or whether to release a defendant with certain conditions. American principles of due process and the adversarial system require that the court give the prosecution and the defendant the opportunity to present evidence and argue for detention or release but the pretrial background investigation and the risk assessment tool permit the court to make a decision based upon facts and not just intuition.

According to the most recent statistics available in the United States, from October 2013 to September 2014, 53.9% of all the U.S. citizens charged in federal court with a felony were released pretrial. 31.2% of all felony defendants, citizen and non-citizen alike, were released.⁵ In state courts, where the vast majority of cases in the U.S. are prosecuted, roughly 60% of defendants were released.⁶

The second story this book tells is how legal reform with respect to pretrial detention and release decisions has taken place in Taiwan. As detailed in Chapters 7 through 9, until about 1997, Taiwanese prosecutors were responsible for making pretrial detention decisions. However, in that

⁴ In 2013, within New York City, 11% of individuals charged with felony arrests failed to appear in court after being released before trial (data from 2013). The rate of non-appearance for non-felony arrests has been slightly higher, at 14% (data from 2014). See "New York Criminal Justice Agency Annual Report" (2014), available at www.nycja.org/research-in-progress/#.

⁵ Federal Justice Statistics, 2014 – Statistical Tables - Table 3.2. March 2017 (bjs.gov).

⁶ Pretrial Release of Felony Defendants in State Courts, Bureau of Justice Statistics, 1990-2004, (November 2007).

year, Taiwan's Council of Grand Justices ruled that Taiwan's constitution required courts, not prosecutors, to make those determinations. Within two years, the legislature changed the law and required prosecutors to apply to the court for orders detaining suspects and gave the courts the exclusive authority to decide who should be detained and who should be released.

As a result of this major structural change giving courts the power once held by prosecutors, the rate of pretrial detention dropped dramatically without any discernable increase in the number of released defendants who failed to appear in court as required or who committed crimes while released. Interestingly, the greatest component of the change was the decline in the number of applications filed by the prosecutors for detention. Taiwanese courts continued to grant a high percentage of prosecutors' applications for detention. However, it seems that the prospect of judicial review was enough to discourage prosecutors from making unnecessary applications.

In Taiwan, during the three years before reform, 1995, 1996 and 1997, the percentage of defendants who were detained pending trial was between 10% and 12%. After the reforms went into effect, the rate dropped to between 3% and 5%. In terms of absolute numbers, the number of defendants detained during the three years before reform, 1995, 1996 and 1997 ranged from 19,122 to 21,457 per year. After reform, in 1998, the number of detainees dropped to 7,508 and since then the number has stayed between 5,000 and 6,000 per year.

The third story told by this book concerns how pretrial detention and release decisions have been made in the People's Republic of China. We begin in 1979, the beginning of the Reform era but apply a greater focus to how the 2012 amendments to the CPL are being or should be implemented.

Since the end of the Cultural Revolution and the beginning of the Reform Era in 1979, China has been engaged in an impressive project to build a society under the rule of law. As part of this project, in 1979, the People's Republic of China promulgated its first criminal law and the CPL. Over the years there have been many amendments with especially large-scale amendments to the CPL in 1996 and 2012. During each phase of legislative reform, there has been an effort to improve China's legal regime for handling the detention and release of individuals suspected of crime.

Since 1979, the CPL has provided that criminal suspects can be held by the police for investigatory detention for a specific period of time after they were placed in police custody. During that initial phase of detention, the police could act unilaterally and did not need approval from any other agency. After that initial period, however, the police would have to apply to Chinese prosecutors for permission to hold the suspect in custody under the rubric of "daibu." The prosecutors can approve "daibu" if there is sufficient evidence to charge the suspect with a criminal offense punishable by a term of imprisonment. At the same time, if prosecutors approve daibu, they simultaneously confirm the results of the police investigation and order the suspect to continue to be held in detention. There is no way to split the daibu decision into its two separate components,

for example, by confirming the investigation and then declining to order the suspect detained. The consequence of prosecutorial approval of “daibu,” then, is the detention of the suspect until the conclusion of the case, unless a subsequent release is granted. In other words, “daibu” is a formal review process conducted exclusively by Chinese prosecutors and includes a confirmation of a preliminary charging decision as well as the consequence that the defendant will be detained.

Initially, in 1979, the time limits for the police to seek approval for “daibu” were fairly strict. Article 48 of the 1979 CPL stipulated that the police must seek approval for “daibu” within 3 days and that in special circumstances that time period could be extended to 7 days. That time period proved to be difficult to apply in practice and within a short time, China launched a series of “strike hard” campaigns and suspended the time limits. By 1996, the next time the CPL underwent a major amendment, the problem of indefinite detention had become so pronounced that one of the primary goals of the 1996 CPL reform was to impose enforceable time limits on police detention.

Article 69 of the 1996 CPL limited police detention to three days, except that in special circumstances, the nature and scope of which were not defined, the time limit could be extended by one to four days and “with regard to major suspects committing crimes from one place to another, repeatedly committing crimes or committing gang crime, the time limit for submitting requests for approval may be extended to 30 days.” In practice, the police generally extend the time limit to 30 days without any recourse available to the suspect. If the police want to detain someone for a period of time longer than 30 days they then must apply to the appropriate prosecutors’ office for approval of “daibu.” The prosecutor must issue a decision to approve or reject daibu within 7 days.

For the first few years after the 1996 amendments went into effect, Chinese media reported many instances of “extended detention,” detention beyond the CPL’s stipulated time limits. In other words, many suspects were held by the police for longer than 37 days and by the prosecutors and the courts for periods longer than the CPL allotted for the consideration and adjudication of charges, respectively. There were many reported cases of individuals held for years before their cases were resolved. After a major political campaign to clean up the backlog of “extended detention” cases in 2002, the problem of extended detention was largely resolved. However, the legally stipulated time limits, which are quite generous to the authorities, remained in place. Moreover, as detailed in some of the articles included in this volume (See Dan in Chapter 11, Bian in Chapter 12), almost all suspects were detained from their initial interrogation by the police through the final outcome of their cases.

Both the 1979 and 1996 CPL provided for alternatives to detention and “daibu,” namely obtaining a guaranty pending trial and residential surveillance. However, neither version of the CPL provided for a procedure at which a determination of the appropriate form of “compulsory measure,” that is, detention, release with a guaranty, or residential surveillance, or simply release, would be

determined. It was left up to the public security authorities and the prosecutors to decide and neither had the responsibility to make a determination whether detention was “necessary.” Naturally, the police and the prosecutors made detention decisions based upon their own judgment as to what was most convenient for them and did not subject those decisions to any outside review. According to one study cited in Professor Bian Jianlin’s article, the rate of pretrial detention during the period from 1990 to 2009 was almost 94.8%. Professor Dan Wei cites official Chinese statistics showing that the rate of detention for the ten years following the 1996 CPL reform exceeded 90%.

When the CPL came up for another major revision in 2012, Article 93 was added, requiring that Chinese prosecutors review whether “detention was necessary.” No standards for making this determination were provided and no procedures were specified.

In Chapters 10 through 18, experts on the Chinese system discuss how pretrial detention and release decisions are made in China and how the reforms, including the 2012 amendments, have affected the day to day decisions in prosecutor’s offices in China. Three of the chapters (chapters, 11, 12 and 13) were authored by distinguished Chinese criminal procedure law scholars, Professor Dan Wei, a senior researcher at the Supreme People’s Procuratorate think tank, the Institute of Procuratorial Theory, Professor Bian Jianlin and his colleagues at China University of Political Science and Law, and Professor Song Yinghui and his colleagues at Beijing Normal University. Chapters 14, 15, 16 and 17 were contributed by leading prosecutors from Beijing and Guangzhou.⁷

Our Chinese contributors have defined the challenge of addressing pretrial detention in China in similar terms. Professor Dan Wei notes that pretrial detention rates in China are above 90% even though 40% of criminal defendants will, in the end, receive sentences less than a term of imprisonment. Simply as a matter of mathematics, it seems that China could release at least, 30% more defendants without any negative impact on the criminal justice process. Given that China prosecutes nearly 1 million people a year, a 30% decrease in the rate of pretrial detention would add up to about 300,000 individuals who, although charged with a minor criminal offense, could continue to work, go to school and contribute to society and support their families instead of being held in a detention facility. Moreover, that number does not include all those individuals who may be sentenced to a term of imprisonment but who pose no danger to society and no risk of flight and therefore may also be released while awaiting trial.

Professors Dan Wei (Chapter 11) and Bian Jianlin (Chapter 12) provide detailed analysis for how China has ended up with a pretrial detention system that is so over-inclusive.

⁷ Chapter 10 by Professor Michael McConville and his colleagues at Chinese University of Hong Kong. Their conclusions are similar to the one reached by Professors Bian and Research Dan, that is, that the vast majority of criminal suspects in China are detained."

First, for reasons which may have been lost to history, when China promulgated its first CPL, it conflated the concepts of “arrest” and “detention.” Chinese prosecutors were charged with acting as a check on the “arrest” and “detention” power of the police. The law tasked prosecutors with reviewing cases within 3 days of the police taking someone into custody. As written, the CPL determined that if the prosecutors found that the police had properly done their job and had gathered sufficient evidence to charge someone with a crime, then the prosecutor’s determination to that effect, approval of daibu, would also automatically have the effect of approving pretrial detention of the suspect throughout the remainder of the case. The conflation of those two ideas, confirming the investigation and detaining the suspect, have remained inextricably bound in one decision-making procedure, the approval of daibu. Every Chinese contributor to this volume has identified this confusion as one of the fundamental challenges facing those who wish to see a more balanced, rational process for deciding pretrial detention and release.

Second, Dan Wei acknowledges that it might make sense for China to follow the practice of other countries and the *International Covenant on Civil and Political Rights*, and take the authority to make pretrial detention and release decisions from prosecutors and give it to more neutral courts.

He opines:

[S]tringent mechanisms of judicial oversight and judicial remedies ensure that the principle that pretrial detention shall be an exceptional measure are followed. This is primarily evident from: (1) review by an independent third party, namely a judge. With the exception of a warrantless arrest made under exigent circumstances, any form of arrest or custody requires a warrant issued by a judge. (2) There is a limited list of justifications for custody, typically confined to the presence of a risk of escape, a risk of destruction of evidence, a risk of committing another crime after being released, or the presence of a serious criminal charge with a potential sentence of over three years. (3) Detention typically cannot exceed four months. (4) Strict processes of judicial oversight in which the detainee can participate. Countries that follow the Anglo-American common law system have established adversarial hearings in which the prosecution and defense both participate. In Germany, Japan, and Taiwan, judges can review written materials and question criminal suspects directly. Any time there is an application for an extension of the period of detention, the prosecution must submit a new application to the court and state the reasons for extension. (5) The mechanism for seeking judicial remedies is highly developed. Detainees dissatisfied with the custody decision can request a review or file an appeal. (6) Alternatives to detention that safeguard the community are well established.

Other commentators have also suggested that providing judicial remedies for improper detention decisions would be beneficial. (See Bian in Chapter 12). However, most of the Chinese contributors to this volume seem to still believe that prosecutors are best situated to make these decisions. Even Dan Wei acknowledges that changing the structure of Chinese criminal justice system would be “a gargantuan task” and, assuming it could be adopted at all, would take a substantial amount of time and that the need for reform is more urgent. Dan Wei candidly suggests that given the current political-legal climate and the emphasis on social stability and fighting crime, such a large scale overhaul of the system of pretrial release and detention is unlikely in the near term.

All of this suggests that the best hope for improving the overall system and reducing the rate of pretrial detention is to work within the current structure of the Chinese CPL to find opportunities to appropriately release more defendants and suspects.

To that end, our Chinese experts suggest that the 2012 CPL may provide the best path forward by requiring prosecutors to review the “necessity of detention” for individual suspects. This reform sounds like it could be the elusive “process” missing from the 1996 reforms that provided for alternatives to detention but did not provide an effective mechanism for selecting among them. Thus, the third aspect of the analyses of our Chinese experts is focused on those reforms. Our Chinese experts seem to agree that the 2012 CPL presents an improvement over the past, however, there is also a consensus that the reforms are flawed and have not delivered fundamental change. As Beijing prosecutor Lan Xiangdong notes citing official statistics, in 2013, Chinese prosecutors nationwide approved 879,817 out of 1,062,063 applications for daibu, an approval rate of 82.8 %. During post-daibu reviews of the necessity of detention, prosecutors recommended release or a downgrading of compulsory measures to non-custodial measures in only 23,894 cases, or 2.72% of the total.

Not surprisingly, our Chinese experts agree that the necessity of detention review process is flawed. Their criticisms include the following: 1) prosecutors do not have any incentive to conduct the review and, in fact, are discouraged by the process and their personnel performance evaluation criteria from recommending any outcome short of detention; 2) the law does not provide sufficient guidance as to which cases should be reviewed, how they should be reviewed and what standards should be used to decide whether a suspect should be detained or released; and 3) there are no time limits on detention and no requirement for periodic reviews so that the period of pretrial detention will be as long as it takes for the police to complete their investigation, the prosecutors to make their charging decision and the courts to reach a judgment.

In addition, Guangdong prosecutor Li Hongliang, in Chapter 15, finds fault with the CPL’s definition of “danger to the community” and how that factor is applied, or, rather, how that factor is not rigorously applied by prosecutors and police in their “necessity of detention” judgments. As

Prosecutor Li demonstrates, the personnel evaluation system criteria, which rewards prosecutors who approve detention and punishes those who order release, has rendered the “danger to the community” factor superfluous. It is generally ignored.

Fourth, our Chinese experts have not simply offered criticism of the current system, they have also offered concrete reform proposals that could be implemented under the current infrastructure of the criminal justice system. These include: 1) requiring review of the necessity of detention in all cases, starting with minor cases; 2) adopting the use of risk assessment tools to assist prosecutors to make more objective, evidence-based decisions concerning who may be released and who must be detained; 3) adopting public hearings for the purpose of making pretrial detention and release decisions; 4) allowing for some appeals process, either to a higher level prosecutors’ office or a court; 5) strengthening the available alternatives to detention to increase confidence that released defendants will appear as required and avoid further violations of law; 6) make prosecutors decisions final and not merely advisory; and 7) modify the personnel evaluation criteria to reward prosecutors for ordering the release of suspects and defendants who should be released and protect prosecutors from punishment if a released suspect happens to abscond or commits another crime, provided the decision to release was reasonable, based on the evidence and not the product of corruption or other improper motives.

Finally, several experts described pilot projects and experiments already underway to try out many of their reform ideas.

Professor Song Yinghui and his colleagues provide a detailed description of several pilot projects in different places in China experimenting with the release of juvenile suspects with a guaranty pending trial (Chapter 13). The pilot projects described and analyzed by Professor Song all include “probation centers” that provide housing, food, education, work opportunities and counseling to juveniles selected for participation in the program. These pilots have produced impressive results. In many cases, based upon the evaluation of the probation center, law enforcement officials have dropped charges against the juvenile suspects and the centers have set them on a path to employment and a law-abiding life. Moreover, the pilots studied by Professor Song and his team have offered a solution to the challenge of how to deal with the members of China’s large floating population who are suspected of crimes. The probation centers in the pilot projects accept migrants as well as residents and since they provide a place to live they solve the issue of how to release migrants who may have no fixed address in the city where they are being prosecuted. Professor Song’s report provides a strong basis for re-thinking the effectiveness of China’s pretrial detention system and the benefits of offering alternatives to detention.

The pilots in Professor Song’s study point to an effective solution for juveniles and young adults suspected of minor offenses. The methodology may even be expanded to include some adult

offenders. However, their application is still limited and only addresses one of the problems identified above, that is, the strengthening of alternatives to detention.

Professor Dan Wei describes a pilot project that has more general applicability Chapter 11. His pilot takes advantage of the special role Chinese prosecutors have as officials charged with ensuring the legality of the conduct of all other government officials and the fact that prosecutors are stationed in each detention center in China. In Dan Wei's pilot, he empowered detention center-based prosecutors to review "the necessity of detention" for the detainees held at their detention centers. Moreover, he provided them with a risk assessment tool that he developed and an 11-step process to seek approval from the prosecutors overseeing the investigation of the case, as well as the investigating agencies and the leadership of the prosecutors' office. In two of the pilot districts he studied the results were modest but promising. In two detention centers, prosecutors recommended release of 46 and 35 detainees, respectively. In one district, 37 out of 46 recommendations were accepted. In the other, all 35 recommendations were accepted. These results suggest that when even a little more attention is paid to each individual case, there is ample room to release more detainees from custody. An expansion of Dan Wei's pilot would likely result in a significantly lower detention rate but, as he acknowledges, implementing the pilot measures nationwide would still not solve all of the challenges to reforming the pretrial detention system in China.

The next set of pilots discussed in this volume concern various experiments studied by Lan Xiangdong, Chief Prosecutor of Dongcheng District in Beijing (Chapter 14). In these pilots, prosecutors use risk assessment tools, convene open hearings and employ non-custodial forms of compulsory measures for migrant suspects. The results, albeit on a small scale, are impressive:

For example, in 2013, in City A, the prosecutors responsible for supervising detention centers initiated reviews of the necessity of detention for 380 detainees, recommended release or a modification of compulsory measures for 367 people, leading to 331 people being released or having their compulsory measures altered. The prosecutors' recommendations were adopted in 90.2% of the cases.

While our Chinese experts have approached the challenges of making pretrial release and detention decisions from different perspectives there is general agreement about the root causes of the problem and the reforms necessary to overcome them. Perhaps the sole outlier is Lin Lan, another prosecutor from Guangzhou (Chapter 16). Unlike the other contributors, Lin Lan believes that pretrial detention can and does serve a useful punitive purpose. She also seems to believe that using pretrial detention to "encourage" suspects to pay compensation to their victims is an appropriate use of the coercive power of the state. Yet even she proposes some meaningful changes to China's pretrial detention regime, including the use of risk assessment tools, public hearings and the improvement of non-custodial measures instead of detention. In a sense, Lin Lan represents

a conservative point of view about the use of the criminal process to fight crime without a great deal of regard for human rights such as the presumption of innocence. It is unknown how many Chinese prosecutors and other influential figures in Chinese legal circles share Lin Lan's views but it is significant that even she believes there is a need for significant reform.

Summing up the eight articles in this volume contributed by PRC experts, one can draw a few significant conclusions. First, Chinese experts have a deep understanding of their own system, its flaws and some of the prescriptions, long term and short term, needed to improve it. Second, these articles document the impressive ingenuity of Chinese legal experts, including prosecutors and other law enforcement and government officials, and their willingness to innovate within the current Chinese legal system. Third, they have clearly identified the problem and its root causes, and have made concrete proposals for positive reforms. At the same time, they are realistic about the prospects for reform in the near term. It is our hope that the openness of this discussion and the depth of the analyses will contribute to prompt and sustainable reform of China's pretrial detention system and that unnecessary pretrial detention of suspects in China can be significantly reduced, if not eliminated.

The three criminal justice systems this book describes are as different as the societies within which they are embedded. Yet they each face a common problem and there is some overlap in the struggles each has faced in its efforts to improve the institutional mechanisms it uses to address this common challenge. Comparative study can be beneficial to criminal justice scholars, practitioners and reformers from these jurisdictions as well as counterparts in the rest of the world. We hope that they will all benefit from this book.

Introduction: Is Pretrial Detention a Minor Issue in Chinese Criminal Procedure?

Dan Wei¹

Ever since human civilization began developing legal systems, pretrial detention has been considered a reasonable and legitimate state act. Arresting criminal offenders and detaining them in jail has been taken for granted as a necessary measure to protect society and the judicial process. However, whether detainees should have any rights while in custody, or whether detention could be changed to other non-custodial measures after a detention decision has been made, is an issue that many countries' justice systems have not addressed. Furthermore, most societies accept this. Like post-trial imprisonment, pretrial detention is also regarded as a useful tool, inherently legitimate and just, necessary to control and punish crime. Meanwhile, since pretrial detention is widely believed not to affect either conviction or sentencing, many people view it as an unambiguous social good. Due to the above-mentioned reasons, pretrial detention is regarded as a small and uncontroversial issue in the justice systems of many countries, including China's.

In 1979, China promulgated its first *Criminal Procedure Law* (“CPL”). For the thirty years preceding that, pretrial detention had been dealing with criminals and enemies using the procedures of the revolutionary era. The 1979 CPL did not specifically stipulate either the definition of detention or the time limit on detention periods. Rather, it merely provided that detention began when an application for “daibu” (arrest)² was approved. According to the 1979 CPL, after daibu was approved, a suspect could be detained for the entire period of investigation, review for prosecution and trial. From a linguistic point of view, the term of “daibu” is a verb, the action of which lasts for a short period of time. The term, “jiya” (detention), is a noun that represents a static situation. Despite the temporal disparity between the two concepts, these two measures of depriving suspects of their liberty were merged with one another in the 1979 CPL legislation and considered one “compulsory measure” called “daibu.”

The same legislation persists today. Despite the fact that the 1979 CPL has gone through two major amendments, in 1996 and 2012, the provisions regarding detention and detention periods remain as they were in the 1979 CPL. The combined working period of the police officers, judges, and prosecutors is still equivalent to the detention period of a suspect or a defendant, and the authority to change a detention measure is still controlled, respectively, by the police officers during the investigation period, the prosecutors during the review and prosecution period, and the judges during the trial period. Meanwhile, detention centers are still administered by the police.

¹ Researcher at the Research Institute of Prosecutorial Theories of the Supreme People's Procuratorate of People's Republic of China.

² See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

The CPL stipulates that, if the responsible agency discovers that detention is improper, that agency each has the authority to suspend detention and replace it with an alternative compulsory measure. However, the clause “if they find” is hypothetical. What if they do not find it improper? Furthermore, the 2012 CPL also provides that a detained suspect or defendant, his agent ad litem, or his close relatives may apply for release by obtaining a guaranty pending trial. But in practice, if the case-handling agency rejects such an application, the applicant does not have any recourse. The direct consequence of the above-mentioned provisions is that in China, the pretrial detention rate has been above 80% since 1979. However, each year, Chinese courts sentence 70% of defendants nation-wide to fixed-term imprisonment below 3 years, or to non-custodial punishments including, supervised release, short-term imprisonment, supplementary punishments, suspended sentences, or conviction with exemption from criminal punishment. Only approximately 40% of defendants are sentenced to serve time in prison.³ A large number of defendants who are not sentenced to imprisonment, or those who are acquitted, are nonetheless detained throughout the pretrial period. Once they are detained they are detained for the duration of the case.

It can be said that, under the current system where all power is wielded by government officials according to their official positions, the authorities generally do not initiate discovery of improper detention and do not accept the defendants’ applications for pretrial release with a guaranty pending trial. Even worse, in October 2000, when the Standing Committee of the National People’s Congress carried out its first nationwide inspection of the CPL implementation, serious violations of the CPL’s stipulated time limits — cases of arbitrary “extended detention” — were widely exposed. It has been reported that it is not uncommon for cases of extended detention to lead to wrongful convictions.

In 1978, the “opening and reform policy” reintroduced China to international society and allowed China to see the global state of the rule of law. Some principles of rule of law, such as human rights protection, due process, and the presumption of innocence, gradually crossed the boundaries of different ideologies and were absorbed in China’s Constitution, Criminal Law and Criminal Procedure Law. However, China’s legislation on pretrial detention and China’s extremely high detention rate still reflect arbitrarily enforced state power and the absence of checks and balances. It is hard to reconcile this situation with: 1) the provisions in Paragraph 4, Article 9 of the International Covenant on Civil and Political Rights of the United Nations, which provides “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody”; 2) the principle of pretrial release in rule-of-law countries where pretrial detention is considered only as an exception; 3) the strict judicial review systems, judicial remedy systems, and bail systems that insure the implementation of this principle in these countries; and 4) pretrial detention rates commonly lower than 20% in these countries. Furthermore, depriving suspects and defendants of

³ Translators’ note: Under the Chinese criminal justice system, only defendants whose remaining imprisonment time is more than three months at the time of sentencing are transferred to a prison to serve their time. Otherwise, they serve their term of imprisonment in a detention center.

the right to personal liberty facilitates the practices of extorting confessions by torture and the illegal collection of evidence in China. Problems derived from illegal evidence, flawed evidence, and fabricated evidence are leading to a crisis of justice in China's system of evidence that affects both convictions and sentencing decisions.

From the perspective of the number of defendants sentenced to prison every year, there are approximately 400,000 defendants per year who are not sentenced to prison but nevertheless are still incarcerated throughout the pretrial phase. Even among those who are ultimately sentenced to imprisonment, there are some defendants who do not need to be detained pending trial. Of the people who are "once detained then detained to the end," that is, detained throughout the criminal process, there are a large number of minors, elderly citizens, minor offenders, first-time offenders and opportunistic offenders (偶犯).⁴ Also included are people who have regular jobs, fixed sources of income, a permanent residence, and/or strong family ties. These people could have been released with a guaranty pending trial. Instead, they were held in custody in detention centers. This leads to serious injustices. If we added up the number of illegally and wrongfully detained people through the past thirty years, it would exceed ten million, which means that more than ten million individuals and families have suffered catastrophic pain from this injustice. Therefore, pretrial detention is not a minor issue that we can afford to ignore. Instead, it is a serious issue that concerns the right to personal liberty of thousands upon thousands of citizens, the criminal justice system, the level of a nation's progress toward the rule of law, and its degree of human rights protection.

Since pretrial detention is an important issue, it should be addressed immediately. However, once it comes to possible resolutions, we inevitably encounter the power of the state authorities responsible for controlling crime. On the scales of justice, one end represents the protection of human rights while the other represents the prevention of crime. Every increment of improvement on the end of human rights protection comes at the cost of an equal or greater increment limiting the degree of freedom of action for those fighting crime. In order to protect the right to personal liberty of suspects and defendants, law enforcement agencies have to curb the freedom with which they exercise their authority. That would increase their workload, make their jobs more difficult and enhance risk. Therefore, law enforcement lacks incentives to support reforms to enhance human rights protection. They may even actively raise obstacles to such enhancements. Additionally, in a country where both the state and the public are inclined towards prioritizing public safety over human rights protection, and efficiency over justice, the actual implementation of the human rights protections written down on paper is very difficult.

This can be seen from the gap between legislation and implementation of Article 93 of the 2012 amended CPL. This article, concerning "review of the necessity of detention," stipulates that after the initial arrest of a criminal suspect or defendant, the prosecutors' office shall continue to review the necessity of their detention. Release or a change of compulsory measures shall be suggested

⁴ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

for those for whom there is no necessity for further detention. According to the statistics released by the Supreme People's Procuratorate, in 2013, all levels of Chinese prosecutors' offices approved daibu for 879,817 people, and engaged in Article 93 review with respect to 23,894 people. In 2014, the number of persons subjected to daibu was 879,615, and Article 93 review was conducted for 33,495 people. In 2015, the number of person subjected to daibu was 873,148, and Article 93 review was conducted for 29,211 people. For these three years, only 5% of those detained under daibu were eventually released pursuant to Article 93. This demonstrates that the purpose of the law has not been achieved. We are still on the road to resolving this important issue. Mr. Ira Belkin, the executive director of the US-Asia Law Institute (USALI) of New York University School of Law, has long focused on the reform of China's criminal justice system. He has acutely observed the severe problems of pretrial detention in China and has enthusiastically undertaken studies and research on this issue. For years, USALI has been inviting American judges who make pretrial release/detention decisions, as well as other officers and officials of pretrial services programs, to visit China and share their experiences.

I myself, as a researcher advocating for the establishment in China of a mechanism for review of the necessity of detention, have benefitted from face-to-face discussions with these foreign experts. I have observed that Article 93 does not provide any incentives to law enforcement because it designates the power of review and release to the very same agencies who, respectively, approve and execute the arrest in the first place. In order to facilitate the implementation of Article 93, I designed a risk evaluation form, named "*Detention Necessity Assessment Chart for Detained Persons*" (在押人员羁押必要性评估表) which is similar to forms used by pretrial release programs in the United States. My chart includes more than eighty risk evaluation factors, each reflecting a positive or negative score. My suggestion is that, after suspects or defendants are detained, the prosecutor should calculate a score of the defendant's individual risk level by filling out the form. If the score is lower than the designated threshold risk level, the case-handling prosecutor may initiate the process of reviewing the necessity of detention, including reviewing case files and interviewing the detainee. If the detainee fulfills the requirements of obtaining a guaranty pending trial, the prosecutor may recommend to the police to release the detainee. This review process could also be initiated by the application of detainees. In practice, however, prosecutors show no alacrity in evaluating detainees, and they ignore detainees' applications for review. There are no adverse consequences for failing to detect illegal detentions because of nonfeasance. Therefore, Article 93 has become, in fact, a provision that lacks certainty. In order to solve the problems of China's pretrial detention, we need to start at the beginning.

First, we need to make two kinds of "separations:" (1) the unity of daibu and detention needs to be broken up. They need to be separated. Daibu should no longer be confused with the static "detention;" and, (2) the time limit for completing the work of a criminal case, the phases of investigation, prosecutorial review and trial, should be separated from the time limit for keeping a suspect or defendant in custody. We should acknowledge that how much time the police, the

prosecutor and the court need to handle a case should not determine how long a suspect or defendant should be detained pending trial.

Second, we need to enshrine in the CPL the principle that pretrial detention should be the exception and not the rule for a person awaiting trial. In accordance with international standards, our laws already state that pretrial release is a right of suspects and defendants. Third, we should, as soon as possible, establish an objective and neutral mechanism for the review of detention and bail decisions. The above-mentioned three considerations are not my inventions. Rather, they are methods of addressing issues of pretrial detention that have proved reliable in other countries, as will be discussed in this book.

This book is a collection of papers published in both Chinese and English. It will help readers from other countries to learn the laws and practices of pretrial detention in China. I would like to take the opportunity to emphasize that it took international society about 400 years, from 1628, when the British Parliament passed the *Petition of Right*, to the present, to recognize pretrial release as a human rights concern worthy of intense effort. Although it is only in the last 30 years that China started proposing the idea of “rule of law,” the determination to achieve rule of law has already become a common goal of both the government and the people. I believe that, since we have this common goal, we will in due course overcome many of the obstacles to achieving it. We will solve the problem of pretrial detention, and perhaps will do so in the near future, because it is one of the most important issues concerning criminal justice.

Part I.

U.S. Pretrial Release History and Practice

Chapter 1: The History of Bail and Pretrial Release¹

Timothy R. Schnacke,
Michael R. Jones,
Claire M. B. Brooker²

A. Introduction³

While the notion of bail has been traced to ancient Rome,⁴ the American understanding of bail is derived from 1,000-year-old English roots. A study of this “modern” history of bail reveals two fundamental themes. First, as noted in June Carbone’s comprehensive study of the topic, “[b]ail [originally] reflected the judicial officer’s prediction of trial outcome.”⁵ In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant’s probability of making all court appearances and not committing any new crimes. The science of accurately predicting a defendant’s pretrial conduct, and misconduct has only emerged over the past few decades, and it continues to improve. Second, the concept of using bail bonds as a means to avoid pretrial imprisonment historically arose from a series of cases alleging abuses in the pretrial release or detention decision-making process. These abuses were originally often linked to the inability to predict trial outcome, and later to the inability to adequately predict court appearance and the commission of new crimes. This, in turn, led to an over-reliance on judicial discretion to grant or deny a bail bond and the fixing of some money amount (or other condition of pretrial release) that presumably helped mitigate a defendant’s pretrial misconduct. Accordingly, the following history of bail suggests that as our ability to predict a defendant’s pretrial conduct becomes more accurate, our need for reforming how bail is administered will initially be great, and then should diminish over time.

B. Anglo-Saxon Roots

¹ This version published, September 24, 2010 by the Pretrial Justice Institute.

² Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, were, as at the time of original publication, employed in the Jefferson County, Colorado, Criminal Justice Planning Unit.

³ While much of the text in this section is attributed to its source by footnote, any un-attributed statements were derived primarily from the following sources: F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898) [hereinafter Pollock & Maitland]; Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959, 1125 (1965) [hereinafter Foote]; Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas]; Gerald P. Monks, *History of Bail* (1982); June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983) [hereinafter Carbone]; Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement*, 1 Res. in Corrections, Issue 3:1; Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999) [hereinafter Lotze, et al.]; Marie VanNostrand, *Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Crime & Just. Inst., Nat’l Inst. of Corrections (2007)) [hereinafter VanNostrand]; and material found on the Pretrial Justice Institute’s website, at <http://www.pretrial.org/> Carbone, in turn, cites to E. De Haas, *Antiquities of Bail* (1940), as well as to Pollock & Maitland for additional “thorough studies on the origins of bail.” All links to websites are current to September 23, 2010.

⁴ See Lotze, et al., *supra* note 1, at 2 n. 3.

⁵ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983), at 574.

To understand the bail system in medieval England, one must first understand the system of criminal laws and penalties in place at that time. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs, which often led to wars. As Anglo-Saxon law developed, wrongs once settled by feuds (or by outlawry or “hue and cry,” both processes allowing the public to hunt down and deliver summary justice to offenders) were settled through a system of “bots,” or payments designed to compensate grievances.⁶ Essentially, crimes were private affairs (unlike our current system of prosecuting in the name of the state) and suits brought by persons against other persons typically sought remuneration as the criminal penalty. In a relatively small number of cases, persons who were considered to be a danger to society (“false accusers,” “persons of evil repute,” and “habitual criminals,”) along with persons caught in the act of a crime or the process of escaping, were either mutilated or summarily executed.⁷ All others were presumably considered to be “safe,” so the issue of a defendant’s potential danger to the community if released was not a primary concern.

Nevertheless, the Anglo-Saxons were concerned that the accused might flee to avoid paying the bot, or penalty, to the injured (as well as a “wite,” or payment to the king). Prisons were “costly and troublesome,” so an arrestee was usually “*replevied* (*replegiatus*) or *mainprised* (*manucaptus*),” that is, “he was set free so soon as some sureties (*plegii*) undertook (*manuceperunt*) or became bound for his appearance in court.”⁸ Thus, a system was created in which the defendant was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction. The amount or substantive worth of that pledge, called “bail” (akin to a modern money bail bond), was identical to the amount or substantive worth of the penalty. Thus, if an accused were to flee, the responsible surety would pay the entire amount to the private accuser, and the matter was done.

According to Carbone, “[t]he Anglo-Saxon bail process was perhaps the last entirely rational application of bail.”⁹ Because the amount of the pledge was identical to the amount of the fine upon conviction, the system accounted for the seriousness of the crime and fulfilled the debt owed if the accused did not appear for trial. All prisoners facing penalties payable by fine were bondable, and the bail bond was perfectly linked to the outcome of trial – money for money.

C. The Norman Conquest to 1700

⁶ *Id.* at 519-20.

⁷ *See id.* at 520-521, and accompanying notes.

⁸ F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898), p.584. Indeed, even those unable to pay the “bot” were typically handed over to the victim for either execution or enslavement. June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983), p.521 n. 18. If they fled, they were declared “outlaws,” subject to immediate justice from whoever tracked them down. Apparently, however, certain offenses were considered to be “absolutely irreplevisable,” requiring some form of prison to house the offenders. *See* F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898), pp.584-85.

⁹ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983), p. 520.

The system became significantly more complex after the Norman Conquest, beginning in 1066:

In the period following the Norman invasion, criminal justice gradually became an affair of the state. Criminal process could be initiated by the suspicions of a presentment jury as well as the sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses, and the delays between accusation and trial lengthened as itinerant royal justices administered local justice.¹⁰

Summary mutilations and executions were gradually phased out, but the overall use of corporal punishment increased, giving many offenders a greater incentive to flee. System delays also caused many persons to languish in primitive jails, and the un-checked discretion given to judges and magistrates to release defendants led to instances of corruption and abuse. Moreover, as the penalties changed, ideas about which persons should be bondable also shifted. The first to lose any right to bail whatsoever were persons accused of homicide, followed by persons accused of “forest offenses” (i.e., violating the royal forests), and finally a catch-all discretionary category of persons accused “of any other *retto* [wrong] for which according to English custom he is not *replevisable* [bailable].”¹¹

In medieval England, magistrates rode a circuit from county (shire) to county to handle cases. The shire’s reeve (now known as the sheriff) was given the duty of holding individuals accused of crimes until the magistrate arrived. Because of the broad discretion given to these sheriffs to hold persons pretrial, bail administration varied from county to county, and instances of abuse became more frequent. Indeed, “[b]ail law developed in the twelfth and thirteenth centuries as part of an assertion of royal control over the authority of the sheriffs,” which had grown increasingly corrupt.¹²

Following exposure of widespread abuse in the bail bond-setting process, Parliament passed the first Statute of Westminster, which assembled and codified 51 existing laws – many originating from the Magna Carta — and which covered, among other things, bail. Importantly, the Statute departed from traditional Anglo-Saxon customs by establishing three criteria to govern bailability: (1) the nature of the offense (categorizing offenses that were and were not bailable); (2) the probability of conviction (requiring the sheriff to examine all of the evidence and to measure such variables as whether or not the accused was held on “light suspicion”); and (3) the criminal history of the accused, often referred to as the bad character or “ill fame” of the accused. According to Carbone, “[i]n defining the criteria to govern bail, the Statute of Westminster rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial. Despite the overlapping and conflicting concerns of the statute’s criteria, each criterion can be reduced to a simple standard: the seriousness of the offense offset by the likelihood of

¹⁰ *Id.* at 521 (footnotes omitted).

¹¹ *Id.* at 523 (internal quotation and footnote omitted).

¹² *Id.* at 522 n. 29.

acquittal.”¹³ Indeed, this standard governed English bail bond determinations for the next five centuries.

During that 500-year period, Parliament occasionally passed legislation defining the bailability of crimes not mentioned in the Statute of Westminster. Mostly, however, Parliament focused on adding safeguards to the bail process to protect persons from political abuse and local corruption. For example, due to the vague nature of the terms “ill fame” and “light suspicion,” as applied by local justices of the peace, in 1486 Parliament required the approval of two justices, rather than one, to release a prisoner and to certify the bailment at the next judicial session. In 1554, Parliament required that the bail bond decision be made in open session, that both justices be present, and that the evidence that was weighed be recorded in writing, essentially introducing the notion of a preliminary hearing into the law.

Over time, additional abuses led to additional reforms. For example, bailability under the Statute of Westminster was initially based on a recitation of a formal charge. Nevertheless, in 1627, King Charles I successfully ordered local judges to hold five knights with no charge, circumventing the Statute, as well as provisions in the Magna Carta upon which the Statute was based. Parliament responded by passing the Petition of Right, prohibiting detention by any court without a charge. In 1676, an individual known only as Jenkes was arrested and held for two months on a charge that, by law, required admittance to bail. Jenkes’ case, and cases like it, ultimately led to Parliament’s passage of the Habeas Corpus Act of 1679, which established procedures to prevent long delays before a bail bond hearing was held. This reform was only a minor hurdle for some of the stubborn and unruly judges of that time, who learned that the monetary amount of a bail bond could also be used to detain a defendant indefinitely. According to Foote, “[t]he Act of 1679 stopped the procedural runaround to which Jenkes had been subjected, but by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention.”¹⁴ Addressing this matter, the English Bill of Rights of 1689, accepted by William and Mary as they assumed the throne, stated that “excessive bail ought not be required,” a phrase similar to that found in the Eighth Amendment to the U.S. Constitution.

D. Bail In the United States

Caleb Foote summarized the state of English law on bail at the time of American Independence as follows:

[A]s the English protection against pretrial detention evolved it came to comprise three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right, by a long

¹³ *Id.* at 526.

¹⁴ Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959, 1125 (1965), p.967.

line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary. Second was the simple, effective habeas corpus procedure which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689.¹⁵

Generally, the early colonies applied English law verbatim, but differences in beliefs about criminal justice (including the belief that the English laws were unnecessarily confusing), differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail. Even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases.¹⁶ In 1682, "Pennsylvania adopted an even more liberal provision in its new constitution, providing that 'all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'" ¹⁷ The Pennsylvania language introduced consideration of the evidence for capital cases, and, "[a]t the same time, Pennsylvania limited imposition of the death penalty to 'willful murder.' The effect was to extend the right to bail far beyond the Massachusetts Body of Liberties and far beyond English law."¹⁸ The Pennsylvania law was quickly copied, and as the country grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."¹⁹

This is especially important, given that the United States Constitution itself only explicitly covers the right of habeas corpus in Article 1, Section 9, and the prohibition against "excessive bail" in the Eighth Amendment, which has been traced back to the 1776 Virginia Declaration of Rights.²⁰ There is no explicit right to bail in the U.S. Constitution, and the Constitution does not define

¹⁵ *Id.* at 968.

¹⁶ It is noted that the substantive criminal law of this period of time is often considered barbaric by today's standards. For example, despite the relatively liberal bail law in Massachusetts, along with homicide that Colony still punished by death (and therefore made unbailable) the offenses of idolatry, witchcraft, blasphemy, cursing or smiting a parent, and stubbornness or rebelliousness on the part of a son against his parents. See *id.* at 981. Moreover, many persons were imprisoned by the colonies for simply being impoverished: "In 1788, a year before Congress was to consider what was to become the eighth amendment, Massachusetts enacted legislation which . . . provided for compulsory work in houses of correction for, inter alia, 'all rogues, vagabonds and idle persons . . . common railers or brawlers, such as neglect their callings or employment, misspend what they earn, and do not provide for themselves for the support of their families . . . and of . . . vagrant, strolling and poor people.'" *Id.* at 990. By 1830 there were roughly three times as many persons imprisoned for debt as were imprisoned for crime. *Id.* at 991.

¹⁷ June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983), p.531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (footnotes omitted).

¹⁸ *Id.* at 531-32 (footnotes omitted).

¹⁹ *Id.* at 532.

²⁰ Article 1, Section 9 of the United States Constitution states that "[T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The Eighth Amendment to the Constitution states that "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

which crimes are bailable, nor which defendants can be detained.²¹ Nevertheless, also before the first Congress in the spring and summer of 1789 was Section 33 of the Judiciary Act, which granted an absolute right to bail in non-capital federal criminal cases.²² To Foote,

“advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of that right in the Constitution itself” was an anomaly that Congress likely did not recognize.²³ Still, through the Judiciary Act, the federal government joined a number of states, which, through their respective constitutions, provided a right to bail for nearly all defendants. Accordingly, at least in the federal justice system, “[p]rinciples of the early American bail system – set forth in the Judiciary Acts of 1789 and the U.S. Constitution’s Eighth Amendment – were: (1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial.”²⁴

E. The Practical Administration of Bail In England And America

As American law governing release on bail bonds was being established, cultural differences between the colonies and England also led to changes in the administration of bail. As discussed previously, under the Anglo-Saxon system of laws persons accused of committing serious offenses, persons with lengthy criminal histories, and those caught in the act of committing an offense were often summarily executed. For less serious crimes, the Anglo-Saxon system provided for pretrial release. This was partly due to the fact that the magistrates tasked with hearing these cases traveled from county to county, and were often only present in a particular locality a few months of the year. Because most persons were released, jails were rarely necessary, and those that did exist were primitive.

Under the Anglo-Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend, neighbor, or family member, to agree to stand in for the accused if he absconded. As the bot system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly. After the invasion, however, with increased use of corporal punishment, it became frequently more

²¹ Professor Foote argues that the founding fathers meant to include a right to bail provision, such as that found in the Statute of Westminster, but inadvertently left it out. See Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959, 1125 (1965), pp.971-989.

²² The Judiciary Act provided a detailed organization of the federal judiciary that the constitution had sketched in only general terms. Section 33 of that Act read: “And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”

²³ Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959, 1125 (1965), p.972.

²⁴ Spurgeon Kennedy, D. Alan Henry, John Clark, & Jolanta Juskiewicz, *Pretrial Release and Supervision Program, Training Supplement*, Pretrial Servs. Res. Ctr. (Wash. D.C., 1997), p.2.

difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act.²⁵ Moreover, the threat of corporal punishment led to increasing numbers of offenders who refused to stay put. As noted by Carbone, these changes in the substantive criminal law, as well as other factors such as procedural delays, led to complexities that required a “new equation” between pretrial release and the criminal sanctions:

The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pretrial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue than calculating the amount of the bot.²⁶

The colonies faced these same complications, with some additions. As noted by author Wayne H. Thomas, Jr.:

First, unlike English law, the Judiciary Act of 1789 and the constitutions of most states provided for an absolute right to have bail set except in capital cases. Second, the absence of close friends and neighbors in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and, third, the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee. Commercial bonds, never permitted in England, were thus a useful device in America.²⁷

F. The Rise of the Commercial Money Bail Bondsman

Arbitrary money bail bond amounts, coupled with a growing number of defendants who were unable to pay them (either by themselves or with the help of friends or relatives), combined to give birth to a profession unique to the field of American criminal justice – the commercial money bail bond industry. There is some debate on when, exactly, this profession got its start. *Taylor v. Taintor*,²⁸ the U.S. Supreme Court case that is commonly cited as the authority for bail bondsmen to act as bounty hunters, was decided in 1872, but it is not clear that the sureties in that case were acting in a commercial capacity. It is commonly believed that the first true commercial money bail bondsmen, persons acting as sureties by pledging money or property to fulfill money bail bond conditions for a criminal defendant in court, were Peter and Thomas

²⁵ According to one commercial bail bondsman website, “Bonds are . . . an arbitrary number set for court appearance, and are not normally lowered over time.” <http://www.austinbailbonds.net/faq/>. The arbitrary nature of bail bond amounts is typically overlooked or even ignored by actors in the criminal justice system because more meaningful alternatives have not been pursued.

²⁶ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983), p.522.

²⁷ Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), pp.11-12.

²⁸ 83 U.S. 366 (1872).

McDonough in San Francisco, who began underwriting bonds as favors to lawyers who drank in their father's bar. When these brothers learned that the lawyers were charging their clients fees for these bonds, the brothers began to charge as well. By 1898, the firm of McDonough Brothers, established as a saloon, found its business niche by underwriting bonds for defendants who faced charges in the nearby Hall of Justice, or police court. The company, which became known as "The Old Lady of Kearny Street," rose and fell in only fifty years, leaving a legacy prototypical of the growing commercial surety industry. In an account of the firm's demise, Time Magazine reported the following:

The Old Lady helped San Francisco be what many a citizen wanted it to be – a wide open town. She furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work. But she was also a catalyst that brought underworld and police department into an inevitably corrupt amalgam. At her retirement the San Francisco Chronicle waxed nostalgic: 'The Old Lady . . . will take to her rocking chair, draw her shawl about her . . . ' But many a citizen thought simply: 'Good riddance.'²⁹

With a growing number of defendants facing increasingly higher money bail bond amounts, the professional bail bond industry flourished in America. If anyone ever saw these businesses as problematic, however, it was rarely reported.

Nevertheless, by the 1920s Arthur L. Beeley studied records of the Municipal and Criminal Court of Cook County, Illinois, and in 1927 published his landmark study, *The Bail System in Chicago*, "which publicized the inequities of the bail system and explored the possibility of using alternatives to surety bail to effectuate pretrial release."³⁰ As Thomas recounts:

Beeley found that bail amounts were based solely on the alleged offense and that about 20 percent of the defendants were unable to post bail. He also noted that professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay off on forfeited bonds. Beeley concluded that 'in too many instances, the present system . . . neither guarantees security to society nor safeguards the right of the accused.' It is 'lax with those with whom it should be stringent, and stringent with those with whom it could safely be less severe.' Among Beeley's recommendations were a greater uses of summons to avoid unnecessary arrests and the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual.³¹

G. *Stack v. Boyle and Carlson v. Landon*

²⁹ The Old Lady Moves On (Aug. 18, 1941), found, at <http://www.time.com/time/printout/0,8816,802159,00.html> .

³⁰ Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), p.13, citing Arthur L. Beeley, *The Bail System in Chicago* (Chicago: Univ. of Chicago Press, 1927; reprinted 1966).

³¹ *Id.* at 13-14.

Little happened in the history of bail and the pretrial process between 1927 and 1951, the year the Supreme Court decided *Stack v. Boyle*, the first major Supreme Court case concerning issues in the administration of bail.³² In that case, a number of federal defendants moved the trial court to reduce their money bail bond amounts on the ground that they were excessive under the Eighth Amendment. In support of their motion, the defendants submitted proof of their financial resources, family ties, health, and prior criminal records. It was undisputed that the money bail bonds set for each of the defendants was fixed in a sum much higher than that usually imposed for offenses with like penalties. The government produced no evidence relating to these four defendants, and rested its case on the fact that four other persons previously convicted of the same crimes had forfeited their bail bonds. The defendants' motions were denied, and the case was ultimately reviewed by the United States Supreme Court.

In its opinion, the Court held the government's actions unconstitutional, writing that "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."³³ Specifically, the Court wrote as follows:

The 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. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.³⁴

Because the government produced no evidence to justify why the money bail bond amount for each of the defendants was higher than that usually fixed for similar crimes, the Court remanded the case to the trial court for new bail bond hearings.

Being the first expression of the Supreme Court's views on bail, the case is known for more than just its holding. First, the Court articulated the reasons for a federal right to bail:

[f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.³⁵

³² *Stack v. Boyle*, 342 U.S. 1 (1951).

³³ *Id.* at 6.

³⁴ *Id.* at 5.

³⁵ *Id.* at 4 (internal citations omitted).

Second, the case includes ample language to support the notion that bail should only be based on an individualized assessment of each defendant. The Court wrote as follows:

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. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, are to be applied in each case to each defendant.³⁶

This notion was amplified by Justice Jackson in his frequently quoted concurrence to the opinion, which eloquently summarized his position on individualized bail assessments:

It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation, and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c).

Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge, defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character, and relation to the charge-elements Congress has directed to be regarded in fixing bail -I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.³⁷

Four months after *Stack*, however, the Supreme Court clarified that the traditional right to freedom before conviction in the federal system was not, in fact, absolute. In *Carlson v. Landon*, the Court wrote that,

[t]he bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.³⁸

³⁶ *Id.* at 5, 6. In addition to granting a right to bail, at that time Rule 46 also required the bail bond to be set to “insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.” *Id.* at 6 n. 3.

³⁷ *Id.* at 9.

³⁸ *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (footnotes omitted).

With these two cases, the Supreme Court established that while a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures. Where a bail bond is permitted, however, there must be an individualized determination using standards designed to set the bail bond at “an amount reasonably calculated” to assure the defendant’s return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, and no more.

H. Empirical studies and the Manhattan bail project

Empirical studies on the administration of bail, akin to Arthur Beeley’s 1927 study, continued after Stack and Carlson. In 1954, Caleb Foote examined the Philadelphia bail system and demonstrated fundamental inequities in bail bond setting practices.³⁹ At the time, Foote observed that for minor offenses, bail bonds were generally based solely on police evidence. For major offenses, a bail bond was set based on the District Attorney’s recommendation approximately 95% of the time. Moreover, Foote observed that those who remained in detention pretrial were mostly poor and unable to raise the bond amount. Finally, Foote found that those defendants who were unable to pay their money bail bond amounts were more likely to be convicted and to receive higher sentences than those defendants who were able to pay their money bail bond amounts. Other studies in the 1950s and early 1960s showed similar outcomes, and laid the foundation for the bail reform movement of the 1960s:

[these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was beyond their means. The studies also revealed that bail was often used to ‘punish’ defendants prior to a determination of guilt or to ‘protect’ society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.⁴⁰

Perhaps the most notable of these studies, and one of the first to explore alternatives to release on financial conditions (money bail bonds), was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. That study, named the Manhattan Bail Project, was designed “to provide information to the court about a defendant’s ties to the community and thereby hope that the court would release the defendant

³⁹ Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 Univ. of Pa. L. Rev. 1031-1079 (1954).

⁴⁰ Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), p. 15.

without requiring a bail bond [i.e., release on the defendant's own recognizance]."⁴¹ The success of the program quickly became evident:

In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial.⁴²

The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.

I. Rising Dissatisfaction with Compensated Sureties

In Illinois, dissatisfaction with the commercial money bail bond system in Chicago led to state legislation in 1963 known as the Illinois Ten Percent Deposit Plan. Under this plan, Illinois retained the use of money bail bonds as the predominant form of release, but eliminated the need for commercial money bail bondsman:

Under this legislation, the 10 percent bonding fee that had previously been paid to the bondsman was to be paid to the court, which was now required to release the defendant on less than full bond. Moreover, the fee paid to the court, unlike the fee paid to a bondsman, is refunded to the defendant upon completion of the case, less a small service fee.⁴³

By 1963 the courts, too, were also questioning the desirability of a system that was based on secured bonds and dominated by commercial money bail bondsmen, who had, in turn, become the focus of numerous inquiries into their often abusive and corrupt practices.⁴⁴ As one court explained:

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who, in their judgment, is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.⁴⁵

⁴¹ *Id.* at 4.

⁴² Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999), p.4; *see also* Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), pp. 4-6.

⁴³ Thomas, *supra* note 1, at 7 (footnote omitted); *see also Id.* pp. 183-89. For a more detailed description of the Illinois plan, *see The National Conference on Bail and Criminal Justice, Proceedings and Interim Report*, pp.240-246 (Washington, D.C. April 1965). The Illinois system was upheld as constitutional against Due Process and Equal Protection challenges in *Schilb v. Kuebel*, 404 U.S. 357 (1971).

⁴⁴ *See* Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), pp.15-16.

⁴⁵ *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

J. The National Conference on Bail and Criminal Justice

Statements such as the one quoted above got the attention of U.S. Attorney General Robert Kennedy, who in March of 1963 instructed all United States Attorneys to recommend the release of defendants on their own recognizance “in every practicable case.”⁴⁶ He then convened the National Conference on Bail and Criminal Justice in May of 1964, bringing together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present “for analysis and discussion specific and workable alternatives to [money] bail based on the experience of the Manhattan Bail Project and some others which followed in its wake.”⁴⁷ Opened with statements by Kennedy and Chief Justice Earl Warren, the Conference analyzed topics involving release on recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes (so-called “preventative detention”), pretrial release based on money or other conditions generally, and pretrial release of juveniles. Attorney General Kennedy closed the conference with the following statement:

For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.

* * * *

What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?⁴⁸

K. 1960s Bail Reform

Also in 1964, on the eve of the National Bail Conference, Senator Sam Ervin introduced a series of bills designed to reform bail practices in the federal courts. Hearings on the bills ultimately led to passage, in 1966, of the *Federal Bail Reform Act*. This Act, the first major reform of the federal bail system since the Judiciary Act of 1789, contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant’s appearance; (4) a deposit money bail bond option, allowing defendants to

⁴⁶ *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), p.297.

⁴⁷ *Id.* at XIV.

⁴⁸ *Id.* p.296.

post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.⁴⁹ Generally, the Act provided that non-capital defendants were to be released pending trial on their personal recognizance or on “personal bonds” unless the judicial officer determined that these incentives would not adequately assure their appearance at trial. In those cases, the judge was to choose the least restrictive alternatives from a list of conditions designed to secure appearance. Those charged with a capital offense, or who were convicted and were awaiting sentencing or appeal, were given a different standard that included public safety: they were to be released unless the judge had reason to believe that they might flee or be a danger to the community.

After passage of the Federal Bail Reform Act of 1966, many states passed similar statutes. By 1971, at least 36 states had enacted statutes authorizing the release of defendants on their own recognizance. By 1999, “virtually every state [had] established by statute or case law the practice of pretrial supervised release.”⁵⁰

Moreover, by 1965, fifty-six jurisdictions reported operational bail projects modeled after the Manhattan Bail Project, and two statewide projects were reported to be operating in New Jersey and Connecticut. According to Thomas,

[t]he procedure adopted for the release of defendants prior to trial in each of these jurisdictions was the written promise to appear. No money was required to secure such release. Although in limited use prior to the Vera experiment, written promises to appear became much more widely used as a result of the Manhattan Bail Project. The terminology varied from one jurisdiction to another, but whether it was known as own recognizance (O.R.), personal recognizance, pretrial parole, nominal bond, personal bond, or unsecured appearance bond, the result was the same. The defendant was released without posting money bail. In theory, the mechanisms differed; for example, nominal bond required the defendant to post one dollar. In practice, however, this was usually never posted. Also, unsecured appearance bonds, in theory, required the defendant to pay the full bond amount should he fail to appear, but this was rarely more than an idle threat. Likewise, most own recognizance releases involved criminal penalties for failure to appear, but these too were rarely enforced. The result was that defendants were released on their personal promises to appear, and this alone proved a sufficient guarantee of their appearance in court. Defendants released on O.R. appeared as well as or better than those on money bail. The Manhattan Bail Project reported a failure to appear rate of less than seven-tenths of 1 percent.⁵¹

⁴⁹ See Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999), p.5. The Act was codified at 18 U.S.C. §§ 3141-3151.

⁵⁰ *The Supervised Pretrial Release Primer*, Pretrial Servs. Res. Ctr. (BJA, August 1999).

⁵¹ Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), p.25.

The gradual change from bail projects fashioned after the Vera experiment to contemporary pretrial services programs began in the District of Columbia. Although the Bail Reform Act of 1966 specified factors to be considered in releasing defendants pretrial, it left unclear who should gather the necessary information. Pretrial services agencies, beginning with the District of Columbia Bail Agency, evolved to fill in this gap. In 1968, “[t]he D.C. Bail Agency assumed much greater responsibility in seeing that bail practices were carried out as mandated. In addition to interviewing, collecting background information, verifying information, [and] producing reports and recommendations to the court, the Pretrial Services programs began supervising defendants on various release conditions.”⁵²

L. Professional Standards

With interest growing in bail reform and more attention being given to the pretrial release decision, professional organizations began issuing standards designed to address relevant bail and pretrial release, detention, and supervision issues at a national level. The American Bar Association (ABA) was first, with its Standards Relating to the Administration of Criminal Justice in 1968,⁵³ followed by the National Advisory Commission on Criminal Justice Standards and Goals,⁵⁴ the National District Attorneys Association (NDAA), with its National Prosecution Standards,⁵⁵ and the National Association of Pretrial Services Agencies (NAPSA), with its Performance Standards and Goals for Pretrial Release.⁵⁶ Initially, each of these sets of professional standards were based on reforms codified in the 1966 federal act, and each reflected the view that the current bail system was flawed, primarily due to its emphasis on money bail bonds and commercial sureties. In its first expression on the topic, the ABA stated:

[t]he bail system as it now generally exists is unsatisfactory from either the public’s or the defendant’s point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.⁵⁷

⁵² *History of Pretrial Services Programs*, at <http://www.pretrial.org/PretrialServices/HistoryOfPretrialRelease/Pages/default.aspx>.

⁵³ See *American Bar Association Standards for Criminal Justice* (3rd Ed.) *Pretrial Release* (2007) [hereinafter ABA Standards].

⁵⁴ *National Advisory Commission on Criminal Justice Standards and Goals* (*Corrections, Courts*) (1973).

⁵⁵ See *National Prosecution Standards* (2d Ed.), Nat’l Dist. Atty’s Assoc. (1991) [hereinafter Prosecution Standards]. The NDAA has released a third edition to its standards, albeit to members only through its website found at <http://www.ndaa.org/>.

⁵⁶ See *Standards on Pretrial Release* (3rd Ed), Nat’l Assoc. of Pretrial Servs. Agencies (Oct. 2004), pp.11-12 [hereinafter NAPSA Standards].

⁵⁷ American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), p.1 (reprinted in *American Bar Association Standards for Criminal Justice* (3rd Ed.) *Pretrial Release* (2007), p.31).

Though virtually identical to the 1966 Bail Reform Act, these standards added input on two important issues: (1) potential danger to the community as a factor that should be considered by the judicial officer in making his decision (so-called preventative detention), and (2) abolition of surety bail for profit as an option.

(i) Preventative Detention

The first of these issues, often referred to as the issue of “preventative detention” of arrestees who are considered threats to society, had been recognized as a common, albeit secretive practice for some time. Addressing the National Conference on Bail and Criminal Justice in 1964, one commenter noted:

[w]hile we lack a statistical statement of the problem, it is apparent: (1) that many factors other than those which indicate the likelihood of flight are considered in the setting of bail; and (2) that bail is used, in current practice, to detain individuals in custody – not for assuring their appearance at trial – but rather because of the belief that the defendant, if allowed to go free, is likely to commit additional crimes or is apt to intimidate witnesses or victims.⁵⁸

The elusive nature of this issue is apparent in the following statement, written in 1967: “[a]lthough it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion.”⁵⁹ In the literature, persons often describe this practice as furthering a “sub rosa” purpose of bail, since the purpose of bail bonds until this time had always been only to assure the appearance of a defendant at trial.

Indeed, deterring flight was so ingrained as the sole purpose of bail that Congress left appearance of the defendant at trial as the sole standard for weighing the bail bond decision in the Federal Bail Reform Act. Thus, in non-capital cases the 1966 law did not expressly permit a judge to consider the defendant’s future dangerousness or community safety during the release decision. The District of Columbia was particularly critical of this aspect of the Bail Reform Act, which allowed the release of potentially dangerous non-capital suspects.

Moreover, this criticism found an audience with the Nixon administration, an administration that had campaigned on a law-and-order platform. A proposed amendment to the Bail Reform Act to allow for preventative detention was voted down. Nevertheless, as a compromise in 1970,

⁵⁸ *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), p.151 (statement of Herman Goldstein, Executive Director to the Superintendent of Police – Chicago, Ill.).

⁵⁹ John V. Ryan, *The Last Days of Bail*, 58 J. of Crim. Law, Criminology, and Police Sci., 542, p.548 (1967) (footnote omitted).

Congress changed the 1966 Act as it applied to persons charged with crimes in the District of Columbia to allow judges to consider dangerousness to the community, along with risk of flight, in setting bail bonds in non-capital cases.⁶⁰

This was the beginning of a vigorous debate over whether or not community safety should be formally recognized as a factor for judges to weigh in setting bail bonds. This particular debate, the debate over preventative detention, would continue until passage of the Comprehensive Crime Control Act of 1984, which is discussed later in this paper.

(ii) Compensated Sureties

The second issue raised in the newly adopted professional standards concerned abolition of compensated sureties. Increased use of nonfinancial release options during the period of bail reform in the 1960s reduced the courts' reliance on commercial money bail bondsmen. Over time, the courts and others realized that the administration of bail using commercial sureties was fundamentally flawed, and began to openly oppose the compensated surety system. The 2007 edition of the ABA standards provides the rationale for its long-standing position against compensated sureties:

There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks – based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsmen's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.⁶¹

⁶⁰ District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

⁶¹ *American Bar Association Standards for Criminal Justice* (3rd Ed.) *Pretrial Release* (2007), p.45 (footnote omitted).

Today, as it was in 1968, the ABA's call for abolition of compensated sureties is adamant: "[T]heir role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification."⁶²

M. Bail Reform Through the 1970s

"Despite its impressive beginning, however, the bail reform movement waned considerably in the late 1960s. Many of the early own-recognition release programs ceased operating, and those that remained often had tenuous financial and official support."⁶³ A good example is found in the creation of the Harris County, Texas, PreTrial Release Agency, which became a focus of attention when a federal court acted to remedy "severe and inhumane overcrowding of inmates" at the Harris County jail.⁶⁴ The federal court, recognizing the Agency's strong fundamental premise and great expectations at its creation in 1972, nevertheless found it to be "foundering," "deficient," and "ineffective" in 1975. The reasons for this were many, including harassment and sabotage by the money bail bondsmen, the Agency's inefficient physical placement, its lack of effective internal practices, and its lack of an adequate budget, personnel, training, and supervision. One of the biggest barriers to the Agency's success, however, was its reliance on methods that were largely subjective and often arbitrary. As the court noted, "[t]he largest impediment to prompt, efficacious operation of pretrial release is the agency's use of, and total reliance upon, a subjective standard

⁶² *Id.* at 46. Best practice standards are common to a number of justice-related fields, but in the area of pretrial release, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system," which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals. See Marcus, *The Making of the ABA Criminal Justice Standards*, 23 Crim. Just. No. 4 (Winter 2009).

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts, including the Colorado Supreme Court, had used the Standards to implement new court rules. *Id.* According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects." *Id.* (internal quotation omitted).

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions over three or more years." *Id.*

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationale for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, various social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognition and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Study (the most notable social science experiment in the field), discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that the defendant may pose to public safety." ABA Std. 10-5.3 (a) (commentary).

⁶³ Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), p.8.

⁶⁴ See *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649 (S.D. Tex. 1975).

of evaluation of each interviewee. That is, the ‘gut’ reaction of the interviewer is used to determine whether a defendant is a good risk for release on recognizance.”⁶⁵ To remedy this particular situation, the court ordered the Agency to adopt an objective point system for evaluating release on recognizance, “designed with a view towards reducing to a minimum the refusing of ‘PR’ bonds on ‘hunches.’”⁶⁶

The movement toward more and increasingly efficient pretrial services agencies has continued through the 1970s to the present. By 2003, the Bureau of Justice Assistance estimated that pretrial services agencies were operational in over 300 jurisdictions in the United States.⁶⁷ Moreover, the federal system showed substantial progress toward bail reform in the 1970s. Because the 1966 Bail Reform Act contained no mechanism for gathering background information on defendants, in 1974 Congress created 10 pilot pretrial agencies within the federal courts to provide judges with the information necessary to make release decisions.⁶⁸ “[These] agencies, following and expanding on approaches initially developed by pretrial services projects in State court systems, developed strong support from judges and magistrates in the pilot districts.”⁶⁹ Ultimately, after testimony from federal magistrates that neither defense counsel nor prosecutors were able to provide them with the information necessary to make an informed bail bond decision, Congress passed the Pretrial Services Act of 1982, which expanded the pilot program by establishing pretrial service agencies in virtually all of the federal district courts.⁷⁰

N. The Bail Reform Act of 1984

While pretrial services programs found their footing in the wake of the 1966 Act, a new debate over the administration of bail began to emerge. “The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond.

Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions.”⁷¹ The Bail Reform Act of 1966 had only narrowly addressed public safety. Under the Act, persons charged with capital offenses or awaiting sentence or appeal could be detained if the court found that “no one condition

⁶⁵ *Id.* p.665.

⁶⁶ *Id.* p.683.

⁶⁷ See John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington D.C.: BJA, 2003), p.2.

⁶⁸ The pilot agencies were created in Title II of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 18 U.S.C. § § 3161-74.

⁶⁹ Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, and Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential*, Nat’l Inst. of Just. (Washington D.C. 2001), p.6.

⁷⁰ Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152. For articles reflecting on the 25th anniversary of the Act, see Federal Probation (Admin. Office U.S. Courts, Sept. 2007).

⁷¹ *The Supervised Pretrial Release Primer*, Pretrial Servs. Res. Ctr. (BJA, August 1999), p.5.

or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community.”⁷² Nevertheless, judges were not authorized to consider danger to the community for any other bailable defendants.

After Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, the first bail law in the country to make community safety an equal consideration to future court appearance in bail bond setting, many states drafted bail laws that also addressed future dangerousness and preventative detention. In 1984, Congress addressed the issue in the federal courts with its passage of the Comprehensive Crime Control Act of 1984.⁷³ Chapter I contained the Bail Reform Act of 1984, codified at 18 U.S.C. Sections 3141-3156, which amended the 1966 Act to include consideration of danger in order to address “the alarming problem of crimes committed by persons on release.”⁷⁴ The 1984 Act mandates “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”⁷⁵ The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person (as required) and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”⁷⁶ The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.⁷⁷

In *United States v. Salerno*, the United States Supreme Court upheld the 1984 Act’s preventative detention language against facial due process and eighth amendment challenges. After reviewing the Act’s procedures by which a judicial officer evaluates the likelihood of future dangerousness, the Court wrote, “[w]e think these extensive safeguards suffice to repel a facial challenge,” and “[g]iven the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.”⁷⁸ Responding to the argument that the Act violated the Eighth Amendment, the Court concluded:

Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil. Of course, to determine whether the Government’s response is excessive,

⁷² Former 18 U.S.C. § 3148.

⁷³ Pub. L. No. 98-473, 98 Stat. 1976 (1984).

⁷⁴ *U.S. v. Salerno*, 481 U.S. 739, 742 (1987) (quoting S. Rep. 98-225, p.3, 1983).

⁷⁵ 18 U.S.C. § 3142 (b).

⁷⁶ *Id.* § 3142 (e).

⁷⁷ *See id.*

⁷⁸ *Salerno*, 481 U.S., p.752

we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.⁷⁹

Prior to *Salerno*, the ABA had endorsed limited preventative detention in its revised Standards. After *Salerno*, both the NAPSA and the Prosecution Standards were revised to include public safety as a legitimate purpose of the pretrial release decision. By 1999, it was reported that at least 44 states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision.⁸⁰ Nevertheless, the need for improvement in this area is still evident. As noted in the ABA's current version of its *Standards for Criminal Justice*,

although many states have revised their bail statutes to allow consideration of risk to public safety, no states have yet adopted a system that calls for the type of careful scrutiny of information about the defendant's background and financial circumstances that was recommended in the [previous] Standards. On the contrary, it is common in many jurisdictions — especially ones that have no pretrial services program — for decisions about pretrial detention or release to be made with little or no information about the financial circumstances of the defendant or other factors relevant to assessing the nature of any risk presented by the defendant's release. Often, the decisions are made in hurried initial appearance proceedings in which the defendant is without counsel.

* * * *

Major improvements in pretrial processes are needed and are clearly feasible. A number of jurisdictions have established systems for gathering relevant and objective information about defendants' backgrounds and about the appropriateness of particular conditions for individual defendants, making release decisions based on such information, and successfully managing defendants on release through comprehensive pretrial services. In four states and the District of Columbia, bail bonding for profit has been completely or substantially eliminated.⁸¹

⁷⁹ *Id.* pp.754-55.

⁸⁰ See Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999), p.12.

⁸¹ *American Bar Association Standards for Criminal Justice* (3rd Ed.) *Pretrial Release* (2007), pp.32-33.

Specifically, Cohen & Reaves report that Illinois, Kentucky, Oregon, and Wisconsin do not allow commercial bail bonds, and the District of Columbia, Maine, and Nebraska allow these bonds but rarely use them.

In 1987, the Government Accounting Office studied the impact of the Bail Reform Act of 1984, as compared to the previous Act of 1966. In its report, the GAO found:

(1) a larger percentage of defendants were detained during their pretrial period under the new law; (2) under the old law defendants were detained because they did not pay the set bail, while under the new law 51 percent were detained for lack of bail money and 49 percent were detained because they were considered a danger risk; (3) the new law left open to interpretation whether the money bail could be set at an amount that the defendant was unable to pay; (4) most of the defendants qualified for the rebuttable-presumption-of-danger provision were indicted for drug offenses that had imprisonment terms of 10 years or more; (5) the new law did not require federal prosecutors to seek pretrial detention of all defendants who met the rebuttable presumption criteria; (6) defendants released on bail who failed to appear for judicial proceedings totaled 2.1 percent under the old law and 1.8 percent under the new law; (7) defendants who were arrested for committing new crimes totaled 1.8 percent under the old law and 0.8 percent under the new law; and (8) although most court officials felt that the new bail law was more direct and honest because it allowed the system to label defendants as dangerous, they were concerned about the amount of time involved in attending detention hearings.⁸²

These findings are enlightening to the federal system, as well as to the various state and local jurisdictions creating or modifying preventative detention provisions.

O. Jail Crowding

One of the most significant developments affecting the administration of bail in the last 20 years is undoubtedly jail crowding. As noted by the U.S. Department of Justice's National Institute of Corrections, jail crowding "can create serious management problems," can "compromise the safety of inmates and staff," can result in the "loss of system integrity," and "can even lead to system fragmentation."⁸³

Moreover, as noted by the ABA, in addition to any negative consequences to the defendant that are caused by unnecessary pretrial detention (e.g., loss of job, strained family relations), "such

⁸² *Criminal Bail: How Bail Reform is Working in Selected District Courts*, GAO Report No. GGD-88-6 (Oct. 23, 1987) (press release), p.1.

