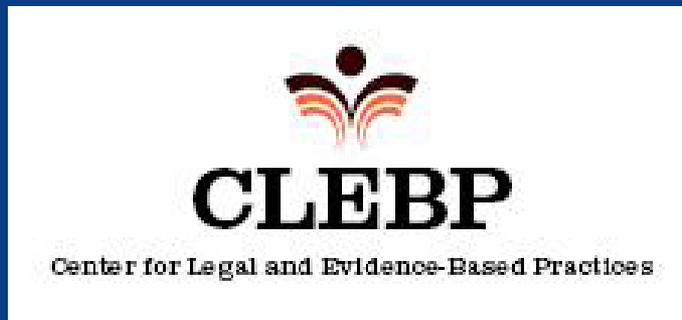


Legal and Historical Foundations of Pretrial Justice

Traverse City, Michigan

August 23, 2019

“Legal and Evidence-Based Practices”



the what
and the why

Need to know the “fundamentals”

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

*Fundamentals of Bail: A Resource Guide for
Pretrial Practitioners and a Framework for
American Pretrial Reform*



*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

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



The American Overlay

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

“Detention Eligibility Net” and “Further Limiting Process”

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

Twentieth Century: The First Generation

1920s - 1960s

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

Help with proper “bail” and “no bail” dichotomy for intentional in/out process

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

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”

RISK



Plan B

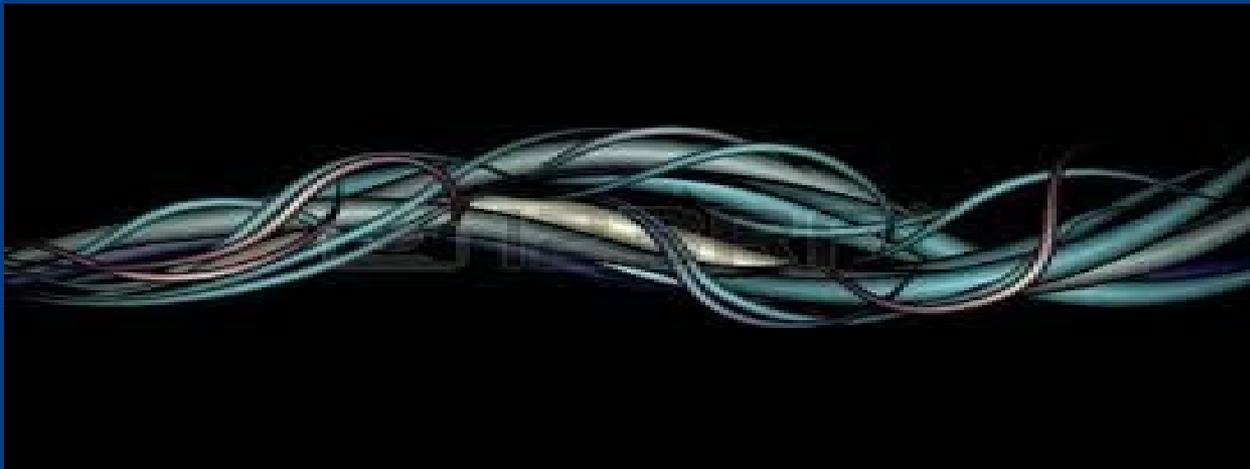


**“Model” Bail Laws:
Re-Drawing the Line Between Pretrial
Release and Detention (and
“Changing Bail Laws” in 2018)**

Legal Foundations of Pretrial Justice



History and the Law



Sources of Law – Your Mix

U.S. Constitution

Federal Statutes, Federal Cases

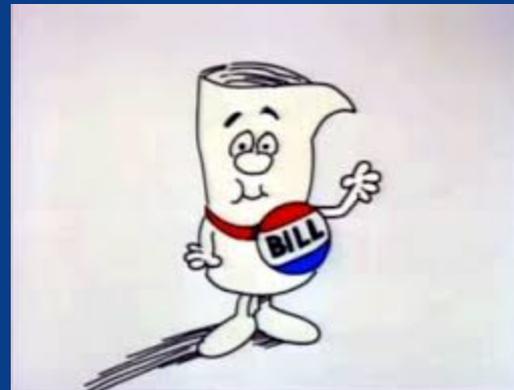
State Constitutions

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 . . .

