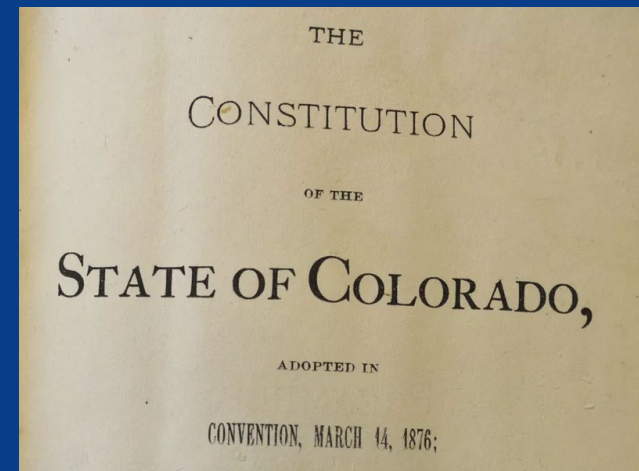


# Creating State Legal Analyses for Pretrial Release and Detention



NCSL

Nov. 30, 2023





**APPR** ADVANCING PRETRIAL  
POLICY & RESEARCH

Managed by

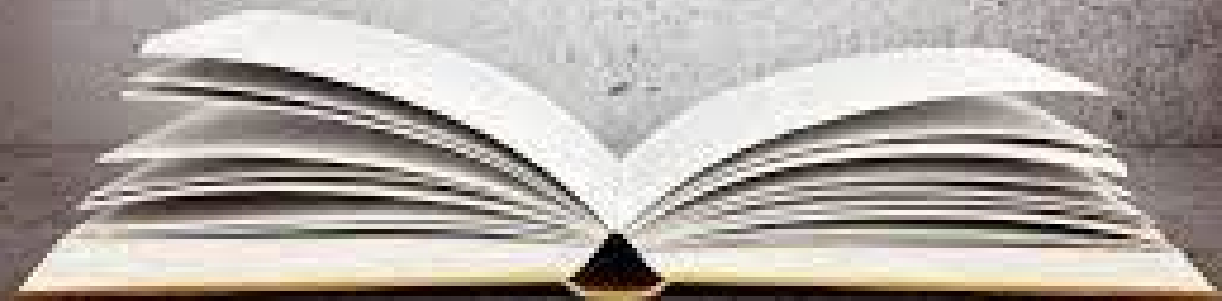
C  P P  
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Effective  
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<https://advancingpretrial.org/>

*Let me tell you a story...*



# Sources of Law – Your Mix

U.S. Constitution

Federal Statutes, Federal Cases

State Constitutions

State Statutes, State Cases

Muni Codes

Court Rules

Admin. Regs.



# Three “Analyses”

1. **NCSL** (Important: Constitutional law as a floor/room for best practices; list of “categories” of issues or subjects; highlights certain best practice laws/trends like ROR, LRC, \$)

2. **Mine** (**mini** = *Terms and Phrases/Statements of Purpose, Right to Bail/Release Eligibility, Detention Process, Release Provisions (including money), Other Stuff Based on ABA Standards.*) **Full-blown** later.

### 3. APPR – medium plus templates!

*Right to bail (release) – federal and state; scope of pretrial detention; setting conditions of release; financial conditions; other “points of intervention,” which can be citations/summons, diversion, delegated release.*

And we looked for glitchy laws and cases.

All have things in common, share issues for concern, and all should be used – not either /or.

Longer, “full-blown,” probably best if you’re thinking about an overhaul (which you should).

# Mine (Full Blown)

## Guidelines for Analyzing State and Local Pretrial Laws





# Ultimate Goal – Your Mix

U.S. Constitution

Federal Statutes, Federal Cases

State Constitutions

State Statutes, State Cases

Muni Codes

Court Rules

Admin. Regs.