⁸³ Bennett & Lattin, *Jail Capacity Planning Guide, A Systems Approach* (NIC No. 022722, Nov. 2009) available at <http://nicic.gov/Library/022722>.

detention, often very lengthy, leads directly to overcrowded jails and ultimately to large expenditures of scarce public resources for construction and operation of new jail facilities.”⁸⁴

In 1984, officials responding to a National Institute of Justice survey described jail crowding as “the most pressing problem facing criminal justice systems in the United States.”⁸⁵ In 2000, a Bureau of Justice Assistance monograph reported that “jail crowding continues to be a nationwide problem. This is somewhat surprising because in the intervening years [between 1985 and 1999] there was a boom in the construction of correctional facilities in many parts of the country and a decline in crime through the entire United States.”⁸⁶ By 2006, the nation’s jail population totaled over 750,000 inmates, and local jail facilities operated at about 94% of their rated capacity.⁸⁷ Moreover, “[s]ince 2000, the number of unconvicted inmates held in local jails has been increasing. As of June 30, 2006, 62 percent of inmates held in local jails were awaiting court action on their current charge, up from 56 percent in 2000.”⁸⁸ Another study of felony defendants in 75 of the most populous counties in the U.S. found that 38% of all defendants charged with a felony were held in confinement until the disposition of their court case.⁸⁹

The cost of housing these pretrial inmates has become prohibitive (as much as \$65 to \$100 per inmate per day, or nearly \$24,000 to \$36,500 per inmate per year), and the cost to build new facilities is also high (as much as \$75,000 to \$100,000 per bed).⁹⁰ With only three realistic alternatives for alleviating a crowded jail facility (reduce bookings, reduce inmate lengths of stay, or build a new facility with more beds), many jurisdictions simply cannot continue to tolerate inefficient bail administration practices that exacerbate the crowding problem.

Today, jail crowding remains a legitimate, if not compelling purpose for jurisdictions to reduce their reliance on the traditional money bail system. In the recent article, *The Impact of Money Bail on Jail Bed Usage* (American Jails, July/August 2010),⁹¹ author John Clark presents the most recent Bureau of Justice Statistics data showing: (1) that jail populations, and especially pretrial inmate populations, have continued to rise even as reported crime has gone down; (2) that the growth in pretrial inmate populations is being driven by the use of money bail; and (3) that money bail adds significantly to a defendant’s length of stay in the jail, and sometimes means that the

⁸⁴ American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007), p.33.

⁸⁵ National Assessment Program: Assessing Needs in the Criminal Justice System (Washington, DC: Abt Assoc. for the Nat’l Inst. of Just., Jan. 1984), p.4.

⁸⁶ A Second Look at Alleviating Jail Crowding; A Systems Perspective (BJA, 2000), p.1.

⁸⁷ See William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (BJS 2007), pp. 5, 7 [hereinafter Sabol].

⁸⁸ Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000, (BJS Press Release, June 28, 2007); See also William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (BJS 2007), p.6

⁸⁹ See Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, U.S. Dep’t of Just. Office of Just. Programs, Bureau of Just. Stats. (Nov. 2007), p.2 [hereinafter Cohen & Reaves].

⁹⁰ Of course, construction and management costs to build new jail facilities can vary widely based on a number of factors, and calculation of an accurate average jail bed cost can be elusive. See Alan R. Beck, *Misleading Jail Bed Costs*, at <http://www.justiceconcepts.com/cost.htm>.

⁹¹ Available from the American Jail Association, at <http://www.aja.org/advertising/jailmagazine/default.aspx>.

defendant will not be released at all prior to case adjudication. The author concludes that “[i]n looking for ways to reduce correctional populations to better manage costs, the pretrial population must have a prominent place in any discussions. And at the forefront of those discussions must be the changing of reliance on money bail.”

P. Money Bail Bondsmen v. Pretrial Services Agencies

Increased judicial reliance on personal recognizance bonds and on pretrial services agencies for supervision of released inmates has generated friction between these agencies and members of the commercial surety industry. During the mid-1990s, money bail bond organizations, including the National Association of Bail Insurance Companies (“NABIC”) and various state bail organizations, worked with the American Legislative Exchange Council (“ALEC”), [an organization consisting of “state legislators and conservative policy advocates,” including corporations and trade associations such as NABIC and the American Bail Coalition] to create an initiative titled “Strike Back!”

Strike Back was an aggressive and concerted effort to eliminate pretrial services agencies (termed “free bail” agencies and “criminal welfare programs” in the commercial surety industry literature) and release on personal recognizance bond to promote the interests of the commercial surety industry. These efforts were opposed in the mid 1990s by organizations such as the Pretrial Services Resource Center (now known as the Pretrial Justice Institute),⁹² and have been countered since by pretrial services and other justice organizations, which continue to call for the abolition of compensated sureties. In the years leading up to 2009-2010, money bail bondsmen have promoted their interests somewhat more passively through repeated reference to two studies, one examining failure to appear rates, fugitive rates, and capture rates for felony defendants released on cash bond, deposit bond, own recognizance, and surety bond,⁹³ and the other a comparison of pretrial release options in large California counties.⁹⁴

Q. 2009-2010 Developments

Most recently, jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release. This renewed interest has been amplified in 2009 to 2010, as manifested by the following relevant bail-related events in several categories.

Pretrial Risk Assessments

⁹² See, e.g., Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision*, Pretrial Servs. Res. Ctr. (July 1994, edited and reprinted in 1996) [hereinafter Kennedy & Henry]. The 1996 reprint is available online through the Pretrial Justice Institute, at <http://www.pretrial.org/Docs/Documents/commsuretybail.doc>.

⁹³ Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping*, 47 J. of L. and Econ. 93 (2004).

⁹⁴ Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California’s Large Urban Counties: 1990-2000*, found online, at <http://www.suretyoneinc.com/sorpts/TheEffectivenessPreTrialRelease..pdf>.

In April of 2009, the U.S. Department of Justice issued its document titled “Pretrial Risk Assessment in the Federal Court — For the Purposes of Expanding the Use of Alternatives to Detention,” a report on the pretrial services function in the federal court system from an evidence-based perspective.⁹⁵ The study’s stated purpose was to (1) identify statistically significant and policy relevant predictors of pretrial outcomes in order to identify federal defendants who are suitable for pretrial release without jeopardizing community safety or judicial integrity, and (2) develop recommendations for the use of funding that supports the federal judiciary’s alternatives to detention program.

This study coincided with the creation of a Federal Pretrial Risk Assessment, which was developed by Dr. Christopher Lowenkamp to provide a consistent and valid method of predicting risk of failure to appear, new criminal arrests, and technical violations for the federal court system.⁹⁶

For similar reasons, the State of Virginia revalidated its statewide pretrial risk assessment instrument in May of 2009,⁹⁷ and other jurisdictions across the United States are currently looking at ways to either create or incorporate existing validated risk assessments into their practices. For example, throughout 2009 several Colorado counties representing roughly 85% of the State’s population continued their work on the Colorado Improving Supervised Pretrial Release project. That project aims to develop a similar validated pretrial risk assessment for use in the Colorado courts, as well as evidence-based supervision protocols that match pretrial release supervisory techniques to each defendant’s specific risk profile in order to lessen his or her risk to public safety and for failure to appear for court.⁹⁸

National Crime Commission

In April 2009, U.S. Senator Jim Webb introduced his bill to establish the National Criminal Justice Commission Act, which would be tasked with a top-to-bottom review of all areas of the criminal justice system, including federal, state, local, and tribal government’s criminal justice costs, practices, and policies.⁹⁹ On July 27, 2010, the House version passed, and on August 5, 2010, it was placed with the Senate version on the Senate legislative calendar.

The National Association of Counties

⁹⁵ VanNostrand, Marie, and Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, found at <http://nicic.gov/Library/023758>.

⁹⁶ See *Introduction to Special Issue on Assessing Pretrial Risk in the Federal Courts*, 73 Federal Probation 2 (Sept. 2009).

⁹⁷ For a copy, as well as other documents associated with the Virginia pretrial risk assessment, go to <http://www.dcjs.virginia.gov/corrections/riskAssessment/?menuLevel=5&mID=12>.

⁹⁸ See Michael R. Jones and Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corr.2008), p.13.

⁹⁹ For the language of the bill, as well as related materials, including news articles, go to http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm.

In October of 2009, the National Association of Counties (NACo), the only national organization that represents county governments in the United States, took a major step toward bail reform by adding to their Justice and Public Safety Platform, among other things, recommendations for county policies “ensuring” (1) pretrial investigation and assessment, and (2) least restrictive bail bond conditions, including release on recognizance, nonfinancial supervised release, and also preventative detention.¹⁰⁰ Notably, in the section on Bail Practices and Release Options, NACo now recommends that states enact defendant-based percentage bail laws,¹⁰¹ and that States and localities make greater use of such non-financial pretrial release options such as citation release and release on recognizance where there is a reasonable expectation that public safety will not be threatened.

Finally, and perhaps most relevant to those jurisdictions examining their current bail practices in light of the law and national standards, the platform states as follows: “NACo recommends that all counties establish a written set of policies and procedures aligned with state statute, national professional standards, and best practices on the pretrial release decision.”¹⁰²

The Pretrial Justice Institute

In the last two years, the Pretrial Justice Institute, the only national nonprofit organization “dedicated to ensuring informed pretrial decision-making for safe communities,”¹⁰³ released a number of relevant documents and reports, including: (1) “A Framework for Implementing Evidence-Based Practices in Pretrial Services”; (2) its annual survey of pretrial services programs; (3) “Jail Population Management: Elected County Official’s Guide to Pretrial Services” (with the Bureau of Justice Assistance and the National Association of Counties); and (4) “Understanding the Findings from the Bureau of Justice Statistics [BJS] Report, ‘Pretrial Release of Felony Defendants in State Court.’”¹⁰⁴

This last document is particularly interesting because of its effect. It was drafted in response to for-profit bail bond industry claims that certain national statistics produced by BJS demonstrated that “commercial bail is the most effective method of pretrial release.”¹⁰⁵ For several reasons, the PJI document concluded that this statement was erroneous, and that the national statistics could

¹⁰⁰ NACo, *Justice and Public Safety (09-10)*, p.4, found at

http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

¹⁰¹ For several reasons, many national bail experts believe that percentage bail laws only foster a flawed, money based bail system, and that better alternatives exist to help indigent defendants.

¹⁰² NACo, *Justice and Public Safety (09-10)*, p.8, found at

http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

¹⁰³ PJI website, found at <http://www.pretrial.org/AboutPJI/Pages/default.aspx>.

¹⁰⁴ For these and other documents, go to <http://www.pretrial.org/Resources/Pages/archived%20publishedresearch.aspx>.

¹⁰⁵ *Id.*, *Understanding the Findings*, at n. ii.

not be used to determine effectiveness.¹⁰⁶ The PJI document sparked a debate that went unsettled until, in March of 2010, BJS itself released a document supporting PJI's position by advising persons not to use its statistics for causal associations, and specifically warning that "evaluative statements about the effectiveness of a particular program in preventing pretrial misconduct may be misleading."¹⁰⁷ Despite the warning, however, the for-profit bail bondsmen have continued using the national statistics for both causal associations and evaluative statements.

Pretrial Services Agencies v. Commercial Bail Bondsmen — Part II

In August of 2009, the National Association of Pretrial Services Agencies released *The Truth About Commercial Bail Bonding in America*.¹⁰⁸ This particular document was apparently drafted to counter a fairly strong and concerted effort by national for-profit bail bonding interests to promote commercial sureties and demote professional pretrial services agencies.¹⁰⁹ One of those interests, the Allegheny Casualty, International Fidelity, and Associated Bond Company ("AIA"), countered with a booklet entitled *Taxpayer Funded Pretrial Release, A Failed System*, which was designed to "point out the critical performance differentials between government and private sector bail bonding."¹¹⁰

Throughout 2009, the struggle between commercial sureties and pretrial services agencies took place mostly in state legislatures, with intense fights in several states. In Virginia, the for-profit bail bond industry unsuccessfully lobbied for passage of a bill that would: (1) significantly limit judicial discretion by requiring financial bonds in every criminal case unless the defendant was identified as indigent; and (2) reduce state funding for Virginia's pretrial services programs.¹¹¹

In Florida, a bill that would prohibit those with money from being released to any entity but a for-profit bail bondsman failed to pass, as did a late amendment designed to prohibit supervised non-financial release for most felony defendants.¹¹² This failed legislative effort did not deter for-profit bail bond interests in that State, who continue to press their cause to county commissioners, judges, and sheriffs.

¹⁰⁶ Other authors have also noted the misuse of these national statistics by commercial bail bondsmen, and have given independent assessments of limitations associated with using those statistics. See Jones, Brooker, and Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District*, available through the Jefferson County, Colorado Criminal Justice Planning Unit, found at <http://jeffco.us/cjp/index.htm>.

¹⁰⁷ See *State Court Processing Statistics Data Limitations*, at http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf.

¹⁰⁸ Found at <http://www.napsa.org/publications/napsafandp1.pdf>.

¹⁰⁹ Many of the documents, videos, press releases, and related links promoted by the commercial bail bonding industry can be found at <https://www.aiaSurety.com/>, the home page to the Allegheny Casualty, International Fidelity, and Associated Bond companies.

¹¹⁰ The booklet can be ordered from AIA through its website at <https://www.aiaSurety.com/home/pretrialtruth.aspx>.

¹¹¹ See *Bail bill would punish defendants for not being poor* (Feb. 2, 2010) found at http://articles.dailypress.com/201002-02/news/dp-local_tamara_0203feb03_1_pretrial-defendants-bank-account; *Bondsmen battle government program* (Jan. 28, 2010) found at <http://fredericksburg.com/News/FLS/2010/01282010/524141/index.html>.

¹¹² See *Battle over bail bonds* (April 13, 2010) found at <http://www.miamiherald.com/2010/04/13/1576502/battle-over-bail-bonds.html>; *Pretrial release targeted by bail bond lobby and Florida legislators* (March 27, 2010) found at <http://www.tampabay.com/news/courts/criminal/article1083146.ece>.

In Georgia, for-profit bail bonding interests successfully backed a bill that reduced the types of defendants who may be released to a pretrial services program with electronic monitoring.¹¹³

In November 2010, Washington State citizens will be asked to vote on a legislatively-referred constitutional amendment to enable that State to broaden its preventative detention provisions. The changes in law were precipitated by the 2009 killing of four police officers by an Arkansas parolee released on a \$190,000.00 surety bond.¹¹⁴

Most recently, national bail bond interests have helped local bail bondsmen in Colorado craft “Proposition 102,” a citizen initiative for the November 2010 election that would force judges wanting to authorize pretrial supervision to also add up-front money conditions to virtually all pretrial defendants’ bail bonds. According to the Colorado Legislative Council Staff, the neutral and objective research entity of the Colorado General Assembly, Proposition 102 would cost Colorado taxpayers millions of dollars a year if it is passed.¹¹⁵

Proponents of Proposition 102 have written publicly that they are concerned with public safety and dedicated to decreasing crime and reducing recidivism. This should be contrasted, however, with quotes found in a recent news story by 9News (KUSA-TV in Denver), which exposed bail bondsmen for using technicalities and other unethical strategies to be exonerated from bail bonds whenever defendants fail to appear. As the story noted, “[The bail agent] said his allegiance is not to the courts and the justice system, but rather to the insurance company. ‘My job is to protect the insurance company from the loss ... It’s not a greed thing, we just don’t want to pay.’”¹¹⁶

These particular examples represent only a small portion of the overwhelming number of bills and initiatives concerning bail and pretrial release that were introduced throughout the country in the last two years, further testifying to the importance of the subject, as well as to the intensity of the fight.¹¹⁷

According to the Americans for the Preservation of Bail, the fight is indeed a national one, in which that group has vowed to “advance the responsible use of commercial bail,” “expose” pretrial

¹¹³ See Georgia HB 306, found at http://www.legis.ga.gov/legis/2009_10/fulltext/hb306.htm.

¹¹⁴ See at [http://ballotpedia.org/wiki/index.php/Washington_Judge_Bail_Authority_Amendment_\(2010\)](http://ballotpedia.org/wiki/index.php/Washington_Judge_Bail_Authority_Amendment_(2010)); see also *Four days in May set stage for Sunday’s tragedy*, at http://seattletimes.nwsources.com/cgi-bin/PrintStory.pl?document_id=2010392869&zsection_id=2003925728&slug=shootingjustice01m&date=20091201

¹¹⁵ Copies of the proposition’s language are available through Jefferson County, Colorado, Criminal Justice Planning Unit, found at <http://jeffco.us/cjp/index.htm>.

¹¹⁶ *Justice delayed while some fugitives run free, bondsmen pocket fees*, found at <http://www.9news.com/rss/article.aspx?storyid=139626>. Mike Donovan, proponent of Colorado Ballot Initiative 92 (now Proposition 102), recently posted Bail USA’s official response to the story, in which he stated that he didn’t believe bail agents were doing anything wrong, and that, instead, the courts were making “serious mistakes.”

¹¹⁷ For an updated list of all legislation relevant to bail and pretrial release across the country, go to <https://www.aiaSurety.com/home/resources/legislative-log.aspx>. It is believed that Oregon will consider a bill to reinstate commercial bail bonding in that state in its next legislative session.

services (sic) radical social agenda,” “build coalitions in states . . . to identify threats to Commercial Bail,” and to “[t]ake the fight against government run criminal welfare nationwide!”¹¹⁸

The commercial bail bond industry’s national agenda has been manifested mostly through the work of Jerry Watson, Chief Legal Officer of AIA, past head of the American Bail Coalition, and past chairman of ALEC.¹¹⁹ Both ALEC and the for-profit bail bonding industry have attempted to push nationally a model bill titled the “Citizens Right to Know: Pretrial Release Act,” which would place numerous (and in most cases, additional) reporting requirements on pretrial services agencies.¹²⁰ In support of this and other bills, in April 2010, AIA and ALEC sent copies of the publication, *Taxpayer Funded Pretrial Release — A Failed System*,¹²¹ to 2,500 legislators across the country.

The contentiousness of the national debate can be seen through countless news articles, editorials, and advertisements highlighting the struggle between for-profit bail bondsmen and professional pretrial release agencies throughout 2009 and 2010. Perhaps the most widely disseminated report was a three-part National Public Radio piece in January 2010 on problems associated with the American money bail system.¹²²

Other Organizations

Organizations typically considered as being outside of the ongoing struggle between commercial sureties and pretrial services agencies also released several relevant documents throughout 2009 and into 2010. In November 2009, the National Institute of Corrections (NIC) of the U.S. Department of Justice published its “Jail Capacity Planning Guide: A Systems Approach.”¹²³ In that document, the authors stress the need for an understanding of the interactive effects of criminal justice system policies and practices on jail planning, and suggest that system leaders combine data analysis with a qualitative review of such things as bail policies and adherence to national standards. In discussing specific jail population management strategies, the authors highlight the need for more purposeful booking decisions and early assignment of defense counsel to help

¹¹⁸ Go to <http://www.preservebail.com/>.

¹¹⁹ Mr. Watson’s close affiliation with ALEC may foster the distribution of potentially misleading information. In a recent speech, Watson stated that he drafted an article questioning the efficacy of pretrial release agencies, but “got [ALEC] to print it as an ALEC piece because we didn’t want it to come from a bail bonding organization – we wanted it to look like it came from some neutral, political source.” See *The Bail Agent’s Perfect Storm – Conclusion*, found at http://www.channels.com/search?search_box=AIA+&search_type=Episode#/search?search_box=AIA+&search_type=Episode at 27:52.

¹²⁰ See *The State Factor, Criminals on the Streets – A Citizen’s Right to Know* (Jan. 2009) found at <http://www.alec.org/am/pdf/sfbailbondjan09.pdf>.

¹²¹ See *supra* note 108.

¹²² Transcripts and audio recordings of this report are available from the Jefferson County Criminal Justice Planning Unit, found at <http://jeffco.us/cjp/index.htm>.

¹²³ David M. Bennett and Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach*, available at <http://nicic.org/Downloads/PDF/Library/022722.pdf>.

manage pretrial inmate populations, and point to pretrial services programs as “indispensable component[s] of an efficient criminal justice system.”¹²⁴

The same month, the American Jail Association published “69 Ways to Save Millions” in its *American Jails Magazine*.¹²⁵ The article summarizes strategies gleaned from interviews with jail administrators across the United States on how to operate jails within budgets without compromising public safety, including strategies to review and revise bail and pretrial release policies. In the same edition of that magazine, author and NIC consultant Mark Cunniff emphasizes the need for agencies to undertake jail impact studies when implementing new program or policy initiatives in the criminal justice system.

In the NIC sponsored article titled, “A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,”¹²⁶ the authors cite to research demonstrating, among other things, the dangers of over-supervision of lower risk offenders as a possible cause for recidivism, and to “promising” research by John Goldkamp and Michael Gottfredson showing that judges using bail guidelines were more consistent in their use of release on recognizance than judges who did not use bail guidelines.¹²⁷

Temple University Professor John Goldkamp’s research, in particular, has special relevance to jurisdictions undertaking serious bail reform as he continues to publish articles on: (1) the lack of any empirical basis showing a relation between money and pretrial misconduct; (2) the abundance of empirical research showing that money is the primary reason for pretrial detention (except, perhaps, in the District of Columbia and the Federal systems, where it is rarely used); and (3) the need to engage judges centrally in the bail reform process through study and review of actual practices, followed by formulation of, or agreement on, judicial policies concerning bail and pretrial release.

Finally, on June 7, 2010, the American Probation and Parole Association published a resolution supporting pretrial supervision services, in part because those agencies base their decisions on likelihood of court appearance and community safety considerations, as opposed to for-profit bail bondsmen, who make decisions based primarily on monetary considerations.

Crime and the Economy

The backdrop for all of these events, initiatives, and research has been (1) the foundering economy, and (2) the overall decrease in crime.

¹²⁴ *Id.* p.10.

¹²⁵ Found at <http://nicic.org/Library/024189>.

¹²⁶ See National Institute of Corrections, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (Center for Effective Policy, Pretrial Justice Institute, Justice Management Institute, and the Carrey Group, May 2010) p.9 n.13, found at <http://nicic.gov/Library/024372>.

¹²⁷ *Id.* pp.43, 48.

Known widely as the late 2000s global recession, the significant deceleration of economic activity has had an impact on criminal justice systems generally, and particularly on various criminal justice actors, including for-profit bail bondsmen and defendants. According to author John Clark, “the riddle of the indigent defendant in the bail system” has been around for as long as money has been used as security.¹²⁸ Nevertheless, the recession has added complication to the already difficult requirement in many states to assess a defendant’s financial condition for purposes of bail.¹²⁹ And yet, despite this recession, crime in the United States dropped dramatically in 2009, marking the third straight year of declines.¹³⁰

While many remain wary that the economy may create some longer term increase in crime, the current reduction has at least allowed criminal justice systems to focus on non-crisis driven improvements.

R. Conclusion

Overall, the history of bail and pretrial release shows steady but slow progress toward the realization of an ideal system of bail administration based on accurate predictions of court appearance and the commission of new crime. To many, however, the history of bail shows only that true bail reform has not been completely attained.

An internet query will uncover a multitude of quotes about the topic of history, from pithy to scathingly sarcastic. However, we leave you with one relevant to the underlying theme of prediction in the field of pretrial release. “History teaches everything, including the future,” wrote Alphonse Marie Louis de Prat de Lamartine, the French writer, poet, and politician. If he is right, then perhaps a solid historical background can, in fact, teach us something about the future of bail and pretrial release in the United States – a future molded by those who are dedicated to repeating historical successes, while avoiding its failures.

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

- *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Rehnquist, C.J., for the Court).

¹²⁸ Clark, John, *Solving the Riddle of the Indigent Defendant in the Bail System*, found at <http://www.pretrial.org/Docs/Documents/Solving%20the%20Riddle.pdf>.

¹²⁹ See, e.g., § 16-4-105 (1) (c) of the Colorado Revised Statutes.

¹³⁰ See Crime rates down for third year, despite recession, found at <http://abcnews.go.com/Politics/wireStory?id=10727789>.

Chapter 2: Fair Treatment for the Indigent: The Manhattan Bail Project¹

Vera Institute of Justice²

There are many penalties imposed upon an accused person who is detained in jail because he is too poor to post bail, and of them all perhaps the most unjust are two that are still not widely known: the detainee is more apt to be convicted than if he were free on bail; and, if convicted, he is more apt to receive a tougher sentence.

Vera takes action

The need for reform in this inherited system of combined rationality and injustice had long been recognized, but action had been rare.

[In 1961,] Vera's investigators set out to learn everything possible about bail practices and about other studies that had been undertaken on this subject. The findings...were eye-opening:

- bail bonds were almost always required by the judges, even though the law allowed other alternatives such as cash deposits or outright release for defendants who could be trusted to return for trial;
- bail was set arbitrarily, without regard to individual cases, and bail amounts tended to be standardized according to type of offense, not according to the trustworthiness of the individual;
- nearly one in three unsentenced detainees in a random sample in Chicago could have been released safely on their promise to appear in court later;
- nearly one in five detainees had pathological problems such as alcoholism, drug addiction, epilepsy, or mental retardation or illness, which would have been better handled in a medical treatment facility;
- bondsmen were crucially important in the bail-setting process and often had collusive arrangements with police, attorneys, and organized crime;
- the relatively high detention rate was extremely costly to the taxpaying public, which of course had to meet the cost of housing and feeding all detainees;
- there was a disturbing correlation between the fact that an individual was detained and the fact that he later was convicted and received a severe sentence.

Release on recognizance

¹ Originally published October 2011, VERA Institute of Justice.

² *Federal Sentencing Reporter*, Vol. 24, No. 1, Sentencing Within Sentencing (October 2011), pp.10-12.

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Real reform was indeed possible, and approaches to it had been suggested in the past.

This was the idea of encouraging judges to release far more accused persons on their honor pending trial, and providing the judges with verified information about the accused on which such releases could be based. It was an obvious, but at that time daring idea: find out who can be trusted, and trust them to appear for trial.

What was needed was a carefully designed project that would open the way for adoption of new procedures — procedures that would circumvent the bail bond industry, develop information about defendants which would enable the courts to grant release to good risks, and, most of all, begin providing the indigent accused with the fairness that the American system of rights and liberties promised him.

A project based on these concepts quickly took form:

Indigent defendants awaiting arraignment in Manhattan's criminal courts would be questioned by Vera staff interviewers to determine how deep their community roots were and thus whether they could be relied upon to return to court if there were released without bail.

The test of indigency [sic] would be representation by a Legal Aid lawyer.

Questions would develop information about the defendant's length of residence in the city, his family ties, and his employment situation.

Responses of the defendant would be verified immediately in personal or telephone interviews with family, friends, and employers.

When verified information indicated that an individual was trustworthy and could be depended on to return for trial, the Vera staff member would appear at arraignment and recommend to the judge that the accused be released on his own recognizance (ROR or pretrial parole) pending trial.

A demonstration project is set up

It was anticipated that such a simple but radical change in generally accepted procedures would meet opposition from those accustomed to the old ways or fearful of the new, and so the entire project was devised as a demonstration—an experiment to see whether people would return for trial if released without bail and, in general, how their cases compared with the cases of those not granted release as well as those released on bail.

If the experiment validated the premise that defendants with verifiable community ties would be released on their own recognizance far more often than anyone suggested, then pressure for widespread adoption of the idea would be hard to resist.

The experiment was scheduled to begin in the fall of 1961 in the arraignment part of the Manhattan Magistrate's Felony Court, one year prior to its merger with the Court of Special Sessions. Evening students from the School of Law at New York University were recruited as Vera staff interviewers and received a period of training during which they learned how the arraignment court functioned.

...

Launching the Manhattan Bail Project

On October 16, 1961, after months of detailed planning, the Manhattan Bail Project began operations. Specifics attending the launching were carefully arranged:

No publicity was given the inauguration of the venture, on grounds that it would be most effective as a demonstration to the community if the results could later speak for themselves. Aroused public expectations might also bias the project by conditioning the behavior of its participants.

The answers sought through the project were limited and precise:

- Would judges release more defendants on their own recognizance if they were given verified information about the defendants than they would without such information?
- Would released defendants return for trial at the same rate as those released on bail?
- How would the cases of released defendants compare with a control group not recommended for release, both in convictions and in sentencing?

A group of research methodologists was persuaded to serve as consultants in designing the study. All magistrates who would be sitting in court during the project were visited personally by Vera staff members prior to its initiation so that they would understand fully what was happening and why.

Since a primary function of the project was to demonstrate to the public and to those within the criminal justice system that pretrial parole was a device that could serve the public's interest as well as the defendant's, some offenses were excluded at the outset from the experiment. These were homicide, forcible rape, sodomy involving a minor, corrupting the morals of a child, and carnal abuse — crimes that were all thought to be too sensitive and controversial to be associated with a release program; narcotics offenses, because of special medical problems and because of a greater risk of flight; and assault on a police officer, where intervention by Vera might, it was feared, arouse police hostility.

Comprehensive follow-up procedures were devised to be sure that released defendants knew when they were expected in court for further appearances in connection with their trials. These procedures included mailed reminders, telephone calls, visits at home or work, and special notifications in the defendant's language, if he did not speak English.

Vera's small staff took up quarters in the Manhattan Criminal Court building at 100 Centre Street, and the law students began their interviews in the detention pens in the arraignment court. At first, they were asked to make subjective evaluations of the defendant's eligibility for pretrial parole after they had verified their community ties. It was discovered, however, that pressures were developing that caused some interviewers to withhold recommendations for release in cases where it was probably justified. To relieve the individual of these pressures and of the personal responsibility that, in part, created them, a weighted system of points was developed and the sole determinant as to whether or not a defendant would be recommended for release without bail was his achieving a point score of five or above. This development of a set of objective criteria on which to base release recommendations proved to be an important innovation.

...

Comparing the experimental and the control groups

During the first year of Bail Project operations, Vera was especially anxious to compare the experiences of those who had been recommended for release with the experiences of the control group, a statistically identical group for which recommendations had not been made to the judges.

It found that 59 per cent of its pretrial parole recommendations were followed by the court and that only 16 percent of the control group was released without bail by the judges acting on their own. Judges were clearly basing their actions on the availability of reliable information about the defendants.

More significantly, 60 per cent of those released pending trial during the first year eventually were acquitted or had their cases dismissed, compared with only 23 per cent of the control group. And only 16 per cent of the released defendants who were convicted were sentenced to prison, where 96 per cent of those convicted in the control group received prison sentences. Unquestionably, detention resulted in a higher rate of convictions and in far more punitive dispositions.

At the end of the second year, the control group was dropped. A sufficient body of evidence had been accumulated and it was no longer necessary to exclude anyone simply for purposes of statistical comparison.

Modifications in project procedures

Further innovations came in the third year of the project. An important one was that the number of offenses that had been excluded for political reasons was sharply reduced to include only homicide and certain narcotics offenses. Also, the indigency [sic] requirement was dropped. It was felt that bail costs should not be imposed on a defendant merely because he had funds; the test for those with money, as well as those without, should be the same: will the accused return for trial?

...

The national Bail conference

[While Vera's Manhattan Bail Project was changing policy in New York City,] it was the National Conference on Bail and Criminal Justice, held in Washington, D.C. in May of 1964, that provided the major impetus to bail reform across the United States. The Conference was sponsored jointly by the Department of Justice and Vera, and brought together for the first time expressly to discuss the bail problem more than 400 judges, prosecutors, defense lawyers, police officials, bondsmen, corrections officers, and interested academicians and government officials.

The extraordinary success of the National Bail Conference could be seen in the great flurry of activity in bail reform that it stimulated over the following months, culminating in enactment of the Bail Reform Act of 1966, signed into law by President Lyndon B. Johnson on June 22, 1966—the first change in federal bail law since the Judiciary Act of 1789. Spurred on by the conference addresses of Chief Justice Earl Warren, Attorney General Robert Kennedy, and Bernard Botwin, then a Presiding Justice of the Appellate Division of the New York State Supreme Court, as well as by the promotional efforts of an Executive Board set up by the Conference for the purpose, state and regional groups in all parts of the country convened to discuss what might be done about bail reform in their own jurisdictions. By the spring of 1965, 44 counties and cities were reported to be operating pretrial release projects, and 35 more had such projects in planning stages. In addition, 21 professional groups of judges, lawyers, attorneys general, and probation officers had scheduled special conferences in various states on problems of bail.

The Bail Reform Act of 1966

Passage by Congress a year later of the Bail Reform Act of 1966 seemed a fitting climax to the effort begun just five years earlier. The Act stipulated that persons should not be detained needlessly in the federal courts to face trial, to testify, or to await an appeal; that release should be granted in non-capital cases where there is reasonable assurance the individual will reappear when required; that the courts should make use of a variety of release options, depending on the circumstances (for example, release in custody of a third party, or with cash deposit, or bail, or with restricted movements); and that information should be developed about the individual on which intelligent selection of alternatives could be based. The Act guaranteed the right to judicial

review of release conditions, and also the right to appeal. President Johnson referred to the Act as “a major development in our system of criminal justice.”

Chapter 3: History of Bail in the United States and Risk Assessment in Bail

Peter Kiers¹

1. HISTORY OF BAIL IN THE UNITED STATES

The American bail system has its roots in medieval England. During that time, a sheriff would release the accused to friends and family, provided that if the person absconded with the sum of the bail money, it would be forfeited to the sheriff. In the United States, the Eighth Amendment to the Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Later, the 1789 *Judiciary Act* promulgated much more detailed provisions on bail. The commercial aspect, where money bail could be imposed as a condition of release and the hiring of one to represent you in court, was retained. The 1789 Act also introduced new requirements, including: 1) bail should be constitutionally non-excessive, 2) the right to bail exists only in non-capital cases, and 3) the purpose of bail is to ensure a person’s appearance in court.

The question of what precisely constitutes “excessive bail” under the Constitution has been settled by two cases. In *Stack v. Boyle* (1951), the US Supreme Court held that “[the] purpose of bail is to ensure that the person returns to court. Any amount higher than the sum calculated to fulfill that purpose is ‘excessive.’ The court must consider the circumstances of the individual defendant.” In the second case, *Carlson v. Landon* (1952), the Supreme Court held: “[the] right to bail is not absolute, but determined by federal and state legislatures.”

The problem with money bail is that people who can pay go free and people who cannot pay stay in jail. The amount of money set for bail is often tied to the type of offense committed, and is usually based on a prosecutor’s request. The bail system has also developed an over-reliance on professional bail bondsmen.

In 1961, the Manhattan Bail Project was launched by the Vera Foundation. It looked at the ties a person has to their community as an indicator of what factors would influence him to return to court. This project encouraged pretrial release without money bail. It started as a pilot program in one part of Manhattan in New York City. The court released approximately half of those recommended by the interviewers. The failure to appear rate was low among those recommended and released without cash bail. Gradually, judges became more confident and released more defendants the program recommended. In 1964, some states passed laws to limit, or eliminate, commercial bail bonds. Still, a defendant must leave a refundable 10% of the total bail amount with the court to ensure that he will appear in court as required. If the defendant fails to appear, he will owe the full amount to the court. This legislative reform transformed commercial bail to court

¹ Peter Kiers is the Director for Operations of New York City Criminal Justice Agency (“CJA”), a not-for-profit corporation serving New York City’s criminal justice system since 1973. CJA grew out the Vera Institute of Justice’s 1960s Manhattan Bail Project. This article is summarized based on a series of presentations given by Peter Kiers during the period 2013-14 in Xi’an, Chengdu, Guangzhou and Beijing while participating in pre-trial detention conferences organized by the U.S.-Asia Law Institute at the NYU School of Law. More information on the Vera Institute and CJA is provided in this Chapter as well as in Chapters 1 and 2 of this book.

bail, but it was still money bail. This, of course, impacted on the poor who must stay in jail because they could not afford the cost of even 10% of the bail amount.

In 1966, the Congress passed the Federal *Bail Reform Act*. In this act, every defendant is presumed eligible for release on recognizance, which is a simple promise to return to court without any financial commitment. It also featured conditional pretrial release with supervision, restrictions on money bail, 10% of the bail money as a deposit to a court, as well as a right of a defendant to have his bail status reviewed by a judge within 24 hours of detention. The 1966 *Bail Reform Act* led to revisions of state bail laws as well.

In the 1970s, there was a public discussion about whether courts should consider dangerousness, or the likelihood of re-arrest on new charges of released defendants. Interest in bail reform focused on appearance in court and public safety. In addition to risk of flight, courts started to consider the likelihood of a defendant committing another offense if released. Courts began to recognize both court appearance and danger of re-arrest as legitimate concerns. The presumption of release remained. If the court did not want to release a defendant on his own recognizance (without a financial commitment or a third party guarantor), then supervision during the pendency of the pretrial period could be imposed. In many cases, jurisdictions still used money bail, albeit a reduced deposit amount or a limited bail amount. However, it was recognized that there may be some defendants who were so dangerous that the safety of witnesses or the community was seriously in danger. The Court recognized that there could be times where a defendant could be held without bail. This was considered to be an exception to the general rule preferring release. Detention because of dangerousness is called “preventative detention,” and was deemed permissible because defendants who could be shown to be seriously dangerous would compromise the court’s authority, and abuse the right to bail.

In the early 1970’s, the District of Columbia became the first jurisdiction to experiment with preventive detention for defendants other than defendants accused of murder. Under the DC Code, a defendant charged with crimes of violence could be held before trial without bail for up to 60 days. When a defendant is charged with crimes of violence, or danger to persons, and his past pattern shows that no conditions would assure community safety, he should be detained before trial. The criteria for holding defendants include a defendant charged with crimes of violence who has previously been convicted within 10 years, or who was on release for another crime of violence at the time of arrest. Preventive detention also includes defendants who may pose a real threat to witnesses. Today, majority of states consider both risk of flight and dangerousness in making bail and pretrial release decisions.

In 1984, Congress passed the *Bail Reform Act* of 1984, replacing the *Bail Reform Act* of 1966. Compared to the previous act, the new act introduced three new features: 1) it clearly established the principle of the presumption of innocence; 2) it required a judge to first consider the least restrictive non-financial condition when bail is set; and 3) it specifically provided for detention justified based upon the defendant’s risk of flight and danger to the community. Under this Act, a court can detain an individual for public safety reasons if the defendant was arrested for an offense while 1) on release pending trial for a felony under federal, state, or local law; 2) on release pending sentencing for any offense; or 3) on probation or parole for any offense under federal, state or local law. The length of detention varies. If pretrial release is justified, the defendant will be detained

for a brief period, up to 10 days, to allow the appropriate agency to take the defendant into a suitable program where he will be under the supervision. Otherwise, a defendant will be detained for the entire pretrial period if no condition or combination of conditions would assure his appearance in court or assure public safety.

In 1986, the Supreme Court determined in *United States v. Salerno* that the *Bail Reform Act* of 1984 (allowing pre-trial detention of dangerous defendants), did not violate either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment. The court held that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the *Bail Reform Act* of 1984 fall within that carefully limited exception.” However, the limitations to the right to bail only apply to a specific list of serious offenses. At a bail hearing, the burden is on the government to prove an arrestee poses a risk of flight or a significant threat to others. The bail hearing itself cannot prevent a speedy trial.

There are some administrative safeguards to protect an arrestee’s rights. Some bail laws require hearings before formal detention. An arrestee must be represented by a counsel at such a hearing, and has the right to refute government evidence or present evidence in his own behalf.

As Wayne H. Thomas put in the book *Bail Reform in America*, bail is “the mechanism by which a defendant’s right to freedom prior to trial is squared with society’s interest in the smooth administration of criminal justice.”

2. RISK ASSESSMENTS IN PRETRIAL DECISION-MAKING AS BEST PRACTICE

The purpose of pretrial risk assessments in most US jurisdictions is to measure whether an arrestee is a flight risk, and/or a risk of danger. Over the years, the New York Criminal Justice Agency (the “CJA”) has developed a very effective method to measure an arrestee’s risk of flight through a short interview, a brief follow-up investigation to verify the information provided at the interview, and consideration of the defendant’s previous criminal record. The benefit of such an assessment as adopted by CJA is that it is objective, fair, trustworthy, transparent, and economical. The assessment is objective because all evaluating factors are based on research. It is fair because everyone is treated alike. The assessment form is understandable by all users, so it is trustworthy and transparent. Finally, the assessment saves money by identifying those who are in a low-risk group that do not need costly incarceration. They can be supervised with lower cost options, such as supervision or even a simple promise to return along with a telephone, text, or letter reminder notice.

Just as insurance companies rely on evidence and predictive behavior of their clients to determine the cost of insurance, a jurisdiction can use a validated risk assessment tool to assess two factors that determine risk during the pretrial period: first, the risk of flight, which assesses whether this person will come back to court if he is released; and second, the risk of re-arrest if the person is released.

Validated assessments use a point scale to determine the weight of the risk. For example, the point scale used by the CJA to determine risk of flight is based on eight indicators. Each indicator is weighted appropriately according to how well each component's individual weight predicts failure to appear according to a statistical model chosen by the researchers. The combination of positive indicators and negative indicators will yield an overall "score" or prediction of the person's reliability with respect to their appearance in court as required and their ability to avoid committing additional crimes.

The questions are: 1) Has the defendant lived at her address for 18 months or more? 2) Does the arrestee live with her family members or a legal guardian? 3) Does the arrestee have a landline phone or cell phone? Does the arrestee have a residence in New York City area? 5) Is the arrestee enrolled in a full-time work or school, or training program? 6) Does the defendant expect someone to come to her arraignment? 7) Is there a previous arrest warrant (either active or resolved) issued for the person's arrest for not appearing in court? And, 8) are there other pending cases against the arrestee? The answers range from "YES", "YES VERIFIED," which yield positive points to "NO," "NO VERIFIED," and "CONFLICT BETWEEN THE DEFENDANT ANSWER AND THE VERIFIER," which yield negative points. The scores from minus 12 to plus 12.

If an arrestee has a score between plus 12 and plus 7, the CJA will recommend for release on recognizance with no bail required. If she scores from plus 6 to plus 3, she is at moderate risk, which means the court must determine based on individual factors whether this defendant is a possible candidate for release with supervision. If she scores from plus 2 to minus 12, the CJA must recommended that the defendant not be release on her own recognizance. These recommendations to the court are based upon ties that the defendant has to his community. The judge may accept or reject the recommendation and the court may considering all of the factors required by law that are not considered in the risk assessment, such as the defendant's mental health, the seriousness of the current offense, and the likelihood of conviction.

Experience shows that of all the arrestees the CJA recommends for release on recognizance, 92% of them appear in court after they are released by a judge. Eighty-five percent (85%) of all the defendants evaluated as moderate risks appear in court after release, and 75% of those not recommended for release on recognizance appear in court. We are very pleased that our work has proven to be effective.

Chapter 4: Pretrial Investigation and Pretrial Service Supervision

Barry Weiner¹⁴⁵

The United States Probation and Pretrial Services system currently employs 7,756 officers who serve in 373 offices across 94 judicial districts. These pretrial and probation officers investigate the backgrounds of defendants, provide courts with the information necessary to make release and sentencing decisions, and also supervise defendants and monitor their activities to manage risks to the community.

There are two goals of pretrial services: first, to reasonably ensure safety of others and the community, and second, to reasonably ensure a defendant's appearance at all court hearings. If defendants obey the law, comply with conditions imposed, and make all court appearances, then pretrial services have successfully achieved their goals. Pretrial services have the responsibility to: 1) interview and investigate defendants; 2) verify information provided by defendants; 3) assess risk of flight and danger; 4) objectively report to judges; 5) recommend detention or release; and 6) supervise released defendants.

When the officers in the pretrial services are carrying out their responsibilities, they are required to strictly adhere to the following principles:

First, they should presume that a defendant is innocent unless proven guilty. Consistent with this, they should always remember that they work for the courts and are not aligned with either the government or defense counsel, and they should use the least intrusive means necessary to adequately investigate a defendant.

Second, they must recommend, and the courts impose, the least restrictive conditions necessary to reasonably assure a defendant's appearance at court and the safety of the community.

Third, they must not unduly intrude on a defendant's privacy, which means that the pretrial services report should contain only information relevant to the assessment of a defendant's potential failure to appear at court hearings and their probable danger to the community. All information garnered from interviews is kept confidential.

Officers in pretrial services should also respect the rights of defendants. Defendants have the right to remain silent during an interview, but if they speak, they must be truthful. They have the right

¹⁴⁵ Barry Weiner is a former Chief Federal Probation Officer in Rhode Island. He currently is a Director of Rehabilitative Services at Rhode Island Department of Corrections. This article is summarized based on a series of presentations given by Peter Kiers during the period 2013-14 in Xi'an, Chengdu, Guangzhou and Beijing while participating in pre-trial detention conferences organized by the U.S.-Asia Law Institute at the NYU School of Law. This article only reflects the situation under Federal US law and does not reflect the law applicable in each US State.

to counsel. An attorney will be appointed if they cannot afford one. They also have the right to confidentiality — all the information is solely for the purpose of making a decision regarding pretrial release, detention and/or supervision.

When a pretrial services officer makes a recommendation to a court, three factors are usually considered: the risk assessment of a defendant, the nature and circumstances of his offense, and the history and character of this defendant. In determining the defendant's risk of flight, eleven factors are considered. These are the defendant's: 1) number of felony convictions, 2) prior failures to appear at court hearings, 3) pending felony or misdemeanor charge, 4) current offense type, 5) offense class, 6) age at interview, 7) highest level of education attained, 8) employment status, 9) residence, 10) current drug problems(if any), and 11) citizenship status. Based on a defendant's risk level, the pretrial services officers divide the risk into five categories, giving the defendant a score from 0 to 12. The higher the score is, the more likely it is that a defendant will: fail to appear at court hearings, commit new criminal activities and/or commit technical violations. According to US national statistics, in 2013, of 101,000 defendants, 26,500 of them were placed under supervised pretrial release, 186,000 offenders were under post-conviction supervision, and 14,200 defendants were under electronic home confinement.

During an interview, pretrial services officers mostly look for the defendant's family and financial ties, his or her criminal history and health condition, including both physical and mental health, as well as their history of substance abuse.

After the interview, pretrial services officers complete a report for the court, the prosecution, and defense counsel. This involves interviewing the defendant, and other collateral resources, and verifying information; reporting any criminal history, substance abuse, and mental health issues; conducting home visits to determine suitability; determining whether there are risks to third parties; assessing risk to the community and risk of flight; and making a recommendation to the court regarding the defendant's release or detention.

If a defendant is released while he or she is waiting for trial, pretrial services officers must conduct efficient supervision of him. The goal of supervision is to assure that a defendant does not commit new crimes, that he is held accountable and that he is prepared for continued success. Pretrial services are trying to use the least restrictive conditions of release and least restrictive strategies for supervision. They assure courts that defendants comply with conditions of release. At the same time, they evaluate a defendant's needs and coordinate their services.

Pretrial services officers not only encourage defendants to comply with all the conditions imposed by the courts, but also provide resources and treatment to facilitate positive behavioral changes. They supervise what kinds of people defendants may contact at home, whom they contact socially, and whether their names show on new criminal record checks. Studies in social sciences show that

anti-social cognition, anti-social companions, anti-social personality, poor family and marital relationships, poor education achievement, unemployment or under-employment, substance abuse and poor use of leisure time are key drivers of future criminal behavior.

Due to effective supervision, national statistics show that in 2013, only 1% of defendants who were under pretrial supervision failed to appear in court; only 2% returned to custody for committing a new crime; and only 10% returned to custody for a technical violation of the conditions of release.

Financially, supervising a release defendant brings more benefits to the society than incarceration. Every month, the US spends \$2,412 on an incarcerated defendant, but only \$279 on a released defendant. The daily cost of electronic home confinement is less than \$6.

Chapter 5: Assessing Pretrial Risk without a Defendant Interview

Marie VanNostrand, Christopher T. Lowenkamp¹⁴⁶

Introduction¹⁴⁷

Judicial officers across the country make release-and-detention decisions for defendants on a daily basis. These decisions carry enormous consequences for both the community and those accused of committing crimes. A pretrial risk assessment is a tool intended to assist judicial officers with these decisions by measuring the risk of failure to appear (“**FTA**”) and new criminal activity (“**NCA**”) if a defendant were to be released pending case disposition (VanNostrand and Keebler, 2007).

The first pretrial risk assessment was used in the early 1960s in New York City to test the hypothesis that defendants could be categorized by the degree of risk they posed to fail to appear in court. The risk assessment, known as the Vera scale, was developed as part of the Vera Institute of Justice’s Manhattan Bail Project (Mamalian, 2011). In the 50 years since that groundbreaking study, a substantial amount of pretrial risk- assessment research has been conducted. A review of the literature identified eight multi-jurisdictional pretrial risk-assessment instruments being used in Colorado, Connecticut, Florida, Kentucky, Ohio, Maine, Virginia, and the federal court system. An examination of these assessments, as well as other assessments developed and used in single jurisdictions, revealed that they all require information collected from defendant interviews, and that information must often be verified. In addition, the assessments use common factors to predict pretrial outcome, including:

- Current charge(s)
- Outstanding warrants at time of arrest
- Pending charges at time of arrest
- Active community supervision at time of arrest (e.g., pretrial, probation, parole)
- History of criminal arrest and convictions
- History of failure to appear
- History of violence
- Residence stability
- Employment stability
- Community ties
- History of substance abuse

¹⁴⁶ Originally published, November 14, 2013, by the Laura and John Arnold Foundation. Authored by Marie VanNostrand, Ph.D., and Christopher T. Lowenkamp, Ph.D.

¹⁴⁷ Bechtel, K., Lowenkamp, C.T. & Holsinger, A.M., “Identifying the Predictors of Pretrial Failure: A Meta-Analysis,” (2011) Federal Probation 75(2), pp.78-87; Mamalian, C.A., *State of the Science of Pretrial Risk Assessment*. Washington, DC: PJI (2011); VanNostrand, M. & Keebler, G., “Our Journey Toward Pretrial Justice,” (2007) Federal Probation, 71(2).

A meta-analysis revealed that the strongest predictors of FTA and NCA were static factors such as prior convictions, prior misdemeanors, prior felonies, and prior failure to appear. In addition, the more dynamic factors such as residence and employment were less predictive or not predictive at all (Bechtel, Lowenkamp, and Holsinger, 2011).

As evidenced by the eight multi-jurisdictional pretrial risk assessments and the many single jurisdiction assessments, the use of pretrial risk assessments is growing. The exact number of jurisdictions that use pretrial risk assessments is unknown, but it is estimated at only 10%. This low adoption rate is due in large part to the requirement of defendant interviews, which are time consuming and resource intensive to conduct and verify. Even jurisdictions that allocate resources for the task cannot assess every defendant. In Kentucky, for example, about one-third of all defendants are not assessed because they decline to be interviewed or provide information that cannot be verified.

The time-consuming and resource-intensive nature of interview-based pretrial risk assessments makes them prohibitive for many jurisdictions across the country. This fact, combined with the proven predictive nature of criminal history factors, leads to a logical question: can an effective pretrial risk assessment be developed without requiring a defendant interview to be completed?

This study is intended to explore this question. Data from Kentucky was selected due to the comprehensive nature of pretrial risk assessment in the state. Kentucky Pretrial Services was established in 1976. A division of the Administrative Office of the Courts, the program (one of the few state-wide unified systems in the country) operates around the clock in all 120 counties and has interviewed more than 2.7 million defendants since its inception. These interviews, performed within 12 hours of arrest, include extensive criminal history checks as well as collection and verification of ties to the community, and they are essential to the completion of the Kentucky Pretrial Risk Assessment (KPRA). The KPRA is an objective 12-point risk assessment used to assist in recommendations to the court on whether to detain or release a defendant pending trial.

Research Objectives and Questions

The study includes three (3) research objectives and five (5) related research questions as shown below.

1. *Develop a pretrial risk assessment that can be completed without a defendant interview.*
 - a. Can a non-interview-based pretrial risk assessment be developed that accurately differentiates low-, moderate-, and high-risk defendants according to the overall Kentucky Pretrial Risk Assessment?

2. Determine if the non-interview-based pretrial risk assessment is predictive of failure to appear and new criminal activity for defendants awaiting case disposition.

- a. Does the non-interview-based pretrial risk assessment predict FTA?
- b. Does the non-interview-based pretrial risk assessment predict NCA?

3. Validate the non-interview-based pretrial risk assessment on a secondary dataset.

- a. Does the non-interview-based pretrial risk assessment predict FTA for a secondary dataset?
- b. Does the non-interview-based pretrial risk assessment predict NCA for a secondary dataset?

Datasets

The data used to conduct this research was provided by the Commonwealth of Kentucky. The primary sample used for research objectives one and two included all defendants arrested and booked into Kentucky jails between July 1, 2009, and June 30, 2010. This led to a sample size of 153,770 cases, 80,034 of which had a valid risk assessment and defendants who were released prior to case disposition. The dataset does not represent unique individuals, but rather includes all bookings within the study period. (Some individuals were booked multiple times within the timeframe; calculating a unique count of individuals could not be performed reliably, as unique identifiers were missing in almost 10% of the cases.) All cases associated with the defendants in the sample reached final disposition.

To investigate the third research objective, a second data sample was drawn from cases booked into Kentucky jails between July 1, 2010, and December 31, 2011. This sample yielded a total of 209,306 cases, 109,633 of which had a valid risk assessment and defendants who were released prior to case disposition. Again, this dataset does not represent unique individuals, and all cases in the sample reached final disposition.

PRIMARY SAMPLE DESCRIPTION

Demographics

The vast majority of the working sample was male (74%). The average age of the defendants was 33.5, while the most common age was 21. Thirty percent of all defendants were 25 or younger, 25% were between 26 and 32, 19% were between 33 and 40, 18% were between 41 and 50, and 9% were 51 or older. The sample was 80% White and 18% African American, with other racial categories (Asian, Native American, and other) comprising less than two percent each.

Fifty-seven percent were single, 20% married, 16% divorced, and 7% separated. More than a third of the sample (34%) had less than a high school education, while a total of 43% had either a GED (13%) or a high school diploma (30%). Approximately 23% reported having some college or a college degree (some college = 17%, associate's = 2%, bachelor's = 3%, graduate degree = 1%). A very small portion (3%) of the sample served in the military.

Less than half (39%) of the sample reported being a full-time worker or a full-time student (35% and 4%, respectively), 31% were unemployed, and 30% reported an "other" status (e.g., disabled, retired).

Charge Information

A primary charge (the most serious) was identified for each defendant in the sample. The most common primary charge was drug related (23%), followed by theft/fraud (17%), and DUI (17%). Approximately 13% of defendants had a primary charge related to violence (including non-domestic violence, domestic violence, and sex offenses). Table 1 shows the breakdown of primary charges.

CHARGE	N	%
Violent (DV)	10,098	7
Violent (Non-DV)	7,096	5
Sex Offense	980	1
Firearm	2,958	2
Drugs	34,502	23
Theft/Fraud	25,713	17
Traffic (DUI)	25,482	17
Traffic (Non-DUI)	17,173	12
Other Felony	5,226	4
Other Misdemeanor	18,288	12
Total	147,516	100

Table 1. Distribution of Primary Charge Category

Pretrial Status

As noted above, the sample includes all cases in which a defendant was arrested and booked into a jail in Kentucky between July 1, 2009, and June 30, 2010. This time frame rendered a total of 153,770 records. Of this sample, 112,215 (73%) were released pretrial while 41,555 (27%) were detained until case disposition. The average length of detention was 7 days for defendants released pending case disposition, and 55 days for defendants detained pending case disposition. Of the 112,215 released pretrial, a total of 80,034 (71%) had a valid risk assessment conducted. Assessments could not be completed on the remaining 29% because the defendant posted a pre-set bond before the interview, declined the interview, provided information that could not be verified, or was homeless.

Pretrial Outcomes

Pretrial outcome is the success or failure of a defendant released pending case disposition. “Failure” includes failure to appear (FTA), arrest for new criminal activity (NCA), or bail revocation. “Success” means avoiding these pretrial outcomes.

Of all defendants with a valid risk assessment who were released pending case disposition, 90% appeared for all scheduled court appearances (10% FTA). Eighty-nine percent were not arrested for new criminal activity (11% NCA). Approximately 1% had their bail revoked for reasons other than FTA or NCA. Table 2 contains these outcomes.

Overall, 81% of all defendants in the sample were successful. Some defendants failed to appear and had an arrest for new criminal activity, which explains why the failure rate of 19% is lower than the sum of the three failure subcategories.

OUTCOME	N	%
Failure (any FTA, NCA, Revocation)	15,312	19
FTA	8,262	10
NCA	8,752	11
Revocation	677	1
Successful (No FTA, NCA or Revocation)	64,688	81

Table 2. Outcomes of Defendants Released Pretrial with a Valid Pretrial Risk Assessment

Risk Assessment

There are 12 risk factors on the current Kentucky Pretrial Risk Assessment (KPRA). Table 3 contains each risk factor, the response which indicates if it is the presence or absence of the factor that is considered a risk, the weight (points) assigned to the risk factor, and the percentage of defendants in the sample who had the risk factor present.

RISK FACTOR	RESPONSE	WEIGHT	%
Does the defendant have a verified local address, and has the defendant lived in the area for the past twelve months?	No	2	12
Does the defendant have verified sufficient means of	No	1	44
Is the defendant's current charge a Class A, B, or C felony?	Yes	1	13
Does the defendant have a pending case?	Yes	7	23
Does the defendant have an active warrant(s) for FTA? If no, does the defendant have a prior FTA on a misdemeanor or felony charge?	Yes	2	18
Does the defendant have a prior FTA on a criminal or traffic violation?	Yes	1	17
Does the defendant have prior misdemeanor convictions?	Yes	2	70
Does the defendant have prior felony convictions?	Yes	1	28
Does the defendant have prior violent crime convictions?	Yes	1	23
Does the defendant have a history of drug or alcohol	Yes	2	14
Does the defendant have a prior conviction for felony	Yes	3	2
Is the defendant currently on probation/parole from a	Yes	1	9

Table 3. Defendants with a Valid KPRA

The points for each risk factor are summed for a total risk score. The defendants were categorized as low risk (0 to 5 points), moderate risk (6 to 13), or high risk (14-24).

For the current sample, 68% were low risk, 29% moderate, and 3% high (see Figure 1). Figure 2 presents the failure rates for each risk category: 14% for low risk, 27% for moderate risk, and 38% for high risk.

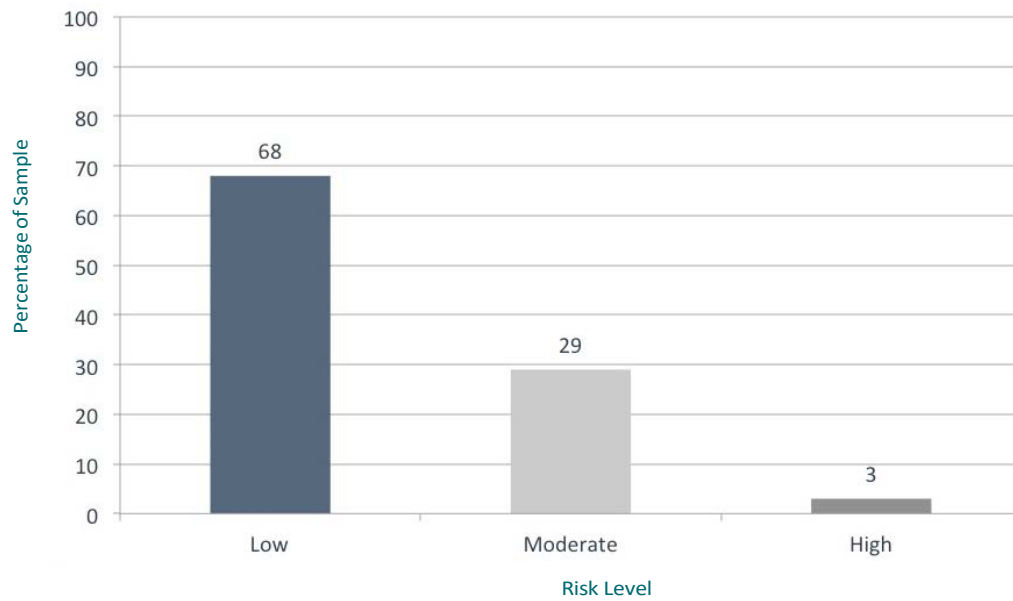


Figure 1. Risk Category Distribution

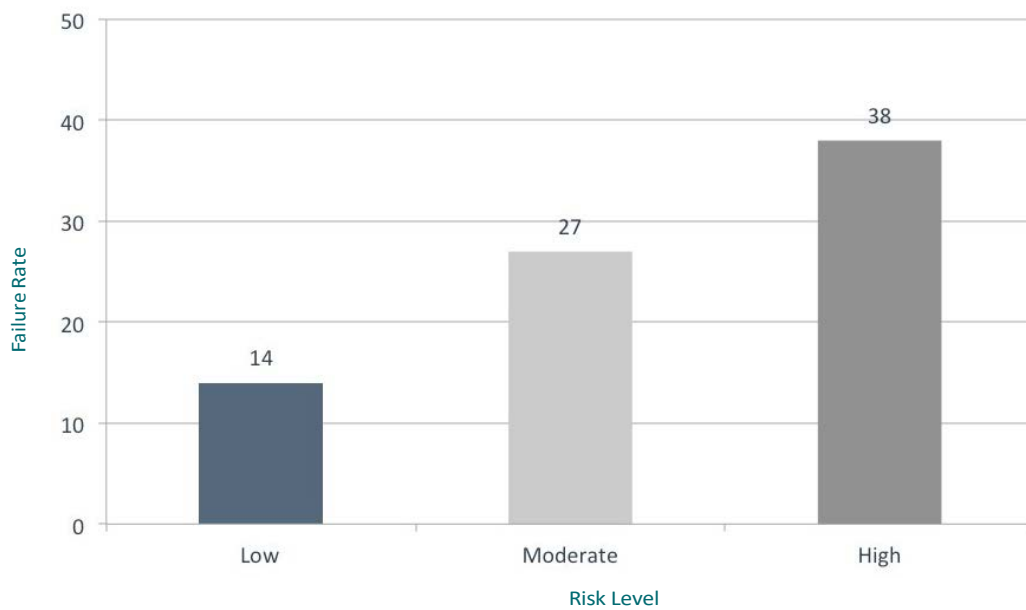


Figure 2. Failure Rate by Risk Category

RESEARCH OBJECTIVE ONE:

- a. *Develop a pretrial risk assessment that can be completed without a defendant interview.*

Research Question

Can a non-interview-based pretrial risk assessment be developed that accurately differentiates low-, moderate-, and high-risk defendants according to the overall Kentucky Pretrial Risk Assessment?

Methods and Analysis Results

The first research objective required analyses of the non-interview-dependent factors contained on the KPRA. Of the 12 factors on the risk assessment, nine were related to criminal history and therefore available without a defendant interview. Table 4 contains the nine factors identified for testing.

Bivariate analyses were conducted to test the relationship between each of the criminal history factors and pretrial failure. Eight of the nine had statistically significant relationships with failure. Only seven of the eight statistically significant factors were selected for further testing and use because one factor (prior conviction for felony escape) was present in less than 2% of the cases and did not add to the overall predictive validity of the instrument. Table 5 includes the seven risk factors used to develop a non-interview-based risk assessment, hereafter referred to as the KPRA-S. The original weighting contained in the full KPRA is maintained in the KPRA-S.

RISK FACTOR	RESPONSE
Is the defendant's current charge a Class A, B, or C felony?	Yes
Does the defendant have a pending case?	Yes
Does the defendant have an active warrant(s) for FTA? If no, does the defendant have a prior FTA	Yes
Does the defendant have a prior FTA on a criminal or traffic violation?	Yes
Does the defendant have prior misdemeanor	Yes
Does the defendant have prior felony convictions?	Yes
Does the defendant have prior violent crime	Yes
Does the defendant have a prior conviction for	Yes
Is the defendant currently on probation/parole	Yes

Table 4. Potential Factors for KPRA-S

RISK FACTOR	RESPONSE	WEIGHT
Does the defendant have a pending case?	Yes	7
Does the defendant have an active warrant(s) for FTA? If no, does the defendant have a prior FTA on a misdemeanor	Yes	2
Does the defendant have a prior FTA on a criminal or traffic violation?	Yes	1
Does the defendant have prior misdemeanor convictions?	Yes	2
Does the defendant have prior felony convictions?	Yes	1
Does the defendant have prior violent crime convictions?	Yes	1
Is the defendant currently on probation/parole from a	Yes	1

Table 5. Non-Interview Dependent Factors Selected for KPRA-S

Once these seven items were identified for inclusion on the KPRA-S, five risk categories were created from the new point scale, which ranged between 0 and 15 points. The categories (low, low-moderate, moderate, moderate-high, and high) were based on the overall distribution of scores as well as the interview-based risk categorization and overall outcomes. Low risk defendants scored 0 points, low-moderate 1-3 points, moderate 4-9 points, moderate-high 10-11 points, and high 12 or more points.

Once the KPRA-S score and categories were developed, analyses were conducted to determine if the KPRA-S placed the defendant in a similar risk category to the full KPRA.

Table 6 shows how the KPRA-S categories aligned with the categories on the full KPRA. All of the defendants in the low-risk category of the KPRA-S were also low-risk according to the full KPRA. Ninety-three percent of defendants in the low-moderate category of the KPRA-S were in the low category for the full KPRA, while 7% were in the moderate category. Twenty-nine percent of defendants in the moderate risk category of the KPRA-S were in the low category of the full KPRA, while 71% were in the moderate category and less than 1% were high risk. Eighty-seven percent of defendants in the moderate-high category of the KPRA-S were moderate on the full KPRA, while 13% were high risk on the full KPRA.

Finally, 47% of defendants in the high-risk category on the KPRA-S fell in the moderate risk category on the full KPRA, while 53% were high risk.

These results were not unexpected because the full KPRA assessment is largely driven by the same factors as the KPRA-S (i.e., criminal history and factors related to court appearance). Nonetheless,

these results indicate that the seven items used to create the KPRA-S categorize defendants in a manner that is consistent with the full KPRA.

	CURRENT KPRA CATEGORY		
KPRA-S	Low	Moderate	High
Low	100%	0%	0%
Low-moderate	93%	7%	0%
Moderate	29%	71%	<1%
Moderate-high	0%	87%	13%
High	0%	47%	53%

Table 6. Full KPRA and KPRA-S Comparison

Summary of Findings

Based on the analysis, it appears that a non-interview-based pretrial risk assessment can be developed that accurately differentiates low-, moderate-, and high-risk defendants. The consistency between the KPRA-S and KPRA was high, with a correlation between the scores on these two instruments of 0.96.

RESEARCH OBJECTIVE TWO

- a. *Determine if the non-interview-based pretrial risk assessment is predictive of failure to appear and new criminal activity while awaiting case disposition.*

Research Questions

- Does the non-interview pretrial risk assessment predict FTA while awaiting case disposition?
- Does the non-interview pretrial risk assessment predict NCA while awaiting case disposition?

Methods and Analysis Results

For research objective two, the distribution of the sample, per the KPRA-S five-category model, was calculated. Figure 3 displays the percentages: 26% of the sample was low risk, 37% low-moderate, 25% moderate, 7% moderate-high, and 5% high.

The next analyses calculated the percentage of defendants who failed to appear for a court appearance, per their KPRA-S risk category (see Figure 4). “Stair-step” increasing failure rates are observed with each risk category. Specifically, 6% of low-risk defendants failed to appear, 9% of low-moderate, 13% of moderate, 15% of moderate-high, and 20% of high. The likelihood of FTA increases with each KPRA-S risk category.

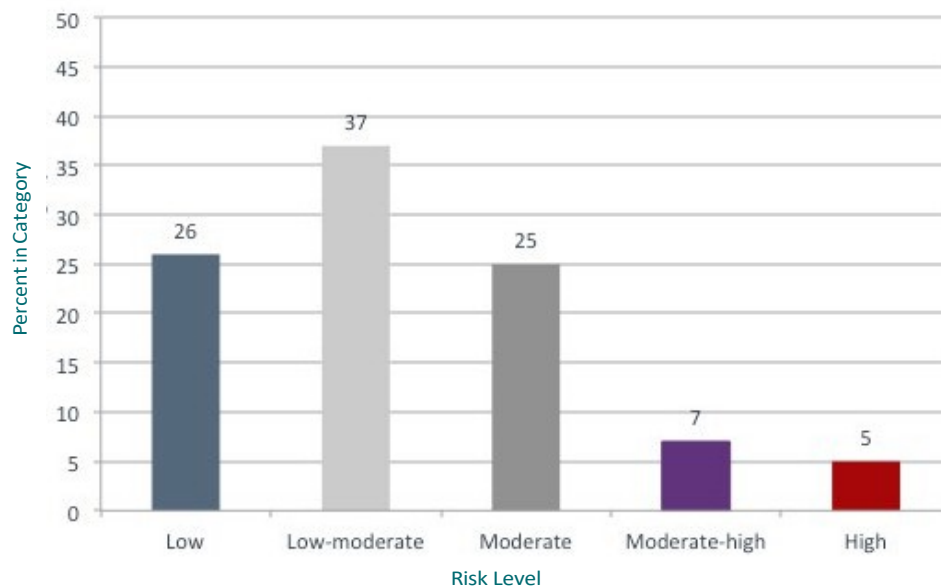


Figure 3. Risk Category Distribution for KPRA-S

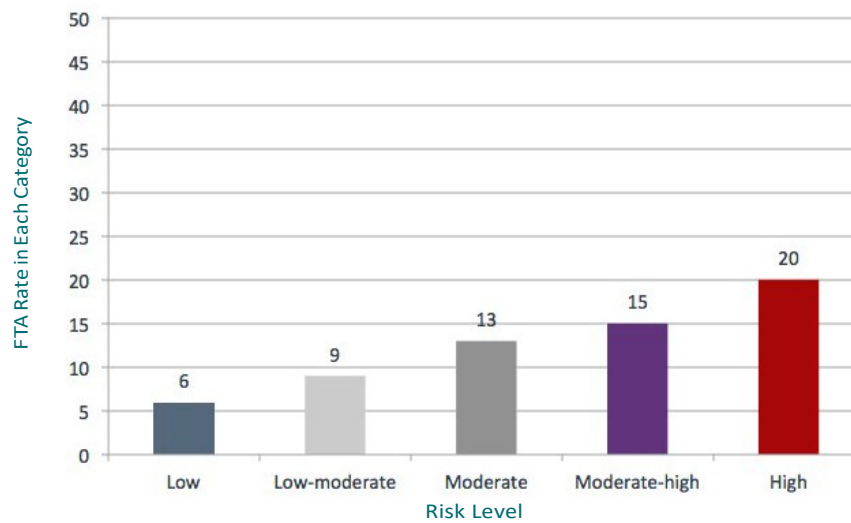


Figure 4. Likelihood of FTA for KPRA-S

The percentage of defendants arrested for NCA was also calculated per the KPRA-S five-category model. NCA rates for each risk category were similar to those observed for FTA. Figure 5 displays the percentages: 5% of low-risk defendants were arrested pretrial, 9% of low-moderate, 15% of moderate, 20% of moderate-high, and 23% of high. NCA, like FTA, increases with each KPRA-S risk category. These results begin to establish the predictive validity (albeit retrospectively) of the KPRA-S.

FTA and NCA were combined into a composite measure of failure, and similar “stair-step” results were observed as the risk categories increased. Figure 6 shows the percentages: 10% of low-risk defendants failed (FTA or NCA), 16% of low-moderate, 25% of moderate, 31% of moderate-high, and 37% of high. On all counts, as risk category increases, so does the likelihood of failure.

