

**Northern District of California
2017 Judicial Conference
Race and the Criminal Justice System
Racial Disparities in Federal Detention Determinations**

April 29, 2017
9:00 a.m.

The Honorable Donna Ryu, U.S. Magistrate Judge, N.D. Cal., Moderator

1. Introduction of the Panel

- Candis Mitchell, Assistant Federal Public Defender, Northern District of California.
- Silvio Lugo, Deputy Chief, Pretrial Services Officer, U.S. District Court Northern District of California.
- Brian Lewis, former Assistant U.S. Attorney and Deputy Chief – Oakland Branch Office United States Attorney’s Office for the Northern District of California.
- Shima Baradaran Baughman, Professor, University of Utah College of Law.

2. Intersection of Race and Federal Detention Decisions.

a. Racial Disparities Exist.

- i. Most studies indicate that there are disparities between pretrial bail determinations for White and similarly situated Black and Latino defendants. Cynthia E. Jones, Give Us Free: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. Legis. & Pub. Pol’y 919, 938-39 (2013). This problem has been documented across the country. *Id.* at 939.
- ii. For example, one study of defendants convicted of drug offenses in federal district courts in Minnesota, Nebraska, and Iowa found that Black male offenders were about twice as likely as White male offenders to be held in pretrial detention. Cassia Spohn, Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage, 57 U. Kan. L. Rev. 879, 889, 895 (2009).

- iii. Research indicates that although higher education and income levels are correlated with more favorable bail determination outcomes for both White and Black defendants, these factors more strongly benefited White defendants. Jones, 16 N.Y.U. J. Legis. & Pub. Pol’y 919, 940.
 - iv. Statistics are being developed on disparities in detention and release rates in the Northern District of California which are expected to be shared at the Conference.
- b. **Background context: racial disparities appear in other aspects of the criminal justice system, and race in the criminal justice system has become an increasingly important issue for the federal bench.**
- i. In recent years, a spate of high profile shootings of African Americans has garnered media attention, beginning with the shooting of Michael Brown on August 9, 2014 in Ferguson, Missouri. See Daniel Funke and Tina Susman, “From Ferguson to Baton Rouge: Deaths of Black men and women at the hands of police,” *Los Angeles Times* (Jul. 12, 2016), www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html. Members of Latino American communities have expressed a similar concern regarding police shootings of Latinos. See Rick Rojas and Samantha Schmidt, “Amid Protests Over Police Shootings of Black Men, Latinos Note a Disparity,” *New York Times* (Jul. 14, 2016), <https://www.nytimes.com/2016/07/15/us/amid-protests-over-police-shootings-of-black-men-latinos-note-a-disparity.html>.
 - ii. The Obama Justice Department investigated policing practices in nearly two dozen cities, including San Francisco, Baltimore, and most recently Chicago. United States Dep’t of Justice, Press Release, Justice Department Announces Findings of Investigation into Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-chicago-police-department>; Julie Bosman and Mitch Smith, “Chicago Police Routinely Trampled on Civil Rights, Justice Dept. Says,” *New York Times* (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/us/chicago-police-justice-department-report.html>; Matt Zapposky, “Justice Department report blasts San Francisco police,” *The Washington Post* (Oct. 12, 2016),

https://www.washingtonpost.com/world/national-security/justice-department-report-blasts-san-francisco-police/2016/10/12/becb841c-90a2-11e6-a6a3-d50061aa9fae_story.html?utm_term=.7332720ec785.

