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Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation

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INTRODUCTION

Within the recently passed expansive criminal law reform for Kentucky, commonly known as House Bill 463,2 were provisions that significantly altered the state’s pretrial detention policy. The legislation mandated that courts utilize evidence-based pretrial risk assessments in their bail determinations,3 expanded pretrial monitoring programs,4 and instituted bail credit requirements.5 These changes were designed to reduce the financial burden of the state’s soaring jail population and increase public safety.6 As can be expected with sweeping reforms, some provisions, particularly the pretrial bond decision procedure, have presented new challenges to Kentucky courts.

After passage of House Bill 463, making a decision on what type of bond to apply requires a judge to consider a means-tested pretrial report with recommendations for release.7 The judge may use her discretion and ignore the report’s suggestions upon a finding that the defendant presents a flight risk or a danger to himself or others.8 This second part of the decision process was intended to be a “safety valve” that preserved the court’s traditionally broad discretion on bond decisions. The language in the “safety valve” portion of the statute implies that this new standard to be used is the same standard set forth by Kentucky courts for judges making ordinary bond decisions before passage

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1 J.D. candidate 2014. Thank you to Professor Robert G. Lawson, Professor Allison Connelly, Tara Boh Klute, Mark Heyerly, and Dina Veldman for their help in assembling this Note.


4 See id.

5 § 431.066(3)(a) (codifying H.B. 463 § 48(4)(a)).


7 Id. § 431.066(a).

8 See id. § 431.066(4)–(5).
of House Bill 463, the Public Safety and Offender Accountability Act.\(^9\) Such language confuses the standards to be used for deciding the type of bond to apply and deciding the amount of bail to apply, if applicable.

Unfortunately, the confusion has allowed the subjective exception to swallow the objective rule in some courtrooms and parts of the state.\(^10\) This has resulted in a significant disparity in bond determinations from courtroom to courtroom. Even when used as intended, the safety valve standard is duplicative and illogical. The confusion is evidenced by studies conducted to measure the legislation's effect on release rates and public safety. Since the Act's passing, pretrial release numbers have increased marginally but not uniformly. The standard for the use of the "safety valve" provision should be clarified to negate the confusion that has led to the present disparity. To improve the bill's effectiveness and keep with the legislative intent, judicial discretion should be curtailed to prevent the dominance of subjective decision making.

Part I of this Note traces the background of House Bill 463 and explains the legislation's past and purpose. Part II fully defines the current Kentucky law governing pretrial bond determinations and illuminates inconsistencies and shortcomings. Part III uses pretrial release numbers from 2011 through 2013 to describe the application of the Act from its passage to the present and demonstrate how the bill has affected the state's jail population awaiting trial. This Part also examines subsequent amendments to the legislation and identifies problems with the law's implementation, as state statistics illustrate that courts have not applied the reforms completely or uniformly. Part IV discusses various legal issues surrounding House Bill 463's implementation and other parts of Kentucky's bond decision law. Finally, Part V suggests potential amendments to existing standards within the Public Safety and Offender Accountability Act.

I. The Legal Context for House Bill 463

A. General Background Information on Pretrial Incarceration

In the 1950s academics began developing risk assessment instruments that attempted to accurately predict individual defendants' proclivity for flight and dangerousness by evaluating uniform characteristics.\(^11\) The ultimate goal was to use objective, statistically tested information to recommend release conditions for arrestees, rather than allow judges to make decisions based solely upon gut

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\(^9\) Abraham v. Commonwealth, 565 S.W.2d 152, 157-58 (Ky. Ct. App. 1977) (finding that the trial court judge made no finding as to whether releasing the defendant on his own recognizance would reasonably assure his appearance at trial and listing relevant factors that inform setting the amount of bail including: the nature of the offenses, past criminal record, reasonably anticipated conduct if released, present address, marital status, employment record, and the financial ability to give bail).

\(^10\) See Klute & Heverly, supra note 2, at ii.

instinct after a cursory review of the limited information provided at the initial appearance. Academics developing the risk assessment instruments collected information through interviews with defendants before their initial court appearance and by compiling defendants’ legal history. Organizations would analyze the assembled information and make bond recommendations to courts based upon objective, predictive factors. Relevant predictive factors included prior failures to appear in court (FTA’s), prior arrests while released on bail, community and family ties, prior criminal record, educational level, and past substance abuse.12

One of the first pretrial organizations to apply available research was the Vera Institute in 1961.13 Their Manhattan Bail Project developed the Vera Point Scale, which used information previously unavailable to judges, such as strength of family and community ties, to identify those defendants who were likely to follow the requirements of their pretrial release and to return to court, even without monetary release conditions.14 Though the Vera Point Scale was not empirically based, it paved the way for more jurisdictions to adopt a scientific approach to pretrial release over time.15

In addition to providing accurate predictive information and recommendations, pretrial agencies established non-financial release options that judges could utilize. “Until the 1960s, the Courts relied almost exclusively on the traditional money bail system.”16 A defendant could only be released in three ways: on his own recognizance, on unsecured money bail, or on secured money bail. Two landmark studies, Arthur Beeley’s study of bail in Chicago in 1927 and Caleb Foote’s study of the bail system in Philadelphia in 1954, exposed the inequities of the old “money bail only” system.17 The studies revealed the disparate impact of the money bail system on the poor.18 They also illustrated that defendants without financial means were more likely to be held pending trial regardless of the actual risk they posed.19 For these reasons, pretrial organizations developed monitoring and supervision programs that allowed defendants who would have otherwise been assigned money bail under the old regime to be released before their trial. These monitoring programs

12 Id.
13 Id. at 7–8.
14 Id. at 18.
15 Id. at 19.
18 Id.
19 Id.
functioned similarly to probation and parole programs for defendants who had not been sentenced. Kentucky has been a leader in these types of progressive pretrial policies. The legislature created a statewide pretrial program in 1976 and prohibited controversial commercial bail bonding services. It is still one of the few states where the questionable practice is illegal. The Kentucky Pretrial Services Agency is also the nation's only statewide pretrial services department that is funded under the state's court system and made available to all counties. Its risk assessment instrument was empirically validated in 2010 by the independent JFA Institute. Now, all recommendations given to judges regarding release decisions are statistically supported and verified in accordance with House Bill 463's requirements.

Despite the proliferation of pretrial agencies, recent national and state detention statistics are alarming. As much as $9 billion was spent in 2011 on pretrial detention in the United States. From June 2010 to June 2011, 735,601 people were confined in county and city jails nationwide. Of that population, more than six in ten inmates were awaiting trial. This level of incarceration is not the historical norm. The average daily jail population rose 26.5% nationally from 2000 to 2008. During the same period, the rated capacity of jails only rose 22.29%. This resulted in the percentage of occupied space rising from 92% to 94.8% during that time period.

This is not to say the growth in detention was uniform between pretrial detainees and sentenced individuals. Though the population of sentenced inmates grew from 1990 to 2008, it did so at a relatively glacial pace of 50%,
as compared to the pretrial population.\textsuperscript{31} The pretrial population increased a surprising 150% in those same eighteen years.\textsuperscript{32} Therefore, the increase in pretrial incarceration largely drove the increase in overall jail populations seen in the previous decades.\textsuperscript{33}

These numbers would be troubling independently, but are more worrisome given their extensive effects on defendants. People held before their trial may lose their job or their housing due to absence.\textsuperscript{34} Health insurance for themselves or their families might be affected.\textsuperscript{35} Children of detained defendants may have to relocate and/or change schools.\textsuperscript{36} Additionally, incarcerated defendants are more likely to be convicted of a felony when they are eventually tried, receive a sentence of incarceration, and be given longer sentences than defendants who were released before their trial.\textsuperscript{37} Finally, pretrial detention adds more coercion to an already coercive process. One study estimated that up to 50% of innocent defendants pled guilty in order to avoid a potential maximum sentence.\textsuperscript{38} Detention prior to trial increases the already high likelihood that defendants will plead guilty.\textsuperscript{39}

The costs of the marked trend of increased pretrial detention and the high number of jail occupants has begun to take its toll on state budgets that were already strapped by the recent economic downturn.\textsuperscript{40}