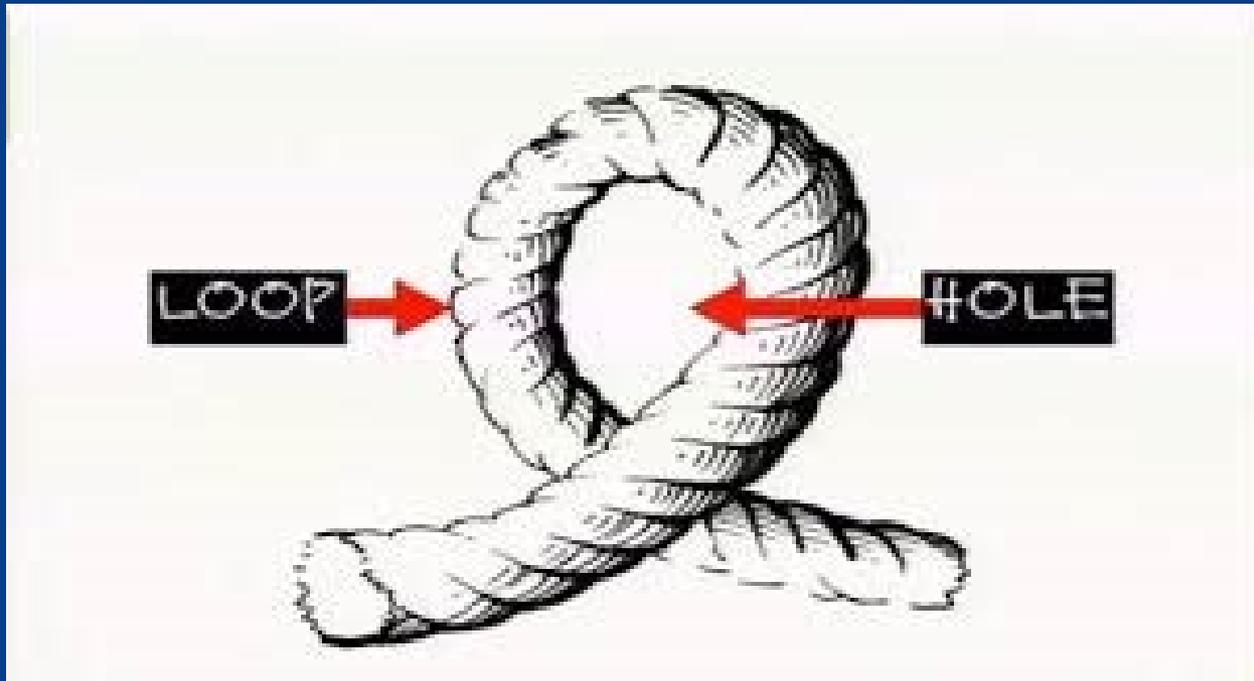
History shows that wheneverailable defendants are in jail, bail reform happens

Law is again beginning to show that keepingailable defendants in jail is unlawful