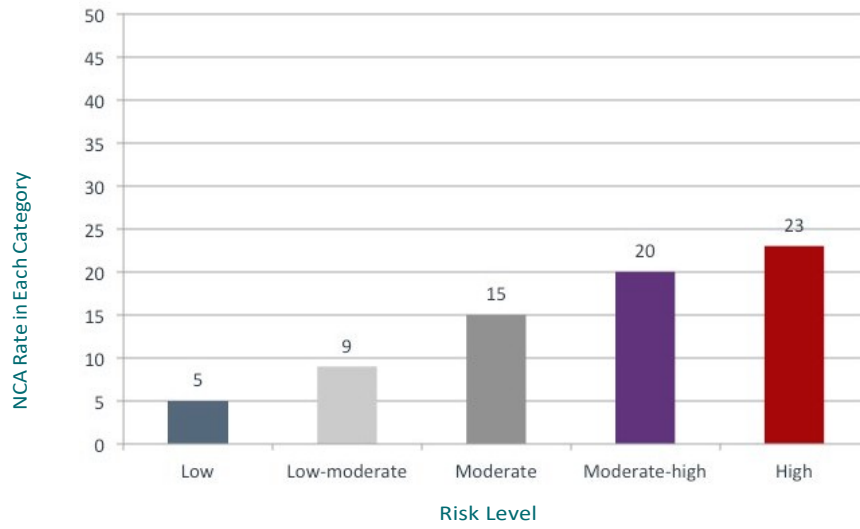


Figure 5. Likelihood of NCA for KPRA-S

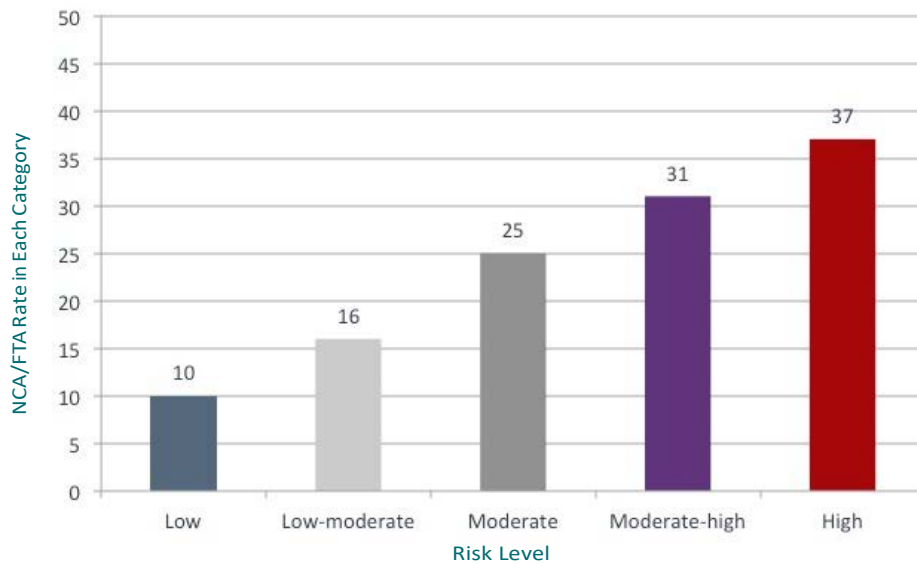


Figure 6. Likelihood of NCA or FTA for KPRA-S

The full KPRA and the KPRA-S were also tested by calculating a summary statistic – area under the curve for the Receiver Operator Characteristics (AUC-ROC).¹ These analyses further test the predictive validity of each assessment, beyond the percentages displayed above. The AUC-ROC

value between the full KPRA risk score and failure (FTA or NCA) was .6474, while the AUC-ROC value between the KPRA-S risk score and failure (FTA or NCA) was .6381. The AUC-ROC values are in the acceptable range, although neither met the commonly accepted target for risk assessment research of .7000. It is also important to note that the two values did not differ to a statistically significant degree. In short, the scales performed equally well.

Summary of Findings

Based on the analysis, the non-interview-based pretrial risk assessment was able to predict both FTA and NCA. The rate of FTA and NCA increased with each increase in KPRA-S risk category. When the measures of “failure” were combined (FTA and NCA), similar results were observed.

RESEARCH OBJECTIVE THREE:

- a. *Validate the non-interview-based pretrial risk assessment on a secondary dataset.*

Research Questions

- a. Does the non-interview-based pretrial risk assessment predict FTA for a secondary dataset?
- b. Does the non-interview-based pretrial risk assessment predict NCA for a secondary dataset?

Research Methods and Analysis Results

A validation of the KPRA-S was completed using a second sample of data that included cases booked into Kentucky jails between July 1, 2010, and December 31, 2011. This sample yielded a total of 209,306 cases, 109,633 of which had a valid risk assessment and defendants who were released prior to case disposition. Again, the dataset did not represent unique individuals, but rather all bookings within the study period.

The KPRA-S was calculated for each of the 109,633 cases in the second working sample. The risk category was then used to predict failure (FTA and/or NCA) pending case disposition. The results from the primary and secondary sample were then compared. Table 7 presents the failure rates for each risk category as defined by the KPRA-S. The failure rates are again strictly increasing when moving from the low-risk to high-risk category.

Figure 7 presents a graphic display of the data found in Table 7. Regardless of outcome measure, an increase in failure rate is again noted when moving from one category to the next. This observation is a baseline test of whether the proposed classification instrument has predictive validity.

	FAILURE RATE		
Risk Category	FTA	NCA	FTA OR NCA
Low (n = 26,536)	6%	5%	10%
Low-moderate (n = 36,491)	8%	9%	15%
Moderate (n = 30,418)	14%	14%	24%
Moderate-high (n = 8,724)	16%	17%	29%
High (n = 7,672)	22%	20%	35%
Total (n = 109,841)	11%	11%	19%
ROC-AUC Values	.64	.63	.62

Table 7. Failure Rates by KPRA-S Category

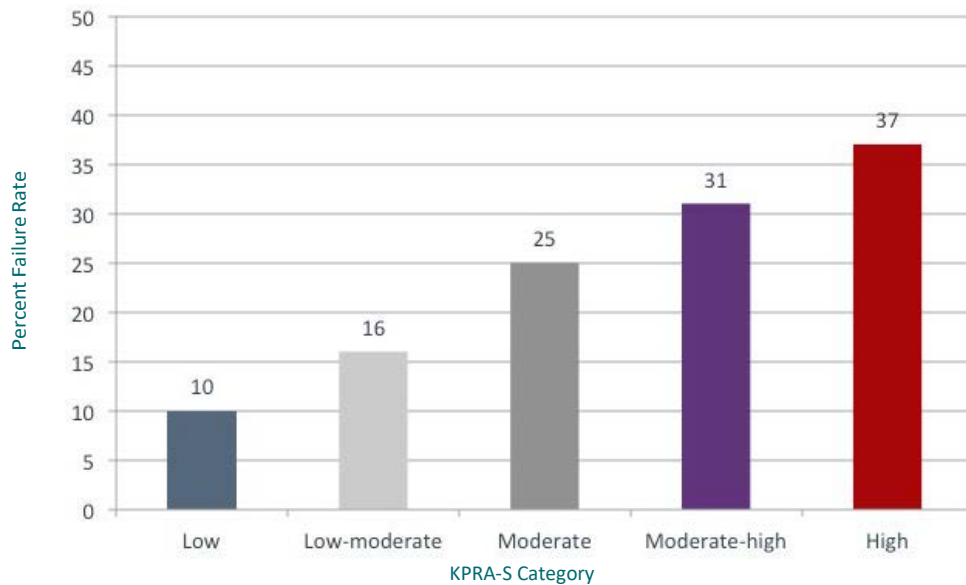


Figure 7. Graphic Display of Failure Rates by KPRA-S

Figures 8 and 9 compare the primary and secondary datasets. The failure rates are strictly increasing with the risk categories for both datasets, and the failure rates are remarkably similar.

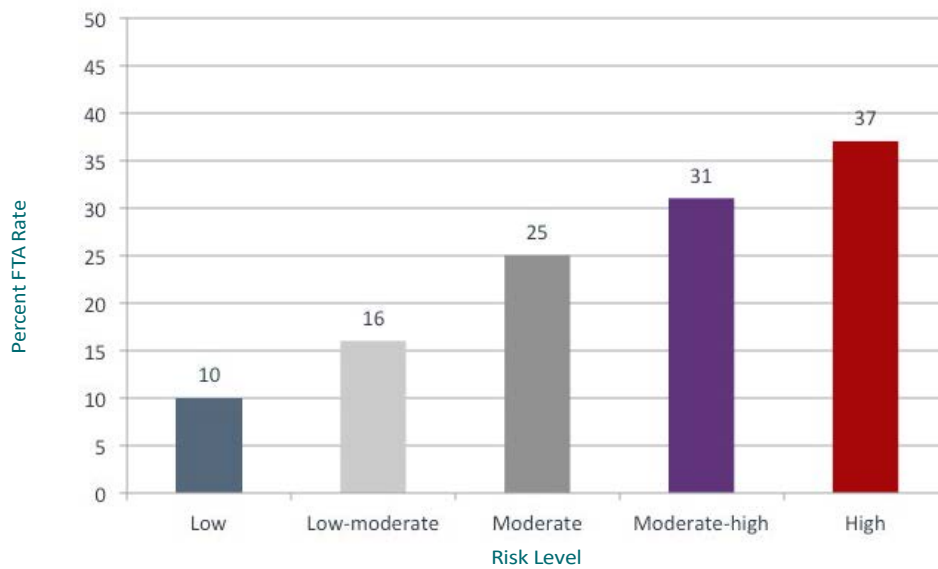


Figure 8. KPRA-S Likelihood of FTA

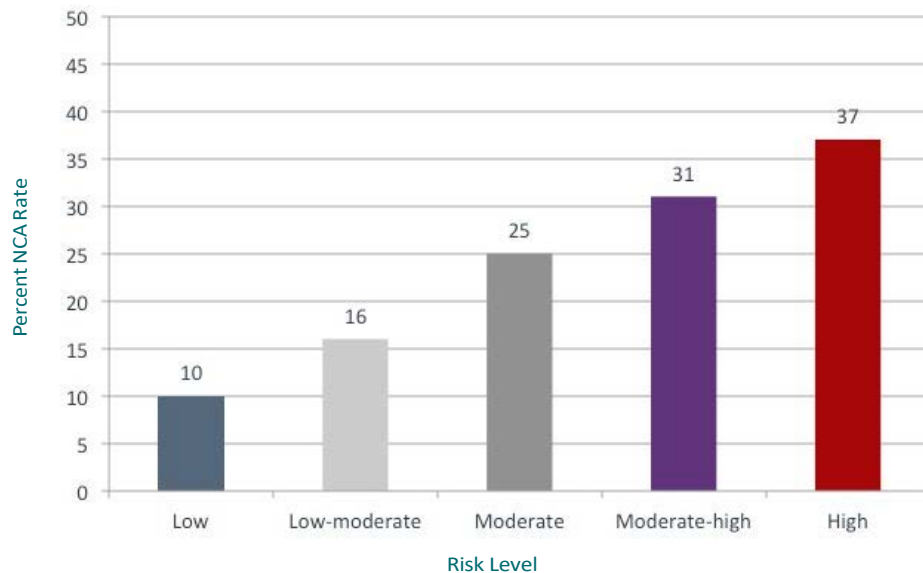


Figure 9. KPRA-S Likelihood of NCA

Comparisons of the AUC-ROC values were also made between the two samples of data. The AUC-ROC values when using NCA as the outcome measure did not differ significantly. The AUC-ROC values for FTA, NCA and FTA/NCA indicated significant differences, with higher AUC-ROC values for the secondary dataset. While the values were larger by a statistically significant margin, there was no practical difference in AUC- ROC values. In other words, the KPRA-S was as predictive with the secondary data sample as it was with the primary sample.

It is also valuable to assess how the KPRA-S compared to the full KPRA for the secondary data sample. AUC- ROC values for the secondary sample of data using the full KPRA were statistically larger than those generated by the KPRA-S, but the differences were less than 0.02, meaning the practical significance of the differences is questionable. To provide a quick assessment of the discriminatory power of the classification instruments and their associated categories, the prognostic separation index - PSEP (a simple measure of separation) was calculated. The PSEP measures the difference in failure rates between the best-performing and the worst- performing groups in a categorization scheme. For the full KPRA, the PSEP between the low- and high-risk defendants is 0.21. For the KPRA-S, the PSEP value is 0.25. The slightly higher PSEP for the KPRA-S indicates a greater separation in failure rates from the lowest to highest categories and thereby more practically useful classification outcomes.

Summary of Findings

The non-interview-based pretrial risk assessment predicted FTA and NCA for the secondary dataset. The rates of FTA and NCA increased with each successive risk category developed using the KPRA-S. Similar results were observed in the second dataset when the measures of failure were combined to include both FTA and NCA. The results demonstrate that the KPRA-S maintained its predictive power with the second data sample. In addition, the KPRA-S was shown to be as predictive as the full KPRA.

Chapter 6: US Laws and Cases

6.1. NEW YORK CRIMINAL PROCEDURE LAW § 510.30

Application for Recognizance or Bail; Rules of Law and Criteria Controlling Determination

1. Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article five hundred thirty and other provisions of law relating to specific kinds of criminal actions and proceedings, providing (a) that in some circumstances such an application must as a matter of law be granted, (b) that in others it must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff, and (c) that in others the granting or denial thereof is a matter of judicial discretion.

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vii) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:

(A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or

household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and

(B) the principal's history of use or possession of a firearm; and

(viii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(ix) If he is a defendant, the sentence which may be or has been imposed upon conviction.

(b) Where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in paragraph (a).

3. When bail or recognizance is ordered, the court shall inform the principal, if he is a defendant charged with the commission of a felony, that the release is conditional and that the court may revoke the order of release and commit the principal to the custody of the sheriff in accordance with the provisions of subdivision two of section 530.60 of this chapter if he commits a subsequent felony while at liberty upon such order.

6.2. FEDERAL RULE 5: INITIAL APPEARANCE

Federal Rules of Criminal Procedure: Title II. Preliminary Proceedings

Rule 5. Initial Appearance

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. §1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) Appearance Upon a Summons. When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) Place of Initial Appearance; Transfer to Another District.

(1) Arrest in the District Where the Offense Was Allegedly Committed. If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(4) Procedure for Persons Extradited to the United States. If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

(2) Consulting with Counsel. The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) Detention or Release. The judge must detain or release the defendant as provided by statute or these rules.

(4) Plea. A defendant may be asked to plead only under Rule 10.

(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

6.3. FEDERAL STATUTE: SECTIONS 3142, 3145, 3146, 3147, 3156

2.1. 18 U.S. Code § 3142

Release or detention of a defendant pending trial

(a) In General.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2) released on a condition or combination of conditions under subsection (c) of this section;
- (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
- (4) detained under subsection (e) of this section.

(b) Release on Personal Recognizance or Unsecured Appearance Bond.—

The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on Conditions.—

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

- (i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
- (ii) maintain employment, or, if unemployed, actively seek employment;
- (iii) maintain or commence an educational program;
- (iv) abide by specified restrictions on personal associations, place of abode, or travel;
- (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii) comply with a specified curfew;
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;
- (x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- (xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;
- (xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;
- (xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.—If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.—

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(B) an offense under section 924(c), 956(a), or 2332b of this title;

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) Detention Hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

- (A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
 - (B) an offense for which the maximum sentence is life imprisonment or death;
 - (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
 - (D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
 - (E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or
- (2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—
- (A) a serious risk that such person will flee; or
 - (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before

or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) **Factors To Be Considered.**—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including—
 - (A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) **Contents of Release Order.**—In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

- (1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person’s conduct; and
- (2) advise the person of—
 - (A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
 - (B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person’s arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of Detention Order.—In a detention order issued under subsection (e) of this section, the judicial officer shall—

- (1) include written findings of fact and a written statement of the reasons for the detention;
- (2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
- (3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and
- (4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of Innocence.—

Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Review and appeal of a release or detention order

(a) Review of a Release Order.—If a person is ordered released by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) Review of a Detention Order.—

If a person is ordered detained by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) Appeal From a Release or Detention Order.—

An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

2.3. 18 U.S. Code § 3146

Penalty for failure to appear

(a) Offense.—Whoever, having been released under this chapter knowingly—

(1) fails to appear before a court as required by the conditions of release; or

(2) fails to surrender for service of sentence pursuant to a court order;

shall be punished as provided in subsection (b) of this section.

(b) Punishment.—

(1) The punishment for an offense under this section is—

(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—

(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;

(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

(iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or

(iv) a misdemeanor, a fine under this title or imprisonment for not more than one year, or both; and

(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) Affirmative Defense.—

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(d) Declaration of Forfeiture.—

If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) of this title or is subject to the release condition set forth in clause (xi) or (xii) of section 3142(c)(1)(B) of this title, the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

2.4. 18 U.S. Code § 3147

Penalty for an offense committed while on release

A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to—

- (1) a term of imprisonment of not more than ten years if the offense is a felony; or
- (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

2.5. 18 U.S. Code § 3156

Definitions

(a) As used in sections 3141–3150 of this chapter—

(1) the term “judicial officer” means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia;

(2) the term “offense” means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress;

(3) the term “felony” means an offense punishable by a maximum term of imprisonment of more than one year;

(4) the term “crime of violence” means—

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or

(C) any felony under chapter 77, 109A, 110, or 117; and

(5) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(b) As used in sections 3152–3155 of this chapter—

(1) the term “judicial officer” means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term “offense” means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

6.4. U.S. v. SALERNO 481 U.S. 739 (1987) (SYNOPSIS)

Anthony Salerno and Vincent Cafaro were arrested after being charged with various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The Government moved to have Respondents detained on the ground that no condition of release would assure the safety of the community or any person. Respondents presented two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness.

A. First, Respondents argue that the Act violates the U.S. Constitution imposing punishment on them without Due Process as required by the Fifth Amendment.

1) Court concludes the Bail Reform Act is regulatory in nature not punitive.

First, the legislative history indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of pretrial detention are not excessive in relation to the regulatory goal Congress sought to achieve. The Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. The conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government. The statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." Thus, the pretrial detention does not constitute punishment before trial in violation of the Due Process Clause.

2) Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, Court concludes that the Act does not violate the Due Process Clause of the Fifth Amendment.

In balancing the Government's regulatory interest in community safety against an individual's liberty interest, Court finds the government's interest in preventing crime by arrestees is both legitimate and compelling. Congress' careful delineation of the circumstances under which detention will be permitted satisfied the standard that an individual's right may be subordinated to the greater needs of society where the government's interest is sufficiently weighty. Under the narrow circumstances the Act prescribes, society's interest in crime prevention is at its greatest. The Act narrowly focuses on a particularly acute problem in which the Government interests are

overwhelming. 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. The Act is by no means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. *In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.* While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee presents a demonstrable danger to the community.

Court further finds the procedures of the Act adequate to authorize the pretrial detention. The procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. The Act's review provisions provide for immediate appellate review of the detention decision.

B. Second, Respondents contend that the Act contravenes the Eighth Amendment's proscription against excessive bail.

While Court agrees that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, it rejects the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. Courts had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial. To determine whether the Government's response is excessive, courts must compare that response against the interest the Government seeks to protect by means of that response. When the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. But the Eighth Amendment does not require release on bail.

Accordingly, Court found that the Act did not violate the Eighth Amendment.

6.5. N.Y. v. MICHELE MAXIAN

The People &c. Ex rel. Michele Maxian on Behalf of Damon Roundtree, et al., Respondents,
v.

Lee Brown, Commissioner, New York City Police Department, et al., Appellants.

77 N.Y.2d 422, 570 N.E.2d 223, 568 N.Y.S.2d 575 (1991)

(March 26, 1991)

per curiam

Under CPL 140.20(1), a police officer, after performing without unnecessary delay the required preliminary police duties, must without unnecessary delay bring a person arrested without a warrant to a local criminal court for arraignment. This appeal involves consolidated habeas corpus proceedings challenging the various pre-arraignment delays to which persons arrested in New York County were subject. The first proceeding (the Roundtree proceeding) was heard in Supreme Court, New York County (Soloff, J.) and the second proceeding (the Lovells proceeding) was heard in the same court (McQuillan, J.). The trial courts reviewed the existing arrest procedures in New York County and granted the petitions to the extent of providing that arrestees held in custody for more than 24 hours without arraignment are entitled to release unless an acceptable explanation for the delay is given. The Appellate Division affirmed and granted leave to this court. We find no reason on the record before us to disturb the order of the court below.

In January 1990, the Legal Aid Society established a practice of filing habeas corpus proceedings against the New York City Police and Correction Commissioners on behalf 24 hours. As of April 20, 1990, there were in excess of 9,000 such arrestees. Justice Soloff consolidated these writs into one proceeding (the Roundtree proceeding). At the time of the decision, each arrestee had been arraigned. Justice Soloff nonetheless invoked the mootness exception because the issue surrounding the pre-arraignment delay is “the quintessential issue ‘capable of repetition, yet evading review.’” Neither party now disputes that the issues raised are properly reviewable under this mootness exception.

Justice Soloff expressly detailed the facts concerning some representative relators, including Sei Boo who was arrested for selling umbrellas without a license and was arraigned 94 1/2 hours after arrest and Harold Fernandez who was arrested for a “B” felony drug sale and arraigned approximately 45 hours after his arrest. Justice Soloff reviewed the Second Circuit's decision in *Williams v Ward* (845 F.2d 374 [2d Cir 1988], cert denied) which held that the Fourth Amendment

of the United States Constitution was not violated when arrestees in the boroughs of Manhattan, the Bronx, Brooklyn and Queens were arraigned within 72 hours of arrest.

Reaching essentially the same factual conclusions as the Second Circuit in *Ward*, she concluded that the arrest-to-arraignment steps follow a general pattern: “the arrestee is brought to the arresting officer's precinct where the case is reviewed by a superior officer, forms are filled out and fingerprints usually taken. The next stop is Central Booking for photographing, and either initial or, if needed, further fingerprinting and transmission of the prints to Albany. Also at Central Booking, the defendant is usually interviewed by a Criminal Justice Agency (“CJA”) caseworker to obtain information for the court to use at arraignment in fixing a securing order. At Central Booking, the arrestee and officer part company. During the time that fingerprint records are awaited and CJA is at work, the arresting officer goes to the District Attorney's complaint room to have the case evaluated and the complaint drawn. If the complaint room is closed, the officer returns the next day. All the paper work is then assembled. The defendant, meanwhile, must be collected from whatever precinct he has been lodged if space limits at 100 Centre Street have not permitted him to be brought directly from Central Booking to the courthouse. Once in the courthouse, the case papers must be docketed and the [arrestee] must be made available for counsel interview, interviewed and arraigned.”

Justice Soloff also found, consistent with the Second Circuit's conclusions in *Ward*, that the initial eleven to fifteen hours following arrest are generally consumed by the above police functions and the “totality of the processes” can usually be completed “in 24 hours with time to spare including any travel which must be done within New York County.” She found all the arrestees were held longer than 24 hours and that little attempt was made to explain the delays. The trial court concluded that, under these circumstances, a period of delay over 24 hours raises a presumption that the delay is unnecessary within the meaning of CPL 140.20(1), requiring, on demand, a satisfactory explanation of that delay. “Obviously,” the court noted, “there are situations which will justify considerably greater delay as well as those which will not. Moreover, the nature of this proceeding makes it unnecessary and inappropriate (as well as impossible) to try to identify and evaluate all of the situations which might require relief.” Accordingly, she granted the habeas petitions to the extent of ordering that an arrestee who has been held in custody for more than 24 hours without an acceptable explanation is entitled to immediate release.

Thereafter, the Legal Aid Society continued its practice of filing writs of habeas corpus for other New York County warrantless arrestees (the Lovells proceeding). Justice McQuillan granted in part certain of these habeas petitions on the basis of unexplained delays in arraignments exceeding 24 hours, relying on Justice Soloff's decision in the Roundtree proceedings interpreting CPL 140.20(1) and on his interpretation of the New York State Constitution, Article I, 12 (“unreasonable seizure”) and 6 (“due process”).

The Appellate Division affirmed the two judgments of Supreme Court. Upon reviewing Justice Soloff's factual findings as to the period necessary to produce and "affirm[ing] them as such," the Appellate Division agreed that generally "there is no reason why the pre-arraignment process cannot be completed within 24 hours." Accordingly, the court agreed with the guideline "that a delay of arraignment of more than 24 hours is presumptively unnecessary and, unless explained, constitutes a violation of CPL 140.20(1)" (*Id.* at 68). The Appellate Division then granted respondents' motion for leave to appeal to this court.

Criminal Procedure Law 140.20(1) requires that "[u]pon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question." (Emphasis added.) The Legislature did not set rigid temporal limits in enacting CPL 140.20(1); nor do we in construing it (see *Matter of Ayers v Coughlin*, 72 NY2d 346). Rather, the statute requires that a pre-arraignment detention not be prolonged beyond a time reasonably necessary to accomplish the tasks required to bring an arrestee to arraignment.

As the Appellate Division below recognized, this obligation is important given that "the deprivation entailed by pre-arraignment detention is very great with the potential to cause serious and lasting personal and economic harm to the detainee. [T]his deprivation is one as to which no predicate is established in advance and, indeed, which may ultimately be found to have been unwarranted" (164 AD2d at 63). It is against this backdrop and the realities of the arrest process as it exists in large urban centers such as New York County that we review the Appellate Division's order. The Appellate Division concluded that the steps leading up to arraignment can generally be accomplished well within 24 hours after arrest and that the delays present in each of the consolidated proceedings here were "unnecessary" within the meaning of CPL 140.20(1). We find no reason on this record to disturb this conclusion.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Order affirmed, without costs. Opinion Per Curiam. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Part II.

Taiwan Pretrial Release History and Practice

Chapter 7: Detention Reform: Taiwan's Experience¹

By CHEN Yujie²

Taiwan's pretrial detention system has undergone several reforms. The challenges Taiwan has faced and, in some cases, continues to face, are very similar to those confronting Mainland China. For example, before reform, Taiwanese prosecutors had exclusive decision-making power over detention decisions. The standards for determining the necessity of detention were unclear. All defendants charged with serious crimes were detained in violation of the principle of the presumption of innocence and the alternatives to detention were inadequate to effectively prevent defendants from fleeing. For these reasons, Taiwan's example may be of value to China. Given the limited scope of this article, the author will provide a brief introduction to Taiwan's reforms, focusing on the transfer of decision-making authority from prosecutors to courts.

ONLY THE COURTS ARE AUTHORIZED TO MAKE DETENTION DECISIONS

Prior to 1997, Taiwan, like Mainland China, gave prosecutors' offices the power to decide whether a suspect should be detained. Now, only a court can make such a decision. This is in accordance with the principle that the ultimate decision-making power should reside with the court. According to the current criminal procedure law, only a court can decide whether to detain an individual. Prosecutors have no power to order anyone's detention. If, during the investigation and after the interrogation of the suspect, prosecutors believe it is necessary to detain a defendant, they must petition the court for approval of detention and provide clear reasons for their request. They must apply to the court for a detention order within 24 hours of the time a criminal suspect is taken into custody by arrest or surrender. The court must convene a public hearing and permit oral argument. The decision may not be based upon a paper record alone. Moreover, the defendant has the right to have counsel represent him at the hearing and advocate on his behalf.

Taiwan did not start out following the principle that the ultimate decision-making authority had to reside with the court. Before December 21, 1997, Taiwan had a bifurcated system: prosecutors had the authority to determine the necessity of detention during investigation and the court had that authority during trial. However, because this system could easily lead to an abuse of the power, in the 1990's, citizens began to call for the elimination of the prosecutor's authority to make detention decisions on its own. In addition, Article 8 of Taiwan's Constitution provides that the organ that arrests or detains a given suspect must send that suspect to a court within 24 hours of arrest. That suspect, or any other person, can then request that the court interrogate the suspect. This interrogation must occur within 24 hours of the arrest. Because the text refers to a "court" (法院)

¹ This article is a shortened version of an article originally published by *Human Rights in China* under their Bi-Weekly *Shuangzhoukan* magazine: <http://biweeklyarchive.hrichina.org/article/286>.

² Yu-jie Chen is a Taiwanese lawyer with a JSD from New York University Law School and a former Research Scholar with the U.S.-Asia Law Institute.

the question of whether prosecutors possessed the power to make detention decisions became a point of contention debated by members of the legal profession.

As a result, in 1995, the Council of Grand Justices of the Judicial Yuan accepted a case for constitutional review and issued Interpretation No. 392. The court decided that the old criminal procedure law, which granted prosecutors the power to decide whether a suspect should be detained, as well as related provisions, violated Article 8 of the Constitution and that the legal provisions allowing prosecutors this power would be invalid within two years' time. The reasoning of the decision was that prosecutors have a duty to follow the directives of the Chief Prosecutor and therefore are not the equivalent of an entity that exercises adjudicatory authority independent of any interference by any other government institution. Accordingly, prosecutors do not meet the narrow definition of a "court" within the meaning of the Constitution. Furthermore, since detention is a compulsory measure that greatly intrudes upon personal freedom, there must be an independent adjudicating body that follows legal procedures to determine the legality and necessity of detention to meet the requirements of Article 8. After this decision, the legislature amended Taiwan's *Code of Criminal Procedure*. Since December 22, 1997, prosecutors have been required to apply to a court for a detention order and only courts have had the authority to decide whether to order detention.

Since the amendment, the number of people detained before trial has decreased dramatically. Statistics show that in 1995, 1996 and 1997, the number of people detained nationwide was 19,122; 19,521; and 21,457, respectively.³ In 1998, the courts only granted the prosecutors' applications for detention for 7,508 people. Over the next six years, the number of individuals detained remained between 5,000 and 6,000. Scholars also note that between 1997 and 1998, the total number of criminal cases increased. Clearly, the reduced number of detentions is not simply the result of a reduced number of cases.⁴

The decrease in the detention rate in 1998 is also evident when comparing the number of people detained during investigation to the number of people indicted by district prosecutor's offices, including those whose cases were resolved through simplified procedures.⁵ The rate dropped from 11.7%, 10.4% and 11.4% in 1995, 1996 and 1997, respectively, to 5.2% in 1998. The rate has remained between 3% and 5 % since then.

Why did rates of detention decrease? Knowing that the courts would review their requests, prosecutors became more selective in deciding which defendants should be detained. They did not apply for detention unless they were confident they would be successful. The number of

³ Statistics of Taiwan's Ministry of Justice, cited by Zhaopeng Wang, *The Right to Secure Legal Defense and Cross-Examination* [辩护权与诘问权], Yuanzhao Press House, June 2008, at p.135.

⁴ *Id.*

⁵ Ministry of Justice, Taiwan, (2005) *Annual Report on Statistics by the Ministry of Justice*, available at: <http://www.moj.gov.tw/site/moj/public/MMO/moj/stat/yearly/m7.pdf>.

prosecutorial applications and the percentage of court approvals all support this conclusion. In 1998, the court detained 8,365 individuals, or less than 25% of the 21,457 individuals detained by prosecutors in 1997, the last year before the reforms. Evidently, prosecutors decided not to pursue detention in many cases. The rate of court approval of detention applications was very high, 89.8% in 1998, and between 85% and 92% since 1999.⁶⁷ Based on the statistics above, the decreasing number of people in custody does not result from the courts' rejection of prosecutorial applications for detention, but rather, from prosecutors' decisions not to seek detention. Judging from the high rate of court approval, it appears that prosecutors are not abusing their power to apply for detention.

Opponents of the transfer of power over detention from the prosecutors to the courts argued that the reform would create obstacles to criminal investigations and negatively impact public safety. The media also denounced the transfer of authority to the courts playing up unreasonable outcomes in select cases. Nevertheless, according to statistics released by the Ministry of Justice ("MOJ"), the crime rate has been fluctuating since 1997.⁸ The crime rate depends on a number of factors, including: population growth, policy implementation, law enforcement, as well as social and economic conditions. To answer the question of whether the transfer of power to the courts has contributed to any increase in the rate of crime would require more thorough empirical research. One fact that deserves greater attention is that the rate of detention for felony defendants is still rather high. To take 2007 as an example: of the 5,265 defendants that district court prosecutors charged with felony public safety offenses, prosecutors applied for detention for 4,686 of them, or 89%. The court granted 4,522 of these applications, or 96.5%. The percentage of applications for detention that were based upon the ground that the defendant might commit similar crimes if released was 97%. The approval rate of those applications was 97.5%.

The MOJ initially took the same position as the prosecutor's office and opposed reform. However, the MOJ changed its opinion and acknowledged that when the prosecutor's office has decision-making power over detention, it often abuses this power for the purposes of obtaining confessions, pacifying victims, and preventing crime. This abuse is a violation of human rights. Since the shifting of the decision-making power over detention to the courts, the number of people detained before trial has decreased and that reflects greater protection of personal liberty.⁹

⁶ Statistics from the Ministry of Justice show how the Prosecution Services of local courts accept cases involving criminal investigation and petition to the court for detention. <http://www.moj.gov.tw/ct.asp?xitem=109571&ctNode=7868&mp=001>.

⁷ Based on the 1997 statistics, the index fell below 80 in 1999 and 2004. During all other years, the index stands above 80, showing that the criminal population does not increase steadily, but rather episodically. See the Ministry of Justice's analysis of crime statistics for 2006. <http://www.moj.gov.tw/public/Attachment/8528104933.pdf>.

⁸ According to the explanation by the Ministry of Justice, there are 17 categories of crimes that pose significant dangers to public safety that justify detention. The approval rate for detention for the following types of crimes is 100%: unlawful public car racing, assaulting police officers, and manufacturing harmful foods. The approval rate is 98% for cyber-fraud and committing crimes in multiple locations. The approval rate is 97% for carjacking, committing multiple offenses within a short time, obstructing investigatory and judicial organs and preventive detention. Ministry of Justice, Detention during Investigation. <http://www.moj.gov.tw/public/Attachment/8528104933.pdf>

⁹ *Id.*

Other opponents of reform argued that courts would face a huge increase in their caseload. However, this has not come to pass because prosecutor's offices have not sought detention as often as was anticipated.

Finally, it is worth noting that Interpretation No. 392 represented an important change in the criminal justice system in Taiwan. Its importance lies not only in its elimination of the authority of prosecutors to control detention decisions but also in its removal of prosecutors from the category of "judicial officers" (司法官). This clarification fundamentally restricted prosecutorial power over other compulsory measures as well.¹⁰ For example, as of July 1, 2001, decision-making power over search warrants was shifted to the courts. On December 11, 2007, the Council of Grand Justices issued Interpretation No. 631, which vested the power to approve monitoring of communications (wiretapping) exclusively with the court. As a result of the interpretation, only a court may issue a wiretapping warrant.

Taiwan's new system shows that when the power over detention is transferred from the prosecutor to the court the rate of detention decreases. Knowing that the courts can provide a check on their power causes prosecutors to become more careful and more selective. The role of the police and the prosecutors is to pursue the criminal responsibility of the defendant. Allowing the prosecutor to decide whether the defendant should be detained reflects the same inherent bias that might exist if a soccer player were simultaneously playing the role of referee. The ethics of any individual prosecutor are not in question here. The problem is in the design of the old system.

It should also be pointed out that in Taiwan, even before 1997, the prosecutors were the chief decision-makers regarding detention. The police had no authority to detain people for extended periods of time. The Civil Law system avoids the nightmare of a police state by using legally trained, objective and just prosecutors to ensure that police officers act within the law.¹¹

Finally, any reform must find assistance in constitutional review. Many significant reform efforts for the protection of human rights, including issues related to custody and wiretapping, started at the Council of Grand Justices in the Judicial Yuan of Taiwan, where the grand justices' interpretations have the power to change history. Even when Taiwan's political system is trapped in a gridlock, the grand justices are able to engage in constitutional review and force legislative and executive branches to take action toward the revision of law and administrative procedure.

Taiwan's reforms are fueled by an ever-growing civil consciousness. At the end of the 1980's, people in Taiwan became more aware of their civil liberties, and they launched campaigns to demand governmental protection of consumer rights, as well as environmental protection and the protection of women, workers, and farmers. In the 1990s, Taiwan inaugurated its Official Judicial

¹⁰ Zhaopeng Wang, *The Right to Secure Legal Defense and Cross-examination* [辩护权与诘问权], Yuanzhao Press House, June 2008, p.134.

¹¹ Yuxiong Lin, *Criminal Procedural Law*, pp.112-113.

Reform Commission which was followed by the formation of a civil society organization called the Judicial Reform Foundation. These bodies, from their inception to the present day, have served to reform the judicial system and protect human rights. At that time, the bar association also started to become more independent and began pushing for legal reform. It was against this backdrop that Interpretation No. 392, came about. The case originated with an individual (Xu Xinliang) (许信良) whose rights had been violated and from petitions by national and local legislators and judges. Because of the continuous advocacy efforts of civil society, since the 1990s, the Judicial Yuan's Council of Grand Justices has played a more active role in fulfilling its responsibility to safeguard human rights, which led to Interpretation No. 392. Since 2004, Mainland China has also incorporated human rights into its Constitution. Chinese citizens are increasingly aware of their rights, and civil society is thriving. Whether this awareness and activism will become a force for reform will have to await further observation and study.

Chapter 8: Judicial Protection of Criminal Defendants' Human Rights Following the Reform of Taiwan's Detention System¹

Lin Jiun-Yi²

1. FOREWORD

On December 19, 1997, the President of Taiwan announced an amendment to Taiwan's *Code of Criminal Procedure* (“**Code**”) that transferred decision-making authority over the detention of criminal suspects from prosecutors to the courts. Courts assumed the responsibility to hear, adjudicate and decide all forms of detention including whether to impose, revoke, terminate or reinstate detention. Prosecutors were no longer able to compel detention of a suspect. And, ultimately the amendment brought about a complete overhaul of the investigatory detention system and made the fundamental constitutional right of freedom of the person a reality.

Now, one year on, have the goals of that amendment been achieved? How effectively has it been implemented? Have the questions raised by the academic community been answered? For example: has transferring decision-making responsibility from prosecutors to judges actually achieved the goal of ending the abuses of the detention system? Are judges, in fact, more just and impartial than prosecutors? By reflecting upon the implementation of the newly amended Code over the course of this past year, the author hopes to help the Code achieve its constitutional goals: “respect for human dignity,” “protection of human rights,” and preventing inappropriate deprivations of people's rights to personal liberty by the government.

2. CASES IN WHICH THE COURT DECLINED TO DETAIN THE DEFENDANT

According to Ministry of Justice statistics, from January to October 1998, the police turned over 78,641 individuals to the district courts and prosecutors around the country, and of those individuals, prosecutors filed applications to courts to approve the detention of 7,175 people, of whom, 6,396 were approved for detention.³ Altogether, 8% of all defendants turned over by the police for prosecution were detained, reflecting an 8% detention rate, and a further 89% of those detained were approved for detention by the courts. In other words, even where prosecutors were instructed to handle decisions to apply for detention strictly and cautiously, the courts still denied 11% of the total number of requests for approval of detention by prosecutors. Clearly, this is an improvement on past practice, where prosecutors, the body in charge of investigations, could use

¹ Originally published in 1999 in Vol 45(1) of the *Taiwan Law Review*, pp.47-56.

² Formerly President of the Criminal Division at the Shilin Local Court, Taipei, Taiwan, Judge Lin is currently a Judge on the Constitutional Court of Taiwan, Judicial Yuan.

³ Ministry of Justice, Taiwan, “Ministry of Justice Statistics Highlights,” 1998, p.1.

detention inappropriately, and these reforms have reduced the likelihood of inappropriate denials of people's rights. With respect to this aspect of the reform, people are the beneficiaries of this transfer to the courts of authority over decisions about detention. The following six examples are cases where a court rejected the prosecutor's request for approval of detention and the decision provoked some controversy, as reported in the media:

- 1) On December 21, 1997, a prosecutor in Taipei requested that the Taipei District Court detain Jiong-Bin Weng (翁炯彬) for possession of a firearm. The court denied the request because it did not state the grounds for detention. Instead, the Court set bail at 120,000 NT dollars.⁴
- 2) In January 1998, a prosecutor in Kaohsiung requested that the Kaohsiung District Court detain Peng-Gui Ma (马鹏贵), who had allegedly bullied a worker in his factory to death. The court denied the request on the ground that it was unnecessary to detain the defendant and instead set bail at 200,000 NT dollars.⁵ The prosecutor appealed to the Kaohsiung High Court. The case was remanded for procedural defects, i.e., that the local court had failed to notify the prosecutor to submit evidence and make an in-court statement.⁶
- 3) On April 20, 1998, a prosecutor in Yunlin requested that four criminal suspects be detained, one of whom was Quan-Zhong Shen (沉全忠). The court denied the request on the grounds that the prosecutor had failed to provide sufficient grounds for the arrest and that the policer officer had failed to record the time of the arrest, causing the legality of the arrest to come under question.⁷
- 4) On May 23, 1998, the Taipei Prosecutor's Office requested that the Taipei District Court order the detention of Zhi-Cheng Zhang (张志成) for discharging a firearm. The judge denied the request and ordered that the defendant be released. The prosecutor appealed to the High Court.⁸ On June 23, 1998, the High Court reversed and remanded the case.⁹
- 5) On July 23, 1998, a prosecutor in Banqiao requested the detention of Li-Xiu Lu (吕丽秀), the wife of Zeng-Biao Zhang (张增标), a criminal suspect who allegedly had kidnapped and killed a school-age girl. The Banqiao District Court denied the request on the grounds that the prosecutor had failed to present any substantive evidence other than Ms. Lu's own statement that she was involved in the commission of the offense. The prosecutor and the police were not satisfied and appealed.¹⁰
- 6) On October 26, 1998, a judge at the Taipei District Court denied a request to detain Fang-Yuan Fan (范芳源), President of Donglong Hardware Industry LLP, who had allegedly

⁴ "First Request for Detention Denied in Taipei Local Court," *Liberty Times* (自由时报), December 22, 1997, p.6. Translators' Note: Approximately \$4,000 US dollars at today's currency exchange rates (2017).

⁵ . Translators' Note: Approximately \$6,500 US dollars.

⁶ *United Daily News* (联合报), February 12, 1998, p.7.

⁷ *United Daily News* (联合报), April 13, 1998, p.7

⁸ *Liberty Times* (自由时报), September 13, 1998, p.7.

⁹ *Liberty Times* (自由时报), September 14, 1998, p.6.

¹⁰ *Liberty Times* (自由时报), July 24, 1998, p.5; *China Times* (中国时报), July 25, 1998, p.8.

misappropriated billions of NT dollars and caused the company to go bankrupt. The court found there was no basis to believe that the defendant would collude with other witnesses or destroy evidence and ordered house arrest contingent on a 2 million NT dollar bail.¹¹ The prosecutor's office was shocked and planned to appeal.¹²

The defendants in the cases listed above would likely have been detained but for the amendment to the Code. The fact that the courts denied the prosecutor's requests for detention speaks to the effectiveness of the new amendment in constraining abuses of prosecutorial power regarding detention decisions.

3. DECISIONS ON DETENTION

Under the amended Code, requests for detention must meet certain procedural requirements. A defendant must have been arrested and interrogated first—that is, the prosecutors must operate under the principle of “arrest before detention” (拘捕前置原则). Then, if the prosecutor believes that detention is necessary, the prosecutor must file a request within 24 hours of the arrest pursuant to paragraphs 1 and 2 of Article 93 of the Code. The specific steps are laid out below.

3.1. *The Judge Must Examine the Defendant before Reaching a Decision on Detention*

A judge must examine the defendant before reaching a decision on detention (Criminal Code Article 101, paragraph 1, and Article 101(1), paragraph 1). The examination should take place promptly after the judge receives the request for detention (Criminal Code Article 93, paragraph 5). Upon receiving a prosecutor's request for detention, the judge should examine the grounds provided by the prosecutor for detention, evaluate the necessity for detention, and give the defendant an opportunity to answer and, if he or she can do so, to address the arguments of the prosecutor. This adversarial process ensures that the judge, through interviewing the defendant and through hearing the arguments made by both sides, is able to better ascertain whether the circumstances call for detention—that is, whether there are grounds to detain the defendant and whether the detention is necessary. Hence, this is a crucial procedure.

The current system also altered the past practice whereby prosecutors combined pre-detention interviews with investigative interrogation. This is a significant accomplishment of this round of reforms. Some may ask: what is the practical significance of distinguishing between pre-detention interviews on the one hand and interrogation for the purposes of investigation on the other? The answer is that the distinction helps to protect defendants from being deceived into giving a false confession in the face of the pressure of potential detention. In practice, it is not uncommon for defendants to argue in court that their confessions were the result of police coercion, stating that

¹¹ Translators' Note: As at time of publication, 2 million NT Dollars is equivalent to approximately \$65,300 US dollars.

¹² *United Daily News* (联合报), November 7, 1998, p.9.

they only admitted to guilt to the prosecutor because the police had allegedly threatened them with words like: “You need to tell the prosecutor exactly what you told us, otherwise they will treat you as a liar and you’ll be thrown in jail and further interrogated.” If a defendant subsequently fails to prove that the previous confession to the prosecutor was “arbitrary” or “false,” then that confession would be used as evidence against them. This is one of the negative consequences of combining pre-detention interviews with investigative interrogation. Now, under the current system, where courts have the authority to make detention decisions, a judge would only need to examine and assess whether the criteria for detention (i.e., whether the defendant is strongly suspected of having committed the crime; whether there are grounds for detention; whether detention is necessary) have been met in order to determine whether to detain the defendant. These new procedures make it difficult for police to deceive defendants as described above. This is beneficial to the protection of the defendant’s human rights and is an indication of the reform’s success.

3.2. *Judicial Preparation for Examination of the Defendant Prior to Approving Detention*

The judge should follow the procedures below before conducting an examination of the defendant.

3.2.1. The Judge Should Request the Presence of the Prosecutor

A prosecutor may choose to be present when the court conducts an interview of the defendant so that the prosecutor may state the grounds for detention and provide relevant evidence to support his request for detention (Code Article 101, paragraph 2). In addition, if the judge reviewing a detention request filed by a prosecutor thinks that the grounds or evidence for detention stated in the request are insufficient, the judge may, if necessary, ask that the prosecutor supplement the grounds or evidence verbally at a designated time and location. Normally, the judge would notify the prosecutor by phone or fax. If the prosecutor is able to appear and make a statement according to the court’s instructions, then this would do much to assist the judge in reaching a fair decision. However, prosecutors usually fail to do this, even though judges must notify them in any event. If a judge denies a request for detention without having asked the prosecutor making the request to appear and supplement the grounds or evidence, that prosecutor will appeal and a higher court may very well reverse the decision on procedural grounds.¹³ There used to be a misunderstanding regarding the nature of such notifications on the part of the prosecutors, who would completely refuse to appear in court upon receiving them.¹⁴

3.2.2. The Judge Should Notify the Defense Attorney

¹³ See case (2) above.

¹⁴ See, “Disputing Detention: Prosecutor Fails to Appear in Court Despite Court’s Three Successive Requests,” *Liberty Times* (自由时报), January 1, 1998, p.6; and “Tensions Between Courts and Prosecutors Over Decisions on Detention,” *United Daily News* (联合报), January 11, 1998, p.7.

The defense attorney, by being present at the examination, is able to assist the defendant in his or her defense, contest the necessity for detention, and refute the arguments advanced by the prosecutor.

Thus, when a court is preparing for an examination prior to detention, if the defendant indicates that he or she has already retained an attorney, the judge should promptly notify the defense attorney by telephone, fax, or any other method, when and where to appear in court. The notification, once made, should be recorded by a court clerk. If the defendant indicates that he or she has already notified his or her attorney or if his or her attorney is already present, the court need not issue a notification.

3.3. *The Procedures for Conducting the Examination*

3.3.1 The Judge Should Provide the Defendant with Information Required by Law

Article 95 of the amended Code provides that “In an examination, an accused shall be informed of the following: (1) That he is suspected of committing an offense and all of the offenses charged. If the charge is changed after an accused has been informed of the offense charged, he or she shall be informed of such change; (2) That he or she may remain silent and does not have to make a statement against his or her own will; (3) That he or she may retain a defense attorney; (4) That he or she may request the investigation of evidence favorable to him or her.”¹⁶ In practice, these requirements are essential to protecting a defendant’s rights, especially number (2), which provides that the defendant has the right to remain silent and does not have to make any statement against his or her own will, which is an excellent feature of the reform insofar as it codifies the defendant’s right to remain silent. Nonetheless, in reality defendants have often asked what it means to have the right to remain silent, and courts have had to explain it before defendants have been fully able to comprehend it. This demonstrates the importance of writing straightforward, accessible laws for the protection of human rights.

On the court’s duty to inform, the Supreme Court’s Judgment No. 3768 of 1997 provides the following interpretation: “during an examination, an accused shall be informed of the criminal activity he is suspected of committing and of the offenses charged (the first clause); should the charge change afterwards, the defendant should be notified of such change (the second clause).” This provision is designed to facilitate the defendant’s exercise of the right to defense, to help judges reach the truth of the matter, and to safeguard procedural justice. Since it appears in the

¹⁵ Editor’s note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others. Subsequent omissions are indicated by ellipses.

¹⁶ Translators’ note: For full translation, see Ministry of Justice, *Laws and Regulations Database of the Republic of China*, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0010001>.

general principles section of the Code, it applies at all stages of a criminal investigation. In particular, when a court applies Article 30 of the Code, it should simultaneously apply Article 95(2) so as to avoid infringing upon a defendant's rights by suddenly deciding the issue and cutting short his or her time to prepare a defense. Now that the detention system has been reformed, courts should strive all the more to do a better job of enforcing the duty to inform so as to better safeguard defendants' rights.

3.3.2. The Judge Should Inform the Defendant and Counsel of the Reasons for Detention

To make it easier for the defendant or the defense counsel to object or appeal, the judge should inform the defendant and the defense counsel of the circumstances justifying detention pursuant to Code Articles 101, paragraph 1 and 101-1 paragraph 1. The amended Code adds this new requirement to better protect the rights of defendants (Article 101 paragraph four, Article 101-1, paragraph two). The court should also ask the defendant for the name and address of a close relative or friend designated to receive a writ of detention in the event that the defendant is to be detained, making sure that the writ of custody is delivered to that designated person.

3.3.3. The Court Should Conduct the Examination in Person

Examinations should be conducted in person so that the defendant has the opportunity to refute the prosecutor's arguments in support of detention. The defendant has the right to make a case against detention by presenting specific arguments to persuade the judge that there is no basis for detention and no necessity for detention. However, because there is no procedure for oral argument, it is not necessary that the prosecutor be present as well.

3.4. *The Court Should Determine Whether the Criteria for Detention are met*

To determine whether the criteria for detention are met, the court needs to examine and decide whether the principle of "arrest before detention" has been met; whether the request for detention was submitted within 24 hours of the arrest; whether the defendant is a major suspect, whether there are grounds for detention (Code Articles 101, paragraph 1 and 101-1, paragraph 2); and whether detention is necessary. After reviewing the prosecutor's request for detention, the court will reach one of the following three conclusions:

One: The Court May Deny the Request

The Ministry of Justice's sample order of denial lists the following grounds for denying a request for detention:

1. If the request fails to state specific facts, supported by evidence, showing i) that the defendant is strongly suspected of having committed the offense; ii) that the defendant is a flight risk; iii) that the defendant may try to destroy, fabricate, or tamper with the evidence; and iv) that the defendant may collude with a co-defendant or a witness to provide false testimony; or if the request fails to state in specific terms that if released the defendant will seriously obstruct the judicial process, including prosecution, trial and enforcement.
2. If the request fails to “provide sufficient evidence” to show i) that “the defendant is strongly suspected of having committed the crime,” ii) that “the defendant has tried to escape custody,” iii) that the defendant is a flight risk,” iv) that “the defendant may try to destroy, fabricate, or tamper with evidence,” v) that “the defendant may collude with a co-defendant or a witness,” or vi) that “the defendant is likely to commit the same crime again.”
3. If the request was submitted more than 24 hours after the arrest and there is no legally permissible cause for the delay, or if the prosecutor fails to provide an adequate explanation even if there might have been a legally permissible cause for the delay.
4. If the request is based on an illegal arrest.

The above-listed requirements, if fully enforced in practice, will go a long way toward protecting the rights of the defendant and eliminating the problem of detention decisions being abused by law enforcement. Some are concerned, though, that the courts might not have enough time or resources to carefully review each and every detention request. Given the great number of cases and how overburdened the courts are already, there is a concern that the courts will end up simply going through the motions with these requests. However, from January to October 1998, despite prosecutors’ offices having considered 78,461 criminal suspects for prosecution, detention requests were submitted for only 7,175 of them— adding some, but overall, not too much, of a burden for the courts. Over the past year, denials of detention requests by courts have generated strong dissatisfaction among prosecutors, a sentiment extensively picked up by the press. Take these headlines for example: “Prosecutor Astonished; Prosecutor Outraged Over Court’s Decision to Release Defendant;” “Prosecutor Vows to Appeal “Immediately” If Court Denies Detention Request;” “Prosecutor Reprimands Court for Decision to Release Defendant;” “Prosecutors Demand Respect from Courts: Detention is Necessary to Ensure Investigation of the Case;” “Judge Asks: Need I Approve All Detention Requests? Must I Find All Defendants Not Guilty?” These news reports indicate that courts do not make cursory decisions on detention or go through the motions when reviewing detention requests; instead, since the reforms, there has been considerable progress toward better protecting the rights of the defendant.

Two: The Court May Grant the Request

The court may grant a detention request if it finds, upon examination of the defendant, that the following circumstances exist: 1) the defendant is strongly suspected of having committed the offence; 2) there are grounds for detention (i.e., the requirement of Article 101-1 of the Code are met, or any of the elements under Article 101-1, paragraph 1 are satisfied); 3) detention is necessary, that is, there will be clear difficulties in prosecuting or trying the case, or in enforcing the judgment (Article 101; Article 101-1). When the court grants a detention request, the defendant should be remanded to the custody of the requesting prosecutor's office, which should then arrange for the defendant to be escorted to a detention center by a designated bailiff or judicial officer (Article 103), facilitating the prosecutor's interrogation of the defendant and investigation of the case.

Three: The Court May Exempt the Defendant from Detention

If a judge finds, upon examination of the defendant, that 1) the defendant is strongly suspected of having committed the offence; and 2) there are grounds for detention (i.e., the requirements of Article 101, paragraph 1 of the Code are met, or one of the elements of Article 101-1, paragraph 1 is satisfied), but that detention is not necessary, the judge should release the defendant on bail (具保), to the custody of a third-party guarantor (责付), or put the defendant on residential surveillance (限制住居). A judge shall not order that a defendant be detained if the defendant satisfies any of the terms of Article 114 of the Code, unless the defendant is unable to post bail or find a guarantor, or if the defendant is unsuitable for residential surveillance (see Article 101(2)). Also, if a judge decides to detain a defendant, the judge is responsible for processing bail or the procedures for releasing a defendant into a third-party guarantor.

1. In practice, courts sometimes alter the compulsory measure if a defendant cannot afford bail or if they are unable to provide a guarantor, noting that: "although the defendant is seriously suspected of having committed the crime and has been arrested or brought into custody on an open warrant, and that this court has previously ordered bail because there is no necessity to detain the suspect, but since the defendant has not been able to secure bail, the court hereby orders that the defendant be detained," thereby revoking the previous order. Thus, even if the defendant or his or her family subsequently secures bail, they will not be able to rely on the first order of bail but will need to file a request for a "termination of detention."

2. Where a prosecutor files a detention request and the judge grants it, not in the form of a court order but a court-issued letter noting that "the defendant is to be released on bail," such letter is deemed to have the same practical effect as a formal court order. A release decision memorialized in an "exemption from detention" or does not differ from a release memorialized in a "termination of detention" order because both essentially deny the prosecutor's request for

detention. It is only when the prosecutor decides to appeal a bail decision on the grounds that detention is necessary that the court will need to issue a formal order in writing so that the higher court may properly review whether the first-instance court had grounds to make that decision.¹⁷

3.5. ...¹⁸

3.6. ...¹⁹

4. EXTENDING THE PERIOD OF DETENTION

4.1. *Extending the Period of Detention at the Investigation Stage*

Code Article 108(1) states that during the period of investigation, the detention of a defendant should not exceed two months. If the prosecutor seeks to keep the defendant in custody for a longer period of time, the prosecutor must provide a specific reason and file a request for an extension at least five days before the original period of detention expires. If the prosecutor files such a request but either fails to provide a specific reason for doing so or if the reason they have provided fails to demonstrate that an extension would be necessary, the court should deny the request. In practice, however, sometimes a prosecutor will initially seek detention on the grounds that doing so would be necessary to prevent collusion between the defendant and a witness, and the same prosecutor would later request an extension five days before the two-month period expires, even though that prosecutor was never ready for trial during that two-month period. In such cases, the court will sometimes deny the request for extension on the grounds that the prosecutor has failed to collect enough evidence against the defendant during the two-month period. This example shows that, compared with prosecutors, courts are stricter when deciding whether to extend a period of detention.

4.2. ...²⁰

4.3. *The Court Should Examine the Defendant Prior to Extending the Period of Detention*

Article 108(1) of the Code adds the requirement that the court should examine the defendant pursuant to Code Articles 101 or 101-1 before deciding to extend a detention order. This is designed to give the defendant an opportunity to make statements directly to the court as to why

¹⁷ *Resolution of the Third Conference of the Presiding Judge of the Criminal Tribunal of the Supreme Court*, see Judicial Yuan, Criminal Law Research (14) (hereinafter “Criminal Law Research (14)”), June 1998, p.343. Criminal Law Research (14), p.50.

¹⁸ Editor’s note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others.

¹⁹ Editor’s note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others.

²⁰ Editor’s note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others.

his or her detention should not be extended, a departure from the past where the court would review the request on paper without giving the defendant a chance to present oral argument. The new practice helps protect a defendant's rights by enabling the court to better understand the grounds and necessity for an extension. This is a step in the right direction.

4.4. *When Does an Extension Take Effect?*

Unless the decision to extend the detention is announced in court, an extension of the current detention takes effect from when a formal copy of the court's order is delivered to the defendant prior to expiry of the original detention period. An extension decision that is not delivered to the defendant before the original detention period expires is deemed to have been cancelled (Code Article 108) and the defendant should be released. The prosecutor should notify the court after releasing the defendant. This provision significantly improves the protection of a defendant's rights. For example, there was a case in which the Taipei District Attorney's Office submitted to the court that the defendant in a corruption case be detained in the Shilin detention center (士林看守所) in Taipei. The prosecutor later requested an extension, which the court granted. However, although the court did deliver a copy of the extension decision to the prosecutor, for some reason the copy for the defendant was delayed in reaching him, and the defendant contended that the decision was invalid because of that delay. The amended Code clarifies matters by providing that, under circumstances such as these, the extension decision would be deemed cancelled.

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7. CONCLUSION

Just as the Supreme Court indicated, first in its decision No. 4672 (Taishentzu, 1996) and later in its decision No. 4672 (Taishentzu, 1998), the court should spare no pains in investigating inculpatory and exculpatory evidence in capital cases, and if it is proved by clear and indisputable evidence that the offense is most deplorable and intolerable to civil society, the imposition of capital punishment will be required by the rule of law. By the same token, when it comes to

²¹ Editor's note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others.

²² Editor's note: Some content from the original has been omitted as it is too focused on the specifics of the Taiwanese system as to be relevant to others.

detention, courts are also required by the rule of law to do their best to thoroughly examine the evidence before making a decision. Ever since the newly amended CPL granted courts the authority to make detention decisions one year ago, a stricter decision-making process has been adopted and effectively implemented, and has received a high level of praise and approval. Now, despite the fact that courts are generally short-staffed, there has been no indication that judges simply go through the motions or make hasty decisions when reviewing and making decisions on detention. Their standards for detention decisions have not slackened. They uphold the idea that detention should be a last resort because it infringes on personal liberty and such decisions should not be made illegally or improperly. This is indicative of the reform's success in alleviating the abuse of detention and other forms of exploitation of the investigative process in ways that undermine the protection of human rights. In sum, the reform of the detention system has achieved its intended purpose of protecting the rights of defendants and therefore deserves recognition and acclaim.

Chapter 9. Laws and Cases from Taiwan

9.1: THE TAIWAN CODE OF CRIMINAL PROCEDURE

Amended Date: 2007.12.12
Category: Judicial Yuan (司法院)

Part I General Provisions Chapter I Application of the Code

*** **

Chapter X Detention of Accused

Article 101

An accused may be detained after he has been examined by a judge and is strongly suspected of having committed an offense, and due to the existence of one of the following circumstances it is apparent that there will be difficulties in prosecution, trial, or execution of sentence unless the detention of the accused is ordered:

- (1) He has absconded, or there are facts sufficient to justify an apprehension that he may abscond;
- (2) There are facts sufficient to justify an apprehension that he may destroy, forge, or alter evidence, or conspire with a co-offender or witness;
- (3) He has committed an offense punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than five years.

At the time a judge is making the examination in accordance with the provision of the preceding section, the public prosecutor may be present and state the reason for applying detention order and present necessary evidence.

The accused and his defense attorney shall be informed of the facts based to support the detention of an accused as specified in section I of this article. The same shall be stated in the record.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 101-1

An accused may be detained, if necessary, after he has been examined by a judge and is strongly suspected of committing one of the following offenses, and if there are facts sufficient to justify an apprehension that he may re-commit the same offense again:

- (1) The offense of Arson as provided in sections I, II, and IV of Article 174, and sections I and II of Article 175, and the offense of constructive arson as provided in Article 176 of Criminal Code;
- (2) The offense of Forced Sexual Intercourse as provided in Article 221, the offense of Forced Obscene Act as provided in Article 224, the offense of Aggravated Forced Obscene as provided in Article 214-1, the offense of Sexual Intercourse or Obscene Act against an insane person as provided in Article 225, the offense of Sexual Intercourse or Obscene Act against under aged child as provided in Article 227, the offense of Battery as provided in Article 277-1 of the Criminal Code. For the case chargeable only upon a complaint, if a complaint is not filed or has been withdrawn, or if the period of time for filing the complaint has lapsed, then this section shall not apply;
- (3) The offense of False Imprisonment as provided in Article 302 of Criminal Code;
- (4) The offense of Forcing as provided in Article 304, and offense of Threaten to Personal Security as provided in Article 305 of Criminal Code;
- (5) The offense of Larceny as provided in Articles 312 and 322 of Criminal Code;
- (6) The offense of Abrupt Taking as provided in Articles 325 through 327 of Criminal Code;
- (7) The offense of commission of Fraudulent as an Occupation as provided in Article 340 of Criminal Code;
- (8) The offense of Extortion as provided in Article 346 of Criminal Code.

The provisions of sections II and IV of the preceding article shall apply mutatis mutandis to the preceding section.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 101-2

After examining the accused, despite the existence of the circumstances specified in section I of Article 101 and section I of Article 101-1, the judge may nevertheless order that the accused be released on bail, or to the custody of another, or with a limitation on his residence if the detention is deemed unnecessary. If the circumstances specified in Article 114 exist, detention shall not be permitted unless that the accused is released on bail, or to the custody of another, or with a limitation on his residence is not workable.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 102

A writ of detention is necessary to detain an accused.

A writ of detention shall be fingerprinted by the accused, and specify the following matters:

- (1) Full name, sex, age, place of birth, and domicile or residence of the accused;

- (2) Offense and article of the Code charged;
- (3) Reason for detention and the facts based upon;
- (4) Place of detention;
- (5) Time period of detention and its starting date;
- (6) Remedy available for challenging the order of detention.

The provisions of section III of Article 71 shall apply mutatis mutandis to a writ of detention. A writ of detention shall be signed by a judge.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 103

The execution of detention shall be, during the stage of investigation, administered by a public prosecutor, and during the stage of trial, administered by the presiding or commissioned judge. A writ of detention shall be executed by a judicial policeman by sending the accused to the specified detention house; the officer in charge of the house shall, after confirming the identity of the accused, note the date and time of the admission on the writ of detention and sign his name.

In the execution of a writ of detention, the writ shall be sent to the public prosecutor, the detention house, the defense attorney, the accused, and the relative or friend appointed by the accused.

The provisions of Articles 81, 89, and 90 shall apply mutatis mutandis to the execution of detention.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 103-1

In the proceeding of investigation, if the public prosecutor, the accused, or his defense attorney deems that it is necessary for the protection of the detention house and for the preservation of the safety of the accused detained, or for other proper reasons, he may apply to the court to change the place of detention.

A notice of change shall be sent to the public prosecutor, the detention house, the defense attorney, the accused, and the relative or friend appointed by the accused, if the court makes a change in the place of detention based on the application according to the provisions of the preceding section.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 104

(Deleted)

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 105

A detained accused may be placed under restraint only if such restraint is necessary to accomplish the purpose of the detention house or to maintain order in the detention house.

An accused may have his own food and daily necessities, may receive visitors, may send and receive mail, and receive books or other things, but the detention house may censor them.

If a court deems that the meeting with visitors, and the sending or receiving of mails or things as specified in the preceding section produce facts sufficient to justify an apprehension that the accused may escape or destroy, forge, or alter evidence or conspire with a co-offender or witness, the court may, upon the application of the public prosecutor or *muto proprio*, prohibit the meeting, sending and receiving or seize the things received. In case of emergency, the public prosecutor or the detention house may take necessary actions, provided that the same shall be referred immediately to the court concerned for approval.

The object, scope, and time period subject to the prohibition or seizure made in accordance with the provisions of the preceding section shall be decided, in the stage of investigation, by the public prosecutor, and in the stage of trial, by the presiding judge or commissioned judge. The same shall be enforced by the detention house under the instruction of the above referenced persons, provided that nothing can be done to restraint the accused's justified right of defending himself.

No restraint shall be placed upon the body of an accused unless sufficient facts exists to support the apprehension of violence, escape, or suicide; such restraint shall be taken by the officer in charge of the detention house only in the case of urgent necessity, and such action shall be referred immediately to the court for approval.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 106

A public prosecutor shall diligently inspect a place where an accused is detained, report the result of his inspection to the competent superior officer, once every ten days, and notify the court.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 107

As soon as the reason for detention ceases to exist, the detention shall be canceled immediately and the accused released.

An accused, the defense attorney, and the person qualified to be the assistant of the accused may apply to the court for cancellation of the detention; the public prosecutor may, also make the said application during the stage of investigation.

The court in deciding whether to approve the application for cancellation of detention referred to in the preceding section may consider statements made by the accused, the defense attorney, or the person qualified to be the assistant of the accused.

During the stage of investigation, upon the public prosecutor's application, the court shall cancel the detention; the public prosecutor may release the accused prior to submitting the application. During the stage of investigation, the court shall consult with the public prosecutor prior to cancellation of the detention except the application for cancellation of detention is made by the public prosecutor.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 108

Detention of an accused may not exceed two months during the stage of investigation and three months during the stage of trial, provided that if it is necessary to continue the detention, the court may, prior to the expiration of the period, after examining the accused in accordance with the provision of Article 101 or Article 101-1 extend such period by a ruling. Application for a ruling for extension of the detention period during the stage of investigation shall be made by the public prosecutor with reasons and submitted to the court no later than 5 days prior to the expiration of the period.

The ruling made in accordance with the provision of the preceding section shall, unless pronounced in court, be effective upon serving a true copy on the accused prior to the expiration of the detention period and the period shall be extended accordingly. If the ruling has not been legally served by the expiration of the detention period, the detention shall be deemed canceled.

During the stage of trial, the detention period shall be counted from the date the case file and exhibits had been sent to the court; the detention period from the date the prosecution has initiated or judgment is rendered, but prior to being sent out shall be counted against the detention period at the investigation stage or that of the original trial court.

Detention period shall be counted from the date the writ of detention is issued; the period of time that the accused is kept in custody after the arrest is made with or without a warrant shall be counted as the detention period before final judgment on a day-by-day basis.

Extension of the period of detention, during the investigation stage, may not exceed two months, and only one extension is allowed; during the trial stage, each extension may not exceed two

months; if the maximum punishment for the offense charged does not exceed imprisonment of ten years, extension may be allowed three times during the first instance and the second instance, and one time only during the third instance.

If a case is remanded, the number of extensions for the period of detention shall be counted anew. If no prosecution has been initiated or no judgment has been rendered at the expiration of the detention period, the detention shall be deemed canceled, and the public prosecutor or the court shall release the accused; if the accused is released by the public prosecutor, the public prosecutor shall immediately notify the court of the same.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 109

If a case is appealed and the period during which the accused has been detained exceeds the term of imprisonment imposed by the original judgment, the detention shall be immediately canceled and the accused released; if the public prosecutor appeals against the interests of the accused, the accused may be released on bail or to the custody of another, or with a limitation on his residence.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 110

An accused or persons who may act as his assistants or the defense attorney may at any time apply to the court for the suspension of detention of the accused on bail.

During the investigation stage the public prosecutor may apply to the court for the suspension of detention of the accused on bail.

The provision of section III of Article 107 shall apply mutatis mutandis to the examination of the application for suspension of detention on bail as specified in the preceding section.

The court, in deciding whether to grant the suspension of detention, during the investigation stage, shall consult the public prosecutor for his opinion, unless the circumstances specified in Article 114 or section II of this Article exist.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 111

If an application for suspension of detention is permitted, an order shall be issued requiring a bail bond and specifying an appropriate amount of bail.

The bail bond shall be signed only by a reliable person within the judicial district of the court; it shall contain a statement of the amount of the bail and a statement that payment will be made in accordance with law.

If an applicant is willing to provide the specified bail or a third party is permitted to supply it, a bail bond is not necessary.

A negotiable instrument may be substituted for the bail.

In cases where an application for suspension of detention is permitted, the residence of an accused may be limited.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 112

If the offense charged is punishable only by a fine, the amount of bail may not exceed the maximum amount of the fine.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 113

If an application for suspension of detention is permitted, the accused shall be released upon receipt of the bail bond or bail.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 114

An application for suspension of detention of an accused under detention who has provided a bail bond, shall not be denied if one of the following circumstances exists:

- (1) The maximum punishment for the offense charged is imprisonment for a period of less than three year, detention, or a fine. If the accused detained is a recidivist, or a person who makes the commission of crime a habit or occupation, a person who commits a crime during the period of parole, or a person detained under section I of Article 101, then the said rule shall not apply;

- (2) The accused has been pregnant for five months or more or has given birth during the preceding two months;
- (3) The accused is ill, and it appears that cure will be difficult unless he is released for medical treatment.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 115

Detention of an accused may be suspended without bail and the accused committed to the custody of a person who may act as his assistant or another suitable person within the judicial district of the court.

A person who has been given custody of an accused shall give a written assurance obligating himself for the appearance of such accused at any time summoned.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 116

Detention of an accused may be suspended without bail, but limitation on his residence imposed.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 116-1

The provisions of section II through section IV of Article 110 shall apply mutatis mutandis to the release of the accused to the custody of another or with a limitation on his residence.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 116-2

In granting the suspension of detention, the court may set the following conditions to be complied by the accused:

- (1) Report to the court or public prosecutor periodically;
- (2) No threat of causing personal injury or property damage made to or action taken against the victim, witness, expert witness, the public official in charge of investigation or trial of the subject case, or the spouse, lineal blood relatives, collateral blood relatives within the

third degree of kinship, relative by marriage within the second degree of relationship, family head or family member of the said public official;

(3) If suspension of detention is granted under the provisions of Item III of Article 114, no activities unrelated to medical treatment are permitted without consent of the court or public prosecutor, except for the activities necessary to maintain normal life or profession;

(4) Other activities the court deems suitable.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 117

An accused who has been released from detention may be detained again under one of the following circumstances:

(1) He has failed to appear without due reasons after having been legally summoned;

(2) He has violated the limitation placed upon his residence;

(3) The circumstances specified in section I of Article 101 or section I of Article 101-1 have newly arisen;

(4) Violation of the conditions needs to be complied with as set forth by the court under the preceding article;

(5) He has committed an offense punishable with death penalty, life imprisonment or with a minimum punishment of imprisonment for no less than five years, and was released under Item III of Article 114, but the reasons for suspension of detention have disappeared and there is a necessity for his detention.

If one of the circumstances specified in the preceding section exists at the investigation stage, the public prosecutor may apply for the re-detention of the accused to the court.

The time period of re-detention shall be counted together with the time period of detention prior to the suspension of the detention.

A court in re-detaining the accused in accordance with the provision of section I of this article may apply *mutatis mutandis* the provision of section I of Article 103.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 117-1

The provisions of the preceding two articles shall apply *mutatis mutandis* to the situations where the public prosecutor releases the accused on bail, to the custody of another, or with a limitation on his residence in accordance with the proviso of section III of Article 93, or section IV of Article

228. The same rule applies when the court releases the accused on bail, to the custody of another, or with limitation on his residence under Article 101-2.

In detaining the accused under the preceding section by court, the provisions of Article 101 and 101-1 shall apply; if the public prosecutor applying for the detention of the accused to the court, the provision of section II of Article 93 shall apply.

The bail bond obligation shall be terminated, if the detention of an accused is made under the provision of section I of this article.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 118

If an accused who has been released on bail absconds or conceals himself, the court shall order the surety to pay the amount of money specified in the order fixing bail and forfeit it; if the bail is not paid, compulsory execution shall be levied; if the cash bail bond has already been supplied, it shall be forfeited.