\textbf{B. Task Force on the Penal Code and Controlled Substances Act Report}

Unfortunately, Kentucky has not escaped the national trend of increased pretrial incarceration. In January 2011, the Task Force on the Penal Code and Controlled Substances Act ("Task Force") released a report detailing the state of corrections in Kentucky.\textsuperscript{41} The report painted a particularly bleak picture of incarceration in the Commonwealth. From 2000 to 2009, Kentucky's inmate population grew 45% while the crime rate is at the same level recorded in 1974.\textsuperscript{42} This increase in incarceration ballooned corrections spending from

\textsuperscript{31} The sentenced population rose from 200,000 to 300,000. \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} See \textit{id.}
\textsuperscript{34} \textit{Justice Policy Inst., supra note 25, at 3.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} See \textit{id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{40} See \textit{Legis. Research Comm'n, Report of the Task Force on the Penal Code and Controlled Substances Act, Research Memorandum No. 506, at 1 (Ky. 2011).}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} See \textit{id.}
$140 million in fiscal year 1990 to $440 million in fiscal year 2010—a 214% increase in required funding.44 At the time, the state prison system was at capacity and local jails held one-third of sentenced state prisoners.45 Despite this increase in penal spending, the state did not see an equivalent return on its escalating investment. Recidivism rates held relatively steady and the crime rate dropped less than the national average during the same time period.46 Looking forward, the report estimated that inaction in the face of this fiscal crisis would cost Kentucky $161 million by 2020 and leave the holding capacity of the state’s prisons wanting.47

The Task Force set forth an extensive list of recommended actions calculated to “contain prison growth and corrections spending while protecting public safety.”48 Amongst its suggested solutions, the report advocated for the use of data to inform key incarceration decisions,49 encouraged implementing strategies to boost the chances that an inmate will successfully transition to the community upon release,50 supported improving parole and probation supervision51, recommended modernizing the Controlled Substances Act,52 and argued for redefining success as reduction in recidivism and criminal behavior.53 The main focus of the suggested reforms was on drug crimes and post-sentencing apparatuses. However, the report also argued for an expanded role for Pretrial Services to reduce costs and increase public safety.54 More specifically, the goal of this expansion of the agency’s duties was to decrease the number of locally incarcerated defendants awaiting trial, rather than decrease the overall penal population at the state level. The Task Force’s report argued that the availability of beds in local jails would be increased and the societal cost of incarceration would be reduced.55

43 Id. Though this Note focuses on pretrial detention, which is funded by local government, the statistics cited illustrate the alarming growth of incarceration generally.
44 Id.
46 LEGIS. RESEARCH COMM’N, supra note 40, at 7.
47 Id. at 8.
48 Id. at 7.
49 Id. at 11.
50 Id. at 12.
51 Id. at 13.
52 Id. at 17.
53 Id. at 19.
54 Id. at 11, 13, 21.
55 Id. at 16, 21. See also Marcia Johnson & Luckett Anthony Johnson, Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas, 7 Nw. J. L. & Soc. Pol’y 42, 73 (2012) (discussing generally the costs of incarcerating individuals).
C. House Bill 463

In the 2011 General Assembly, the Kentucky Legislature passed House Bill 463, also known as the Public Safety and Offender Accountability Act, with the aim of reducing the ever-increasing cost of corrections while improving public safety.\(^{56}\) Estimated to save the Commonwealth $422 million over ten years,\(^{57}\) the bill was sponsored by eleven Representatives, including House Judiciary Committee Chair John Tilley (D–Hopkinsville); researched by the Task Force with the help of the Pew Research Center; and supported by Governor Steve Beshear.\(^{58}\) Many of the reforms contained within the bill followed the Task Force’s recommendations. The overarching legislative intent was to implement evidence-based decision making in order to decrease spending and increase public safety.\(^{59}\) Like the Task Force report, House Bill 463 aimed to achieve its goals primarily by altering drug laws and post-incarceration processes. Reforms included changing the probation and parole decision-making process, modernizing drug crime sentences, and requiring cite and release police procedures for some crimes.\(^{60}\)

The legislation also followed the Task Force’s advice by implementing important changes in Kentucky’s pretrial detention policy. The Act required Pretrial Services to use a “research-based, validated assessment tool” to measure a defendant’s flight risk and public dangerousness.\(^{61}\) Courts would now be required to consider the pretrial risk assessment in their bond decision process, where previously they were not mandated to examine the instrument or its recommendations.\(^{62}\) All defendants charged with certain misdemeanors and given money bail were presumed to have the amount of their bail limited by the maximum fine and costs.\(^{63}\) Defendants charged with crimes that may result in presumptive probation were required to be released on their own recognizance.\(^{64}\) Additionally, most defendants held on money bail would be presumed to be eligible for a bail credit of $100 per day toward his or her bail

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\(^{57}\) See Gov. Beshear Signs Landmark Corrections Reform Bill, supra note 56.


\(^{61}\) Id. at 1.

\(^{62}\) See Ky. REV. STAT. ANN. § 431.066(2) (West Supp. 2013).

\(^{63}\) Ky. REV. STAT. ANN. § 431.525(2) (West Supp. 2013). This requirement can be negated by a finding of risk of flight or dangerousness. Id. § 431.525(6).

\(^{64}\) Ky. REV. STAT. ANN. § 218A.135(1) (West Supp. 2013).
amount. If a judge decided to override any of these presumptions upon a subjective finding of dangerousness or risk of flight, she would have to provide written documentation supporting her decision.

This was a marked change from the old bail decision processes. Previously, a judge was able to make a bond decision based upon a wide range of criteria, and then choose from any bond condition legally available. Her decision would be reviewed by the extremely favorable "abuse of discretion" standard on appeal. This led to significant difficulty when challenging any bond decision made at the trial court level. The judge would now be required to make specific findings on the record, thereby preserving issues for appeal and giving appellate courts presumptions to fall back on when remanding trial court bond decisions. The abuse of discretion standard would still apply, but the increased information on appeal would be beneficial to defendants challenging their bond.

D. Reaction to House Bill 463

Passage and implementation of House Bill 463's substantial changes was met with understandable resistance, despite widespread bipartisan political support. Unsurprisingly, much of the documented resistance came from prosecutors and law enforcement personnel. There has also been anecdotal evidence of judges resisting the implementation of the legislation. The passage of House Bill 54

65 § 431.066(3)(a).
66 Id. § 431.066(3)(b), (6).
68 See Long v. Hamilton, 467 S.W.2d 139, 141 (Ky. 1971). The abuse of discretion standard has been questioned in the wake of House Bill 463, but courts have not explicitly overruled Long since the new legislation. See B. Scott West, Top 10 FAQ's When Litigating HB 463 Pretrial Release on Behalf of the Accused, in CRIMINAL LAW REFORM: THE FIRST YEAR OF HB 463 13, 21 (2012).
69 See West, Changes in Pretrial Release from HB 463, supra note 67, at 3.
70 See id.
71 See id. (arguing that HB 463 "has breathed new life into the presumption of innocence").
72 See KLUTE & HEYERLY, supra note 2, at 4, 11.
73 "But Commonwealth's Attorney Edison Banks says this bill is creating less punishment for more crimes. 'We had to go back and redo eighty-eight—some indictments because they were either no longer felonies or the penalties are greatly reduced or because it was mandatory probation for first and second offenses,' said Banks. Law enforcement agencies can not arrest for the same crimes that they used to. On Monday, Hazard Police officials say they could not arrest a suspect on drug charges due to House Bill 463. 'Its [sic] of course misdemeanor stuff at that point, and he had to cite and release and confiscate the drugs and let them go,' said Hazard Police Chief Minor Allen." Katie Roach, Law Enforcement, Attorneys Talk About HB 463 Effects, WYMT MOUNTAIN NEWS (Feb. 27, 2012), http://www.wkyt.com/wymt/home/headlines/Law_enforcement_attorneys_talk_about_HB_463_effects_43684143.html.
to amend House Bill 463 (the parts relevant for this discussion were codified in KRS section 431.066) also evidences this resistance.\footnote{Damon Preston, Updates to 2012 HB 463 (2012 House Bill 54), THE ADVOCATE (Ky. Dept of Pub. Advocacy), July 2012, at 1, available at http://dpa.ky.gov/NR/rdonlyres/F34E8F4C-308D-4F7B-AA3A-03114A804086/0/AdvocateJulyFINAL0712124PAGESONRED.pdf. For an analysis of a similar problem in another state and the recommendation for an increase in the reliance on pretrial assessments, see Johnson & Johnson, supra note 55, at 78-79.} Despite the obvious legislative intent to require consideration of the pretrial risk assessment in the bond decision, some courts refused to consider the report's recommendations based on a drafting error that resulted in explicit language not being inserted in the original version of the Act.\footnote{See Preston, Updates to 2012 HB 463 (2012 House Bill 54), supra note 75, at 1.} Resistance after implementation of reform is not unique to Kentucky, nor corrections reform in general.\footnote{See Francis T. Cullen et al., Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections, 4 VICTIMS & OFFENDERS 197, 210-11 (2009).}

