

The Importance of Legal Counsel in Pretrial Justice

National Association of Counties

March 3, 2016

Stronger Counties. Stronger America.



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Pretrial Justice at NACo

March 17: Using Pretrial Risk Assessment to Guide Release and Detention Decision-Making

April 14: Effectively Framing the Pretrial Justice Narrative

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Today's Speakers



Colette Tvedt,
Director of Public
Defense Training
and Reform,
National Association
of Criminal Defense
Lawyers



Dan Chadwick,
Executive Director,
Idaho Association of
Counties

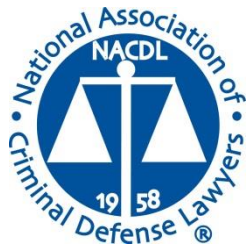


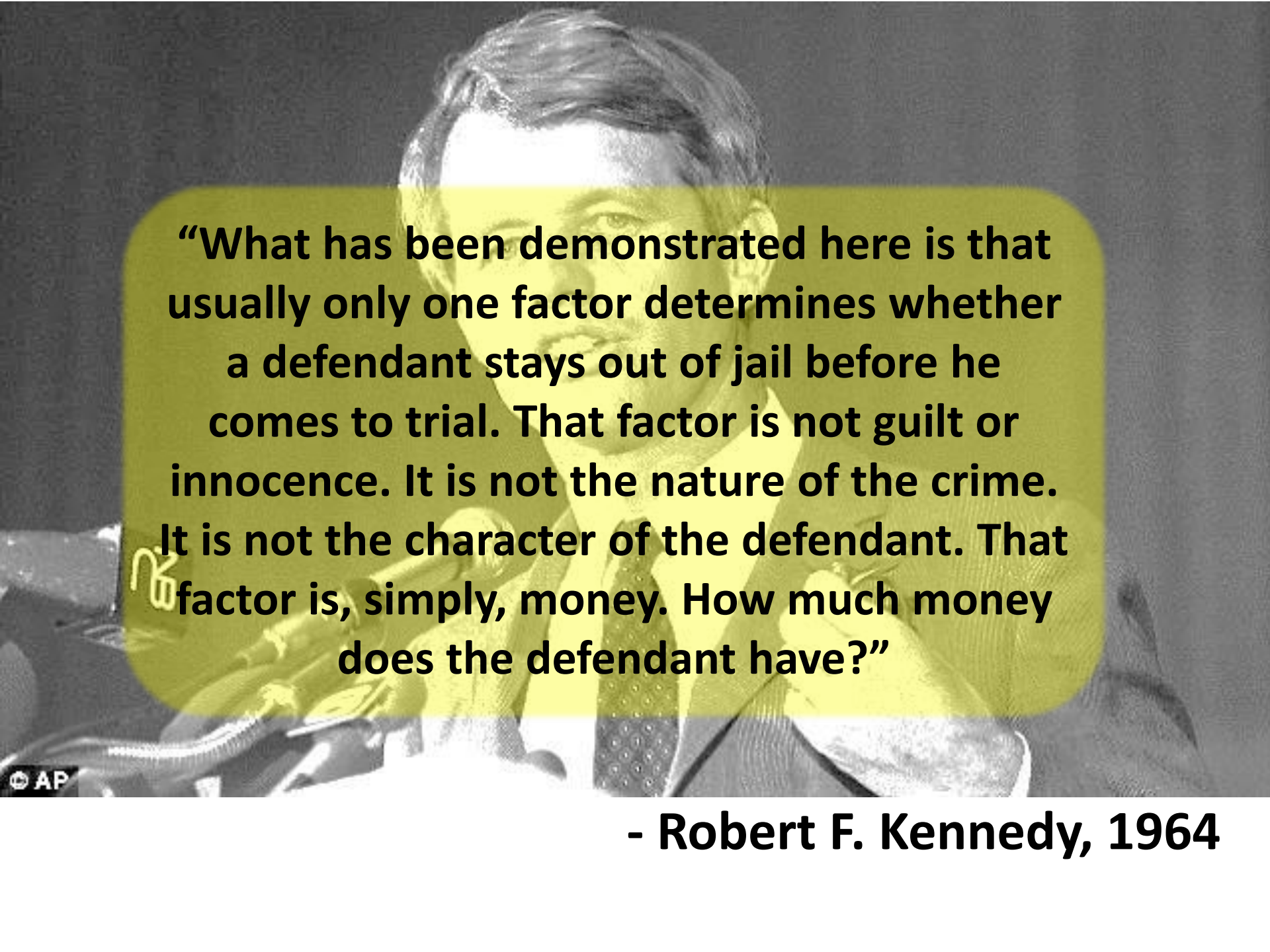
Robin Lipetzky,
Chief Public
Defender, Contra
Costa County, Calif.