The provision of the preceding section shall apply mutatis mutandis to the case where the public prosecutor orders the release of the accused on bail under the proviso of section III of Article 93, and section IV of Article 228.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 119

The obligation under a bail bond shall be terminated, if the detention of an accused is canceled, or if he is again detained, or if the detention is nullified by a decision not to indict or a judgment or ruling.

If a third party who furnished a written or cash bail bond reports to the court, public prosecutor, or judicial police officer the circumstances of an attempt by an accused to abscond or to conceal himself so that such abscondence or concealment may be prevented, his application to withdraw the bond may be granted, unless the law provides otherwise.

If the obligation under a bail is terminated or a bail bond is withdrawn, the bond shall be canceled or the cash bail bond which has not been forfeited shall be returned.

The provisions of the preceding three sections shall apply mutatis mutandis to a person who has been given custody of an accused.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 120

(Deleted)

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

Article 121

The cancellation of detention specified in section I of Article 107, the release on bail, to the custody of another, or with a limitation on residence specified in Article 109, the suspension of detention specified in section I of Article 110, Article 115, and Article 116, the forfeiture of cash bail bond specified in section I of Article 118, the withdrawal of the bond specified in section II of Article 119, shall be made by a court in the form of a ruling.

A ruling relating to the matter specified in the preceding section shall be made by the court of the second instance while the case appeal is pending at the court of the third instance and the case file and exhibits have already been sent to the said court.

In making the ruling specified in the preceding section, the court of the second instance may request the delivery of the case file and exhibits from the court of the third instance.

During the investigation stage, the forfeiture of cash bail bond specified in section II of Article 118, the withdrawal of the bond specified in section II of Article 119 and the order to furnish bail, release to the custody of another, or with limitation on residence specified in the proviso of section III of Article 93 and section IV of Article 228, shall be made by a public prosecutor in the form of an order.

Note: Articles 1 through 343 were amended lastly on February 6, 2003.

9.2. THE CRIMINAL SPEEDY TRIAL ACT

Announced Date: 2010.05.19

Category Judicial Yuan: (司法院)

Article 1

This Act is enacted to ensure fair, legitimate and speedy criminal trials so as to protect human rights and the public interest.

Matters other than prescribed hereinto, other relevant laws shall apply.

Article 2

The court shall conduct investigation of evidence speedily and comprehensively in accordance with the law, ensure a fair trial, establish facts effectively and deliberately so as to be the basis for rulings and verdicts, and to protect the legitimate rights and interests of the parties and the victim.

Article 3

The parties at issue, agents, defense attorneys and other people who participate the proceeding and engage in litigation acts shall exercise their rights on the litigation proceeding in accordance with the principle of good faith, and shall not misuse or delay the exercise of such rights without good cause.

Article 4

The court shall conduct preliminary proceedings in conformity with relevant provisions in the Code of Criminal Procedure, and after the preliminary proceeding is completed, the court shall proceed with continuous trials at the earliest possible time so that the case can be disposed effectively and speedily.

Article 5

Where the accused is in detention, the court shall give priority to the trial of the case and conduct continuous trials at the shortest time limit.

Where the accused has committed an offense punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than ten years, the

extension of detention may be allowed 6 times during the first instance and the second instance respectively, and one time only during the third instance.

The accumulated period of detention during the trial shall not exceed eight years.

Where no final judgement is made at the expiration of the detention period prescribed in the preceding paragraph, the detention shall be deemed cancelled and the court shall release the accused. Where the accused is kept in detention, the court shall give priority to the trial of the case and conduct continuous trials at the shortest time limit.

Article 6

The public prosecutor shall bear the burden of proof and persuasion to convince the court the facts of the crime charged against the accused. Where the evidence provided by the prosecutors is insufficient to prove that the accused is guilty, or the method of proof indicated fails to convince the court to a guilty verdict, the principle of presumption of innocence shall apply.

Article 7

Where no final judgement is made after eight years from the date the case is pending in the first instance, except when a not guilty verdict shall be rendered, the court may, upon the request of the accused, and after considering the following circumstances, reduce the sentence at discretion if the court concludes that the accused right to a speedy trial is gravely violated so that remedies shall be provided:

1. Whether the delay in litigation proceeding is caused by the accused;
2. The balance between the complication of the case in terms of legality and facts and the delay in proceeding;
3. Other circumstances related to the speedy trial.

Article 8

A case shall not be appealed to the Supreme Court if it is more than six years from the date the case is pending in the first instance and after being remanded by the Supreme Court for the third time, the court of second instance upholds the not guilty judgement rendered by the first instance or its not guilty judgement has been upheld by courts of the same instance for more than twice before remanding.

Article 9

Except for the circumstances provided for in the preceding Article, if the court of second instance reaffirms the not guilty judgement rendered by the first instance, the reasons for appeal are limited to the following conditions:

1. The law or order applied in the judgement is inconsistent with the Constitution;
2. The judgement is in contradiction to the Interpretation of the Judicial Yuan;
3. The judgement is in contradiction to the precedent.

Articles 377 to 379 and Paragraph 1, Article 393 of the Code of Criminal Procedure shall not apply to the trial of the case specified in the preceding paragraph.

Article 10

Where a judgement is rendered by the court of second instance and is during the period allowed for appeal to the Supreme Court, an appeal has been filed within the appeal period, or the case is pending in the Supreme Court before this Act comes into force, Chapter 3, Part 3 of the Code of Criminal Procedure shall apply to the case of the preceding two Articles.

Article 11

Where a court requires the cooperation from relevant agencies for the purpose of speedy trial, relevant agencies shall give priority to its cooperation to the court as soon as possible.

Article 12

To achieve the goal for speedy trial and human rights protection, the government shall construct an efficient judicial proceeding system, increase suitable judicial personnel and build up a structure and environment that is convenient to retain attorneys.

Article 13

This Act shall apply *mutatis mutandis* to cases pending in the court before the Act coming into force.

Where the court renders a ruling to extend the detention of an accused before Paragraph 2 to 4 of Article 5 come into force, such ruling remains effective.

Article 14

Paragraphs II to IV, Article 5 shall take effect two years from the date of promulgation. Article 9 shall come into force one year from the date of promulgation. The effective date of the other articles shall be decided by the Judicial Yuan.

9.3: TAIWAN LAW OF COMPENSATION FOR WRONGFUL DETENTIONS AND EXECUTIONS

Amended Date 2007.07.11

Category Judicial Yuan (司法院)

Article 1

A person who is prosecuted under the Code of Criminal Procedure, Law of Military Trial, Law governing the Disposition of Juvenile Delinquency or Anti-Gangsters Statute, may seek State compensation pursuant to this Law under any of the following circumstances:

1. A person who has been in custody or detained before a "to be unwilling to prosecute" disposition is issued or a "not guilty" or "not entertained" judgment is rendered.
2. A person who has been in custody, detained, imprisoned or in compulsory services before a "not guilty" or "not entertained" judgment is rendered or the rehabilitative measures is vacated on retrial or interlocutory appeal.
3. A person who has been detained before a "not to hear the case" or "no protective measures and treatment" ruling is rendered.
4. A person who has been detained or in rehabilitation before a "no protective measures and treatment" ruling is rendered on retrial.
5. A person who has been detained before a "no imprisonment in a State correctional institution" final judgment is rendered.
6. A person who has been detained or imprisoned in a State correctional institution before a "no imprisonment in a State correctional institution" final decision is rendered.

If detention in custody, detained, or in compulsory services is not made in accordance with law or order may also seek State compensation pursuant to this Law.

Article 2

A person who seeks State compensation pursuant to the preceding Article may not recover compensation if one of the following circumstances exists:

1. Except for the applicable excuse specified in Paragraph 1, Article 18 or Paragraph 1, Article 19 of the Criminal Law, there is evidence sufficient to prove that the claimant who is not prosecuted or found "not guilty" shall be prosecuted, sentenced or exempted for sentence.
2. A claimant who was in serious violation of public order or good morals, or who shall be subject to peace preservation measures.
3. A claimant who has been in custody, detained, or in compulsory services due to his intentional or grossly negligent Laws.

4. A claimant who is partially found "not guilty" but found "guilty" for the remaining part of combining punishments for several offenses.
5. If the claimant is not prosecuted for the reasons other than the Law is unpunishable or insufficient suspicion.
6. Except for claimant's death, there is evidence sufficient to prove that the claimant who is exempt from prosecution or who is dismissed the case shall be prosecuted, sentenced or exempted for sentence.
7. Except for Subparagraph 8 of this provision, the claimant is not tried or in protective custody not for the reason exempted for protective custody.
8. Except for the reason of claimant's insanity or death, there is evidence sufficient to prove that the claimant who is not tried or in protective custody shall be tried or in protective custody.
9. The claimant is ruled not to be imprisoned in State correctional institution based on Subparagraph 2, Paragraph 3 of Article 13 of the Anti-Gangsters Statute.
10. Except for statutory justifications specified in Subparagraphs 3 to 5, Paragraph 3 of Article 13 of the Anti-Gangsters Statute, there is evidence sufficient to prove that the claimant who is not imprisoned in State corrective institution shall be imprisoned in State corrective institution.

Article 3

Compensation for a wrongful custody, detention imprisonment, detention sentence, rehabilitation, corrective institution or compulsory services shall be at the rate of no less than Three Thousand New Taiwan Dollars (NT\$3,000) and no more than Five Thousand New Taiwan Dollars (NT\$5,000) per day based on number of days served.

Compensation for executed monetary penalties and for commutation to executed monetary penalties shall be paid twice the full amount plus statutory interest.

Paragraph 1 of this provision applies mutatis mutandis to compensation for commutation to labor services.

Confiscated, levied, surrendered or atoned objects shall be returned in full except those which should be destroyed. Confiscated, levied, surrendered or atoned objects already auctioned shall be compensated by twice the auction value plus statutory interest.

In addition to compensation for a wrongful detention pursuant to Paragraph 1 of this provision, compensation for a wrongfully executed death sentence, shall be made by buying a solatium no less than One Thousand New Taiwan Dollars (NT\$1,000) and no more than Three Thousand New Taiwan Dollars (NT\$3,000) per day of his remaining life calculated by the Nationals' average life expectancy. The total amount of compensation for a wrongfully executed deceased

shall no more than Thirty Million New Taiwan Dollars (NT\$30,000,000) and no less than Ten Million New Taiwan Dollars (NT\$10,000,000).

The number of days of custody or detention shall be calculated from the day of detention or arrest.

Article 4

A agency which renders the original ruling or a subsequent court which renders the ruling of "not guilty", "not entertained", "not to hear the case", "no protective measures and treatment", "no imprisonment in corrective institution", "revocation of compulsory services" shall have jurisdiction to adjudicate the claim of compensation. However, the local district court where the judicial court rendering the custody, detention, execution ruling is located or the claimant resides shall have jurisdiction to adjudicate the claim of compensation pursuant to Paragraph 2, Article 1 of this Law. The local Military trial Court (Cases) of criminal offenses shall have jurisdiction to adjudicate the claim of compensation under the Law of Military Trial.

When the local court-martial which renders the original ruling is abolished or reorganized, the court-martial or prosecuting office which takes over the claim shall have jurisdiction to adjudicate the claim of compensation under the Law of Military Trial.

Article 5

A claim for wrongful imprisonment compensation shall specify the following information in writing and shall be submitted to judicial agencies which have jurisdiction to adjudicate the claim:

1. the claimant's name, gender, age, domicile or residence.
2. the legal representative's name, gender, age, domicile or residence.
3. the subject matter of the claim.
4. facts and reasons of the claim; original copy or proof of the prosecutor's "to be unwilling to prosecute" disposition, or a "not entertained", "not guilty", "not to hear the case", "no protective measures and treatment", "no imprisonment in corrective institution", or "revocation of compulsory services" ruling should be attached.
5. the agency with jurisdiction.
6. year, month, and date.

Article 6

The legal heir(s) of a wrongfully imprisoned victim may seek State compensation.

Except when the deceased victim is executed under the death penalty, a claim for wrongful imprisonment compensation by the victim's legal heir(s) pursuant to the preceding provision may not Law against the express manifestation of the deceased victim or heir(s) with higher priority.

Article 7

When an heir of a wrongfully imprisoned victim files a claim of compensation, he/she shall explain his/her relationship with the deceased and the existence of other heir(s) with same priority.

In case one of several heirs files a compensation claim, the effect of claim shall have the same effect as by all. When the heir who files the compensation claim wants to withdraw the claim, such a withdrawal must be agreed by all heirs.

Article 8

A claim of compensation shall be filed to the agency with jurisdiction within two years from the date of the final judgment of "not guilty", "not entertained", "not to hear the case", "no protective measures and treatment", "no imprisonment in corrective institution", "revocation of compulsory services" is rendered. However, a claim of compensation pursuant to Paragraph 2, Article 1 of this Law shall be filed to the agency with jurisdiction within two years from the date of the victim's custody, detention or execution is terminated.

Article 9

A wrongfully imprisoned victim may commission a legal representative to file a claim of compensation.

The legal representative shall provide a power of attorney in writing.

Except acting on the specific request of withdrawal from the claimant, the legal representative may not withdraw the claim of compensation.

Article 10

The claim of compensation may be withdrawn before the adjudicating agency renders the decision.

Once the claim of compensation is withdrawn, the claimant may not file the same claim of compensation again.

Article 11

When a claimant is ordered to rectify the procedural defect of the claim but fails to do so within a specified deadline, the agency with jurisdiction to adjudicate the claim shall dismiss the claim of compensation.

Article 12

If the adjudicating agency finds the claim has merit, the agency shall award the compensation to the claimant. However, if the adjudicating agency finds the claim has no merit, the agency shall dismiss the claim.

The adjudicating agency stated in the preceding paragraph shall render a decision and serve the decision to the Prosecuting Office of the Supreme Court and the claimant within three months after receiving the claim of compensation filed by the claimant.

The service of process set forth in the Code Of Criminal Procedure applies mutatis mutandis to the process of service set forth in Paragraph 1 of this provision.

Once the adjudicating agency has rendered the final decision, the claimant may not file another claim of compensation based on the same facts and cause (of action) of the wrongful imprisonment.

Article 13

The claimant who objects to the decision rendered by the adjudicating agency stated in Paragraph 1 of the preceding Article, may file an appeal for re-examination to the Wrongful Imprisonment Compensation Court of the Judicial Yuan.

When a decision of claim rendered by the adjudicating agency violates the provisions set forth in Articles 1 and 2 of this Law, the Prosecuting Office of the Supreme Court may also file a petition to the court of Compensation for Wrongful Detentions and Executions of the Judicial Yuan for judicial review of the decision.

Article 14

The presiding judges in the court of Compensation for Wrongful Detentions and Executions of the Judicial Yuan shall be appointed by the President of the Judicial Yuan and shall consist the Chief Justice and other Justices of the Supreme Court. The Chief Justice of the Supreme Court

shall be the Chief Presiding Judge of the court of Compensation for Wrongful Detentions and Executions.

The personnel of the court of Compensation for Wrongful Detentions and Executions shall be assigned from the personnel of the Judicial Yuan.

Article 15

The claimant shall specify in writing the reasons for re-examination in the petition and file the petition to the court of Compensation for Wrongful Detentions and Executions through the adjudicating agency rendering the original decision within 20 days after the decision has delivered to the Prosecuting Office of the Supreme Court and the claimant.

Article 16

After the final decision against the claimant is made, the claimant, legal representative or legal heirs may file a petition for Re-trial to the affirming court if one of the following circumstances exists which is sufficient to adversely affect the outcome of the original decision:

1. The applicable law or statute is apparently in error.
2. The substance of the decision is inconsistent with the holding.
3. The evidence which the original decision relies upon is proved to be forged or altered.
4. The testimony, authentication or translation which the original decision relies upon is proved to be false.
5. The prosecutor, court-martial prosecutor or judge involving the original decision is proved to commit a malfeasance for the reason of the decision he/she renders or is disciplined for the reason of his/her malfeasance.
6. New material evidence is discovered.

Article 17

The claimant shall file the petition of retrial to the affirming court within fixed period of 30 days after the decision against the claimant is affirmed, but if the circumstance which allows retrial is occurred or made known to the claimant after the final decision is made, the claimant shall file the petition of retrial within fixed period of 30 days after the circumstance is made known to the claimant. However, if the circumstance which allows retrial is occurred or made known to the claimant 5 years after the final decision is made, the claimant may no longer file the petition of retrial.

Article 18

The claimant shall specify in writing the reasons for retrial in the petition and file the petition to the final affirming agency with a copy of the final affirming decision and evidence attached.

Article 19

If the adjudicating agency finds the petition of retrial has no merit, or the period of limitation for filing the petition of retrial has run, or the petition has procedural defect, the agency shall dismiss the petition. If the adjudicating agency finds the petition has merit, the agency shall set aside the original decision and renders a new decision.

Once the adjudicating agency has dismissed the petition of retrial, the claimant may not file another petition of retrial based on the same facts and reasons of the wrongful imprisonment.

Article 20

The petition of retrial may be withdrawn before the adjudicating agency renders the decision. Once the petition of retrial is withdrawn, the claimant may not file another petition of retrial based on the same facts and cause (of action) of the wrongful imprisonment.

The claimant who wants to withdraw the petition of retrial shall file a petition of withdrawal in writing.

Article 21

The provisions set forth in Paragraph 2, Article 7 and Article 9 of this Law applies mutatis mutandis to the petition of retrial or withdrawal filed by the claimant pursuant to this Law.

Article 22

The funds for wrongful imprisonment compensation shall be defrayed by the National Treasury.

The State is entitled to seek indemnification from the civil servant who commits a malfeasance based on his/her intentional or grossly negligent Law, resulting the claimant's claim of wrongful imprisonment compensation.

Article 23

The request of compensation payment shall be submitted to the adjudicating agency in writing with a copy of domicile certification attached. The request shall be submitted within one year after the decision of claim is served to the claimant. The claimant's right to payment of

compensation will be forfeited if the claimant fails to submit the request of payment before the specified deadline.

Article 7 of this Law shall apply mutatis mutandis to the request of compensation payment submitted by the legal heir pursuant to the preceding paragraph.

For a claimant of wrongful imprisonment compensation where the claim is made upon one and the same cause for which the wrongful detention claimant has already received compensation under other laws, the amount of the compensation shall be subtracted from the compensation payment awarded under this Law.

Article 24

The right to seek State compensation and the right to request compensation payment cannot be seized, transferred or pledged.

Article 25

For compensation claims with a petition of judicial review or retrial is pending, the adjudicating process of the claim shall be suspended until the ruling on the petition of judicial review or retrial becomes final.

When a ruling of "guilty" or "in protective measures and treatment" is rendered for claims stated in the preceding paragraph, a petition of judicial review or retrial shall be dismissed accordingly.

Article 26

When a petition of judicial review or retrial is filed after the decision to award compensation is granted, the payment of the claim shall be suspended until the ruling on the petition of judicial review or retrial becomes final.

When a ruling of "guilty" or "in protective measures and treatment" is rendered for a claimant in the preceding paragraph, the decision to award compensation shall be invalidated accordingly.

Article 27

When an award of compensation has already paid to a claimant under the circumstances prescribed in the Paragraph 2 of the preceding Article, the awarding agency shall order the claimant to refund the compensation payment.

The order made by the awarding agency in the preceding paragraph is self-executing.

Article 28

The awarding agency shall proclaim and publish the decision of awarding the compensation and syllabus and its summary in the Government gazette and newspaper of the place where the claimant resides.

Article 29

The payment of compensation, the refund of a fine ,or the return of things confiscated, shall be effected within 15 days after receipt of the claim for payment, refund, or return.

Article 30

The adjudicating rules governing the claim of wrongful imprisonment compensation shall be prescribed by the Judicial Yuan.

No fee shall be charged on the claimant for the legal proceedings of claim of wrongful imprisonment compensation.

Article 31

The Law shall apply mutatis mutandis to foreign nationals , provided, however, that this shall be applicable only when the nationals of Republic of China are entitled to the same right under international treaties or the law of the nationals of the respective countries.

Article 32

This Law applies to claims of compensation under the Law of Military Trial before the revised provisions of this Law come into effect on June 14th, 2007.

The claim of compensation pursuant to the preceding paragraph shall be filed within two years after the revised provisions of this Law come into effect on June 14th, 2007.

Article 33

For those claimants who may file a petition of retrial under Article 16 of revised provisions of this Law come into effect on June 14th, 2007, shall file the petition within two years after the revised provisions of this Law come into effect on June 14th, 2007.

Article 34

This Law comes into effect on the day of promulgation.

9.4: MATTERS FOR PROSECUTORS TO CONSIDER IN THE CONDUCT OF THE CRIMINAL PROCEDURE
LAW (SEPTEMBER 23, 1998)

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21. Any defendant who is arrested or detained should be promptly interrogated without delay. If the prosecutor, after conducting the interrogation, believes there is no need to detain the defendant, the prosecutor should release him or apply for release on bail, release to another person or house arrest. If the prosecutor believes that the defendant should be detained, the prosecutor should immediately apply to the court for a detention order, explaining clearly in concrete terms why there is strong suspicion that the defendant committed a crime and what the bases for detention are under each provision of CPL Articles 101(1) and 101-1(1) and deliver the relevant documents and the defendant to the court to apply for detention. The prosecutor's application for detention and the response should be recorded. (1994 CPL 101(10), 228(4))

22 The acceptance or appeal of a ruling denying an application for detention)

For the aforementioned application for detention, if the court rules that the application should be rejected or the court directly orders release on bail, release to another person or release under house arrest if the public prosecutor disagrees with the ruling, she should immediately state the reasons and file an appeal immediately after the court issues its ruling, to avoid any delay of the decision-making process concerning whether the defendant should be detained. When the court decision is delivered, the case-handling public prosecutor should immediately receive it and deliver it to the prosecutor's office. If the public prosecutor is not present in her office, the decision should be delivered to the Chief Prosecutor, who should appoint another public prosecutor to handle the appeal. (CPL 403, 404)

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36. (Prudent Applications for detention)

When a public prosecutor applies for detaining a defendant, she must act prudently. She may not abuse her power to apply for detention and may only do so if the circumstances of the case satisfy the elements of CPL Articles 101(1) and 101-1(1). Whether such circumstances exist shall be determined through interrogation. Even if interrogation shows the existence of circumstances specified in section CPL Articles 101(1) and 101-1(1), the prosecutor shall not apply for detention application for detention shall not be submitted if detention is unnecessary, and the defendant should be released on bail, to the custody of another, or placed under house arrest. Strong suspicion of having committed an offense, as specified in CPL Articles 101(1) and 101-1(1), refers to the strength of the suspicion based upon evidence and does not refer to the seriousness of the offense. The public prosecutor should prudently determine the situation in each individual case based on the evidence.

For serious and important criminal cases and cases of great public concern, the public prosecutor should determine the necessity of detention according to the materials in the case file. When applying for detention, the public prosecutor should voluntarily appear in court and state the reasons for the application, and present appropriate arguments and evidence to achieve an impartial judgment. (The Code of Criminal Procedure 93, 101, 101-1)

37. (Attention: making statements in court regarding opinions on the application for detention)

If the public prosecutor is present in court to state her opinion when the court reviews the application for detention, it should be noted that the purpose of the court review is solely to determine whether the application for detention or for extension of detention satisfies the prerequisites prescribed by law, rather than determining whether the defendant has committed a crime. When necessary, the public prosecutor should remind the court that there is no need to initiate the process of argument, and the principle of the secrecy of investigations should be observed to avoid disclosure of irrelevant investigation materials. As to the reasons for application for detention, it is sufficient to make explanations. (The Code of Criminal Procedure 159.2

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38. (the meaning of “using facts to prove” the elements necessary for detention)

The standard of “using facts as proof” for the elements of CPL Articles 101(1)(1)(2), 101-1(1) means according to concrete facts and objective judgments and the bases for the application for detention should all be clearly stated in the application.

9.5. MATTERS FOR THE COURT TO CONSIDER WHEN IMPLEMENTING THE CODE OF CRIMINAL
PROCEDURE (AMENDED JANUARY 29, 2013)

28. (Prohibition against the abuse of detention)

The court should be prudent when deciding to hold a defendant in detention. Unless the circumstances specified in section I of Article 101 or section I of Article 101-1 are present, and there is a necessity of detention, a defendant should not be detained. When applying preventative detention provided for in section I of Article 101-1, the court should be extremely prudent. A “strongly suspicion” means that there is strong evidence that the defendant committed a crime and not that the defendant is suspected of having committed a serious crime. (CPL Articles 101, 101-1)

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31 (The times and decision of extending detention)

Extension of the period of detention, during the investigation stage, should be restricted to one time; during the trial stage, if the maximum punishment for the offense does not exceed ten years imprisonment, an extension may be allowed three times during the first instance and the second instance, and one time only during the third instance. The detention period from the date the prosecution was initially detained shall be counted against the detention period at the investigation stage. The detention period from the date the judgment is rendered shall be counted against the detention period of the original trial court. If a case is remanded, the number of extensions for the detention period shall be counted anew. (CPL, Article 108)

34. (Detention interrogation, notification and waiting for the presence of a defense attorney)

When the judge examines a defendant upon receiving an application for detention, if the defendant has made the presentation that a defense attorney has been retained, the court should, by telephone, fax, or other means of fast communication, inform the defense attorney to be present, and the clerk should make a record of the notification. If the defendant clearly states that she has already notified the defense attorney, or that the defense attorney has already appeared, then a court notification is not necessary. If the defendant is unable to make a complete statement due to unsound mind, or if she has an aboriginal Taiwanese identity, and during the investigation stage the public prosecutor and the police failed to notify her defense attorney, or the defendant requests an immediate examination or interrogation, or has waited for a public defender for more than four hours, the court should notify a lawful legal-aid institution to designate a defense attorney to represent the

defendant, provided that the defendant's public defender is absent at the examination, and that they defendant has requested the court to notify her defense attorney. (CPL Articles 31, 93-1, 95, 101, 101-1)

35. (notifying the public prosecutor to file an amended application)

A judge shall not imprudently grant an application for detention if he deems that the evidence or reasons for application for detention or extension of detention is insufficient. When necessary, the judge may specify a time and a location and notify the public prosecutor to appear in court to provide the reasons and evidence supporting the application for detention. Such notification should be made by the clerk by telephone, facsimile, or other fast means of communication, and a written record of the notification should be made. A decision may be made without the public prosecutor's presence if she fails to appear in court at the location within the time limit. Furthermore, the judge, when reviewing the above-mentioned applications for detention or extension of detention, should still be mindful of the principles of the secrecy of investigation, and must not voluntarily disclose any investigation materials. The purpose of the said review should be limited to assessing whether the application of detention or extension of detention filed by the public prosecutor satisfies the requirements provided by law, and does not extend to determine whether the defendant has committed a crime. Therefore, the applicable rules of evidence rule not need be strictly applied. (CPL, Article 101, 101-1, 108, 245, reference to the Taiwan Supreme Court decision 1982 Taishangzi No. 5658)

36. (The premises of application for detention at the investigation stage)

The premises of a legal detention at the investigation stage is that a defendant is lawfully arrested with or without a warrant and that the public prosecutor has filed an application for detention within twenty-four hours from the time of the arrest. Time delayed by circumstances specified in law shall be counted against the twenty-four-hour limitation, provided that the public prosecutor explicitly states those circumstances at the time of application for detention. (CPL, 93, 93-1)

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38. (When the public prosecutor applies for detention, the court may order that he be released on bail, to the custody of another, or placed under house arrest.)

In cases where the public prosecutor applies for detention, if the judge, after examining the defendant, considers that the application for detention is not necessary notwithstanding the existence of one of the circumstances listed in Articles 101(1) or 101-1(1), the defendant may be released on bail, to the custody of another, or placed under house arrest. If the circumstances listed in Article 114 are present, the defendant may not be detained unless the defendant is not eligible to be released on bail, to the custody of another, or placed under house arrest. (CPL Articles 93, 101, 101-2, 114)

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39. (Nondisclosure of investigation materials in detention hearings)

When a judge dismisses an application for detention and orders that the defendant be released on bail, to the custody of another, or placed under house arrest, the ruling shall be issued in writing with supporting grounds, so that the public prosecutor could file an interlocutory appeal immediately. The judge should be mindful of the principle of the secrecy of investigations in making the ruling, in which detailed investigation materials shall not be recorded, and the investigation case file and evidence shall not be disclosed to the public. (CPL Articles 93, 245, 404, 413)

40. (The court hearing an interlocutory appeal shall make its own ruling)

If the public prosecutor appeals the court ruling of dismissal or an order to release the defendant on bail, to the custody of another, or to be placed under house arrest, the interlocutory appeal court shall conduct an immediate hearing and make its own ruling regarding whether the defendant shall be detained. (CPL 404, 413)

41. (The principle of being prudent in ruling against interviewing and corresponding, or ordering a seizure)

Prohibition of interviewing and corresponding, or order of seizure is related to detention. Such restrictions inflict significant impact on a detained defendant. Therefore, the court shall prudently exercise its authority. When the public prosecutor applies to the court for such restrictions, the court should review whether there is evidence sufficiently proves its necessity. The court shall not casually grant the application if it fails to provide detailed evidence, or the evidence cannot justify the necessity of such restriction. (CPL Article 105)

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51. (ex officio cancellation or suspension of detention)

The court shall, ex officio check whether the reasons for detention are still in existence, and whether there is necessity of continued detention. Detention shall be immediately cancelled and the defendant shall be released upon elimination of the reasons for detention. Detention shall be suspended when the necessity of detention has disappeared. (CPL 107, 110, 115, 116, 116-1)

52. (Trial of an application of detention cancellation or suspension)

A defendant, his defense attorney or assistant may apply for cancelling or suspending a detention. The court may hear their statements when it is necessary. When the public prosecutor applies for suspending a detention, the court may also hear the statements of the defendant, his defense attorney or assistant when it is necessary. CPL Article 107, 110, 115, 116, 116-1)

53. (Handling application for detention cancellation from the public prosecutor during investigation)

When the public prosecutor applies for cancellation of detention during investigation, the court shall grant it and must not dismiss it. (CPL Article 107)

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58. (Attention: grant release on bail or to the custody of another)

When suspending detention because bail is granted, the amount of bail bond shall be determined based on the circumstances of the case and the identity of the defendant. Except for the situation where the applicant or the third party is willing to submit a bail bond or securities, the court shall, according to law, order the defendant to submit a letter of recognizance, but may not force him to submit the bail money. When the applicant or the third party has already rendered the designated amount of bail money or securities, the court shall grant the bail and shall not force her to submit a letter of recognizance. When it is feasible to suspend detention, and release the defendant to the custody of another or place the defendant under house arrest, the court shall adopt the alternatives to detention. The court ordering release on bail, to the custody of another or house arrest shall decide the fitness of the person who submits the bail bond money, or the custodial guardian to whom the defendant is going to be released. (CPL Article 111,115,116)

9.6: MATTERS FOR COURTS TO CONSIDER IN THE CONDUCT OF THE CRIMINAL PROCEDURE LAW
AMENDMENTS PERTAINING TO ENFORCING AND TERMINATING PRETRIAL DETENTION

(FEBRUARY 9, 2000)

1. When a court releases a defendant on bail, to the custody of another, or under house arrest, the court should consider the circumstances of the individual case and, when it is appropriate and necessary, order that the defendant should report to the court periodically, that the defendant must not harm or threaten certain individuals, and that those who have been released for medical treatment, unless permitted, must not engage in activities that are obviously not related to medical treatment, and that the released defendant must obey any other appropriate restrictions.
2. When considering what conditions to order a defendant to obey upon his release a court should consider what conditions are appropriate based upon all relevant factors including: the defendant's status, occupation, family environment, the nature of the suspected crime, the circumstances of the crime, the harm caused by the crime, the defendant's attitude after committing the crime, and his relationship with the victims, the witnesses and the expert witnesses.
3. Concerning a defendant's violation of a condition of his release, if the court determines that it is necessary, the court may, in accordance with the law, reinstate the enforcement of detention, provided the impact of the violation is significant and the conditions imposed were concrete, clear and feasible enough to avoid any dispute over their meaning and regardless of whether the conditions required positive action or the forbearance of action.
4. The condition or conditions imposed by the court should be clearly recorded and, in accordance with law, notice should be served upon the defendant and the prosecutor; the clerk should make a notation in the appropriate place in the file to assist the court in determining whether a violation has occurred.
5. When ordering a defendant to report periodically to the court or the public prosecutor, the time and duration of the required reporting should be clearly communicated to the defendant, and the defendant should be explicitly instructed that he should report to the public prosecutor during the investigation of the case, and report to the trial court when the case is transferred for trial.
7. When ordering that a defendant refrain from threatening or harming certain individuals, the name and identity of such individuals should be clearly recorded. For example, Victim ○○○, Witness ○○○, or blood relatives within the third degree of kinship of the victim, family members of the witness etc.
8. When ordering that, without court permission, a defendant who has been released to receive medical treatment must not engage in activities unrelated to medical treatment, the condition should be clearly recorded.

9. When the court permits a defendant to conduct activities that are obviously unrelated to medical treatment, such permission should be recorded in the court file or in other forms of written documents.
10. When imposing conditions on a defendant, such conditions should be clearly recorded. Such conditions should be objectively feasible according to the common sense of ordinary people, for example, ordering that a defendant not retaliate or make unnecessary contact with the victims or witnesses, or that a defendant should receive proper medical treatment.
11. As a case proceeds, a court may, in accordance with the circumstances, reinstate detention or modify the conditions of release imposed on the defendant.
12. After the termination of detention if any of the provisions of Criminal Procedure Law, Article 117 section 1 apply and detention must be reinstated all of the procedures and conditions are the same as they are for imposing detention.
13. For a defendant who has committed a crime punishable with the death penalty, life imprisonment, or imprisonment for no less than five years, and was suspended from detention for medical treatment, when the reason for the suspension of detention no longer exists, and the court deems detention necessary, after considering all of the circumstances, the court may reinstate detention. The aforementioned “reason for suspension of detention no longer exists” means that the medical condition that justified the release has been resolved or, if not completely resolved, is improved and leave for medical treatment is no longer required.
14. When reinstating detention, the period of detention should be calculated to include both the period before detention was terminated and the period after it was reinstated and the period of detention should not be counted anew from the date of reinstatement. Courts should pay attention to Criminal Procedure Law, Article 108’s regulations on the period of detention and should protect the rights of the defendant by initiating the lawful process of extending detention in advance of the expiration of the detention period.
15. When a court releases a defendant on bail, to the custody of another, or under house arrest, the court should follow the Criminal Procedure Law, Articles 116 and 117 as it applies to reinstating detention.
16. When a court decides to cancel the detention of a defendant pursuant to Criminal Procedure Law, Article 119, and release a defendant on bail, to the custody of another, or under house arrest, the court should use the flexibility provided under Criminal Procedure Law, Articles 116, section 2 and 117.

9.7. JUDICIAL YUAN INTERPRETATION NO. 329¹

Date: December 24, 1993

Issue: What is the meaning of “treaty” in the Constitution? Which kind of international agreement should be sent to the Legislation Yuan for deliberation?

Holding: Within the Constitution, “treaty” means an international agreement concluded between the R.O.C. and other nations or international organizations whose title may apply to a treaty, convention or an agreement. Its content involves important issues of the Nation or rights and duties of the people and its legality is sustained. Such agreements, which employ the title of “treaty,” “convention” or “agreement” and have ratification clauses, should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or pre-determined by the Legislative Yuan, should also be sent to the Legislative Yuan for deliberation.

Reasoning: According to the Constitution, the president has the power to conclude treaties. The premier and ministers shall refer those treaties that should be sent to the Legislation Yuan for deliberation to the Committee of the Executive Yuan. The Legislative Yuan has the power to review those treaties. All of these procedures are explicitly enshrined in Article 38, Article 58, Paragraph 2, and Article 63 of the Constitution, respectively. Treaties concluded according to the above procedures hold the same status as laws. Therefore, the term “treaty” in the Constitution means an international agreement concluded between the R.O.C., including those institutions and groups authorized by governmental agencies, and other nations, including their authorized institutions and groups or international organizations, that employ the title of “treaty,” “convention” or “agreement”; is involved directly in important national issues such as defense, diplomacy, finance, the economy or people’s rights and duties, and has legal effect. Agreements that employ the title of “treaty,” “convention” or “agreement,” and have ratification clauses should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or pre-determined by the Legislation Yuan, should also be sent to the Legislative Yuan for deliberation. Those international agreements, which do not need to be sent to the Legislative Yuan for deliberation or cannot be regarded as treaties concluded by governmental agencies or their authorized institutions or groups, should be processed by responsible governmental agencies compliant with legislative or normal executive procedure. It is obvious that the “Procedure Rules on Treaties and Agreements” enacted by the Ministry of Foreign Affairs should be amended in accordance with this interpretation.

¹ Translated by Dr.F.T.Liao. Source Judicial Yuan Republic of China, :
http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=329.

According to Article 4 of the Constitution, treaties that alter the territory of the R.O.C. within its existing national boundaries should also be resolved by the National Assembly. Agreements concluded between Taiwan and mainland China are not international agreements to which this interpretation relates. It should also be noted that whether or not these agreements should be sent to the Legislation Yuan for deliberation is not included in this interpretation.

9.8. JUDICIAL YUAN INTERPRETATION NO.665¹

Date: October 16, 2009

Issues:

- I. Is the Case Assignment Directions of the Taiwan Taipei District Court stipulating an integration of correlated cases in contravention of the Constitution?
- II. Is the criterion of the statutory detention of defendants in felony cases pursuant to the Code of Criminal Procedure in contravention of the Constitution?
- III. Is the prosecutor's right to appeal by filing a motion to set aside the court's ruling of ceasing the detention a defendant during a criminal trial in contravention of the Constitution?

Holdings:

I. Articles 10 and 43 of the Case Assignment Directions of Criminal Divisions of the Taiwan Taipei District Court are not in contravention of the constitutional guarantee of people's right to institute legal proceedings.

II. Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure stipulates that the courts may order to detain a defendant in a criminal trial when he/she is the major suspect of the crimes specified, and there is a reasonable ground to believe that the he/she may escape, may destroy, fabricate or falsify evidence, or may conspire with accomplices or witnesses, and when it becomes apparent to the courts that there will be difficulties with respect to the prosecution, the trial process, or the enforcement of the final judgment without such detention. To the extent of its statutory language, Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure falls under the constitutional mandate of the principle of proportionality under Article 23 of the Constitution and is not in contravention of the constitutional guarantees of people's personal freedom and of people's right to institute legal proceedings under Articles 8 and 16 of the Constitution respectively.

III. Article 403, Paragraph 1 of the Code of Criminal Procedure, for the relevant part of empowering a prosecutor to appeal on the trial court's ruling of ceasing the detention of a defendant, is not in contravention of the constitutional guarantee of people's right to institute legal proceedings under Article 16 of the Constitution.

IV. As a result, it is moot and unnecessary to review the petition to stay the trial of the Criminal Case Gin-Tzu-Chung-Su-Tze No. 1 (2008) and to re-assign the case pursuant to the result of the

¹ Translated by Professor Chun-Jen Chen. Source: Judicial Yuan Republic of China, http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=665.

case assignment decided on December 12, 2008. The petition for a mandamus (or writ of habeas corpus) to issue a court temporary order to release the Petitioner is in contravention of the J.Y. Interpretation Nos. 585 and 599, and is hereby denied.

Reasoning:

I. The Stipulations under Articles 10 and 43 of the Case Assignment Directions of Criminal Divisions of the Taiwan Taipei District Court

Article 16 of the Constitution guarantees people's right to institute legal proceedings. The core content of this constitution guarantee is to enable the people to seek for a fair trial from the courts in accordance with due process of law in order to redress their grievances when their rights or interests are infringed. To ensure a fair trial, Article 80 of the Constitution also mandates that judges shall be above partisanship, shall, in accordance with law, hold trials independently, and shall be free from any interference.

The court's case assignment procedure through which a judge is assigned on a given case is closely related to the realization of judicial fairness and trial independence. In order to preserve the judge's fair and independent adjudication and to enhance the operational efficiency of judicial power, as long as judges are objectively, fairly, and reasonably assigned pursuant to a predefined, abstract and generally applicable method, and when such a method is fair enough to preclude arbitrary assignments and other inappropriate interferences, the court's case assignment procedure is not in contravention of the constitutional guarantee of people's right to institute legal proceedings. A judge carries a duty to conduct the assigned case in a fair, legitimate, and speedy manner. Given that different courts have difference in organizational scale, case loads, and the number of judges, provided that the case assignment procedure relates a judge's duty of independent adjudication and fair burden of workloads, without contravening to the statutes as well as regulations and administrative rules promulgated by the Judicial Yuan (see Articles 78 and 79 of the Court Organic Act), the courts may, to the reasonable and necessary extent, naturally promulgate supplemental rules on matters concerning case assignment taking into account their respective practical needs to prevent arbitrary, capricious or other inappropriate interferences and to enhance the operational efficiency of judicial power.

Among major rule of law countries around the world, the constitutional law of the Federal Republic of Germany is noteworthy. Article 101, Paragraph 1 of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) expressly provides that, "Extraordinary courts (Ausnahmegerichte) shall not be allowed, and no one may be removed from the jurisdiction of his lawful judge." Academically, this is the so called principle of a lawful designation of judges (gesetzlicher Richter) under the constitutional law. It entails the constitutional mandates that cases shall be assigned by pre-defined abstract and general guidelines,

and are not subject to the arbitrary control of any particular judge so as to interfere the adjudication. However, this principle does not preclude the assignment of cases by regulations or rules promulgated by a legally organized judicial panel (Präsidium, including the Chief Judge of the court and judges' representatives). (See Article 21-5, Paragraph 1 of the German Organic Law of Courts.) While other rule of law countries, such as the United Kingdom, the United States of America, France, the Nederland and Denmark, whether with a written or unwritten constitution, contain no provision pertinent to the principle of lawful designation of judges. Nevertheless, without a doubt the principle that case assignment of the courts shall not be subject to arbitrary manipulation shall be the constitution principle adhered to by a rule of law country. As stated above, based upon the constitutional guarantees of people's right to institute legal proceedings and the constitutional mandate of judges' lawful, independent adjudications, our Constitution also embraces the same meaning and purpose.

Once a case is assigned to a certain judge, it is unavoidable in courts' trial practices that the case may be reassigned to or be integrated with another case and transferred to a different judge due to relocation, promotion, resignation, retirement, or other causes of the originally designated judge. Article 7 of the Code of Criminal Procedure stipulates that, "Cases are deemed to be correlated if one of the following circumstances exists: (i) one person commits several offenses; (ii) several persons jointly commit one or several offenses; (iii) several persons separately commit offenses at the same time and at the same place; or (iv) the commission of concealment of offenders, destruction of evidence, perjury, or receipt of stolen property related to the primary offense." Article 6 of the Code of Criminal Procedure stipulates that, "In the event that several cases are correlated and are subject to the jurisdiction of several courts at the same level, they may be integrated and subject to the jurisdiction of one court. (Paragraph 1) Under the circumstance in the preceding paragraph, if several cases are already pending in several courts, by consent and ruling of each respective courts, each case may be transferred to one of the courts to be integrated and tried together. If there should be disagreements, it shall be decided by the ruling of the court of common appellate level. (Paragraph 2) For correlated cases subject to the jurisdictions of several courts at different levels, they may be integrated and subject to the jurisdiction of the highest one among those courts. For cases already pending at lower courts, the court at the higher level may, with the issuance of a ruling, orders the integration and has it transferred to that court for review, provided, however, that this provision does not apply to the cases specified in Article 7, Item 3. (Paragraph 3)" The underpinning rationale of Article 6 of the Code of Criminal Procedure which allows an integration of correlated cases from different jurisdictions into one is to avoid the waste of repetitive investigations and discoveries of evidence as well as the diversity and conflicts of court opinions so as to meet the demand of litigation economy and consistency of judgments. Since the integrated litigation still applies the statutes and rules, and since the defendant may also file a motion for a judge's recusal on certain statutory grounds, such integration does not infringe the defendants' right to institute legal proceedings. Although the relevant statutes and regulations are silent with respect to whether and how to integrate correlated criminal cases pending before

different judges of the same court may be integrated, since these questions fall under the power of allocating internal affairs of the courts, and is deemed to be the disposition of correlated cases stipulated in Article 6 of the Code of Criminal Procedure thus necessary for integrated review, by applying the above stated regulations, *mutatis mutandis*, with pre-defined general and abstract rules. The integration and reassignment of correlated cases from several judges to one among them does not contravene the meaning and purpose of the Constitution.

Article 79, Paragraph 1, of the Court Organic Act stipulates that, “Prior to the end of each fiscal year, Chief Judges, Division Chief Judges, and judges of courts and branch courts at each respective level shall respectively convene conferences to pre-assign the allocation of judicial affairs and acting sequence for the next fiscal year in accordance with this Act, the Regulation for Departmental Affairs, and other laws and regulations.” The Regulation for Departmental Affairs of the Courts at each level and their branches is promulgated by the Judicial Yuan under the statutory authorization of Article 78 of the Court Organic Act. The Case Assignment Directions of Criminal Divisions of the Taiwan Taipei District Court (hereinafter referred to as the DIRECTIONS AT ISSUE) were promulgated by the resolution of the meeting of divisional affairs of the court’s criminal divisions pursuant to the Court Organic Act and under the authorization of the meeting of judges of Taiwan Taipei District Court. The DIRECTIONS AT ISSUE are generally applicable, abstract and supplementary regulation to regulate in advance the affairs of assignments, integrations, deductions, reassignments and suspensions of assignments of criminal cases before the court. Article 10 of the DIRECTIONS AT ISSUE stipulates that, “For correlated cases under Article 7 of the Code of Criminal Procedure necessary for integrated review but have already been assigned to several judges, the respective judges shall consult to one another and jointly submit an integration request for the approval of the Chief Judge of the court. When there is a difficulty to reach an agreement of integration, the presiding judge of the case brought most latterly may submit a signed, written request to the Reviewing Unit of the court for resolution.” Although the term “necessary for integrated review” is an uncertain legal concept in nature, its meanings is not difficult to understand. Whether or not there is a need of integration shall be determined by showing that there is a need to void the waste of labors and costs in repeated investigations of facts and evidence, and to avoid the difference and conflicts among judgments of the court. Those presiding judges may voluntarily negotiate with one another and decide on whether there is a need of integration and enter into an agreement of integration. The Chief Judge of the court, who is also a judge (See Article 13 of the Court Organic Act.), may review the request of the agreement of integration and may decide on whether those criminal cases are related, whether there is a need of integration, and whether the agreement of integration should be approved. If the Chief Judge approves the agreement of integration, those criminal cases will then be integrated in accordance with the agreement; if the Chief Judge disapproves the agreement of integration, those criminal cases will remain in the hands of those assigned judges. Therefore, this design of case assignment and case integration will not influence the fairness of trials and the judgment of a judge in a given criminal case and will not give rise to the possibility of arbitrary manipulation of the presiding

judge of any given criminal case or the possibility of the use of any inappropriate way to unjustly interfere with process of case assignments. Besides, Article 43 of the DIRECTIONS AT ISSUE stipulates that, “The Reviewing Unit under the Directions shall consist of all Division Chief Judges of all criminal divisions and shall be presided by the Division Chief Judge of the First Criminal Division. (Paragraph 1) When any Division Chief Judge (including her delegate) of any criminal division fails to attend the meeting of the Reviewing Unit, she shall appoint a judge of the same criminal division to attend. However, if the judge appointed has a conflict of interests, she shall recuse herself. (Paragraph 2) The resolution of the Reviewing Unit shall be made by the majority vote with the quorum of majority members. When there is a deadlock, the chairman of the meeting may cast her vote to break the deadlock. (Paragraph 3)” The Reviewing Unit is formed under the authorization of all judges of all criminal divisions and consists of Division Chief Judges, who are also judges (See Article 15 of the Court Organic Act.), and exercise the power on behalf of all judges of all criminal divisions. When those presiding judges of related criminal cases fail to reach an agreement of integration, only the presiding judge of the case brought most latterly has the authority to file pro se a signed, written request to the Reviewing Unit for resolution. The Reviewing Unit has no power whatsoever on its own to order case integration and to assign the case integrated to any given judge; the resolution of the Reviewing Unit is made by a majority vote. Both of these procedural limitations will be able to prevent from arbitrary alternation of the presiding judge in any given criminal case. Thus, taken the latter paragraph of Article 10 and Article 43 of the DIRECTIONS AT ISSUE together, it will be difficult to conclude that the procedure of case assignment and case integration runs afoul of the requirement of legal certainty, and hence the procedure is not in contravention of the constitutional mandates for fair trials and judicial independence.

In sum, Articles 10 and 43 of the DIRECTIONS AT ISSUE were promulgated under the statutory authorization of Articles 78 and 79, Paragraph 1 of the Court Organic Act and under the authorization of the meeting of judges of the Taiwan Taipei District Court. The DIRECTIONS AT ISSUE are reasonable and necessary supplementary regulations to lay out a procedure promulgated by the meeting of divisional affairs of all criminal divisions of the court to stipulate in advance a generally applicable, abstract rule on whether or not there is a need of integration and how to and whether to integrate related criminal cases. Accordingly, the DIRECTIONS AT ISSUE are not in contravention of the constitutional guarantee of people’s right to institute legal proceedings under Article 16 of the Constitution and of the constitutional mandate that judges shall, in accordance with law, hold trials independently and shall be free from any interference under Article 80 of the Constitution.

II. The Stipulations under Article 101, Paragraph 1, Subparagraphs 1-3 of the Code of Criminal Procedure

The first half of Article 8, Paragraph 1 of the Constitution states that, “Personal freedom shall be guaranteed to the people.” As a means of evidence preservation in the criminal proceeding, the detention of defendants is exercised to ensure the smooth process of the criminal trials so that the state’s panel authority can be realized. However, the nature of a detention is to limit the personal physical freedom of a defendant in a criminal case to a designated place and is a mandatory action which interferes the personal freedom of a criminal defendant to the largest extent and isolates her from her family, the society and her professional life. The detention of a criminal defendant not only will create a serious psychological impact upon her, but will largely affect her rights of personality such as reputation, credit, and so forth as well. Accordingly, the detention of a criminal defendant shall be as the last resort and shall not be taken lightly. (See J.Y. Interpretations No. 392, 653 and 654.) Thus, as one of the statutory elements of the detention of a criminal defendant, it is required by law that the detention of a criminal defendant shall be ordered only when the detention is consistent with the major public interest of maintaining the effective exercise of the state’s power of criminal justice and is consistent with the principle of proportionality.

Article 101, Paragraph 1, of the Code of Criminal Procedure prescribes that, “A defendant may be detained after she has been examined by a judge and the judge deem her as a major suspect of a criminal offense, and due to the existence of one of the following circumstances it is apparent that there will be difficulties in the prosecution, the trial process, or the execution of the final judgment unless the detention of the defendant is ordered: (i) She has absconded, or there are facts sufficient to justify an apprehension that she may abscond; (ii) There are facts sufficient to justify an apprehension that she may destroy, forge, or alter evidence, or conspire with accomplices or witnesses; or (iii) She has committed an offense punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than five years.” This provision shows that the purpose of detaining a criminal defendant shall be limited to the preservation of the criminal prosecution, the trial process and the execution of the final judgment. Therefore, even if the defendant may commit the felonies as indicted under Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure, when there is no evidence indicating that there is a risk of obvious difficulties with regard to the prosecution, the trial process, or the execution of the final judgment owing to the defendant’s escape or destruction of evidence, the necessary element of a statutory detention is not met. Namely, the order of a detention issued by the court solely because of the defendant’s commission of felonies will deviate from the nature of the statutory detention which is a part of the evidence preventive procedure and will run afoul of the principle of proportionality as it is against the principle of the equality of weapon and limits the full exercise of the right of defense of the defendant. Moreover, according to the principle of the presumption of innocence, it is prohibited not only to execute criminal punishments upon a defendant who is not proven guilty in a court of law, but also to impose similar criminal punishments upon a defendant solely on mere suspicion of crime commitment. If an order of a detention of a defendant issued solely based on the suspicion that she is a major suspect, the detention will constitute an execution of criminal punishments prior to a trial and will likely be

deemed in contravention of the principle of the presumption of innocence. Hence, if Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure prescribed the “the crime committed carries the capital punishment, life imprisonment, or a basic penalty of no less than five-year imprisonment” as the only element of a statutory detention regardless of whether the defendant is a major suspect, of whether she is likely to escape or to destroy evidence and therefore shall be detained in order to prevent from happening, or of whether she falls into the category of the statutory limitations of detentions, the statutory language would be in contravention of the principle of the presumption of innocence, the principle of the equality of weapon, and the principle of proportionality due to its undue restriction of the defendant’s right to fully exercise her right of defense.

But, a close look of the stipulations of the Code of Criminal Procedure will reveal otherwise. If we read Article 101, Paragraph 1, Subparagraph 3, and Article 101-2 of the Code of Criminal Procedure together, it is clear that the statutory detention consists of four elements which shall be met before a court can issue an order of a detention. Those four elements are: (i) the defendant is a major suspect; (ii) there is a statutory cause of detentions; (iii) there is a necessity of a detention (i.e., there is an apparent difficulty with respect to the prosecution, the trial process, or the execution of the final judgment without ordering a detention); and (iv) there is no statutory limitation of detentions which prohibit a court order of a detention under Article 101-2 of the Code of Criminal Procedure. Therefore, even if a defendant falls under the statutory cause of detentions specified by Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure, the judge shall take into account whether she is a major suspect, whether there is a necessity of a detention, and whether there is a statutory limitation of detentions which prohibit a court order of a detention. It is a misinterpretation of law to deem that a defendant may be detained so long as there is a cause of a statutory detention under Article 101, Paragraph 1, of the Code of Criminal Procedure.

Since a defendant is a major suspect of a felony which is punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than five years and since the applicable criminal punishment is severe, it is reasonable to expect that there will be an increasing likelihood of avoidance of the execution of the sentenced criminal punishments or of obstruction of the trial process as the likelihood of a trial process increases. Thus, the statutory cause of a detention under Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure was enacted with a view to ensure that the trial process will be uninterrupted and that the state’s power of imposing criminal punishments upon nationals will not be curtailed in order to preserve the significant social order and to further material public interests. The statutory purpose of Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure is legitimate. In addition, based on the constitutional guarantee of people’s personal freedom, in order to satisfy the statutory requirements, prior to ordering a detention the trial court shall has a reasonable ground to believe that the defendant is likely to escape, to destroy, forge, or alter

evidence, or to conspire with accomplices or witnesses, and at the same time the court shall has a reasonable ground to believe that the less harmful measures such as a bail, a consignment to custody, and the limitation on residence are not sufficient to preserve the prosecution, the trial process, or the execution of the final judgment. When the trial court has those two reasonable grounds, an order of the detention of a defendant in fact serves as the last and necessary resort to preserve the effective implementation of state's power of criminal justice. Accordingly, Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure does not exceed the constitutional mandate of the principle of proportionality under Article 23 of the Constitution, and is not in contravention of J.Y. Interpretation Nos. 392, 653 and 654 and the constitutional guarantees of people's personal freedom and of people's right to institute legal proceedings under Articles 8 and 16 of the Constitution respectively.

III. The Stipulation Which Empowers the Prosecutor to Appeal on the Trial Court's Ruling of Ceasing the Detention of a Defendant under Article 403, Paragraph 1 of the Code of Criminal Procedure

Article 16 of the Constitution guaranteeing people's right to institute legal proceedings is with a view to ensure people may bring forth legal actions under statutory procedural processes and to ensure people a fair trial. With respect to the courts' jurisdictions, litigation procedures, and related elements, all of these shall be determined by the legislative branch to enact laws to regulate them reasonably after taking into account different kinds and natures of litigation, the purpose of the litigation policy and the functions of the litigation system. (See J.Y. Interpretation Nos. 442, 512 and 574.) In accordance with the above cited J.Y. Interpretations, whether or not the prosecutor may appeal on the trial court's ruling of ceasing the detention of a defendant is an issue falling under the domain of the criminal litigation system to be regulated reasonably by the legislative branch after taking account relevant factors.

The order of a detention is a compulsory power which statutorily reserved to the judges. Article 403, Paragraph 1 of the Code of Criminal procedure prescribes that, "Unless this Code provides otherwise, a party who disagrees with the ruling of a court may appeal to the court of its direct appellate level." Article 404 of the Code of Criminal procedure prescribes that, "Those rulings with respect to the jurisdictions or trial procedures issued by the courts prior to handing down judgments are not appealable, but a party may appeal on one of the following rulings: ' ' ' (ii) a ruling of a detention, a bail, a consignment to custody, the limitation on residence, a search, an attachment, a return of attached materials, having the defendant examined by a hospital or other institutes, or a prohibition or an attachment issued pursuant to Article 105, Paragraphs 3 and 4 of this Code." Article 3 of the Code of Criminal procedure prescribes that, "The term 'party' as used in this Code refers to a public prosecutor, a private party plaintiff (self claimant), or a defendant." In accordance with the foregoing statutory law, a prosecutor may certainly appeal the trial court's ruling of ceasing the detention of a defendant. When a prosecutor appeal the trial court's ruling of

ceasing the detention of a defendant, the defendant is not deprived either of the right to equally access to information during trials, or of the exercise of the right of defense; hence there is no contravention of the principle of the equality of weapon. Furthermore, the appellate court which hears the appeal shall, in accordance with law, hold trials independently, and shall be free from any interference; hence, there is no genuine issue of infringing the principle of the separation of powers. Accordingly, Article 403, Paragraph 1 of the Code of Criminal procedure, for the relevant part which empowers a prosecutor to appeal the trial court's ruling of ceasing the detention of a defendant, is a reasonable stipulation enacted by the legislative branch after taking into account the nature of the criminal litigation system, and is not in contravention of the constitutional guarantee of people's right to a fair trial under Article 16 of the Constitution.

IV. The Denials of the Petition for Interpretation and for Granting a Temporary Order

The Petitioner's petition for interpretation for the part of Articles 5, 78, 79 and 81 of the Court Organic Act and Article 4, Paragraph 2 of the Regulation of Departmental Affairs of the District Court Its Regional Branches shall be denied because those laws are irrelevant to the final and conclusive ruling and are not relied by the court, and hence are not suitable for interpretation. Accordingly, pursuant to Article 5, Paragraph 1, Subparagraph 2, and Paragraph 3 of the Constitutional Interpretation Procedure Act, the petition is denied.

The Petitioner's petition for the part of staying the trial of the Criminal Case Gin-Tzu-Chung-Su-Tze No. 1 (2008) and of re-assigning the case pursuant to the result of the case assignment decided on December 12, 2008 is hereby denied as the disputed provisions concerning case assignment has been interpreted and is no longer necessary for review. With respect to the petition to issue for a mandamus (or writ of habeas corpus) to stay the district court's temporary disposition to detain to release the Petitioner, the Petitioner may at any time file a petition to the trial court for ceasing the detention with bail pursuant to Article 110, Paragraph 1 of the Code of Criminal Procedure; therefore, the Petitioner has no ground to claim that she is suffering an irreparable or difficultly reparable harm due to an infringement of her fundamental rights. Thus, for the reasons stated above, the petition, for relevant parts, is in contravention of our J.Y. Interpretation Nos. 585 and 599, and hence shall be denied.

Part III.

China Pretrial Release History and Practice

Chapter 10: “The Problem of Pretrial Detention”²

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THE PROBLEM OF PRE-TRIAL DETENTION

A. Existing Literature and Data

There is no right to bail in China. Many suspects have historically been detained in custody pending trial subject to ‘investigative detention’, a provision which appears to have been without limit. Today, conditions in detention centers may be appalling and there has been official recognition of the concerns which have arisen as a result.³ As has been periodically reported, extra-judicial detention is also deployed at politically sensitive and other times with some citizens held in ‘black jails’ (Anderlini, 2009; Hartley, 2007; and Jacobs, 2009). Thus, a defendant called Wu Liusuo in Henan, in a murder case, was reportedly arrested in 1984 and had not received a final judgment by August 1998, which meant that he had been subjected to 14 years’ detention (Chen Yongsheng, 2004). In addition, in practice, the investigation organ sometimes fails to inform the families of suspects of the decision to detain within 24 hours as required by Article 64(ii), 1996 CPL (Wang Xin’an, 2004). In this section we look at the issue of pre-trial detention and try to deal both with detention beyond the legal time limits and detention which may be for proper or improper purposes within the allowable time limits.

A range of estimates of the incidence of extended detention beyond the legal time limits has been reported at both national and local level. *Xinhuanet* reported that according to statistics maintained by ‘authoritative departments’ there were 50,000 to 80,000 suspects subjected to extended detention each year from 1993 to 1999.⁴ The *Legal Daily* reported that as of 15 August 2003, 7415 persons were being subjected to extended detention in the public security organs in China: of these, 6982 had been detained for less than one year after the expiration of the statutory time limit for detention, 369 persons had been detained for one to three years beyond the statutory time limit, and 64 persons had been detained for over three years following the expiration of the statutory time limit (Zhai Huaimin, 2003). According to a survey of 720 dossiers (951 suspects) provided by the public security bureau of eight districts and counties in a city used for annual evaluation and selected intentionally to highlight positive aspects, 41.5 percent of suspects suffered from

² Excerpt taken from, *Criminal Justice in China – An Empirical Study*, by Mike McConville, Satnam Choongh, Pinky Choy Dick Wan, Eric Chui Wing Hong, Ian Dobinson and Carol Jones (2011) Edward Elgar publishing (<http://www.e-elgar.com/>).

³ A run of unexplained deaths in centres managed by the Ministry of Public Security in 2009 led the Supreme People’s Procuratorate to launch an initiative designed to secure appropriate management of centres. See, ‘Top Prosecuting Body Starts Jail Safety Drive After Inmate Deaths’, *South China Morning Post*, 21 April 2009.

⁴ ‘Sunshine Detention: Public Security Organs, Procuratorates and the Courts are Taking Actions’, *Xinhuanet*, available at <http://www.humanrights-china.org/china/rqgz/rd20031114.asp>.

extended detention (Zhang Chao, 2010). Of the extended detention cases, the longest was three years and 155 days involving some 400 extensions to effect detention beyond the required period.

The statistics should be viewed with caution. Thus, the police can side-step the time limits by 'creative' use of the rules. A commentary in the *People's Procuratorial Semi-Monthly* reported that in some cases suspects were granted residential surveillance after the expiration of the period of criminal detention, but re-arrested a few days later and placed under detention once more. Alternatively, the police have been known to release suspects 'unconditionally' after expiry of the detention time limit, only to re-arrest them immediately after their release (Wang, Han and Bi, 1999). And individuals may be held in 'black jails', facilities which are not officially acknowledged to exist.

Extended periods of both pre- and post-arrest detention have attracted criticism in China from both official and non-official sources (Sun, 200; Che and Song, 2000). At a conference in 2000 examining the implementation of the CPL, the Chairman of the standing Committee of the National People's Congress (NPC) recognized the problem,⁵ and similarly the Chairman of the Committee for Internal and Judicial Affairs of the NPC was quoted as saying that: 'A number of cases in which the persons concerned have been detained for years remain unresolved. Moreover, after old cases of extended detention are straightened out, new ones have emerged, and cases of extended detention in disguised form have also increased.'⁶ Despite this, the practice continues. The main themes and concerns which emerge from the literature can be summarized as follows:

- (i) The police routinely use the exceptional power granted under Article 69 to detain for up to 30 days (Lu Weiju, 2004). Scholars and lawyers in Shanghai and Beijing interviewed by *Human Rights in China* revealed that the power to detain a suspect for the maximum of 37 days was invoked by the public security organs in all detention cases,⁷ a view that many scholars in China have voiced in academic journals;⁸
- (ii) A commentary in the *People's Procuratorate* reported that some judicial organs apply the special 30 day detention period to all migrants, even to those who have worked and lived in the local jurisdiction for a long time and also to suspects who have committed more than one crime without regard to whether they satisfy the test of being a 'major suspect' (the requirement under Article 69, 1996 CPL) (Wang, Han and Bi, 1999);
- (iii) A commentary in the *Guangming Ribao* and *Legal Daily* attributed the problem to the mentality of police officers who fail to appreciate such concepts as rule of law and fairness towards suspects (Guo Qing, 2001; Zhu Guobin, 2004; Cui Shixin, 2000);
- (iv) Some cases of extended detention occur not because the police need more time to investigate, but because the initial apprehension of the suspect was unjustified and

⁵ 'Top legislator on implementation of the Criminal Procedure Law', *Xinhua News*, 20 November 2000.

⁶ 'China's assembly hears of torture, irregular judicial procedures', *BBC Monitoring Asia Pacific*, 29 December 2000. See also Sun Changyong (2009) pp. 28-29.

⁷ Chen Weidong (2001).

⁸ See for example Chen Ruihua (2001); Cui Min (1998).

- prolonged detention is used simply to keep an aggrieved individual in check (Guo Qing, 2001);
- (v) Some police officers, rather than filing one application for arrest for all counts of crimes involved in a case, apply for arrest for each count separately thereby ‘justifying’ a recalculation of the permissible detention period. Others falsely claim that the further counts have been discovered during the course of investigation, thereby ‘entitling’ them to recalculate the detention period from the alleged date of discovery of the further offences (Zhang Lizhao, 1999). Others readily resort to the excuse that the case is complex, or involves travel over large areas (Jiang Xianyong, 2004);⁹
 - (vi) Requests by the procuratorate for supplementary evidence caused by police investigative failings or incompetence inevitably lengthens the period of time for which the suspect is held in detention and may, indeed, be used for this purpose (Xiong Jiangning, 2001);
 - (vii) One major problem arises out of the internal police performance indicators which are closely connected with the welfare, promotion and even continued employment of the police officers involved. These include such matters as the detection rate and percentage of the victim must be detected within a certain period. Against such a background, there is strong incentive to detect cases by using detention to obtain confessions;¹⁰
 - (viii) Once extended detention is utilized, the system does not possess an efficient method for challenging or rectifying the decision (Chen Ruihua, 2001).

On 12 November 2003, the Supreme People’s Court, Supreme People’s Procuratorate and the Ministry of Public Security jointly issued the *Notice Concerning the Strict Enforcement of Criminal Procedure Law and Serious Rectification and Prevention of Extended Detention* (‘Notice’). The *Notice* pointed out that extended detention had not been effectively eliminated in many areas and set out five tasks for the personnel of the courts, procuratorates, public security organs, military courts and procuratorates of the People’s Liberation Army, and the Defence Department of the General Political Bureau to improve the situation regarding extended detention:

- 1) To pay equal attention to both substantive law and procedural law and respect the legal rights of suspects/defendants;
- 2) To strictly observe the time limits for detention as set out in the CPL, and prohibit the abuse of measures such as supplementary investigation, withdrawal of prosecution and change in jurisdiction over the case to extend the duration of detention of suspects/defendants;
- 3) To use bail or residential surveillance if the relevant conditions are satisfied;
- 4) To ensure that the judicial organs check and balance each other;
- 5) To punish those involved in imposing extended detention on suspects/defendants.

⁹ See also, Tan Hua (2010); Ai Jianguo and Junying Yan (2006); Liu Lina, Ying Wang and Jing An (2010); Sun Changyong (2009); and Yang Cheng (2007).

¹⁰ Zhang Ying and Shang Xidon (2009), p. 141.

There is no reliable information on the impact of this *Notice* on the ground although some studies claim that efforts have been made to clear backlogs (e.g., Zhong Shikai, 2004; and Ding Xingyu and Xiangqiang Lu, 2004).

B. Our Qualitative Research Data

Our survey of judges, prosecutors, and defence lawyers revealed that extended detention remains an issue and, subject to the important caveat that qualitative interview material might generate some self-serving responses and material that relates more to how respondents would like their world to be than to how is actually is, for some it remains a ‘problem’. A judge from site D (D-K-03) mentioned extended detention as an ongoing problem, and some prosecutors we interviewed (e.g. in Site K, prosecutors K-W-01 and K-Z-02; and in Site D, prosecutor D-K-01) stated that they would check, during the stage of examination for prosecution, whether there had been extended detention. One prosecutor from Site F (F-N-04) suggested that in some cases he might decide not to prosecute if a defendant had already been subjected to a period of extended detention though no concrete example was offered of any occasion on which this had in fact been done.

In our research study, a lawyer from Site E (E-L-04) said that he always asked his clients whether they had been subjected to extended detention and, if they had, he would file a petition or complaint on their behalf. Another defence lawyer (Site E, Defence lawyer in E-L-05) was less optimistic in terms of what he could do for those subjected to extended detention. He said he would visit such suspects more often, check on their health and keep their families informed, but that none of this helped to bring the case to trial earlier. A lawyer from Site F (F-N-04) stated that he had secured a judgment from the court that his client had been wrongfully detained for 56 days in one province. Although the lawyer added that the procuratorate made it difficult for his client to actually enforce the judgment, it suggests that at least some lawyers are pushing the authorities to comply with the rules on detention.

There is some evidence of top-down pressure to eradicate cases of extended detention. A prosecutor from Site H (H-S3-003) disclosed that the number of extended detentions was used as an index to assess their work performance. In fact, during the currency of the research one of the leaders of the Supreme People’s Court visited one of our research sites to investigate and ‘resolve’ cases of extended detention in the province and there was considerable concern with the procuratorate that an adverse report would be filed following the visit, local officials conceding privately to us that some cases had been subject to unacceptably prolonged delays spanning years.

Among respondents in the research sites, there were difference of opinion as to whether the authorities had been able to rein in excessive use of extended detention. A lawyer from Site D (D-K-01) (who blamed both the police (PSB) and the procuratorate for extended detention) said that although the problem had been serious in the past it had improved considerably in recent years:

Site D-KM-01: Extended detention is a problem. This was a big problem several years ago but it is better now.

However, another lawyer in Site E (E-L-03) suggested that the situation had not improved:

E-L-03: . . . in practice extended detention at each stage is serious, most of which exceeds two months. They can change the time of detention in the legal document. This is why the Supreme People's Court, Supreme People's Procuratorate and the Ministry of Public Security jointly issued a document to demand that courts, procuratorates and the public security organs eliminate cases of extended detention.

As to the causes of extended detention, some of our respondents identified reasons similar to those highlighted in the literature reviewed above. So, for example, a prosecutor from Site C (C-B3-04) pointed to shortcomings in the initial policy investigation which can sometimes lead to the procuratorate ordering one or possibly two supplementary investigations, a process which extends detention. Another in Site A (A-B1-02) pointed to communication problems between the various state organs, giving as an example the decision by a court to adjourn the trial: unless the court informs the prosecution at an early stage, the likelihood is that the procuratorate or police will simply hold the defendant in custody until the new trial date.

C. Time Lapse Between Initial Detention and Application for Approval of Arrest: Our Qualitative Data

As explained above, the 1996 CPL allows suspects to be held for extensive periods of time during the investigative stage of the criminal process. Although pre-arrest detention is limited to three days in ordinary cases, it can extend to seven days in 'special circumstances' and 30 days if the case involves a 'major suspect' who is suspected of having committed offences in several locations, repeatedly or in a gang.

In our sample, we found only a tiny percentage of cases (2 per cent) in which the police made an application for approval of arrest, within the three days laid down in Article 69, 1996 CPL for ordinary cases. The percentage of cases in which the police made their application for approval of arrest within the seven days allowed in 'special circumstances' (Article 69) was similarly small (3 per cent). Compliance with these time limits was slightly lower for the Basic Court sample (1.3 per cent and 2.3 per cent respectively) than it was for the intermediate Court sample (3.1 per cent and 4.1 per cent respectively).¹¹ However, we cannot read too much into this counter-intuitive finding given that the police managed to make a decision on prosecution within three and seven

¹¹ Zhang Chao (2010) found that in 14.5 per cent of the cases following detention, the procuratorate did not make a decision within seven days as allowed by law after receiving the investigation organ's request for arrest or there was no clear record in the dossier.

days in only 50 of the 1000 cases in which the relevant data were available. In the vast majority of both Basic Court cases and Intermediate Court cases (74 per cent and 63 per cent respectively) the police took between eight and 30 days to apply for authorization of arrest.¹² In approximately one-fifth of Basic Court (20.2 per cent) and Intermediate Court cases (19.4 per cent) the police took up to 12 months to make an application for authorization of arrest. In one Basic Court case and in four Intermediate Court cases no application was made for up to two years, and in a further four Intermediate Court cases no application had been made even after two years had elapsed from the date of first detention.¹³ These data are set out in more detail in Tables 3.1-3.3.