Different theories explain this type of well-documented resistance. Some sources have identified and coined the term "local legal culture" to explain why some courts perform differently than others.\footnote{Mamalian, supra note 11, at 24.} Court culture is defined as the expectations and beliefs of judges and court administrators about how work should get done.\footnote{Id.} Any legislation counter to a jurisdiction's local legal culture would undoubtedly meet resistance. This particular legislation completely altered the bond decision process by abridging the judges' formerly broad discretion in addition to decreasing the overall punitive effect of the justice system.

Substituting objective decision making for subjective decision making has been met with resistance in other seemingly unrelated fields. Pretrial and baseball "share the common plight of being social domains in which irrational practices, based on unsystematic observation and 'common sense,' have been enshrined with legitimacy."\footnote{Timothy P. Cadigan, Evidence-Based Practices in Federal Pretrial Services, 72 FED. PROBATION, No. 3, Sept. 2008, at 87, 87 (quoting Cullen et al., supra note 77, at 197) (internal quotation marks omitted) available at http://www.uscourts.gov/uscourts/federalcourts/pps/fedprob/2008-09/15_evidence_based_practice.html.} Defense of these practices, and related attempts to undermine reform, have been referred to as "knowledge destruction techniques."\footnote{Cullen et al., supra note 77, at 208. For a local example, see infra notes 225-28 and accompanying text.} Some of the cited resistance to House Bill 463 could be characterized in such a manner.\footnote{dailindependent.com/opinion/20120907/A-good-report; Editorial, Kentucky Must Follow Through on Corrections Law, COURIER-JOURNAL.COM (Sept. 7, 2012), http://www.courier-journal.com/article/20120907/OPINION01/30907005fl/}
Other sources argue that the process has become the punishment in some lower courts. In the lower courts, it is the cost of being caught up in the criminal justice system itself that is often most bothersome to defendants accused of petty offenses, and it is this cost which shapes their subsequent course of action once they are entrapped by the system. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.

By simplifying the pretrial process and directing non-financial releases, House Bill 463 effectively removed a portion of the perceived punishment for offenders.

II. CURRENT LAW

A. Present Law on Pretrial BondDeterminations

In Kentucky, a person arrested by police officers and charged with a crime is transferred into corrections' custody. All defendants must have a bond set by a judge within twenty-four hours of arrest unless they have been charged with a capital offense. This may be done telephonically, if there is not an opportunity to physically see a judge within the allotted time period. If the defendant was not released or bonded out, then she would be presented to a judge for her initial appearance. She would be informed of her constitutional rights, enter her plea, have counsel appointed if she was indigent, and have her bond conditions reviewed by a judge. At the end of the appearance, the defendant's next court hearing is set.

House Bill 463 did not change the "steps" a defendant goes through post-arrest, but it did substantially alter the procedure utilized at the bond decision phases of the process. After passage of House Bill 463, the procedure is

82 Mamalian, supra note 11, at 24–25 & n.68 (citing M.M. Feely, The Process is the Punishment: Handling Cases in a Lower Criminal Court 30–31 (1979)).

83 Id. at 25 n.68.

84 It is worth noting that "pretrial costs do not distinguish between innocent and guilty; they are borne by all, by those whose cases are nulled or dismissed as well as by those who are pronounced guilty." Id. Therefore the process should never be the punishment.


86 Ky. R. Crim. P. 3.02(3).

as follows: In determining what type of bond will be assigned, every defendant is presumed to be able to be released on his or her own recognizance. From that starting point, "the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released," when deciding what type of release conditions to assign. The court must consider Pretrial Services' objective risk assessment on the individual defendant in making this determination. The assessment will contain extensive information that was collected prior to the proceedings through an interview and investigation. This information would include the defendant's residency history, work status, current charge, legal status, any substance abuse history, any prior misdemeanor or felony convictions, any prior violent crime convictions, any prior failures to appear, mental health history, and any prior escape convictions. Pretrial Services will use this to recommend a release decision for every defendant that has had his information verified by a third-party. Each category of information mentioned above is weighted with different points. A defendant's point total determines whether he represents a low, moderate, or high risk of flight and/or danger. Pretrial Services recommends that a low risk defendant be released on his own recognizance with no conditions pending trial. They recommend a moderate risk defendant be released on his own recognizance with pretrial supervision conditions. A high-risk defendant’s bail decision is left up to the discretion of the judge.

After considering Pretrial Services’ recommendation for the type of bail, the judge can choose to ignore that objective assessment if she subjectively finds that such a release would not reasonably assure the appearance of the defendant, or if the defendant represents a flight risk or danger to the public. KRS section 431.066, the codified version of certain parts of House Bill 463, states that the judge must consider the factors listed in KRS section 431.525 in making this determination, which include: bail sufficient to insure compliance;
bail that is not oppressive; bail commensurate with the nature of the offense charged, considerate of the past criminal acts and reasonably anticipated conduct of the defendant if released, and considerate of the financial ability of the defendant.100

Other sources and the title of KRS section 431.525, “Conditions for establishing amount of bail,” indicate that the legislature, in referencing section 431.525 in section 431.066, could have confused the judge’s decision to choose the bail type and the decision to set the amount of bail.101 For example, the oppressiveness of bail factor referred to in section 431.525 does not directly inform the section 431.066 inquiry into the dangerousness or flight risk of a given defendant. Additionally, other factors listed in section 431.525 are already a part of the judge’s decision on what type of bail should be ordered. The nature of the offense and the defendant’s criminal history are taken into account in Pretrial Services’ risk assessment instrument.102 Non-oppressive bail and bail sufficient to ensure compliance are constitutional requirements that apply with or without statutory implementation.103 The only factor listed in section 431.525 that is not already accounted for is bail “considerate of the financial ability of the defendant.”104 It is not a constitutional requirement and not measured in the pretrial assessment.105

If the judge ultimately deems a type of money bail is necessary, whether over Pretrial Services’ recommendation or not, the five factors in KRS section 431.525 must also be considered in deciding the amount of bail required.106 For crimes punishable by fines only, the bail given shall not exceed the maximum fine able to be imposed unless the judge finds the defendant to be a flight risk or a danger to others.107 As mentioned previously, if the judge does reject any of pretrial’s recommendations in her final determination, written reasoning must be provided for the decision.108

The bond decision procedure can be confusing. Factors for choosing types of bonds and amounts of bonds overlap explicitly and implicitly. Some factors are considered both objectively and subjectively. Some are not. However, one common thread connects many of the decisions that are made regarding defendants’ bonds. A finding of “flight risk” or “dangerousness” can preclude an individual from release in a number of different ways. The finding can

101 § 431.525 (emphasis added); West, Top 10 FAQs When Litigating HB 453 Pretrial Release on Behalf of the Accused, supra note 68, at 16.
104 § 431.525(6).
106 § 431.525(1)(a)–(c); § 431.066(2); Ky. R. Crim. P. 4.16(1).
107 § 431.525(2), (6). See also Ky. R. Crim. P. 4.16.
potentially deny non-financial release,\textsuperscript{109} negate limits on the amount of bail,\textsuperscript{110} and disallow bail credit that would permit a timed financial release.\textsuperscript{111} These threats can be found objectively by the risk assessment or subjectively by the judge examining essentially the same evidence for a second time.