Right to Counsel at First Appearance

Saving Money, Saving Lives

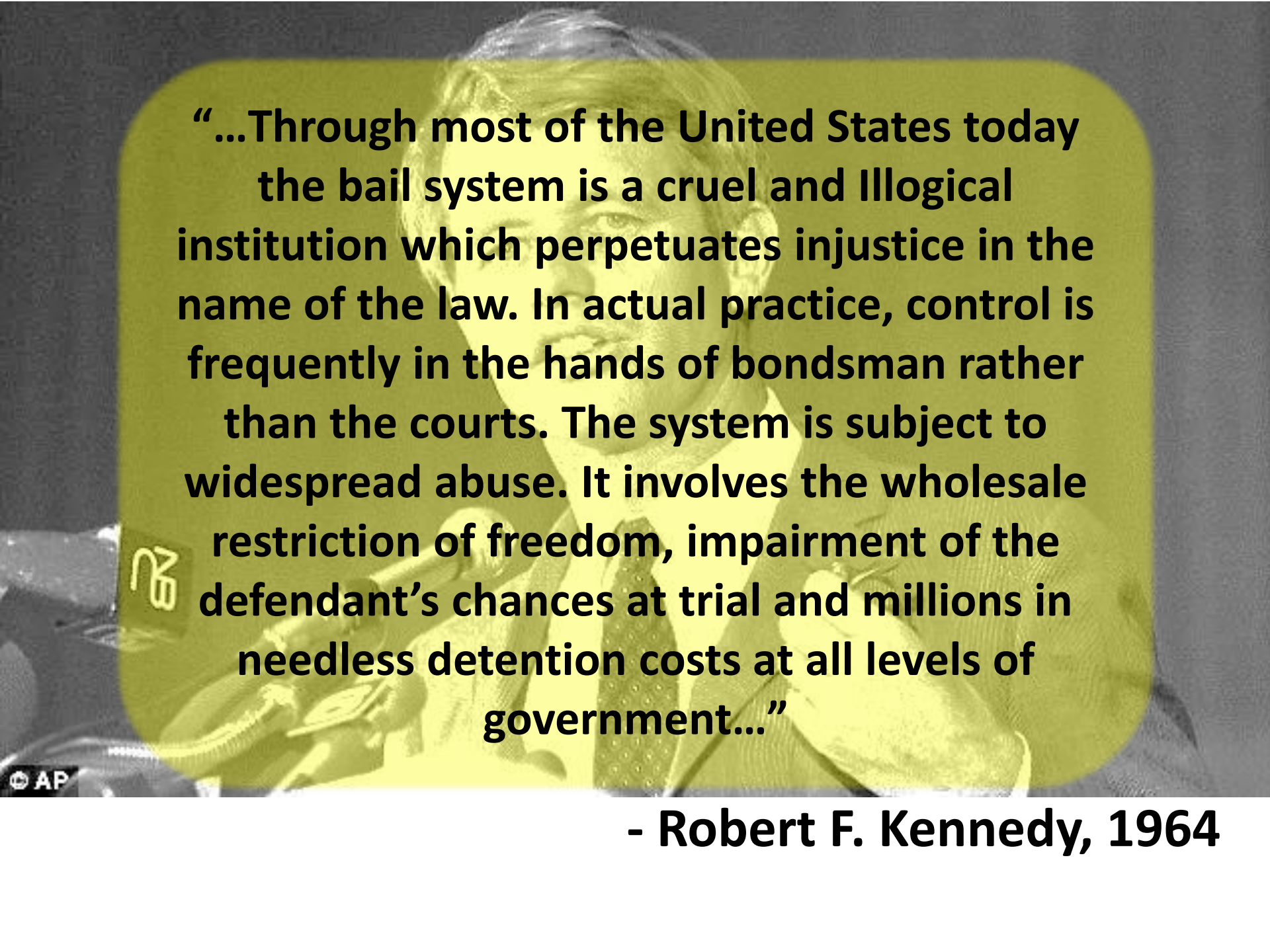
Colette Tvedt
National Association of Criminal Defense Lawyers



A black and white photograph of Robert F. Kennedy speaking at a podium. He is wearing a suit and tie, and his hands are clasped in front of him. A yellow rounded rectangle is overlaid on the image, containing the text. In the bottom left corner of the image, there is a small logo that says "© AP".

“What has been demonstrated here is that usually only one factor determines whether a defendant stays out of 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?”

- Robert F. Kennedy, 1964

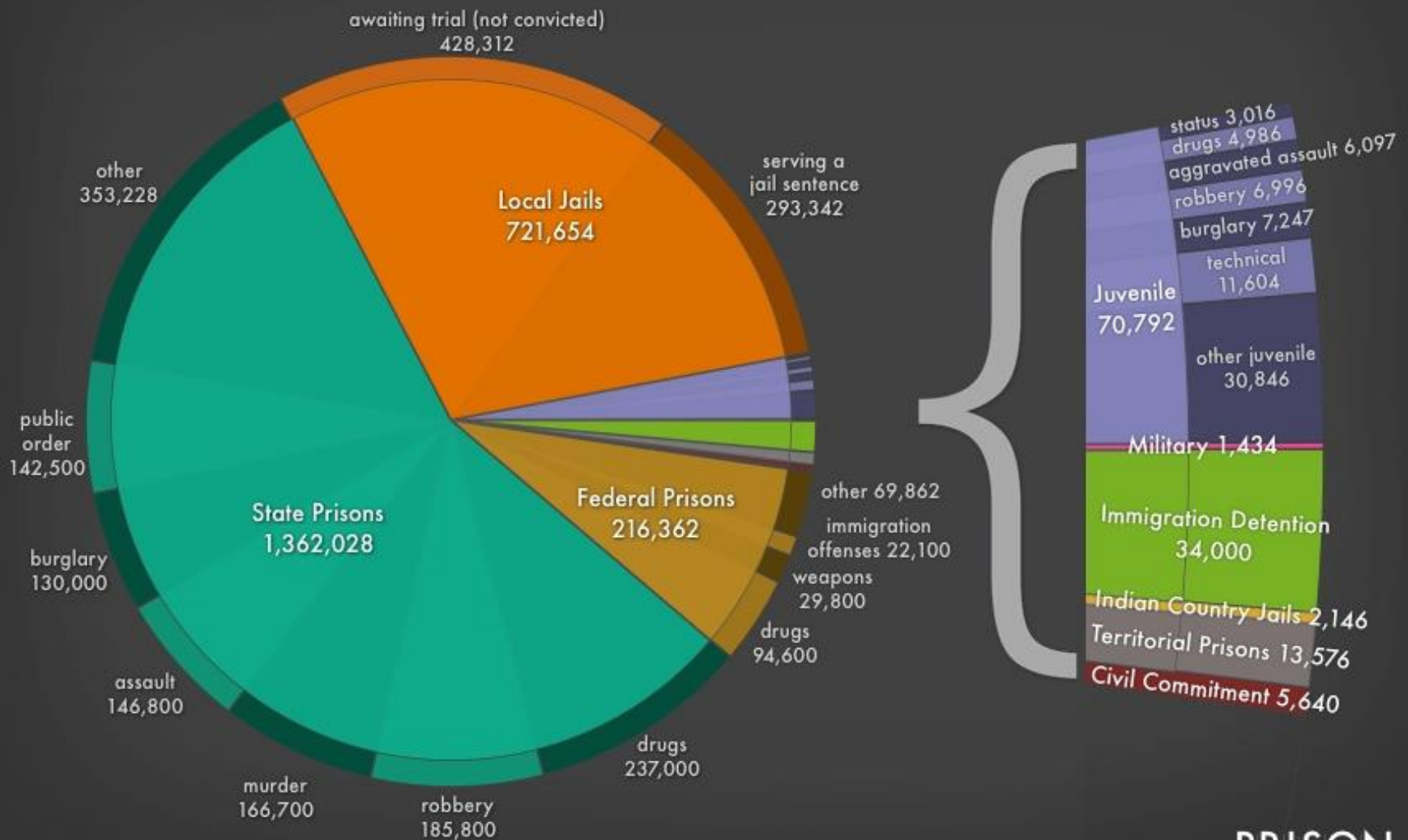
A black and white photograph of Robert F. Kennedy speaking at a podium. He is wearing a suit and tie, and his hands are raised in a gesture. The image is partially obscured by a large yellow rounded rectangle containing text. In the bottom left corner of the image, there is a small logo that says "© AP".

