

THE SUPREME COURT *of* OHIO

Pretrial Justice ²⁰¹⁹
SUMMIT

Legal & Evidence-Based Pretrial Justice

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Practices

*“Legal and
Evidence-Based”*


CLEBP
Center for 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?

BAIL
BONDS



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”

- 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



Explain this . . .

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

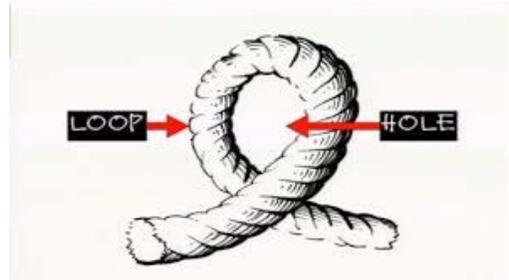
Law is again beginning to
show that keeping bailable
defendants in jail is unlawful



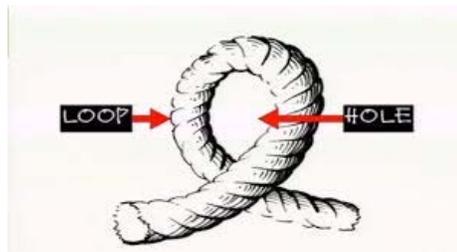
“Wait, I don’t get it. We’ve
always had ‘bailable’
defendants in jail. We do right
now. That’s not unlawful,
right?”



“Excessive Bail Loophole”



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



Loophole Masked Need for Reform



In Fact, We Needed a New Name

Old: bail = release, exception
to bail clause made sense

Now, bail does not = release,
so called net/process (process
came before due process
protections)

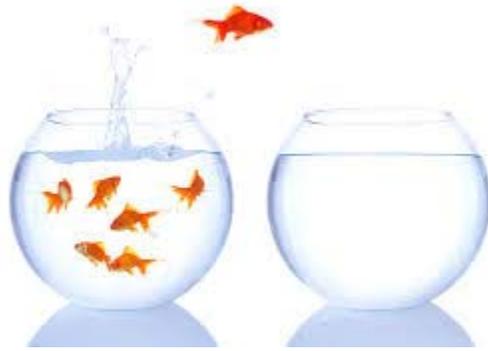


Important

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 with the
right record, and the law has
allowed it to happen, making
reform elusive.



All This is Changing!



Pressure to Change I No Money to Detain



The Language of DP/EP

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

“Certainly?”



Buffin v. SF (2019)

“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 Ohio's net and limiting process?
- Should we change?
- How do Ohio's bail statutes/rules stack up?



Pressure to Change II



Pressure to Change III

No justification for detention laws
(not “carefully limited”)



The Key to Understanding Bail Reform

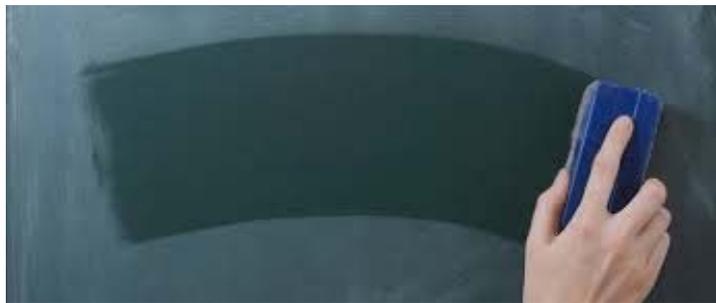
Both “Bail” and “No Bail” are lawful if we do them right.



If we don't do them right, history demands correction.



So, the “best” model might be . . .



You (like me) will be
tempted . . .



Plan B

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



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Model Elements

- Mirror the “Big Fix” Elements of the 1970s and 1980s
- Eliminate “unintentional detention” or detention due to money (no loophole)
- “Intentional detention” = limited charge-based net and further limiting process



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!

Hint: Focus on limiting process



To Do LEBPJ in Release/Detain Decision

- Risk Assessment/ Risk Mitigation, Management (done through history 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*)

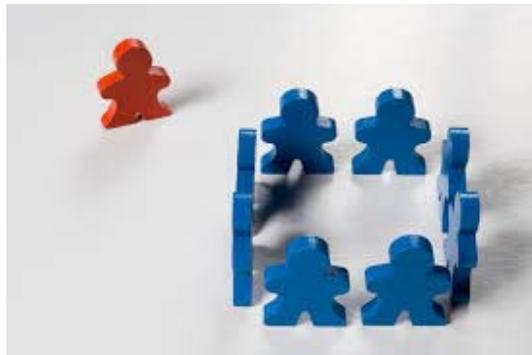


Fundamentals in Practice

State v. Brown
November 6, 2014



LEBP = Know and Apply Fundamentals of Bail



Thank You!

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