

# Legal and Evidence- Based Practices in Pretrial Release and Detention

April 28, 2016



*the what*  
*and the why*

Need to know the “fundamentals”

It's the only way to truly understand  
the scope of change needed

*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)?

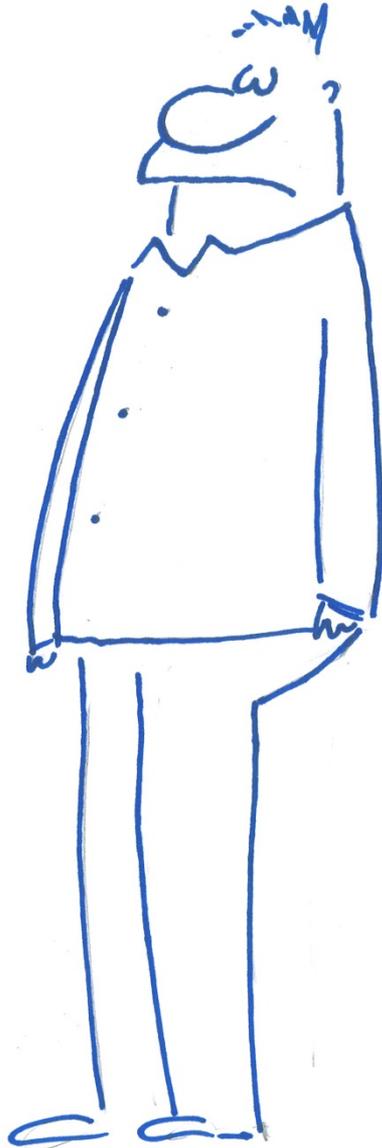
History of Bail

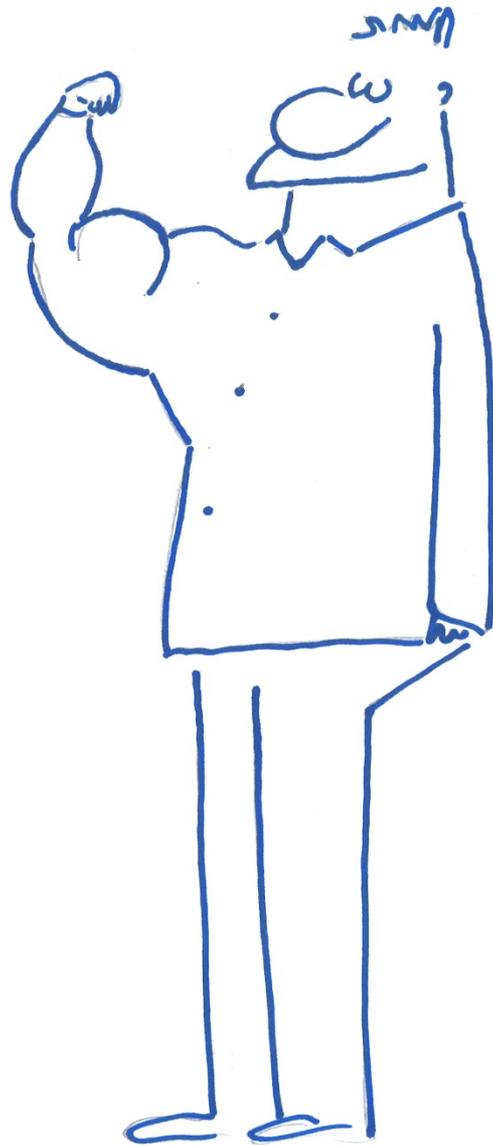
Legal Foundations

Pretrial Research

National Standards

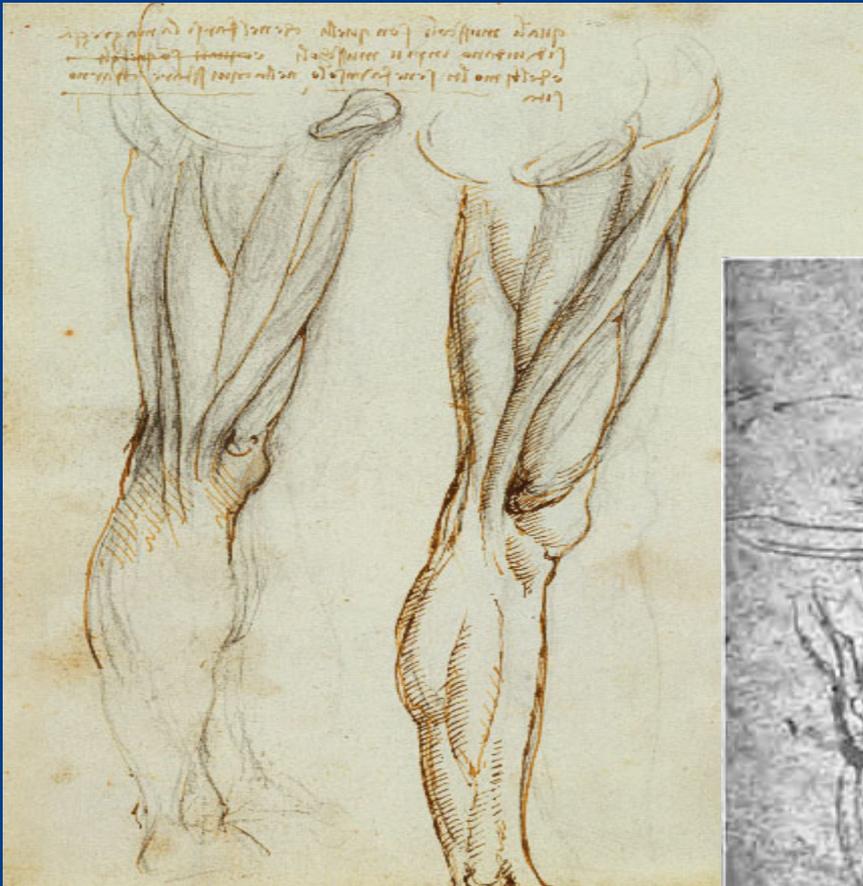
Terms and Phrases







# Your Legs – Why We Need Pretrial Justice



# Risk

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



William Blackstone

# Risk and Bail

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