**“...Through most of the United States today
the bail system is a cruel and Illogical
institution which perpetuates injustice in the
name of the law. In actual practice, control is
frequently in the hands of bondsman rather
than the courts. The system is subject to
widespread abuse. It involves the wholesale
restriction of freedom, impairment of the
defendant’s chances at trial and millions in
needless detention costs at all levels of
government...”**

- Robert F. Kennedy, 1964

How many people are locked up in the United States?

The United States locks up more people, per capita, than any other nation. But grappling with why requires us to first consider the many types of correctional facilities and the reasons that people are confined there.



Sources and data notes: See <http://www.prisonpolicy.org/reports/pie.html>

PRISON
POLICY INITIATIVE

WHY??? Low level defendants held on
HIGH bail without representation





Purpose of Bail

- Court Appearance (FTA)
- Protect the public (re-arrest)
- Guard against punishment prior to adjudication

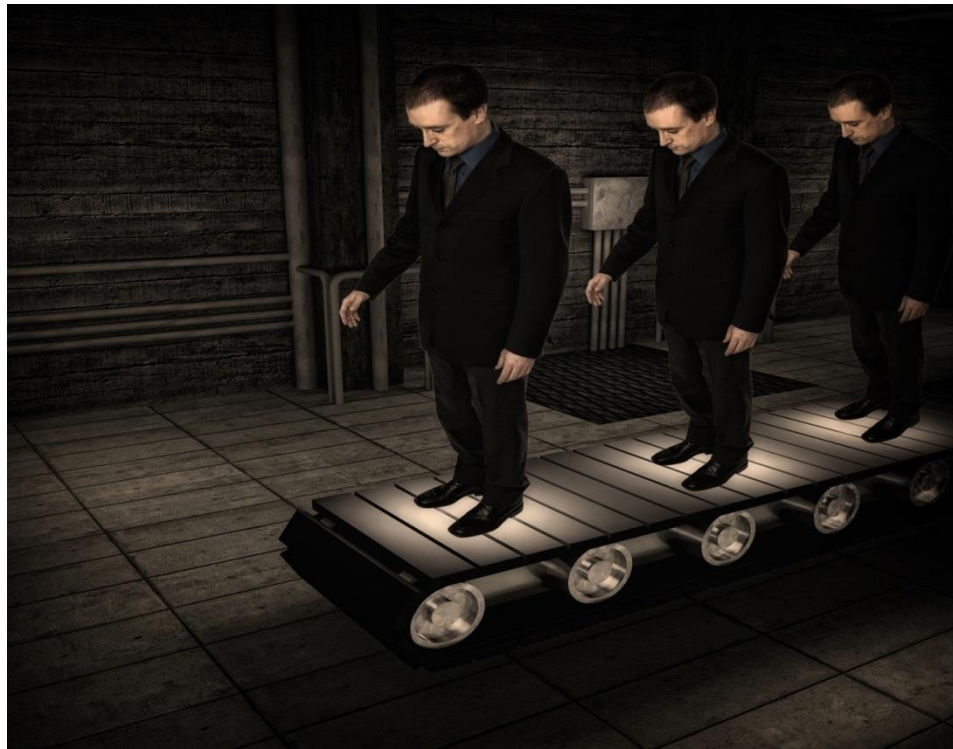
Bail law

- MUST be individualized (Stack v. Boyle)
- May consider danger/public safety (Salerno)



...but in some jurisdictions courts
continue to live in the past...

- Offense based
- Schedules
- No individualized assessment



FELONY BOND SCHEDULE

CITATION	DESCRIPTION	BOND AMOUNT
	Class 1 Felony	No Bond
	Class 2 Felony	\$100,000
	Class 3 Felony	\$10,000
	Class 4 Felony	\$5,000
	Class 5 Felony	\$5,000
	Class 6 Felony	\$2,000
Specific Offenses Regardless of Class:		
16-13-303(1)(b)	Public Nuisance – Gambling	\$10,000
16-13-303(1)(c)	Public Nuisance – Controlled Substances	\$10,000
16-13-303(1)(d)	Public Nuisance – By Statute	\$10,000

16-13-303(1)(k)	Public Nuisance – Hit and Run	\$10,000
18-4-301	Aggravated Robbery	\$50,000
18-4-102	Arson	\$50,000
18-6-401	Child Abuse With Bodily Injury	\$50,000
18-8-208	Escape	\$50,000
18-4-202	1st Degree Burglary	\$50,000
18-3-402(1)(h)	Sexual Assault on Helpless	\$50,000

