

From Money Bail to Moneyball

The Use of Predictive Analytics in Improving our Justice System

By Marc Theriault & Soha Saiyed

The 2003 book *Moneyball: The Art of Winning an Unfair Game* (and, more popularly, the 2011 movie by the same title) focused on the cash-strapped Oakland Athletics' use of an analytical, evidence-based, data-driven approach to assembling a competitive baseball team. The movie was a commercial and critical success—even nominated for an Oscar—most likely because it accomplished the near-impossible: making data collection and analysis interesting to the masses.

It's taken for granted that the use of data analytics is omnipresent in today's world. Companies collect massive amounts of data, expertly analyze this information, and produce tailor made advertisements that fit their consumers' needs. Google, Facebook, and other data giants have an almost scary level of accuracy in knowing what you want before you even know. While these predictive analytics have made a lot of companies a lot of money, they have an even greater potential in our criminal justice system.

Our court system collects data from all who pass through. However, the analysis of this data to make better decisions from the bench and for policy makers, has yet to become as commonplace as in the business world. The Kentucky Supreme Court is changing that.

Effective in January 2017, Order 2015-24 will make uniform the

administrative release of low to moderate risk defendants charged with non-violent and non-sexual misdemeanors through the use of a validated, data-supported screening tool. This initiative will build off of decades of leadership in the area of pretrial release and is designed to alleviate a strained system, ensure fairness in the pretrial release process and rely on data driven decisions. Anyone found to be a low or moderate risk offender can be released without money bail by a pretrial officer, without judicial review.

Kentucky's Pretrial Release Program

In 1976, Kentucky passed the Bail Bond Reform Act and became the first state in the U.S. to abolish commercial bail bondsmen. Kentucky's Pretrial Services was created through that Act and placed within the purview of the Administrative Office of the Courts (AOC). The program is nationally recognized and operates under the premise that defendants are presumed innocent until proven guilty, have a right to reasonable bail and are entitled to the least restrictive release terms possible.

In 2013, AOC's Pretrial Services program took another step forward and became the first state to use the revolutionary Public Safety Assessment (PSA) tool, developed by the Laura and John Arnold Foundation. The PSA tool was developed through in-

depth research and analysis of 1.5 million cases from hundreds of jurisdictions to find which factors most contribute to a defendant appearing (or not) in court. The tool uses nine predictive factors considered to be the strongest predictors of whether a defendant will commit a new crime or fail to appear for a court hearing if released from custody. The risk scores generated by the PSA tool, along with the judge's knowledge of the facts and circumstances in a certain case, currently are the factors that primarily guide decisions about release, detention and supervision in the pretrial phase.

For the past three years, the combined use of the PSA tool with judicial discretion has served courts and the public well. In this time, more data has been gathered and analyzed to make this tool even more accurate as a predictor of risk. Nationally, 62 percent of criminal defendants are released prior to their trial, yet Kentucky releases 73 percent of its pretrial defendants. Of those released pretrial, 88 percent show up for their court dates and 90 percent of that group have not been rearrested.

While the Kentucky statistics already dwarf those of other jurisdictions, more research is being done on how to push those numbers even higher. One such successful pilot project involves the use of text messaging to improve the rates of court appearance. Simply put, studies are showing that when low-risk defendants are released from detention, they will show up for their court date unless they forget about it.

The Future of Pretrial Release in Kentucky

Effective January 1, 2017, Order 2015-24 will make uniform the administrative release of low to moderate risk defendants charged with non-violent and non-sexual misdemeanors through the use of the PSA tool. This Order was entered last year and authorized administrative release as a pilot project in 20 counties around the commonwealth, including Jefferson County. Since that time, individual judges around the state have been allowed to "opt in" to this pilot program. The pilot has been successful in reducing pretrial detention time among low and moderate risk defendants. Even with these results, the major differences are yet to be seen. Issues currently affecting Louisville, such as the well-documented overcrowding of Metro Jail, should receive relief by the full implementation of the Administrative Release Program.

