Lists of Pretrial Improvements Over the Last 100 Years

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My move from a relatively specific, fixed "list" of pretrial improvements to a collaborative system with education designed to illuminate more fluid improvements deemed crucial to individual jurisdictions does not mean that I am unaware of the importance of such lists in this and other generations of reform. Indeed, as long as there have been persons studying the criminal system, there have been lists of recommended improvements, and this is also true in bail. This document provides a chronology of some of those lists over the last 100 years in order to give the reader some idea of substance as well as context to help explain how some recommendations change (or remain unchanged) over time.

Sometimes, these lists show clear errors in thinking – for example, at certain points in time, people created lists with virtually no recommendations concerning money at bail, ignoring what has been the central problem in American bail since the mid-1800s. In other instances, the lists show the intractability of particular problems. For example, there are worthy and objectively good recommendations found in the ABA Standards of 1968 that have still not been adopted in the states.[1] In the sections that follow, I focus on highlights from the 20th and 21st Century.

Roscoe Pound and Felix Frankfurter (1922)

Strong rumors of corruption combined with public perceptions of government failure responding to crime led Harvard Law School Dean Roscoe Pound and future Supreme Court Justice Felix Frankfurter to write a comprehensive 700-page study of crime and institutions of criminal process in Cleveland, Ohio.[2] The topics ranged from police administration, to prosecution, to all aspects of the criminal

[1] Equally informative is the study done by the United States Commission on Civil Rights on "cash bail," a comprehensive study of the topic, albeit with zero recommendations due to partisan disagreements, illuminating the political nature of today's bail discussions. USCCR, *The Civil Rights Implications of Cash Bail,* Briefing Report, (2022), found at USCCR-Bail-Reform-Report-01-20-22.pdf.

[2] Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland,* at 290 (Cleveland Found. 1922) [hereinafter *Pound and Frankfurter*].

courts, to corrections, to medical science, and even to legal education and newspaper coverage of crime with recommendations scattered throughout.

Bail received relatively small but nonetheless important attention, leading to the famous quote about a commercial system that had barely gotten started in America: "The real evil in the situation is not the matter of easy bail, but the disreputable professional bondsmen who make a business of exploiting the misfortunes of the poor, and whose connection with 'runners' and 'shysters' tends to prostitute the administration of justice in the inferior courts."[3] This led to recommendations to "eliminate the professional bondsmen" by "removal of the necessity of bail wherever possible, and a relaxation where such a removal cannot be accomplished." These included increasing the use of "cash bail" or release of defendants on a personal bond with no surety (especially for lower level offenses) as well as making more use of summonses versus arrest warrants as the "normal mode of beginning the criminal process in certain classes of cases."[4] In a later section, the authors were especially critical of press coverage seeking to "expose" scandals in bail-setting designed to change system-actor behavior, albeit with complete ignorance of the bail process and without coverage of any resulting changes, leading not only to "inefficienc[ies]" but also possibly to "grave injustice."[5]

The Pound and Frankfurter process for determining recommendations relied on deep study and education in all areas of criminal justice, which, in turn, allowed certain issues to rise up as "essential" or "crucial." In that way, it resembles my current theme as articulated in the "pillars" paper, which allows jurisdictions to

[3] *Id.* at 290.

[4] *Id.* at 290-91. Recognizing the difficulty of complete elimination of commercial sureties, the authors recommended that the business be "regulated like that of 'loan sharks' in other jurisdictions." *Id.* at 292.

[5] *Id.* at 547. In perhaps the most recited portion of the study, the authors showed how mere increased newspaper coverage of crime during the period studied (from 925 column inches to 6,642 column inches), despite crime not actually significantly increasing, morphed into headlines describing a "crime wave," upon which the papers demanded action for a problem that seemingly did not exist. This led the authors to recommend that the press report on "crime" in a more objective and nuanced manner. A more recent treatment of the same phenomenon is detailed in Alec Karakatsanis' book, *Copaganda* (The New Press, 2025). In the last several years, a prominent Colorado television station has done an "expose" on the dangers of releasing persons on so-called personal recognizance bonds, the timing of which seems only designed to push the General Assembly to increase the use of money bail while ignoring our emails or, indeed, testimony showing the flaws of those proposed bills. As in 1922, this television station shows great ignorance of bail bonding and the use of money bail in particular, and the "grave injustice" caused by increasing the use of money bail offsets, but does not excuse the inefficiencies of having to defeat the same basic bill year after year.

collaborate and, through deep research and education, come up with the most pressing issues facing the system for ultimate implementation.