- iii. Government data also show that Blacks are more likely than Whites to be stopped by law enforcement. For example, the Bureau of Justice Statistics reported that, in 2011, 13% of Black drivers reported being stopped by law enforcement while only 10% of White drivers reported having this experience. Bureau of Justice Statistics, Traffic Stops, <https://www.bjs.gov/index.cfm?ty=tp&tid=702> (last visited Feb. 15, 2017). In addition, police were more likely to search Black and Hispanic drivers than White drivers. The Bureau reported that, in 2011, police searched 6% of Black drivers, 7% of Hispanic drivers, and just 2% of White drivers. *Id.*
- iv. These disparities exist in the Bay Area as well. 5.8% of the population in San Francisco is Black, but 14.8% of traffic stops by police involved Black drivers. Office of Community Oriented Policing Services, U.S. Dep't of Justice, Collaborative Reform Initiative: An Assessment of the San Francisco Police Department 69-70 (Oct. 2016). In contrast, the percentage of police traffic stops of Whites, Asians, and Latinos were lower than each group's respective share of the San Francisco population. *Id.* at 70-72. Blacks are twice as likely and Hispanics are 43% more likely than Whites to be arrested during traffic stops. *Id.* at 74. However, both Black and Latino drivers whom police search at traffic stops are less likely than Whites to be found with contraband. *Id.* at xi, 75.
- v. Research indicates that minorities have less confidence in the police. For example, the Bureau of Justice Statistics reported that a lower percentage of Blacks (38%) and Hispanics (63%) than Whites (78%) who were stopped on the street by the police in 2011 felt that the police behaved properly during the encounter. Bureau of Justice Statistics, FAQ Detail: What are the characteristics of persons who come into contact with the police for different reasons? <https://www.bjs.gov/index.cfm?ty=qa&iid=364> (last visited Feb. 15, 2017).
- vi. There are also a disproportionately large number of Black and Latino inmates in federal prison: 37.7% of federal inmates

are Black and 33.5% of federal inmates are Hispanic. U.S. Bureau of Prisons, BOP Statistics: Inmate Race, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Mar. 19, 2017) ; U.S. Bureau of Prisons, BOP Statistics: Inmate Ethnicity, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last visited Mar. 19, 2017. In contrast, 13.3% of the U.S. population is Black and 17.6% of the population is Hispanic or Latino. U.S. Census Bureau, QuickFacts from the US Census Bureau, <https://www.census.gov/quickfacts/> (last visited Mar. 19, 2017).

- vii. As recently as last month, the Supreme Court observed, in the context of racial bias in jury deliberations, that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’ ” *Pena-Rodriguez v. Colorado*, — S. Ct. —, 2017 WL 855760, *12 (Mar. 6, 2017) (internal citations omitted). In fact, the Supreme Court has twice addressed racial bias in the criminal justice system this year. Erwin Chemerinsky, “Justices Turn to Racism in Trials,” *Daily Journal* (Mar. 14, 2017).
- viii. Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, New Press, 2010) and documentaries such as Ava DuVernay’s *13th* (Kandoo Films, 2016) assert that these disparities are no accident. They contend that anti-Black racial bias throughout the criminal justice system amounts to a socially acceptable modern day system of oppression of African Americans.

3. Effects of Detention Determinations.

a. “No Bail” Determinations

i. Effects on individuals.

- (A) The hardships of being detained include a higher risk of disease and suffering violence or threats of violence. Jones, 16 N.Y.U. J. Legis. & Pub. Pol’y 919, 937.
- (B) More difficult or altogether impossible to take care of family responsibilities. *See Id.*
- (C) Loss of employment. *Id.* at 937-38.

- (D) Impairment of ability to consult with counsel and prepare defense. *Id.* at 938.
 - (E) May alter the trajectory of adjudication toward a greater likelihood of conviction. *Id.* at 936. Holding a defendant on bail is correlated with a greater likelihood of conviction, less advantageous plea deals, and longer sentences. *Id.* at 936-37; James C. Olsen et al., *The Sentencing Consequences of Federal Pretrial Supervision* 13 (2014), <http://cad.sagepub.com/content/early/2014/09/25/0011128714551406>. It is also correlated with a higher recidivism rate. Aript Gupta, *The Heavy Costs of High Bail: Evidence from Judge Randomization 2* (Aug. 5, 2016).
 - (F) May result in a higher classification status in the Bureau of Prisons.
- ii. **Systemic Effects:** Jail overcrowding. Over sixty percent of people housed in jails across the country are pretrial detainees. Jones, 16 N.Y.U. J. Legis. & Pub. Pol’y 919, 934-35.
- b. **Pre-trial Release Granted.**
 - i. Harm to society if defendants commit crimes while released on bail.
 - ii. Harm to society and victims of crime if defendant flees while out on bail.

4. Federal and State Bail Differ in Key Respects.

- a. **Federal Detention.**
 - i. **The Bail Reform Act of 1984** (the “Act”) governs determination of bail in federal cases.
 - ii. Under the federal detention scheme, there is a legal presumption of release on the least restrictive terms and conditions, with an emphasis on non-financial terms. *See* U.S. Pretrial Services Performance and Outcome Assessment 2, U.S.D.C. (N.D. Cal.) (Mar. 4, 2011).