There is little protection from these subjective determinations beyond appeal. Even on appeal, the appellate courts have recently allowed trial courts to deviate from the prescribed factors when altering a defendant's bail.\textsuperscript{112} Proving and disproving future dangerousness (beyond mere statistical likelihoods) at the initial appearance is also questionable at best.\textsuperscript{113} The unchecked subjective safety valve allows unconscious and conscious biases to potentially influence the bond decision process. It also allows for circumvention of the legislature's intended purpose in passing House Bill 463. The current procedure is unnecessarily duplicative and accords too much discretion to the trial courts. Effectively, the statistically verified risk assessment is neutered by the wide scope of the subjective exception. The results of this can be seen in the implementation of House Bill 463 and the failure to broadly meet stated legislative goals.\textsuperscript{114}

III. Implementation of House Bill 463

A. Statewide Effects of the Changes

Significant amounts of data have been collected since the implementation of House Bill 463 in June 2011 to measure its effect. The legislature's efforts have yielded moderately positive results as a whole. Overall pretrial releases increased from 5% to 70% of all arrested defendants in the first year of implementation.\textsuperscript{115}

\textsuperscript{110} § 431.525(2), (6).
\textsuperscript{111} § 431.066(3).
\textsuperscript{113} See discussion infra Part IV.B.1.
\textsuperscript{114} See discussion infra Part III.B.
\textsuperscript{115} KLUTE & HEYERLY, supra note 2, at 10. The release rate fell to 69% from June 2012 to June 2013. E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 4, 2013, 10:41 EST) (referencing 2011–2012 June to June H.B. 463 spreadsheet & 2012–2013 June to June H.B. 463 spreadsheet) (on file with author). This could be due to the falling number of cases actually handled by Pretrial Services during the same timeframe.
Non-financial releases increased from 15% to 66% of all releases since 2011.\textsuperscript{116}

[From June 2011 to June 2012], among defendants assessed as low risk, 85% are released, a figure up 8% from the pre-HB 463 time period. The release rate of moderate risk defendants has risen to 67%, up 7% from the pre-HB rate. By comparison, the release rate of high risk defendants has risen just slightly to 51%, suggesting more high risk defendants are perhaps fittingly being detained.\textsuperscript{117}

Additionally, the monitoring program within Pretrial Services, Monitored Conditional Release (MCR), was assigned 40% more clients in the year following the Act's implementation.\textsuperscript{118} This indicates a decrease in the use of money bail as a condition of release.

Pretrial Services measures its service to the public by three hallmarks: appearance rate, public safety rate, and supervision compliance rate.\textsuperscript{119} The appearance rate is the percentage of defendants released before trial who make all scheduled court appearances.\textsuperscript{120} The public safety rate is "the percentage of defendants who have not been charged with a new crime while on pretrial release."\textsuperscript{121} The supervision compliance rate is "the percentage of defendants supervised by Pretrial Services who are not charged with a violation of the conditions of release, including making all scheduled court appearances and who have not been charged with a new crime."\textsuperscript{122} In the year following House Bill 463, the appearance rate and public safety rate increased 1% from the same time period the previous year—an increase from 89% to 90% and 91% to 92% respectively.\textsuperscript{123} While these numbers fell from June 2012 to June 2013, they must be viewed in light of the increased release rates.\textsuperscript{124} The Act's intent was apparently being achieved.\textsuperscript{125} More detainees were being released, more defendants were returning to court, and public safety was improving.


\textsuperscript{117} KLUTE & HEYERLY, supra note 2, at 10. These numbers remained unchanged from June 2012 to June 2013 except that the low risk release rate fell from 85% to 83%. E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 4, 2013, 10:41 EST) (referencing 2011–2012 June to June H.B. 463 spreadsheet) (on file with author).

\textsuperscript{118} KLUTE & HEYERLY, supra note 2, at 7.

\textsuperscript{119} Id. at 5.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 6.

\textsuperscript{124} From June 2012 to June 2013, the appearance rate fell to 87% and the public safety rate fell to 9%. E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 4, 2013, 10:41 EST) (referencing 2012–2013 June to June H.B. 463 spreadsheet) (on file with author).

\textsuperscript{125} H.B. 463 § 1(1), 2011 Gen. Assemb., Reg. Sess. (Ky. 2011) (stating the legislature's primary objective was public safety and offender accountability); Id. § 68(1) (requiring documentation of cost reduction due to amendments in the bill including those to KRS section 431).
B. Statistical Problems with Implementation

While there have been improvements since House Bill 463's passage, there is also room for significant progress. Statewide, 15% of defendants recommended for release without conditions and 33% of defendants recommended for conditional release remained incarcerated for the period between June 2011 and June 2012.126 Those numbers stayed the same or increased between June 2012 and June 2013.127

These rejections of Pretrial Service's recommendations are inefficient. Judges are detaining low-risk individuals who are statistically more likely to appear for court and less likely to commit crime than the average released defendant. According to data collected by the agency, low-risk defendants in Kentucky had an appearance and public safety rate of 94% during the two years prior to House Bill 463.128 Simply releasing all low-risk defendants across the board, assuming their 94% appearance and public safety rates held true, should have resulted in an increase of those average rates from the year following the Act’s implementation—90% and 92% respectively.129 It would have also decreased the overall cost of incarceration.

Additionally, the 70% release rate for the state and the 66% rate for non-financial release mean that only approximately 4% of the 34% of defendants who receive financial bond conditions secured their release by payment of money bail.130 Because the remaining 30% of detainees were presumably unable to pay the bond assigned to them,131 actual payment of bail appears to be the


127 Seventeen percent of low risk defendants were retained and 33% of moderate risk defendants remained in custody. See E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (referencing 2012-2013 June to June H.B. 463 spreadsheet) (on file with author).


129 Klute & Heyerly, supra note 2, at 6.

130 See id. at 10. Seventy percent is approximate given the 69% release rate from June 2012 to June 2013. E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file referencing 2011-2012 June to June H.B. 463 spreadsheet & 2012-2013 June to June H.B. 463 spreadsheet) (on file with author). However, the 66% non-financial release rate was the same for both time periods. Klute & Heyerly, supra note 2, at 10; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (referencing 2011-2012 June to June H.B. 463 spreadsheet & 2012-2013 June to June H.B. 463 spreadsheet) (on file with author).

131 This number could be somewhat lower because capital offenses are not bailable. Ky. R. Crim. P. 4.02(1).
exception rather than the rule. This indicates that money bail is used as a *sub rosa* means of detention, not as a means of insuring compliance upon release.\textsuperscript{132}

Kentucky also faced problems correctly utilizing the Monitored Conditional Release program statewide. During the first two years after implementation, two out of every five defendants monitored by Pretrial Services had been recommended for unconditional release.\textsuperscript{133} That represents a significant number of defendants who should have been placed under less restrictive bond conditions and subsequently missed opportunities to release detained defendants recommended for conditional release.

In response, the agency has called for stricter adherence to the risk principle—matching a defendants' release type and conditions with that of their risk assessment—in order to realize additional cost savings.\textsuperscript{134} Beyond monetary losses, unnecessary pretrial monitoring has been shown to actually decrease public safety and appearance rates.\textsuperscript{135}

More specifically, county–by–county statistics paint a starker picture. Pretrial release rates across the state vary greatly.\textsuperscript{136} The lowest average county release rate in Kentucky between June 2011 and June 2013 was McCracken County at 46.48%.\textsuperscript{137} The highest average release rate over the same time period was Russell County at 84.93%.\textsuperscript{138} These figures are not outliers. Seventy–nine

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\textsuperscript{132} John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 42 (1985) (explaining *sub rosa* detention and how preventative detention in the federal system sought to eliminate it).

\textsuperscript{133} From 2011 to 2012, 43% had been recommended for unconditional release, and then 42% from 2012 to 2013. *KLUTE & HEYERLY*, supra note 2, at ii; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (referencing 2011–2012 June to June H.B. 463 spreadsheet & 2012–2013 June to June H.B. 463 spreadsheet) (on file with author).