Arthur Beeley (1927)

In 1927, Arthur Beeley conducted a similar study of the Cook County justice system, but with a focus on bail and in which he concluded, "It is clear, therefore, from the facts summarized above that the bail system as it is administered in Chicago has completely broken down at many critical points."[6] As I wrote in 2014, Beeley acknowledged the fundamental flaws of the traditional money-based bail system that, after a painstakingly detailed examination, still exhibits the same "waste and injustice" today:

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. *The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.*[7]

One can glean and implied set of recommendations by simply looking at the various flaws at which he points. For example, he decries the lack of judicial discretion and thus hints at the elimination of secured money-bond schedules, which hindered discretion at that time.[8] Nevertheless, he also included the following specific recommendations designed around providing both more discretion and "all-round improvement" in the general administration of criminal bail in Chicago: (1) make bail unnecessary by: (a) making fewer arrests and increasing summonses and (b) extending the age of jurisdiction for juvenile courts;

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[6] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927) [hereinafter *Beeley*].
[7] *Id.* (emphasis added).
[8] Money bail schedules began to get serious attention later after the United States Supreme Court emphasized the importance of individualization in bail setting. *See Stack v. Boyle,* 342 U.S. 1 (1951). Recommendations about bail schedules have fluctuated between creating statewide schedules for uniformity (based on less bail education) to eliminating them altogether (based on more bail education). Very few recommendations today address judicial discretion directly, although my main "pillars" paper admits a likely decrease in at least some judicial discretion when moving away from money simply due to money's unlimited conveyance of discretion to detain.

(2) craft a constitutional amendment granting courts the power to "suspend, entirely, the bail privilege in [additional] certain cases;"[9] (3) individualize bail using five main factors;[10] (4) permit reductions in amounts of bail, accept cash or property as security, and allow release without sureties;[11] and (5) allow courts to use investigators to help judges with their discretionary decisions.

As more "palliative" recommendations, Beeley suggested: (1) creating licensing and placing more regulation on commercial bail bondsmen (with several specific recommendations going to the substance of regulation; (2) providing arrested persons with adequate and readable information; (3) using social workers for help with indigent persons; (4) making use of "time served" periods from pretrial detention; (5) compensating persons held in jail over seven days when the case is later discharged; and (6) creating a "bail commissioner," responsible to the courts for overseeing the bail industry.

These recommendations were followed by a number of "indirect measures," to promote a more effective bail system: (1) minimize case delay using a variety of tactics; (2) create a "joint administrative council" of criminal justice stakeholders for policy making;[12] (3) conduct a thorough investigation into the "defects of the criminal law and its local administration, done by paid staff and investigators and possibly for publication of results."[13]

I pause momentarily to look broadly at Beeley's list of improvements, for it contains something important worth additional emphasis. Although the fields of adaptive leadership and implementation science were still 70-80 years from development, Beeley's list contains specific recommendations to (1) collaborate,

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[9] Of course, this is the same as our proposal to craft intentional detention provisions in constitutions, statutes, or court rules, although today we would never call bail a mere "privilege."

[10] *Id.* at 167. "Factors" to be weighed by judges in setting bail have been a part of American statutes since the founding. Beeley's is the earliest recommended list we have seen (created well after Section 33 of the Judiciary Act of 1789, which mentioned using the "nature and circumstances of the offence, and of the evidence, and the usages of law," but well before Rule 46 (c) in the Federal Rules (referenced in *Stack v. Boyle*), and which included the nature of the offense, the weight of the evidence, the character of the accused, the seriousness of the potential punishment, and the "quality" of the bail, or security.

[11] Now, of course, most lists say to eliminate commercial sureties altogether, and to use secured bonds, if at all, only when they are affordable and do not lead to pretrial detention.

[12] This is the essence of the current paper's essential element number one, collaboration, and is akin to statements made by Roscoe Pound under the title of "organization of the administration of justice." *See* Pound & Frankfurter, *supra* note 2, at 605.

[13] This is essentially the same as essential element number two, education, which includes deep research into any particular jurisdiction's own mix of relevant statutes, constitutional provisions, court rules, and court opinions.

(2) educate, and (3) amend the Illinois constitution to allow for "no bail" in certain cases, all while diminishing the role of money bail. One hundred years later, I find myself mostly recommending the same things.

Caleb Foote (1954)

While Professor Foote is remembered in this field mostly for his seminal 1965 paper, *The Coming Constitutional Crisis in Bail*,[14] and while that paper can be read to imply a purely legal list of improvements focusing on changing American bail laws so as to better align bail practice with foundational American constitutional principles[15] (such as to reject pretrial detention except in extremely limited "situations of extraordinary risks"),[16] it was his study of bail in Philadelphia that led to a concrete list of pretrial improvements for that time.