- iii. **The Act authorizes the pretrial detention of a defendant** only if the court believes that there is no set of conditions that will protect the safety of the community or assure the defendant's appearance. 18 U.S.C. § 3142(e). The government must show by "clear and convincing evidence" that the defendant must be detained to protect community safety. *Id.* § 3142(f)(2)(B).
- iv. **Before the court may impose preventative detention,** the Defendant is entitled to a prompt hearing, representation by counsel, and the right to present evidence. *Id.* § 3142(f).
- v. **Pretrial Services must provide the court with information** and, where appropriate, provide recommendations concerning pretrial detention or conditions of release of a defendant before the pretrial detention hearing. *Id.* § 3154(1).
- vi. **The court must consider the following factors when considering pretrial release of a defendant:** (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the person, (3) the history and characteristics of the person, and (4) the nature and seriousness of danger to the community posed by the defendant's release. *Id.* § 3142(g).
 - (A) The Act creates presumptions in favor of pretrial detention for defendants who have previously been convicted of drug offenses or violent crimes. *Id.* § 3142(e)(2), (f)(1).
 - (B) It also creates presumptions in favor of pretrial detention where there is probable cause to believe that the defendant committed certain violent, sexual, or drug offenses. *Id.* § 3142(e)(3).
- vii. **The court has the following options at the detention hearing:** (1) release the defendant on personal recognizance or execution of an unsecured appearance bond (the defendant agrees to appear at a later date), (2) release the defendant with nonmonetary restrictions, (3) release the defendant based on an unsecured written agreement to forfeit property of a particular value upon failing to appear, (4) release the defendant based on execution of a bail bond with sureties

who can pay the bond, and (5) deny bail and detain the defendant. *Id.* § 3142(a), (c).

(A) Bail bondsmen are not typically used in the Northern District. There is no need to use a bondsman because property or money can be directly posted with the Clerk of the court. However, posting real property does entail the need for a recent appraisal and title search. Office of the Federal Public Defender, Northern District of California, Frequently Asked Questions, http://www.ndcalfpd.org/clients_faq.html (last visited Feb. 17, 2017).

(B) Federal Rule of Criminal Procedure 46(e) requires that no bond issue unless a surety appears to be qualified. The practice in this district is for the defense to present co-signers who are interviewed by Pretrial Services for the magistrate judge to accept as signatories on the bond. Pre-trial Services also interviews potential co-signers they identify on their own during their bail investigation.

viii. **Success Rate in Our District.** The U.S. Pretrial Services Performance and Outcome Assessment found that “[b]etween FY 2005 and 2009, defendants released to pretrial supervision in the District had a 97.1% court appearance rate and a 97.7% no new alleged criminal activity rate (the measure of community safety).” U.S. Pretrial Services Performance and Outcome Assessment 11, U.S.D.C. (N.D. Cal.).

ix. **Appeal of Detention Decision.**

(A) The district court may review a magistrate judge’s release order on motion by the government or the defendant, but only a detainee may move the district court to revoke or amend a magistrate judge’s detention order. 18 U.S.C. § 3145(a), (b). The review is *de novo*. *United States v. Koenig*, 912 F.2d 1190, 1191 (9th Cir. 1990). Review of a detention or release order shall “be determined promptly.” 18 U.S.C. § 3145(a), (b).

(B) Both the defendant and the government may directly appeal a trial court’s release order to the Circuit

without first seeking reconsideration in the trial court.
See 18 U.S.C. § 3145(a).