We will deal with bail/residential surveillance later but note here that few get either with the consequence that most suspects are held in custody.

Table 3.1 Period between date of first detention and application for approval of arrest: Basic Court

	Site A		Site B		Site C		Site D		Site F		Site G		Site M	
Within 3 days	2	1.6	2	1.5	0	0.0	1	1.6	0	0.0	4	6.3	0	0.0
3-7 days	0	0.0	9	6.9	3	2.4	3	4.8	0	0.0	0	0.0	7	15.6
8-30 days	35	28.5	111	85.4	117	92.1	56	88.9	54	88.5	46	71.9	35	77.8
31 days to less than 1 year	86	69.9	8	6.2	7	5.5	3	4.8	7	11.5	11	17.2	2	4.4
1-2 years	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	2.2
Over 2 years	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Not known	34	-	11	-	26	-	7	-	4	-	6	-	25	-

¹² Under Article 69, 1996 CPL the time limit for submitting a request for examination and approval may be extended to 30 days in cases involving ‘a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang . . .’

¹³ See also Wang Xin’an (2004) who found that of the 128 defendants surveyed, 21 per cent had a custody period after criminal detention of less than 14 days, while the majority (62 per cent) were detained between 15 and 37 days, and 17 per cent had been detained for 38 days or more.

Total	157 100.0	141 100.0	153 100.0	70 100.0	65 100.0	70 100.0	70 100.0
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Table 3.2 Period between date of first detention and application for approval of arrest: Intermediate Court

	Site E		Site H		Site I		Site J		Site K		Site L	
Within 3 days	1	1.7	0	0.0	0	0.0	0	0.0	0	0.0	1	1.0
3-7 days	25	42.4	6	16.2	5	7.4	1	1.7	4	5.8	16	16.3
8-30 days	29	49.2	27	73.0	46	67.6	27	45.0	61	88.4	58	59.2
31 days to less than 1 year	2	3.4	4	10.8	15	22.1	32	53.3	3	4.3	20	20.4
1-2 years	1	1.7	0	0.0	1	1.5	0	0.0	0	0.0	2	2.0
Over 2 years	1	1.7	0	0.0	1	1.5	0	0.0	1	1.4	1	1.0
Not known	6	-	16	-	2	-	0	-	1	-	2	--
Total	65	100.0	53	100.0	70	100.0	60	100.0	70	100.0	100	100.0

Table 3.3 Period between day of first detention and application for approval of arrest: all cases

	BC 7 Sites		IC 6 Sites		Total 13 Sites	
Within 3 days	9	1.5	2	0.5	11	1.1
3-7 days	25	4.1	57	14.6	82	8.2
8-30 days	454	74.1	248	63.4	702	69.9

31 days to less than 1 year	124 20.2	76 19.4	200 19.9
1-2 years	1 0.2	4 1.0	5 0.5
Over 2 years	0 0.0	4 1.0	4 0.4
Not known	113 -	27 -	140 -
Total	726 100.1	418 99.9	1144 100.0

D. Time Lapse Between Date of Arrest and Transfer for Prosecution: Our Quantitative Data

Our researchers gathered data on the time that elapsed between the arrest of a suspect and the date at which the case was transferred by the police to the procuratorate. These data demonstrate that in a minority of cases (15.8 per cent) the police make a decision within the two month custody time limit prescribed for ‘ordinary cases’. The percentage of cases in which the decision was taken within two months was higher in the Basic Court sample (19.1 per cent) than in the Intermediate Court sample (10.1 per cent), which may be explained by the greater complexity and seriousness of cases in the Intermediate Courts. One-third of cases took between two and three months to be transferred to the procuratorate; almost 40 per cent of cases took between three and five months, and 8.3 per cent took five to seven months (the percentage of such cases in the Intermediate Court sample being much higher at 13.1 per cent than in the Basic Court sample at 5.6 per cent). In the Intermediate Court sample, four suspects had to wait between one and two years following their arrest before their case was transferred to the procuratorate and two suspects had to wait for over two years. The data are set out in more detail in Tables 3.4-3.6.

E. Time Lapse After Transfer for Prosecution: Quantitative Data

Once a case is transferred to the procuratorate further delays may occur in the processing of the case and hence in the delay for the suspect. We looked at whether requests by the procuratorate for supplementary investigation are a regular occurrence, and thus another possible cause of extended detention. The data are set out in Table 3.7.

The data demonstrate that supplementary investigation is requested in one-third of all cases in which the file records the relevant information. Supplementary investigation was requested in a higher proportion of Intermediate Court cases (43 per cent) than Basic Court cases (29 per cent). The high proportion of cases in which the procuratorate find it necessary to request supplementary

investigation supports the view that there is a need to enhance police investigatory and evidence-gathering skills (see also, Zuo, Ma and Hu, 2007).¹⁴

Table 3.4 Period between date of arrest and transfer of case to procuratorate: Basic Court

	Site A		Site B		Site C		Site D		Site F		Site G		Site M	
Less than 2 months	24	16.9	18	14.0	23	18.5	4	6.3	20	32.8	8	13.1	26	40
2 to less than 3 months	63	44.4	57	44.2	19	15.3	18	28.6	11	18.0	27	44.3	18	27.7
3 to less than 5 months	45	31.7	46	35.7	74	59.7	38	60.3	23	37.7	18	29.5	20	30.8
5 to less than 7 months	5	3.5	8	6.2	6	4.8	1	1.6	7	11.5	8	13.1	1	1.5
7 months to less than 1 year	5	3.5	0	0.0	2	1.6	2	3.2	0	0.0	0	0.0	0	0.0
1 year to less than 2 years	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Over 2 years	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Not known	15	-	12	-	29	-	7	-	4	-	9	-	5	-
Total	157	100.0	141	100.0	153	100.0	70	100.0	65	100.0	70	100.0	70	100.0

Table 3. 5 Period between date of arrest and transfer of case to procuratorate: Intermediate Court

	Site E	Site H	Site I	Site J	Site K	Site L
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¹⁴ The investigation and prosecution departments may also borrow time limits from each other. The investigator commonly pays little attention to returned cases and some take no further action. See, Xi Meijun (2009), p. 28; Ji Gang and Jing Liu (2006), p. 91; Hu Zhifang and Zhihui Hu (2009), p. 70; Sun Xiaoyu (2009), pp. 28-29; Cheng Fei and Cheng Ming (2006), p. 6; Ma Jingrui, Xuemei Jin and Heng Liu (2005), p. 80; and Ru Yaguo (2007), p. 65.

Less than 2 months	1	1.7	0	0.0	5	7.4	0	0.0	5	7.7	27	31.0
2 to less than 3 months	26	43.3	6	16.2	0	0.0	1	1.7	54	83.1	46	52.9
3 to less than 5 months	29	48.3	27	73.0	41	60.3	27	46.6	4	6.2	13	14.9
5 to less than 7 months	2	3.3	4	10.8	16	23.5	25	43.1	1	1.5	1	1.1
7 months to less than 1 year	0	0.0	0	0.0	4	5.9	4	6.9	0	0.0	0	0.0
1 year to less than 2 years	1	1.7	0	0.0	1	1.5	1	1.7	1	1.5	0	0.0
Over 2 years	1	1.7	0	0.0	1	1.5	0	0.0	0	0.0	0	0.0
Not known	5	-	16	-	2	-	2	-	5	-	13	--
Total	65		53	100.0	70	100.0	60	100.0	70	100.0	100	100.0
	100.0											

Table 3.6 Period between date of arrest and transfer of case to procuratorate: all courts

	BC 7 Sites	IC 6 Sites	Total 13 Sites
Less than 2 months	123 19.1	38 10.1	161 15.8
2 to less than 3 months	213 33.0	133 35.5	346 33.9
3 to less than 5 months	264 40.9	141 37.6	405 39.7
5 to less than 7 months	36 5.6	49 13.1	85 8.3
7 months to less than 1 year	9 1.4	8 2.1	17 1.7
1 year to less than 2 years	0 0.0	4 1.1	4 0.4
Over 2 years	0 0.0	2 0.5	2 0.2
Not known	81 -	43 -	124 -

Total	726 100.0	418 100.0	1144 100.0
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Table 3.7 Prosecutor requested supplementary investigation

	BC7 地	IC6 地	共计 13 地
Yes	169 28.6	148 43.4	317 34.0
No	422 71.4	193 56.6	615 66.0
Not Known	135 --	77 --	212 --
Total	726 100.0	418 100.0	1144 100.0

Article 140, 1996 CPL requires that supplementary investigation be completed within one month, and states that ‘supplementary investigation may be conducted twice at most’, a limitation introduced by the 1996 CPL to stop the practice of suspects being held indefinitely under the guise of supplementary investigation. Our data show that in a quarter of those cases in which supplementary investigation is requested it is requested twice. As Table 3.8 shows, the proportion of cases in which it is requested twice was higher in respect of the Basic Court sample (29 per cent) than the Intermediate Court sample (20 per cent).

It is clear from the above that the combination of the various stages of detention from initial apprehension to the application for approval of arrest, from arrest to transfer for prosecution, and from delays after transfer, all contribute to prolong the total period of detention. Setting aside wholly unlawful detentions the number of which cannot be determined, in the absence of a right to bail and with a porous set of legal provisions which confer considerable discretion on state actors, extended detention is a common feature of Chinese criminal justice in both serious and non-serious cases.

Table 3.8 No. of supplementary investigations conducted per prosecutor's request

	BC 7 Sites	IC 6 Sites	Total 13 Sites
One	83 70.9	57 80.3	140 74.5
Two	34 29.1	14 19.7	48 25.5
Not Known	52 --	77 --	129 --

Total	169	100.0	148	100.0	317	100.0
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Table 3.9 The outcome of the police's request for the authorization of arrest

	BC 7 Sites		IC 6 Sites		Total 13 Sites	
Approved	474	99.6	381	99.0	855	99.3
Disapproved	2	0.4	4	1.0	6	0.7
Not Known	250	--	33	--	283	--
Total	726	100.0	418	100.0	1144	100.0

Chapter 11: Unresolved Questions Regarding Pretrial Detention and Reforming the Role of Detention Center-Based Prosecutors:¹

Establishing a System to Review the Necessity of Pretrial Detention

DAN Wei²

Abstract: *Under China's Criminal Procedure Law ("CPL"), pretrial custody is not a compulsory measure in and of itself, but rather it is a circumstance that goes along with two other categories of compulsory measures that are explicitly provided for in the CPL, namely, juliu (criminal detention)³ and daibu.⁴ Although they are commonly translated as "arrest," juliu and daibu are not similar to arrest, which is a short-term compulsory measure used to bring an individual into custody. Juliu and daibu are compulsory measures pursuant to which individuals may be held for long periods of time. The systems of daibu and pretrial detention are closely and directly linked to the freedom of a person within the criminal justice system. The slightest mistake will result in an infringement of a citizen's right to liberty, and deviate from the objectives of criminal justice: to punish crimes while protecting human rights. Although the 1997 CPL gave human rights protection the highest priority, "daibu for good" remains the norm in Chinese criminal procedure. It is typical for a suspect to be held in detention for the duration of the case. This can be attributed to: 1) the failure to strictly adhere to the three statutory requirements for the approval of daibu, 2) the absence of any post-daibu mechanism to review the necessity of detention, and 3) the low likelihood of success of any detainee or defendant's application to alter the compulsory measures taken against him. The continued practice of detaining those who need not be detained shows that there has been a lack of effective protection of the legal rights of suspects and defendants. This not only imposes ex ante punishment on people who should be presumed innocent, but also undermines the legality and legitimacy of detention. As the agency specifically established to protect detainee's rights, the prosecutor's detention center supervision division should address this issue and perform its duty of supervision. The author proposes creating an innovative mechanism within the existing legal framework for prosecutors working in detention centers to effectively protect detainees' lawful rights. The proposal is based upon the results of a pilot program in which twenty Chinese prosecutor's offices experimented with "A Working Mechanism for Detention Center-Based Prosecutors to Propose that Case-Handling Prosecutors Make Changes in Compulsory Measures Based on Actual Detainee Circumstances" (建立由驻所检察官根据在押人员的实际情况向办案单位提出变更强制措施检察建议的工作机制).*

¹ This is a translation of the article [论未决羁押与监所检察改革----兼论羁押必要性审查机制的建立] and is published for the first time in this book.

² Researcher, Institute of Procuratorial Theory, the Supreme People's Procuratorate of the People's Republic of China.

³ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁴ *Id.*

The CPL defines five types of compulsory measures. Of these, *juliu* and *daibu* are the two that are most severe in that they deprive suspects and defendants of their liberty. The investigating agency unilaterally decides upon and enforces *juliu*. *Juliu* can last up to 30 days, but in practice, when one adds the 7-day limit a prosecutor has to review a request for *daibu*, *juliu* can last up to 37 days. This differs from investigating authorities in other countries who may, in exigent circumstances, execute an arrest warrant or execute an arrest without a warrant. In those cases, they can only hold a suspect in custody for twenty-four or forty-eight hours.⁵ In China, to subject a person to *daibu*, the investigating agency must submit a request for approval to the prosecutor. Once the prosecutor approves *daibu*, the suspect's custody continues, and there is no further review or reexamination. Once the decision to *juliu* is made, custody can last for up to thirty-seven days; once *daibu* is approved, custody can continue from the beginning of the investigation stage until the entry into effect of the first-instance judgment, or until the end of second-instance trial proceedings. Thus, "*daibu*," despite its typical translation, does not refer to a compulsory measure to capture a suspect, but rather to one by which an individual may be held in long-term detention. The Chinese measure of "arrest" is therefore roughly equivalent to the system of arrest, with or without a warrant, in combination with the separate and distinct process of determining whether the suspect should be detained while awaiting trial in Western countries.⁶

I.

As most suspects are already in custody before *daibu*, *daibu* cannot be seen as the act of capturing someone.⁷ Rather, in China, *daibu*, which is usually translated as "arrest," primarily refers to the suspect's continued deprivation of freedom after being taken into custody, in other words, pretrial detention. In that sense, China's system of *daibu*, which literally means "arrest" is an example of calling something by the wrong name; it is, in fact, a system of pretrial detention. Nor is the Chinese system of *juliu*, which is usually translated as "detention," equivalent to arrest. Rather, *juliu* may result in up to one month of custody. On that level, when a suspect is captured and then subjected to *juliu*, that primarily fulfills the function of an "arrest." The function of pretrial detention is divided between *juliu* and *daibu*.

Further, after a suspect is taken into custody, subjected to *juliu* or *daibu*, the investigation may lead to changes in the facts and evidence of the case, resulting in corresponding changes in the necessity of keeping the suspect or defendant in custody. Suspects who should no longer be in detention should instead be subjected to non-custodial compulsory measures. Under the CPL, such

⁵ See, Chen, Ruihua, *Between Problems and Ideas: Research on Basic Criminal Procedure Problems* [问题与主义之间--刑事诉论基本问题研究], (2003) (Beijing: China People's University Press), p.201.

⁶ *Id.*, p.202.

⁷ An exception is when the court decides to make an arrest. It generally means that among the cases handled by the People's Court, although the defendant is not detained, but the necessity of detention is found during the trial of the case, and the People's Court, when trying the cases of private prosecution, finds that the defendant who will potentially be sentenced to imprisonment attempts to commit suicide, abscond, or may destroy, forge evidence, or continue to commit crimes. This kind of arrest has both the act of "capturing," (抓捕) and the result of "detention," (羁押) and is thus a combination of "capturing" and "detention."

compulsory measures include pretrial release with a guaranty pending trial and residential surveillance. However, the authority to alter compulsory measures rests exclusively with the agency that authorized the *juliu* or *daibu* of the suspect in the first place. Article 65 of the CPL provides:

A public security bureau shall interrogate a person within 24 hours of their being subjected to *juliu*. If the public security bureau discovers that the individual should not have been taken into custody, they must be released immediately.

Article 65 clearly states that it is for the public security bureau to find whether the individual should not have been taken into custody. But what if they are unable to make that finding or refuse to correct themselves, despite the finding? Article 72 provides:

The People's Court or the People's Prosecutor, with respect to a person that each respective organ has decided to *daibu*, and the Public Security Organs, with respect to a person whose *daibu* has been approved by a People's Prosecutor, must interrogate that person within 24 hours of arrest. If it is found that the individual should not have been subjected to *daibu*, he must be released immediately.

Article 73 continues:

If the People's Court, People's Prosecutor, or a Public Security organ discovers that the compulsory measures adopted toward a suspect or defendant are inappropriate, such measures shall be cancelled or modified immediately.

Here, the same issue appears — each entity is supposed to “discover problems by itself and correct them by itself.”

The law has no explicit stipulations regarding any procedure for review of the necessity of detention after *daibu*; nor are there processes by which detainees can seek review of their detention or seek judicial redress. The extension of the time limit for detention during the investigation stage is decided by the prosecutor based on a written application by the public security organs. During the charging process, prosecutors make such decisions and higher level prosecutors are responsible for approving them. During trial, courts are responsible for such decisions subject to approvals from higher level courts. At no stage can the detainee participate in the decision-making process regarding the extension of time for detention; nor can he express an opinion or make submissions, or seek redress. Articles 52 and 96 of the CPL, which provide that a detained suspect, a defendant, their legal representative, or their close relative has the right to apply for release with a guaranty pending trial and that a detained suspect's lawyer may apply for release with a guaranty pending trial. However, such applications are made to the public security organs during the investigation

stage, to the prosecutor during the charging phase, and to the courts during trial. Whether any of these three agencies grant such an application depends entirely on its discretion. If they withhold approval, the detainee has no recourse. In the end, the detainee's right to make an application is just that; a right just to file an application; once filed, the process stops there.

II.

The current system of detention does not seek to protect the integrity of the evidence, to prevent criminal suspects or defendants from committing new crimes or escaping. Rather, its objective is to meet the needs of the investigation, prosecution, and trial. Numerous provisions of the CPL illustrate that the period of detention directly corresponds with the time needed for investigation, prosecution, and trial. The necessity of detention is considered the same thing as the necessity of the investigation, prosecution and trial. Article 124 of the CPL provides that, following daibu, a person may be held in custody pending investigation for up to two months, with the possibility of a one-month extension for complex cases. Article 126 provides for a further two-month extension for serious and complex cases. Article 127 provides for yet another two-month extension where a suspect may be sentenced to a fixed-term imprisonment of ten years or more. Article 128 provides that, if during investigation, a suspect is found to have committed other serious crimes, the maximum pretrial detention period shall run from the date of the discovery of the additional crime. Thus, the duration of detention depends entirely on how long the investigation takes. Detention turns the suspect into a hostage to the investigative or criminal process.⁸

Article 138 provides that the period of detention during prosecution is limited to one month, with a possible half-month extension for serious or complex cases. Article 140 provides that a prosecutor may send a case back to the public security bureau for additional investigation up to two times, each time for up to one month. After the additional investigations are complete and the case is transferred back to the prosecutor, the time limit within which a prosecution must be brought (another one-and-a-half months) runs anew. In this fashion, detention during investigation and prosecution can last as long as five months. Accordingly, the time limit for pretrial detention is simply equivalent to how long it takes to complete the first and second-instance trial in court.

Article 168 provides that a first-instance court shall accept and hear a case within one month of the case being referred to it. In the event that one of the situations defined in Article 126 arises not more than one-and-a-half months after referral, that period may be further extended by one month. If jurisdiction over a case is altered, the time limit for trial shall run from the date on which the new court receives the case. If the prosecutor requests additional time for further investigation, the time period shall be recalculated. In this way, even without a change in jurisdiction, a first instance trial can take up to three-and-a-half months before a judgment is issued. Article 196 stipulates that

⁸ Lin Yuxiong, *Criminal Procedure Law* [刑事诉讼法], (Vol.1) (Zonglun ed.) (Beijing: China People's University Press), at pp.201, 265.

the second-instance trial shall be concluded within one and a half months at the latest, subject to the one-month extension in the situations listed in Article 126, above. The calculation of the period of detention referred to above does not include the indefinite period for individuals whose identities cannot be confirmed; nor does it include the time period for death penalty review, or the time period for cases appealed to the Supreme People's Court by a defendant or a prosecutor. From the above, we can see that the time limit for detention is equal to the time a public security bureau, a prosecutor, and a court needs to handle a given case. The handling of a case has become a self-evident justification for detention. Due to the low risk, low cost, high efficiency, and relative absence of restrictions, "detention from beginning to end" is the most convenient and safe method for handling cases.

III.

Article 69 of the CPL provides:

[i]f the public security bureau deems it necessary to daibu a detainee, it shall, within three days of juliu, submit a request to the People's Prosecutor for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days. For cases involving fugitives, or suspects involved in repeat offenses or gang activity, the time limit for submitting a request for examination and approval may be extended to 30 days.

These provisions clearly define the time limits and reasons for extension in the three sets of circumstances where public security organs could detain an individual. In other words, in the absence of special circumstances, the duration of detention is limited to one to three days; in the absence of fugitives, repeat offenses, or crimes involving accomplices, juliu should only last from four to seven days. In practice, however, there is no real impediment to extending juliu to 30 days and that is often done.⁹ Prosecutors also typically and indiscriminately take all 7 days to approve daibu. Is a 30-day detention of a suspect who is not suspected of being a fugitive, a repeat offender, or having accomplices, in the absence of special circumstances, an instance of erroneous detention, detention in excess of the statutory time limit, or arbitrary detention? The clear provisions of the law become an empty letter in practice. Since the public security organs can unilaterally decide on detention without the review or approval of any other agency, neither of the prosecutor's supervisory divisions, the investigation supervision and detention center-based prosecutor division, which oversees the detention center, have ever considered review of such detention to be within their spheres of oversight. Similarly, in cases directly investigated by the prosecutor's office, the oversight of detention is non-existent.

⁹ The author interviewed policemen in over two hundred detention centers and conducted a random sampling. More than 80% of the detentions lasted thirty days.

Article 60 of the CPL defines three criteria for daibu: 1) there must be evidence that a crime occurred (the evidence requirement); 2) the crime of which the defendant is accused must carry a punishment of imprisonment or worse (the punishment requirement); and 3) alternatives to detention such as pretrial release with a guaranty pending trial or residential surveillance must be insufficient to prevent danger to the community, thus necessitating the daibu of the criminal suspect or defendant (the necessity requirement). In practice, only the first requirement is observed: whether there is evidence to support the facts of the crime. If the evidence makes out the crime, then the suspect is kept in custody. Less consideration is given to the punishment requirement and the necessity requirement. In its written application for approval of daibu, the investigating agency need only state which crime has been committed; it need not state the anticipated sentence or the necessity for detention. Further, in approval or disapproval of arrest, the prosecutor reviewing the application typically only states the crime alleged.¹⁰ Therefore, the review of applications for approval of daibu focuses only on evidence relating to the elements of the crime. In their paperwork, public security bureaus and prosecutors ignore the requirements stated clearly in the law, rendering those safeguards completely ineffective in the prevention of improper daibu and detention. However, this is merely a technical reason.

The primary reasons for the indiscriminate use of daibu and detention and the loosening of the legal limitations on daibu and detention are the law-and-order values of cracking down on crime and the political imperative for social stability above all else. As the control of crime and the maintenance of social order and safety remain the fundamental values and goals of Chinese criminal procedure, the use of daibu is still primarily focused on prosecuting crimes. Under this ideology, the public security bureau, the prosecutors, and the courts at all levels are assessed based on the rate of daibu. The juliu-to-daibu ratios of public security organs, the proportion of prosecutions following daibu approvals, and the conviction rates of prosecutors are important benchmarks for public security and prosecutor performance. The performance assessment system is a significant quantitative criterion in the granting of unit or individual awards and for individual promotions. These benchmarks emphasize high rates of daibu, prosecution, and guilty verdicts. If an officer handling a case decides not to daibu or prosecute because of the facts or law, she runs the risk of a negative performance assessment. A high acquittal rate may have an even greater negative effect on a prosecutor's performance assessment.

Quantitative performance assessment indicators incentivize both public security and prosecutorial officials to pursue a high conviction rate from the initial juliu decision onwards. The mindset that

¹⁰ Format of a Written Decision Approving an Arrest:

XXX People's Procuratorate's Written Decision Approving an Arrest, X Jian Xing Pi Bu [1998] No. 25

Public Security Bureau of XX County,

With regards to your bureau's Written Request for Approval of Arrest, X Gong Pu Zi No. 38, requesting to arrest the criminal suspect, XXX, this Procuratorate believes that the aforementioned criminal suspect may be involved in robbery and theft in violation of Article 61.1 of Criminal Procedure Law of People's Republic of China. The request to arrest the criminal suspect XXX is approved. Please enforce immediately and notify this Procuratorate of the enforcement within three days.

MM/DD/YYYY (Stamp).

emphasizes fighting crime at the expense of due process continues to play a major role. The harder the strike against crime and the harsher the punishments, the better the performance evaluation will be. Legally mandated procedures are easily overridden by internal rules. These quantitative assessment indicators have become a “mini criminal procedure law” that govern the conduct of public security personnel and prosecutors and have become the logic that guides their interactions in handling cases. “Making the numbers” renders non-custodial compulsory procedures a low priority choice while internal imperatives have made pretrial detention routine.¹¹

Moreover, the criteria for reviewing the necessity of daibu are vaguely articulated in existing law and that has led to officials to ignore the reasoning behind the law governing whether daibu is necessary. Article 7 of the “*Quality Standards for Prosecutors Reviewing Daibu (experimental rules)*” (人民检察院审查逮捕质量标准(试行)) (the **Standards**) issued by the Supreme People’s Procuratorate in August 2006 defines nine situations under which a criminal suspect need not be subjected to daibu.¹² The Standards are for imposing limitations on the use of daibu as they help lead to a better grasp of the criteria for daibu and the caution with which it should be used. However, the “possible” circumstances described in the Standards are not defined in a concrete way. Whether a suspect poses a danger to society and whether daibu is necessary, remains dependent on the investigating officer’s subjective judgment.

Additionally, there is the question of who should bear the responsibility if a suspect who has been released flees, commits suicide, or poses an additional risk of danger to society. This has long been an important factor restricting the use of non-custodial compulsory measures.¹³ Further, releasing a suspect may result in suspicions of a corrupt relationship between the prosecutor and the suspect or may lead the victim to seek remedies by petitioning. These concerns have led to consideration of daibu-for-the-duration of the case as the “safest” way to proceed.

¹¹ Changshen Li, “Why Pretrial Release Has Become the Exception? - The Reason Why Investigatory Detention Has Become the Norm in China,” *Journal of Xiangtan University (Philosophy and Social Sciences)*, Vol. 33, Issue 2, Mar. 2009.

¹² The standards provide that detention may be unnecessary in the following circumstances: (1) the criminal suspect was in the act of preparing to commit a crime, or voluntarily discontinued his criminal offense before it was completed, or used unjustifiable excessive force in self-defense, or acted beyond what was necessary to avoid danger; (2) the criminal suspect is a first time or casual offender acting without a high degree of malevolence, or was an accomplice after the fact or was a relatively minor confederate in a joint crime, or surrendered or rendered meritorious service by cooperating in the investigation, or took the initiative to return ill-gotten gains, compensate victims for losses, and manifested remorse after committing the crime; (3) the criminal is suspected of a crime of negligence and has manifested remorse after committing the crime, and effectively mitigated the amount of resulting damage or took the initiative to make compensation for the damages caused; (4) the criminal is suspected of committing a crime arising out of a dispute between neighbors, relatives, or friends, has apologized to the victim after committing the crime, compensated for the victim’s losses, and has obtained the forgiveness of the victim; (5) the criminal suspect is a juvenile or student fourteen years of age or older but younger than eighteen years old and has shown remorse, and his family, school, local community, or residents’ committee are willing and able to provide supervision and education to reform him; (6) the criminal suspect is elderly or disabled and is physically unfit for custody; (7) the criminal suspect should be subjected to daibu but is suffering from a serious illness, is pregnant, or is a woman who is breastfeeding her own baby; (8) the criminal suspect may be subject to a prison sentence of less than three years and his release will not pose any risk of danger to society or the obstruction of the normal criminal proceedings; (9) and other circumstances indicating that daibu is unnecessary.

¹³ A case-handling officer should not bear this kind of risk. An accountability mechanism should not be initiated either. As long as the case-handling officer handles the case by law, it is the criminal suspect or defendant’s responsibility if he or she escapes, commits a suicide, or commits another crime. This is an internationally accepted standard.

“If there is evidence then daibu” is not a new phenomenon in China. Rather, it has been a decades-long tradition in criminal justice work. The problem of high daibu rates leading to high detention rates only stood out after the 1997 amendments to the CPL emphasized new trial procedures that prioritized human rights protections in criminal justice. The original legislative purpose of the three criteria for arrest was to limit the number of arrests, but the practice of “if there is evidence then daibu” led to the continued detention of people who might not have been detained if the three requirements were strictly followed. Problems such as high detention rates and pretrial detention in excess of the statutory time limits are inconsistent with the constitutional principle of respect and protection of human rights.

IV.

In other countries, pretrial detention is independent of arrest and the purpose of separating the two is to limit the use of detention. Pretrial detention is not a short term jailing but rather involves the lengthy deprivation of a suspect’s or a defendant’s freedom of the person. Based on the presumption of innocence, a suspect or defendant is not a criminal until convicted, and should not be sentenced without first being found guilty. In addition, a suspect or defendant may be acquitted, given a non-custodial sentence, such as community service, probation, a fine, or a short period of imprisonment. Hence, the use of custodial measures before trial, at its core, is a manifestation of a presumption of guilt, directly infringing the freedom of the person. Criminal procedure laws in many other countries explicitly set out the principle that pretrial detention should be the exception and they regulate its use through strict mechanisms of judicial review and the availability of judicial remedies. For instance, Article 137 of the French *Criminal Procedure Code* states, “During the preliminary judicial procedure, the suspect is presumed innocent and should remain at liberty.” Article 9 of the *International Covenant on Civil and Political Rights* provides, “it shall not be the general rule that persons awaiting trial shall be detained in custody.” The United Nations Human Rights Committee, in its General Comment No. 8 on this provision, points out, “pretrial detention should be an exception and as short as possible.” These provisions make clear that suspects or defendants shall not be deprived of personal freedom for extended periods of time prior to judgment, and that pretrial detention should not be a routine practice.

In addition, stringent mechanisms of judicial oversight and judicial remedies ensure that the principle that pretrial detention shall be an exceptional measure are followed. This is primarily evident from: (1) review by an independent third party, namely a judge. With the exception of a warrantless arrest made under exigent circumstances, any form of arrest or custody requires a warrant issued by a judge. (2) There is a limited list of justifications for custody, typically confined to the presence of a risk of escape, destruction of evidence, the risk of committing another crime after being released, or a serious criminal charge with a potential sentence of over three years. (3) Detention typically cannot exceed four months. (4) Strict processes of judicial oversight in which the detainee can participate. Countries that follow the Anglo-American common law system have

established adversarial hearings in which the prosecution and defense both participate. In Germany, Japan, and Taiwan, judges can review written materials and question criminal suspects directly. Any time there is an application for an extension of the period of detention, the prosecution must submit a new application to the court and state the reasons for extension. (5) The mechanism for seeking judicial remedies is highly developed. Detainees dissatisfied with the custody decision can request a review or file an appeal. (6) Alternatives to detention that safeguard the community are well established.

In many foreign countries, as well as in Taiwan, Hong Kong, and Macau, the rate of individuals held in pretrial detention is under 20%.

V.

According to statistics in the China Law Yearbook, the pretrial detention rate has exceeded 90% in the decade since the CPL was amended in 1997 (See Table 1).¹⁴

Daibu Approved				Formal Indictment Approved			
Year	Police Investigations	Prosecutor Investigations	Total	Police Investigations	Prosecutor Investigations	Total	Pretrial Detention Rate (%)
2006	891,620	15316	906,936	999086	29,966	1,029,052	88.13
2005	860,372	16,047	876,419	950,804	30,205	981,009	89.34
2004	811,102	17,078	828,180	867,186	30,778	897,974	92.23
2003	748,756	16,020	764,776	793,092	26,124	819,216	93.35
2002	765,899	16,161	782,060	829,530	25,340	854,870	91.48
2001	823,167	18,678	841,845	817,479	27,827	845,306	99.59
2000	696,265	19,568	715,833	681,254	27,582	708,836	100.99
1999	645,632	17,886	663,518	647,440	24,927	672,367	98.68
1998	582,120	15,981	598,101	557,929	26,834	584,763	102.28
1997	512,978	24,385	537,363	493,762	31,557	525,319	102.29

¹⁴ Li, Changshen, "Why Pretrial Release Has Become the Exception? - The Reason Why Investigatory Detention Has Become the Norm in China," *Journal of Xiangtan University (Philosophy and Social Sciences)*. Vol. 33, Issue 2, Mar. 2009.

Table 1, A Comparison of the Number of Persons for Whom Prosecutors Approved Daibu and Indictment from 1997 to 2006 in China.

In March 2010, the author conducted a survey of the daibu and pretrial detention rates in twenty basic level Chinese prosecutor's offices for the 5-year period between 2004 and 2009. They were all above 90%. The rate of pretrial detention after daibu for defendants charged with a crime related to their official duties was as high as 98%. During the period from 2004 through 2009, one prosecutor's office received requests for approval of daibu for 704 people and only rejected 10, equivalent to a daibu approval rate of 98.57%. Of the 32 cases of misconduct in public office (including bribery and misconduct) investigated by the prosecutors, daibu was approved for all of the suspects, a rate of 100%.

Around 68% of sentences handed down by courts nation-wide every year are for fixed-term imprisonment below three years, including supervised release, criminal detention, non-custodial supplementary punishment,¹⁵ probation, or no punishment, with the latter five categories constituting 64%. Overall, the ratio of light sentences exceeds 60%. From 2005 to June 2009, the courts sentenced 69.7% of defendants charged with crimes related to official duties to no punishment or probation.¹⁶

Large numbers of the following categories of suspects and defendants could have qualified for release but were instead held in detention, including: minors, senior citizens, petty-crime offenders, first-time offenders, opportunistic offenders (偶犯),¹⁷ suspects charged with minor offenses related to their official duties, those who had fixed employment, fixed work units, regular incomes, family ties, or suspects whose crimes showed little malice and no danger to society, who voluntarily turned themselves in, proactively returned illegal gains, or who paid compensation to the victims of their offense. The detention of such suspects pending investigation or trial has become the routine way of dealing with criminal cases in China. This phenomenon has long been overlooked by public security bureaus, prosecutor's offices and the courts. Numerous basic level prosecutor's offices have as much as a 100% rate of post-daibu detention for individuals suspected of crimes related to their official duties. One feature of this type of investigation is that by the time the case is referred to the prosecutor's office for investigation, there has already been a complete body of evidence collected.¹⁸ Therefore, the likelihood of collusion, fabricating or destroying of evidence, or committing additional crimes is plainly not present and cannot constitute a sufficient

¹⁵ Translator's note: "supplementary punishments" refer to minor punishments such as fines or a deprivation of political rights that often accompany prison sentences but can also be imposed independently of a prison sentence. In this context, "supplementary punishment" means a non-custodial punishment.

¹⁶ Wei You, "Trend of Light Punishment of Crimes by Taking Abusing Duty v. Strict Governance over Officials," *Legal Daily*, (22 Nov. 2010), p.1.

¹⁷ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

¹⁸ Translators' note: the author may be referring to the fact that many public officials suspected of misconduct are first investigated by the Disciplinary and Inspection Committee of Chinese Communist Party and, if the Party finds evidence of criminal conduct, they refer the case for criminal prosecution. By that time, the case has already been fully investigated.

justification for continued detention. If there is no reason to expect the defendant to flee, a change of compulsory measures to a non-custodial measure should be considered. However, in practice, this rarely occurs. The high rate of cases in which the defendant was sentenced to a minor form of punishment shows that the detention rate is too high, that pretrial detention is routine, and that there is no proportionality when it comes to the length of the periods of detention.¹⁹ This also highlights the question of whether the high rate of pretrial detention is lawful or legitimate.

VI.

Admittedly, the set of compulsory measures — with detention at their core — are successful in protecting the investigative process and controlling crime. However, this success comes at the cost of the rights of large numbers of unnecessarily detained suspects and defendants, as well as the integrity of the country's justice system. Judicial resources are wasted. Citizens' rights are not effectively protected. Prosecutors and judges do not properly perform their function. There are loopholes in the system of legal oversight, and social conflicts are not effectively resolved. How can this state of affairs be changed?

The sections above analyze the current state of China's systems of *juliu* and *daibu*, and compare them to the practices of other countries and the relevant United Nations documents. It is not difficult to see that if substantial changes are going to be made to the existing systems of *juliu* and *daibu*, in particular, if the relevant provisions of the CPL are to be amended and if an independent system of pretrial detention is to be established, this cannot be achieved quickly. The reason is that the existing systems of *juliu* and *daibu* not only serve the functions of handling cases and detaining suspects, but also of maintaining social control. This is tightly linked to the habitual mindset and practices of political-legal work.²⁰ This mindset and these practices are in turn linked to the entire system of judicial system management and national politics. Changing conceptual thinking, amending the legal system, and reforming the political system are a gargantuan systemic undertaking. That task involves numerous changes impinging on many interests. Resistance to such changes will be powerful, and reform will involve considerable time and expense. Yet victims of unwarranted detention decisions cannot wait for systemic reform. Notwithstanding the central government's demands for "rational, cool-headed, civilized, and consistent application of law," political-legal organs at all levels continue to emphasize the kind of law enforcement that strikes hard against crime. *Daibu* rates, indictment rates, and conviction rates are inflexible assessment indicators for all political-legal organs, creating substantial resistance to efforts to lower the *juliu* and *daibu* rates by enforcing the three criteria for *daibu*. Additionally, the conditions are not yet ripe for the creation of an effective system of judicial oversight.

¹⁹ Liang Tang, "Empirical Studies on Pretrial Detention," *China Law Science*, Issue 7, 2001.

²⁰ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

Therefore, this paper proposes another way to lower the detention rate after daibu; one that will not conflict with existing assessment indicators, and hence will not cause frontline officers to encounter insurmountable criticism. The author has spent almost three years surveying over two hundred local prosecutor's offices, over two hundred detention centers, convened numerous conferences, and interviewed over five thousand detainees. During that process, it became clear that the law contains many provisions that are supposed to protect the rights of suspects and defendants, however, there is no effective remedy for violations of these rights. Thus, when someone is improperly detained, no one cares. The core notion of rights is that "where there is a right, there must be a remedy." Rights reflect a country's promise to its citizens, and remedies are what a country provides to guarantee that the promises it makes to its citizens can be realized in practice. A lack of remedies renders the law toothless.

In the prosecutor's office, the division that oversees the detention centers has an office in each detention center. These offices are responsible for supervising the detention center and protecting detainees' legal rights. The duration of a suspect's deprivation of liberty, from daibu (or even the beginning of juliu) until the carrying out of the sentence — is entirely within the scope of the prosecutor's supervision. In this closed system, the protection of the suspects' legal rights depends mainly on the prosecutor's oversight of the detention center. The division supervising the detention center must, by law, accept "accusations, reports, and appeals from detainees, their legal representatives, and close relatives." This responsibility is not simply a delivery service like a post office or dispatcher's office. Rather, this should be a task that carries substantive disciplinary powers. Without hard and fast provisions, human rights protection is vague and abstract and the result is there is no protection. After interacting face-to-face with over five thousand detainees, the author considers that the most basic human right for a detainee is the right *not* to be detained. The fact that so many suspects who should not be detained are still detained shows that case handling officials are seriously violating the legal rights of detainees. The detention center-based prosecutors can see this happening repeatedly with their own eyes and it is part of their responsibility to exercise oversight authority. They should incorporate this work into the scope of their official responsibilities.

The current law regulating pretrial detention centers, combined with the studies referred to above, suggest that prosecutors based in local detention centers must determine the necessity of an individual's detention and accept appeals from those who seek to challenge their detention. To facilitate this task, the author has drafted "*A Working Mechanism for Detention Center-Based Prosecutors to Propose that Case-Handling Prosecutors Make Changes in Compulsory Measures Based on Actual Detainee Circumstances*" (建立由驻所检察官根据在押人员的实际情况向办

案单位提出变更强制措施检察建议的工作机制) and developed an “*Evaluation Form to Determine the Necessity of Detention for a Detainee*” (在押人员羁押必要性评估表).²¹

The proposal contains eleven steps, including the scope of application, the agencies responsible for implementation, the operating procedures, the methods of work, and so on, that, together, standardize this work.

- (1) In addition to their regular oversight responsibilities, prosecutors in local detention centers should make it a priority to oversee whether a detainee’s custody is necessary.
- (2) In addition to entering records of detainees when they first arrive at the detention center, prosecutors in local detention centers should distribute the “*Evaluation Form to Determine the Necessity of Detention for a Detainee*” in a timely fashion, learn the facts of each detainee’s case and whether his detention is necessary.
- (3) If prosecutors in local detention centers believe a change needs to be made, or if they receive a request from a detainee (a criminal suspect or defendant), their legal representatives, or close relatives, prosecutors should look into the case, consider the detainee’s circumstances, reevaluate the detainee’s custody status, and obtain the detainee’s case file by contacting the investigation supervision division or the public prosecution division. Upon review of the case file, the prosecutors should decide whether to suggest a change of compulsory measures.
- (4) If it is necessary for the prosecutor to recommend to the case-handling division that the compulsory measure be changed to a non-custodial measure, then the prosecutors, after reporting to the responsible person in their division, should report orally to the case-handling division and solicit that division’s view on the proposed change to the compulsory measure. If the case-handling division agrees to the change, it is unnecessary to submit a written recommendation form. If the case-handling division disagrees, the prosecutors may complete the necessity of detention evaluation form and, according to their review of the case, submit a “Prosecutor’s Recommendation to Modify the Compulsory Measure.” They may submit the written recommendation to the responsible person of the division for his review.
- (5) After the responsible person for the detention center-based prosecutor’s office reviews the “*Prosecutor’s Recommendation to Modify the Compulsory Measure*,” he should forward the written recommendation to the Deputy Chief Prosecutor in charge of the division for review.
- (6) After the Deputy Chief Prosecutor reviews and approves the recommendation, the prosecutor handling the matter for the detention center-based prosecutor’s office should stamp the prosecutor’s official seal on the “*Evaluation Form to Determine the Necessity of Detention for a Detainee*” and the “*Prosecutor’s Recommendation to Modify the Compulsory Measure*,” and deliver these forms to the division that has the authority to decide whether the compulsory measures should be modified.

²¹ An evaluation of the necessity of detention refers to a quantitative evaluation by a prosecutor in a detention center on the necessity of continuing detention of a criminal suspect or defendant through trial. With respect to the quantitative evaluation, the prosecutor will decide whether to advise the case-handling agency to change the compulsory measures.

- (7) If the Deputy Chief Prosecutor believes the case is relatively complex and should be submitted to the Prosecutor's Committee for discussion, the prosecutor handling the case should deliver the case file, along with the "Prosecutor's Recommendation to Modify the Compulsory Measure," to the Office of Prosecutor's Committee for review. If the Office believes the conditions call for a change, the Office will request the Chief Prosecutor to meet with the Committee to discuss whether to recommend a change in compulsory measures.
- (8) The relevant division that receives the detention center-based prosecutor's "*Prosecutor's Recommendation to Modify the Compulsory Measure*" should provide a written response within five days of receipt indicating whether a change to the compulsory measure will be made.
- (9) If the relevant division agrees with the detention-center based prosecutor's "*Prosecutor's Recommendation to Modify the Compulsory Measure*," then the detention center-based prosecutor should consult with the relevant division, decide on a release date and oversee that the release is carried out.
- (10) If the relevant division disagrees with the "*Prosecutor's Recommendation to Modify the Compulsory Measure*," then it should provide a written statement explaining its disagreement and submit it to the responsible person for review.
- (11) If the responsible person believes the written statement of disagreement is insufficient to demonstrate the necessity of detention, he should report to the relevant Deputy Chief Prosecutor to ask whether he will issue a notice to correct the violation of law.

The evaluation form categorizes and quantifies the danger a suspect poses to the community, allowing the prosecutor in the detention center to accurately assess the necessity of detention for a given suspect. The content of that evaluation, which is divided into the main text and the appendix, is entirely based on existing regulations in the current Criminal Law and CPL. The main text lists all the premises and conditions that affect an arrest under the Criminal Law and the CPL and consists of four parts: (1) "*Standard Scores for Juliu and Daibu*" is a reexamination of the legitimacy of daibu. (2) "*The Legally Mandated Score that Corresponds to the Criminal Conduct Involved in the Case*" provides a score that corresponds to the potential terms of imprisonment and types of punishments. (3) "*The Necessity of Detention Score*" determines a score based on seven factors: the result of the crime, the subjective view of the offense, the nature of the offense, any aggravating circumstances, other factors that impact danger to community, and circumstances that could affect the orderly functioning of the criminal process. (4) "*The Elements that Clearly Demonstrate the Absence of Necessity for Detention Score*" contain two possible outcomes, specified as follows: "*The Public Prosecutor has Already Declined to Indict*" and "*The Trial Court has Decided on a Sentence of Probation.*" There is a corresponding score for each specified outcome. A negative number favors the defendant and a positive number is unfavorable to the defendant. If the net score is less than minus six, then there is no need for detention. If the net score is more than minus six, then it is necessary to hold the defendant in detention.

Since there are many types of crimes, the pilot program applied to only five types of crimes: traffic accidents, assaults resulting in minor injuries, robbery, and crimes involving less than ten thousand yuan, opportunistic crimes, juvenile crimes, and petty crimes with a statutory sentence below three years.

After a one-year pilot program launched to implement this proposal, most of the twenty participating basic level prosecutor's offices found the proposal easy to follow and effective in supervising the detention center. They discovered problems with detention quickly and found feasible solutions. Implementation allowed detention center-based prosecutor offices to reach their full legal potential and effectively reduced the rate of detention.

Before the implementation of the pilot project, the prosecutor's office in Fei County, Shandong Province reviewed and approved daibu in 324 cases involving 486 individuals. The daibu approval rate was 86%. As many as 65% of the defendants received sentences involving no prison time, including defendants who were sentenced to probation, no punishment and punishments such as fines or deprivation of political rights that are often supplementary to prison sentences but, in this case, were imposed without a prison sentence. Since October 2009, when the pilot program was launched, the prosecutors in local detention centers filed 46 "*Prosecutor's Recommendation to Modify the Compulsory Measure*" (检察官提出变更强制措施检察意见) forms, and the status of 37 detainees was changed from daibu to pretrial release with a guaranty pending trial. Since July 2009, when the pilot program was launched in Yichang City of Hubei Province (湖北省宜昌市), prosecutors reviewed the necessity of detention for 433 detainees held in ten detention centers. After review, the prosecutors found that there was no need to continue to detain 35 detainees and recommended that the compulsory measures for those 35 detainees be modified. All of the prosecutor's recommendations were adopted.

On April 23, 2010, the Supreme People's Procuratorate convened a special conference to debate whether the pilot project mechanism was feasible. A decision was reached to extend the pilot program to ten additional provinces throughout the entire country. One could say that this project has already grown from a small-scale experiment to a large-scale practice.

Proposing this kind of pilot project must be understood against a background where the relevant law has not been amended, the relevant reform has not been initiated but the rights of people in custody still need to be protected. A mechanism like the one proposed optimizes resources within the internal prosecutorial supervision system, avoids costs associated with judicial reform, and encourages prosecutors to perform their duty to supervise the necessity of detention determinations and provide remedies when appropriate. The pilot project suggests that fairness can be fully realized within China's existing legal framework. The mechanism suggested by the pilot project applies underutilized resources to promote the realization of equity and justice. This kind of work can be done efficiently, at low cost and can achieve fairness and justice extraordinarily quickly

through the enforcement of existing laws. If the reform debate gets stuck at the stage of conceptualization, theoretical criticism or a discussion of foreign models, then the lawful rights of detainees are sacrificed, time is wasted and judicial reform is further delayed. Just as with earthquake relief work, should we first describe the most modern and most beautiful garden or should we build the sturdiest building or should we set up tents as soon as possible to provide shelter for the homeless? The answer is the same when it comes to violations of citizens' legal rights in criminal proceedings: we should provide remedies as soon as possible. The most significant lesson learned from this pilot project is to remind us that many of the problems in our judicial system can be solved through the development of innovative mechanisms within the existing legal framework.

Chapter 12: On Improving the Pretrial Detention System in China¹

BIAN Jianlin²

Abstract: *The primary reason pretrial detention of criminal suspects in China is so common as to be considered the normal state of affairs, is that there is confusion between the concepts of “daibu,”³ (commonly translated as “arrest”) and “detention.” This confusion has led to an absence of judicial review and a lack of judicial remedies. In order to control the use of pretrial detention, there should be a fundamental reform of the pretrial detention system, separating daibu (arrest) decisions from detention decisions, ensuring that daibu (arrest) occurs before detention is considered, and establishing a procedure for the independent review of the decision to detain a suspect before trial. On the basis of the following generally accepted modern principles governing systems of pretrial detention such as the principle of judicial delegation of authority, judicial review, judicial remedies, and proportionality, the Chinese pretrial detention system can be improved in the following concrete ways: maintain the prosecutor’s⁴ position as the primary authority to review pretrial detention decisions, improve procedures for reviewing pretrial detention decisions, clarify the question of how long periods of pretrial detention can be, strengthen procedures for seeking remedies for improper detention, and broaden the set of alternatives to detention.*

The pretrial detention process is not just a means of depriving an accused of liberty for a period of time to ensure that litigation proceeds smoothly,⁵ it is also a means of protecting citizens from improper and arbitrary deprivation of liberty by the state. Based on the important role pretrial detention plays within the Chinese criminal justice system, the question of how to design a pretrial detention system in a scientific manner is important to the establishment of the rule of law in Chinese criminal procedure. The amended *Criminal Procedure Law* (“CPL”) implements major changes and improvements to the pretrial detention system that ensures a more cautious use of pretrial detention and expands the use of alternatives to detention. In that light, this chapter will first review and reflect on the existing system of pretrial detention and then comment on the CPL’s reforms. Based upon that foundation, this chapter will make concrete proposals for the improvement of China’s pretrial detention system in light of generally accepted modern principles governing pretrial detention systems, all in the hope that this will contribute to the creation of a more scientific pretrial detention system.

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² The author is Juris Doctor and Professor, Procedural Law Research Institute at China University of Political Science and Law. The author is grateful for the assistance of Li Jing, a Ph.D. candidate in procedural law studies at the China University of Political Science and Law.

³ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁴ *Id.*

⁵ The pretrial detention system in China’s Criminal Procedure Law includes pre-daibu detention and daibu. Daibu is a compulsory measure that deprives a criminal suspect of his personal freedom for the long term. To limit its scope, this study on pretrial detention system in China focuses on the daibu system.

1. A REFLECTION UPON THE CURRENT STATE OF PRETRIAL DETENTION IN CHINA

1.1 *The Distinction between Daibu and Detention*

“Daibu” and “detention” are concepts that are easily confused in the pretrial detention system and must be kept distinct. From a linguistic perspective, “daibu,” (or “arrest”) refers to the momentary act of capture, whereas “detention” (*jiya* 羁押) is a state of relative deprivation of freedom of the person, which lasts for a certain duration.⁶ From the perspective of the relevant provisions of the *International Covenant on Civil and Political Rights* and of the pretrial detention systems of countries with a well-developed rule of law, on the one hand, there is a clear distinction between arrest and detention; detention is not a necessary consequence of arrest. An arrestee should be promptly brought before a judicial officer who then determines whether the arrestee should be detained for a certain period. As a consequence of that determination, the arrestee may face continued detention, or may be released. On the other hand, there is a close link between arrest and detention, even though the conduct that justifies an arrest does not necessarily lead to detention. One does not necessarily result from the other. Arrest is a necessary but insufficient precondition to detention while detention is a possible but not a necessary consequence of arrest.⁷ Unlike common international practice, in Chinese criminal litigation, “daibu” not only refers to the act of capture, but also to the state of being held in custody. Daibu is not a process that precedes detention; instead, continued detention is necessarily the result of daibu. Once the decision to daibu is made, the suspect is not only placed in custody but is also held for an extended period of time.

1.2. *Regulating Pretrial Detention Through Legislation*

The 1996 CPL provides substantive standards and procedural requirements for the use of pretrial detention. In terms of the substantive criteria, daibu may only be imposed if the following conditions are met: (1) there exists evidence that a crime has been committed; (2) the crime carries a possible sentence of at least fixed-term imprisonment, and (3) the use of pretrial release on a guarantee pending trial or residential surveillance would be insufficient to prevent the risk of danger to the community, and (4) daibu is necessary. Article 86 of the *People’s Procuratorate Criminal Procedural Regulation (Trial Version)* (人民检察院刑事诉讼规则(试行)) explains that the criterion “there exists evidence that a crime has been committed” includes the following: “(1) there exists evidence that a crime has been committed; (2) there exists evidence that the suspect committed the crime; and (3) the evidence that the suspect committed the crime has been substantiated.”

In terms of procedural requirements, with the exception of a small number of cases directly determined by the courts, the right to decide and approve pretrial detention rests with the prosecutor’s office. Although the statute uses the word, “daibu,” (arrest) when referring to the decision-making authority, in practice, deciding “daibu” has the effect of deciding pretrial detention. The power to approve daibu is the power to approve pretrial detention. The prosecutor’s

⁶ See, *The “Cihai” (辞海)* (Translators note: this is a large-scale Chinese dictionary), Shanghai Cishu Press, (2002), pp.137, 281, 755 and 1,945.

⁷ See, Chen Ruihua, “Legal Control over Pretrial Custody — A Comparative Law Perspective,” *Tribune of Political Science and Law*, (2002), Issue no. 4.

office can decide to detain a suspect upon the request of the public security organs, or on its own. Where the public security organs request prosecutorial approval of daibu, the suspect is typically already in custody. The public security organs must deliver the relevant documents, that is, case files, and evidence to the prosecutor's office for review. They need not, however, transfer the criminal suspect to the prosecutor for questioning or review. After reviewing the relevant documents, the prosecutor may approve the arrest as long as the request demonstrates that it meets the statutory requirements.

In 2010, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued the "*Regulations on Interrogating Criminal Suspects During the Daibu Review Period*" (关于审查逮捕阶段讯问犯罪嫌疑人的规定) (the **Regulations**). The Regulations amend the process by which people's prosecutors make daibu decisions through documentary reviews. The Regulations require prosecutors to interrogate suspects, if necessary, when making decisions to approve daibu. They also define the circumstances that require prosecutors to interrogate suspects. In general, prosecutors should interrogate any suspect who makes a request to be interrogated. Even where a detained suspect is not interrogated, his or her written submissions should be evaluated. Regardless of the means of review, the decision to approve daibu will become the basis for taking a suspect into custody who is not already in custody, as well as the basis for justifying the ongoing detention of a criminal suspect already in custody. The law sets a time limit for custody, but where the facts of the case are complex, the nature of a case is important and complex, or there exist other special factors that mean the investigation cannot be concluded within the time limit, the period of detention can be extended upon approval by the prosecutor. A detainee may also apply for a pretrial release with a guaranty pending trial. A detainee who has been detained in excess of the time limit provided by law may also request that he be released from detention. Where the prosecutor or the public security organs discover that pretrial detention has been improper, they should release the suspect or substitute a different, non-custodial compulsory measure. If they discover that detention has exceeded the time limit, they should release the suspect or substitute a different, non-custodial compulsory measure.

1.3. Reflections on the Current Pretrial Detention System in China

Although the legislative purpose of China's CPL is to promote the cautious application of pretrial detention, nevertheless pretrial detention has become the routine way for dealing with criminal suspects, and requests to be released from detention are rarely given any consideration. One commentator discovered, following studies, that in the twenty years from 1990 to 2009, prosecutors approved daibu requests for as many as 94.84% of all criminal suspects. In the 8-year period between 2002 and 2009, prosecutors' offices nationwide approved or initiated daibu of a total of 7,024,200 people. Courts nationwide issued criminal verdicts against 6,896,571 people. The ratio of detainees to those convicted of criminal offenses was 101.85%⁸. The high rate of pretrial detention is due to views of the role of criminal justice, as well as biases concerning the function of pretrial detention — especially the neglect of human rights protection. But actors' interests are also a driving force. In summary, the primary procedural flaws are the lack of judicial oversight and the absence of judicial remedies.

⁸ See Liu Jihua, "Chinese Characteristics and Reform of Daibu Review System," *Chinese Journal of Law*, (2012), Issue no. 2.

The failure to distinguish “daibu” from “detention” in the existing system has led to a situation where “daibu” itself has come to mean detention. This has prevented the development of judicial oversight mechanisms to deter abuses of pretrial detention after the initial arrest but prior to “detention.” For an international perspective, countries with more developed rule of law have a clear separation between arrest and detention to prevent unnecessary infringement of their citizens’ liberty. This has resulted in two mechanisms of oversight: any deprivation of freedom of the person must be initiated by a document like an arrest warrant and is subject to judicial review. As Japanese scholar Morikazu Taguchi (田口守一) notes, “the primary purpose of establishing arrest as a prerequisite to detention is to subject arrest to judicial restraint, and then to subject detention to judicial restraint as well, thus creating a system of double restraint.”⁹ In China, however, daibu itself means detention. After subjecting a suspect to daibu pursuant to a determination by the prosecutor, the public security organs have the power to keep the suspect in detention, without any further need to deliver the suspect to the prosecutor for review. This results in the suspect losing the opportunity to regain his or her liberty or be subjected to alternative, non-custodial compulsory measures. It also results in the prosecutor losing the opportunity to discover whether detention is improper or unnecessary by interrogating the suspect. This necessarily results in the expansion of the scope of cases for which pretrial detention is used. In addition, the confusion of daibu with detention and the lack of judicial oversight have led to a dilemma for prosecutors’ offices in determining whether to approve daibu. If they do not authorize daibu, this may result in suspects who should be detained being able to obstruct justice. If they do authorize daibu, a lack of opportunity to interrogate a suspect directly to verify the necessity of detention may lead to their ongoing unnecessary detention.

On the other hand, although the 1996 CPL, in principle, gave detainees the right to apply for pretrial release with a guaranty pending trial, and a right to be released from detention if it exceeds the statutorily mandated maximum time period, the CPL failed to provide a mechanism for vindicating these rights. For example, there are no provisions concerning: to whom such an application should be made, the effect of such an application, how the recipient of such an application should review it, how the reviewing unit should dispose of the application, the effect of such a disposal, and so on. This has resulted in detainees having, in practice, no law upon which to base a request for relief. It also frequently leads public security and judicial organs to ignore detainees’ requests for redress. This, in turn, compels detainees’ friends and relatives to resort to “petitioning,” media disclosures, and other mechanisms to achieve their objectives. These roadblocks to judicial redress result in legal problems, or problems that could have been resolved through judicial means, transforming into social or even political problems.¹⁰

At the same time, while the 1996 CPL required relevant agencies to release or substitute an alternative non-custodial measure for suspects whom they had discovered should not have been detained in the first place or who had been held in detention beyond the statutory time limit, the law nonetheless failed to provide any guidance regarding the mechanisms, procedures and effectiveness of review. One commentator has gone so far as to say: “Strictly speaking, the 1996 CPL does not contain any provisions that govern challenges to the legality of detention; nor does it contain any recognition of a detainee’s right to judicial redress for improper or unlawful pretrial detention. In other words, in China, there can never be a question about the legality of pretrial

⁹ Morikazu Taguchi, *Criminal Procedure Law* (刑事诉讼法), Translated by Di Liu, Ling Zhang, et al. Law Press, (2000), p.54.

¹⁰ See Chen Ruihua, “Theoretical Reflections on the Pretrial Detention System,” *Chinese Journal of Law*, (2002), Issue no. 5.

detention. As long as a prosecutor approves daibu, the legal presumption is that the ensuing lengthy period of custody is all legal.”¹¹ In practice, the prosecutors’ office, as the agency charged with ensuring that the government functions in a lawful manner, may review specific cases to determine whether a suspect has been held in detention beyond the maximum statutory period. However, such reviews often occur as part of a “special campaign,” and there have been no enduring legal mechanisms developed to address this problem. Moreover, the prosecutors’ office does not have the power to decide whether a detainee should be released, except in cases where the prosecutors’ office is itself the investigating body or the prosecutor has independently imposed daibu on the suspect during the investigation or trial period. Otherwise, in cases investigated by the police, the prosecutor’s office only has the power to recommend release: limiting its ability to affect the outcome.

2. THE NEWLY AMENDED CPL AND REVISIONS TO THE PRETRIAL DETENTION SYSTEM

One major bright spot of the 2012 CPL amendments is the relatively extensive revisions to the provisions regarding compulsory measures, including the pretrial detention system. The revisions satisfy the practical needs of the legal system and are responsive to trends in criminal justice development. In particular, the amendments to pretrial detention focus primarily on substantive criteria and on procedural provisions.

The amended CPL clarifies the prerequisites for detention by defining what kind of suspect presents a “danger to the community,” with greater specificity, including: a criminal suspect who may commit a new crime; a suspect who may present a risk to national security, public safety, or social order; a suspect who may destroy, forge, or conceal evidence; a suspect who may obstruct witnesses’ testimony or collude with others to present false testimony; a suspect who may retaliate against victims, informants, or accusers; and a suspect who may attempt to commit suicide or abscond. It also specifies certain kinds of felony charges and certain categories of suspects and defendants that satisfy the grounds for detention, including: those who are charged with an offense that can potentially result in a sentence of ten years or more based upon the available evidence; and those who may be sentenced to a term of imprisonment and have a criminal record, or whose true identity cannot be established.

To correct the inadequacies and confusion in the legislative provisions governing the current daibu review procedure, the amended CPL has clarified the procedural requirements of daibu review and approval. It stipulates that the prosecutor may interrogate a suspect, question witnesses or other parties to the litigation, and consult with defense attorneys during the daibu review and approval process. The prosecutor ought to interrogate a suspect if it is questionable that they meet the criteria for detention, if the suspect wants to make a statement to a prosecutor, or if there may have been serious illegal conduct during the investigation. In general, the prosecutor should listen any time a defense attorney makes a request to be heard. At the same time, in order to prevent unnecessary detention and detention that exceeds the legal time limits, prosecutors now have an obligation to review the necessity of continued detention. Whenever detention is unnecessary, the prosecutor should propose that the suspect be released or that the suspect’s detention be modified to an alternative non-custodial compulsory measure.

¹¹ Xue Hong, “Researching on Establishing Judicial Remedy to Pretrial Detention in China,” *Contemporary Law Review*, (2006), Issue no. 3.

Furthermore, the amended CPL promotes the protection of the defendant's fundamental human rights and endeavors to prevent unlawful police conduct, including the illegal collection of evidence (非法取证),¹² detention that exceeds the legal time limit and any other police action that violates the defendant's rights. The CPL specifies that the public security organ must transport suspects in custody to a detention center immediately and notify their family within 24 hours of arrest, unless they are unable to be reached. The amended CPL also emphasizes that suspects, legal representatives, relatives, and defense attorneys have the right to request release of the defendant or a modification of their detention to a form of non-custodial compulsory measure once the legal time limit has elapsed.

Moreover, when the purpose of the legislation, the strengthening of procedures and standards for pretrial detention and the prevention of unnecessary detention are considered, it can be seen that the overall direction of reform is toward the principle of prioritizing non-custodial alternatives over detention and making pretrial detention the exception, not the rule. Unfortunately, however, the 2012 CPL fails to address several fundamental flaws in the pretrial detention system. First, it fails to resolve the confusing nomenclature of using both "daibu" and "detention" in the pretrial detention system, and as a result, it is still not possible to establish a process of effective judicial review at the point after the suspect has first been taken into custody and prior to the imposition of detention. Second, as in the past, the amendment fails to establish judicial remedies. The law also still fails to provide a path for detainees to apply for review of the "necessity of their detention", or for release with a guaranty pending trial. Even though the law requires prosecutors to determine the necessity of detention, it does not specify strict standards or deadlines for prosecutorial review of a case. The vagueness of these statutory requirements is an invitation to prosecutors to evade their responsibilities. Moreover, even if detention is found unnecessary, prosecutors do not have the legal authority to order the release of detainees before their detention has exceeded the statutory time limit. Prosecutors are only allowed to recommend release or alternative non-custodial, compulsory measures to the investigative bodies and their recommendations can easily be ignored. This creates a certain amount of concern about how much impact prosecutors' recommendations really have.

In addition, when it comes to detention that has exceeded the maximum time limit allowed under the law, the amended CPL fails to specify how prosecutors should rectify the situation; there is no specificity regarding methods, paths or their effectiveness and this lack of specificity undermines the effectiveness of any remedy in practice. The CPL also fails to clarify whether prosecutorial recommendations are binding upon investigative bodies. Finally, the amendment fails to specify a time limit for detention or a deadline for solving cases, and does not specify methods for extending the statutory time limit for detention. Because the time limit for detention is determined by the amount of time the investigators need to solve the case it is difficult to enforce any time limit in practice.

¹² Translator's note: this refers to using torture or coercion to elicit a confession.

3. COMMON PRINCIPLES OF THE MODERN PRETRIAL DETENTION SYSTEM

Professor Shantian Lin (林山田) has said: “Although compulsory measures restrict individual freedom and rights, they are not meant to punish individual defendants; rather they are meant to: (1) ensure that the defendant is present when needed; (2) guarantee that evidence will be discovered and preserved; (3) ensure an orderly litigation process; (4) guarantee execution of the verdict and uphold the authority of criminal law and procedure.”¹³ As a compulsory measure, the function of detention is to ensure the orderly progress of a case and to prevent improper obstacles in criminal proceedings. Apart from litigation, however, there is another purpose of compulsory measures that bears emphasizing, namely the protection of human rights. However, if ensuring the orderly progress of litigation is the only goal, it would be tantamount to the state giving investigative agencies tacit permission to use compulsory measures, including detention, indefinitely. When suspects are in custody investigators can control them more easily both physically and psychologically. The fundamental nature of the pretrial detention system is to protect human rights and individual freedom from infringement by the state. The mature methods used to achieve this goal by the *International Covenant on Civil and Political Rights* and countries with a well-developed rule of law are to regulate and limit the use of pretrial detention through specific norms and procedures. These have been developed into the common principles of modern pretrial detention systems.

3.1. *The Principles Regulating Pretrial Detention Procedures*

From a procedural perspective, pretrial detention can only be ordered according to previously enacted legal procedures. Article 9.1 of *International Covenant on Civil and Political Rights* provides, “[e]veryone has the right to liberty and personal security. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of their liberty, except on such grounds and in accordance with procedure as established by law.” According to the principle of procedural law, in order for pretrial detention to be imposed, there must be a legally authorized procedure, a lawfully empowered decision-maker and bases that are clearly stated in the law.¹⁴ Under the general principle of guaranteeing procedural legality, a modern pretrial detention system should feature judicial authorization, judicial review, and judicial remedies.

The principle of judicial authorization, also known as “pre-arrest authorization” or “a warrant requirement,” is the first line of defense against improper or unnecessary detention. Judicial authorization requires a judicially-authorized arrest warrant issued by an impartial judicial officer as a prerequisite to arrest. Instead of a warrant requirement, many countries require that an arrest be made as a prerequisite to detention but that the authority to arrest does not include the authority to continue to detain the suspect. The principle of judicial review requires that after arrest, the suspect be brought promptly before a judicial officer for a hearing where the officer hears both sides’ arguments and decides whether the suspect should or must be detained. The principle of judicial review is the second line of defense against improper or unnecessary pretrial detention. The principle of judicial remedies gives a suspect the right to apply to the judicial authority to terminate an improper or unnecessary detention and therefore this is the third line of defense

¹³ Lin Shantian, *Criminal Procedure Law*, (Wu-nan Publishing), (1998), p.178.

¹⁴ See Sui Guangwei, “Detention: Characteristics and Applying Principles,” *Contemporary Legal Science*, (2004) Issue no. 3.

against improper and unnecessary pretrial detention. Some countries allow judges to initiate the review of the necessity of detention of a suspect on their own, *sua sponte*. Although there is a remedy for detentions exceeding their legal term, judicial remedies primarily focus on the review of the necessity of pretrial detention that is still within the statutory time limits.

3.2. *The Principles Constraining the Bases for Pretrial Detention*

In addition to regulating procedures for determining whether to order pretrial detention, countries have also established statutory standards for deciding whether pretrial detention is appropriate as a way to prevent its abuse. Those standards are based fundamentally on the principle of proportionality. Proportionality is the principle that states must follow when they infringe upon citizens' fundamental rights. When the state exerts its power over its citizens, it must use methods that achieve a balance among the goals the state seeks to achieve.

“The legitimacy of compulsory measures permitted by any criminal procedure code depends not only on statutory authority, but also on the constitutional principle of proportionality. When considering proportionality, we must weigh many factors, including the severity of the crime, the degree of proof of guilt, the importance of preserving evidence and information, and the potential danger of destruction and threats posed to others .”¹⁵

Generally speaking, the principle of proportionality includes three subcategories: 1) appropriateness, which requires that the application of compulsory measures is helpful in achieving the set goal; 2) necessity, which requires that compulsory measures should be taken only if other less restrictive means are inadequate; and 3) proportionality, in a narrow sense, requires that the benefits of the compulsory measure outweigh the burden on the rights of the citizen. The application of proportionality demands prudent exercise of state power, prioritizing the balancing of the law's impact on fundamental human rights, and minimizing the burden on citizens' rights.

4. PROPOSALS TO IMPROVE THE PRETRIAL DETENTION SYSTEM IN CHINA

In China, the human rights protection aspect of pretrial detention has not received as much attention as it should. Instead, pretrial detention has been used to serve a diverse set of functions, including: criminal punishment and education, anticipatory punishment, facilitating the gathering of evidence, and crime prevention.¹⁶ In practice, there have been certain other phenomena, such as using detention for the purpose of investigation, making a public spectacle of an arrest, extending detention beyond statutory time limits and using the detention center to root out other crimes. These are real life footnotes to the above list of the diverse purposes for which pretrial detention has been used. If we are to improve the pretrial detention system and lower the detention rate in China, however, we must refocus the purpose of compulsory measures to ensure the orderly functioning of the criminal justice process and the protection of human rights. Additionally, in an effort to ensure the prudent use of pretrial detention, the amended CPL invites criminal suspects,

¹⁵ Song, Bing, *Judicial System and Judicial Procedures in the United States and Germany*, (China University of Political Science and Law Press), (1998), p.384.

