Pretrial Justice Reforms in America

Topeka, Kansas
June 14, 2019
“Legal and Evidence-Based Practices”
Need to know the “fundamentals”

They instruct and guide (literally) every action in release and detention

Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain A Defendant Pretrial
Need To Know to Follow LEBP!

Why Change (The Problem)?

History of Bail

Legal Foundations

Pretrial Research

National Standards

Terms and Phrases
Risk

“It is better that ten guilty persons escape than that one innocent suffer.”

William Blackstone
“Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice.”

Justice Robert Jackson
Justice

“If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”

Judge Learned Hand
The Big Issue = Money
The Problem of Money Bail

Historically, secured bonds are new and flawed

Money often triggers/offends legal principles

Research shows no tie between money and public safety; only a legal (no empirical) tie between money and flight; money causes detention, which leads to bad outcomes

Standards
“Problems at both ends.”
“Problems at both ends.”

Parkland, WA, November 29, 2009

Officers Richards, Griswold, Owens, and Renninger
Money is Everywhere

It is the fundamental problem at bail, but it’s part of our culture and even has lobbying groups dedicated to keeping it alive.

But . . .
But Does it Have to Be?
Understanding Bail Reform
“Bail/No Bail”

“Bail/No Bail” Includes the “Big Rule:” Bail Equals Release and No Bail Equals Detention

If anything is seen as abusing or interfering with this, history demands a correction
Bail = Personal Surety System

400-500 A.D. to 1800s – unsecured bonds administered through personal surety system
Like England, “bail” equaled release with unsecured bonds and no profit or indemnification.

Bail as release was incorporated into colonial charters, statutes, and constitutions.
The American Overlay

Even *more* of an emphasis on release and freedom so enlarged “bail”

*And* made people “bailable upfront” (discretion versus freedom and moral deterrence based on clearly articulated laws); “limiting process”
“No Bail”

It was a state’s articulation of who to detain upfront, on purpose, using prediction of flight.

All “no bail” provisions are preventive detention.

Whole thing worked great until . . .
1800s
Switch to Commercial Surety System

1900 to present – secured bonds administered through a commercial surety system
America in the 20th Century

Commercial Surety System Using Secured Bonds

Collides with “Bail/No Bail” Dichotomy
Finding Alternatives to the Traditional Money Bail System; Reducing Unnecessary Pretrial Detention of Bailable Defendants

Focused on “Bail” or Release
Twentieth Century: The Second Generation

1960s – 1980s

Allowing Consideration of Public Safety as a Constitutionally Valid Purpose to Limit Pretrial Freedom; Defining the Nature and Scope of Preventive Detention

Focused on “No Bail” or Detention
Why Do We Need a Third Generation?

Not all states used generational knowledge

New research helped us to understand the problems and the potential solutions

Money has continued to cause abuses to “bail” and “no bail” – history demands a correction
The Third Generation

Implement proper “bail” and “no bail” dichotomy using risk

Use LEBP to do “bail” and “no bail” correctly, informed by generations one and two and current research
Third Generation
Advantages

Doing “bail” and “no bail” in the states at the same time

Have substantive answers

Judges are involved
Trends in State Courts

Fines, Fees, and Bail Practices: Challenges and Opportunities

www.ncsc.org
The Key to Understanding Bail Reform

Both “Bail” and “No Bail” are lawful if we do them right.

If we don’t do them right, history demands correction.
Bail the old way – charge, money, wait around

Bail the new way – risk, less or no money, intentional

“RISK”
Plan B

Summary: What Does the History Tell Us?

“Bail” was/is always about release – “No bail” was/is all about detention.

Bail that worked – unsecured bonds/personal sureties.

Interfering with “bail” or “no bail” requires reform/correction.
Secured money bonds have been interfering with both “bail” and “no bail” since 1900.

How to make this the last generation.
Legal Foundations of Pretrial Justice
History and the Law
Sources of Law – Your Mix

U.S. Constitution
Federal Statutes, Federal Cases
State Constitutions
State Statutes, State Cases
Muni Codes
Court Rules
Admin. Regs.
Law is Sparse But Important & Often Ignored

Two Examples:

1. Individualization

2. Detention without due process
First, explain this . . .

History shows that whenever bailable defendants are in jail, bail reform happens.

Law is again beginning to show that keeping bailable defendants in jail is unlawful.
“Wait, I don’t get it. We’ve always had ‘bailable’ defendants in jail. We do right now. That’s not unlawful, right?”
“Excessive Bail Loophole”
Loophole allows judges to detain anyone so long as make the right record; allows us to ignore “no bail”

Loophole Also Masked Need for Reform
Even though America wanted less discretion to detain than in England, for the last 180 years judges have been able to detain virtually any defendant, and the law has allowed it to happen, making reform elusive.
All This is Changing!
Pressure to Change I

No Money to Detain

“Bailable” = Liberty Interest
Certainly, keeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible.

“Accordingly, the Bail Schedule, which merely associates an amount of money with a specific crime, without any connection to public safety or future court appearance, cannot be deemed necessary.”

“In fact, the use of such an arbitrary schedule may not even satisfy an analysis under a rational basis review.”
The future is more lawsuits, more groups, more legal theories

Lawsuits could take away a state’s ability to detain using money. This leaves the state with it’s net and process for intentional detention.
What is Your Net? Limiting Process?
Pressure to Change II

HELLO
I AM...
INTENTIONAL!
Pressure to Change III

No justification for detention laws (not carefully limited)
So, the “best” bail/no bail model . . .
How to Start: Plan B

You will need to dive into “risk.”
The Three Questions

1. Whom do we release?

2. Whom do we detain?

3. How do we do it?

AND It Must All Be Legally Justified!
The Law and History Together
So What is Bail?

“Bail” is a process of release (Stack)
The purpose of “bail” is to release
The purpose of “no bail” is to detain

“Bail” and “No Bail” are both lawful if done correctly
Money is a condition of release -- a limitation on pretrial freedom

Money has separate purpose from bail

The lawful purposes of limitations on pretrial freedom are (1) court appearance and (2) public safety
(Legal &) Evidence Based Decision Making

“Making decisions about how to achieve the goals of a given discipline by integrating the best available evidence.”

“What works to do what?”
Health/medicine
Bail?
History/Law – Goals for “Bail” or Release

Maximize Release
Maximize Court Appearance
Maximize Public Safety
History/Law – Goals for “Bail” and “No Bail”

Maximize Appropriate Placement
Maximize Court Appearance
Maximize Public Safety
History/Law – Goals for “Bail” or Release

Maximize Release
Maximize Court Appearance
Maximize Public Safety
Research

As a Fundamental

Ex: Outcome research
Research helps you understand risk
It’s Necessary for to do balancing tests
LEBP: What Do All States Need?

Risk Assessment/ Risk Mitigation/Supervision (even though it’s been done for all of bail)

Do “No Bail” (Detention) Right – Salerno

Do “Bail” (Release) Right – LEBP – Everyone Else Out Immediately, Varying Conditions
All States Have Two Options

Improve On Their Own Or . . .

Wait And It’ll Be Forced On Them (And That Won’t Be Long – Federal Court, State Court – Brown)
Fundamentals in Practice
State v. Brown
November 6, 2014
LEBP = Know and Apply Fundamentals of Bail

Accounts for All Significant Pretrial Justice Reform in America
Questions?
Thank You!

Timothy R. Schnacke
Center for Legal and Evidence-Based Practices
Golden, Colorado
TimSchnacke@earthlink.net