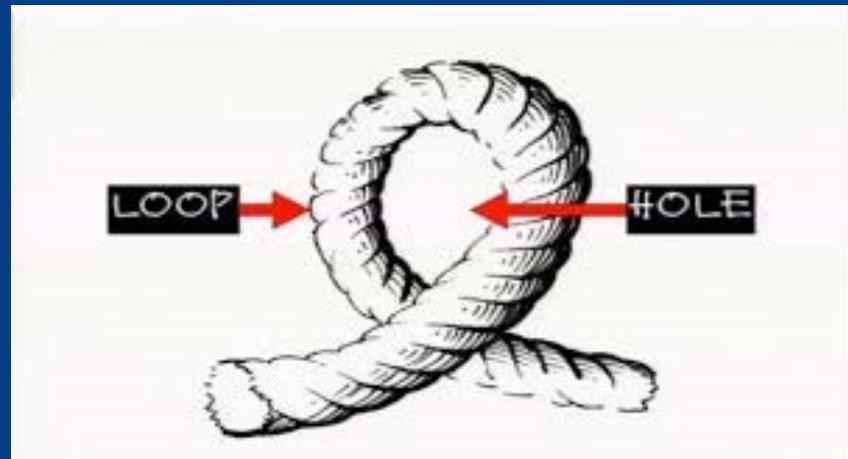
“Wait, I don’t get it. We’ve always had ‘bailable’ defendants in jail. We do right now. That’s not unlawful, right?”



“Excessive Bail Loophole”



Loophole allows judges to detain anyone so long as make the right record; allows us to ignore “no bail”

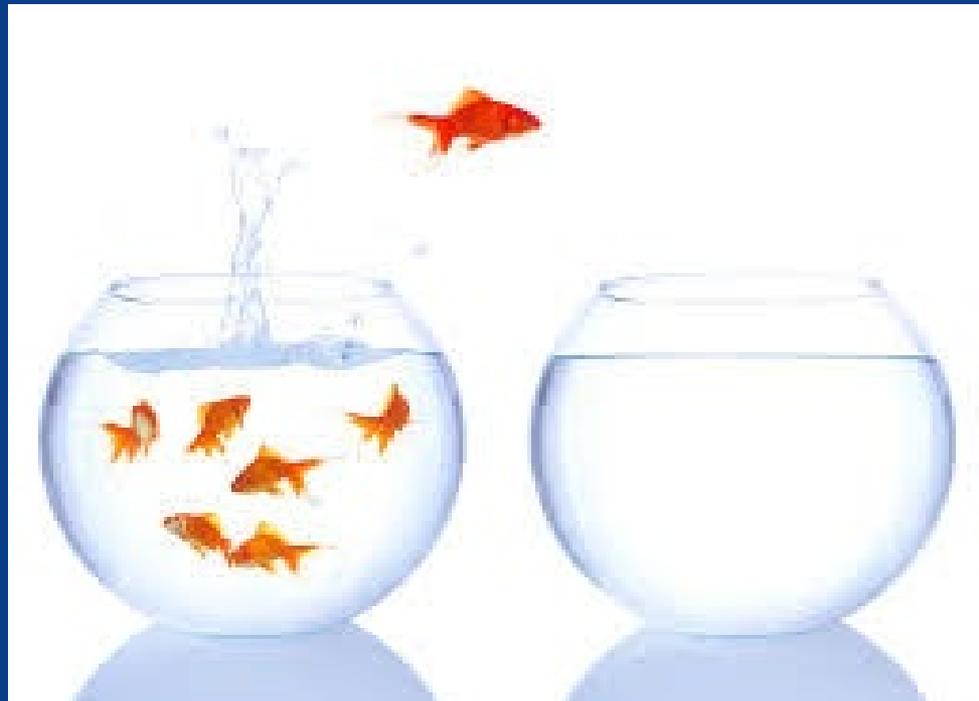


Loophole Also Masked Need for Reform

Important

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



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 its net and process for intentional detention.

Do You Know Your Net? Limiting Process?