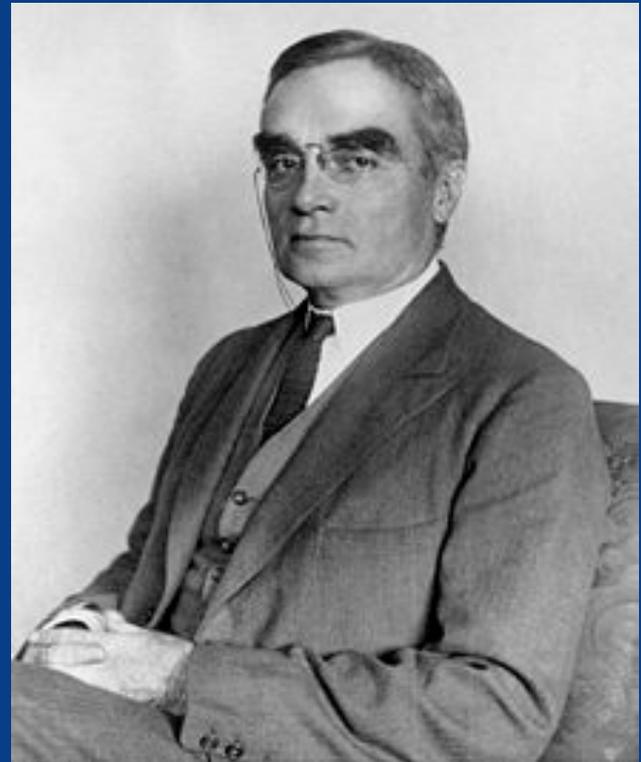
Justice Robert Jackson



# 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 in Bail

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?



# Your Back – The History of Bail



# Understanding Bail Reform



# “Bail/No Bail”

“Bail/No Bail” Includes the Notion that 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



# In America

Like England, “bail” equaled release with unsecured bonds and no profit or indemnification

Bail as release was incorporated into colonial charters, statutes, and constitutions

Even *more* of an emphasis on release and freedom

Personal surety system with unsecured bonds worked well with “bail” and “no bail” until . . .