18-3-402(4)(a-d)	Sexual Assault Force, Violence, Threat	\$50,000
18-3-405(2)(a-d)	Sexual Assault on a Child	\$50,000
18-3-405.3	Sexual Assault on a Child – Position of Trust	\$50,000
18-3-205	Vehicular Assault	\$50,000
18-3-105	Deadly Weapon Involved with Criminally Negligent Homicide	\$50,000
18-3-104	Deadly Weapon Involved with Manslaughter	\$50,000
18-3-203(b) or (d)	Deadly Weapon Involved with 2nd Degree Assault	\$50,000
18-3-302(4)(a)(II)	Deadly Weapon Involved with Kidnapping	\$50,000
18-3-206(a) or (b)	Deadly Weapon Involved with Menacing	\$50,000
18-18-412.5	Manufacture of Controlled Substances	\$50,000
16-4-103(1)	Schedule I and II Controlled Substances	\$50,000

Effective February 17, 2010

The biggest challenge to bail reform is the judiciary and prosecution

- They have come to rely on bail schedules, gut instincts and fear of headlines

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16-13-303(1)(f)	Public Nuisance – Drug Paraphernalia	\$10,000
16-13-303(1)(g)	Public Nuisance – Child Prostitution	\$10,000
16-13-303(1)(h)	Public Nuisance – Sex Exploitation	\$10,000
16-13-303(1)(i)	Public Nuisance – Commission of Felony	\$10,000
16-13-303(1)(j)	Public Nuisance – Eluding	\$10,000
16-13-303(1)(k)	Public Nuisance – Hit and Run	\$10,000
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Effective February 17, 2010



Varden v. City of Clanton



- Plaintiff alleges City of Clanton sets bail based on schedule alone
- US DOJ weighs in: Fixed-sum bail systems are unconstitutional and **bad public policy**
- System shouldn't work differently for rich and poor

“Although it may be theoretically possible to design a money bail system that does not regularly violate the Constitution, we haven’t seen it yet.”



Director Lisa Foster of the DOJ Office for Access to Justice at ABA’s 11th Annual Summit on Public Defense

Harms of Pretrial Detention

- Erosion of Presumption of Innocence



Loss of Stability for Defendants and Families



PHOTO: JOE RAEDLE/GETTY IMAGES



Nation

lateral
cord?

ICE



COLLATERAL DAMAGE

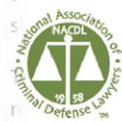
America's Failure to Forgive or Forget in the War on Crime

A Roadmap to Restore Rights and Status After Arrest or Conviction

5 to Know About Collateral Consequences

Over the past 40 years, as the U.S. prison population grew from fewer than 400,000 to 1.5 million, states and the federal government enacted thousands of laws that are triggered by a criminal conviction. They prohibit people with criminal records, who now number in the tens of millions, from obtaining a range of licenses and jobs in some industries. But as states explore ways of reducing the prison population, many are questioning the wisdom of limiting the job prospects of many.