Ways \$ Based Detention Might Go Away

Harris County Analysis; State Right to Bail (can't detain on purpose, SS, negates net); Federal Substantive Due Process; Excessive Bail Balancing Test; Make it Really Hard to Detain with \$; ***State Merely Decides to Release/Detain on Purpose***; Using PSA to Do Release/Detain on Purpose; Argument That Money is Always Irrational; Argument That Money is Rarely, If Ever, Least Restrictive Alternative

Pressure to Change II

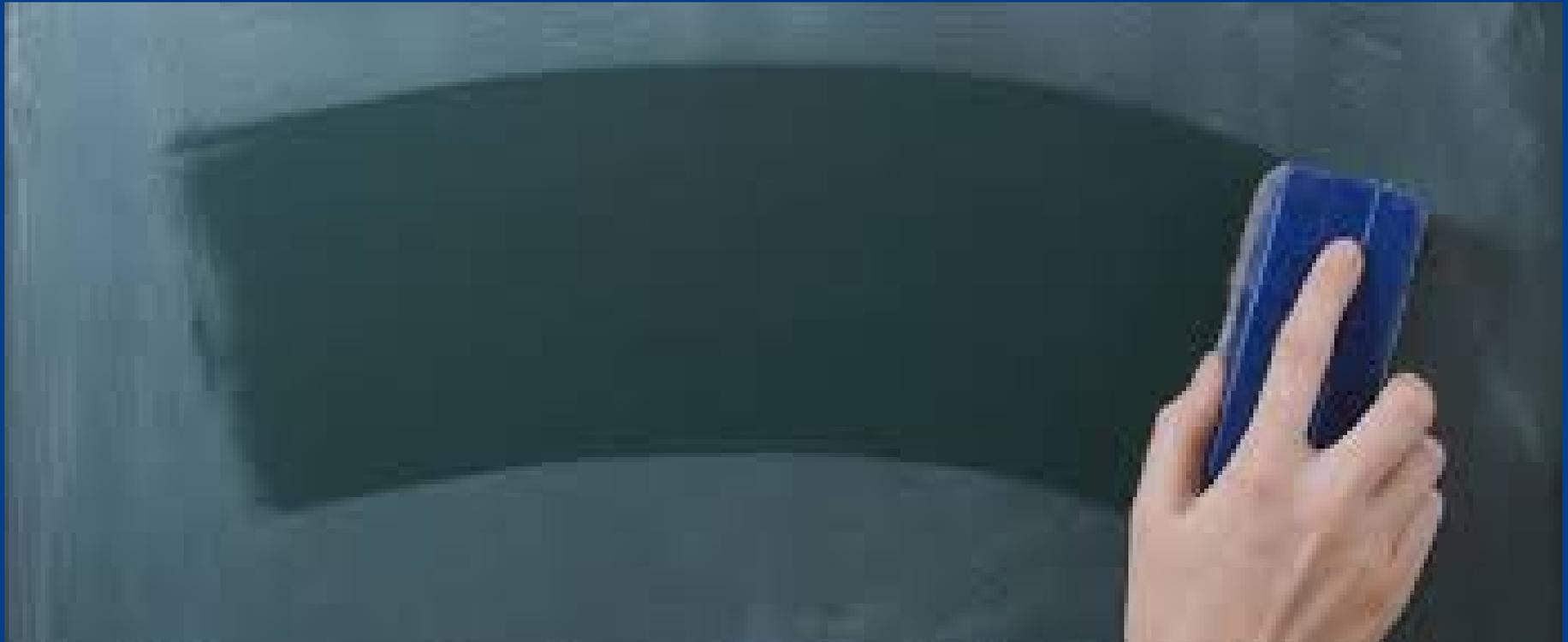


Pressure to Change III

No justification for detention laws
(not carefully limited)



So, the “best” bail/no
bail model . . .