# 1800s



# Switch to Commercial Surety System



1900 to present – secured bonds administered through a commercial surety system



# America in the 20<sup>th</sup> 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 ofailable 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 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.



# The Third Generation

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

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

Mostly by replacing “charge and money” based systems with systems informed by risk and using less or no money

# 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.**

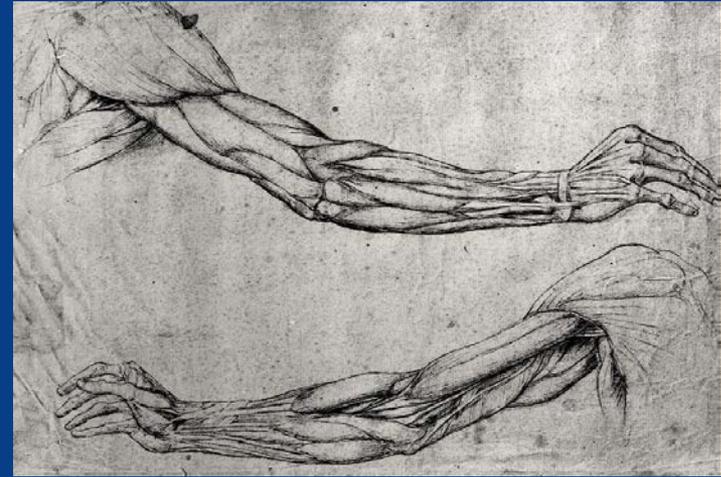


# What Does the History Tell Us?

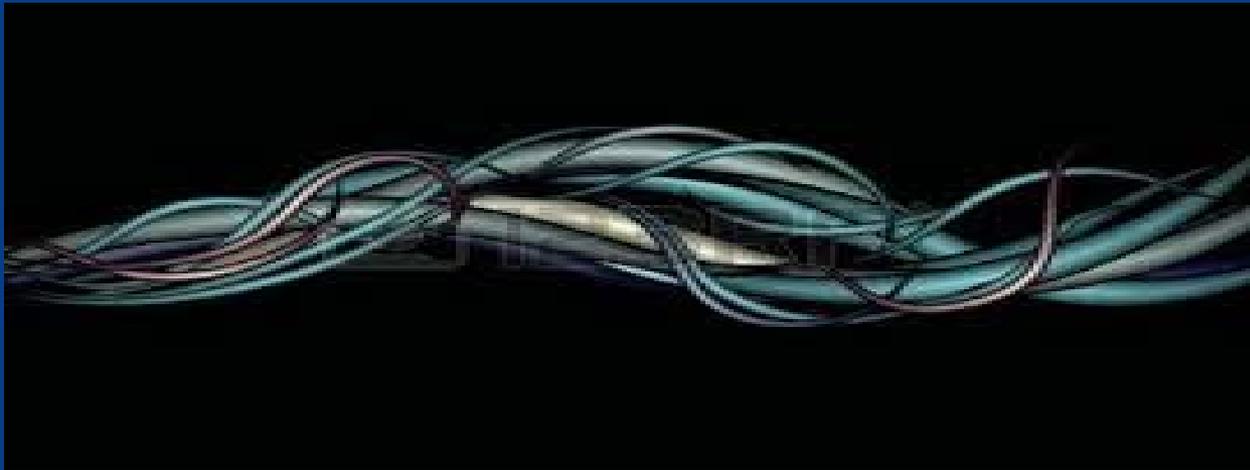
**Secured money bonds have been interfering with both “bail” and “no bail” since 1900.**

**How to make this the last generation.**

# Your Arms – The Legal Foundations



# History and the Law



# Sources of Law – Your Mix

U.S. Constitution

Federal Statutes, Federal Cases

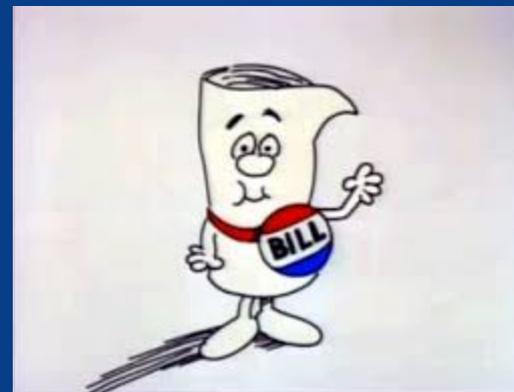
State Constitutions

State Statutes, State Cases

Muni Codes

Court Rules

Admin. Regs.