BY JOE PALAZZOLO



NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

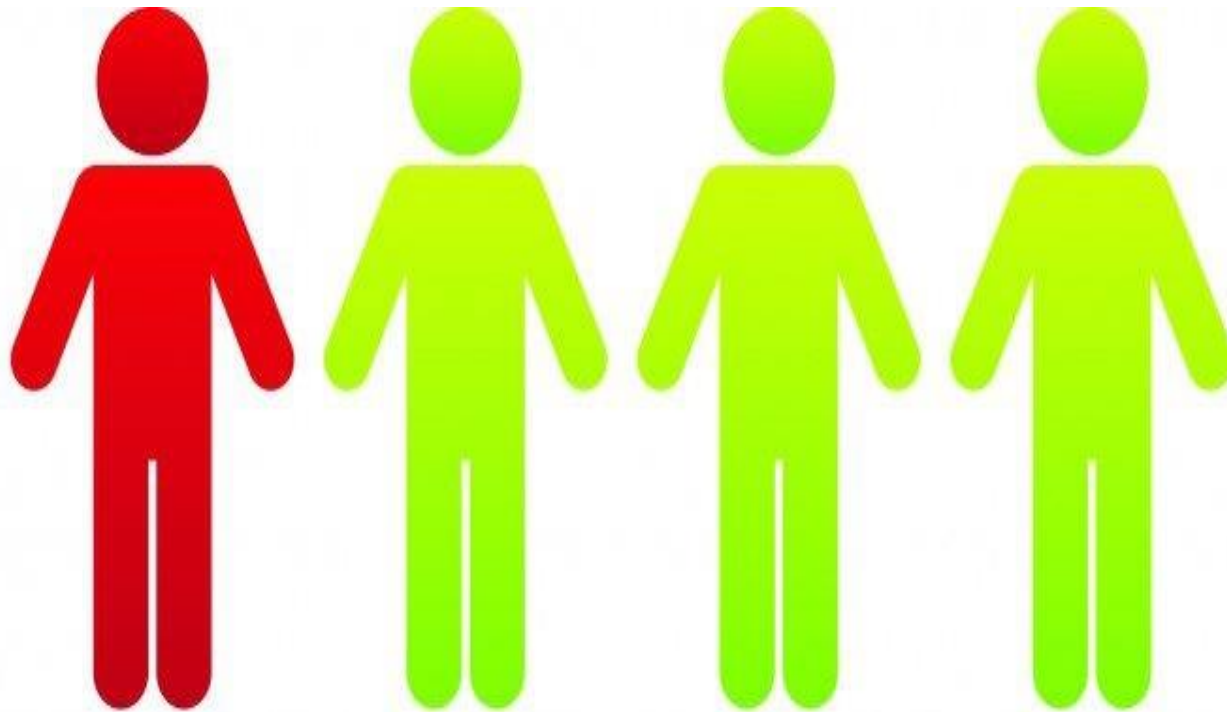
May 2014

Mental Health Issues: But Jails are not psychiatric facilities



Mental Illness in Jails Report

-



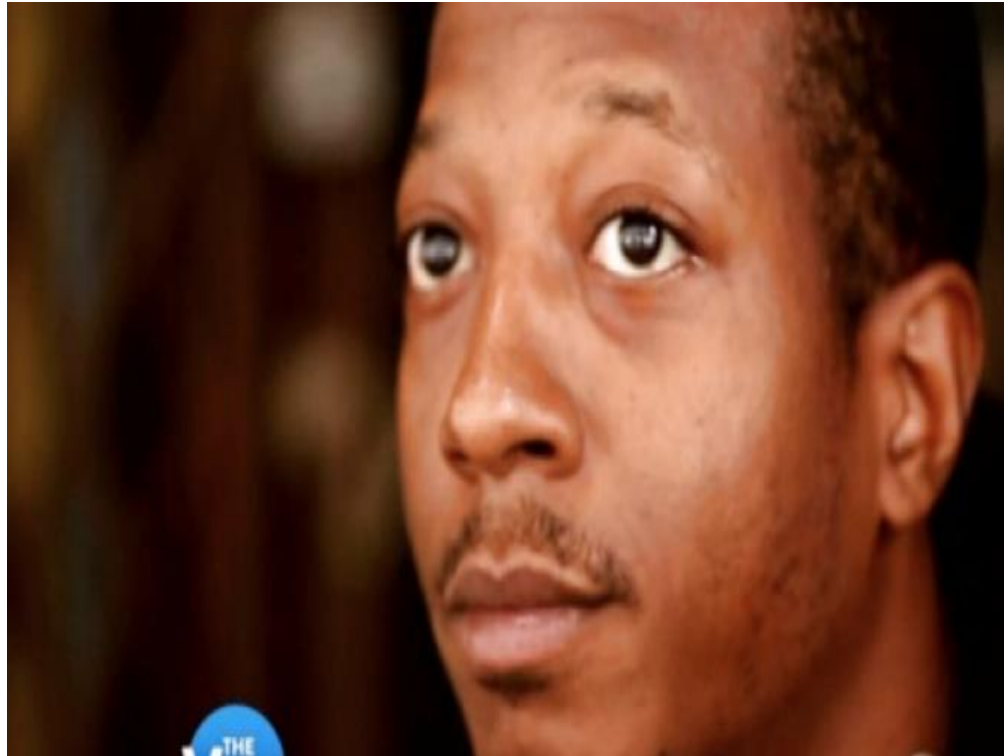
One in four people has a **mental illness.**



Suicide Rates are Skyrocketing



Actual Representation...not just a body



**Kalief Browder Took His Own Life, but the System
Murdered Him**

Jails are not Detox Centers



ACLU: Burks v. Scott County, Mississippi

- County Detention Center held people for as long as a year without indicting them or appointing counsel;
- Violate the 6th and 14th Amendment's right to counsel, to a speedy trial and to a fair bail hearing.

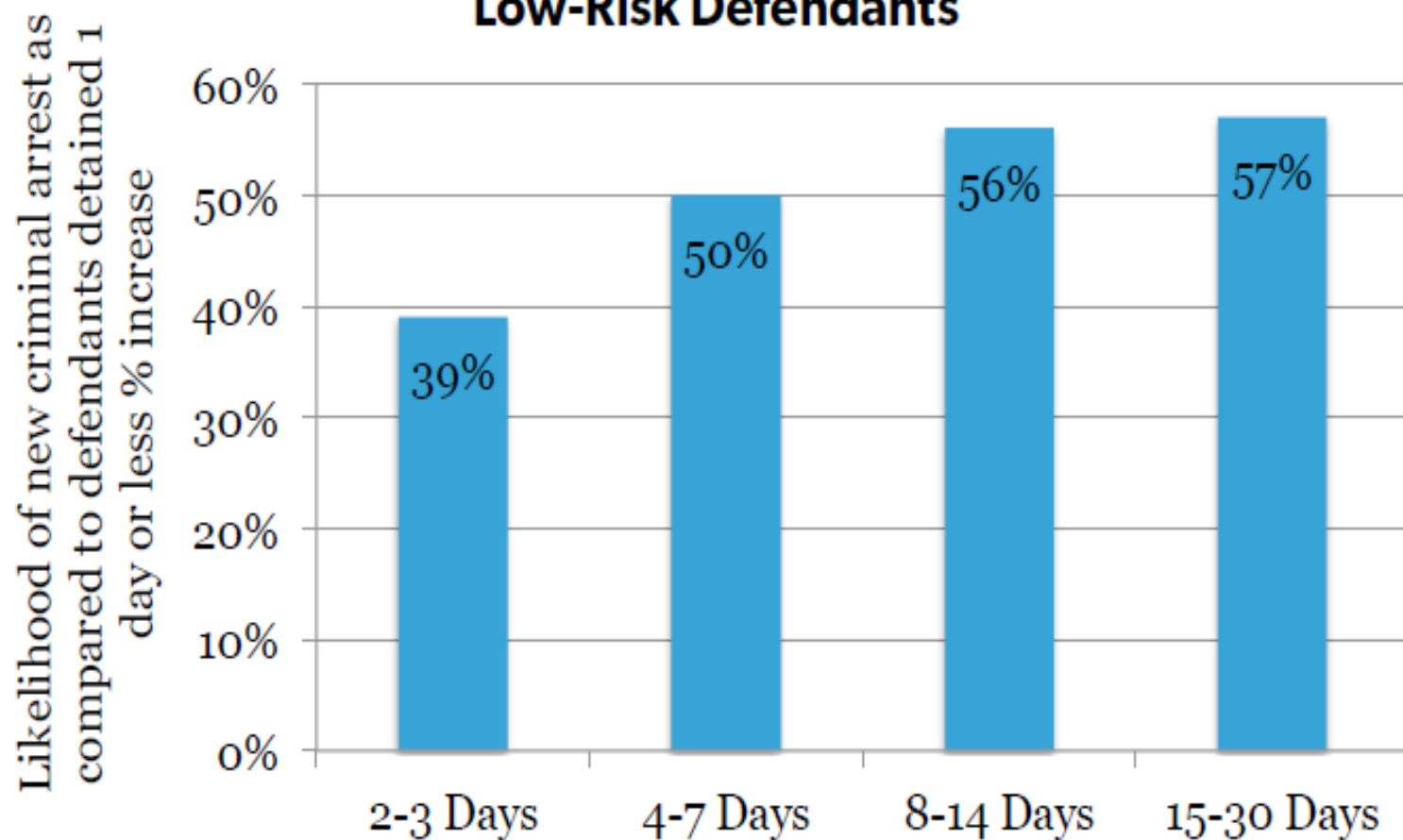


Arnold Foundation Study: Incarceration for low risk offenders leads to recidivism