In *Compelling Appearance in Court: Administration of Bail in Philadelphia,*[17] Foote made the following broad recommendations based primarily on the history of bail and the law intertwined with that history: (1) make non-appearance a criminal offense so as to allow for the ultimate abolition of the current money bail system; (2) reduce the use of bail [defined as money] by using more summonses and by releasing more accused persons without bail [money] on his or her own promise to appear; (3) provide a prompt preliminary hearing and bail setting to avoid the abuse of defendants being held without bail ever being set; (4) replace setting amounts of financial conditions based on an "irrational product of custom," and in which "variations of amount have almost no relationship to the weight of the deterrent force against bail jumping,"[18] with a more rational (albeit a compromise compared to the preferred elimination of money bail) system by basing the number on research showing aggregate numbers of persons detained on various amounts, with an emphasis on disallowing judges using "high bail" to intentionally

[14] Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959 and 1125 (1965) [hereinafter *Foote*].
[15] These included extending the rule of *Griffin v. Illinois,* 351 U.S. 12 (1956), to bail as a matter of equal protection, to re-define "excessive bail" so as to forbid financial discrimination, and to release the vast number of accused persons through non-financial recognizance.
[16] *Foote, supra* note 14, at 1182 (1965).
[17] Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. Penn. L. Rev. 1031 (1954).
[18] *Id.* at 1076

detain; (5) guarantee a prompt trial (or commitment for the mentally ill) rather than pretrial detention to protect the public; (6) make sure detained defendants are treated physically different than sentenced offenders, especially by allowing for more outside communication; and (7) create criminal and civil sanctions to be imposed against persons who willfully deprive defendants of their rights.

At the time, Foote recognized the "band aid" nature of many so-called reforms, which is likely due to the pervasive nature of commercial bail as well as appellate opinions allowing money-based detention based on excessive bail jurisprudence. Indeed, Foote wrote:

> The premise upon which the bail system was founded, that we should not imprison a person who was merely an accused, can be realized only if a direct penal sanction is substituted for the bail system as the deterrent relied upon to compel appearance in court. Reforms within the bail system are at best temporary expedients pending a time when abolition of the wrongs inherent in pre-trial imprisonment is more highly valued than the usually fictitious deterrent force provided by modern commercial bail.[19]

The implication of this and other quotes is that Foote's preferred "model" (at the time, based only on flight) would be one in which every accused person is released, and with motivation to return to court provided by prosecuting FTAs as criminal matters rather than motivation provided by the loss of money. Today, we know that court appearance is not near the problem it may have been at the turn of the century (jurisdictions can create various strategies to raise court appearance rates to as high as 98%), that most defendants rarely, if ever willfully flee (*see* discussion in main "pillars" paper), that those who do are often easily apprehended due to modern-day policing practices, and that thus the incredibly few who actually willfully flee might not justify an intentional detention for flight alone based on prediction due to the high likelihood of false positives.

[19] *Id.* at 1079.

Bail Projects (early 1960s)

Studies such as those recounted above illuminated the flaws of the traditional money-bail system, but never fixed the central abuse caused by using secured financial conditions of release. Decades later, though, the same problems led to a particular brand of research, called "action research," in which bail practices were altered and outcomes measured in pioneering "bail projects" to study alternatives to the secured bond/commercial surety system of release. Perhaps the best known of these endeavors was the Manhattan Bail Project, conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in 1960. The Manhattan Bail Project used an experimental design to demonstrate that given the right information, judges could release more persons without the requirement of a financial bond condition and with no measurable impact on court appearance rates.[20] While I was unable to find any formal list of pretrial recommendations, the following implicit list can be crafted from Vera's actions as applied to its hypotheses: (1) release more accused persons on recognizance, with no secured bonds; (2) conduct interviews to assess background information on the accused's life to assess flight risk; (3) collect and use empirical data whenever possible; (4) reduce economic discrimination in release and detention; and (5) move from wealth-based to more risk-based decisions to release and detain persons pretrial.

The Allen Committee (1961)

As mentioned in the main "pillars" paper, the so-called "Allen Committee" of 1961, which focused on poverty and criminal justice, made several recommendations concerning federal bail practice, but with much discussion of the parallels between federal and state practice and the need for overall reform to both. That Committee made the following recommendations:[21]

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[20] At the time, the only clear constitutional purpose for limiting pretrial freedom was court appearance, even though many states still included laws allowing so-called "peace bonds" for public safety. Peace bonds, however, were rarely used due to the fact that appellate courts in the 1800s had declared that unaffordable money bonds did not violate the constitution per se. This allowed judges to set unaffordable amounts on appearance bonds for public safety so long as they did not articulate the improper purpose.