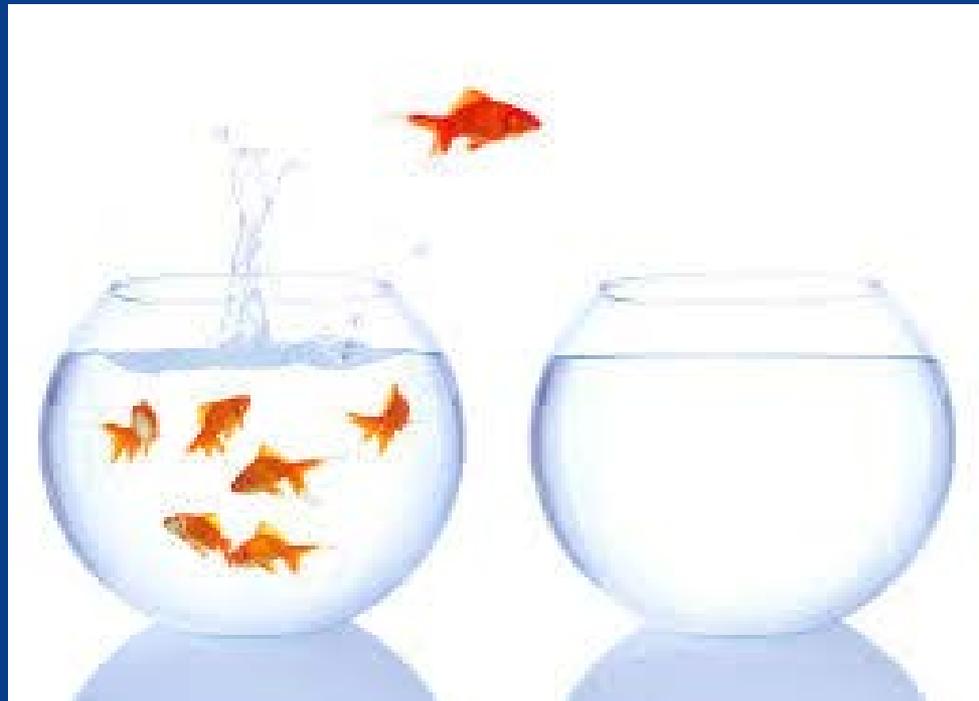
# Law Is Sparse But Important & Often Ignored

Two Examples:

1. Individualization

2. Detention without due process

# This is Changing!



# The Language of Equal Protection

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

(Walker v. Calhoun, Georgia (N.D. Ga. Jan. 28, 2016))

# The paper looks at . . .



Definitions

Application to Bail

Misconceptions

New Ways to Look at Old Concepts

# Example

## Excessive Bail



# Excessive Bail

The Old Way = \$

The New Way = proper  
purpose; all conditions;  
“reasonable”

# History and Law Together

There is “bail” and there is “no bail;”  
Both are lawful if you do them right.

Every state is now faced with re-  
working “bail” and “no bail” and figuring  
out how to do them.

Fortunately, we know how to do that!

# History/Law Together: Three Purposes for the “Bail” or Release



Maximize Release

Maximize Court Appearance

Maximize Public Safety

# Three Purposes for “Bail” and “No Bail”



Maximize Appropriate Placement  
Maximize Court Appearance  
Maximize Public Safety

# History/Law Together: Three Purposes for “Bail” or Release



Maximize Release

Maximize Court Appearance

Maximize Public Safety

# Your Core – Pretrial Research





# Third Generation Research

Special mention: Risk Assessment,  
Risk Management, Outcomes

NIC Paper: “Money as a Criminal  
Justice Stakeholder”

# What Does the SS Research Tell Us?

What works

Possibly what's lawful/unlawful

How to do “bail” and “no bail”

# (Legal) & Evidence-Based Decision Making

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

Pyramid of Evidence Types



“What works to do what?”