Arnold Foundation Research

Increase in New Criminal Arrest Related to Pretrial Detention Length for Low-Risk Defendants



PJI

**3 DAYS
COUNT™**

Commonsense Pretrial

\$\$\$ DOES NOT ENSURE RETURN:

Unsecured bonds are as effective and most efficient pretrial release option

**UNSECURED BONDS: THE
AS EFFECTIVE AND MOST
EFFICIENT PRETRIAL
RELEASE OPTION**

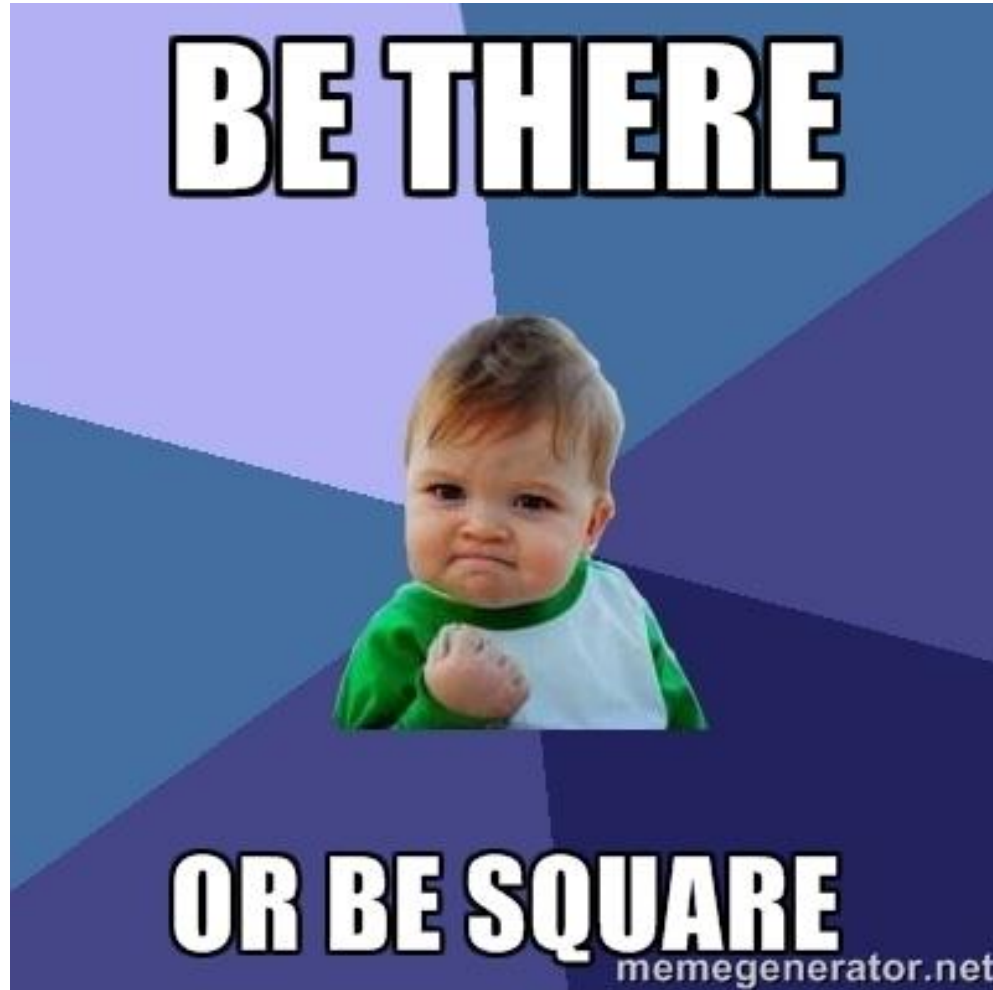


**Michael R. Jones
Washington, D.C.
October 2013**

Impact

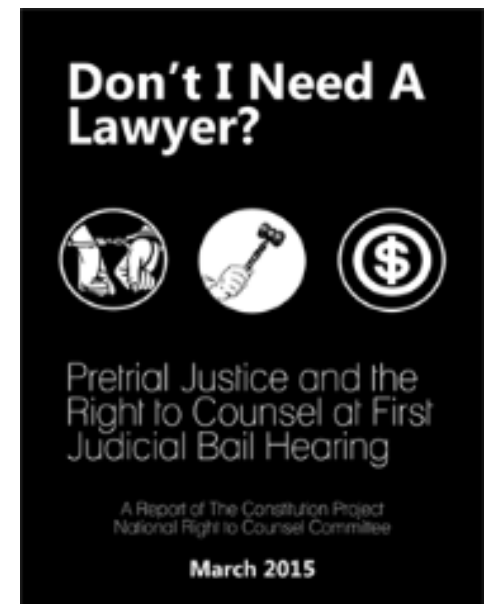
- Jail beds disproportionately filled with low risk defendants
- The poor stay in custody and/or may be over supervised and over conditioned
- Pretrial detention of lower risk defendants increases likelihood of recidivism
- Impacts the poor and clients of color