¹⁶ See Bian Jianlin, “Replacing the Function of and Perfecting the System of Criminal Compulsory Measures in China,” *China Legal Science*, (2011), p.6. Liu Jihua, “Distortion of Arrest Functions and its Correction—Rational Interpretation of the Amount of Arrests and Rate of Arrests,” *Political Science and Law*, (2006), Issue no. 3.

witnesses, defense lawyers and other participants in a criminal case to join in the pretrial detention review process, however it still fails to thoroughly solve the problems created by the original defect of confusingly combining daibu and detention. Treated as two separate categories, daibu and detention should each be utilized and applied differently. I believe that daibu and detention are two distinct compulsory measures, each with a different legal consequence, each of which should be used under different circumstances. In the future, we need to undergo a fundamental reform of our pretrial detention system, clearly distinguish between daibu and detention, implement a separation of daibu from detention, make daibu precede detention, implement a daibu-first system, and establish an independent detention review mechanism to control the use of pretrial detention. Making daibu come before detention will appropriately introduce more lenient standards for the pretrial detention process, while at the same time satisfying the practical needs of investigatory agencies. In addition, making the conditions and procedures for pretrial detention more strict and strengthening the judicial review process will standardize the use of pretrial detention. Using the principles of the modern pretrial detention system as a foundation, I propose the following improvements to the Chinese pretrial detention system:

4.1. *Maintain the Prosecutor's Role as Reviewer of Pretrial Detention*

In China, it is the prosecutor who is responsible for reviewing the necessity of pretrial detention. In theory, this is not an issue. Having the prosecutor play this role does not violate the requirements of the *International Covenant on Civil and Political Rights* and, as a practical matter, is feasible under current judicial institutional arrangements in China.¹⁷ This is consistent with the Chinese Constitution's grant of authority to the prosecutor to review daibu decisions, and few changes would need to be made to the *Organizational Law of the People's Procuratorate* (中华人民共和国人民检察院组织法), the CPL, or the national criminal legal system. Allowing the prosecutor to maintain this authority would create the least amount of shock to the system. Additionally, the prosecutor already has staff and units who have experience reviewing daibu applications and their experience with pretrial detention review would give them a good foundation for this work. In addition, in prosecutor's offices, there is one department that supervises investigations and a separate department that handle prosecutions. On some level, giving this responsibility to the prosecutors' office would resolve the problem of separating the responsibility to pursue criminal responsibility from the responsibility to review the necessity of detention.¹⁸

4.2. *Improve the Detention Review Procedure*

Pretrial detention review and approval should include three processes. First, after receiving a request to approve daibu from the public security organ, the prosecutors' office should review the file to determine whether the legal requirements for daibu have been met. After the review and approval, it should issue to the public security bureau a daibu warrant, which should specify the person to be subject to daibu, the grounds for daibu and the date by which the daibu should be effected. Second, if, after executing the daibu warrant, the public security organ believes detention

¹⁷ Translator's note: In Chinese law and nomenclature, procurators/prosecutors are considered "judicial officers" and any reference to "judicial officer" and "judicial" system, review or remedy, should be understood to include the prosecutor's office as a "judicial" organ.

¹⁸ See Wu Mengshuan, "On the Power to Investigate and its Legal Supervision," in Qian Sun & Lixian Liu ed., *Collections on Procuratorial Theories*, Vol. 2. Law Press, 2001, p.212.

is necessary, it should send a request for approval of pretrial detention to the prosecutors' office within the statutory timeframe (e.g. twenty-four hours after arrest). The request should be reviewed by the prosecutor and this review would include the factual and legal bases for the request as well as the necessity of detention. As part of the review process, the prosecutor should summon the suspect to inform him or her of the charges, the underlying facts, and the right to counsel. During the review, a prosecutor should interrogate the suspect and solicit the opinions of defense counsel and, if necessary, invite the investigators to be present and explain the case, as well as the bases and necessity for pretrial detention. After review, the prosecutor should decide whether or not to approve detention, or whether to approve pretrial release with a guaranty pending trial, or residential surveillance. The final matter is the review of the necessity of detention. Even after detention has been initially approved, the prosecutor's office should periodically review the necessity of continued detention. If circumstances change so that detention is no longer necessary, the detainee should be released immediately or, if appropriate, be subjected to alternative, non-custodial compulsory measures.

4.3. *Clarify the Time Limits for Pretrial Detention*

When prosecutors approve detention requests they should issue a written document authorizing detention for a specific period of time. If the public security agency believes there is a need to extend the period of detention, it should submit a request for extension seven days before the date the detention is due to expire. If the prosecutor grants approval, he or she should issue a written decision providing for a specific time period for continued detention. If the detention has exceeded the approved time period and the public security agency has not requested an extension or the prosecutor has not approved the request for an extension, the detainee should be released immediately.

Currently, Chinese prosecutors only use their investigatory supervision authority to correct errors in detention, that is, when detention exceeds the statutory time limit. This is not consistent with the legal authority conferred upon prosecutors by the Constitution. Pursuant to Article 37 of the Constitution, the prosecutors have the authority to approve daibu whereas the public security agency's power is limited to the enforcement of daibu. The public security agency has no power to make any daibu decisions on its own under any circumstances. The only reason a suspect can exist in a state of detention is because that is the effect of a prosecutor exercising its authority to decide daibu should be approved. Accordingly, when detention of a suspect has exceeded the legal time limit and there has been no lawful extension, the effect of the prosecutor's initial approval will expire immediately. No additional legal authorization can justify the suspect's continued detention so he or she must be released. Additionally, when, during the review of the necessity of detention, the prosecutor determines that a suspect should be released, the suspect must be released because the power to decide whether the suspect should be released or detained is part of the prosecutor's power to approve daibu. The prosecutor's power is to issue a decision and not a mere recommendation.

Another issue within the current judicial system is the confusion between time limits for handling cases and time limits for detention.¹⁹ Extending the time to handle a case should not automatically

¹⁹ See Chen Yongsheng, "Problems of Pretrial Detention System and their Solutions," in Ruihua Chen ed. *Empirical Studies on Pretrial Detention*. Peking University Press, (2004), p.48.

extend the period of detention. The nature of the two matters is completely different. If, one day, the basis for detention no longer exists then the period of detention should expire regardless of whether the handling of the case has reached an end. Completing the handling of the case is a matter for the public security and judicial organs and the total time period includes statutory time limits for investigation, charging and adjudication.

4.4. *Strengthen a System of Judicial Remedies*

China has yet to establish a meaningful system of judicial remedies for pretrial detention. The current law provides only that the defendant, his or her legal representative, close relatives, and defense attorney have the right to apply for a modification of compulsory measures to a non-custodial measure or to request release once the period of detention exceeds the legal limit. In practice, this remedy is of little use and is a far cry from the common principles of a modern pretrial detention system. “It is one thing to declare the existence of fundamental rights and another to ensure that the infringement of such a right is effectively prevented or sanctioned. Machinery for enforcement must be provided and an injured party must have ready access to it.”²⁰

China should learn from Taiwan’s interlocutory appeal procedure known as *junkanggao* (准抗告) and establish a procedure to seek review of detention decisions.²¹ If a detainee refuses to accept the prosecutor’s decision to approve detention, he has a right to request review by a higher level prosecutor’s office. The higher level prosecutor’s office should review the detention decision immediately and, if appropriate, modify the compulsory measure to a non-custodial form of compulsory measure. If the higher level prosecutor decides against modifying the detention order, the prosecutor should explain the basis for her decision. If, prior to the expiration of their detention, a detainee believes the reason for his detention no longer exists and he should be released, he should have the right to request the prosecutor to institute another review of the necessity of detention. If a detainee remains in custody after his detention period has expired, the detainee, close relatives or the defense attorney should also have the right to request immediate release from the agency in charge. If the agency refuses to release the suspect, the prosecutor should order his release and handle the matter of the agency’s unlawful conduct according to the circumstances.

4.5. *Provide a Variety of Alternative Measures to Detention*

One weakness of the current system in China is that there are not enough alternatives to detention. Law enforcement agencies and judicial authorities do not have many alternatives to detention other than release. Compelled appearance is an alternative principally used to compel a person to be present for interrogation. Pre-daibu detention is primarily used for defendants caught red-handed and suspects involved in serious crimes. Pretrial release with a guaranty pending trial is used more frequently but lacks a practical method of strict enforcement. Residential surveillance is not particularly feasible and can easily become another form of custody in disguise.

²⁰ Peter Stein and John Shand, *Legal Values in Western Society* [西方社会的法律价值], translated by Xianping Wang, China Legal Publishing, (2004), p.216. Translator’s note: Quote from original work, Peter Stein, John Shand, *Legal Values in Western Society*, (1974) (Edinburgh Univ. Press), p.152.

²¹ *Id.*

The lack of alternatives creates dilemmas for public security agencies and judicial authorities in choosing compulsory measures. Generally, non-custodial compulsory measures are insufficient to ensure the orderly functioning of the criminal process while detention is excessively harsh. When forced to weigh their options, law enforcement agencies find detention more practical, which is a key factor in the excessively high rate of pretrial detention in China. In the future, building reforms on the foundation of existing non-custodial measures, China should model alternative measures that vary in their restrictions of personal freedom on measures used in other countries, such as regular reporting, limiting the defendant's activities, and compulsory medical examination and treatment. Except for special circumstances regulated by law, defendants should always have the right to apply for non-custodial measures as alternatives to detention, including obtaining pretrial release with a guaranty pending trial.²²

²² See Sun Changyong, "Criminal Compulsory Measures in View of Comparative Law," *Chinese Journal of Law*, 2005 no. 1 (2005).

Chapter 13: Alternatives to Detention and Support Systems for Juveniles Awaiting Trial — An Empirical Study¹

SONG Yinghui, SHANGGUAN Chunguang, WANG Zhenhui²

Abstract: *It should be standard practice that juveniles suspected of committing crimes are released while awaiting trial and not held in detention centers. Pretrial detention for juveniles should be severely restricted. In practice, some jurisdictions in China are experimenting with using “probation centers” (观护基地)³ as support systems for alternatives to detention for juvenile suspects. These centers offer supervision and services to reduce pretrial detention for juveniles and assist with their reentry to society. Empirical research shows that using probation centers reduces pretrial detention for juveniles, is an effective alternative to conventional punishment, assists reentry to society, and has encouraged law enforcement officials to reconsider their way of thinking about juvenile suspects. To establish and improve a non-custodial support system for juvenile suspects awaiting trial, based primarily on the use of probation centers, there should be greater clarification of the role of probation centers within the overall juvenile justice system, a clarification of their relationship with law enforcement agencies, a balance reached between the probation center’s rights and obligations, measures to ensure juveniles are assessed for risk before being sent to probation centers, and there should be effective supervision of the handling of juvenile offenders while they are in probation centers. Finally, we need to reform the professional evaluation mechanisms for case handling agencies.*

China’s rapid economic and social development has brought about increasing movement of people within the country. As a result, the commission of crimes by internal migrants (外来人员)⁴ has become a salient problem, particularly in the more developed eastern regions of China. Even if migrants suspected of committing crimes meet the statutory criteria for either release with a guaranty pending trial (取保候审)⁵ or residential surveillance (监视居住),⁶ in practice, investigating authorities are more inclined to detain them under daibu,⁷ as they are frequently unable to provide suitable guarantors or to put up money or property for a guaranty. This has

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² Song Yinghui: Professor and Doctoral Student Supervisor, Criminal Law Research Institute, Beijing Normal University. Shangguan Chunguang: Juris Doctor, Assistant Professor, National Procurators’ Academy. Wang Zhenhui: Juris Doctor, Assistant Professor, Project 2011 Judicial Civilization and Innovation Center; Assistant Professor, Litigation Research Institute, China University of Political Science and Law. The authors would like to thank Dr. SHEN Wenkuan at Beijing Normal University for helping to gather materials and for reviewing the first draft.

³ Different places have given these centers different names but they are substantially the same. Hence, this article uses the term “probation center” to describe them all, except for specific examples where original terms will be introduced.

⁴ Translator’s note: “Internal migrants” or “migrants” refers to Chinese citizens who leave their home, usually in the countryside, to find work in urban areas but who do so without obtaining permission to change their official place of residence, or “hukou” (户口), their “household registration.” They become part of China’s large “floating population” (流动人口) who actually live and work in China’s growing cities but do not enjoy the full benefits of citizens with household registrations for their place of residence.

⁵ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁶ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁷ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

resulted in large numbers of migrants suspected of committing crimes being subjected to pretrial detention. This not only results in the infringement of the rights of migrants to equal protection, but also brings about the “cross-contamination” of detainees, which inhibits their rehabilitation. Moreover, detention of this population in large numbers also increases the financial burden on the justice system.

Compared to adults, minors are not yet fully developed in body and mind. Their ways of thinking and behavior are more easily influenced by external factors. The use of daibu against juveniles⁸ suspected of committing crimes may cause even more serious negative effects. They are more easily influenced by other suspects or defendants. If they do not receive effective guidance after committing crimes, it is frequently more difficult to get them to acknowledge the harmfulness of their own behavior. If their education or employment is interrupted, they may encounter even more obstacles to their return to society.

In order to address the numerous problems with using custodial compulsory measures against juveniles, prosecutorial and judicial agencies⁹ throughout the country have sought to create new mechanisms for young offenders. They have actively explored the use of non-custodial measures for juvenile suspects and accumulated a certain amount of experience in doing so. The primary method has been to use organizations or groups such as socially-responsible enterprises, schools, or nursing homes as pretrial non-custodial social support mechanisms to establish “probation centers” or “probation work stations.”¹⁰ These groups provide food, lodging, work, education, and guarantors for juvenile suspects who are migrants and do not otherwise meet the criteria for pretrial release on a guaranty. During the period of release with a guaranty pending trial, the probation center is responsible for supervising the suspect. Such supervision includes arranging a school for education, providing the best work opportunities available, vocational training, psychological counselling, helping the juvenile to develop ideals and goals, and ensuring that the juvenile has at least one outstanding skill. After the period in the probation center has concluded, the probation center should issue a certificate regarding the suspect’s performance under probation to the case-handling agency. The certificate can then be taken into account by the prosecutor when he is considering whether to indict, or when the court is deciding on a type or duration of sentence. In the future, this mechanism could also be applied to juveniles who are local residents but who are also unable to provide appropriate individuals to serve as guarantors or lack money for a guaranty.

Juveniles have their own special characteristics. In dealing with criminal cases involving juvenile suspects, there should be a greater emphasis on education, reform and rehabilitation. Not only should there be special treatment for juveniles in terms of punishment but there should also be special treatment in terms of the criminal process. The *Criminal Procedure Law* (“CPL”) confirms that juvenile justice should prioritize education, reform and rehabilitation over punishment. Its provisions impose strict limits on the use of daibu for juvenile suspects and defendants.

⁸ In practice, criminal suspects, who are older than 18 years but are still students, have sometimes been treated according to standards for juvenile suspects.

⁹ Translator’s note: In Chinese, “judicial agencies” (司法机关), refers to both prosecutors and courts, but to avoid confusion, we have chosen to translate the term as “prosecutorial and judicial agencies” or “prosecutors and courts” rather than to translate it literally.

¹⁰ OPC programs in different places have been given different appellations, but they are substantially the same. Hence, this article uses the term “OPC” to describe them all, except for specific examples where original terms will be introduced.

This suggests that the general rule should be to use alternatives to detention for juvenile suspects and defendants, and only impose pretrial detention in exceptional cases. In addition, the CPL distinguishes between situations in which pretrial release with a guaranty and residential surveillance apply. The CPL considers residential surveillance as an alternative to daibu. With provisions clearly stipulating the criteria for detention under daibu and the provisions requiring a post-daibu assessment of the necessity of detention, the legal basis for imposing alternatives to detention for juvenile suspects is expanding.

To sum up and evaluate the experience of implementing non-custodial measures, uncover potential problems, and better implement the CPL provisions limiting the use of daibu and detention for juvenile suspects, during the period between May 2010 and October 2011, we conducted an 18-month, systematic, empirical study of the practice of establishing “probation centers” to expand the use of alternatives to detention for juvenile suspects.

1. RESEARCH LOCATIONS

1.1. *An Overview of Locations*

Our research focused on City S and Cities W and C of Province J.

1.1.1. City S

One of the primary focuses for City S’ juvenile criminal justice innovation is the use of non-government “probation centers”¹¹ as alternatives to detention for juvenile suspects.

In May 2003, the District M prosecutor’s office (in City S) began a pioneering exploration of the use of “probation centers” for juvenile suspects who were released with a guaranty pending trial. In October 2004, the M District established a juvenile suspect probation center system hub. In 2005, this system of work was extended from the stage of a case where the prosecutor was considering an indictment back to an earlier stage when the case was still under investigation.¹² In April 2007, the District M prosecutor’s office, along with the public security sub-bureau and the district’s social workers’ office issued a document called the “*Regulations Strengthening the Coordination of Education and Monitoring of Juvenile Suspects*” (关于加强对涉罪未成年人教育考察及衔接工作的规定) (the “**Regulations**”).

The Regulations established a single probation center hub, involving the participation of the relevant agencies, with work carried out at 13 social workers’ offices throughout the district staffed primarily by 85 youth affairs social workers. The hub’s work focused on juvenile suspects within the district, with particular emphasis on creating a monitoring and rights support and education network for juvenile suspects who were migrants from outside the district.

¹¹ Translator’s note: Throughout this chapter, we have translated “shehui guanhu tixi” (社会观护体系) as either non-government “probation centers,” or, the literal translation, social “observation and protection” centers or system. What the authors are referring to are the use of non-governmental social organizations, which could include companies, to house juveniles and provide them with certain services.

¹² Up to the year 2010, the number of juvenile offenders who had participated in the probation center program as early as the investigation stage reached 29.

After the system of probation centers was established, the number of juvenile offenders released pending trial with a guaranty increased by 165% — from 23 people in 2004 to 61 in 2008. Within that number, the proportion of migrant juveniles released increased from 17.4% in 2004, to 65.5% in 2008, to 76.9% in 2009, and to 90% in 2010. In addition, the number of people who absconded or committed new crimes after being released decreased from 17 people in 2005-06 to only 5 people in 2007. Since 2008, that number has remained at zero. By December 2010, all eighteen districts of City S had established their own community probation center systems.

1.1.2. City W of Province J

In August 2008, Province J began a pilot program using probation centers for migrant juvenile offenders within a district of City W.¹³ The program was gradually expanded to other districts and counties in City W and the subjects of the program were also expanded to encompass all migrant suspects, as well as some local suspects who met the criteria for pretrial release with a guaranty but who were unable to provide appropriate individuals to serve as guarantors or lacked money for a guaranty. In September 2010, City W established a leadership group for probation centers for migrant suspects,¹⁴ whose mission was to coordinate the various agencies involved with this work. The leadership group set up an office within the prosecutor's office of City W, and was responsible for supervision and education of migrant offenders within its jurisdiction. Most counties and districts followed suit, establishing their own leading groups to unify the work of the probation centers.

As of August 2011, City W had established 55 probation centers, 42 of which were located in private companies, 6 of which were in residential communities, and 7 of which were in social welfare organizations; namely, homes for senior citizens. In total, 239 individuals participated in the program and received support, rehabilitation and education. The 239 persons included individuals released with a guaranty pending trial, those who were not prosecuted, and those who were sent to community corrections centers after having served their sentences. 55 were juvenile suspects who were still under investigation.

1.1.3. City C of Province J

In late 2007, the prosecutor's office in City C started to explore a model of "community assistance by businesses" to expand the use of alternatives to detention for juvenile offenders. In late 2008, the "Dechun Center for Juvenile Assistance and Protection," a specialized center for juvenile suspects, was established in District X of City C. In 2010, the "probation center" system was implemented throughout City C.

¹³ Some are called "care and protection centers." Some are called "management and protection centers." Most published their own normative documents. For example, City W, District B, issued a series of documents: "Working Opinion on Establishing a Care and Protection Center to Provide Equal Protection for Juvenile Suspects Who Are Released On a Guaranty Pending Trial" (关于建立监护教育基地平等保护涉罪外来人员取保候审权利的工作意见); "Decision Establishing a Leading Group for a Care and Protection Center for Migrant Suspects" (关于成立涉罪外来人员监护基地领导小组的决定); "Decision Establishing the First Group of Care and Protection Centers for Migrant Suspects" (关于建立首批涉罪外来人员监护基地的决定); "Detailed Regulation for the Work of Migrant Care and Protection Centers" (外来人员监护基地工作实施细则) etc.

¹⁴ The leading group was made up of responsible persons from the following 12 agencies: the general committee on public safety, the people's court, the people's prosecutor, the bureaus of education, public security, civil affairs and justice, personnel resources, social security, youth league, women's federation and the committee for the well-being of youth.

Each district established leading groups that included the prosecutor's office, the Chinese Communist Party political-legal committees,¹⁵ the courts, public security bureaus, judicial bureaus, the "next generation working committee," and other bodies. Some districts even established written regulations specifically to regulate the work of the probation centers.¹⁶ As of June 2011, City C had 17 probation centers, including state-owned enterprises, private enterprises, and residential communities. Some probation centers focused on migrant juvenile suspects, some on all migrant suspects, and some on female suspects. According to one study, in 2010, a total of 89 people received assistance from the probation centers, of whom 29 were juveniles and most of those were migrants.

1.2. *Research Methods*

1.2.1. Questionnaire Survey

We distributed 300 questionnaires and received 253 valid responses, a response rate of 84.3%. Of the valid responses, 87 were completed by police officers or prosecutors, 58 by judicial personnel, 38 by guarantors, and 43 by juveniles.

1.2.2. Interviews

We conducted 16 group interviews and 51 individual interviews with law enforcement officers, guarantors and juvenile suspects involved in the work of the probation centers. Interviewees consisted of 14 police officers and prosecutors, 4 judges, 15 guarantors and 18 juvenile suspects.

1.2.3. Document Analysis

We cataloged and analyzed the documents and information collected during our study. Sources included: local regulatory documents, archives of individual cases from the probation center pilot program, brief reports of the pilot project progress and developments, working summaries, typical case files, and other products of research.

2. OPERATIONS

The objective of establishing probation centers is to improve support mechanisms for alternatives to pretrial detention and explore new ways for more expansive use of non-custodial mandatory measures for juvenile suspects. Based on our observations, the operation of probation centers in practice is as follows:

2.1. *Categories of Probation Centers*

¹⁵ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

¹⁶ For example, City C and City J issued documents including: "Working Opinion on Establishing a Probation Center Program to Protect Juvenile Suspects' Right to Pretrial Release With a Guaranty" (关于建立管护教育基地保护涉罪未成年人取保候审权利的工作意见) "Detailed Regulations on Implementing on Working in Probation Center Programs for Juvenile Suspects" (涉罪未成年人管护教育基地工作实施细则), "Workflow Procedures on Admitting Juvenile Suspects into Probation Center Programs" (办理涉罪未成年人入驻管护教育基地工作流程), etc.

Probation centers can be classified as “open” or “semi-open,” depending on the extent to which they restrict personal liberty. Open centers, the type present in City S, allow participants to come and go freely, but require participants to abide by center discipline. Semi-open centers do not, in principle, permit participants to leave. In the event that a participant needs to leave, he must first obtain approval. In practice, most areas have adopted the semi-open approach. Our study indicates City J has both semi-open centers and open centers, which are referred to as “care and education centers.” The implementation of different types of probation with different degrees of restrictions on personal liberty provides a model of different ways to implement “residential surveillance” or “release with a guaranty pending trial.” It also provides valuable experience for establishing a diverse set of non-custodial compulsory measures with different levels of restrictions.

Centers can also be classified as “group supervision” centers or “individual supervision” centers, based on the manner of supervision. Group supervision refers to centers where a number of suspects are concentrated in the same center for supervision and organization of their residence. Individual supervision, on the other hand, refers to the assignment of individual guarantors to conduct one-on-one supervision of subjects, keeping the subject’s status confidential. For centers adopting individual supervision, neither center employees nor the subjects themselves know the status or identity of other subjects. All locations of the study, except for City S, used the group supervision approach.

Centers can also be classified as “categorized” or “uncategorized,” based on whether they oversee suspects according to categories. “Categorized” centers assign suspects to different centers more suited to them, based on criteria such as gender or age (adult or juvenile). Centers then adopt the means of observation and mentoring that is most relevant to that category. This approach was developed based on practical experimentation, and has been adopted by some centers in Cities S, C, and J. “Uncategorized” probation centers place all subjects in the same center and adopt a uniform method of supervision and mentoring.

2.2. *Eligibility for Probation Center Programs*

In order to ensure that non-custodial measures effectively link up with the probation center system, centers in various areas have devised typical criteria for admission. Our studies show that there are variations in these criteria. Some areas distinguish between the criteria for admission and the criteria for release on guaranty pending trial, and require that a suspect simultaneously meet both sets of criteria before they can be admitted. Other areas adopt unified criteria. Anyone who meets the criteria for entering the probation center can also be released on a guaranty pending trial.

City S implements a two-step eligibility process. First, the investigating agency determines whether to release a juvenile suspect with a guaranty pending trial and then decides whether to admit the suspect into the probation center system. Thus, the criteria that must be met for each step are defined separately and are therefore not completely identical.¹⁷ Conversely, City W has

¹⁷ For example, the prosecutor and the public security agency in District M in City S jointly issued “Regulations on the Cautious Use of Detention for Juvenile Suspects (Experimental)” (关于对未成年犯罪嫌疑人慎用羁押性强制措施的若干规定(试行)), specifying prerequisites for non-custodial compulsory measures for juvenile suspects from two aspects: First, suspects satisfying the following circumstances should not be detained: (1) a suspect whose offense is not considered especially egregious and who is a first-time offender, an opportunistic offender, or an offender accused of a crime of a negligence; (2) a suspect who is still in the process of preparing to commit the offense, who voluntarily discontinued preparation for the offense, was prevented from

combined the criteria for entry to a probation center with the criteria for release with a guaranty pending trial. When juvenile suspects meet the criteria for entry to a probation center, prosecutors take the necessary steps to process them for release with a guaranty pending trial.¹⁸ City C's conditions for entry are broadly similar to City W. City C does not clearly distinguish between the criteria for admission to a probation center and the criteria for release with a guaranty pending trial. If a juvenile meets the criteria for admission to the center then that indicates that he also meets the criteria for release with a guaranty pending trial.

Although admission criteria vary from one probation center to another, in general the content is basically the same. In sum, the factors considered for whether a juvenile suspect may be accepted by a probation center primarily include: (1) whether the subject is a first time offender, an opportunistic offender, or accused of a crime of negligence; (2) whether the subject is accused of being an accomplice with a lesser degree of culpability or was induced into committing a crime; (3) whether the crime was only in the preparation phase and was not completed, or whether the suspect voluntarily discontinued preparation for the offense, or whether the suspect was prevented from completing the offense or used excessive force in self-defense or used excessive force to avoid danger; (4) whether the suspect surrendered voluntarily to the police or made valuable contributions to the criminal investigation; (5) whether the offense was a minor crime and the offender has shown remorse, relinquished illegal profits, or provided compensation; and (6) whether the offender has reconciled with the victim and has obtained the forgiveness of the victim.

2.3 *Risk Assessment for Admission to the Probation Centers*

completing the offense, or who used excessive force in self-defense or who used excessive force to avoid danger; (3) a suspect who was an accomplice or was coerced into committing a crime; (4) a suspect who surrendered voluntarily to the police and made valuable contributions to the criminal investigation; (5) a suspect who made a truthful confession, expressed remorse, relinquished any illegal gains and provided compensation for any losses; (6) a suspect who has reconciled with the victim and obtained the forgiveness of the victim; or (7) where there are other mitigating factors. Second, suspects meeting the following requirements can be granted alternatives to detention like pretrial release with a guaranty or residential surveillance:

(1) the suspect has a fixed location to live, study or work; (2) the suspect can provide an appropriate person to serve as a guarantor or provide sufficient funds for a guaranty; (3) the suspect has expressed remorse, and his family, school, residential committee, village committee, company, or social association has the resources to provide supervision and mentoring; (4) the suspect does not pose further danger to the community and the case is likely to proceed without incident. Accordingly, the prosecutor and the public security agency also issued "The Opinion on Implementing a Probation Center Program for Juvenile Suspects in District M" (关于建立 M 区未成年人社会观护体系的实施意见), which specifies the following suspects can be admitted into the program: (1) a local juvenile suspect who is eligible for pretrial release has no school, no job and no supervision; (2) a migrant juvenile suspect who is eligible for pretrial release and currently lives temporarily within the city; (3) other juvenile suspects eligible for entering the probation center program. Thus, the prerequisites for obtaining pretrial release and entering the probation center program are not the same. Not every suspect who has obtained pretrial release is eligible for participating in the probation center program.

¹⁸ For example, according to City W's "Regulations on Probation Center Programs for Migrant Suspects" (涉嫌犯罪外来人员管护教育基地工作条例), a migrant suspect may be admitted to a probation center if he satisfies several conditions. If a suspect is likely to be sentenced to imprisonment under 3 years, there is no necessity for detention, he is unable to provide a suitable individual to serve as a guarantor or does not have sufficient funds to pay for a guaranty but satisfies the other prerequisites for pretrial release, he can enter the probation center program if he also falls into any one of the following categories: (1) the suspect is a first time offender, an opportunistic offender, or is accused of a crime of a negligence; (2) the suspect was an accomplice or was coerced into committing the offense; (3) the suspect was still in the process of preparing to commit the crime and had not completed the offense, the suspect voluntarily discontinued preparation for the offense, or was unable to complete the offense; (4) the suspect used excessive force in self-defense or in exigent circumstances to avoid danger; (5) the suspect surrendered voluntarily or made valuable contributions to the criminal investigation; (6) the offense was minor and the suspect expressed remorse, relinquished any illegal gains, provided compensation to the victim and obtained the victim's forgiveness. Thus, if a juvenile suspect has met the eligibility requirements for entry to a probation center program, he will have also met the requirements for pretrial release with a guaranty.

Our research shows that most of the jurisdictions we studied conduct risk assessments of juvenile offenders before admitting them to probation centers. Some districts extend the risk assessment to the determination of whether it is necessary to continue to detain juveniles who are already in detention.

City S adopted a dynamic risk assessment process for juvenile suspects. The first part of this process involves promoting the use of risk assessment at the early stage of a case when the investigation is still ongoing. The second part involves the introduction of multiple types of risk assessments. After the risk assessment during the investigation stage, additional risk assessments are conducted both when the prosecutor is considering whether to approve daibu, and again when the prosecutor is considering whether to bring an indictment. The goal is to have a clear grasp of any changes in the risks posed by releasing the juvenile suspect and to modify the applicable compulsory measure as appropriate and in a timely manner.

For example, the District M prosecutor has created two forms: the “*Assessment Form: Viability of Non-Custodial Measures for Juvenile Suspects*” (未成年犯罪嫌疑人非羁押措施可行性评估表) and the “*Assessment Form: Necessity of Continued Detention for Juvenile Suspects*” (未成年犯罪嫌疑人继续羁押必要性评估表) for the approval of daibu initially and at the indictment stage, respectively. The former is used when determining whether to approve daibu in the first place and covers four categories of factors: the nature of the offense conduct, the suspect’s personal circumstances, the suspect’s family situation, and the availability of a guarantor or other forms of support. These categories encompass 26 risk assessment factors, including the category of criminal conduct, the age of criminal responsibility, the circumstances of the juvenile suspect’s supervision, and his schooling. The second form is used at the stage of a case when the prosecutor is deciding whether to bring an indictment. It contains three main categories of risk assessment factors: the nature of the criminal conduct, the suspect’s personal circumstances and support by family and potential guarantors. These categories encompass 20 risk assessment factors including crimes discovered after the initiation of the case, the commission of new crimes, reconciliation with and compensation of the victim, and the supervision of the suspect.

In addition, the District M prosecutor has also created the “*Follow-Up Risk Assessment Form: Application of Non-Custodial Measures to Juvenile Suspects*” (未成年犯罪嫌疑人非羁押措施风险跟踪评估表) to conduct timely follow-up risk assessments during a juvenile suspect’s time in a probation center to track any changes in the risk assessment while the suspect is at the center.

Since 2011, City S has taken further steps to explore the use of non-custodial measures for juvenile suspects. In order to enhance the objectivity of the risk assessment, the prosecutor’s office has required that prosecutors seek out the views of the officials handling the case, as well as the views of the victims and the victims’ legal representatives when determining whether to release a juvenile suspect with a guaranty pending trial and whether to admit him to a probation center.

Under City W’s regulations, admission of juvenile suspects to probation centers requires a multi-step process that includes notice, application, risk assessment, review and approval. Once the investigating agency receives a suspect’s application to be admitted to a probation center, the agency should commence the risk assessment process. The risk assessment encompasses both a

social background investigation and a legal evaluation. The social background investigation should be conducted by the investigating agency, with the assistance of bureau of justice administrative staff and should focus on factors such as the suspect's home life, personality, behavior, conditions for education and supervision, and their risk of reoffending.

The legal evaluation, which is done primarily by the investigating agency, considers the reasons for the juvenile suspect's application and focuses on factors such as the danger to the community posed by the suspect, the risk of personal danger, risk of impeding the prosecution, whether the facts of the offense have been thoroughly investigated already, and the possible sentence. Based on the risk assessment, the investigating agency should make a recommendation, indicating whether it agrees with the suspect's suggestion that he be admitted to a probation center. The agency's recommendation should then be referred to the leadership group for a final determination.

City C's risk assessment process is similar to that of City W, although, from district to district, there are some variations in the content of the risk assessments. For example, assessments in District X in City C focus on three areas, namely "whether the suspect will obstruct justice; whether the suspect will reoffend; and whether the suspect can be reformed." Assessments consider a suspect's "basic situation, morality, behavior, expressions of remorse, and whether the suspect can be reformed." Some districts require that two risk assessments be conducted before a decision is made on a defendant's eligibility for release with a guaranty pending trial and admission to a probation center.

For instance, District T's risk assessment procedure for juvenile suspects is as follows. First, there must be a risk assessment to determine whether the suspect can be released on a guaranty pending trial. For that assessment, the investigating agency should consider the suspect's risk to society, his personal risk, the risk of recidivism, whether the suspect might obstruct the proceedings, whether the investigators had satisfactorily completed the factual investigation, and the possible sentence. Based on an overall evaluation, suspects are ranked as high risk, medium risk or low risk. For high-risk suspects, daibu should be approved; for low-risk suspects, approval of daibu should be declined; for medium-risk suspects, the official responsible for the case should review the risk assignment and then report to the chief prosecutor for a decision. Second, suspects may apply voluntarily and juvenile suspects may apply with the permission of their guardians. After receiving an application, the pre-entry risk assessment process begins. The leadership team's office will conduct a risk assessment based on factors such as the suspect's age, growth experience, family situation, personality, and motive for offending, to ensure that the suspect will not pose a danger to the community while at a probation center. Some juvenile suspects may not be admitted into a probation center even if they have been approved for release with a guaranty pending trial.

Overall, as part of their pilot projects, the different districts have taken the initiative to implement stringent risk assessment processes and have taken into account a range of risk factors. Their efforts not only help to ensure the proper use of release on guaranty pending trial but also ensure appropriate linkages between the probation center system and available alternatives to detention.

2.4. *Providing a Guaranty in the Form of a Guarantor or Money*

For a juvenile suspect, the availability of a suitable guarantor, or the payment of money as a guaranty, is a prerequisite for release with a guaranty pending trial. Our research has found that the various district's exploratory studies emphasized the role of probation centers in supporting applicable alternatives to detention. Districts use probation centers as social support entities for the purpose of securing pretrial release with a guaranty, thereby helping people who would otherwise be unable to find a suitable guarantor or pay guaranty money to meet the prerequisites for pretrial release. In some districts, third parties supply funds for the guaranty. Others use the probation centers to supply guarantors. In either case, these districts are doing what they can to provide alternatives to detention for juvenile suspects.

In order to expand the use of alternatives to detention for juvenile suspects, the City S prosecutor has experimented with a "third party guarantor" system where community enterprises and social organizations act as third parties to pay a money guaranty for juvenile suspects who are unable to locate suitable guarantors or provide money for a guaranty themselves. In City W and City C, juvenile offenders who are unable to provide guarantors or money for a guaranty may have probation centers appoint suitable individuals to serve as guarantors. The guarantor then assumes the duty of monitoring and making periodic reports on the suspect for the duration of the pretrial release period. Guarantors are typically the leadership staff, security staff, or other employees of the probation center. Where the center is located in a school, the guarantor is typically the suspect's class tutor or counsellor. In normal circumstances, the guarantor is also responsible for the suspect's education and skills training.

Within probation centers, the relationship of the guarantor to the suspect is primarily as a supervisor-educator. The guarantor's supervision and education of a juvenile suspect typically involves reporting on the suspect's work, thought processes, psychological counselling and education. In interviews, most guarantors considered focused supervision and education to be more effective at maintaining communication with suspects than the stricter pretrial release with a guaranty pending trial, and was typically more effective in educating suspects. In practice, guarantors have not neglected the supervision and education of their charges purely because they are not personally liable for the adverse consequences of violations of the conditions of release. Suspects are also more willing to accept the supervision and mentoring of their guarantors. The guarantors and suspects are on better terms. Our interviews show that most guarantors are happy to assume the duties of guarantor and can dutifully perform their tasks. Some guarantors have even tried to broaden communication with their charges in diverse ways, such as eating and living together, participating in labor together and organizing cultural events.

2.5. *Supervision and Education of Juvenile Suspects*

Probation Centers not only provide accommodations and the basic living conditions for juvenile suspects but also provide supervision and education. Our research revealed that in some locations, the guarantor also serves as the single individual responsible for providing all of the following: supervision, education, and psychological counselling. In other locations, a different individual is responsible for performing each function.

2.5.1. Appropriate Restrictions on a Suspect's Movements

In order to facilitate the supervision of juvenile suspects and prevent escape and the commission of new violations of law, the various pilot projects typically impose certain limits on movements of the suspects at the probation center. Some locations, such as City S, forbid subjects from leaving the county in which they reside. Others, such as Cities W and C, forbid subjects from leaving the probation center but if the subject has a legitimate reason to leave, he must request permission from his guarantor or the probation center as well as from the investigating agency.

Most centers have created *pro forma* documents for the regulation of applications for, and cancellations of, leave. If a subject does not return to the center in a timely manner, the guarantor or the probation center must promptly notify the law enforcement authorities. City J has fully open probation centers where subjects are fundamentally at liberty. Our research shows that most subjects are able to comply with center regulations, with only isolated incidents of suspects violating the regulations, such as by failing to return promptly to the center after an approved leave of absence. Relatively minor violations are typically dealt with by an admonition and letters of remorse. More serious violations are subject to punishment by the authorities in charge of the case or may even result in a change in compulsory measures.

2.5.2 Requiring Regular Reflection Reports¹⁹

Communication and exchanging ideas are a means by which probation centers supervise the education²⁰ of juvenile suspects. Juveniles' thinking is less stable and more subject to fluctuation. In order to achieve their goals of supervision and education, various districts have attempted to understand changes in juvenile suspects' thinking through periodic reports. In City J, subjects are typically required to record an impression from their work or education experience every three days and then provide a detailed overall report every ten days. These reports are periodically reviewed by the person in charge of educating subjects, who then adds any personal opinions or comments. In this way supervisors can engage in exchanges with subjects.

The content of the comments mainly includes: (1) writing affirmative and encouraging remarks; (2) correcting juvenile suspects' misunderstandings; (3) explaining issues regarding social phenomena; (4) answering questions and posing additional questions; (5) expressing concern for subjects' diet, living conditions, and personal health; (6) suggesting additional demands for improvement; and (7) highlighting typos and correcting the use of incorrect Chinese characters. Listening to subject's reports or reviewing their written reports is a means by which teams supervising the education of the suspect²¹ can fully understand the changing path of a juvenile suspect's thinking. In our interviews, most guarantors agreed that listening to subjects' reports of their thoughts, or reading their written reports or diaries, was the main method by which they

¹⁹ Translator's note: the literal meaning of the original Chinese, "sixianghuibao" (思想汇报), is "thought report" but, for purposes of English fluency, we have translated this as "reflection report."

²⁰ Translator's note: up to this point, we have translated "jiandujiayou" (监督教育) as supervision and education. However, in this context, it appears that "supervision of education" is more appropriate as the context implies that this form of education is closely connected to reforming the juvenile suspects' thinking and, by extension, his behavior. For this reason, where appropriate, we have translated this term as "supervision of the education" or "supervising the education" of the suspect.

²¹ The supervisory team consists of personnel handling cases, comprehensive neighborhood administration committee, local judicial bureau personnel and the responsible persons at the probation center, and guarantors.

understood how their subjects were thinking and was an important means of supervision of their education.

Our research showed that the City J prosecutors have also been actively exploring new, more diverse methods of supervising education. In 2011, the prosecutor's office of City J teamed up with the City J Communist Youth League and organized visits to patriotic education sites, including the Revolutionary Martyrs' Memorial Garden, in order to conduct ideological education. At the same time, the City J prosecutor's office used the probation centers as a place for more junior officials to engage in social interactions. During their off-duty time, junior officials engaged in face-to-face conversations with young suspects and actively participated in supervising their education.

2.5.3. Psychological Counseling

Most probation centers place great emphasis on psychological counselling and some even consider it to be indispensable to their work. Starting in 2004, the prosecutor's office of City L (within City C's jurisdiction) has offered psychological counselling to juvenile suspects, with an emphasis on providing psychological counseling to juvenile suspects with mental illnesses. After 2010, the offering of psychological counselling became more professional and standardized. City L conducts scientific analysis and evaluation of juvenile suspects' personality types, character traits, self-control and intellect based on specialized software such as the "*Criminal Psychology Exam: Personality Evaluation*" (犯罪嫌疑人心理测试·个性分测验) and the "*Minnesota Multiple Personality Exam*" (明尼苏达多相人格测定). Based on the subjects' circumstances, such as their social background or their experience growing up, the project selects suitable staff to communicate with them with the aim of eliminating their mental illness, encouraging them to find it within themselves to express remorse, and to return to society.²²

Our studies also show that some probation centers have established joint training programs with nearby schools and school counselors provide counseling for subjects. Other centers have hired professional therapists to provide counselling.

2.5.4. Legal Education

Research shows a strong link between a juvenile's level of education, specifically their knowledge of the law, and their tendency to commit crimes. Pilot projects have taken the development of legal education as an important channel for increasing juvenile suspects' legal awareness. In District C of City W, the management and education team organizes legal classes for suspects at least once a week, with the aim of broadening their legal knowledge, encouraging a law-abiding consciousness and preventing recidivism. Classes are organized by prosecutors who directly handle cases. District Q in City C has established a "mentorship system," where law enforcement officers act as individual mentors for juvenile suspects and provide them with one-on-one legal education. Education takes place using methods such as interviews, telephone calls, video calls, QQ chats, and emails.

²² By the time of our research, none of six juvenile suspects in the probation program in City L had committed a new crime.

2.5.5. Skills Training

Probation centers typically select and arrange appropriate skills training for subjects based on different characteristics such as gender, age, and individual interests. The training includes industrial safety knowledge and manufacturing skills, with the aim of enabling subjects to grasp basic labor skills and increase their ability to support themselves upon release. Our research shows that some centers provide appropriate allowances to subjects. Others treat them like regular employees and provide them with the same pay for the same work.²³

With the increasing experimentation concerning the use of probation centers, there has been continuing innovation and development of labor skills training methods. Our research shows that the City J prosecutor's office expanded its original program of education and training by encouraging vocational schools to participate in training subjects. They have also cooperated with culinary institutes and other technical training schools and have invited vocational schools to conduct skills training for subjects. The participation of vocational schools has enabled subjects' occupational skills training to become more professional and practical.

2.6. *Exit Certificates*

Probation centers typically begin to compile a dossier on a subject when he first enters the center. Mentors complete follow-up evaluation forms and periodically record the subjects' activities and what they are learning. After a juvenile suspect concludes his stay at a center, centers issue certificates regarding the subject's performance at the center. The certificate may have an impact upon the outcome of the case. There are three main types of situations where the certificate is used as a reference: (1) the certificate is delivered by the public security agency to the prosecutor to be used as a reference when the prosecutor is considering an indictment. In particular, when the prosecutor exercises his discretion not to prosecute, the certificate is frequently an important reference in assessing the suspect's risk to society; (2) when the prosecutor decides to bring an indictment, the certificate is given to the court as a reference to use in deciding whether to convict and if so, what the appropriate sentence should be; and (3) the certificate can inform the prosecutor's sentencing recommendation and the court's sentencing decision.

The courts of District T in City C have established a cooperation scheme with the "New Hope Community Practice Center," to implement pretrial evaluation and post-judgment observation and supervision, to expand the space for supervision of education for juvenile suspects. When courts impose non-custodial punishments on juvenile defendants, they issue a "pre-sentencing probation notice" (判前观护通知书). The juvenile defendants are then sent to the New Hope Community Practice Center for a period of probation. Judicial staff visit the center periodically to learn of the defendant's progress and use the center's reports as one of the factors in determining an appropriate sentence. After handing down a non-custodial sentence for a juvenile defendant, the court issues a "post-sentencing probation notice" (判后观护通知书) and refers the defendant to the New Hope Community Practice Center for probation. Judicial staff visit the center periodically to converse and interact with the defendant, to understand his learning, working, and living conditions, and to help him re-enter society.

²³ For example, "Dechun Center" in District X in City C would compensate suspects according to their positions in the training program. The salary is as high as other staff who are actually employed in the Center.

2.7. *The Speed of Handling Cases Where the Juvenile Suspect is in a Probation Center*

In order to shorten the time it takes to resolve a case where a probation center is used, all the districts participating in pilot projects have imposed shorter time limits for handling cases where the suspect is in a probation center. For example District C of City W has adopted the following time limits for a criminal case involving a juvenile who is in a probation center. The public security agency must conclude its investigation within 7 days of the suspect's release with a guaranty pending trial. The prosecutor must decide whether to file an indictment within 7 days of receiving the case from the public security agency. The court must issue a decision within 15 days of accepting the case. If the prosecutor decides not to prosecute, it should typically issue its decision not to prosecute within 30 days of receiving the case. Compared to the time limits defined in the CPL, the time limits for investigation, indictment, and trial are all noticeably shorter for cases involving juvenile suspects in probation centers and cases are processed much faster. This not only improves efficiency in disposing of cases, but reduces the risk of escape or recidivism during the period the suspect is in a detention center.

3. ANALYSIS OF EFFECTIVENESS

The use of probation centers as a foundation upon which to build social support systems has expanded the use of alternatives to detention for juvenile suspects. This demonstrates concern for this special group of people and meets the principle of giving greatest priority to the best interests of the child. This also fulfills the requirement under Chinese law that the use of daibu for juveniles be strictly limited.

3.1. *Impact on Pre-trial Detention*

Article 67 of the CPL provides that guarantors must: (1) have no interest in the outcome of the case; (2) be able to fulfil the duties of guarantor; (3) continue to enjoy full political rights; (4) not be subject to restrictions on liberty; and (5) have a fixed residence and income. A guarantor's duties include ensuring that the suspect who is the subject of the guaranty abides by the law. If the guarantor discovers that the suspect is about to violate the law or has already violated the law, the guarantor must promptly report the violation to the authorities. In practice, juvenile suspects' guarantors are typically their legal representatives or close relatives. However, juvenile suspects who are migrants typically have parents and relatives who are either not present in the area where the alleged crime occurred, or if they are present, they lack a fixed residence and income in that area. This greatly limits the availability of alternatives to detention for juveniles who are migrants. Probation centers serve as important support mechanisms for alternatives to detention because they expand the potential sources of guarantors. Where juvenile suspects are unable to provide guarantors or lack money for a guaranty, probation centers can provide other suitable people to serve as guarantors, thus increasing the availability of pretrial release with a guaranty.

Increasing the use of alternatives to detention for juvenile suspects means an overall reduction in the number of suspects held in pretrial detention. All other conditions being equal, when probation centers serve as support mechanisms for alternatives to detention by providing guarantors or money for guaranties for juvenile suspects, it decreases the overall pretrial detention rate. For

example, through establishing a probation center system, the number of juvenile suspects in District M of City S who were released with a guaranty pending trial increased by 165%, from 23 in 2004 to 61 in 2008. The proportion of juvenile suspects released with a guaranty pending trial who were migrants increased from 17.4% in 2004 to 76.9% in 2009, greatly increasing the rate of pretrial release for migrant juvenile suspects.

To cite District W of City C and City J as additional examples, since the introduction of probation centers in 2007, the proportion of juvenile suspects in District W released with a guaranty pending trial increased from 8.8% in 2006 (before the introduction of probation centers) to 17.2% in 2007, and to 36.0% in 2010. Although the percentages of pretrial release of juvenile suspects decreased in 2008 and 2009, those percentages remained higher than the percentage in 2006. The proportion of juvenile suspects in City J released with a guaranty pending trial increased year-on-year from 4.0% in 2007 to 13.6%, a marked increase from the pre-probation center release rate of 1% in 2006 (see Figure 1).

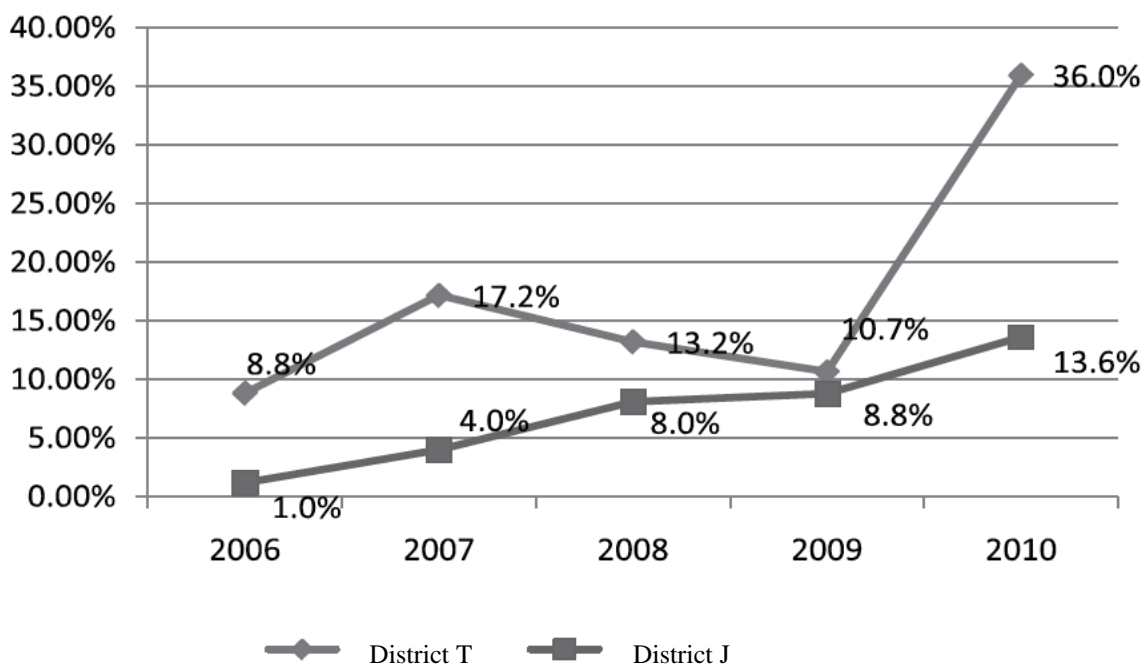


Figure 1. Percentage of Juvenile Suspects Released With a Guaranty Pending Trial

A comparison of the outcomes of cases before and after the introduction of the probation center pilot programs also illustrates the impact of the probation centers on the rate of pre-trial detention.

Case Study 1:

Shen was a sixteen-year-old of Han ancestry from Henan Province with only a middle school education level. Shen had no criminal record and was a first time offender. Shen was suspected of

stealing 2,100 yuan.²⁴ The case occurred after the establishment of the pilot probation center program. Based on the judicial bureau's pre-prosecution investigation and assessment report and the community corrections working group's psychological report, the prosecutor took the view that there was no need to daibu Shen. That conclusion was based on Shen's age (16) when the alleged offence was committed, Shen's lack of a criminal record, the relatively minor nature of the offence, Shen's expression of remorse, and the relatively low risk to society. The prosecutor instead recommended that Shen be admitted into a probation center for supervision and mentoring. Following the probation center's case assessment, the center agreed to accept Shen. Following Shen's mentoring at the center, the prosecutor ultimately decided not to prosecute Shen.

Case Study 2:

Yan was an unemployed 17-year-old of Han ancestry from Szechuan Province, with a primary school education level. Yan was suspected of stealing 2,400 yuan.²⁵ Yan had no prior criminal record. The case occurred prior to the establishment of the pilot probation center program. The prosecutor approved daibu for Yan so he was held in custody during the investigation and prosecution. The court ultimately sentenced Yan to three months' criminal detention and a fine of 1,000 yuan.

A comparison of how the two cases above were resolved shows the value of probation centers in reducing pretrial detention. The existence of the probation center enabled Shen to be released with a guaranty pending trial, thus avoiding pretrial detention. The prosecutor ultimately decided not to prosecute. Yan was suspected of the same offence, based on similar facts and involving a similar amount. Yan's personal circumstances were also fundamentally similar to Shen's. However, because Yan was unable to provide an individual to serve as guarantor or money for a guaranty, and because there was no probation center to enable the use of pretrial release with a guaranty, Yan was subjected to daibu and detention and ultimately sentenced to 3 months' in criminal detention and fined 1,000 yuan. The existence of probation centers enables the investigating agencies to use pretrial release with a guaranty for juvenile suspects who are unable to provide a guarantor or money for a guaranty and thus decrease the use of pretrial detention for juvenile suspects.

3.2. Impact on Conviction and Sentencing

The use of a probation center as an alternative to detention also has a certain impact on the court's ultimate decisions regarding conviction and sentencing. We randomly selected five centers and analyzed criminal cases that had already been adjudicated involving juveniles who had entered the centers between 2010 and 2011. We found that of the 26 convicted and sentenced juveniles, 24 had been given suspended prison sentences, suspended detention, probation, supervision or fines. These lighter sentences accounted for 92.3% of all cases (Figure 2). It was obvious that courts are typically more lenient to juvenile suspects who have entered probation centers, both in terms of the type of sentence and its severity.

²⁴ The equivalent of less than USD 300.

²⁵ The equivalent of less than approximately USD 400.

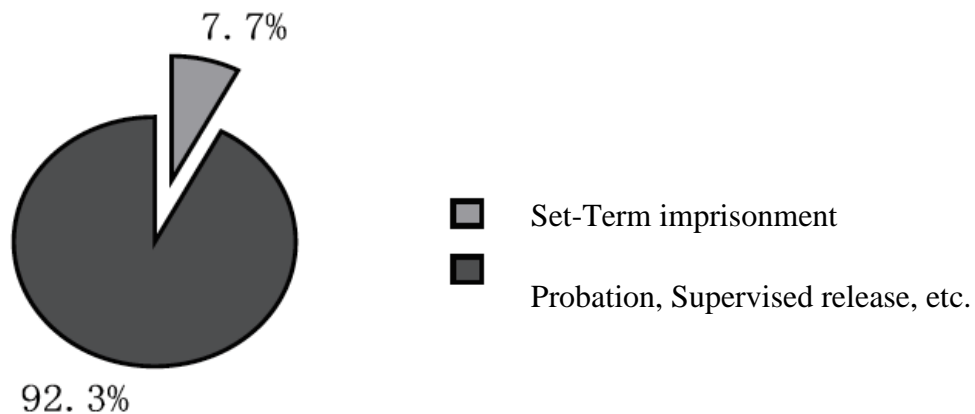


Figure 2. Sentences of 26 Convicted Juveniles who had been Admitted to the Observation & Protection Center

Surveying judges concerning their knowledge of and attitude towards the use of probation centers can also reflect the impact probation centers may have on conviction and sentencing decisions. Through interviews with judges who presided over cases with juvenile defendants, we found that most judges would consider the exit certificates prepared by the probation centers for juvenile suspects who had been sent there and, in the absence of special circumstances, would typically impose sentences that did not involve any incarceration. Some judges referred to the defendant's willingness to admit to his crimes and to his expression of remorse, phrases borrowed from the probation center report, and then imposed a lighter sentence. Other judges stated that they would not only use the probation center reports as a reference, but would directly quote them in their judgments.

Our questionnaire survey showed that 38 judges (65.5%) would use suspended sentences for juveniles who had been placed in a probation center. 29 judges (50% of respondents) stated that they would reduce sentences for juveniles placed in probation centers. 33 judges (56.9%) stated that they would give lighter sentences to juveniles placed in probation centers. 11 (18.97%) stated that they would avoid giving any sentence to juveniles placed in probation centers. 2 judges (3.45%) stated that they would not reduce sentences, or would give lighter sentences, to juveniles placed in probation centers. The majority of judges said they would consider the positive effects of mentoring when sentencing juvenile defendants to a suspended sentence, a reduced sentence, a lighter sentence or even a sentence of no punishment. This demonstrates that there is a definite link between whether a juvenile suspect has exhibited good behavior while in a probation center and judges' decisions on guilt and sentencing.

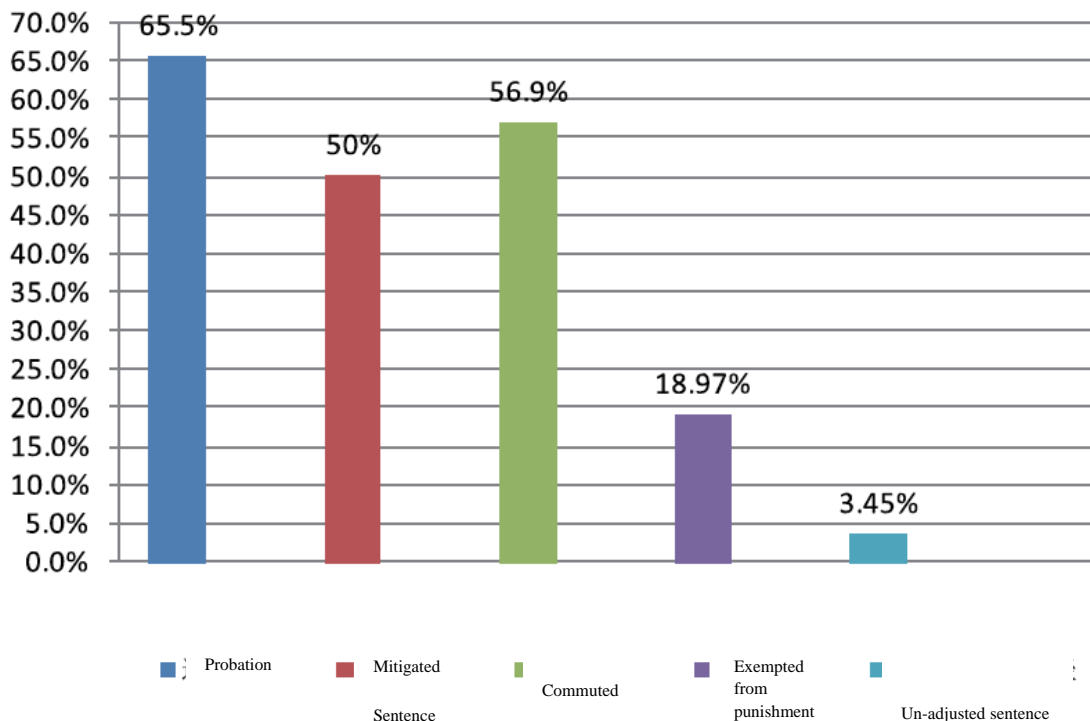


Figure 3. Judges' Attitudes towards the Center's Impact on Sentencing

3.3. *Impact on Re-entry*

3.3.1. Improvement in Life Skills

Our research shows that juvenile crimes are typically offenses involving personal property such as theft, robbery, and fraud. These crimes account for 79.1% of juvenile crimes (Figure 4). In addition, most juvenile suspects have a relatively low level of education. Of 43 juvenile suspects surveyed, only 3, or 7%, had graduated from high school. The remaining 40 received, at most, middle school education. Of these, 25 (58.1%) graduated from middle school. 15 (34.9%) received, at most, primary school education. (Figure 5). From these statistics it appears that the primary causes of juvenile crime are a lack of the following: education, suitable employment opportunities, basic life skills, and steady sources of income. Assisting juveniles in resuming their schooling or acquiring life skills will decrease the odds of juveniles reoffending, and will assist with their reintegration into society.

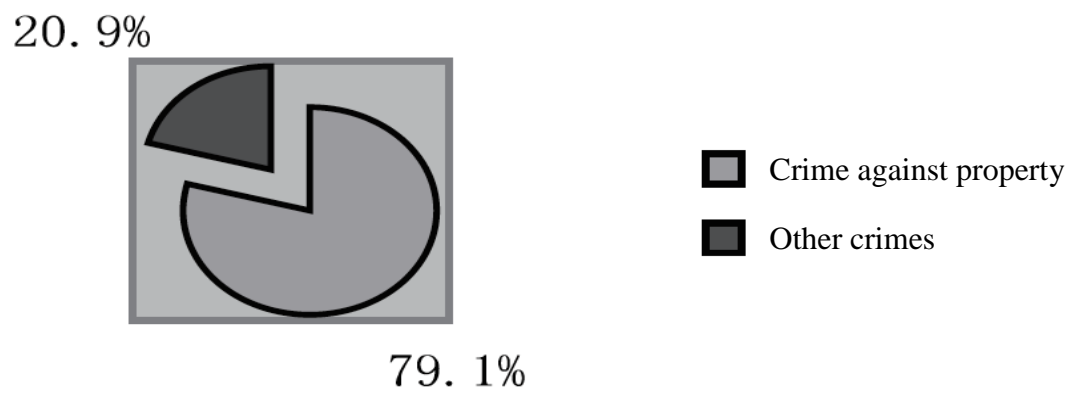


Figure 4. Charges against Juvenile Suspects

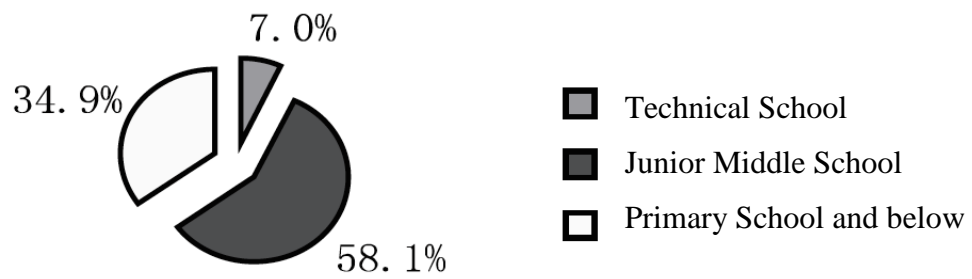


Figure 5. Education Background of Juvenile Suspects

By providing life skills training, probation centers can increase the ability of juvenile suspects to meet the demands of daily life. Our questionnaire survey showed that over 80% of juvenile suspects surveyed believed that the skills they learned at the probation centers would assist them in their daily life in the future. Of 43 juvenile suspects surveyed, 36 (83.7%) thought that the skills they learned would help them in future. Of those surveyed, 10 (23.3% of the total) thought those skills would be very helpful. 21 (48.8%) thought the skills would be relatively helpful, 5 (11.6%) thought the skills would be helpful but not greatly so and 5 (11.6%) thought the skills would be not very helpful. In addition, 2 respondents (4.7%) (Figure 6), said they were not sure whether their skills training would be useful in future. In contrast with detention in a detention center, at a probation center, juvenile suspects can, through learning life skills, increase their self-sufficiency and facilitate their reintegration into society. In addition, probation centers can, to some extent, lower the costs of juveniles' reintegration into society.²⁶

3.3.2 Juvenile Suspects' Attitudes Toward Their Futures

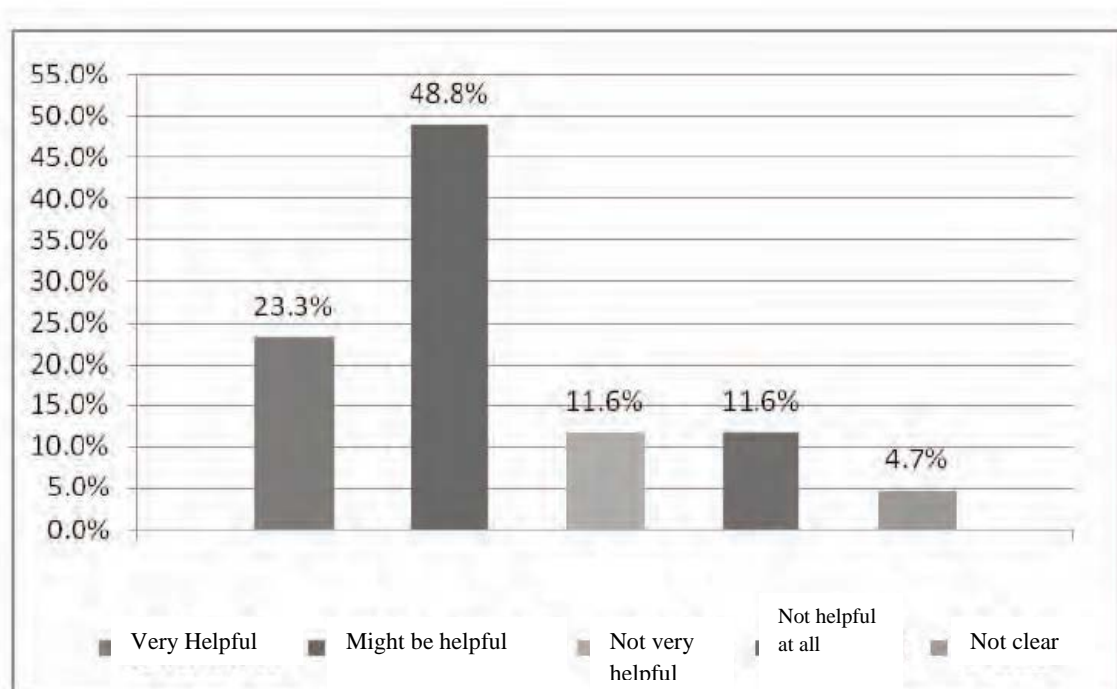


Figure 6. Impact of Skill Obtained on Future Life

²⁶ For example, a juvenile offender surnamed Liu, who was a migrant originally from outside the jurisdiction, was a first-time offender, aged 19, with a junior high school level education, who had formerly worked at a factory before being charged with an offense. He did not meet the criteria for release with a guaranty pending trial. He was detained on charges of stealing construction materials from a construction site. After the public security agency applied to the prosecutor for approval of daibu for Liu, the prosecutor rejected the application finding that Liu was just barely over 18 years old, had shown remorse, and the total value of the stolen materials was low. They found there was no need for detention and that Liu was eligible for admission to a probation center. The public security agency decided to release Liu with a guaranty and sent him to a probation center run by the J company. After a period of supervision and education at the probation center, the prosecutor decided not to go forward with criminal charges against Liu and Liu stayed on as a regular employee at Company J.

One indicator of the probation center's effectiveness in reintegrating juvenile suspects into society is the juvenile suspects' attitudes towards their future lives. Our research indicates that juvenile suspects who go through the probation center program see overall improvements in their character and are more optimistic about their futures. Most of them want to begin their new lives by finding employment or by returning to school. Through the probation centers, in 2011, nearly 90% of juvenile suspects in City S returned to school or found employment.²⁷ Our questionnaire survey discovered that of the 43 juvenile suspects currently in probation centers, 39, (90.7%) were optimistic about their futures. Only 4, or 9.3%, were relatively pessimistic (Figure 7). In addition, the 18 juvenile suspects we interviewed were also relatively optimistic about their futures. 15 interviewees expressed remorse and a desire to return home to resume their education or learn technical skills. Three interviewees expressed the hope that others would not learn about their criminal histories. In interviews, some juvenile suspects specifically referred to the psychological counselling provided by probation center staff as being helpful in helping them reflect on their behavior.

Records of follow-up visits with 16 subjects also showed that the vast majority of juvenile suspects successfully reintegrated into society by resuming their education or finding employment and led relatively stable lives after they left the probation centers. Only one person committed another crime and was sentenced to imprisonment. (See Figure 8). After the introduction of a probation center in District M of City S, the number of instances in which juvenile suspects violated the conditions of their release, escaped or committed new crimes during pretrial release with a guaranty decreased from 17 in 2005-06 to 5 in 2007, and has remained at zero since 2008.

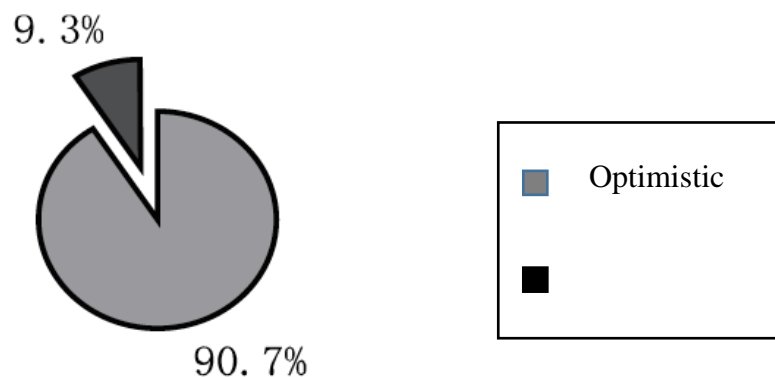


Figure 7. Juvenile Suspects' Attitudes towards Future Life

²⁷ Bojin Zhang, Zhongming Lin, "Shanghai Procuratorate Has Been Widely Applauded for Its Work on Juvenile Offenders," *Procuratorate Daily* (检察日报), (Mar. 11, 2012), http://news.jcrb.com/jxsw/201203/t20120311_822680.html.

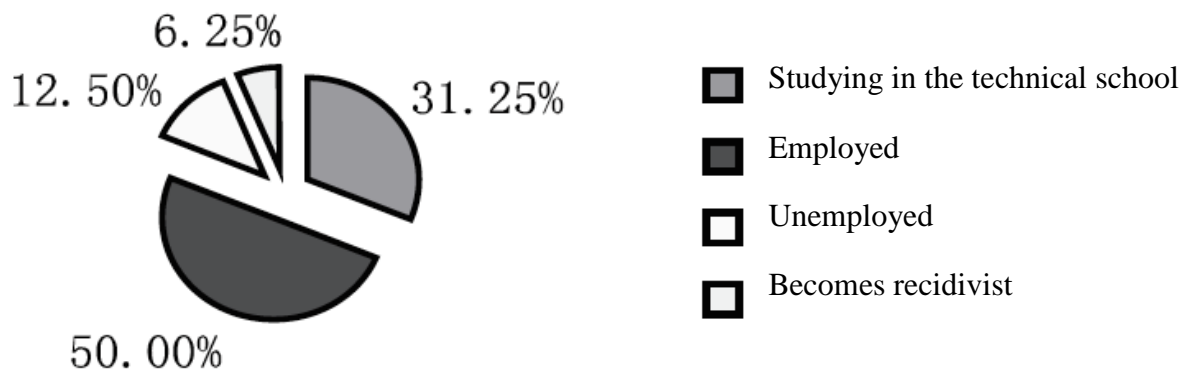


Figure 8. Record of Follow up Visit to Juveniles Who Had Been Formerly Admitted to the Center

3.4. *The Impact of the Pilot Projects on the Mindset of Police and Prosecutors*

The research team conducted individual interviews with 14 police officers and prosecutors who handled juvenile cases. Most agreed that the probation center pilot program had had a positive effect on their thinking about the judicial process.

The pilot program has deepened officials' familiarity with the education of juvenile suspects. First, educators can play diverse roles in juvenile criminal cases. Educators are not limited to the officials handling the case. Through the establishment of probation centers, the role of educating juvenile suspects can be extended from officials handling the criminal case to probation center staff as well as to staff from other community organizations. Second, the content of juvenile suspects' education can be made more substantive and practical. In interviews, numerous officials observed that the educational content for juvenile suspects extends beyond understanding the dangers of criminal behavior, and includes patriotic education, vocational training, psychological interventions and many other fields. Third, there can be continued expansion of the time and space for educating juvenile suspects. Under the programs, probation center staff had more time to interact with juveniles and more opportunities for face to face interactions. Pedagogical space can also extend to shared work space, shared dormitories, and other locations. In interviews, many officials expressed the view that probation centers were well suited to suspects who were released pretrial with a guaranty and that the center experience deepened the educational nature of juvenile criminal justice, diversified methods of education for juveniles, and had benefits for their healthy development as well as for social stability.

Some officials stated that the pilot probation centers broadened their horizons and led them to recognize that the reform of juveniles can occur in many different ways and changed their definition of what it means to "rescue" (挽救) someone. By expanding the use of pretrial release

with a guaranty, probation centers prevented juvenile suspects from being incarcerated alongside each other with the risk of negatively influencing one another and that that was another form of “rescue.” Probation centers also enable juveniles to experience the warm embrace of society, to receive social support, and to maintain closer links to their parents and other social support systems, all of which are beneficial to their rehabilitation. Life skills training can effectively enhance the ability of juvenile suspects to adapt to society and that is a more active form of rescue. Of 14 officials interviewed, 10 expressed a sense of accomplishment and pride in their work in handling cases involving juveniles in probation centers. This sense of pride came from the successful reform and rescue of juvenile suspects.