[21] *See Report of the Attorney General's Committee On Poverty and the Administration of Federal Criminal Justice,* at xiii-xv and 58-89, found at https://babel.hathitrust.org/cgi/pt?id=mdp.39015010772674&seq=5&q1=bail.

1. Under federal law, release – at least for non-capital defendants – should be the norm.
2. Money conditions should be set at levels calculated to provide reasonable assurance of the accused's presence at trial, not to insure his retention in custody (citing *Stack v. Boyle,* 342 U.S. 1 (1951)) or as a punitive or treatment measure, or to be used as leverage against a defendant.
3. Speculation on future dangerousness should not be allowed, and other sub rosa or extra-legal uses of the bail setting power should not be allowed in either the federal system or the states.
4. Bail systems must establish processes to give judicial officials information on factors relevant to bail setting, such as criminal history, ties to the community, and financial ability to pay the amount.
5. Lawyers should provide representation at bail hearings or some other third party should be used to supply the relevant information, such as persons like those used by Vera Foundation's Manhattan Bail Project.
6. Bail setters should focus on making a right decision in the first instance, and not rely on laws allowing for reconsideration of financial conditions.
7. Efforts should be made to shorten the pretrial period and/or to provide for speedy trials for detained persons.
8. Because financial inability to post bail is a principal factor leading to pretrial detention, and because of the oversized influence of the commercial bail bondsman to the issue of release, the Department of Justice should study whether commercial bail bonding practices advance the policy of pretrial release.
9. Criminal justice systems should collect data to see if forfeiting money has any effect on deterring flight.
10. Both the federal system and the states should assure that persons detained prior to trial do not receive as harsh or harsher treatment than those who are already convicted of a crime.
11. The federal system and the states should do all they can to avoid the numerous negative outcomes arising from unnecessary pretrial detention.
12. Attempts to implement what the Committee believed was needed to fix the "most obvious and pressing problems created by the present system,"

included: (a) making more frequent use of summonses versus arrest warrants; (b) making more frequent use of "release on the defendant's own recognizance" without additional financial securities; (c) creating better fact finding mechanisms for bail decisions; (d) providing adequate representation at first appearance; (e) funding the Federal Probation Service and tasking it to provide information and other duties concerning pretrial release; (f) creating various non-pecuniary inducements to be used to help assure court appearance (albeit concluding that the current federal inducements – including criminal penalties for "bail jumping" are already "impressive"); (g) using probation and parole to guide responses to pretrial failure; and (h) if money bail is used, allowing jurisdictions to enact percentage bail laws, which allow the defendant to pay some percentage of the entire bail amount so as to facilitate release.

Interestingly, the Committee report mentioned, but gave no opinion on the issue of whether candid and transparent provisions for "no bail" with adequate safeguards, factors, and appellate review – at least in theory – should be substituted for currently unlawful bail settings done for improper purposes, such as setting bail to intentionally detain. Nevertheless, it wrote, "We believe that recent efforts to re-examine and re-evaluate the institution of bail are highly important and that the Department of Justice should participate actively in this process of re-appraisal."

Freed & Wald (1964), the National Conference on Bail and Criminal Justice (1964), and the Bail Reform Act of 1966

The Allen Committee's call for the Department of Justice to re-examine American bail was given life through Robert Kennedy's National Conference on Bail and Criminal Justice,[22] which relied upon a summary report/federal and state survey for attendees describing the bail process found throughout America written by Daniel Freed and Patricia Wald.[23] At a time when the "problem" of bail was of

[22] *See National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Wash. D.C., Apr. 1965) [hereinafter *National Conference*].
[23] *See* Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found., 1964).

equal importance to both the federal and state actors, the Conference relied on numerous presentations from various states describing changes to the administration of bail, including highlights of the various bail projects, such as the Manhattan Bail Project, and the extensive legislative changes in Illinois, which included eliminating the commercial surety business by creating a ten-percent release provision. The shared problem of bail was acknowledged through various quotes showing the awareness of both federal and state bail practices leading to the "wrong" people being both in and out of jail, and the use of secured financial conditions was the identified abuse leading to that problem. Indeed, as mentioned in the initial pages of the Conference Report,