How to Start: Plan B



**“Model” Bail Laws:
Re-Drawing the Line Between Pretrial
Release and Detention (and
“Changing Bail Laws” in 2018)**



RISK

You will need to dive into “risk” to
change culture

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

(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



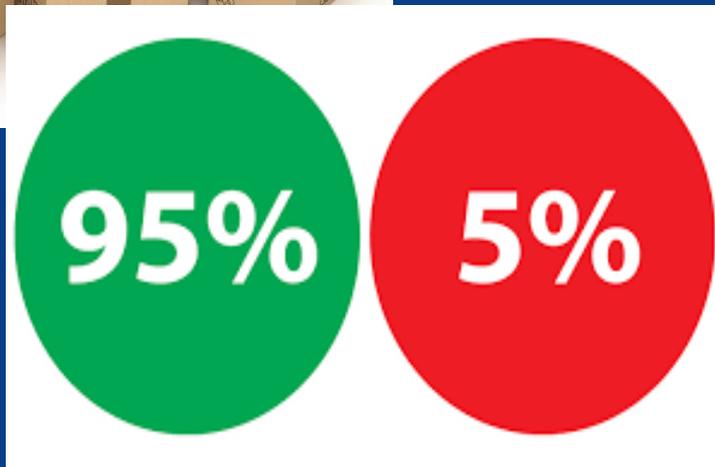
Maximize Release

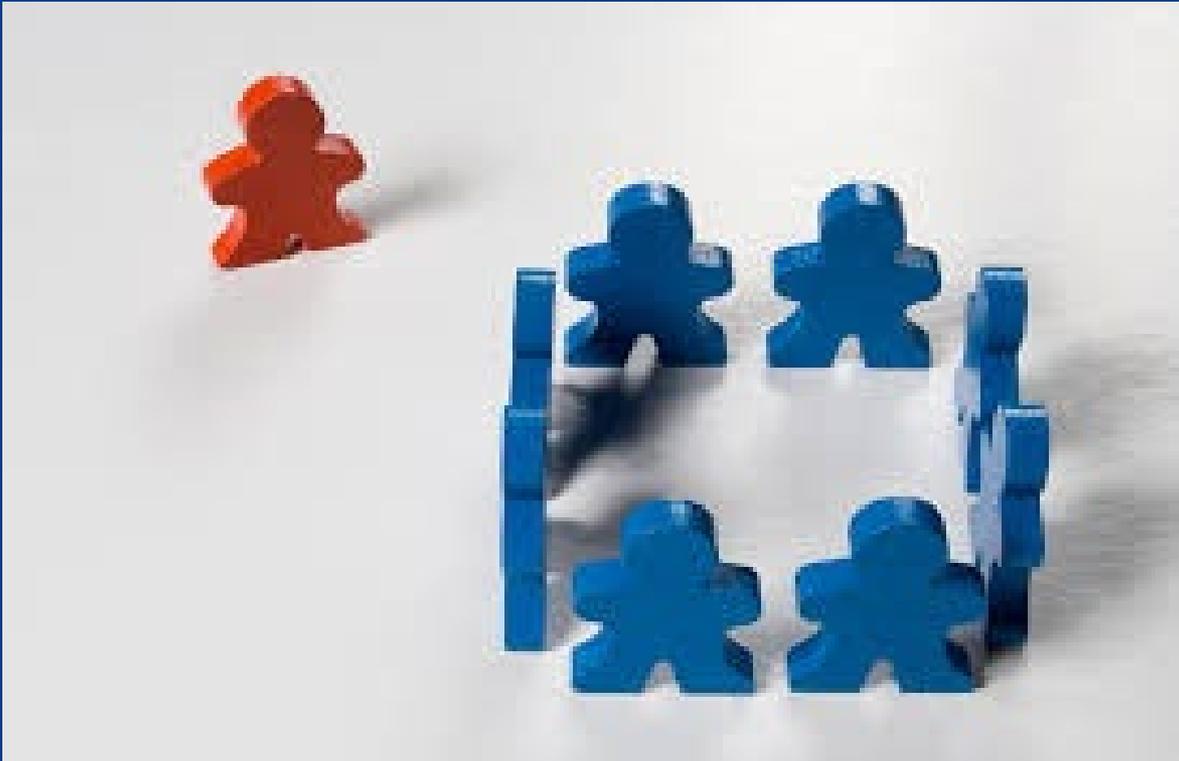
Maximize Court Appearance

Maximize Public Safety



SUMMARY





Questions?

Thank You!

Timothy R. Schnacke

Center for Legal and Evidence-Based Practices

Golden, Colorado

TimSchnacke@earthlink.net