The probation center pilot program also led officials to recognize that many factors come into play in determining: a) whether to subject juveniles to daibu and detention; b) whether to bring an indictment against them; and c) whether to convict and sentence them. Not only should they consider the motive and goals of the suspect in committing the crime, the nature of the crime, the facts of the case, the danger to society, whether the offence was a first offence, whether the offence was a crime of opportunity and whether the suspect expressed remorse. Factors such as the juvenile’s life experience, family situation, personality, and social interactions also had to be investigated to get a more fully-rounded grasp of the juvenile’s case and handle it appropriately. The probation center pilot program also restored officials’ confidence in adopting alternatives to detention for juvenile suspects, and in gradually expanding their use. Our research showed that the primary reason for the reluctance of investigators and prosecutors to use alternatives to detention is the fear that the suspect will flee. Some officials also believe that that detention is helpful in obtaining evidence. Reliance upon probation centers to implement the process of pretrial release with a guaranty pending trial strengthens the supervision of suspects who have been released from detention and through risk assessments and oversight, reduces the risk of flight. Because probation centers, when compared to the traditional use of pretrial release with a guaranty, reduce the risk of flight, officials’ concerns regarding the use of pretrial release with a guaranty were alleviated.

4. PROBLEMS AND SUGGESTIONS

4.1. *The Function and Role of Probation Centers*

In practice, probation centers have assumed multiple functions, such as expanding the use of alternatives to detention for criminal suspects, correctional education of juveniles whom the prosecutors have declined to prosecute, and the community rehabilitation of criminals. However, there is no clear hierarchy of functions and there are no clear boundaries between each distinct function. This not only results in different suspects influencing each other, but can also easily result in the blurring of boundaries between different suspects. As a result, the various functions of probation centers should be more clearly organized. In order to maximize the benefits of a probation center, there should be a differentiation made between different individuals and each should be provided with the specific services that meets his or her individual needs.

The thinking behind the pilot probation center program was to expand the use of alternatives to detention by providing guarantors and temporary accommodation for juveniles who did not have the resources to provide an individual to serve as a guarantor or money for a guaranty. The amended CPL has provisions that clearly impose strict limits on the use of daibu against juveniles.

Thus, probation centers' highest priority should be to serve as a support mechanism for the use of non-custodial pretrial measures as alternatives to detention. They should seek to expand the use of those measures for juvenile suspects. On that basis, probation centers should provide food, lodging, work, education, and guarantors for juveniles who are unable to provide individuals to serve as guarantors or money for a guaranty. Centers should take responsibility for monitoring subjects, including organizing a school for education, the best work opportunities available, vocational training, and psychological counseling.

In addition to serving as a support system for alternatives to detention, the centers can also serve the functions of mentoring juveniles whom the prosecutors decline to prosecute and providing community corrections for convicted criminals. On the one hand, with respect to juveniles whom prosecutors decline to prosecute, centers can provide services that include targeted correctional education, psychological counseling and skills training. The CPL states that any juvenile who is the subject of a conditional decision not to prosecute must undertake correction and education as prescribed by the prosecutor. Connecting probation centers to juveniles who are the subject of conditional non-prosecution decisions is beneficial to the implementation of the CPL. On the other hand, with respect to convicted and sentenced criminals, centers can provide community correction services, such as psychological correction and behavioral correction, teaching juveniles to understand the dangers their actions have posed to society and prevent recidivism. Probation centers can hire psychiatric experts or partner with psychiatric services organizations to provide psychological counseling for juvenile offenders. Probation centers can also link up with community corrections institutions to share resources and strengthen correctional measures available after sentencing. Vocational training can also serve as a correctional measure to prevent recidivism.

However, it should also be noted that suspects who have been released with a guaranty pending trial or who are released to residential surveillance or are merely defendants who have been charged but are awaiting adjudication are very different from individuals who have already been convicted and sentenced and are in a community corrections program. Because there has been no judicial determination of guilt or innocence, suspects and defendants are not criminals in the eyes of the law. Unlike those who are serving a sentence they should not be subjected to a form of correction or rehabilitation. The primary role of a probation center and a guarantor is to assist the investigating agency to ensure that the released suspect or defendant complies with the conditions of their release, whether it is with a guaranty or under residential surveillance, and to prevent them from escaping or impeding the investigation, prosecution, and trial. Of course, juveniles are in a stage of their life when they should be receiving education. Probation centers should organize relevant education or vocational training, based on the individual's situation and wishes. Juveniles with mental health issues due to family circumstances or other reasons can be given counselling and therapy.

4.2. *The Relationship between Probation Centers and Law Enforcement Agencies*

Under the CPL, public security agencies are responsible for implementing and enforcing release with a guaranty pending trial and residential surveillance. In practice, however, due to a lack of sufficient personnel resources, public security agencies are frequently unable to perform this task. This often leads to release with a guaranty pending trial and residential surveillance existing more

in form than substance. In the various pilot programs, the work of probation centers has primarily been advanced by prosecutors, who have established centers in conjunction with public security agencies, courts, enterprises, schools and social welfare groups. The centers thus established enable juveniles who cannot provide individuals to serve as guarantors or funds for a money guaranty to meet the criteria for pretrial release with a guaranty. When a public security agency seeks approval to subject a juvenile to daibu, the prosecutor may decline to approve daibu, and if he considers it appropriate, may refer the juvenile to a probation center for supervision and education. The center's daily work includes the supervision and education of the juvenile, as well as reporting and other matters. The public security agencies, which are responsible for the supervision of released suspects, directly participate in the center's overall work. In the construction of future probation centers, there should be a further rationalization of the relationship between the centers and the investigating agencies to strengthen the regulatory role of public security in pretrial release with a guaranty and residential surveillance, and to strengthen the role of the prosecutor in exercising legal oversight.

4.3. *The Balancing of Probation Centers' Rights and Obligations*

In practice, there is a problem with the imbalance between the rights and duties of probation centers.²⁸ As a result of this imbalance, centers are significantly less willing to participate in the criminal process. As the saying goes, "with rights come responsibilities." When a probation center's negligence leads to a juvenile fleeing or committing a new crime, the imbalance of rights and duties makes it untenable to hold the center or its staff accountable. As probation centers and guarantors do not enjoy corresponding rights, it is difficult to hold them responsible. Our research shows that the absence of a mechanism to hold the center or a guarantor accountable is a concern shared by many investigating officers. In our interviews, the majority of investigating officers admitted that because probation centers and guarantors do not enjoy many rights, therefore they ought not to be subject to too many obligations. There should be further improvement in the system of rights and obligations for probation centers to define the rights enjoyed by centers, guarantors, and other related persons, in order to encourage enterprises, charities, and the like to participate. For instance, the government could provide subsidies and preferential tax treatment, among other benefits. At the same time, there should be a clear stipulation of their obligations. For instance, centers must, among other things: (1) provide a suitable guarantor for their subjects; (2) provide materials for their daily needs, including, clothing, food, and lodging; (3) ensure that subjects are complying with the law and with center disciplinary rules; and (4) promptly report to the authorities any unapproved departure from the center. Where a center has been derelict in fulfilling its duties, the investigating agency may order the center to review or acknowledge its shortcomings and if a subject escapes or reoffends, or where there are other serious events, a center may be penalized with fines or have its license cancelled, or the investigating agency may hold the center's supervisor accountable.

4.4. *Implementing Risk Assessments*

²⁸ According to City W's "Regulations Concerning Some Opinions on the Work of Probation Centers for Migrant Suspects (Experimental)," (涉嫌犯罪外来人员管护教育基地工作条例) probation centers enjoy the right to receive guidance and assistance from the leading group and the right to receive recognition and rewards. Meanwhile, the center's obligations include: recommending a suitable guarantor for the suspect, guaranteeing the suspect's accommodations, providing skills training, paying for the suspect's personal accident insurance, and providing timely reports of any absence without permission and the duty to address any problems caused by such absence.

Our studies found that typically it is investigating officers, with the assistance of judicial administrative staff, who conduct risk assessments of juvenile suspects. In practice, risk assessments are undertaken without the participation of lawyers and victims and thus, do not fully take advantage of the resources of the community. Investigating officers, in conducting risk assessments, may be affected by the time spent working on the case or by their regular workload, and thus encounter difficulty in compiling a complete, objective, risk assessment report. Investigating officers also commonly harbor distrust towards risk assessment reports supplied by lawyers.

Our interviews showed that the initial objective of probation centers was to provide equal protection to migrant juvenile suspects. With the accumulation of practical experience, the scope of the probation centers has increased. However, in practice, the actual process of determining which juvenile suspects may enter a probation center, and which suspects may not, has been relatively cautious. For instance, although some juvenile cases have not involved large sums of money, investigating officers have considered that the suspects' risk of danger to the community to be relatively substantial and therefore have declined to send them to a probation center. Consequently, the questions of how to enhance the objectivity and fairness of risk assessments and how to make the most use of risk assessments remain unresolved.

Law enforcement agencies can mobilize more of society's resources and invite a greater diversity of entities to participate in the conducting of risk assessments. The agency should conduct risk assessments for juvenile suspects from a legal perspective, taking into account factors such as the category of the crime, the details of the crime, and the danger to society while at the same time inviting others such as the administrative law enforcement agencies and other community entities such as lawyers, schools, residents' committees, psychological counselling clinics, and so on, to conduct risk assessments based on specific factors. A juvenile suspects' family background, typical behavior, expressions of remorse, as well as the facts of the crime, are all relevant to a risk assessment. If necessary, as part of the risk assessment prior to determining whether to grant pretrial release of a juvenile suspect with a guaranty, a hearing may be convened where the views of the juvenile suspect, the victim, lawyers and others may be heard. There should also be an accurate treatment of the risk of flight made after the risk assessment. As long as there is a certain degree of management of the flight risk after pretrial release with a guaranty is granted, there should be no *ex post facto* accountability in the event that the suspect does flee.

4.5. *Supervision of Juvenile Suspects*

In practice, there are various ways to supervise juvenile offenders. Open supervision, under which subjects may enter and leave the probation center freely, only requires compliance with center disciplinary rules. Semi-open supervision requires participants to secure permission from the probation center and law enforcement agencies before leaving the probation center. One-on-one supervision protects juvenile suspects from discrimination on account of their status and facilitates their reintegration into society, but requires more resources—and that leads to a major problem in how to muster the necessary resources effectively. Group supervision is convenient for center management, but can lead to issues of cross-contamination, that is, suspects having a bad influence on one other and discrimination against participants because of their status as suspects. Avoiding

discrimination by outsiders and preventing information leaks are the main problems facing group management.

Juvenile suspects who pose little or no risk should be placed in open centers and, in accordance with certain standards, be divided up and provided with one-on-one supervision. Juvenile suspects who pose a certain risk but who should not or need not be detained may be placed in semi-open centers or subject to more stringent regulations.

4.6. *Increasing the Effectiveness of Skills Training*

The skills training provided at probation centers has had a relatively obvious impact. Most juvenile suspects acquired some skills which were beneficial to their reintegration into society. Our research shows that some have already become key technical employees of some enterprises. However, some juvenile suspects felt that they did not learn any skills in the centers, or that the skills they learned were not going to be very helpful to them. One reason is that enterprises' work posts themselves are unable to provide appropriate skills training. Another reason is that the juveniles themselves are not interested in the skills training provided by the enterprises and are not enthusiastic about learning the skills offered. To the extent possible, technical skills training should be tailored to the individual circumstances of juvenile suspects.

Juvenile suspects who are still in school should first be offered the opportunity to study at a regular school and receive a standard education. For those who are unwilling to return to school, they may be given skills training. During school attendance and the skills training period, psychological counselling may be offered as part of the suspects' education, provided it does not amount to the same kind of rehabilitation and community corrections to which convicted persons are subjected. Juvenile suspects willing to engage in labor may be provided with labor that is within their abilities, but they should not be subjected to forced labor. They should also be kept strictly separate from criminals engaged in rehabilitation through labor.

4.7. *Coordination with Law Enforcement Agencies' Personnel Evaluation Mechanisms*

Public security agencies, prosecutors and courts each have their respective personnel evaluation mechanisms, aimed at ensuring that their officers fulfill their duties according to law. Personnel evaluation results are tied to bonuses and promotions for officials. Through our interviews, we discovered that officials are frequently concerned about how their handling of a case will affect their performance evaluations. For instance, a low case clearance rate, low rate of approval of daibu, or a low rate of approval for indictment, may all affect a public security agency's personnel evaluation results. Probation centers fundamentally expand the institutional use of non-custodial measures and decrease the use of pretrial detention. As such, they necessarily conflict to a degree with investigating agencies' personnel assessment mechanisms.

Assessment criteria should be defined based on their legal and social effects. When a suspect is referred to a probation center, this should count as a successful case resolution. Defendants released with a guaranty pending trial to participate in probation center programs should not be counted when daibu approval rates are calculated. Similarly, when prosecutors decide to decline prosecution of a suspect in a probation center, there should be no negative assessment of the quality

of the public security investigation. When a defendant in a probation center is given a suspended sentence or probation, the case should not be used to evaluate the quality of the prosecutor's work.

Chapter 14: Prosecutorial Review of the Necessity of Pretrial Detention

LAN Xiangdong,¹ and WANG Ran²

Abstract: *Based on our empirical analysis of Chinese prosecutors' review of the necessity of pretrial detention, we were able to find that on the one hand, through experimentation in pilot programs, prosecutors have achieved some initial success in implementing the review process, and in exploring the review mechanism, as well as other facets. On the other hand, there are still some problems, including the low rate of actual implementation, the lack of clarity in the methods and standards to be used in the review process, and the inadequacy of the complementary measures necessary to support the review process.³ Therefore, given the goals the review process was designed to achieve, and in order to increase the rate at which prosecutors use the review process, we propose making the prosecutor's decision binding, improving the methods of review and strengthening the complementary measures needed to support the review process.*

In 2012, the addition of a formal process for prosecutors to review the necessity of detention as part of the amended *Criminal Procedure Law* (“CPL”) showed that the spirit of China's legislation was to respect and protect defendants' human rights. Under Article 93 of the CPL, prosecutors are charged with the task of tracking a case from daibu⁴ through trial and judgment and undertaking a review of whether it is necessary to continue to hold the suspect or, once charged, the defendant, in detention. Prosecutors are to conduct this review either on their own initiative or upon the detainee's request. If the prosecutor finds that there is no longer any need to detain the suspect or defendant then she shall, in accordance with the law, make a recommendation to the responsible agency that the detainee be released or that the compulsory measure pursuant to which he is detained be modified to a less restrictive measure.⁵

Article 93 significantly expands the prosecutor's authority to review the necessity of detention over the entire duration of post-daibu, pretrial detention, which previously applied only at the time of the initial approval of daibu. This reform, to some extent adheres to the principle that there should be some appropriate separation between the power to take someone into custody through an arrest and the power to continue to hold them in detention throughout the criminal process up to trial and judgment. This shows some progress in criminal justice legislation as it represents the natural unification of the dual goals of ensuring the orderly functioning of the criminal process while still guaranteeing the protection of human rights.

In order to put this new system in practice, several prosecutors' offices in different locations started exploring innovative ways to actually implement the necessity of detention review procedure and

¹ Lan, Xiangdong, Chief Prosecutor, Dongcheng District, Beijing, PhD candidate, China University of Political Science and Law.

² Wang Ran, Research Department, Prosecutor's Office, Dongcheng District, Beijing.

³ Translator's note: “Complementary measures to support the review process” (审查配套措施) generally refers to non-custodial measures regarding supervision of released detainees to guaranty their appearance in court as required.

⁴ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁵ Article 93 of CPL provides, “After subjecting a suspect to daibu, a people's prosecutor shall continue to examine the necessity of detention. If detention is no longer necessary, it shall suggest a release of the detainee or modification of the compulsory measure. The relevant authority shall notify the people's prosecutor's office of the result within 10 days.”

they achieved a certain amount of success. They also ran into some problems that need to be resolved. The authors conducted an empirical analysis of the experience of one city (City A) that is under the direct administration of the central government.⁶ Drawing on the data from that study, this article seeks to identify the key challenges to implementation and their causes and to advance suggestions for key steps to improve implementation and achieve the ultimate goal of this reform in a manner that captures its significance.

1. ANALYZING IMPLEMENTATION OF ARTICLE 93 BY PROSECUTORS

Based on nationwide statistics for prosecutors' implementation of Article 93, there are indications that Article 93's establishment of a review process for the necessity of detention has advanced the protection of human rights. In 2013, across China, prosecutors recommended the release or alteration of compulsory measures for 23,894 criminal suspects.⁷ This is an encouraging number, however, it is only a small portion of the total number of persons detained. This indicates that implementation of the review process is still too limited in scope, that there is substantial room for improvement and that the challenges will be difficult to resolve in the short term.

1.1. *The Overall State of Implementing Review of the Necessity of Detention*

CPL Article 93 explicitly mandates that prosecutors review the necessity of detention. However, because of disagreements concerning the values, goals and significance of the procedure there are many controversies over how the system should actually be implemented. To this end, prosecutors at various levels have made broad and deep efforts to explore ways to implement the review procedure. For example, by the end of 2013, prosecutors in "City A," a municipality directly under the Central Government, had issued unified guidelines for the implementation of Article 93 citywide. The guidelines were called the "*Regulations Concerning the Review of the Necessity of Detention*" (关于羁押必要性审查工作的规定) and were based upon the results of pilot programs carried out in various prosecutors' offices throughout the city during the first part of the year.

Under these guidelines, in City A, the necessity of detention review can be divided into two distinct categories based upon the different roles played by prosecutors in different divisions of the prosecutor's office. In one category, the prosecutor conducts a review as part of his day-to-day duties as they arise during the ordinary sequence of events in a criminal case. In another category, the prosecutor can exercise his role as the supervisor of the criminal process to make recommendations to other agencies to release a suspect or to modify the compulsory measure under which he is held in detention.

In still a further category, various departments within the prosecutor's office review the necessity of detention in accordance with their specific roles as a case proceeds. For example, when the investigation supervision division receives a request to extend the period of detention while the investigation is still ongoing, they should review the necessity of continuing detention as well as extending the period of detention. If they find that the investigation can be concluded before the

⁶ Translator's note. China has 34 provinces, four cities under the direct control of the central government and five semi-autonomous regions. The four cities are: Beijing, Tianjin, Shanghai and Chongqing. In terms of their legal systems—the high courts and high prosecutor's office of Beijing, Tianjin, Shanghai and Chongqing are the equivalent of provincial high courts.

⁷ Data quoted from "Work Report of the Supreme People's Procuratorate submitted by Prosecutor-General Cao Jianming to the National People's Congress on March 10, 2014," see *People's Daily*, (March 11, 2014), p.2.

time limit expires they should reject the request for an extension. Or when the public prosecution division considers whether to indict a suspect who is currently being detained, they should also initiate the review of the necessity of continued detention, either on their own initiative or upon the request of the detainee, and decide whether to modify the compulsory measure pursuant to which the suspect is being held in detention.

In the second category, based on the mandate of the prosecutor's office to supervise the criminal process, prosecutors should make recommendations to the relevant authorities to release a suspect or modify compulsory measures. Depending on the specific stage of a criminal case, the investigation supervision division can recommend to the investigating agency to release the suspect or modify the compulsory measure that is keeping him in custody. The public prosecutor division can also recommend to the court that the defendant's compulsory measure be modified. The division supervising the detention center can recommend release or modification of compulsory measures to the investigating agency, the various divisions of the prosecutor's office, and the court.

For example, in 2013, in City A, the prosecutors responsible for supervising detention centers initiated reviews of the necessity of detention for 380 detainees, recommended release or a modification of compulsory measures for 367 people, which led to 331 people being released or having their compulsory measures altered. The prosecutors' recommendations were adopted in 90.2% of the cases.

The detention necessity review process can either be initiated by responding to requests made by the suspects, the defendants, their legal representatives, close relatives or their defense attorneys. Review can also be initiated by the various divisions within the prosecutor's office such as the investigation supervision, public prosecution, and detention center supervision divisions, in accordance with their respective roles and responsibilities.

Department	Investigation Supervision Department	Public Prosecution Department	Detention Center Supervision Department	Total
2013	1 case/1 person	13 cases/16 people	15 cases/15 people	29 cases/32 people
2014	26 cases/28 people	17 cases/19 people	8 cases/8 people	51 cases/55 people
Initiated by application	19 cases/21 people	19 cases/20 people	3 cases/3 people	41 cases/44 people
Initiated by prosecutors	8 cases/8 people	11 cases/15 people	20 cases/20 people	39 cases/43 people
Total	27 cases/29 people	30 cases/35 people	23 cases/23 people	80 cases/87 people

Table 1: Implementation of the Article 93 in the Prosecutor's Office of District B of City A (Jan 2013 to April 2014)

According to the above table, the number of cases in which prosecutors reviewed the necessity of detention increased by 76% from 2013 to 2014. In 2014, prosecutors initiated review in 51 cases involving 55 individuals, while in 2013 they only initiated the assessment for 29 cases involving 32 individuals. This indicates that prosecutors have gradually implemented Article 93 since the new CPL went into effect. Additionally, in terms of way the review process is initiated, 41 cases involving 44 people were initiated by an application on behalf of the detainee, while 39 cases involving 43 people were initiated directly by the prosecutor. From the study, it is evident that the prosecutor has taken the initiative to play a more active role in implementing Article 93, while the study also indicates that criminal suspects' awareness of their right to review is inadequate.

Among the 51 cases involving 55 suspects reviewed by the prosecutors in District B in 2014, the investigation supervision division reviewed 27 cases involving 29 people, or 33.75 % of the total; the public prosecution division reviewed 30 cases involving 35 people, or 37.5 % of the total; the detention center supervision division reviewed 23 cases involving 23 people, or 28.75 % of the total.

In 2014, the detention center supervision division recommended the imposition of less restrictive compulsory measures in a total of 23 cases, 3 cases to the investigating agency, 17 cases to the public prosecution division, and 3 cases to the court. Given the breakdown above, it is clear that the prosecutor's emphasis on the review process varies at different stages of a case, which is in accordance with the nature of detention necessity, as it may change throughout the progress of a case.

Generally speaking, while the suspect is held in custody pursuant to daibu and the case is still under investigation, the suspect will be kept in custody to make sure the investigation moves forward without incident. This is because the evidence has not yet been fully collected and securely preserved. It would be unusual to initiate the detention review process at this stage. However, by the time investigators hand the case over to the prosecutor to consider an indictment, they have already secured most of the evidence. Thus, at this stage, it is more likely that the prosecutor will initiate the detention review process and recommend an alternative, non-custodial compulsory measure. 73.9% of the recommendations for changes in compulsory measures were made by the detention center supervision division to the public prosecution division, which demonstrates that the review process primarily occurs when the public prosecution division is considering an indictment.

Types of cases	Disrupting the socialist market economy order	Infringing upon the personal rights of citizens	Property crimes	Crime of disrupting social order	Traffic Offenses

Cases/ people	23/25	13/15	25/27	18/19	1/1
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Table 2: Cases Handled by the City A, District B Prosecutor According to Type of Crime (Jan 2013 to Dec 2014)

According to Table 2, in 2014, of all the cases reviewed, the prosecutors of District B in City A reviewed 23 cases (25 people) involving disruption of the socialist market economy, including charges of illegal business operation, credit card fraud and sales of forged invoices, etc.; 25 cases (27 people) involving property crime such as theft and fraud; 18 cases (19 people) of disrupting social order, such as obstructing state personnel from discharging their duties and picking quarrels and provoking troubles (寻衅滋事); and 13 cases (15 people) of intentional criminal assault. The range of criminal cases indicates that the Article 93 review process is normally triggered when the crime charged was a minor economic crime or a personal injury crime, and the facts of the case were straightforward and the evidence was conclusive. This can be explained by the fact that suspects in these cases normally take the initiative to obtain the forgiveness of victims by paying compensation while the cases are still at the stage where prosecutors are considering an indictment. In these cases, the defendant has eliminated the losses suffered by the victim as a result of his crime so there is a significant drop in the necessity to keep him in custody.

2. EXPLORING WAYS TO IMPROVE THE MECHANISMS FOR REVIEWING THE NECESSITY OF DETENTION

The prosecutor's offices at every level of City A have launched a number of pilot programs to explore ways to improve the methods of review, the standards of evaluation and to create complementary implementing measures (to better supervise detainees who have been released). Although these programs have proven to be preliminarily effective in accumulating practice experience, City A still faces difficulties with regard to fully implementing Article 93. We have analyzed the experience of each location below.

2.1 *Exploring the Hearing Process Mechanism*

To improve transparency and ensure justice in the process of reviewing requests to approve daibu and the necessity of detention, prosecutors across the country have launched multiple pilot programs to explore ways of using hearings. Integrating the experience of experimenting with hearings since 2013, the prosecutor of District B in City A has issued measures providing guidance with regard to the hearing procedure: “*Working Measures for Convening Hearings to Review Daibu and the Necessity of Detention*” (审查逮捕案件羁押必要性审查听证工作办法) (“**Measures**”).

According to the Measures, the hearing mainly applies to cases involving crimes punishable by 3 years imprisonment or less, where the facts are clear and the evidence is sufficient. This hearing shall be presided over by the prosecutor handling the case or the head of the division handling the case. Participants may include the legal representative of the suspect, close relatives, a representative or defense attorney from the defense side and a representative of the investigating

agency on the other side. The hearing shall focus on the whether it is necessary to detain the suspect and will not focus on the substance of the case. The division responsible for handling the case should, based on information obtained during the hearing, decide whether to alter the compulsory measures. At present, the prosecutors of City A, District B have held hearings in 23 cases involving 25 people, of which 4 suspects were ordered to be kept in custody after the hearing. The prosecutors also determined that 21 suspects (in 19 cases) should be given a pretrial release with a guaranty pending trial. The hearing participants have all expressed their approval of the process. One defense attorney specifically expressed his feelings in writing to the presiding prosecutors after the hearing and made several appropriate suggestions for improvement, including: 1) that the entire process be recorded electronically; and 2) that time limits be imposed for each participant to speak. In sum, the hearing process promotes transparency and openness of the daibu approval process and shows that the process of reviewing the danger the suspect may pose to society and the necessity of keeping him in custody, is entirely objective.

However, as a general matter, the implementation of the hearing process in various places has generated some controversy. Due to the fact that the hearings are still in a pilot phase and that there is no uniform regulatory document to implement them, there is still disagreement concerning how the hearings should be initiated, who should be allowed to participate, and what the substantive contents of the hearings should be. In particular, answers to the following questions remain uncertain: who can initiate the hearing? Should it be limited to the division handling the prosecution or should a defense attorney be allowed to request a hearing? Who should be invited to participate in the hearing? Should an invitation be issued to a people's supervisor,⁸ or a deputy from a people's congress? Should a detention center-based prosecutor be invited to give his opinion at the hearing as to the suspect's behavior while in custody? What kinds of issues are subject to inquiry at the hearing? Should substantive matters regarding guilt or innocence be allowed? What if the defense lawyer raises a defense of innocence at the hearing?

Despite these unresolved problems, holding a hearing to determine the necessity of detention is considered a good way to implement the review process. We expect that as the exploration of this work deepens, in the end, the hearing process will provide greater assistance to prosecutors to fulfill their role in reviewing the necessity of detention of criminal suspects.

2.2. *Exploring Non-Custodial Compulsory Measures for Migrants Charged with Minor Offenses*

China's economic growth and its transition to a market economy with greater freedom of movement for labor and capital, have led to exponential growth of the migrant population and a corresponding increase in the seriousness of the problem of migrants committing crimes.⁹ In practice, the detention rate for migrants is generally higher than it is for local residents. As a result,

⁸ Editor's note: The phrase "People's supervisors" (人民监督员) refers to laypersons appointed by the prosecutor who have responsibility to ensure the legality of certain discretionary decisions made by the prosecutor at the pretrial stage. They may give advice or make inquiries and the responsible prosecutors ought to respond. See, "Notice of the Supreme People's Procuratorate and the Ministry of Justice on Issuing the Plan for Deepening the Reform of the People's Supervisor System" (深化人民监督员制度改革方案), available at http://www.spp.gov.cn/tt/201503/t20150311_92695.shtml.

⁹ In this article, the phrase "migrants" or "floating population" (流动人口) refers to those who leave the place of their original residence and move to other cities for the purpose of working and live. This is a different definition than the one used in statistics generally.

we have issues with a lack of fairness because we do not apply custodial compulsory measures for the same type of criminal offense at the same rate for migrants as we do for residents. Moreover, after the approval of daibu, a review of the necessity of detention is of little benefit for suspects who are migrants because they lack property to post as a guaranty and they are unable to obtain an appropriate individual to serve as a guarantor.

For example, for the first half of 2010, among the 10,127 criminal suspects prosecutors approved for daibu, 7,572 were migrants, accounting for 74.44% of the total.¹⁰ For the migrant population, the high crime rate, high detention rate, and high possibility of receiving a sentence of incarceration has become a special characteristic of this kind of crime. This characteristic has, in turn, presented a challenge to the implementation of the criminal justice policy of “combining leniency with severity,”¹¹ and has resulted in a waste of judicial resources, and a possible violation of the principle that the punishment should fit the crime.¹² As a consequence, in order to protect migrants’ legal rights and ensure equal treatment in the application of compulsory measures, various prosecutors’ offices in different locations have experimented with ways to apply non-custodial compulsory measures to cases involving minor crimes committed by migrants. To that end, we will introduce the practice of the prosecutor of City A, District C, which has issued “*Working Measures on Applying Non-Custodial Measures to Migrants Who Are Suspected of Committing Minor Crimes*” (流动人口涉嫌轻微犯罪不捕工作办法). The first step is to determine whether to impose detention based upon a quantitative risk assessment. The prosecutors’ office made a list of factors to be considered as part of the evaluation and assigned numerical values for the standard for daibu. Altogether, there are 14 factors considered in an evaluation, which may be further divided into four principal categories, including: (1) the level of danger posed to the community, (2) the personal characteristics of the suspect, (3) the suspect’s post-crime behavior, and (4) the suspect’s suitability for rehabilitation. Within each category, a numerical risk value is assigned: low, medium or high. Adding up all the values, a total score will reflect the degree of risk involved in releasing each individual suspect.

The second step is to carefully review and ensure the legality of non-custodial supervisory measures. The prosecutor will consider whether the suspect, or, in the case of a juvenile suspect, his guardian, has a relatively stable job or address and whether the suspect has been working, studying, or residing in this locality continuously for a year or more. A suspect who has been granted release shall have regular reporting requirements imposed, that is, he will be required to report to the prosecutor by telephone every half month, so that the prosecutor may readily monitor

¹⁰ Zhang, Xinxian, Xu Ning, “The Current Situation of Crimes Committed by Migrants, Their Special Characteristics, Reasons, Policies to Prevent and Punish,” published in Lan Xiangdong, Han Dianyun, Guo Xinghua, “A Risk Assessment Mechanism for Non-Detention of Migrant Criminal Suspects,” *The People’s Procuratorate*, (2012), No.5, p.49.

¹¹ “Combing the leniency with severity”, or (宽严相济), is a criminal policy meant to provide clear guidance on how to appropriately handle criminal cases while giving considerations to other values such as rehabilitation, social effect, etc. See “Notice of the Supreme People’s Court on Issuing the Some Advice on Implementing the Criminal Policy of Combining Leniency with Rigidity” (关于贯彻宽严相济刑事政策的若干意见), available at <http://en.pkulaw.cn/display.aspx?cgid=126987&lib=law>; and “Notice of the Supreme People’s Procuratorate on Issuing the Several Provisions of the Supreme People’s Procuratorate on Implementing the Criminal Policy of Tempering Strict Justice with Mercy in Procuratorial Work” (最高人民法院关于在检察工作中贯彻宽严相济刑事司法政策的若干意见), Chinese version available at <http://en.pkulaw.cn/display.aspx?cgid=83578&lib=law>.

¹² Lan Xiangdong, Han Dianyun, Guo Xinghua, “A Risk Assessment Mechanism for Non-Detention of Migrant Criminal Suspects,” *The People’s Procuratorate*, (2012), No.5, p.49.

his movements. Moreover, to better serve the purpose of supervising suspects awaiting trial, the prosecutor shall share information with the relevant agencies like the local offices of the Ministry of Justice and local police stations, and monitor the current circumstances of suspects, to ensure they will appear as required.

The third step is to establish a stronger coordination mechanism to ensure positive social outcomes. The prosecutor shall cooperate closely with local agencies, including public security, courts, government departments, schools, enterprises, communities, village or neighborhood committees and provide psychological, general and educational counseling.

From 2012 to 2013, the prosecutor of District C in City A received requests to approve daibu in 648 cases involving 933 people, among which 545 were migrants, accounting for 58.4 % of the total. By means of the working mechanism for applying non-custodial measures to migrant suspects, the prosecutor rejected daibu approval in 94 cases (involving 158 people) in 2012 and 60 cases (96 people) in 2013. Among them, they rejected daibu approval for 82 suspects who were migrants, in 2012, accounting for 51.9% of the total rejections and 47 migrants in 2013, accounting for 48.9 % of the total rejections in 2013. These statistics indicate that the migrant population received equal treatment with respect to the imposition of pretrial detention and alternative non-custodial measures.¹³ Although these provisions directly regulate the daibu approval process, they can also have significant impact on the review of the necessity of detention that takes place after approval of daibu. The establishment and development of this mechanism offers an effective approach to handling assessments of the necessity of post-daibu detention for the migrant population.

3. ANALYSIS OF THE PROBLEMS WITH IMPLEMENTATION OF ARTICLE 93

3.1 *The High Rate of Daibu and the Low Rate of Review of the Necessity of Detention*

In 2013, prosecutors nationwide approved 879,817 out of 1,062,063 applications for daibu, an approval rate of 82.8%. During post-daibu reviews of the necessity of detention, prosecutors recommended release or a downgrading of compulsory measures to non-custodial measures in 23,894 cases, or 2.72% of the total.¹⁴ The main reasons for the high daibu approval rate and the low rate of review of necessity of detention were:

- (1) From the perspective of the substantive law, the way crimes are defined in the criminal law is very specific and narrow in scope, which makes the threshold for criminal conviction high. Unlike Western countries in which minor offenses with minimal social

¹³ Correspondingly, during 2008 to 2010 before the risk assessment mechanism had been adopted, the average daibu approval rate for suspects who were migrants reached up to 85.11%, and the rate for non-custodial measures was 14.89%. Among migrants who were released or subjected to non-custodial measures, only 24.31% received such treatment on the ground that detention was unnecessary. Editor's note: presumably the balance were released because of a lack of evidence.

¹⁴ Data quoted from "Work Report of the Supreme People's Procuratorate submitted by Prosecutor-General Cao Jianming to the National People's Congress on March 10, 2014," see *People's Daily*, March 11, 2014, p.2. Given the fact that the period for handling a case may impact the accurate calculation of arrest rate and the rate for detention necessity assessment, the reader shall be advised that this article uses the number of daibu and number of daibu approvals for the same year, just for reference. Readers shall refer to the number of final decisions made by the year end.

harm are treated as violations,¹⁵ in Chinese law, those kinds of offenses are normally categorized as administrative violations, punishable by administrative penalties. As a result, the offenses for which the Chinese police submit a request for approval of daibu normally pose a relatively high risk of danger to society and this leads to a higher likelihood that the daibu request will be granted. Meanwhile, the high threshold for establishing a criminal offense suppresses the number of total cases against which approvals of daibu are measured. Once daibu is approved, if the process of reviewing the necessity of detention is triggered, there will still be a consideration of the risk of danger to the community and that consideration will influence the decision whether to release the suspect or alter the compulsory measure that is being applied to him.

- (2) From the perspective of criminal procedure, although the investigating agency and the prosecutor play different roles in criminal justice, the legal standards for approving daibu are the same for both. If the investigative agency adheres to the legal standards in applying for approval of daibu then it is to be expected that the prosecutor will be likely to approve the request, resulting in a high rate of approval. Otherwise, if it is not necessary to keep the suspect in custody, the investigating agency will not seek approval of daibu in the first place, and the case will be transferred directly to the public prosecution department to consider an indictment. Therefore, the review process will be initiated only when there has been a change in circumstances after daibu and detention is no longer necessary and this does not happen very frequently.
- (3) In terms of alternative non-custodial compulsory measures, since they are poorly implemented in practice, suspects granted such measures may fail to appear in court as scheduled. The amended CPL makes release with a guaranty pending trial the only alternative to detention, and residential surveillance only applies to suspects who are legally eligible for daibu but cannot be detained due to other concerns.¹⁶ In light of such circumstances, release with a guaranty pending trial should play a bigger role in ensuring that released suspects will appear at trial. Nevertheless, due to limited economic resources and technical constraints, as well as a lack of an advanced credit rating system and other supporting measures, it is difficult to guarantee that suspects will appear at trial and accept the criminal process. As a result, in an effort to ensure that litigation proceeds smoothly, prosecutors are often reluctant to initiate a review of the necessity of detention and to propose the suspect's release or an alteration of custodial compulsory measures.

3.2. *Inconsistency in Implementation Due to a Lack of Clear Rules*

¹⁵ "Violations" (违警罪) normally refer to minor offenses which are punishable by the minimum punishment. Violations are considered less serious than misdemeanors. The same offenses punishable as violations in Western countries are normally handled by administrative authorities in China.

¹⁶ See, Article 72 of CPL: "Under any of the following circumstances, a people's court, a people's procuratorate, and a public security authority may place a criminal suspect or defendant who meets the arrest conditions under residential confinement: (1) the criminal suspect or defendant suffers a serious illness and cannot live by himself or herself; (2) the criminal suspect or defendant is a pregnant woman or a woman who is breastfeeding her own baby; (3) the criminal suspect or defendant is the sole supporter of a person who cannot live by himself or herself; (4) considering the special circumstances of the case or as needed for handling the case, residential confinement is more appropriate; or; (5) the term of custody has expired but the case has not been closed, and residential confinement is necessary. Where a criminal suspect or defendant meets the conditions for bail but is neither able to provide a surety nor able to pay a bond, he or she may be placed under residential confinement. Residential confinement shall be executed by a public security authority."

First of all, looking at the standards for assessing the necessity of detention, in practice, the standards have remained quite flexible despite the efforts of prosecutors to set concrete standards and adopt quantitative assessment models. By its very nature, the determination of the necessity for detention is not an “either or” proposition but is rather a matter of degree that is difficult to ascertain accurately. As a result, it is more difficult to come up with reasonable recommendations.

Second, there are no clear standards for when prosecutors should initiate the review process. Criminal suspects’ lack of legal knowledge and their low rate of representation by counsel¹⁷ has led to a corresponding lack of awareness by a large number of criminal suspects that they have the right to request a review of their detention. Thus, the role of the prosecutor in initiating the review process is increasingly crucial. Since there is no unified standard to determine under which of the various circumstances a prosecutor should initiate a review process, we will just have to wait until prosecutors have more fully explored this issue in practice.

Finally, if a prosecutor rejects a suspect’s request for review, the suspect has no judicial remedy such as a right of appeal or to ask for reconsideration. Additionally, there are no clear rules on how many times a criminal suspect may request a review or how long a period of time a suspect must wait before making another request for review. These procedures need clear guidelines.

3.3. *A Less Than Optimal Division of Labor Within the Prosecutor’s Office*

Based on the relevant provisions of the CPL and the “Advisory Opinion on the Assessment of the Necessity of Detention by the Detention Center Supervision Department” (关于人民检察院监所检察部门开展羁押必要性审查工作的参考意见), the detention center supervision department prosecutors should be responsible for implementing the necessity of detention review process throughout the various stages of a criminal case, from investigation through charging and trial. Based on the type of work these prosecutors located within detention centers do, they are in the best position to render a comprehensive and updated assessment of whether detention is suitable for the detainee before making a recommendation to the agencies handling the case.

Nevertheless, based on data collected from the detention center supervision division in the prosecutor’s office of City A, 80% of cases where the prosecutors proposed a change in the detainee’s compulsory measure were a result of changes in the evidence and not based on the personal circumstances of the defendant. It was in only 20% of the cases that the prosecutors recommended a change based upon the detainee’s circumstances, such as a serious illness, pregnancy, or the need to nurse one’s baby. Therefore, to make sound proposals, prosecutors based in detention centers must investigate the details of the case by reviewing the case files and interrogating the suspect, which, in fact, involves doing the same work as the divisions of investigation supervision, prosecution and trial. Hence, future work should focus on how different divisions can collaborate and clarify their functions to avoid duplication of effort. This should be a focus of future efforts and exploration.

¹⁷ According to statistics from the Beijing Lawyers’ Association, less than 30% of criminal defendants in Beijing were represented by counsel during the period from 2012-13 and most of those were in cases of economic crimes, crimes committed by public officials and crimes where the amounts at stake were relatively large. See Wang Xiu, *Beijing Lawyer’s Development Report* (北京律师□展□告), Social Science Literature Publications, (2013), p.36.

4. SUGGESTIONS FOR IMPROVEMENT

4.1. *Grant Greater Decision-Making Authority to the Prosecutor*

According to the CPL, prosecutors do not have the power to make the final decision regarding whether the suspect should be detained, released, or subjected to other non-custodial compulsory measures. The prosecutor's authority is limited to making recommendations to the responsible agency; either the investigating agency during the investigation stage of a case or to the court during trial. We propose that there should be greater decision-making power granted to the prosecutor in accordance with the nature of the various stages of a case.

In particular, if the prosecutor has already approved daibu, the prosecutors in the investigation supervision division or the detention center supervision division should be able to make the final decision, based upon the necessity of detention assessment, as to whether or not the detainee should be detained further, released or subjected to alternative, non-custodial compulsory measures. For cases that are at the stage where they are being reviewed by the public prosecution division, the prosecutors in the detention center supervision department should make recommendations to the public prosecution division, which should have the authority to decide whether to accept the recommendation. For cases at the trial stage, the detention center supervision department should make recommendations regarding detention or release to the court but it should be up to the court to decide whether or not to accept the recommendation.

By strengthening the power of the prosecutor to implement Article 93, the prosecutor will be more motivated to initiate the necessity of detention assessment process. Moreover, this decision-making authority is consistent with the prosecutor's role in approving daibu, and, in fact, is a natural extension of that power. Meanwhile, the authorities to whom the prosecutor makes recommendations shall be authorized to request reconsideration or review. In this way, various divisions handling the case will be able to collaborate with one another while, at the same time, providing a check on each other's work.

4.2. *Improve and Standardize the Methods for Evaluating the Necessity of Detention*

First, prosecutors should establish an evaluation mechanism that incorporates both document review and an evidentiary hearing. The review process should be initiated both periodically and on a regular basis. The hearing process should be further improved and the scope of the application should be expanded. Before the CPL was amended, prosecutors had the authority to assess the necessity of pretrial detention in some circumstances, for example, the prosecutors who supervise investigations, when responding to police requests to extend the time limits for investigation, had to assess the necessity of continued detention. Now Article 93 grants supervisory authority to prosecutors based in detention centers to conduct assessments and make prosecutorial recommendations. We believe that since suspects rarely initiate the review process themselves we need to make the prosecutor-initiated review take place on a regular basis at specified intervals.

Given the fact that the time limits for any extension, including one to supplement the investigation, or one to consider an indictment or complete an adjudication, are normally one to two months, we

believe a time interval of 15 or 30 days for a periodic review of the necessity of detention is relatively appropriate. In between each review, the responsible prosecutor should fill out an assessment form, and make a recommendation relevant to the review.

Furthermore, for cases in which detention has already exceeded the time limits prescribed by law, as well as cases in which the time in detention has already exceeded the length of prison time the suspect is likely to receive after conviction, the prosecutor should be obliged to conduct a mandatory review of the necessity of detention and recommend either release or a change to non-custodial compulsory measures.

Second, the method used to determine the necessity of detention should be both reasonable and scientific. The criteria should cover three factors, including the risk of danger to the community, the danger to the person, and the risks to effective control over the criminal process. The detailed evaluation form for determining the necessity of detention should include consideration of the facts of the crime, the subjective evil character of the crime, any showing of remorse, the physical condition of the suspect, and the potential sentence. Each factor should have a carefully assigned numerical value such that when all the values are calculated they should provide a clear standard for exercising judgment to determine the necessity of detention. Using this method, it will be clear that the work of determining the necessity of detention is objective, fair, standardized and efficient.

Third, coordination and supervision among various divisions within the prosecutor's office should be strengthened. An internal information sharing system should be established so as to optimize the use of prosecutorial resources. The division in charge of case intake and management should play an overarching managerial role to coordinate among the various departments. During the procedural steps of a case, it should remind the relevant department that there needs to be a review of the necessity of detention, for example, whenever there is a request for an extension of the time for investigation, or the case is returned for supplemental investigation and when prosecutors are reviewing the case for indictment.

At the same time, there should be an online platform created so that each division, including the self-investigation, detention center supervision, public prosecution and investigation supervision divisions can all share information and a requirement that the relevant divisions enter information relating to the assessment of the necessity of detention in a timely manner, so that the status of a case and the detainee can be readily tracked. This will increase the quality and efficiency of the assessment process.

4.3. *Improve Complementary Measures to Promote Application of Reviews of the Necessity of Detention*

First, we should improve the alternatives to detention to guarantee the appearance of the suspect at trial. We need to innovate new ways to supervise the activities of suspects not in custody, seeking outside assistance, such as from community corrections organizations and community networks to guarantee the effectiveness of monitoring suspects who are not in custody.¹⁸ We

¹⁸ It is important to note that, a community correction organization (社区矫正机构) is designed to monitor the activities and behavior of convicted defendants who have been granted probation, parole, or are permitted to serve a sentence outside a prison

should also expand the development of electronic monitoring devices and pro-actively make use of modern technological products. For example, electronic bracelets can be put to use in the legal process to supervise the activities of suspects. Additionally, as a credit rating system is promoted and the monitoring measures improve, a bail system can also be established and suspects and defendants shall have a right to be released on bail while their cases are pending.

Second, proceedings to seek relevant judicial remedies for an assessment of the necessity of detention should be improved. Current laws do not provide remedies for a suspect whose application for release has been declined. To protect the rights of detainees, the right to request reconsideration or appeal to a higher level prosecutor's office, should be provided. Moreover, the time interval between each request for consideration and reconsideration should also be clearly regulated.

Furthermore, establishing a scientific and reasonable compensation system to compensate detainees who have been improperly detained should be explored. If it is determined after the fact that a suspect who should have been released applied for release but was denied by the prosecutor then the prosecutor should compensate him for the time he was wrongly detained. If it is determined that the initial detention was properly deemed necessary at the time of the first application for review, and the prosecutor denied the request for release or alteration of compulsory measures, then the criminal suspect should not be compensated.

Third, there should be an advanced system of quality control for assessments of the necessity for detention. The assessment of necessity for detention should be included in case quality control testing as a key factor to evaluate the quality of cases. If a prosecutor did not initiate a review process when she should have, her evaluation should be lowered one grade. Nevertheless, if a prosecutor properly initiated a review of the necessity of detention and issued a decision releasing the suspect under altered compulsory measures in compliance with the relevant standards, even if the criminal suspect flees, the prosecutor handling the case should not be held accountable for it, nor should his evaluation grade be lowered; thus, there will be a mechanism to encourage and reward prosecutors handling cases to implement the necessity of detention review process.

facility. Here, the authors suggest that the prosecutor may rely on their monitoring resources to monitor the activities of suspects who are not detained while awaiting trial.

Chapter 15: Consideration of “Danger to the Community” as a Factor in Approving Daibu:

An Empirical Analysis of its Effectiveness and Some Relevant Policy Proposals¹

LI Hongliang²

Abstract: *This article consolidates: a) a study of the practice of considering “danger to the community” as a factor in approving daibu;³ b) some problems regarding the use of this factor; c) an analysis of the root causes of these problems; and d) some practical policy proposals to address these questions; all in the hope of providing some reference material for judicial policy making and legislation.*

1. AN OVERVIEW OF “DANGER TO THE COMMUNITY” (社会危险性)

As everyone knows, there are three criteria Chinese prosecutors use to determine whether to approve daibu: a) criminality; b) punishment; and c) danger to the community. Of these three, the “danger to the community” criterion is the more subjective and it is variable. To explain its variability and subjectivity further:

First, an assessment of “danger to the community” can change based upon the circumstances of the defendant. If, after committing a crime, the suspect shows sincere remorse and is willing to accept rehabilitation, then the danger to the community is diminished. On the other hand, if, after committing a crime, the suspect shows no remorse and is already planning his next crime or to escape prosecution, then the danger to the community is enhanced. Accordingly, the “danger to the community” factor is not the same as the “criminality” factor which is relatively fixed and not subject to change. “Danger to the community” is a variable factor.

Second, during review of a request for approval of daibu, a prosecutor must make a subjective judgment concerning all of the evidence. Such a subjective judgment leaves a great deal of room for prosecutorial discretion.

¹ This article was first delivered as a paper by the author at a conference jointly held in Guangzhou between NYU School of Law's U.S.-Asia Law Institute and the University of Guangzhou in June, 2014.

² A prosecutor with the Guangzhou City, Huadu District Prosecutor's office.

³ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

Compulsory measures⁴ are intended to be preventive in nature and not punitive.⁵ As the most restrictive compulsory measure, daibu's purpose is to ensure the orderly progress of a criminal prosecution and to prevent danger to the community. This purpose defines the specific characteristics of the criterion: "danger to the community." First, consideration of the "danger to the community" should be an important factor in making a judgment about whether a suspect should be subjected to daibu. If a suspect presents no danger to the community, then daibu should not be approved and he should be released. Second, even if a suspect has already been subjected to daibu and is in pretrial detention, his detention should be modified or he should be released if there is a significant change in the assessment of the danger he presents to the community. We should avoid "once and for all" decision-making where once a prosecutor approves daibu there can be no reconsideration of that decision. There should be a reassessment of the reasons underlying the pretrial detention decision at the outset of each stage of a criminal prosecution. If a basis for pretrial detention no longer exists then detention should be terminated immediately.⁶

From the point of view of judicial practice, it is precisely from these two factors, its subjectivity and variability, that an entire series of problems appear and have brought about condemnation of our system of pretrial detention. First, the problems manifest in what can be understood as a system of daibu review that boils down to "if there is a crime then there should be detention" (够罪即捕). Little weight is given to the question of whether, if released, the suspect would pose a danger to the community. Second, our country's pretrial detention decision-making has the special characteristic of being a "once and for all" process. Thus, once a determination is made that the suspect should be detained then he is detained throughout every stage of the criminal prosecution, including the prosecution's weighing of charges and the court's adjudication of the case. That is why we say we have the special characteristic that "once daibu'ed, daibu'ed for good," ("once detained, detained for good") (一捕到底、一押到底).

In the face of the situation described above, the *Criminal Procedure Law* ("CPL") and the *Supreme People's Procuratorate Criminal Procedure Regulations (experimental)* (最高人民法院刑事诉讼规则(试行)) ("SPP Regulations"), have responded by making relevant amendments. What has been the effect of those amendments?

2. ANALYSIS OF "DANGER TO THE COMMUNITY" AS A FACTOR IN PRETRIAL DETENTION REVIEW

⁴ Translator's note: "Compulsory measures" (强制措施, qiangzhi cuoshi) are described in *Criminal Procedure Law* (CPL) Chapter VI, Articles 64-98. The CPL's compulsory measures provide the legal basis for Chinese law enforcement authorities to restrict the liberty of criminal suspects and defendants during investigation, prosecution and adjudication of a criminal case.

⁵ Chen Guangzhong, *Criminal Procedure Law*, (3rd Edition), 《刑事诉讼法》(第三版) Peking University Press, Higher Education Press, p.209.

⁶ Ruihua Chen, *Reflections on the Pretrial Detention System*, (未决羁押制度的理念反思), *Tsinghua Law Journal*, Issue 5, 2002.

As described above, one of the important factors leading to the high rate of pretrial detention in China is that during pretrial detention review, prosecutors focus on two of the criteria: criminality and punishment, while de-emphasizing or ignoring the third element, that is, danger to the community. Many scholars believe that a reason for this is that the provisions in the old CPL concerning “danger to the community” were so general and overbroad that they were incapable of being implemented. Because of this, when the CPL was amended, Article 79(1) of the amended law provided more detail regarding the meaning of “danger to the community.” However, the author believes that the amendments will not lead to significant change in the way prosecutors reviewing detention decisions fail to consider “danger to the community.” This is because there has been no fundamental change in the thinking of prosecutors. They see their primary responsibility as pursuing criminal responsibility. An additional reason is that there have been no fundamental changes to the personnel evaluation criteria that govern the conduct of prosecutors.

There are several reasons why Chinese prosecutors do not take the assessment of “danger to the community” seriously. The author believes that one important reason is the following type of guidance taken from standards on approval of daibu: emphasize the factor of “criminality” and de-emphasize the factor of “danger to the community.”

Chapter 3 of the “*People’s Procuratorate’s Quality Standards for Reviewing Daibu*” (人民检察院审查逮捕质量标准) (“**the Standards**”) refers to “problems with the quality of daibu determinations.” Article 21 provides that the problems include (a) mistakenly approving daibu; (b) mistakenly declining approval of daibu; and (c) deficiencies in the handling of cases.

Article 22 provides that “mistakenly approving daibu means that the prosecutor has approved daibu despite the fact that the evidence cannot prove that a crime has been committed or that the criminal responsibility of the suspect should be pursued.”

Article 25 provides that “mistakenly declining to approve daibu means that 1) in a case where daibu should have been approved but was not and the suspect committed another crime or seriously interfered with the orderly progress of a criminal prosecution;” or 2) in a case where daibu should have been approved but was not and the next level prosecutor’s office⁷ reversed the declination and approved daibu, even though there was no change in the evidence and the court issued a final judgment that included a sentence of imprisonment; or 3) a higher level prosecutor’s office discovered that the lower level prosecutor’s office, in declining to approve daibu, violated the CPL or these standards, reversed the declination and the court issued a final judgment that included a sentence of imprisonment.

⁷ Translator’s note. Just as there are four levels of government in the Chinese political hierarchy, there are also four levels of prosecutor’s office in China: the basic level corresponds to the county government (县); the intermediate level corresponds to the city government (市); the high level corresponds to the provincial government (省); and the Supreme People’s Procuratorate corresponds to the central government (国). Each level is subject to the supervision of the higher levels.

Article 26 provides that “deficiencies in the handling of cases” (办案质量优缺陷) includes the following: 1) after daibu has been approved, in accordance with CPL Articles 142(2) (see Article 173(2) of the amended CPL), it is determined that the suspect should not be indicted or is sentenced to probation, detention, or some other non-prison supplementary sentence or is exempted from all criminal punishments. ... or 2) approving daibu for a suspect about whom there is no necessity for detention and for whom detention is not appropriate...”

Thus, one can conclude that: 1) if a prosecutor makes a mistake as to whether the “criminality” element is satisfied then that may be considered a “mistake in approving daibu;” 2) if a prosecutor makes a mistake declining to approve daibu when considering the element of “danger to the community” then that maybe considered “mistakenly declining to approve daibu;” 3) even if a prosecutor makes a mistake in approving daibu for a suspect who does not pose a danger to the community, as long as the suspect is eventually determined to have committed a crime, the worst that can happen is that there might be a determination that there was a deficiency in the handling of the case. Even if the suspect is ultimately not prosecuted or is not sentenced to any prison time, this would not be considered a mistake in approving daibu.

2.1.

From the above analysis, the element of “danger to the community” is relatively subjective and constitutes a variable factor. For example, who can provide a 100% guarantee that a suspect who appears to pose no danger to the community, once released, will not commit a new crime? Therefore looking at the situation from the point of view of the standard for determining “a mistake in declining to approve daibu,” this is basically a results-oriented determination. This naturally leads prosecutors to ignore the “danger to the community” factor and simply approve daibu if the “criminality” factor is satisfied. A prosecutor would prefer to accept criticism for “having deficiencies in handling a case,” rather than be accused of having mistakenly declined to approve daibu. As long as there is even a very small chance that the released suspect will commit a new crime or obstruct justice, as long as there is even a possibility of being labelled as one who “mistakenly declined to approve daibu,” prosecutors will do what they can to avoid it.

What other differences are there in these different categories of errors? Chapter Four of the Standards regulates the consequences to the prosecutor for each category of error. According to the “*Provisions for Pursuing the Enforcement Process Responsibility of Procuratorate Personnel*” (检察人员执法过程责任追究条例) and the “*Provisions for Discipline and Punishment of Procuratorate Personnel*” (检察人员纪律处分条例(试行)), for a case of intentional or grossly negligent mistaken daibu or mistakenly declining daibu, the responsible prosecutor and any prosecutor directly involved will be punished according to law or disciplinary provisions. By contrast, for a case of “deficiencies in handling a case,” the most severe consequence would be

that the same level prosecutor's office gives the prosecutor counseling, guidance and review pursuant to the personnel evaluation criteria. When the two possible outcomes are compared, it is obvious which is the more severe. Naturally, this disparity in treatment leads prosecutors to only consider the "criminality requirement," that is, to ask whether the alleged conduct constitutes a crime, in making daibu decisions, and ignore the element of "danger to the community." Prosecutors may go so far to avoid the possibility of being found to have "mistakenly declined daibu" by exercising extreme caution even when the suspect poses no danger to the community and thus should not be subjected to daibu.

2.2.

Judicial practice provides circumstantial evidence of the phenomenon described above. Article 86 of the CPL provides a system for defense lawyers to express their opinions to prosecutors concerning whether daibu is appropriate for their clients. During the period between January 1, 2013 (when the amended CPL first came into effect) and April 30, 2014, the author conducted an empirical study of the submission of defense opinions and their effect on outcomes in Huadu District, Guangzhou City.

Defense lawyers expressed opinions in a total of twenty-eight cases.⁸ Of these:

(1) In nine cases, the defense argued that "the facts were not clear and the evidence was insufficient." In six cases, prosecutors declined to approve daibu. In the three remaining cases, the prosecutors approved daibu.

(2) In twelve cases, the defense argued that "the suspect posed no danger to the community." In two of those cases, prosecutors declined to approve daibu. Prosecutors also declined to approve daibu in three more cases because the facts were unclear and the evidence was insufficient. Prosecutors approved daibu in the seven remaining cases.

(3) In six cases, the defense argued both that "the facts were not clear and the evidence was insufficient" and that the suspect posed no danger to the community. In one case, prosecutors declined to approve daibu on the ground that the facts were not clear and the evidence was insufficient. Prosecutors approved daibu in the five remaining cases.

(4) In one case, the defense argued that "the circumstances were so minor that they did not amount to a crime" and that the suspect posed no danger to the community. Ultimately, the prosecutor did not approve daibu on the ground that the circumstances were so minor that they did not amount to a crime.

⁸ Prosecutor Xin Wen collected the quoted data from the People's Procuratorate in Huadu District, Guangzhou. "Twenty-eight" refers to the number of suspects.

Overall, out of twenty-eight suspects, prosecutors approved daibu in fifteen and declined approval in thirteen. Of the thirteen declinations, eleven were based on problems with the evidence. Only two were based on the fact that the suspect posed no danger to the community, a mere 15.38% of all the declinations. Thus, it can be seen that, even though the CPL has more precisely defined the “danger to the community factor, in practice, it still receives little attention.

2.3.

Then there is also the problem of how to understand Article 79(3) of the CPL. Here is one actual case that unfolded as follows. The suspect had a prior conviction for robbery. The police attempted to take the suspect into custody while he was in the process of selling illegal narcotics. The suspect brandished a knife and resisted arrest. After a warning shot proved ineffective, the police shot the suspect in the leg. The public security bureau placed the suspect under residential surveillance on the ground that he had a “serious illness.” After the period of residential surveillance expired, the public security bureau released the suspect with a guaranty pending trial. The basis for the release was that the investigation could not be completed within the time limits for residential surveillance. During the period of time the suspect was released with a guaranty pending trial, the public security bureau applied for approval of daibu of the suspect for the crime of the unlawful sale of narcotics. A review of the case showed: a) the suspect never confessed to selling drugs; and b) while on release, the suspect had not violated any conditions of his release. In these circumstances, could daibu for the suspect be approved? In discussing this case study, three views emerged:

The first view was that the suspect brandished a knife and resisted arrest and refused to confess his guilt. He therefore posed a greater danger to the community. The public security organs’ decision to release the suspect with a guaranty pending trial was a mistake. Daibu for the suspect should be approved.

The second view was that the suspect committed intentional crimes. He therefore met the requirements of CPL Article 79(2) and daibu should be approved.

The third view was that the suspect did not violate the conditions of his release pending trial. He therefore did not meet the criteria of CPL Article 79(3) and daibu should not be approved.

The author considers that the “criteria for effecting daibu” (迳行逮捕的条件) in Article 79(2) apply to cases where the public security organs apply to the prosecutor for approval of daibu when the suspect is already in custody under police-approved-and-controlled criminal detention (拘留). Where the suspect has been released with a guaranty pending trial or is under residential surveillance, and the public security organs apply for approval of daibu, only the CPL Article 79(3) criteria (and not the Article 79(2) criteria) apply to the determination of whether the requirements

for daibu have been satisfied. In other words, even if the suspect's current alleged crime could result in a fixed-term sentence of 10 years' imprisonment or more, or the suspect had previously intentionally committed a crime and the suspect's identity is unclear, the suspect does not meet the criteria for daibu if he has not violated the conditions of his pretrial release with a guaranty or residential surveillance and daibu should not be approved. The reasons for this are:

(1) Article 105 of the *Procedural Regulations on the Handling of Criminal Cases by Public Security Organs* (公安机关办理刑事案件程序规定) (“**the Regulations**”) provides: if a suspect meets the criteria for daibu but has a serious illness and cannot care for himself, the public security organs may place him under residential surveillance. In this case, the public security organs' use of residential surveillance for the suspect on the ground that he was seriously ill complied with the law. Article 78 of the Regulations states that “[p]retrial release with a guaranty pending trial is not applicable if the criminal suspect is a recidivist, is suspected of being a principal of a crime organization, seeks to avoid investigation through self-inflicted injury and/or self-inflicted mutilation, or has committed a serious violent crime or other serious crimes, unless any of the circumstances stipulated in Article 77(1), paragraphs 3 or 4 applies to the suspect.” Article 77(1)(4) refers to “a case where the detention period has lapsed but the investigation has not yet been concluded and requires further investigation.” Thus, the public security organs' decision to release the suspect in this case with a guaranty pending trial on the basis that further investigation was required was entirely proper. As a result, the first view, described above, should be rejected.

(2) CPL Article 79(3) CPL provides: “if a suspect is released with a guaranty pending trial or is placed under residential surveillance, but violates the conditions of release or residential surveillance, if the violation is serious, daibu may be approved.” Yet the criteria for release with a guaranty pending trial and residential surveillance in CPL Articles 69 and 75 respectively do not include the three situations in Article 79(2) in which daibu should be approved.

(3) Compulsory measures (which include daibu) are meant to be preventive, not punitive. Their objective is to ensure an orderly criminal process. Compulsory measures should be used only when both necessary and proportionate.⁹ If the use of less restrictive compulsory measures can achieve these objectives, then naturally there is no need for stricter measures. This is a manifestation of the CPL's injunction to “respect and protect human rights.” In this case, although the suspect had a criminal record, he appeared promptly when summoned, did not commit any new crimes, and did not obstruct the prosecution. Transferring the case directly to prosecution and trial (without daibu) would have achieved the objective of pursuing the suspect's criminal responsibility. Modifying the compulsory measure and seeking daibu—the harshest of the compulsory measures—is neither necessary nor proportionate. It also increases unnecessary pretrial detention before the outcome of the case has even been determined and wastes judicial resources.

⁹ Guangzhong Chen, *Criminal Procedure Law* [刑事诉讼法], (3rd ed. Peking University Press), p.212.

(4) One of the law's primary functions is to provide a positive guide for behavior to the masses—in other words to encourage members of the public to engage in law-abiding behavior. In this case, if the suspect was to be subjected to daibu and pretrial detention notwithstanding his compliance with all of the conditions of his release, what meaning would a suspect's compliance have? This kind of enforcement only damages the authority and the stability of the law.

(5) According to Article 100(3) of the Regulations, “when a suspect must be subjected to daibu (as described above), he may first be criminally detained (拘留). If the suspect has paid a guaranty, the prosecutor should give written notice to the public security office to confiscate the guaranty funds.” In the absence of a violation of the conditions of release, a confiscation of guaranty money would also be unfair to the suspect.

In practice, the first and second views discussed above reflect the traditional judicial thinking that emphasizes cracking down on crime, but overlooks the protection of human rights. This illustrates the difficulties in truly implementing the requirement to assess the danger to the community in practice.

3. PROBLEMS IN DETERMINING THE NECESSITY OF DETENTION AFTER DAIBU: AN ANALYSIS

Article 93 of the amended CPL provides for a mechanism for assessing the necessity of detention after daibu. The amended CPL creates a system under which prosecutors must assess whether continued detention of a suspect or defendant who is already in custody is necessary for the duration of the prosecution. Based on a combination of factors such as changes to the conditions that existed when the suspect was first taken into custody, the suspect's overall behavior while in detention and the need to preserve evidence, a prosecutor must determine whether continued detention is necessary. Based on that assessment, the prosecutor then makes a recommendation to the relevant investigating agency whether to alter the daibu and detention measures already in place.

In substance, the review of the necessity of detention after daibu is a review of the “danger to the community” factor. Faithful implementation of this review would prevent “once-and-for-all” detention and would take care of the root causes of “unlawfully extended detention,” that is, detention for a period in excess of statutory time limits. However, from the perspective of the actual results of implementation in practice, the author suspects that what is actually happening is what Professor Ruihua Chen refers to as “dysfunction in criminal procedure.”

For instance, in the Huadu District Procuratorate, where the author works, between March 14, 2013, after the amended CPL went into effect, and December 31, 2013, the prosecutor's office

reviewed the necessity of detention in 17 cases involving 27 people. It recommended that the investigating agency release, or adopt other compulsory measures, in four cases affecting four individuals, or 1.04% of the 1,640 cases in which daibu was approved, affecting 1.14% of the 2,358 people. Between January 1, 2014 and this writing, no cases have been subjected to review of the necessity of post-daibu detention. With numbers this low, even ignoring the statistics, it is evident that the results of implementation are not ideal. Some of the critical reasons for this are:

3.1.

The need to control costs and ensure efficiency limits the effectiveness of implementation. “The design of legal processes often involves questions of litigation costs. As an activity that requires the investment of judicial resources such as manpower, material resources, and time, the need for efficiency in criminal litigation requires serious consideration. If any proposal for criminal procedure reform will decrease litigation efficiency and increase the time required to resolve cases, there will be no realistic chance for it to be implemented.¹⁰” First, reviewing the necessity of post-daibu detention necessarily creates a large workload and increases the costs of litigation. At the outset, prosecutor must review the relevant materials, ascertain the progress of the case from the investigating agency, inquire of the detention center about the suspect’s behavior and circumstances in custody, interrogate the suspect, and organize and convene a public hearing to determine whether it is necessary to continue the detention of the suspect, etc. Moreover, post-daibu review of the necessity of detention reduces the efficiency of the criminal justice system.

For instance, the result may be that the prosecutor’s office will recommend to the public security organs that an alternative measure, typically release with a guaranty pending trial, be substituted for daibu. However, the increased use of release with a guaranty will lead to an increase in conflicts:

- a) problems in the use of pretrial release with a guaranty for migrant workers;
- b) after pretrial release with a guaranty is granted, there is a significant increase in workload for investigating organs and prosecutors in the event that they need to interrogate a suspect. This exacerbates the problem of “too many cases and insufficient staff to handle them;”
- c) after pretrial release with a guaranty is granted, it is difficult to guaranty the suspect’s attendance, resulting in the progress of cases being stalled, or being passed back and forth between prosecutors and public security organs. This increases the pressure from a high caseload, exacerbates the tension between justice and efficiency and may bring about crime victims’ dissatisfaction with the justice system’s lack of efficiency.

¹⁰ Ruihua Chen, *Chinese Model of Criminal Litigation* [刑事诉讼的中国模式], (2nd ed., Law Press), p.303.

3.2.

There is no mechanism to implement the post-arrest process for determining the necessity of continued detention. The CPL does not establish a good mechanism for implementing the review process, creating the risk that the process for determining the necessity of detention will be avoided or abandoned.¹¹ Only CPL Article 93 sets forth provisions relevant to the necessity of detention determinations. Although CPL Articles 616 to 621 include more detailed provisions, they remain closer to statements of principle, which leads to a lack of clarity. For example, Article 616(2) of the CPL defines two means by which a review of the necessity of post-arrest detention can be commenced: 1) an “active” means, where “upon discovery by the People’s Procuratorate,” the prosecutor may initiate the review; and 2) a “passive” means where “upon application by the defendants, their legal representatives, near relatives, or defense attorneys,” the prosecutor may initiate the review. However, there are no clear provisions regarding how the prosecutor’s office might go about discovering a basis for review, how a review is commenced, and what criteria should be used to initiate a review, or how a suspect may request a review.

3.3.

There is a lack of scientific design in portions of the review process. First, a plain reading of the text of CPL Article 93 suggests necessity of detention review should take place in all cases in which either a prosecutor or a court has approved daibu, without exception. However, in practice, local prosecutor office’s investigation supervision departments already face problems with heavy caseloads, staffing shortages and the complexity of the work. It is therefore unrealistic to conduct such a detailed review in every case. Second, the SPP Regulations provide for two means of initiating review, one active and one passive, that is, one initiated by the prosecutor and one initiated by the defendant or his representatives. However, for a prosecutor to initiate the review unavoidably appears to be administrative oversight of the judicial process rather than an integral step in the judicial process.¹² In the absence of a clear legal requirement that prosecutors conduct reviews in all cases, it is impractical to expect prosecutors to diligently instigate reviews of each case on their own initiative. Only a suspect has the incentive to apply for review and to press for an effective system of reviewing the necessity of detention. However, because suspects have much less familiarity with the system, in practice, relatively few suspects have applied for review. Third, it is unreasonable to task the prosecutors with initiating the review of the necessity of continued detention during the prosecution and trial stages. Although China’s prosecutors are relatively neutral, and prosecution decisions are based on making objective determinations from a position of neutrality,¹³ prosecutors are also the formal adversaries of the defendant. As such, they are influenced by their prosecutorial mentality as well as their performance assessments. When

¹¹ *Id.*, p.13.

¹² Ruihua Chen, *Theory Of Procedural Checks And Balances*, (程序性制裁理论) (2nd ed. Law Press), p.228.

¹³ Xiaoqing Zhu, “On Litigation Supervision,” *Journal of National Procurators Academy of China*, (2012), issue no. 5.

judging whether to terminate the detention of a defendant, they would naturally tend toward continuing the detention.

3.4.

There are no consequences mandated for violations of procedural requirements. The law does not define consequences for prosecutors who fail to initiate review when the criteria are met or when a suspect applies for review, or prosecutors who conduct reviews in a lackadaisical manner. The law not only fails to provide for any consequence for a violation but also fails to provide a suspect with any right to a remedy for a violation. As a result, prosecutors are under no procedural pressure to conduct reviews.

4. SUGGESTIONS FOR IMPROVEMENT

4.1. *Use Daibu and Detention Cautiously*

On the surface, if a defendant is ultimately found guilty, detention prior to conviction does not hurt his interests, as the sentence can be discounted by the period of time spent in pretrial detention. However, in practice, daibu is the harshest compulsory measure and involves considerable risk. First, before trial, a detained suspect loses his liberty. Further, the veracity and objectiveness of any confession he makes cannot be guaranteed. This is, in fact, the most significant cause of wrongful convictions. Second, the biggest risk of pretrial detention exists where the defendant is ultimately acquitted. For these reasons, pretrial detention is risky. As a result, prosecutors responsible for reviewing requests to approve daibu should abandon the traditional mindset of “approve daibu as long as there is evidence of criminality” (够罪即捕). Instead, they should pay more attention to the danger to the community posed by the suspect’s release and be more cautious in the use of daibu.

4.2. *Fully Develop Alternatives to Detention*

When modifying custodial measures to non-custodial alternatives, the non-custodial measures must be improved to prevent suspects from failing to appear and interfering with the orderly progress of a case. Consequently, alternatives to detention should be fully developed:

a) In the absence of effective constraints on guarantors, the proportion of cases where money guaranties are accepted should be increased in accordance with law. The judicial organs should collect information such as whether the suspect has a criminal record, whether the suspect has legitimate employment, the suspect’s financial means, and the suspect’s social ties. Based upon this information, there should be a comprehensive determination of the amount of a guaranty that would serve as a practical restraint on the suspect.

b) Improve the system of using guarantors. Strengthen assessments of guarantors based on criteria such as residence and income, and restrict the ability of individuals who have “negative social credit records” (不良社会信用记录) to serve as guarantors. Improve mechanisms for holding individuals who violate their duties as guarantor accountable. Explore the use of the suspect’s work unit as a guarantor, especially to conduct oversight of suspects during pretrial release.

c) Pay greater attention to the applicability of a sliding scale of restrictions on liberty, from pretrial release with a guaranty to residential surveillance to daibu. In accordance with law, increase the proportion of cases in which residential surveillance is used. For suspects for whom there is no necessity of detention but who have no fixed residence, cannot nominate suitable guarantors and cannot pay a money guaranty, and for whom the use of pretrial release with a guaranty might pose a greater risk to the orderly progress of the litigation, consideration should be given to residential surveillance at a designated location in accordance with the law. In this way, resources can be consolidated to conduct surveillance.