YOU **MUST** be there at first
appearance

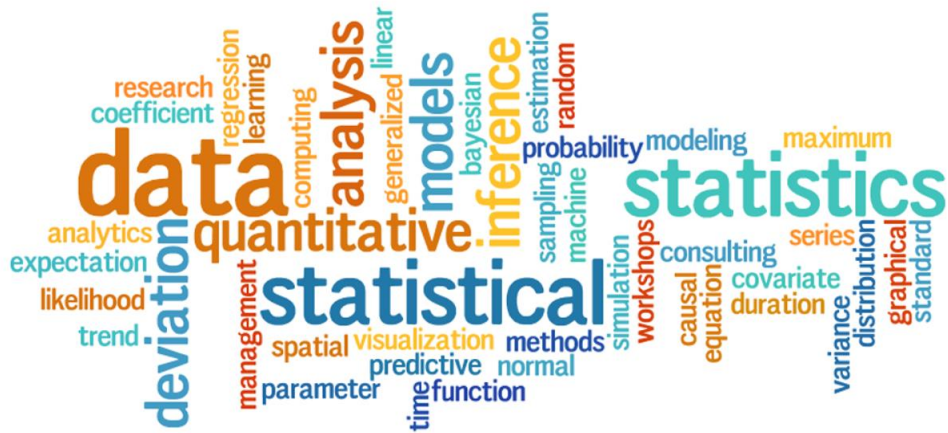


2002 Baltimore Study

- 2 ½ times more likely to be released on PR
- Money bonds that were set were 2 ½ times more likely to make that bond
- Those who were released get lower sentences



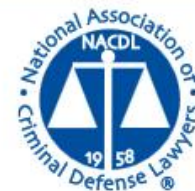
EBDM/Data/Statistics/Risk Assessments



THE COLORADO BAIL BOOK

**A Defense Practitioner's Guide
to Adult Pretrial Release**

September 2015



**Colorado Criminal Defense Institute
Colorado State Public Defender
National Association of Criminal Defense Lawyers (NACDL)**

Early appointment of counsel has profound benefits

- Meet with Defendant – investigate, find witnesses, establish rapport, mitigating steps taken early on (get client into treatment..)
- Advocate for PR or non-monetary conditions of release

Present at ALL court appearances





Negotiate with the Prosecutor



Explain the Collateral Consequences



PHOTO: JOE RAEDLE/GETTY IMAGES



stock image



Prepare for Trial

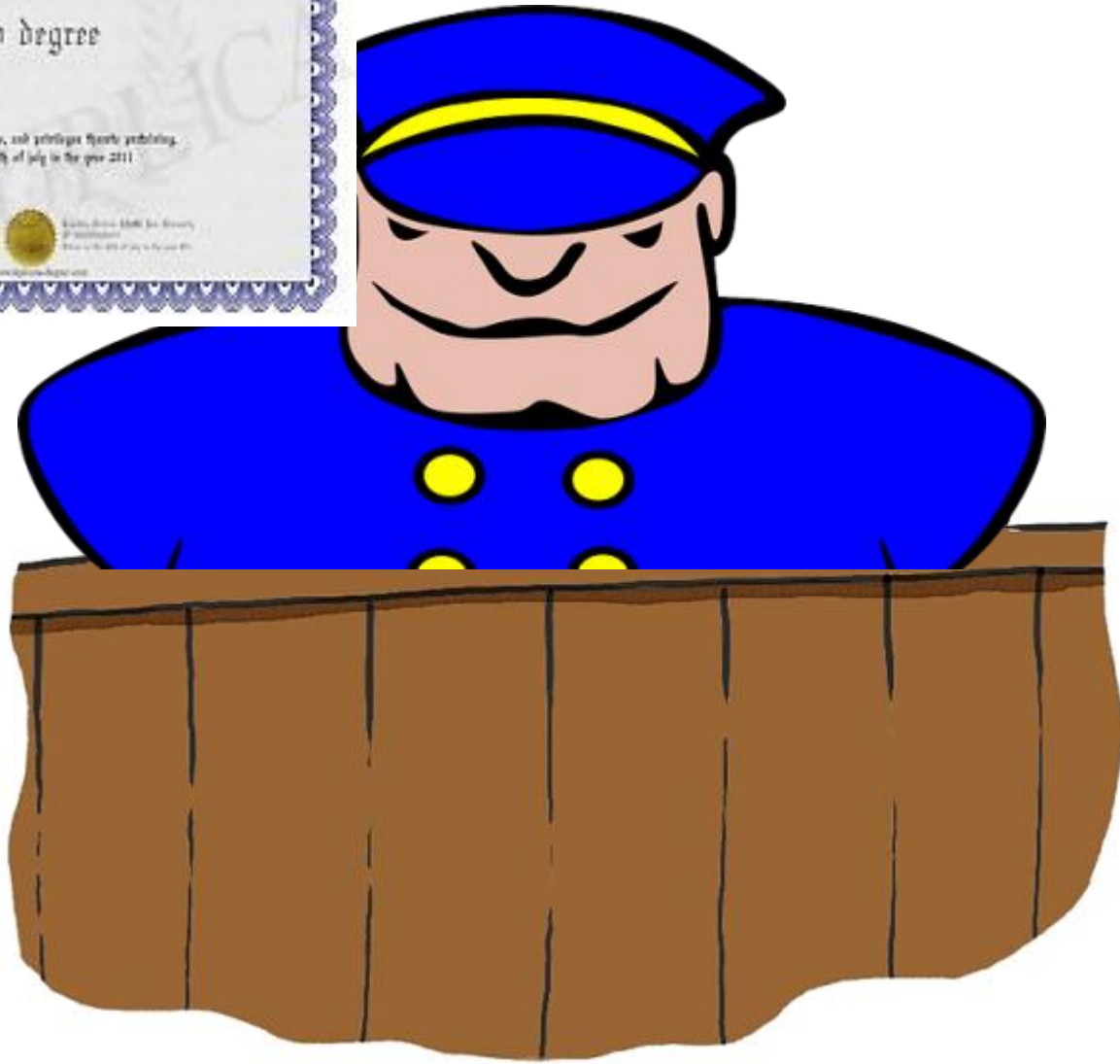


Advocate at Sentencing



In many counties...there are no
lawyers





Defendants are...