\textsuperscript{134} *KLUTE & HEYERLY*, supra note 2, at ii.

\textsuperscript{135} See Christopher T. Lowenkamp et al., *The Development and Validation of a Pretrial Screening Tool*, 72 FED. PROBATION, 2, 2–3 (Dec. 2008). For example, the pretrial failure rate for low–risk defendants is 11% to 33% higher if substance abuse treatment is added as a condition of release, 30% to 56% higher if third–party monitoring is required, and 46% to 112% higher if location monitoring is required. See *id*.

\textsuperscript{136} See infra app. A.

\textsuperscript{137} The statistics provided here are derived from averaging the statistical data provided in the following sources: *KLUTE & HEYERLY*, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

\textsuperscript{138} The statistics provided here are derived from averaging the statistical data provided in the following sources: *KLUTE & HEYERLY*, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).
counties had an average release rate below the 69.35%\textsuperscript{139} state average and seven counties had release rates above 80%.\textsuperscript{140}

Demographics cannot be used to justify the disparities. Counties with similar communities had dissimilar release rates. For example, Jefferson County released 69.54% of its 92,921 total cases from June 2011 to June 2013.\textsuperscript{141} Fayette County, the next largest caseload, released 47.46% of its 30,356 total cases.\textsuperscript{142} Similarly, adjacent rural counties also differ greatly.\textsuperscript{143} Rockcastle County released 74.85% of its 2,433 total cases\textsuperscript{144} while Lincoln County released 53.24% of its 2,453 total cases.\textsuperscript{145}

In addition, the disparities cannot be justified by improved outcomes in the counties.\textsuperscript{146} Higher retention rates do not necessarily equate to better appearance and public safety rate. For instance, the counties compared above

\textsuperscript{139} The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

\textsuperscript{140} The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author). Jefferson County’s high case load could be “anchoring” the average thereby explaining the large number of counties below the state average. KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

\textsuperscript{141} The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author). Jefferson County has a population of 750,828 and a median household income of $46,701. AMERICAN FACTFINDER, U.S. Census Bureau, http://factfinder2.census.gov.

\textsuperscript{142} The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author). Fayette County has a population of 305,489 and a median household income of $48,779. AMERICAN FACTFINDER, supra note 141.

\textsuperscript{143} Rockcastle County has a total population of 17,006 and a median household income of $28,178. AMERICAN FACTFINDER, supra note 141. Lincoln County has a total population of 24,461, and a median household income of $34,454. Id.

\textsuperscript{144} The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

\textsuperscript{145} The statistics provided here are derived from averaging the statistical data provided in the following sources: See KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

have similar appearance and public safety rates. Very little correlation can be found statewide. Statistical analysis reveals no correlation between the release rate and the appearance rate and a small to moderate correlation between the release rate and the public safety rate. A simple visual comparison of outcomes in the counties as compared to release rates visually illustrates the lack of direct correlation.

Even more specifically, some judges within certain counties have outcomes that illustrate a failure to comply with the intent of House Bill 463. Statistics are difficult to obtain, but it has been acknowledged that some courts "throughout the state apply their judicial discretion frequently and rather broadly; as a result these areas have not seen a significant decrease in their jurisdiction's release rates."

IV. Legal Issues

A. Application of Existing Bail Law

1. The Eighth Amendment and Kentucky Bond Law.—The types of disparities seen in the application of Kentucky bail law described above potentially violate

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147 Both Jefferson County and Fayette County are in the bottom ten counties for appearance rate—19.78% and 16.49% respectively. Jefferson County has a 9.54% public safety rate and Fayette County has an 8.00% public safety rate. Rockcastle County has an appearance rate of 12.90% and Lincoln County has an 8.27% appearance rate. Rockcastle County has a public safety rate of 11.04% and Lincoln County has a public safety rate of 8.19%. These numbers place all counties in relative proximity to each other as compared to other counties. The statistics provided here are derived from averaging the statistical data provided in the following sources: KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author).

148 See KLUTE & HEYERLY, supra note 2, at 4. See also infra app. C.

149 See infra app. C. The linear trend line marks the relation between the x and y axes in both charts. The Pearson Product-Moment Correlation coefficient is a measure of linear correlation between two variables. It is represented by r and can range from +1 to −1. A value of 0 represents no association between the two variables. +/- .3 to +/- .1 represents a small correlation. +/- .5 to +/- .3 represents medium correlation. +/- .1 to +/- .5 represents strong correlation. Pearson Product-Moment Correlation, AERD STATISTICS, https://statistics.laerd.com/statistical-guides/pearson-correlation-coefficient-statistical-guide.php (last visited Feb. 16, 2014). Here, the r for the release rate and the FTA rate for 6/8/11 to 6/8/13 for the state of Kentucky was .061 based off of the data provided in the Pretrial Impact Report at Appendix C and 2013 Statistics provided by Mark Heyerly. KLUTE & HEYERLY, supra note 2, app. C; E-mail from Mark Heyerly, Project Specialist, Ky. Admin. Office of the Courts, to Robert Veldman (Sept. 16, 2013, 02:33 EST) (on file with author). The r for the same time period for the release rate and the re-arrest rate was .358. It is important to note that a lack of correlation does not necessarily imply a lack of causation. Additionally, this analysis is admittedly rudimentary. However, this data does tend to contradict the traditional "tough on crime" logic. Further research would be needed to fully understand the statistics behind this analysis. For a review of nonparametric statistics, see YAK-IUN CHOU, STATISTICAL ANALYSIS 536-68 (2d ed. 1975).

150 See infra apps. B–C.

151 KLUTE & HEYERLY, supra note 2, at 11.
constitutional and state law protections against excessive bonds. “Bail set at a figure higher than an amount reasonably calculated to fulfill its purpose is ‘excessive.’” Disregarding individual nuances in a case can lead to bonds not reasonably calculated to fulfill their purpose. “Each case comprises a set of facts and circumstances peculiar to it and there is no rule of law which will automatically determine for every case the amount of bail which may be required without violation of the prohibition against excessiveness.” Therefore, bond decisions can become so automatic as to be unlawful.

Questions regarding the automatic application of bond decision law often arise when bond amounts are based solely on bail schedules or court practices. Kentucky courts have rejected these types of “one size fits all” procedures. The routine setting of high bail for certain types of offenses without regard for the statutorily prescribed factors was held to be an abuse of the broad discretion vested in the trial court. In its 1951 decision in Stack v. Boyle, the United States Supreme Court also found that bond decisions not made upon an individual assessment of each defendant violated the Eighth Amendment. Of course, in Stack, bail’s only purpose was to assure the appearance of the accused. Under Kentucky law, prevention of future dangerousness is also a permissible purpose of bail.

Based on the data examined above, Kentucky courts are not making individual bond determinations. It would be a stretch to argue that Fayette County’s defendants are significantly more dangerous than Jefferson County’s defendants. Yet, a difference of eighty miles in the location of arrest could reduce the chance of release by 25%. Though some may argue that it is within the judicial and prosecutorial purview to apply bond law as their community sees fit, KRS sections 431.066 and 431.525 do not explicitly allow for such considerations. Local legal culture, the only discernible reason for the...

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152 Stack v. Boyle, 342 U.S. 1, 3 (1951).
153 Long v. Hamilton, 467 S.W.2d 139, 141 (Ky. 1971).
154 See Abraham v. Commonwealth, 565 S.W.2d 152, 157 (Ky. Ct. App. 1977) (rejecting a trial court bond decision based upon the fact that $25,000 was the bond always set by the court in theft and related cases). See e.g., Application for Writ of Habeas Corpus, Neely v. Sabbatine, No. 12–CI–00401 (Fayette Cir. Ct. Ky. 2012) (challenging successfully an initial bail of $88,335 for a moderate risk defendant charged with Trafficking a Controlled Substance first and second degree, Wanton Endangerment, and Fleeing and Evading, who was found subjectively to be a flight risk and a danger to the community then given a bail based upon a bail schedule). Neely later had his bail reduced to a combination of lower monetary bail with pretrial monitoring conditions. Id.
156 See Stack, 342 U.S. at 4 (citation omitted).
157 See discussion supra Part IV.B.1.
159 See Klute & Heyerly, supra note 2, app. C.
160 See discussion supra Part II.A.
disparities, should not affect bond decisions in such an egregious manner when there is a statewide statute on point. It is clear that some jurisdictions are using money bail as a means of sub rosa detention, utilizing the subjective exception in KRS section 431.066 that arguably allows judges to override Pretrial Services' recommendation for release. Individual defendants are not having their bonds set as individuals, but as individuals from a certain county. Therefore, their bonds are not reasonably calculated to achieve public safety and court appearances. Consequently, Kentucky defendants' constitutional rights are being violated.