- x. **Defendants unlawfully present in U.S.** The Bail Reform Act provides specific procedures for criminal defendants who are unlawfully present in the U.S.
- (A) If the judicial officer determines that a criminal defendant who is not lawfully present in the U.S. is likely to flee or pose a danger to the community, the judicial officer may order detention of the criminal defendant for up to ten days and direct the attorney for the government to notify the appropriate Immigration and Naturalization Service Official. 18 U.S.C. § 3142(d).
 - (B) If immigration officials do not take custody of the defendant during that ten day period, the defendant is subject to the other provisions of the Bail Reform Act. *Id.* § 3142(d); *U.S. v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015).
 - (C) Bail determinations concerning aliens being detained by immigration officials pending removal proceedings under the Immigration and Nationality Act are not reviewable by the federal courts. 8 U.S.C. § 1226(e).
 - (D) However, the federal courts have repeatedly reviewed the constitutionality of different aspects of this statutory scheme. The Supreme Court has upheld the constitutionality of the provision of this statute that makes bail unavailable to certain criminal aliens for relatively short periods. 8 U.S.C. § 1226(c); *Demore v. Kim*, 538 U.S. 510, 530-31 (2003). The Ninth Circuit subsequently held that, to avoid constitutional due process problems, the statute implicitly requires that aliens convicted of certain crimes and aliens who are not entitled to admission to the U.S. receive bail hearings after six months of detention. *Rodriguez v. Robbins*, 804 F.3d 1060, 1081, 1084 (9th Cir. 2015) certiorari granted by *Jennings v. Rodriguez*, 136 S.Ct. 2489 (Jun. 20, 2016).

- (E) In practice, if there is an immigration hold on a defendant, a defendant is unlikely to be released from pretrial custody. If the defendant was released on bail in this situation, ICE would in most instances take the defendant into custody, which would interfere with the criminal case.

xi. **Constitutionality of Federal Pretrial Detention.**

- (A) The Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required . . .” U.S. Const. Amend. 8. The Supreme Court has held that the Eighth Amendment does not guarantee a right to release on bail, unless the government’s only interest in pretrial detention is preventing flight. *United States v. Salerno*, 481 U.S. 739, 754-55 (1987); *Stack v. Boyle*, 342 U.S. 1, 5 (1951).
- (B) Conditions of pretrial detention do not violate the due process clause of the Fifth Amendment where they are “reasonably related to a legitimate governmental interest.” *Bell v. Wolfish*, 441 U.S. 520, 539-40 (1979).
- (C) The Supreme Court has upheld the constitutionality of the Bail Reform Act under the due process clause and the Eighth Amendment. *Salerno*, 481 U.S. at 748-52.
- (D) There have been bills introduced in Congress to revise the bail process in the immigration context, but these proposals have not gained traction. *See e.g.*, Immigration Courts Bail Reform Act, H.R. 6097, 114th Cong. (2016).

b. **Bail under California Law.**

- i. Other than for violations of the Vehicle Code, California permits each county to set its own bail schedule based on the type of bailable offense charged. Cal. Penal Code § 1269b(c)-(f).
- ii. A recent analysis estimated that the median bail amount for California defendants facing felony charges in state court was

\$50,000, more than five times the median bail amount in the rest of the nation. Sonya Tafoya, Pretrial Detention and Jail Capacity in California, Public Policy Institute of California (Jul. 2015), http://www.ppic.org/main/publication_quick.asp?i=1154#fn-1.

- iii. A Defendant may petition the judge or magistrate for a lower bail amount or for release on recognizance. Cal. Const. Art. 1 §§ 12, 28(f)(3); Cal. Penal Code § 1269c. Judges may also increase the bail amount in certain circumstances. Cal. Penal Code § 1270.1(e).
- iv. In setting, reducing, or denying bail, judges consider the protection of the public, the seriousness of the offense(s) charged, the defendant’s criminal record, and the defendant’s flight risk. Cal. Const. Art. 1 §§ 12, 28(f)(3); Cal. Penal Code. § 1275.
- v. San Francisco’s bail system currently faces a legal challenge to its constitutionality. *Buffin v. City and County of San Francisco*, 3:15-cv-04959 (N.D. Cal.). *Buffin* is a challenge under the Fourteenth Amendment to the U.S. Constitution to the bail system in San Francisco under which arrestees who can afford to pay bail are released immediately after booking but arrestees who cannot afford to pay bail must wait longer. These arrestees’ only other options are use of a bail bondsman, seeking relief from the judge days later, or own-recognizance release based on a recommendation from the O.R. project, which can also take days.
- vi. The California Legislature is considering overhauling the state’s bail system. Alexei Koseff, “California considers an end to bail: ‘We’re punishing people simply for being poor,’” *The Sacramento Bee* (Feb. 4, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article130682914.html>; see also L.J. Williamson, “Legislators introduce bills to overhaul state bail system,” *San Francisco Daily Journal* (Dec. 6, 2016).
- vii. Similar challenges to bail systems have been filed across the country.