4.3. *Provide a Rational Design and More Detailed Rules*

4.3.1. The System for Review of Daibu Requests for Approval

(a) When a prosecutor determines whether to approve daibu, he or she should conduct a stringent review of whether the materials in the dossier (案卷材料) and the evidence relevant to the criteria for daibu are complete. If the investigating organs cannot explain how the suspect poses a danger to the community, or have not delivered the evidence relevant to that factor, the prosecutor should demand that the investigating organs provide such an explanation and deliver the evidence promptly. If the investigating organs cannot give an explanation or provide the additional evidence within the designated time period, and the existing materials cannot establish that the suspect poses the requisite risk to society, the prosecutor should reject the application to approve daibu.

(b) The “Opinion on Daibu Review” (审查逮捕案件意见书) must explain the review of the danger to the community posed by the suspect’s release and provide a clear explanation and a discussion of the relevant evidence. Any submissions by the defense attorney regarding the suspect’s lack of a danger to the community, his unsuitability for detention, as well as relevant evidence, should be accepted, seriously considered, and included as appendices.

4.3.2 The System of Reviewing the Necessity of Continued Detention after Daibu

(a) In order to reduce their workload, prosecutors should focus reviews of the necessity of detention on individuals suspected of minor offenses. Individuals suspected of minor offenses are typically less dangerous and less anti-social. Reviews of the necessity of continued detention should

therefore focus on such scenarios and leniency can be extended to such suspects, including: i) suspects who may be sentenced to fixed-term sentences of 3 years or less, criminal detention, probation, suspended sentences, or no sentence; and ii) individuals suspected of attempted crimes, individuals suspected of crimes of negligence, suspects who turned themselves in or assisted in investigations, accomplices, first time offenders with no criminal record, opportunistic offenders, juvenile suspects, suspects who are unsuited to detention for health or physiological reasons, suspects who have actively made restitution or compensation, and suspects who have reconciled with their victims.

Conversely, individuals who may be sentenced to fixed-term sentences of 10 years or more, or who are the lead defendant in a multi-defendant case, ringleaders, repeat offenders, individuals suspected of endangering national security, individuals suspected of being involved in organized crime, individuals suspected of drug-related crimes, all should be subjected to more stringent review, in order to reach a balance between controlling crime and protecting human rights.

(b) Establish as a norm that the affected individual should apply for review so as to weaken the notion that release is bestowed by the authorities while at the same time strengthening the idea that an application for release is the assertion of a remedy to vindicate a right. In other words, reviews should primarily be based on applications by a suspect who has been subject to daibu or detained, rather than relying on prosecutors actively seeking to remedy procedural irregularities as part of their official duties.

(c) Require that the review of the necessity of detention during the investigation, prosecution, and trial stages be conducted by the investigation supervisory department. In the event that the prosecution division or the detention center supervision division discovers that detention is no longer necessary, that division may recommend that the suspect or defendant be released, or that other less restrictive compulsory measures be substituted for daibu.

4.3.4. Revise Assessment Criteria

The emphasis placed by the CPL and the SPP Regulations on the assessment of a suspect's danger to the community should be reflected in the prosecutor's internal performance review standards. The criteria for assessing the handling of daibu requests should be changed accordingly. The importance given the assessment of the danger to the community in evaluating daibu requests should be enhanced. For instance, cases in which the "Opinion on Arrest Review" (审查逮捕案件意见书) fails to explain the danger to the community the suspect poses should be considered cases with quality flaws. The definition of "wrongful non-arrest" (错不捕) should be altered to dispel prosecutors' concerns over refusing to approve arrests using the social risk criterion.

Chapter 16: Redefining the Power of *Daibu*: Improving the System of Checks and Balances in the People's Republic of China¹

LIN Lan²

Daibu³ is the most restrictive compulsory measure available to Chinese law enforcement agencies under the *Criminal Procedure Law* (“CPL”) of the People's Republic of China. The measure allows the police to detain any suspect in custody pending trial so long as that suspect is charged with an offense that would subject him to at least a sentence of imprisonment.

A 2012 amendment to the CPL clarified one previously vague precondition for arrest: “danger to the community.” The intent of that amendment was to curb abuse of the power to impose daibu and to protect human rights. Under Article 79 of the amended CPL, individuals could be subject to daibu before trial only if their release would constitute a “danger to the community.” After January 1, 2013, when the amended CPL came into effect, observers anticipated an increase in the proportion of low-risk criminal suspects released. As one example, consider the prosecutor's office of Luogang District of Guangzhou, where the author is chief of the investigation supervision division. Over the past three years, the proportion of suspects released because they do not pose a danger to society has grown from 18.7% in 2011 to 31.13% in 2012 and to 58.5% in 2013.

As part of his work, the author approves police requests for daibu. As an official who handles cases for the prosecutor's investigation supervision division and oversees the approval of daibu requests, based upon practical experience, the author believes that there is a need to redefine the role of daibu, to clarify the confusion brought about by legislative changes, to harmonize the legislative directives with an improved system of checks on power, and in this way, lead the prosecutor's office to exercise the power to impose daibu in a more appropriate manner.

1. REDEFINING THE PURPOSE OF DAIBU

Traditional legal theory posits that the main purpose of daibu is to assure the orderly functioning of the investigation, charging and trial processes, and the imposition of any criminal penalties. Thus, daibu is designed to safeguard the criminal process. Some scholars argue that daibu should serve no other purpose than to guarantee an orderly litigation process.⁴ This article, however, views

¹ This article was first delivered as a paper by the author at a conference jointly held in Guangzhou between NYU School of Law's U.S.-Asia Law Institute and the University of Guangzhou in June, 2014.

² Lin Lan is the Chief of the Investigation and Supervision Department of the People's Procuratorate of Luogang District, Guangzhou, China.

³ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

⁴ Wan Yi, “Daibu Is Not a Crime Control Measure—the Procuratorate Should Not Report the Number of Daibu Approvals,” *Legal Science*, (2009) (2), p.152.

daibu as fulfilling multiple functions, including those dictated by the CPL and those that flow organically from the day to day operation of the criminal justice system.

1.1. *Daibu is a Punishment and a Deterrent*

First, daibu is both a penalty and a deterrent. The first clause of Article 79 (in the 2012 amended CPL), for example, stipulates that a suspect who “might commit new crimes” can be detained because he satisfies the prerequisite of “danger to the community.” In the second clause of the amended Article 79, a new prerequisite was added to justify immediate arrest: a suspect should be detained if:

- 1) evidence of a crime has been found, and the suspect is likely to face imprisonment for ten years or a more severe punishment; or if 2) evidence of a crime has been found, and the suspect is likely to face imprisonment or more severe punishment, and has a criminal record or has no valid identity.

The author believes the amendment demonstrates that the legislature endorsed daibu as both a punitive and a preventive measure. Scholars view the situation similarly.⁵ The legislation explains why prosecutors issue work reports describing the daibu approval process as a key part of “cracking down on crimes and safeguarding social stability.” Daibu demonstrates a prompt response from judicial organs, which appropriately reflects the popular desire that criminals be imprisoned.

1.2. *Daibu Approval Involves Making Preliminary Judgments About Guilt and Punishment*

According to Article 79 of the CPL, prosecutors must make two preliminary judgments in reviewing daibu approval requests. One is to judge whether the suspect has committed a criminal offense, based on the legal requirement that “there is evidence of criminal activity” (有证据证明有犯罪事实). The other is to make a far-sighted judgment regarding the sentence the suspect might face. In considering this second matter, prosecutors must determine whether the suspect “may be sentenced to imprisonment or a more severe punishment” (可能判处徒刑以上刑罚). Only when the suspect has satisfied these two legal requirements may the prosecutor consider whether the criminal suspect or defendant poses a danger to the community. If there is, in fact, a danger to the community, or other relevant conditions, daibu of the suspect should be approved and extended through the period of indictment review, prosecution, and even trial.

The process for approving pretrial detention not only involves a prejudgment regarding guilt and sentencing, but also a prejudgment of whether a person should receive a suspended sentence or

⁵ Thomas Weigend, *Deutsches Strafverfahren*, translated in Deguo Xingshi Susong Chengxu (德国刑事 诉讼程序) [Criminal Procedure in Germany] (translated from the German into Chinese by Yue Liling & Wen Xiaojie 2004), pp.95-6.

probation. As a matter of fact, when the provisions are compared side by side, it is not difficult to see that the requirements established by the CPL for release with a guaranty pending trial, and those that allow for probation, are reciprocal. Article 79(1) of the CPL stipulates that, in addition to the requirements of possible conviction and sentencing, the third requirement for approval of daibu is that the offender “would pose a danger to the community if he were to obtain release with a guaranty pending trial” (five types of dangers are listed). The implication is that any suspect can obtain an alternative to daibu such as release with a guaranty pending trial if they do not present a danger to the community. Article 65 of the CPL stipulates that the criminal suspect or defendant can obtain release with a guaranty pending trial under four circumstances: (1) the person may be sentenced to public surveillance, criminal detention, or simply assigned supplementary punishments; (2) the person may be assigned a punishment of fixed-term imprisonment or worse but he will not pose a danger to the community if released with a guaranty pending trial; (3) the person is seriously ill, cannot take care of herself, or is pregnant or breastfeeding, and would not pose a danger to the community if released with a guaranty pending trial; or (4) the legally permissible time period for detention has expired, yet the case has not been resolved, and the person in question must be released with a guaranty pending trial.

Article 72 of the CPL provides for the following conditions for probation: a person should receive probation if he or she is sentenced to public surveillance or a term of imprisonment of less than three years, or if a person satisfies the following criteria: 1) the offense is not serious; 2) the offender has shown remorse; 3) there is no risk that the offender will commit new crimes; 4) probation will not have a serious impact on the community where the offender lives. The four conditions listed above serve as clarification of prerequisites for probation, and were applied prior to the issuance of the eighth amendment to the CPL. These four conditions actually define the imperative that “the application of probation [to the suspect or defendant] will not endanger society.” Notably, the four conditions are similar to the second and third conditions regarding release with a guaranty pending trial. In everyday practice, consequently, suspects who are not subjected to daibu and who are released with a guaranty instead, are more likely to receive probation. Take the prosecutor’s office where I work as an example. In 2013, we did not approve daibu for 45 people and ultimately all 45 were sentenced to probation. Those 45 individuals account for 70% of all people for whom we did not approve daibu.

1.3. *Daibu Review Functions as a Mechanism to Oversee Police Investigations*

The powers to review and approve police requests for daibu are invested in the investigation supervision division of the prosecutor’s office, which reviews the initiation of cases (立案) and presides over cases investigated by public security organs. The investigation supervision division oversees the legality of daibu requests as well as the working procedures of public security organs, focusing especially on whether there is sufficient evidence to prosecute criminal suspects and whether their conduct is serious enough to warrant criminal punishment. In short, daibu should not

be approved if the suspect did not commit a criminal offense, or if the unlawful conduct was minor, or if there is no danger to society, or if there is insufficient evidence to prove the crime. The prosecutor examines whether the investigation has been carried out in compliance with the law and excludes all illegally obtained evidence. The amended CPL is more rigid regarding conditions of daibu, and even more demanding regarding evidence, and that has led to an upward trend in the rate of release nationwide. For example, according to the 2013 work report issued by the Supreme People's Procuratorate, prosecutors declined to approve daibu for 82,089 criminal suspects, a 2.8% increase on the previous year. In addition, prosecutors decided to release 100,157 suspects for lack of evidence, an increase of 9.4% on the previous year.

1.4. *Daibu Promotes Reconciliation with Victims*

One scholar points out that daibu is often regarded as a tool that “pushes those involved to negotiate an agreement to compensate victims, and that eases public anger and prevents victims from petitioning.”⁶ Prior to arrest, a criminal suspect is usually unaware of the legal consequences of his actions and is unwilling to pay compensation to the victims of his criminal conduct. However, once placed under daibu, a suspect will view his situation differently. No one wants to be deprived of personal freedom. After daibu, suspects have more incentive to negotiate compensation agreements with victims, especially if the crime in question is minor. This author considers encouraging reconciliation to be a positive function of daibu.

2. CLARIFYING THE CHALLENGES OF EXERCISING THE POWER OF DAIBU

Once we have redefined the functions of daibu, we must clear up some common misconceptions regarding use of this power.

First, it is incorrect to think that by reducing the number of people subjected to daibu or eliminating the number of people subject to daibu altogether that we will have achieved the proper “balance between leniency and severity” (宽严相济). Some scholars believe that a high rate of daibu approval can lead to an exceedingly high rate of short-term deprivations of liberty. They argue that although daibu is aimed at punishing, isolating, deterring, and correcting crimes, in practice, these goals are difficult to achieve.⁷ If a criminal is forced to leave the community where he lives, it is possible that he will become anti-social. It is also possible that the criminal will learn more criminal behavior from other criminals and commit even more serious crimes. Other scholars think that short-term deprivations of liberty cannot rehabilitate criminals. Rather, they believe that short-term punishment worsens circumstances because criminals become accustomed to living in detention and are no longer fearful of imprisonment. With lower self-esteem, they are prone to

⁶Jia Liping, “An Analysis and Discussion on Post- Arrest Criminal Cases with Light Punishments- A Perspective of Statistics of the First Half Years from 2009-2013”, *China Today Forum*, p.324.

⁷ Zhang Haifeng, “An Empirical Analysis of the Operation of the Right to Arrest,” *Journal of Southwest University of Politics and Law*. Vol. 13, Issue No. 3, June 2011, at p.87.

become repeat offenders.⁸ Hence, these scholars argue, we must pay more attention to human rights protection.

The author recognizes that this point of view emphasizes human rights protection and is consistent with the demand for the development of a harmonious society. However, under the current Chinese judicial environment, if we overemphasize leniency, we would be overlooking the rights and interests of the victims of crime and would undermine the social value that “crime deserves punishment” (罪有应得). Each year, a large number of China’s farming population leave their rural homes to live and work in cities. Because China still has not developed a system to track individuals’ creditworthiness and trustworthiness, the criminal records of migrant workers have almost no bearing on their ability to find new jobs and start new lives in new places. Criminal activity does not have a huge cost for migrant workers so this population is, of course, more likely to commit crimes. The deprivation of liberty appears to be the only effective punishment for criminal offenses committed by migrant workers. I urge caution in not approving requests for daibu. The existence of daibu’s function as a preliminary judgment of legal punishment allows us to consider what the appropriate punishment for minor offenses is in order that that we may be sure that the punishment fits the crime. Will the public be satisfied if we do not approve daibu and the only punishment is probation plus the 10 to 37 days of pre-daibu detention (拘留), which is the maximum period (according to CPL Article 89)? We need to consider whether short-term detention can fully account for a victim’s suffering and whether it demonstrates proper judicial authority. While the length of a period of detention cannot be determined by popular will, we need to be as prudent about not approving requests for daibu as we are about approving daibu.

A second misconception concerns the prerequisite that in order to approve daibu the defendant must be subject to a sentence of at least fixed-term imprisonment. The prerequisite is not based upon the prosecutor’s prediction of the final outcome but rather on the maximum penalty authorized by statute for the offense charged. Some scholars contend that, if daibu can be approved simply on the ground that a fixed-term imprisonment or more severe punishment is authorized then almost any crime can reasonably result in daibu. Thus, they say, for individuals who have committed a crime that will result in a sentence that would be less than fixed-term imprisonment, prosecutors must not approve daibu. Prosecutors should not approve daibu when it is possible that the sentence will be a short period of criminal detention or probation.⁹ This point of view is no different than saying the prosecutor’s ability to predict the future outcome should be enhanced and the prosecutor should put himself in the same position as a judge to consider whether the sentence is likely to be criminal detention or probation but that he should do so at the early stage of daibu approval. Some prosecutors will use a likely sentence of criminal detention or probation as a way

⁸ Ma Kechang, *Comparative Criminal Law Principle—An Overview of Foreign Criminal Laws* (比较刑法原理——外国刑法学总论). Wuhan University Publishing House, (2002), p.858.

⁹ Zhang Haifeng, “An Empirical Analysis of the Operation of the Right to Arrest,” *Journal of Southwest University of Politics and Law*, Vol. 13:3, (June 2011), p.90.

to measure the quality of the case and this creates a lot of additional concerns for the prosecutor. Sometimes, he will even go so far as to consult the sentencing guidelines released by the court. The author recognizes that most criminal offenses in our country carry a penalty of fixed-term imprisonment but there are some offenses, for example, dangerous driving, where the maximum sentence is criminal detention and a fine. In such cases, I agree that daibu should not be approved. That said, it is not practical to expect that a prosecutor can, within a seven-day time limit, have the foresight to make the same kind of sentencing decision a judge would make at the end of the case, especially since not all of the circumstances that affect the sentencing decision have been fully investigated yet. Based on these considerations, punishments starting at the level of fixed-term imprisonment should be decided according to the statutory maximum, which is more practical and is consistent with legislative intent.

The third mistake is the use of the rate of daibu as a basis for the evaluation of the performance of public security and prosecutorial personnel. In order to promote efficiency, public security organs and prosecutorial organs in a variety of locales have launched experiments to try different formulae to evaluate their own internal efficiency. Since daibu both punishes and prevents criminal activities, it makes sense that the number of criminal suspects approved for daibu is used to indicate whether a state organ is functioning properly. As a consequence, public security organs pursue a high rate of daibu approvals, even to the extent of neglecting to conduct any investigation to determine whether a suspect poses any the danger to the community. Some prosecutor's offices even evaluate the performance of prosecutors based on the number of daibu approvals. A prosecutor earns one point for each daibu she approves. This gives rise to a tendency for prosecutors to approve all daibu requests even when daibu is not necessary. By promoting this unscientific evaluation criterion these evaluations are already directly influencing prosecutors' conception of what it means to enforce the law and it goes against the fundamental law enforcement principle of valuing and protecting human rights. We should call a halt to this immediately.

The fourth misconception is the belief that in order to have the most impartial and the most scrupulous party undertake a review of whether an individual should be charged and detained, the power to approve daibu must be controlled by a court. Although China, unlike other countries, does not confer the power to review arrest and detention decisions upon courts, China similarly separates the functions of approving and executing arrests. As some scholars have correctly pointed out, the existence of the daibu approval mechanism manifests a principle of checks and balances, and because of the prosecutors' supervision, the use of daibu is limited and this guarantees citizens' fundamental human rights.¹⁰ Because of its role as the government organ that oversees the legality of other government actors, it is appropriate within the division of labor under the Chinese judicial structure for the prosecutor to exercise the power to review and approve daibu requests from the public security organs. The purpose is for the prosecutor to filter out unnecessary

¹⁰ Wan Yi, "Daibu Is Not a Crime Control Measure — the Procuratorate Should Not Report the Number of Daibu Approvals," *Legal Science*, 2009 Issue, No. 2, p.152.

and illegal applications for daibu, eliminate wrongful detention, and protect human rights. Because the function of reviewing daibu applications is not merely a procedural guarantee but also serves to supervise the public security organ's conduct of criminal investigations, the view that only an impartial court can approve daibu is somewhat biased.

3. SUPPLEMENTARY MEASURES TO IMPLEMENT CHECKS ON THE POWER OF DAIBU

Because there are multiple mechanisms to review the power to impose daibu, we must be doubly careful in how we implement this power. In addition to adjusting the notions of law enforcement concepts held by officials who handle cases, reasonable implementing measures and institutional checks on this power are the basis for guaranteeing that the exercise of this public authority will be appropriate. Scholars have engaged in many valuable studies. Some scholars suggest borrowing the concept of proportionality from administrative law and advocate for early modification or elimination of compulsory measures, including daibu.¹¹ Other scholars suggest that community corrections organizations can supervise defendants released with a guaranty pending trial or under residential surveillance.¹² Other scholars suggest introducing quantitative measures,¹³ to expand the reporting requirements to higher levels of prosecutors' offices, requiring registration and review and giving those subjected to daibu a right to appeal to a court for review of the daibu decision.¹⁴ The author believes that no matter what the suggestion is, it must be consistent with our current legal regulations and law enforcement environment. Otherwise those proposals have no chance of being put into practice and will not survive. Therefore a thorough analysis of the current institutional checks on the power of daibu, including any gaps that need filling, is a precondition to perfecting reform. The current checks on the power of daibu are as follows.

3.1. *Legislative Constraints*

Legislative constraints include:

3.1.1. The review of the necessity of detention:

Article 93 of the CPL, which is part of the 2012 amendments to the CPL, requires that after the prosecutor's office approves daibu for the criminal suspect or defendant, the prosecutor's office should also review whether it is necessary to continue to detain him. For those individuals the prosecutor determines need not be detained any longer, the prosecutor should recommend release or a modification to a different form of compulsory measure. The relevant agency must, within ten days, act upon the prosecutor's recommendation and notify the prosecutors' office of its decision.

¹¹ Wang Kongluo, Wu Qiang, "Revelations on Compulsory Measures of Macau," *New Heights (Bimonthly)* (2013)(5) at p.121.

¹² Zhang Haifeng, "Empirical Analysis on Exercising the Right of Arrest," *Journal of Southwest University of Political Science & Law*, June 2011 Vol. 13(3), p.91.

¹³ Translator's note: it appears the author is referring to risk assessment tools.

¹⁴ Qiu Qingli, Lai Shanming, "On the Risk Management of Arrest," *Journal of Southwest Petroleum University (Social Sciences Edition)*, September 2011, Vol. 13. No.5, p.60.

3.1.2. Appeal to and review by a higher level prosecutors' office:

CPL Article 90 provides that if the public security organ believes that the prosecutor's decision to not approve daibu is mistaken, it may demand a review by a higher level prosecutor's office but it must immediately release the person it has detained. If the agency does not accept the higher level prosecutor's opinion, it can immediately seek review from the next highest level prosecutor. That office must then decide immediately whether to make a modification and then must notify the lower level prosecutor's and public security organ which must then implement the decision.

3.1.3. Permission to extend the period of detention:

CPL Article 154 provides that the time period of investigatory detention after daibu must not exceed two months. For complex cases that cannot be resolved within two months, the lower level prosecutor's office may seek approval from the next highest level prosecutor's office to extend the period of detention by one month. The Supreme People's Procuratorate has, with the Ministry of Public Security and General Administration of Customs, jointly issued regulations that standardize and limit the procedures and the criteria for extending the period of detention.

3.2. *Internal Constraints*

Internal constraints can be divided into two categories: checks among co-equal departments and oversight by higher level prosecutor's offices. In the first category is the annual review of decisions not to approve daibu which is conducted by the prosecutor's case management center and disciplinary supervision organs as part of their review of the quality of cases handled by prosecutors. In the second category, there are internal documents that require reporting of all daibu decisions to the higher level prosecutors' office either for review or registration. Certain cases, such as those involving foreigners or daibu with special conditions, must be reported to a higher level people's prosecutor's office.

3.3. *External Constraints*

In practice, there is outside oversight of the daibu approval process, including periodic review by the political-legal commission of the Chinese Communist Party (政法委), the local People's Congress delegates and the people's monitors who make suggestions regarding individual cases.¹⁵

¹⁵ Translator's note: at every level of government there is a political-legal committee of the Chinese Communist Party that oversees the work of all law enforcement and judicial authorities. Local party congresses also oversee the work of law enforcement and judicial authorities. People's monitors are a relatively new innovation and they are charged with reviewing individual criminal investigations, usually for corruption offenses.

In the opinion of the author, the new legislation, which has added a requirement that prosecutors review the necessity of detention, has solved the problem raised by many scholars concerning the lack of a remedy for unnecessary detention. Moreover, the joint guidance issued by the relevant agencies limiting the ability to extend detention has also prevented abuse in a relatively effective manner. Internal checks within prosecutors' offices are also improving all the time. This shows a willingness on the part of prosecutors to take the initiative to enhance the care with which daibu is used. The following are the author's thoughts for how to improve even further the institutional checks on the power of daibu.

4. PROPOSALS FOR IMPROVEMENT¹⁶

4.2. *Implementing Measures*

The first way to improve the system would be to put in place implementing measures. As for review of the "necessity of detention," in the *People's Procuratorate's Criminal Procedure Regulations (Experimental)* (人民检察院刑事诉讼规则(试行)), which came into effect on January 1, 2013 and complemented the amended CPL, in Section 40, "Oversight of Criminal Procedure Law," a new paragraph 5 has been added, entitled "detention and detention relating to handling of a case." Article 616 provides that even after daibu, the prosecutor should undertake a review of the necessity of detention. The prosecutor may initiate the review, on his own motion, or based on information from the criminal suspect, defendant, his close relatives or legal representatives. If the prosecutor considers it unnecessary to detain the person any longer, he should propose to the relevant organs that the person be released or that they be subjected to a less restrictive compulsory measure. However, it is unclear under what circumstances the review should be initiated, which renders this sort of work somewhat arbitrary.

The author suggests that the Supreme People's Procuratorate, the Ministry of Public Security and the General Administration of Customs issue a joint document that clarifies the circumstances when detention necessity review should be initiated, including: 1) when public security organs request an extension of detention; 2) when the suspect requests a review of the necessity of his continued detention; 3) when the prosecutor finds that the victim and the suspect have reached a reconciliation agreement after daibu; or 4) when the danger to the community posed by the release of the suspect needs to be reevaluated. Also, the joint document requires that the prosecutor read the suspect's case file and interrogate the suspect before a detention extension request may be approved. Prosecutors' offices should also establish a case information sharing platform in conjunction with public security agencies so that they can track a criminal suspect's circumstances

¹⁶ Translators' note: Heading has been added here for ease of reading in the English language text. The heading does not appear in the Chinese original.

and the progress of the criminal case.¹⁷ This would make it easier for a prosecutor to initiate the evaluation process when and where necessary to do so.

4.3. *Convening a Public Hearing*

The public should be invited to participate in overseeing and restricting the exercise of the power of daibu. For those cases in which the public security agencies or individuals involved are not satisfied with the decision approving daibu, a hearing can be organized prior to a daibu decision is made. Depending on the circumstances of the case, legal representatives, victims, defense attorneys, and close relatives should be invited to this hearing. Some scholars have indicated that such a hearing could also include people who have no direct interest in the outcome of the case, such as representatives to people's congresses, experts, scholars, citizen supervisors, and citizen mediators, as well as individuals from relevant schools, workplaces, neighborhood committees, or village committees.¹⁸ A second public hearing might also be held concerning the evaluation of the necessity of post-arrest detention. This would make detention decisions more reasonable.

4.4. *Evaluation Mechanisms*

First, if the goal of Chinese judicial reform is to create a direct management mechanism for human and material resources within people's prosecutors' office, then the higher people's prosecutors' offices should regularly organize reexamination of "daibu" approval. This reexamination would occur from the top-down, but also among similarly situated prosecutors' offices. The focus should be placed on cases in which daibu requests have been denied. Second, the case management department should regularly evaluate the quality of case handling. Evaluation is especially necessary for cases in which daibu approval has been denied, prosecutors have dropped charges after daibu, the case is withdrawn after daibu, and someone has been subjected to daibu but was not convicted.

4.5. *Performance Evaluation Mechanisms*

Personnel performance evaluations should not be based upon the number of daibu approvals or on the proportion of daibu approvals to suspects. The public security organs and prosecutorial organs should develop internal, top-down, uniform, scientific programs and standards of evaluation with an emphasis on daibu where no crime was committed, acquittals after daibu, and like situations which demonstrate that the daibu power has been abused. Finally, the new personnel evaluation mechanism will necessitate certain changes to the "*Quality Standards of Prosecutorial*

¹⁷ Qiu Qingli, Lai Shanming, "On the Risk Management of Arrest," *Journal of Southwest Petroleum University* (Social Sciences Edition), (September 2011), Vol. 13:5, p.60.

¹⁸ Yang Chun-lei, "On Public Hearing Process of Examining and Approving Arrests—A Shift Away from Administration to Litigation," *Journal of Heilongjiang Administrative Cadre Institute of Politics and Law*, (2013), Vol. 1, p.142.

Examination of Arrest Requests” (人民检察院审查逮捕案件质量标准). In the current Standards, the definitions of “Mistaken Approval of Arrest” and “Mistaken Disapproval of Arrest” are either too simple or too complicated, and these definitions cannot be used as workable standards.

Chapter 17: An Empirical Analysis of the Review of “the Necessity of Detention”¹

WU Minglai, SUN Hanmei²

Since the implementation of the amended *Criminal Procedure Law* (“CPL”), Chinese prosecutors have been diligently fulfilling their responsibility to oversee and review the “necessity of detention” of criminal suspects. Prosecutors perform an important role in combating the phenomenon in which anyone against whom there is sufficient evidence is simply detained and then continuously held in detention until the conclusion of their case. They are also reducing the number of unnecessary detentions, inappropriate detentions, detentions that have exceeded the legal time limit, and prosecutors are generally strengthening the protection of human rights. However, since the process for reviewing the necessity of detention pending trial is still new, there are challenges and obstacles to its implementation. This paper analyzes how the review process has been working in Guangdong Province and will discuss the challenges it faces, as well as possible solutions.

1. THE STATUS OF THE REVIEW OF “THE NECESSITY OF DETENTION” IN GUANGDONG PROVINCE

From January 2013 to April 2014, prosecutors in Guangdong Province have actively engaged in the work of reviewing the necessity of detention. During this period, of the cases they reviewed, they recommended release or a change to a non-custodial compulsory measure in 333 cases involving 488 defendants. Of these, the investigating agency accepted the recommendations of the prosecutors in 213 cases involving 290 people. The details of these cases are discussed below.³

1.1. *A Comparison of Different Categories of Cases*

The cases that were reviewed consisted primarily of the following categories of criminal offenses: intentional assault, traffic offenses, theft, credit card fraud, and “picking quarrels and provoking troubles” (寻衅滋事). Of these, there were 104 cases of intentional assault (involving 133 suspects), 55 traffic offenses (involving 55 suspects), 45 cases of theft (involving 45 suspects), 14 cases of credit card fraud (involving 15 suspects), and 8 cases of “picking quarrels and provoking troubles” (involving 16 suspects). The prosecutors primarily based their recommendations for release on several factors, including: a) the defendant’s payment of compensation to the victim; b) the victim’s forgiveness of the defendant; c) the minor nature of the offense; and d) evidentiary

¹ This article was first delivered as a paper by the author at a conference jointly held in Guangzhou between NYU School of Law’s U.S.-Asia Law Institute and the University of Guangzhou in June, 2014.

² Minglai Wu, Division Chief of Investigatory Supervision Division I of the People’s Procuratorate of Guangdong Province. Haimei Sun, Section Chief of Investigatory Supervision Division I of the People’s Procuratorate of Guangdong Province.

³ Translator’s note: To put these statistics in some context, according to the official 2014 *China Statistical Yearbook*, the total number of individuals approved for daibu in all of China for 2013 was 896,403. Statistics for Guangdong Province were not available but one can reasonably deduce that the number individuals approved for daibu was in the tens of thousands.

issues. Of these, the payment of compensation in an amount sufficient to obtain the forgiveness of the defendant was the most common.

1.2. *The Promptness and Diversity of Cases Reviewed*

The cases reviewed vary in several different ways. First, the types of individuals affected include Guangdong residents as well as migrants from outside of Guangdong.⁴ There were 58 cases involving 65 individuals who were legal residents of Guangdong and there were 275 cases involving 423 individuals who were migrants from provinces outside of Guangdong. The individuals involved in these cases included migrant workers, agricultural workers, the unemployed, as well as more economically successful professionals and business owners. Second, there were differences in the way each case was initiated. The prosecutor may initiate reviews in one of three different ways: 1) through the application of the criminal suspect, his family, or attorney; 2) when the prosecutor's office elects to initiate a review itself; or 3) when another department office makes a suggestion that the case be reviewed or provides some evidence leading to the conclusion that it should be reviewed. The most common reason the prosecutor initiated review was that the criminal suspect and the victim reached a settlement on the amount of compensation. The promptness of the review is demonstrated by the short period between the decision to approve *daibu*,⁵ and the review of the necessity of detention. In most cases, the review was initiated within one month of *daibu* approval, but in many cases, prosecutors conducted their review within ten days of *daibu* approval.

1.3. *The Review of the Necessity of Detention Varied from District to District*

Not all districts implemented review of "the necessity of detention" at the same pace. Throughout Guangdong Province there were 333 cases involving 488 detainees. But these were not evenly distributed throughout the province. Of the more active districts, Foshan district reviewed 139 cases involving 204 detainees. At the other end of the spectrum, there were four districts that did not review the necessity of detention in a single case. In addition, the rate at which investigative agencies accepted the prosecutor's recommendations also varied by district. In nine districts, the rate of acceptance was 100%. For example, the district prosecutor's office in Yunfu made recommendations in 17 cases involving 21 defendants, and the investigating agency accepted them all. In other areas, however, the rate of acceptance was as low as 13%.

1.4. *Variations in Experimentation with the "Necessity of Detention" Review Processes*

⁴ Translator's note: in this context, Guangdong resident refers to individuals who have a residence permit (*hukou*) allowing them to reside in Guangdong legally. Migrants refers to individuals who may or may not actually reside in Guangdong but who have a residence permit that ties them to a place other than Guangdong. Traditionally, migrants who became criminal suspects tended to be detained because their legal residence was outside of Guangdong, even if their long time *de facto* residence was in Guangdong.

⁵ See *Explanatory Notes Regarding the Translation of Chinese Legal Terms*.

Prosecutors' offices in different districts experimented with various ways to address the diverse issues that arose during necessity of detention reviews. In Foshan, for example, in order to deal with the high volume of cases and a lack of sufficient personnel, the prosecutor's office developed a mechanism to study the possibility for alternative non-custodial compulsory measures. Under this mechanism, once daibu was approved, the prosecutor in charge of the case would have to analyze the likelihood that an alternative compulsory measure could be used and he would also be required to state the reasons for his conclusion. The prosecutor was also required to fill out a form called a "*Record of Post-Daibu Review of the Necessity of Detention*" (捕后羁押必要性审查案件登记表) ("**the Record**"). The prosecutor would make an entry in the Record as to whether this was a case where the prosecutor approved daibu under the usual conditions (一般逮捕), or whether this was a case where there was a strong likelihood that there would be a change to a non-custodial compulsory measure. Using this system, it became easier to track the progress of cases and to narrow the scope of review.

Another example is Jiangmen, where the investigation supervision division of the Jiangmen prosecutor's office, together with the detention center-based prosecutor's offices and communities, established a post-daibu review mechanism to determine the necessity of detention. Detention center-based prosecutor's offices in each community detention center are responsible for talking to criminal suspects, their legal representatives, close relatives, defenders, and other relevant parties and listening to their opinions. They are also responsible for providing materials about a criminal suspect's family circumstances as well as the opinions of community representatives concerning whether the suspect poses a danger to the community and whether there is any basis to believe he has shown remorse for the offense. Prosecutor's offices based in detention centers are also responsible for observing a criminal suspect's behavior during detention, making detailed written statements, and submitting them to the investigation supervision division for review. The investigation supervision division of the prosecutor's office should review all relevant materials, consult with the investigators to gain an understanding of the progress of the investigation, listen to the officials handling the case and then make a decision.

The Dongguan prosecutor's office, working with the local investigatory agencies, jointly promoted alternatives to detention, which could provide better complementary measures for evaluating a criminal suspect's danger to the community. They established a juvenile education center to guarantee the effectiveness of alternatives to detention for juveniles.

2. REMAINING ISSUES

2.1. *Subjective and Objective Factors that, in Practice, Lead to a Lack of Motivation to Review the Necessity of Detention*

Currently, the total number of cases reviewed by prosecutors is quite limited. This is due to several factors. First, when handling cases, prosecutors are hesitant to engage in a review of the necessity of detention out of a desire to avoid possible risks—releasing a detainee is riskier than keeping him in custody. If a detainee is released, he poses ones of the 5 categories of risks to society outlined in Article 79 of the CPL and since prosecutors are unwilling to bear this risk, they generally will not recommend modifying detention to a different non-custodial compulsory measure. Additionally, under the current performance assessment mechanism, when a suspect remains in custody it facilitates the seamless processing of the case and will not result in any negative evaluation for the prosecutor.

Second, the difficulty of resolving arguments over the necessity of detention discourages prosecutors from initiating the review of necessity of detention. Arguments in the judicial process include both legal and factual arguments. Legal arguments aim to explore the true meaning of laws and apply the meaning of the law to the facts. Factual arguments refer to sifting through all of the evidence and applying logic to determine which pieces of evidence are relevant to the application of the law.⁶ The legal and factual arguments for determining the necessity of detention are different from traditional arguments. The focus of a legal argument on the necessity of detention is whether the suspect, if released, poses a danger to the community, a question that is abstract and subjective. A traditional argument focuses on whether certain facts constitute the elements of a criminal offense, a question that is concrete and objective. The factual argument necessary to determining whether there is a necessity of detention in a particular case focuses on the uncertain speculation of whether one of the dangers enumerated in Article 79 will come to pass in the future if a suspect is released from detention. Traditional factual arguments focus on whether there is evidence that a crime was committed sometime in the past. These distinctive characteristics can lead to uncertainty and without a doubt increase the risk for the prosecutor handling the case.

Third, the burden of handling existing workloads reduces prosecutors' incentives to take on the additional responsibility of reviewing the necessity of detention. As the frontline of the prosecutor's office, the investigation supervision division generally has too many cases, not enough staff, and functions under extreme pressure. In addition, they are asked to participate in special campaigns even when they are already exhausted from their day-to-day responsibilities and, as a result, they do not have the time or energy to deal with the additional work of reviewing the necessity of detention.

2.2. *Institutional Weaknesses*

On an institutional level, the working mechanisms relevant to pretrial detention leave quite a bit of room for improvement. First, the division of labor and the level of coordination among the

⁶ Liu, Song & Liu, Zhongfa, "Studies on Review System on Necessity of Detention," *Essay Collection of the Third Criminal Procedural Supervision Forum*, p.197.

following units within a prosecutor's office is not clear: a) the investigation supervision unit, b) the public prosecution unit and c) the unit responsible for supervision of the detention centers. According to Article 617 of the *Supreme People's Procuratorate Rules on Criminal Procedure (for Trial Implementation)* (人民检察院刑事诉讼规则(试行)), the investigation supervision unit and the public prosecution unit are responsible for reviewing the necessity of detention during investigation and trial, respectively. In addition, prosecutors responsible for overseeing detention centers can also make recommendations in cases where they discover that an individual's detention is not necessary. However, the law is unclear as to whether the prosecutor based in a detention center should address his request to the other units to review the necessity of detention or whether he can make recommendations directly to the officials responsible for investigating the case. In practice, different districts have adopted different approaches. Some detention center prosecutors refer the cases to the investigation supervision division or public prosecution units, while others conduct the necessity of detention review themselves and make their recommendations directly to the investigators. Furthermore, while each unit has the legal authority to conduct the necessity of detention review and make recommendations themselves, the law does not provide a specific working mechanism for coordination among the various units. Thus, the lack of coordination often leaves the unit undertaking the review without a handle on all of the relevant information necessary to making an accurate determination and that, in turn, limits the accuracy and efficiency of the process.

Second, the prosecutor's recommendations are not binding. Pursuant to the requirements of the CPL, the prosecutor's office has the authority to make a recommendation to the investigating agency to release the suspect or modify the compulsory measure to a non-custodial one. However, the decision whether to adopt the recommendation is ultimately in the hands of the investigating agency. If the investigating agency rejects the prosecutor's recommendation the prosecutor has no recourse. She will have wasted time and resources reviewing the case and making a recommendation and, in the process, suffered damage to the authority of her office.

2.3. *An Unsupportive External Environment*

(1) When it comes to reviewing the necessity of detention, investigating agencies and courts alike harbor resistance to the idea. For investigators, detaining a criminal suspect not only guarantees that the suspect will be present for interrogation and other pretrial procedures but also helps investigators to obtain a confession which, in turn, helps them to resolve the case. Some districts even use the rate of detention as a factor in evaluating the performance of criminal investigators. For the courts, detaining a suspect guarantees the defendant's presence at trial and ensures an orderly process. Some courts will not even accept a case unless the defendant is in custody.

(2) The public's misunderstanding also creates undue pressure. Most ordinary citizens have a misunderstanding of the relationship between compulsory measures and pursuing criminal

responsibility. They believe that if someone is arrested then they must be guilty of a criminal offense. If they are released, then that means the authorities have given up on the crime and have given up on bringing the suspect to justice. This type of misunderstanding leads to a situation, especially in cases where there is a victim, and where the release of a criminal suspect from custody will result in the victim petitioning the government for some form of redress.

(3) The pressure to maintain social stability (维稳) is another factor. If the suspect is not detained that will, on some level, have a negative impact on the fight against crime. In addition, the release of a suspect may incite some citizens to petition the government for redress and petitioning is one factor that is considered to increase the level of social instability. Because of the pressure to maintain social stability, the tendency of the government is to favor detention even to the point that in some cases, where the suspect has been released, the government will intervene and initiate consultations among the relevant authorities. In the current situation in China, where the judicial system is not completely independent from the government, there can be no doubt that the involvement of the government would create some pressure for the prosecutor's office.

2.4. *The Current Alternatives to Detention are Too Weak to Safeguard the Judicial Process*

Under the law, the current alternatives to detention are residential surveillance and obtaining release with a guaranty pending trial. Residential surveillance requires a great deal of manpower and material resources and therefore, when considering it from an economic standpoint, it would rarely be the first choice for investigative agencies. In addition, given the current state of social control mechanisms, the fact that family members are spread out in different geographic locations, and the state of the household registration (户口) system, it is impossible to guarantee that a member of the "floating population" (流动人口)⁷ will not flee the jurisdiction if released. Moreover, it is local police stations who are charged with supervising a suspect who has been released with a guaranty pending trial. They are already understaffed and overwhelmed with various complex responsibilities and are therefore unlikely to provide effective supervision of a suspect or defendant who has been released but is still awaiting trial. The local police station charged with supervising a suspect who has been released will rarely be able to make a timely discovery of a violation of the conditions of release and will also rarely be able to timely inform the officials who had made the decision to release the suspect in the first place. For these reasons, in practice, obtaining a release with a guaranty pending trial is not as effective as one might have expected.

⁷ Translators' note: The phrase "hukou" (户口) refers to a person's official place of residence, or their "household registration." Chinese citizens who leave their home, usually in the countryside, to find work in urban areas but who do so without obtaining permission to change their official place of residence become part of China's large "floating population" (流动人口) who actually live and work in China's growing cities but do not enjoy the full benefits of citizens with household registrations for their place of residence.

3. SUGGESTIONS FOR RESOLVING THESE ISSUES

3.1. *Innovation and Inspiration*

(1) The performance assessment system should be reformed to incentivize prosecutors to embrace their responsibility to undertake the review of the necessity of detention. On the one hand, we must make it understood that a small number of detainees who are released will inevitably flee and that this outcome is a normal consequence and is just a cost of developing the rule of law. For prosecutors handling cases, as long as the prosecutor adhered to legal procedures, and based their decision on the facts and the law—carefully analyzed the necessity of detention, did not violate the law and was not corrupt—their decision to recommend release of a suspect should not be considered an error, even if a released detainee commits any of the violations proscribed by Article 79. On the other hand, performance assessment criteria should take into account the review of the necessity of detention in a positive way. Credit should be given to prosecutors who successfully recommend to the investigating agency: a) the release of a suspect or change to their detention to a non-custodial compulsory measure and; b) the change or release has no negative impact on the case.

(2) We should explore new ways of proving whether detention is necessary. In light of the special characteristics of evaluating the necessity of detention, we should establish a quantitative evaluation system. This so-called quantitative evaluation system would require that we first set some rules, assign a value to each factor relevant to detention and then once we add all of the values together to reach a total score, that total score would inform our judgment about whether detention of the suspect is necessary. The use of objective data to make a quantitative evaluation of whether detention is necessary has been tried both within China and abroad. Outside of China, the United States Department of Justice uses a detailed model. To avoid personal bias and subjective arbitrariness, they use something called the “actuarial” method. The “actuarial” method takes into account various factors that affect a suspect’s pretrial risks, assigns a different weight to each risk factor, called the “odds ratio,”⁸ and then uses these weights to calculate the risk of releasing a suspect. The pretrial services officer then notifies the judge of the suspect’s pretrial risk score and makes a recommendation on whether to release the suspect or keep him or her detained. The judge makes the final decision.

This kind of risk assessment is standardized and objective and makes up for the biases inherent in subjective evaluations. In China, some of our line prosecutors’ offices have tried a similar process. During the past few years, under the guidance of the Supreme People’s Procuratorate, a proportion of China’s prosecutor’s offices participated in a pilot program that used a risk assessment tool to determine the necessity of continued detention. The feedback from the experiment has been that the evaluations went smoothly, the risk assessment tool was easily accepted by all parties and that

⁸ Yao, Li & Shao Shao, “On Post-Arrest Review of the Necessity of Detention,” *Science of Law*, (2013), p.5.

it was simple and easy to implement. However, there is still room for improvement. Specifically, we need further study and analysis to determine which factors should be considered and the how much weight should be assigned to each factor. Therefore, before we adopt a risk assessment measure we must adhere to the principles of an orderly process. First, a sample group of prosecutor's offices should experiment with the risk assessment tool and then, only after we have had a successful experience with it, should we extend it to the whole country.

3.2. *Improve the Structure and Improve Efficiency*

(1) First, we must have a clear division of responsibility among the various divisions of the prosecutor's office. We should establish a model where the investigation supervision and public prosecution divisions are in charge and the detention center supervision division complements them. This is because determining the necessity of detention is itself an inherent responsibility of "investigation supervision" (侦查活动监督).

Second, determining the necessity of detention is part of the power to approve daibu. One of the special characteristics of daibu in China is that detention is a necessary extension of daibu and most factors considered relevant to the analysis of the necessity of detention overlap with the factors considered in whether to approve daibu.

Third, this division of labor is consistent with the normal workflow of a prosecutor's office. The investigation supervision division handles cases from the daibu approval phase to the extension of detention phase and, in the process, develops the most thorough understanding of the circumstances of individual cases, as well as the greatest grasp of and capacity to judge whether it is necessary to keep a suspect in detention. This distribution of labor can also help conserve justice system resources and increase efficiency.

A scholar once theorized that if the investigation supervision division is in charge of both approving daibu and determining the necessity of detention, it cannot reasonably be expected to supervise its own work and correct its own mistakes. He concluded that there should be a mechanism whereby prosecutors in detention centers make recommendations on alternative compulsory measures to the agency handling the case based upon their observations of the detainee's circumstances. This view is understandable. However, the necessity of detention review contemplated in the CPL focuses on necessity of *continued* detention, rather than the accuracy of the *initial* decision to detain. If the *initial* decision to approve daibu was erroneous, the prosecutor should revoke the approval of daibu pursuant to Article 94 of CPL, instead of determining that there is no necessity for detention. The investigation supervision divisions' review of detention is based on the situation at the time of the review and does not involve reviewing whether the initial detention decision was correct. Therefore, the investigation supervision division should not have

a problem acting impartially and should not be reluctant to supervise and correct its own mistakes while determining the necessity of detention.

During the indictment and prosecution phase of a case, the public prosecution division should determine whether it is necessary to detain a criminal suspect based upon the individual circumstances of that case. The prosecution division is the best choice to review the necessity of detention during this phase because that division is responsible for reviewing the case, filing an indictment, supporting the prosecution in court, and supervising the legality of trial proceedings and is therefore completely familiar with the case. However, further studies are required to determine whether having the prosecutor review the necessity of detention during trial is consistent with the proper flow of a criminal case and whether it is the most efficient process.

Compared to the investigation supervision and public prosecution divisions of prosecutors' offices, the detention center supervision prosecutors are limited in their ability to determine the necessity of post-daibu detention. They do not handle cases directly so they are unfamiliar with the cases and cannot make a comprehensive or accurate assessment of the necessity of detention. They may well invest huge amounts of time and human resources to understand cases as well as the investigation supervision and public prosecution divisions when it is unrealistic for them to do so. However, the prosecutors based in detention centers *do* have some knowledge of circumstances relevant to whether a criminal suspect or defendant should be kept in custody. Thus, the investigation supervision and public prosecution divisions should consult with the detention center prosecutors during the review process, and the detention center prosecutors should cooperate with and provide relevant information to the other divisions.

(2) The effect of prosecutorial recommendations concerning detention should be clarified. Making recommendations concerning detention is within the prosecutor's power to supervise other agencies so it is reasonable for the prosecutor's office to have this responsibility. Moreover, having this authority reside within the prosecutor's office guarantees the independence of the investigating agency handling the case. The prosecutor's recommendations should be taken seriously. If the investigating agency disagrees with a recommended change to compulsory measures, it should state its reasons. If the investigating agency does not provide a reason or its reasons are inadequate, the prosecutor can suggest a correction. Furthermore, the investigation supervision division can file a report to the next level prosecutor's office investigation supervision or public prosecution divisions. The next level investigation supervision or public prosecution division will use the report as a factor when deciding whether to extend detention.

3.3. *Strengthen Communication and Seek External Support*

(1) In order to secure the understanding of the investigating agency and the court, the prosecutor should promptly communicate with them and execute the relevant enforcement documents, forge

a consensus concerning the law enforcement approach, and establish a cooperative working mechanism between the public security agency, the prosecutor's office, and the court. At the same time, there should be a mechanism established to exchange information among public security agencies, prosecutors and the courts concerning the process for reviewing the necessity of detention and to clarify the division of responsibilities for carrying out the results of the review.

(2) Prosecutors should use the media to broadcast the legal significance of the necessity of detention and non-custodial compulsory measures, measures such as obtaining release with a guaranty pending trial. This will aid suspects or defendants and members of their social networks to understand exactly what "release with a guaranty pending trial" entails, which, in turn, may improve enforcement of the restrictive conditions of release with a guaranty pending trial. Long-term media reporting may help correct victims' internalized misconceptions of non-custodial compulsory measures, which, in turn, will ease the pressures created by vexatious petitions from victims any time a suspect or defendant is released with a guaranty pending trial.

3.4. Improving Non-custodial Measures and Ensuring the Enforceability of Detention Decisions

The availability of effective alternatives to detention directly influences the utility of reviewing the necessity of detention. If there are no viable alternatives to detention, there will be no choice but to keep a defendant in custody, even if their detention is unnecessary. Without alternatives, any prosecutorial recommendation to release the suspect or defendant will have to be set aside. Therefore, in order to effectively implement the requirement for review of the necessity of detention it is necessary to increase the variety and enhance the feasibility of alternative measures to detention.

(1) We should improve the process for "release with a guaranty pending trial." Currently in China, the process has much room for improvement. Guarantors find it difficult to carry out their responsibility to supervise the suspect or defendant. Also, right now, money is the only available form of financial guaranty. This has brought about a situation whereby defendants who could have been released must remain in custody because they cannot find a guarantor and cannot pay the monetary guaranty themselves. Therefore, we should expand the kinds of financial guarantees that are acceptable. In practice, for some criminal suspects who cannot provide cash or a guarantor, we could consider the experience of foreign countries and accept other forms of property including, valuable chattels, stocks, or real estate and or other forms of immovable property as collateral by way of a guaranty. It is also necessary to improve the guarantor system. We should review the qualifications of potential guarantors more intensely and strengthen their duties to supervise a suspect or defendant. When a guarantor violates his or her obligations to supervise a suspect or defendant, the relevant department should hold them legally accountable.

(2) We need to improve the supervision of suspects and defendants who have been released with a guaranty pending trial. We ought to establish, within the public security agency, a special office to manage released defendants and ensure their presence whenever required. At the same time, this special office should also manage guarantors, ensuring that they voluntarily and faithfully fulfill their legal obligations as guarantors. Second, we should combine local police supervision with “community corrections” centers (社区矫正) so that the community can play a positive supervisory role. Third, we should create incentives for social organizations, such as enterprises, to take up supervisory responsibilities. Finally, we should make use of surveillance technologies, which can enhance the surveillance of migrants who have no fixed address or employment.

(3) We should also improve the system for informing released defendants of their duties in order to reduce the number of unintentional escapees. Some criminal suspects purposefully flee to avoid legal liability while others flee because they are unaware of their duties while they are on release with a guaranty pending trial. Therefore, at the time of release, the investigating agency should give criminal suspects a written statement clarifying their obligations and they should also advise them orally of the following: first, what a release on guaranty pending trial specifically means so that they will obey the rules while they are on release; and second, the serious legal consequences of violating any of these rules so that defendants will take their required duties seriously and will not dare to lightly violate any of the rules.

Chapter 18. Relevant Laws of China

18.1. ARTICLE 93, 94 OF THE 2012 CRIMINAL PROCEDURE LAW

Article 93:

After the daibu of a criminal suspect or defendant, the people's procuratorate shall continue to review the need for detention. Release or a change of compulsory measures shall be suggested for those who do not require detention be continued. The relevant organs shall inform the people's procuratorate of the circumstances of the disposition within 10 days.

Article 94:

The people's courts, people's procuratorates and public security organs shall immediately withdraw or change a compulsory measures against a suspect or defendant, if it is discovered that its adoption was improper. Public security organs releasing a person who has been subject to daibu or who alter an order that a person be subjected to daibu shall notify the people's procuratorate who originally approved the daibu.³²⁴

³²⁴ Translation, with some modifications, courtesy Chinalawtranslate, available at <http://www.chinalawtranslate.com/criminal-procedure-law/?lang=en> (accessed July 31, 2017).

18.2. SPP LITIGATION RULES OF THE PEOPLE'S PROCURATORATE

Article 614

The People's Procuratorate supervises whether the custody period and case handling is legal according to law.

Article 615

The People's Procuratorate and detention facility's inspection department shall supervise the custody and case handling period of cases processed by public security organs and those involving the People's Court where the criminal suspect or accused person is under custody; if the criminal suspect or accused person is not under custody, the investigation supervision or public prosecution department of the People's Procuratorate is responsible for supervision. The case management department of the People's Procuratorate is responsible for supervising the custody and case handling period for cases handled by the People's Procuratorate.

Article 616

After arresting a criminal suspect or accused person, the People's Procuratorate shall examine the necessity of keeping him or her under custody.

If the People's Procuratorate finds or believes that it is not necessary to continue detention after an examination based on a criminal suspect, accused person, legal representative, close relative of defender's petition, the People's Procuratorate shall suggest that the concerned organ to release him or amend the compulsory measures.

Article 617

The investigation supervision department shall review the necessity of detention during the investigation; the public prosecution department shall be responsible for reviewing the necessity of custody at during trials. If the detention facility's inspection department finds that it is not necessary to continue detention, it may suggest that the criminal suspect or accused person be released or that compulsory measures be amended.

Article 618

A criminal suspect or accused person or his/her legal representative, close relative, or defender may apply to the People's Procuratorate to examine whether detention is necessary. In the application he or she shall state why it is not necessary to continue detention. If there is relevant evidence or other materials, he or she shall provide them.

Article 619

If the People's Procuratorate finds one of the following circumstances, the People's Procuratorate may present written suggestions to release or change compulsory measures:

- (1) there is a major change in case evidence making it such that it is no longer sufficient to prove criminal facts or that a crime has been committed by the criminal suspect or accused person;
- (2) if there is a change in case facts or circumstances, the criminal suspect or accused person may be sentenced to public surveillance, criminal detention, supplementary punishments, or exempted from criminal punishment/found innocent;
- (3) The possibility that a criminal suspect or accused person has committed a new crime, destroyed or falsified evidence, intervened or colluded in witness testimony, retaliated against a victim, informer or petitioner, or attempted suicide or escape, etc. has been eliminated.
- (4) The case facts are basically clear and evidence has been collected and established. The conditions for obtaining a guarantor pending trial or residential surveillance are met;
- (5) If a criminal suspect or accused person continue in custody, the custody period would exceed the duration he or she may be sentenced to according to the law;
- (6) The detention term expires;
- (7) It is more suitable to amend the compulsory measures due to special circumstance in the case or the requirements for handling the case;
- (8) Other circumstances making it unnecessary to keep a criminal suspect or accused person in custody.

The reasoning and legal basis for which it is unnecessary to keep a criminal suspect or accused person under custody shall be stated in the suggestions for releasing or amending the compulsory measures.

Article 620

The People's Procuratorate may examine the need for detention by the following means:

- (1) appraise the need for detaining a criminal suspect or accused person;
- (2) get to know the development of the investigation and evidence available to investigation organs;
- (3) to listen to the opinions of the relevant organs and persons handling the case;
- (4) to listen to the opinions of a criminal suspect, accused person, his/her legal representative, close relative, or defender, or a victim and his agent *ad litem*/other concerned persons;
- (5) to investigate and check the health of a criminal suspect or accused person;
- (6) to render the concerned case materials, examine the evidence provided by a concerned party to prove that it is unnecessary to continue custody for a criminal suspect or accused person;
- (7) other methods.

Article 621

When the People's Procuratorate presents suggestions for releasing a criminal suspect or accused person or amending his or her compulsory measures to organs handling the case, the People's Procuratorate shall require the concerned organs to notify this Procuratorate of its final decision. If the concerned organs do not adopt the People's Procuratorate's suggestions, it shall be required to state its reasoning and legal basis.

Regarding cases handled by the People's Procuratorate, if it is found, after an examination, that keeping a criminal suspect in custody is unnecessary, suggestions shall be submitted to the case handling department to release or amend the compulsory measures. Specific procedures shall be followed as listed in the preceding paragraph.

Article 622

When the investigation, investigation supervision, or public prosecution department of the People's Procuratorate handles a case, if a criminal suspect or accused person is under custody, they shall notify the detention facility's inspection department responsible for supervision or the case management department and the detention center within 10 days of making the decision or receiving the decision or determination under one of the following circumstances:

- (1) extending or deciding to extend the duration of investigation and detention;
- (2) for cases that the People's Procuratorate directly accepts for filing and investigation, it is decided to recalculate the custody period and amend or lift compulsory measures;
- (3) to conduct an expert evaluation of mental disorders towards a criminal suspect or accused person;
- (4) changing the jurisdiction during examination and prosecution, or extending the time allowed for examination and prosecution
- (5) returning cases for supplementary investigation or recalculating the period allowed for examination and prosecution after a supplementary investigation and rendering the case for examination and prosecution;
- (6) The People's Court decides to apply summary procedures to a first instance case or have the case retried with regular procedures instead of summary procedures;
- (7) The People's Court changes the jurisdiction, decides to extend or suspends the trial, or grants the People's Procuratorate a withdrawal from prosecution.

Article 623

The People's Procuratorate shall submit a corrective recommendation according to the law if it finds one of the following circumstances in the detention center's administration of custody:

- (1) not to urge the organ handling the case to go through formalities or remanding permit ;
- (2) not to send a notice for detention periods that will soon expire to the organ handling the case within seven days before the criminal person or accused person's detention period ends;

- (3) not to immediately report to the People's Procuratorate in writing and notify the case handling organ after a criminal suspect or accused person remains under custody for a period exceeding the maximum allowed duration thereof;
- (4) after receiving the petition or complaint presented by a criminal suspect, accused person, his or her legal representative, close relative, or defender for changing compulsory measures, examining the need for continue custody, or requiring that compulsory measures be released or amended, does not transfer the petition to the concerned organ handling the case or the People's Procuratorate;
- (5) other illegal circumstances.

Article 624

If, during investigation, one of the following circumstances is found concerning the detention carried out by public security organs, a corrective recommendation shall be put forth:

- (1) not instituting formalities to remand permission in accordance with regulations;
- (2) not to notify the People's Procuratorate and the detention center in writing when it is decided to recalculate the duration of custody or to extend the duration of investigation and custody after approval;
- (3) not to notify the People's Procuratorate and detention center in writing when a criminal suspect is under expert evaluation for mental illness;
- (4) other illegal circumstances.

Article 625

When the People's Procuratorate finds one of the following circumstances during the trial period as dictated by the People's Court, it shall submit a corrective recommendation according to the law:

- (1) not to go through the formalities for remanding a permit during the first instance trial, the second instance trial, and death sentence review;
- (2) to recalculate the duration of a trial, approve an extension for a trial, change jurisdiction, extend or suspend the trial, or remand the case for retrial due to violations of the criminal procedure law;
- (3) It is decided to recalculate the duration of a trial, approve an extension for a trial, change jurisdiction, extend or suspend the trial, or remand the case for retrial, but not notify the People's Procuratorate and detention center in writing;
- (4) Other illegal circumstances.

Article 626

When the People's Procuratorate finds that the public security organ or a People's Court at its level or below imposes undue custody, the People's Procuratorate shall report to the chief prosecutor for approval. After approval, a corrective notice shall be sent regarding the illegal activity to the case handling organ.

If overdue custody is imposed by the public security organ or higher level People's Court, the People's Procuratorate shall report to a People's Procuratorate at the same level as the case handling organ, level by level, in a timely manner. A People's Procuratorate at the same level shall send a notice for correcting illegal activity to such organs.

Regarding cases in which custody is conducted in a different location, if it is found that the case handling organ has imposed undue custody, the People's Procuratorate shall report to the People's Procuratorate at the same level as the level of the case handling organ and send a corrective notice regarding the illegal activity.

Article 627

After the People's Procuratorate sends a corrective notice regarding the illegal activity and the concerned case handling organ makes no reply or continues overdue detention, the People's Procuratorate shall report to a higher level People's Procuratorate in a timely manner.

Regarding people directly responsible for cases who instate overdue custody, the People's Procuratorate may write to his work unit or competent organ to suggest that administrative or disciplinary punishment be imposed in accordance with the laws or relevant regulations; if the overdue custody is serious and may constitute a crime, criminal responsibility shall be pursued.

Article 628

Regarding cases directly accepted by People's Procuratorates for filing and investigation, examination for arrest, or examination and prosecution before criminal suspects' investigation custody and case handling period expires, the case management department shall send a warning concerning the term expiration to the investigation, investigation supervision, or public prosecution department according to relevant regulations. If the department handling the case is found to have exceeded the prescribed term, a corrective recommendation shall be submitted in accordance with concerned provisions.

18.3. SPP'S PROVISIONAL GUIDELINES ON HANDLING CASES OF REVIEWING THE NECESSITY OF DETENTION (PROVISIONAL)

(Passed by the 47th Meeting of the 12th Procuratorial Committee of the Supreme People's Procuratorate on January 13, 2016)

Chapter I: General Provisions

Article 1

These Provisions are formulated on the basis of the Criminal Procedure Law of the People's Republic of China, the People's Procuratorate Criminal Procedure Rules, and other provisions, combining actual procuratorial work conditions, in order to strengthen and normalize the review of the necessity of detentions, safeguard the lawful rights and interests of criminal suspects or defendants under arrest, and to guarantee the smooth proceedings of criminal procedural activities.

Article 2:

Review of the necessity of detention refers to supervisory activity by which the people's procuratorates follow article 93 of the "Criminal Procedure Law of the P.R.C. to conduct a review of whether or not it is necessary to continue detention of a criminal suspect or defendant that has been formally arrested, and where continued detention is not necessary, recommend that the case-handling organs grant release or modify compulsory measures.

Article 3

Cases reviewing the necessity of detention are uniformly handled by the criminal enforcement procuratorate department of the people's procuratorate at the same level as the case-handling organ; and departments such as for investigative oversight, public prosecution, investigation, case management and procuratorial techniques shall cooperate.

Article 4

Documents such as for case acceptance, filing, closure, and recommendations for release or modification of compulsory measures in cases reviewing the necessity of detention shall be registered, circulated, and handled on the procuratorial organ uniform operations usage system in accordance with relevant regulations; and after cases are filed, the case management departments shall carry out management, supervision, and early warnings for case-handling deadlines, procedures, and quality.

Article 5

Where state secrets, commercial secrets, or personal privacy are involved in the course of handling a case reviewing the necessity of detention, confidentiality shall be preserved.

Article 6

People's procuratorates conducting review of the necessity of detention must not abuse the right to make recommendations so as to influence the lawful conduct of criminal proceedings.

Chapter II: Case filing

Article 7

Where criminal suspects or defendants and their legally-designated representatives, close relatives, or defenders apply for review of the necessity of detention, they shall explain the reasons for not continuing detention. Where relevant evidentiary materials are available, they shall be provided at the same time.

Article 8

Applications for review of the necessity of detention are uniformly handled by the procuratorial departments for criminal enforcement of the corresponding people's procuratorates at the same level as the case handling organs.

Upon receipt of applications for review of the necessity of detention, the prosecution, case management and other departments of the corresponding people's procuratorates at the same level as the case handling organs shall transfer them to the procuratorial departments for criminal enforcement of the same procuratorates within 1 business day.

Where other people's procuratorates receive applications for review of the necessity of detention, they shall notify the applicants to apply to the corresponding people's procuratorates at the same level as the case handling organs, or within 2 business days, transfer the application materials to the corresponding people's procuratorates at the same level as the case handling organs and notify the applicants.

Article 9

After receiving application materials, the procuratorial departments for criminal enforcement shall conduct a preliminary review and submit opinions on whether to file and review the case within three business days.

Article 10

Procuratorial departments for criminal enforcement shall use means such as the procuratorate's unified operations system to promptly make inquiries about that procuratorates' approvals of or decisions to modify or revoke arrest measures.

Article 11

Procuratorial departments for criminal enforcement shall follow their duties to conduct preliminary review of the necessity of detention of the criminal suspects or defendants who have been approved for arrest by the procuratorates to which they belong or who have been arrested as decided by the people's courts at the same level.

Article 12

Upon preliminary review, where the criminal suspect or defendant may have one of the circumstances stipulated in Article 17 and 18 of these Provisions, the procurator shall draft a case filing report and file the case after the chief procurator or the deputy chief procurator in charge approves it.

Where applications have no grounds or the grounds are obviously not sustainable, or where, after review by the people's procuratorate an applicant fails to provide new supporting materials or reapplies without new grounds, the procurator will make a decision not to file the case and notify the applicant in writing.

Chapter III: Review

Article 13

People's procuratorates conducting review of the necessity of detention may employ the following methods:

- (1) Reviewing the grounds and supporting materials showing that the criminal suspect or defendant does not need to be detained;
- (2) Hearing the opinions of the criminal suspect or defendant as well as their legally-designated representative or defender;
- (3) Hearing the opinions of victims as well as their legally-designated representatives or agents ad litem, to understand whether they have reached a settlement agreement;
- (4) Hearing the opinions of the case-handling organ for the current stage;
- (5) Hearing the opinions of the investigative supervision or public prosecution department;
- (6) Investigating and verifying the physical state of the criminal suspect or defendant;
- (7) Other methods.

Article 14

People's procuratorates may conduct an open review in cases reviewing the necessity of detention. However, this excludes cases involving state secrets, commercial secrets or personal privacy.

People's congress delegates, CPPCC members, peoples supervisors, and special prosecutors may be invited to participate in open reviews.

Article 15

People's procuratorates shall make a comprehensive assessment of whether it is necessary to continue detention of a criminal suspect or defendant on the basis of factors such as the facts of the crime they are suspected of, their subjective malice, their demonstrations of remorse, their physical condition, the development of the case, the sentence that might be given and whether their is any danger of further harm to society.

Article 16

The assessment of whether continued detention of a criminal suspect or defendant is necessary may employ quantitative methods, establishing specific standards such as positive items, negative items, or disqualification items. Criminal suspects or defendants' scores may be a reference for the comprehensive assessment.

Article 17

In cases reviewing the necessity of detention, where it is discovered that the criminal suspect or defendant has any of the following circumstances, a recommendation for release or modification of compulsory measures shall be submitted to the case handling organ:

- (1) A major change occurs in the case evidence and there is no evidence showing a crime was committed or that the criminal conduct was not by the criminal suspect or defendants;
- (2) A change occurs in the case facts or circumstances, where the criminal suspect or defendant might be sentenced to short-term detention, controlled release or the independent use of a supplementary punishment; have punishment waived; or be found not guilty.
- (3) Continued detention of the criminal suspect or defendant will exceed the period of detention they might be lawfully sentenced to;
- (4) Case facts are already basically clear, evidence has been gathered and fixed, and the conditions for release on guarantee or residential surveillance are met.

Article 18

Where upon review of the necessity of detention it is discovered that the criminal suspect or defendant has any of the following situations, and demonstrates remorse, and not detaining them would not endanger society, a recommendation for release or modification of compulsory measures may be made to the case handling organ:

- (1) only criminal preparation or aborted crime;
- (2) was an accomplice or accomplice under duress in a joint offense;
- (3) crime of negligence;
- (4) unjustified self defense or unjustified necessity defense;
- (5) first offender with a small degree of subjective malice;
- (6) is a juvenile or person 75 years or older;
- (7) has lawfully and voluntarily reached a settlement agreement with victims and already performed on it or provided assurances;

- (8) has a serious illness or is unable to care for themselves;
- (9) is pregnant or is a woman currently nursing their own child;
- (10) is the sole supporter of a person unable to care for themselves;
- (11) might be sentenced to less than one year imprisonment or given a suspended sentence;
- (12) other situations where the continued detention of criminal suspects and defendants is not needed.

Article 19

During the handling of cases reviewing the necessity of detention, reports on the review of necessity of detention shall be made, and the reports shall clearly indicate: the basic information of the criminal suspects or defendants, a brief description and the stage of proceedings of the original case, reasons and evidences for filing the case for review, the handling situation, review opinions, and so forth.

Chapter IV: Case Closure

Article 20

For handling cases reviewing the necessity of detention, decisions on whether to issue recommendations for release or modification of compulsory measures shall be made within 10 business days of case filing. Where the cases are complex, this may be extended for 5 business days.

Article 21

Where upon review it is decided that continued detention is not necessary, the procurator shall, upon reporting for approval to the chief procurator or the deputy chief procurator in charge, issue a recommendation for release or modification of compulsory measures to the case handling organ, and request that the case handling organ reply with the handling situations within 10 days.

Recommendations for release or modification of compulsory measures shall explain the reasons and the legal basis for which continued detention of criminal suspects or defendants is not necessary.

Article 22

People's procuratorates shall track the disposition of recommendations to case-handling organs for release or modification of compulsory measures.

Where the case-handling organ has not replied about the disposition within 10 days, then upon reporting for approval to the chief procurator or deputy chief procurator in charge, a notice to correct unlawfulness may be issued to it in the name of the procuratorate, requesting that they promptly reply.

Article 23

Where upon review it is decided that continued detention is necessary, the procurators shall decide to close the case and notify the case handling organ.

Article 24

For cases that have been filed for review by application, after the people's procuratorates handle and close the cases, they shall promptly notify the applicants of the situations of issuing recommendations and of the handling by case handling organs, or of the review opinions that continued detention is necessary and the reasons therefor.

Article 25

The procuratorial departments for criminal enforcement shall promptly notify the investigation supervision, public prosecution, investigation, and other departments of their respective procuratorates of the situations of review, the situations of issuing recommendations and of the handling by the case handling organs via the procuratorial organ unified operations system or other means.

Chapter V: Supplementary Provisions

Article 26

In cases that the procuratorate is currently investigating or reviewing for prosecution, where the criminal enforcement department conducts a review of the necessity of detention, it is handled with reference to these Provisions.

Article 27

Where people's procuratorates conduct a review of the necessity of detention in accordance with a detention center's recommendation, it is handled with reference to the procedures for conducting a review of the necessity of detention in accordance with an application.

Article 28

The handling of cases reviewing the necessity of detention by procuratorial personnel shall be included in the supervision system of judicial case handling by procuratorial organ; where there are discipline-breaking or unlawful acts such as bribe-taking, dereliction of duty, abuse of power, bending the law for personal gain, and leaking state secrets, they shall be sternly dealt with according to discipline and law; where they constitute a crime, pursue criminal responsibilities according to law.

Article 29

These Provisions shall take provisional effect upon release.