An actual constitutional challenge by a defendant on Eighth Amendment grounds would be difficult. The standard of review on appeal gives significant deference to the trial court. As long as the trial court considers the statutory factors, its decision will likely be upheld. However, this does not change the fact that individual bond decisions are not actually being made by courts across the state. The slim chance of a successful appeal should not preclude reform that brings the bond decision process within the spirit of the Eight Amendment and House Bill 463.

2. Section 2 of the Kentucky Constitution.—The application of Kentucky bail law in the years following the enactment of House Bill 463 could also violate the second section of the Kentucky Constitution. That section states, “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” Courts have interpreted Section 2 “to embrace the traditional concepts of both due process and equal protection of the laws”—both fundamental fairness and impartiality. This includes arbitrary and discriminatory enforcement.

But, “[d]iscrimination or selectivity in enforcement is not, by itself, a constitutional violation.” In order to violate the due process prong of Section 2, “unequal treatment must amount to a conscious violation of the principle of uniformity.” Such a violation occurs when state actions are so unreasonable

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161 This conclusion holds true in light of the statistical analyses set forth above. See discussion supra Part III.B.
162 See discussion supra Part I.C.
163 See West, Changes in Pretrial Release from HB 463, supra note 67, at 3.
164 See id.
165 Ky. Const. § 2.
166 Ky. Milk Mkrg. v. Kroger Co., 691 S.W.2d 893, 899 (Ky. 1985) (citing Pritchett v. Marshall, 375 S.W.2d 253, 258 (Ky. 1963)).
that they appear arbitrary. Reasonableness is a matter of degree determined on the particular facts of a case.

In this instance, when courts grant unequal access to pretrial release by over-utilizing the subjective safety valve and ordering release in an uneven manner across the state, they are categorizing defendants based upon geographic location of arrest and thereby consciously violating the principle of uniformity. Dangerous or flight prone defendants are having their bond decided in a different manner across the state with no reasonable explanation for the deviation. This sort of geographic categorization would seem to be present in all adjudications of state statutes by virtue of the structure of the court system and its division by county. But Kentucky’s Supreme Court has previously struck down explicit statutory language that resulted in geographic categories. The court in D.F. v. Codell found a statute to be unconstitutional because it premised revocation of high school dropouts’ drivers’ licenses on the educational facilities available in the dropout’s county. The court found that such geographic categorization was not reasonably related to the legitimate aims set forth in the legislation. It is obviously different to argue that application of a neutral statute—like House Bill 463—unconstitutionally categorizes geographically, but, “whether the proceeding is an attempt to enforce an invalid law or to enforce a valid law in an invalid manner makes no logical difference.”

However, other challenges on selective enforcement grounds have required flagrant conduct—beyond mere categorization—to be successful. These cases vary in their theories between substantive due process and equal protection analyses, but all use the same rational basis test. That test requires the rationale for selective enforcement to be reasonably related to the goals of the statute.

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169 Express Mart, 759 S.W.2d at 601 (citing Ky. Milk Mkts., 691 S.W.2d at 899).
170 Id.
172 See id.
173 See id. at 578.
175 See Express Mart, 759 S.W.2d at 602 (denying a challenge of geographic selective enforcement because the enforcing agency made its decision based upon available resources and a higher percentage of legal actions in a certain district does not amount to selective enforcement); Exec. Transp. Sys. LLC v. Louisville Reg’l Airport Auth., 678 F.Supp. 2d 498, 510 (W.D. Ky. 2010) (denying an allegation of unequal treatment by an administrative agency in choosing transportation contractors because the parties were not similarly situated); Standard Oil Co. v. Boone Cnty. Bd. of Supervisors, 562 S.W.2d 83, 84–85 (Ky. 1978) (denying challenge of selective enforcement because there was no evidence that the agency in charge of tax collection knew that similarly situated properties were also taxable); Davis v. Commonwealth, Nos. 2002-CA-000469-MR, 2003-CA-002029-MR, 2004 WL 2149218 at *2 (Ky. Ct. App. Sept. 24, 2004) (denying challenge of selective enforcement of a statute controlling the appearance of junkyards due to a failure to identify an invidious purpose for enforcement). But see City of Ashland, 407 S.W.2d at 424 (sustaining a challenge of unequal enforcement when Sunday closing law enforced against only one retailer in twenty-five years but not other violators).
176 See Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and
The construction of Section 2, a combination of equal protection and due process safeguards, lends itself to this confusion. The precedent is such that the only difference between the two theories would seemingly be the remedy sought—either a change in the procedure utilized or a change in the treatment of the category created by selective enforcement.

As shown above, the rational basis test is notoriously difficult to overcome for parties bringing suit against the government. Here, the challenged county could argue that the differences in the utilization of the safety valve across the state should be characterized as a matter of degree influenced by valid economic and political policy decisions. They could also argue that such geographic categorization is just a product of the structure of the court system. It would be difficult to rebut such claims due to the high bar a defendant must meet on appeal. It would also be difficult to prove, beyond use of statistics, that there are similarly situated defendants treated differently due to their location. Judges at initial appearances rarely, if ever, state their reasoning for bond decisions in terms of what they would do if they were in a different county or state, or whether a bond was chosen because their particular county is tougher on crime than the others. Pretrial reports are also confidential, so it would be difficult to prove another defendant was situated in the exact same way as a plaintiff. Any number of nuances could also be used to distinguish individuals due to the plethora of required factors to be considered in the bond decision process. Nevertheless, as stated in the Eighth Amendment analysis, this geographic categorization has no rational relation to the aims bond decisions seek to achieve—mitigation of dangerousness and ensuring appearance in court. It is unlikely that those counties with low release rates have less dangerous defendants than those with high release rates. A statistical analysis of the outcomes supports that conclusion, yet disparities remain.

Constitutional Remedies, 93 COLUM. L. REV. 309, 315-16 (1993); Codell, 127 S.W.3d at 578.


178 See West, Changes in Pretrial Release from HB 463, supra note 67, at 3.

179 See McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (holding that statistics alone do not support a cause of action for disparate treatment by showing a discriminatory purpose in the capital punishment context).

180 See Ky. R. CRIM. P. 4.08.

181 See discussion supra Part II.A.

182 See discussion supra Part IV.A.1.
B. Other Constitutional Issues

1. Consideration of Dangerousness.—Three principles have traditionally governed the early American bail system at the federal level.183 First, bail should not be excessive.184 Second, a right to bail exists in non-capital cases.185 Third, bail is meant to ensure the appearance of the accused at trial.186 Kentucky protects the first two principles in its constitution, but the third principle has seen change at the state and federal levels.187 The first major Supreme Court case concerning the administration of bail unequivocally stated that “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.”188

As stated above, any bail set higher than reasonably calculated to fulfill that purpose is excessive under the Eighth Amendment.189 However, a case decided four months after Stack clarified the Court’s position. The Supreme Court in Carlson v. Landon held that the right to bail is fundamental but not absolute.190 The Court’s holding left the door open to a limitation of the right to bail by the legislature.191

The states and Congress stepped through that open door in the years following Stack and Carlson. Concern about crime committed by defendants released prior to trial and the “tough on crime” culture of the 1970’s ushered in reforms that allowed judges to consider future dangerousness in bond decision making.192 The first law that made community safety an equal consideration to future court appearance was the District of Columbia Court Reform and Criminal Procedure Act of 1970.193 Between 1970 and 1984, many states followed suit by including dangerousness considerations in their bail statutes.194 Congress addressed the issue at the federal level with the passage of the Bail Reform Act of 1984.195 The 1984 Act amended the Bail Reform Act of 1966 "to include consideration of danger in order to address the alarming problem
of crimes committed by persons on release." In *United States v. Salerno*, the Supreme Court upheld the dangerousness consideration in the 1984 Act. The state response progressed and "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." The popularity of allowing dangerousness considerations in bond decisions should not be taken as evidence of its widespread support. Even in *Salerno*, Justice Marshall wrote a vigorous dissent, calling such statutes "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state." He also cited Justice Jackson to support his contention that the majority's holding contravened the presumption of innocence: "Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice." In fact, he cited the Government's retention of Salerno upon a finding of dangerousness and subsequent pretrial release when he became an informant as an "eloquent demonstration" of the inevitable abuses the consideration of dangerousness would breed. He concluded:

> Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. . . . Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.