- Health/medicine
- Bail?

# Research Should Address All Three

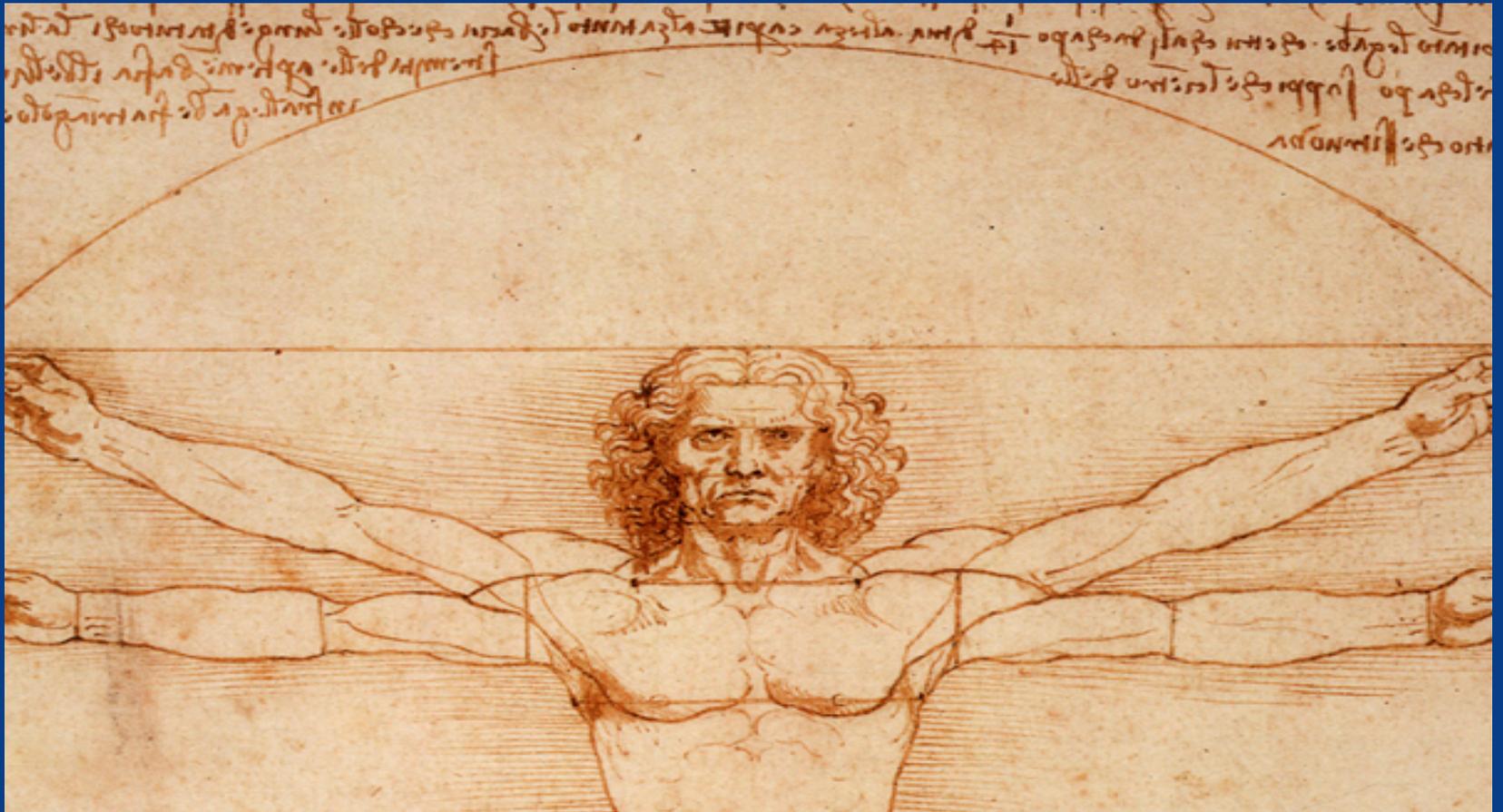


Maximize Release

Maximize Court Appearance

Maximize Public Safety

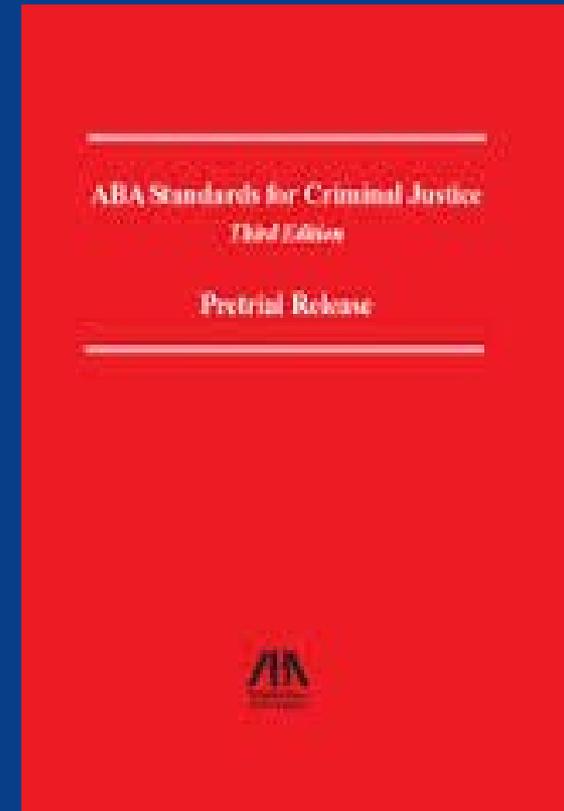
# Your Chest – National Standards



# National Standards

American Bar Association  
Criminal Justice Standards  
On Pretrial Release

LEBP – Law and social  
science research