- **Not always being given complete information about their rights**
- **Bail set with no lawyer and no information about the defendant**
- **Not being told of the collateral consequences of conviction**
- **Routinely proceeding without lawyers**
- **Negotiating directly with police officers**
- **Being sent to jail because they can't pay**

Lawyers Make A Difference

- Regardless of the outcome, clients that are well represented feel heard in the process.



IDAHO AND THE 6TH AMENDMENT RIGHT TO COUNSEL

THE PRE-TRIAL RIGHT AND OTHER ISSUES

Daniel G. Chadwick
NACo Webinar
March 3, 2016



Idaho: A System in Crisis

- The State
- Delegated to Counties
- Meeting the Responsibility
- Conflicts within the County
- Prosecutor or D.A. vs. Public Defender

The Findings

- NLADA Report 2009 – Specific finding on pre-trial which was simply one more example of a system not working.

The Idaho Experience

Part 1

- Delegation to Counties
- Idaho Criminal Justice Commission
- Subcommittee on the Public Defender
- Recommendations to the Idaho Legislature

Recommendations to the Idaho Legislature

- House Bill 147 :
<http://legislature.idaho.gov/legislation/2013/H0147.htm>
- Definitions of Defending Attorney and Indigent
- Presumptions of Indigency
- Threat of Incarceration
- Annual Reports

Recommendations to the Idaho Legislature

- House Bill 148:
<http://legislature.idaho.gov/legislation/2013/H0148.htm>
- Guardian Ad Litem-resolved an ethical problem/defending attorney for child and guardian

Recommendations to the Idaho Legislature

- House Bill 149:
<http://legislature.idaho.gov/legislation/2013/H0149.htm>
- Juveniles Entitled to the Same Right to Counsel
- Final Recommendation: Creation of an Interim Legislative Committee

The Idaho Experience

Part 2

- Idaho Legislative Interim Committee Met Summer and Fall of 2013, 2014, 2015 and January, 2016
- Idaho Criminal Justice Commission
- The Counties
- ACLU & The Lawsuit
- Idaho Prosecuting Attorneys
- Public Defenders

Idaho House Bill 542

- Idaho Public Defense Act:
<http://www.legislature.idaho.gov/legislation/2014/H0542.htm>
- Public Defense Commission
- Recommendations to Future Legislatures
- Prohibits Flat Fee Contracts
- Offices or Contracts Only

House Bill 504 – 2016

- House Bill 504:
<http://www.legislature.idaho.gov/legislation/2016/H0504.htm>
- Principles and Standards
- Experience, Reporting, Education and Training
- State Oversight with a Backstop/Enforcement
- Grants to Counties
- The Reaction-ACLU

IAC Response

- Major Difference of Opinion Between Counties
- State Takeover
- County Control with Funding
- County Control with Funding with Oversight

The Importance of Legal Counsel in Pretrial Justice

Robin Lipetzky

Public Defender, Contra Costa County

National Association of Counties Webinar

March 3, 2016

TOPICS

- Importance of including defense counsel at the Pretrial stage - PD Perspective
- Our experience in Contra Costa County
- Another Access to Counsel Approach: access to counsel pre-appearance

Importance of Counsel in Pretrial

Two concerns with using a pretrial risk assessment tool without counsel

- **5th Amendment protections**
 - Without counsel giving advice, may result in incriminating statements
- **Accuracy and reliability of information from the accused**
 - The accused may not trust or understand the purpose of the questions - self-censorship

One Solution: PD Employees do the Interview

Contra Costa County experience

- **Collaborative process was critical to building an effective PTS program**
- Solution born of necessity - use of PD Legal Assistants to interview for dynamic factors - solved other problems
- Probation Department adds the static factors
- **Requires trust and good relations between the stakeholders**

Defense Counsel Must be Involved, Regardless of Program Design

- If the interviews are conducted by law enforcement or probation, should still provide arrestees with access to counsel prior to interview
- How defense counsel will be integrated depends on the program design
- If starting from scratch, incorporate PD office or other appointed counsel
- If program in existence, modify to include early access to counsel

Lessons Learned in Contra Costa County

- Collaboration is critical
- Training, training, training - ongoing, all-inclusive and continuous
- Common messaging for worst case scenario

Why Counties Should Care About Funding a Pretrial Program

- In general why a Pretrial Services Program is Important
 - **Cost effective** - incarceration is expensive
 - **Enhances public safety** through evidence-based risk decisions
 - **Reduces the danger of implicit bias** in release decisions
 - **Reduces recidivism**—benefits all around

Why our County Continues to Fund the Program

- Had to find a way to reduce the jail population
- After two years the Program has strong County support
 - Sheriff is happy with fewer unsentenced inmates
 - Started at over 80%, now at 65%
 - DA's Office part of the ongoing planning
 - The statistics so far are encouraging
 - 80% appearance rate
 - 93% free of new arrest
 - No violent offense

Why Counties Should Fund Defense Counsel as Part of a Pretrial Program

- Improves the reliability of the program
- Improves the credibility of the information obtained from the accused
- Avoids the potential of litigation
- Preserves important 5th and 6th Amendment rights of the accused

Another Innovation in Contra Costa County: Pre-appearance Access to Counsel

- Pilot program with County funding
- Designed to lower the costly failure to appear rate
- Targeted at misdemeanor, cite-released offenders
- Two-way information at time of citation:
 - LE provides arrestee with PD contact information
 - LE obtains contact information from arrestee
 - PD given a copy of each citation
 - PD makes court reminder calls/texts week prior to appearance
 - PD assists with court appearance plan and follow-up for FTA

Resources

- NLADA - National Legal Aid and Defender Association and American Council of Chief Defenders
Risk and Needs Assessments: What Defenders and Chief Defenders Need to Know July 2015
- Jefferson County, Colorado - Court Reminder Calls Program

Question & Answer session

- Type your question into the “Questions” box and the moderator will read the question on your behalf.

THANK YOU!

Additional questions or feedback?
Contact Kathy Rowings at krowings@naco.org