Numerous secondary sources have also criticized the legality of the consideration of dangerousness in bond decision making. Others have
criticized its practical application in addition to its constitutionality.\textsuperscript{205} One Harvard study allowed participants to apply the aforementioned D.C. statute's factors to attempt to predict future dangerousness.\textsuperscript{206} The "hunch system" of bond decision making, at best, was accurate 30\% of the time—for every three actual recidivists selected for detention, seven persons who would not have been convicted of an offense were wrongly detained. The system also failed to capture 60\% of the recidivists.\textsuperscript{207} In sum, the consideration of dangerousness is fraught with constitutional and practical pitfalls. It tread on basic guaranteed rights and lends itself to inaccurate use and abuse.

2. Use of Money Bail.—Even more generally, some sources have cited the marked increase in the use and quantity of monetary release conditions as a primary cause of the increase in pretrial detention nationwide.\textsuperscript{208} "Between 1990 and 2004, the pretrial release rate in felony cases fell from 66 percent to 56 percent. Over that same period, the percent of cases where courts were requiring felony defendants to post a money bail to be released from jail rose from 54 percent to 69 percent."\textsuperscript{209} In fact, there was a "nearly perfect inverse relationship between the rise in the use of money bail and the decline in the pretrial release rate."\textsuperscript{210} The amount of money required for release also increased over approximately the same time period. Average bail amounts increased by over $30,000 between 1992 and 2006.\textsuperscript{211} In 2006, the "jail population in the 75 most populous U.S. counties had a median bail amount of $10,000."\textsuperscript{212} This increase in the use and amount of money bail has led to five out of six defendants with a financial release condition unable to make the bond amount set by the court.\textsuperscript{213} As stated above, while approximately 34\% of defendants in Kentucky received financial conditions of release in the year after House Bill 463's implementation, only about 4\% of the total population actually secured their release through satisfaction of their bail conditions.\textsuperscript{214}

The use of money bail also raises a plethora of other constitutional issues. First, studies show that it has a discriminatory impact on certain racial, ethnic,
and economic classes. Second, use of money bail is arbitrary—varying from state to state and county to county. Third, the money bail system is subject to exploitation by the wealthy. These issues raise equal protection and due process concerns. Finally, there is a distinct lack of empirical evidence supporting the argument that bail incentivizes appearance in court and public safety, raising Eighth Amendment concerns.

3. Kentucky, Dangerousness, and Money Bail.—Dangerousness and money bail are being used in conjunction with the subjective exception in KRS section 431.066 as a means of sub rosa detention, thereby subverting the legislature’s intent with House Bill 463. Examples can be seen in some of the habeas corpus actions and motions for bond reduction filed recently in Fayette County. In one case, a low risk defendant was given a $3100 bail by the district court, over Pretrial’s recommendation, because his prior FTA indicated that he was a flight risk and his prior charge for Possession of a Firearm by a Convicted Felon indicated that he was a danger to the community. The defense attorney argued that there was no actual violence in the defendant’s past and that Pretrial Services recommended that the defendant be released on his own recognizance. The application was rendered moot by a plea deal.

In another case, a defendant charged with two counts of trafficking in a controlled substance in the first degree was given a $28,000 bail that was later reduced to a 10% bail of $2800 when Pretrial Services amended her

215 JUSTICE POLICY INST., supra note 25, at 16; VANNOSTRAND, supra note 16, at 15; see MINTON, supra note 26, at 6, tbl.6 (2012).

216 JUSTICE POLICY INST., supra note 25, at 22–23 (discussing the use of money bail primarily in states without pretrial risk assessments).

217 Jonathan Zweig, Note, Extraordinary Conditions of Release Under the Bail Reform Act, 47 HARV. J. ON LEGIS. 555, 555–57 (2010) (discussing the equal protection clause implications of the exploitation of the federal bail system through the examples of Bernie Madoff and Marc Dreier and the use of their significant wealth).

218 See discussion supra Part IV.A.2.

219 JUSTICE POLICY INST., supra note 25, at 21 (“[D]espite the use of money bail at increasingly higher amounts, failure to appear rates have not changed substantially. Whereas in the 1960s and ’70s, the failure to appear rate among the most populous cities was 6–9 percent, the failure to appear rate for felony cases was at 21 percent in 2006.”).

220 See discussion supra Part IV.A.1.

221 See Application for Writ of Habeas Corpus, Medlock v. Ballard, No. 12–CI-003355 (Fayette Cir. Ct. Ky. 2012). Incidentally, the prior FTA and prior conviction would have been accounted for in the objective risk assessment. See KLUTE & HEYERLY, supra note 2, at 5.

222 See Application for Writ of Habeas Corpus, Medlock, No. 12–CI-003355.

223 See Medlock v. Ballard, No. 12–CI-003355.

224 A 10% bail requires someone to post 10% of the defendant’s original bond to secure his release, $2800 in this case. If the defendant does not appear in court, the person posting the bail may be subject to pay the entire bail amount to the court, $28,000 here. KENTUCKY COURT OF JUSTICE, PRETRIAL SERVICES FREQUENTLY ASKED QUESTIONS, http://courts.ky.gov/courtprograms/pretrialservices/Pages/FAQs.aspx (last visited Mar. 6, 2014).
classification from moderate to low risk.\footnote{Application for Writ of Habeas Corpus, Estes v. Sabbatine, No. 11-CI-005832 (Fayette Cir. Ct. Ky. 2012).} In making the determination, the Fayette County district judge considered the fact that drugs were dangerous to the community in general, that the defendant had been on probation ten years ago, and that she had one prior FTA.\footnote{Id. Coincidentally, the prior FTA and prior conviction would have been accounted for in the objective risk assessment. See Klute & Heyerly, supra note 2, at 5.} The district judge also mentioned on the record that Fayette County's circuit courts were growing weary of the Department of Public Advocacy's challenges to district court bond rulings in the wake of House Bill 463.\footnote{Application for Writ of Habeas Corpus, Estes, No. 11-CI-005832.} The circuit court subsequently ordered the defendant released on her own recognizance because a bond decision based upon blanket statements about the dangerousness of drugs without more specific facts was arbitrary.\footnote{Id.}

These are just a few examples of how the use of the subjective safety valve in conjunction with subjective findings of dangerousness and money bail circumvents the intent of House Bill 463 to decrease pretrial detention. Money bail is being set at high amounts resulting in large percentages of defendants unable to secure their freedom. The use of the dangerousness consideration is making these bond decisions difficult to appeal. While not explicitly unconstitutional, the system, in some cases, barely comports with the spirit of House Bill 463. Minor adjustments to the use of dangerousness, money bail, and the subjective exception, however, could bring Kentucky bond law in line and measure up to the General Assembly's intent.