- (A) Some of those actions have settled. *Pierce v. City of Velda City*, No. 415CV570-HEA, 2015 WL 10013006 (E.D. Mo. Jun. 3, 2015); *Jones v. The City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).
- (B) In an action challenging the constitutionality of the California Bail law, California Penal Code 1269b, and Sacramento County's bail schedule adopted under that law, a court recently granted Sacramento County and the California Attorney General's motion to dismiss plaintiff's claims under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. The court also granted defendants' motion under Federal Rule of Civil Procedure 12(e) for a more definite statement concerning the plaintiff's due process claim. *Welchen v. County of Sacramento*, 2:16-cv-00185-TLN-KJN, Slip Copy, 2016 WL 5930563, *10-11 (E.D. Cal. Oct. 11, 2016). Regarding plaintiff's Equal Protection claim, the court applied rational basis review and concluded that the law was rationally related to the state's interest in ensuring that criminal defendants appear for trial dates. *Id.* at 11.
- (C) A federal court in Mississippi held that applying a bail schedule to retain custody of an indigent defendant who cannot pay bail violates the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. *Thompson v. Moss Point*, No. 115CV182LG-RHW, Slip Copy, 2015 WL 10322003, *1 (S.D. Miss. Nov. 6, 2015).
- (D) In an action brought by misdemeanor probationers challenging a detention scheme, the court granted a preliminary injunction and denied defendants' motion to dismiss plaintiffs' claims that imposing supervised probation on indigent defendants but not others and that jailing probationers for failing to pay preset money bonds without an inquiry into their ability to pay violates the Fourteenth Amendment. *Rodriguez v. Providence Community Corrections, Inc.*, No. 315CV01048, 191 F. Supp. 3d 758, 775-76, 779 (M.D. Tenn. Jun. 9, 2016).

- (E) A court held that plaintiff, a man arrested for committing a misdemeanor, was likely to prevail on his claim that detaining him post arrest because he could not pay bail without considering his ability to pay violated the Equal Protection clause. *Walker v. City of Calhoun, Georgia*, No. 414CV0170-HLM, Slip Copy, 2016 WL 361612, *11-13 (N.D. Ga. Jan. 28, 2016).

5. Implicit Racial Bias in the Criminal Justice System.

- a. Implicit biases are “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” The Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University, State of the Science: Implicit Bias Review 2015 62, <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf> (hereafter “Kirwan Institute, Implicit Bias Review”).
- b. Key characteristics of implicit biases:
- i. Everyone possesses them. *Id.* at 63
 - ii. Implicit biases do not necessarily align with views that we would explicitly endorse. *Id.*
 - iii. People generally hold implicit biases that favor their own “in groups,” but research indicates that people can hold implicit biases against their “in groups.” *Id.*
 - iv. Implicit biases can affect our behavior towards others. *Id.*
- c. Research has documented implicit racial biases in actors throughout the criminal justice system, including in trial judges, jurors, and defense attorneys. *Id.* at 15-16; *see also* Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1141, 1144-48 (2012) (“Kang article”).
- d. It may be possible to unlearn implicit biases through a variety of techniques such as intergroup contact and exposure to counter stereotypical exemplars. Kirwan Institute, Understanding Implicit Bias; Kirwan Institute Implicit Bias Review 63; Kang article, 1169-71. Jerry Kang’s UCLA Law Review article proposes several techniques that judges can use to tackle implicit biases that they hold

and to counteract the effects that implicit biases have on their behavior. *Id.* at 1172-79.

6. Perspectives on How to Eradicate or Lessen Racial Disparities in Federal Detention Decisions.

- a. From Pre-Trial Services: Silvio Lugo
- b. From the Defense: Candis Mitchell
- c. From the Prosecutor: Brian Lewis
- d. From Academia: Shima Baradaran Baughman
- e. Perspective of the Court: Should magistrate judges keep and share statistics on racial impact of bail decisions? How is our district doing compared to national trends?

7. Conclusion. The Supreme Court recently warned against racial bias in the criminal justice system: “All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution.” *Pena-Rodriguez*, 2017 WL 855760, *13. To that end, district courts should adopt best practices designed to lessen or eradicate racial disparities in pretrial detention.