Beyond the implementation of the Administrative Release Program throughout Kentucky, there can be little doubt where this nation is headed on this issue. In August of this year, the U.S. Department of Justice (U.S. DOJ) filed a brief in a Georgia federal court arguing that "[f]ixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for the ability to pay, unlawfully discriminate based on indigence." Earlier this year, the U.S. DOJ filed a similar Statement of Interest in Alabama federal court. Far from being an entirely novel con-

cept, this argument is instead an extension of the seminal 1983 U.S. Supreme Court case, *Bearden v. Georgia*.

Bearden held generally that courts may not revoke a defendant's probation for failure to pay a fine and make restitution unless the defendant "willfully refused to pay" those amounts owed. While much ambiguity has always existed around what constitutes a *willful* refusal to pay as opposed to an individual's inability to pay, the application of *Bearden* to this newest line of pretrial money bail cases is interesting because the defendants affected by these policies are in vastly different legal positions at the time the harm occurs.

In *Bearden*, the defendant had already been convicted of a crime and was serving his probation. In the fixed bail schedule cases this year, the defendants were being detained at the pretrial stage of their proceedings and were therefore cloaked with the presumption of innocence. In this newest line of cases, *Bearden* is being asserted to argue unequivocally that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits a state from "punishing a person for his poverty."

Fixed bail schedules create the appearance (if not solidify the reality) that the criminal justice system favors the wealthy. In the above-mentioned Georgia case, the defendant was charged with "being a pedestrian under the influence" and spent six nights in jail because he was unable to pay his \$160 bail. As shocking as that may sound, the Pretrial Justice Institute estimates that the average length of stay for pretrial inmates in the nation is between three and four months. This is the same amount of time that Brock Turner, the Stanford swimmer convicted of three counts of felony sexual assault, served as his sentence.

Towards Moneyball Justice

For those who missed or skipped *Moneyball* because in their own personal equation (Baseball + Data ≠ Fun), the central theme is not-so-unrelatable. It's about challenging conventional wisdom, confronting irrational intuitions, and the difficulties involved in enacting systemic cultural change. With *Moneyball*, the stakes were winning baseball games. With pretrial justice reform and moving toward non-financial bail, the stakes are significantly higher.

More data, to wit:

- **Administrative Pretrial Release saves taxpayer dollars:** In Kentucky, the cost of pretrial supervision averages \$1.90 per defendant per day, depending on the location and level of monitoring. Jail costs average \$10 to \$30 per inmate per day, depending upon the jurisdiction.
- **Administrative Release Reduces Jail Overcrowding:** A May report from the Prison Policy Initiative shows that 70 percent of the 646,000 people held in

3,000 local jails across the country are awaiting trial, "meaning they have not yet been convicted of a crime and are legally presumed innocent."

- **Administrative Pretrial Release affects local business climates:** The working poor are more likely to lose their jobs if they are in jail for several days. This has the ability to trigger other economic costs often borne by the community, such as increase in foreclosures (which decreases community home values), reliance on public benefits, potential homelessness and other potential costs related to impact on children.
- **Administrative Release decreases opportunity for discrimination:** Using data-driven practices reduces the opportunities for implicit bias or confirmation bias inherent in unvalidated "intuition based" practices. In Jefferson County alone last year, Mark Bolton, Director of Louisville Metro Department of Corrections, reported that "[a]lthough they constituted 32 percent of the persons booked in 2015, black males constituted 43 percent of the persons held in custody in Jefferson County."
- **Money bail increases the likelihood that someone will commit another crime in the short and long term:** In one conservative study, researchers found that when compared to defendants held no more than 24 hours, low risk defendants who were held for two to three days were 40 percent more likely to commit new crimes before trial and 22 percent more likely to fail to appear, and if held for 31 days or more, were 74 percent more likely to commit new crimes before trial and 31 percent more likely to fail to appear.

Conclusion

Supreme Court Order 2015-24 is another step Kentucky has taken towards creating a fair, efficient, and data-driven system of pretrial justice. As the PSA tool is used more frequently, generates data of its own, and that data is analyzed, the criminal justice system will be able to quantify the benefits from the use of data analytics. The long-term ramifications of the Order remain to be seen, but the intersection of law and data will continue to develop. Based upon its history, Kentucky will remain in the forefront of pretrial innovation by continually analyzing this data and allowing it to inform our decisions and laws.

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