# Authoritative

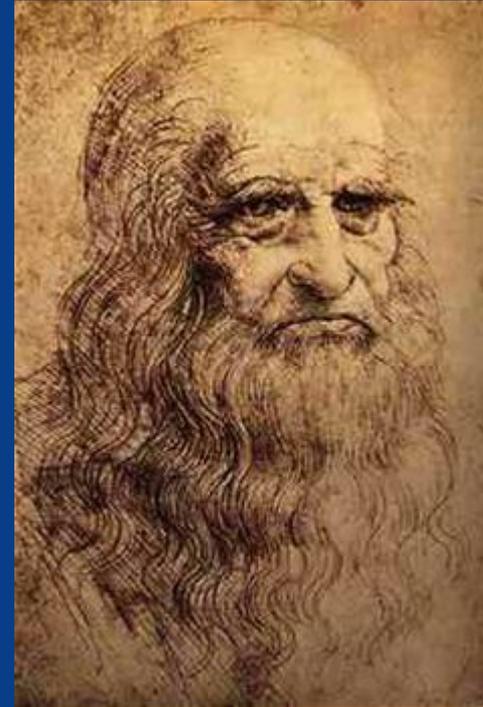
Martin Marcus, *The Making of the ABA Criminal Justice Standards*



# NAPSA Standards



# Your Head and Neck – Terms and Phrases



# Importance

*“The beginning of wisdom is a definition of terms.”*

Socrates

*“Terms and phrases require both consensus and truth.”*

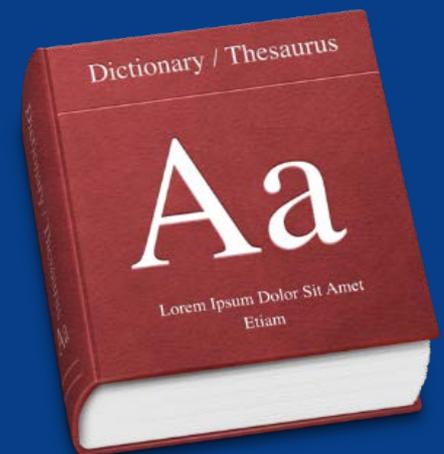
Tim

# Example: “Bail”

“Bail” is a process of release (Stack)