# 1. Skillset of Researcher

1. Lawyer (professor?)


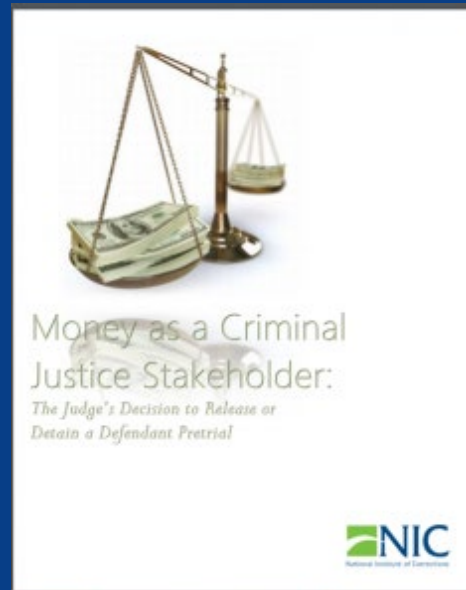
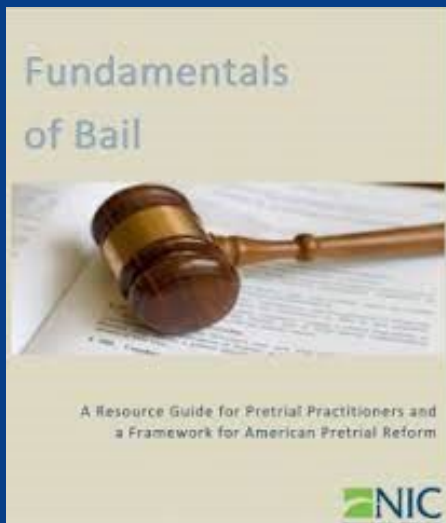
2. State *and* Federal

3. Neutral



# 2. Learn the Basics

## Fundamentals of Bail, Money as a Justice Stakeholder, Changing Bail Laws



**CLEBP**  
Center for Legal and Evidence-Based Practices

### CHANGING BAIL LAWS

Moving From Charge to “Risk:”  
Guidance for Jurisdictions Seeking to Change  
Pretrial Release and Detention Laws

Timothy R. Schnacke  
September 23, 2018

American law requires a broad right to pretrial release, but allows jurisdictions to create rational and fair laws allowing pretrial detention in narrow categories of cases. When jurisdictions declare who is eligible for release and detention, they create a “release/detain” dichotomy, a notion extending back hundreds of years in both America and England. Until now, virtually all jurisdictions have expressly declared most persons eligible for release, but with limited exceptions articulated through detention eligibility laws based primarily on criminal charge as a proxy for pretrial risk. These release/detain dichotomies have been clouded through the use of money, which has led to the unwise release or (far more frequently) the unlawful detention of people accused of crimes. For a number of reasons, including increased focus upon the use of money as a condition of release or a mechanism of detention, many jurisdictions are now either choosing or being forced to craft new laws articulating – upfront and on purpose – which defendants are to be released, and which are to be eligible for, and ultimately held through, pretrial detention. In most cases, jurisdictions crafting these new laws have articulated a desire to move from a charge-based system to a “risk-

# BTW, Fundamentals Taught Me . . .

Why We Need Pretrial Justice

History

**FUNDAMENTALS**

Legal Foundations

# The Fundamentals Taught Me

Research

National Standards

**FUNDAMENTALS**

Terms and Phrases

# Up To Date?

Only things not up to date are (1) federal money cases; (2) actuarial tool debate; (3) constitutional change.

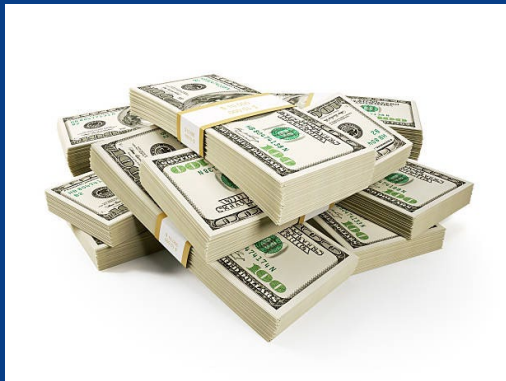
But all three are well established, and I've written extensively on constitutional change.

Bottom line: we have the answers in this generation of reform.

# The Big Question: What is Bail Reform?

Changing Systems

Money to Intentional Release/Detain



# 3. Establish a Standard



Otherwise, it's just a bench book (ex: MT). The more you know, the better your standard.



# 4. List Pretrial Issues

I list many in the paper, but states look for the ones that really need work.

Ex: In **NJ**, it was speedy trial and money

Ex: In **Maryland** in 2013, it was counsel at first appearance

Ex: In **Illinois** in 2022, how to move to moneyless, intentional release/detain

# 5. Assemble “Materials and Write

Collect everything – as in, **the universe** – and then write the analyses holding up laws to the standard.



# Difficult Issues

Your Constitutional Provision

Glitch Cases

Separation of Powers

Sufficient Sureties

Actuarial Tools?



# Final Warnings

Again, don't copy other states without research (esp. constitutions); "models"

**Bail is different.** All statutes likely need complete overhaul; constitutions may or may not, but most will change.

Analyses go **out of date** quickly.

# Thank You!

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