V. Suggested Changes

Kentucky's pretrial detention policy was significantly improved with the implementation of House Bill 463. The legislative goals of increased release rates and increased public safety are being achieved; however, there is also significant room for improvement. Improvement has not been uniform across the state.\footnote{See discussion supra Part IV.A.1.} Resistance to objective release decision making has been firm in some parts of the state.\footnote{See discussion supra Part IV.A.1.} The reasons for this resistance were laid out above: First, Kentucky's bond decision process is duplicative.\footnote{See discussion supra Part II.A.} Objective findings on flight risk and dangerousness can be ignored upon subjective findings of flight risk and dangerousness.\footnote{See discussion supra Part II.A.} Ignoring the objective findings allows a court to apply stricter release conditions, usually money bail, and subsequently
circumvent the legislature's intent to decrease pretrial detention.\textsuperscript{233} Second, the consideration of dangerousness in Kentucky's bond decision process is not without controversy.\textsuperscript{234} Though the Supreme Court ruled it constitutional, scholars and judges both question its constitutionality and efficacy. Finally, the use of money bail in general has also been broadly criticized.\textsuperscript{235} Statistics cited above clearly indicate that its use is being abused.\textsuperscript{236}

All of this analysis points toward a current Kentucky pretrial system that is not strictly unconstitutional but employs contentious practices that result in unfortunate outcomes for its citizens. For those reasons, the Kentucky bond decision process should be developed further.

\textit{A. Deciding the Type of Bond}

In keeping with the legislature's intent to encourage evidence based practices, the application of KRS section 431.066 should be changed in such a way that restricts the use of the subjective safety valve.\textsuperscript{237} This Note proposes a decision process that begins as it does now. A judge shall consider Pretrial Services' objective recommendation in the bond determination phase if required. If a judge subjectively finds that the defendant is a flight risk upon a finding of facts, she should be able to disregard Pretrial Services' recommendation and apply a bond in accordance with the relevant statutes. Bond conditions could include money bail. This is in line with the traditional purpose of bond conditions—to assure appearance in court.\textsuperscript{238}

However, if the judge subjectively finds the defendant to be a danger to the community, she should be required to choose only from any of the available non-financial release options at her disposal. Subjective findings of dangerousness should not be grounds for the application of money bail.\textsuperscript{239} As mentioned above, both the consideration of dangerousness and money bail can be controversial and, therefore, should be limited.\textsuperscript{240} The potential for abuse of these considerations is demonstrated by the disparate detention statistics across Kentucky.\textsuperscript{241}

The proposed modified procedure allows for more objective decision making by protecting Pretrial Services' recommendations while preserving
traditional judicial discretion. This helps ensure that bond decisions do not become so automatic as to be unconstitutional. Subjective determinations of danger and applications of money bail would no longer be a way to disregard objective recommendations and circumvent the legislature’s intent. Flight risk determinations are also easier for the defendant to appeal because the subjective decisions are usually based upon ascertainable facts, such as prior FTAs, the distance a defendant lives from the courthouse, and ties to the community. These discernible factual findings would help inform the court’s analysis of a defendant’s flight risk.

Some may argue that there are defendants so dangerous that only money bail will reasonably assure their compliance with court orders should they be released. However unlikely this may be, those critics could be satisfied with a type of secondary hearing modeled after the procedure in the federal Bail Reform Act. At the federal level, detention without bond is permissible upon a showing that no conditions of release can reasonably assure the safety of the community or any person by clear and convincing evidence. Like the federal bond decision process, the hearing would be adversarial and occur after the right to counsel attaches at the initial appearance. If the prosecutor could prove by clear and convincing evidence that no other reasonable bond condition could assure the defendant’s compliance, then money bail could be applied.

B. Deciding the Amount of Bond

The confusion between KRS sections 431.066 and 431.525 should be resolved. The overlapping factors in these statutes contribute to the confusion in applying Kentucky’s bond law. This confusion allows some districts to resist the legislative intent of House Bill 463 by over-utilizing the subjective safety valve. As discussed above, the only factor that does not implicitly overlap from KRS section 431.525 when deciding the type of bond under KRS section 431.066 is the defendant’s economic status. All other factors contained within KRS section 431.525 are either considered in the review of the pretrial report, are constitutionally required to be considered, or do not inform the inquiry required by KRS section 431.066. One way to eliminate confusion

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242 See discussion supra Part IV.A.1.
243 But see infra app. C (showing no current correlation between retention rate and FTA rate).
244 It is worth noting that high-risk defendants’ bond decisions are left to the discretion of the judge. See Klute & Heyerly, supra note 2, app. B, at 3. As a result, only low and moderate defendants’ bond decisions would be affected by the proposed statutory change.
245 See Goldkamp, supra note 132, at 55 (arguing for due process protections for state-level defendants akin to the protections afforded at the federal level).
247 See discussion supra Part II.A.
248 See discussion supra Part II.A.
249 See discussion supra Part II.A.
would be to simply eliminate the reference to KRS section 431.525 from KRS section 431.066(2). This would effectively cabin each section to its respective inquiry: the type of bond and, if necessary, the amount of bail.

An additional explicit requirement to consider the defendant’s economic status when subjectively inquiring into the defendant’s dangerousness and likeliness to appear in court could also be added to the last sentence of KRS section 431.066(2). Such an explicit clarification promotes individualized bond decision making, as required by the Eighth Amendment and Kentucky law. It would also provide additional protection to defendants from categorization based on geography by curtailing the use of money bail as a means of sub rosa detention.

Currently, ambiguity can be used as an explanation for not following the statutory requirements and using the subjective safety valve in KRS section 431.066. Clarification would promote consideration of characteristics not measured in the objective pretrial recommendation. Some of the duplicative analysis would be eliminated therefore removing some of the arbitrariness from the bond decision process. This also allows the safety valve to function as it was designed—as a tool to prevent unconstitutional, automatic application of the law.

Furthermore, clarification would firmly place the individual economic status factor in a statute where it could do more “work” for a defendant. As discussed above, a defendant’s inability to pay a bail does not make the amount of the bail oppressive. This makes the defendant’s economic status essentially moot when deciding the amount of bail. Yet, any money bail is too often too much for many defendants. Consideration of individual economics when deciding the type of bond would affect the process in a significant way.

For instance, a court considering a defendant’s economic status could find that the defendant is indigent and opt for highly stringent pretrial monitoring in lieu of money bail. Alternatively, a court could find that the defendant is wealthy and decide to apply money bail rather than non-financial conditions to unburden the monitored conditional release program. Explicit consideration of the individual’s ability to pay also allows defendants to argue that non-financial bond types, such as the MCR program, should have been applied in a particular situation on appeal.

Some may argue that such clarification, mandating the court to consider an individual’s economic status, would unduly restrict or burden the trial court by requiring a more detailed inquiry. This argument is mistaken because the statutorily required information must be obtained for many defendants, regardless of any added clarification in the KRS section 431.066. In fact, the application of money bail statute currently requires consideration of personal

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250 See discussion supra Part II.A.

251 See discussion supra Part III.B.
For those defendants who are not given money bail, the information is often already obtained by Pretrial Services. The agency is required to fill out affidavits of indigency for the court to consider if the defendant requests a public defender. Therefore, for those defendants who will not receive money bail and who do not request a public defender, a quick inquiry into the defendant’s finances hardly seems burdensome to the trial court. It is something that the court is already accustomed to performing for other defendants.

**Conclusion**

An open interpretation of release laws allow for different needs in different counties or in the particular circumstances in a given case.

Disparities of the magnitude described in this Note, at every level, indicate misuse of judicial discretion and inarticulate standards for pretrial release. Advocates for the traditional and current system may argue that no portion of the bond decision process used by Kentucky has been explicitly ruled unconstitutional. However, Kentucky has never been a state that tolerated “just enough” for its criminal justice system. The legislature has made its intent to lead once again known, and the fiscal state of the Commonwealth demands action. A small change in Kentucky’s bond decision process could result in great good for the state.

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254 Cullen et al., *supra* note 77, at 210.
APPENDIX A

Outline Map of Kentucky and 120 Counties
APPENDIX B

Bluegrass Region (6/8/11 to 6/8/13)

Eastern Mountain Coal Fields Region (6/8/11 to 6/8/13)
Ten Largest Counties by Population (6/8/11 to 6/8/13)

[Graph showing the retention rate, FTA rate, and re-arrest rate for each of the ten largest counties by population.]
APPENDIX C

Release Rate vs. FTA Rate (6/8/11 to 6/8/13)

Release Rate vs. Re-arrest Rate (6/8/11 to 6/8/13)