The purpose of “bail” is to release

The purpose of “no bail” is to detain



# Bail is Not . . .

Bail is *not* money



Money is a condition of bail or release/a limitation on pretrial freedom

With a different purpose

# Generations of Reform Attributes



# Meeting of Minds



Public Welfare  
Foundation



**BJA**  
Bureau of Justice Assistance  
U.S. Department of Justice



MacArthur  
Foundation



**NIC**  
National Institute of Corrections



 **COSCA**  
Conference of State Court Administrators



 **NATIONAL  
LEGAL AID &  
DEFENDER  
ASSOCIATION**



**ABA**  
AMERICAN BAR ASSOCIATION

 **NCJA**  
NATIONAL CRIMINAL  
JUSTICE ASSOCIATION

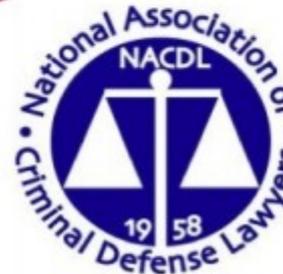
 **ACLU**  
AMERICAN CIVIL LIBERTIES UNION

**CRJ**  
CRIME AND JUSTICE INSTITUTE



**NACO** *National Association of Counties*

**ATA** Association of  
Prosecuting Attorneys



**THE NATIONAL  
JUDICIAL COLLEGE**

 **NCSC**  
National Center for State Courts

**NAPD**  
NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

# Changes



Implementing the  
Recommendations of the  
National Symposium  
on Pretrial Justice:  
The 2013 Progress Report

# 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

# To Help Make This Happen . . .



# All States Have Two Options

Improve on Their Own or . . .

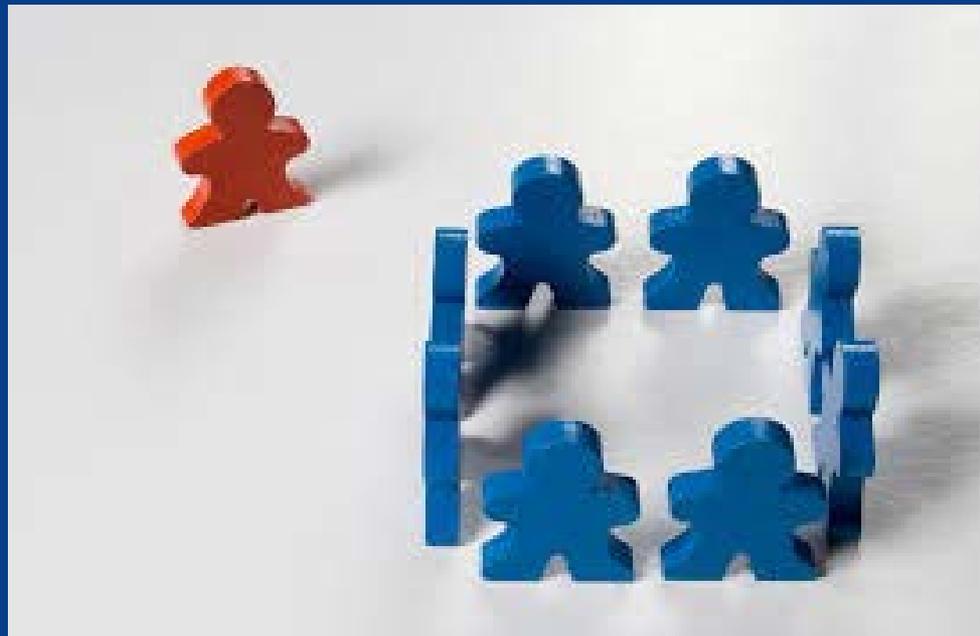
Wait and It'll Be Forced on Them (And  
That Won't Be Long – Federal Court,  
State Court -- *Brown*)

# Fundamentals in Practice

## *State v. Brown*

### November 6, 2014





# Summary – LEBP in Ohio

Learn Fundamentals



Decide to Improve on  
Your Own

# Questions?

# Thank You!

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