> For many years, the bail system in the United States has presented a disturbing picture to those concerned with the evenhanded administration of criminal justice. Originally conceived as a device to free accused persons prior to conviction by a court of law, bail had degenerated into a two-way door, opening outward to pretrial liberty for defendants with funds, but inward to prolonged confinement for defendants without money to post bond. Those on bail remained free to earn a living, support dependents and aid in their own defense; those without money could not. For them poverty itself became a crime, punishable by imprisonment.[24]

While neither document included lists of concrete recommendations, the documents provided a wealth of information on mostly successful tactics to address the "disturbing picture" of bail, described above. At the very least, simply discussing the history and law of bail, debating the various issues, summarizing the various bail projects, and hearing from different cities and states all aiming for the same basic outcomes was enough for multiple states to begin their own discussions toward change.[25] The primary changes to come out of the Conference and Freed & Wald documents, however, were found in the federal Bail Reform Act of 1966, which – while crafted in the form the first federal bail legislation since 1789 – can also be seen as a series of recommendations aimed at the states. And,

[24] *National Conference, supra* note 22, at xiii.

[25] It would be wrong to say that the Conference document as well as the Freed & Wald summary provided no recommendations or guidance whatsoever. Indeed, merely illuminating an issue was an important step, and it often took very little reading of the various points of view to recognize a "pretrial improvement" to address that issue, with only a few being identified as currently "unsolvable."

indeed, many of the provisions of the 1966 Act were ultimately enacted in the states. Looked at as a "list" of bail recommendations, albeit made forceful through enactment into law, that list would be as follows:[26]

1. The word "bail" should be replaced by the word "release."
2. There should be a presumption of release without payment of money before trial. Release without money should be the norm.
3. Legislatures should authorize a scale of "conditions" of release, which may be imposed to help secure an accused person's appearance based on their individual risk. The conditions should be imposed in rank order of restrictiveness, with secured money bonds being most restrictive.
4. Legislatures should impose severe penalties for failure to appear to supplant bond forfeitures as motivation for court appearance.
5. Legislatures should create effective agencies designed to supervise released persons.
6. Legislatures should craft factors to guide the discretion of judges in determining which conditions are appropriate.
7. If a person remains detained due to money bail, the court must review the bail setting within 24 hours.
8. There should be expedited appeals.
9. Preventive detention should be allowed only for capital defendants and only when displaying the necessary risk.
10. Defense attorneys should be present at first appearance and develop techniques to assemble relevant information for the judge. Counsel should also take responsibility for crafting a "release plan," to include non-financial conditions such as third-party custody (the highest priority condition, albeit not including commercial sureties), and moving through the list of more-restrictive conditions when necessary.
11. Ten-percent financial release should be preferred over other forms of secured financial release, and only when judges make certain findings of the necessity for using money bail.

[26] The list is primarily crafted from reading Patricia Wald & Daniel Freed's *The Bail Reform Act of 1966: A Practitioner's Primer* (ABA Reprint) found at https://dcchs.org/wp-content/uploads/2018/11/Judge-Wald-on-Bail-Reform-Act-33-JBDC-1966.pdf.

The Bail Reform Act of 1966 was obviously linked to this period of activity. Nevertheless, as I have written previously, soon after the enactment of the 1966 Act, Wald and Freed opined that it "neither authorizes pretrial detention nor guarantees that it will not occur." Accordingly, even in the federal system in which there is no constitutional right to bail, federal detainees did not have a clear avenue to challenge money-based detention based on confusion over whether the new statute even allowed for it. However, the catch-all release condition allowing for "return to custody after specified hours" appeared, at least to Wald and Freed, to be an adequate avenue for challenging on-purpose preventive detention, something that I cannot be sure ever happened. Nevertheless, many of the elements used in the 1966 Act (such as use of ROR, conditional release, third party custody, judicial factors of risk, and even ten-percent money options) were borrowed for enactment into the bail laws of various states.

President Johnson's Commission on Law Enforcement and Administration of Justice (1967)

In addition to the crucial elements of collaboration, education, and implementation advocated by the document, *The Challenge of Crime in a Free Society*[27] (discussed in the main paper), the Johnson Commission also provided several specific recommendations concerning bail. They were as follows:

1. Provide judges with enough information about individual defendants to permit the release without money bail for those who can be safely released.
2. Magistrates should not rely merely on the seriousness of the charge, but should, instead, analyze individualizing risk factors when setting bail.
3. Bail projects (akin to the Manhattan Bail Project) should be established at all levels of government to provide sufficient information to permit non-

[27] *The Challenge of Crime in a Free Society* (1967), found at https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf [hereinafter *Challenge of Crime*].

financial pretrial release, for all but those who pose a high risk of flight or dangerous acts prior to trial.[28]

4. Each state should enact comprehensive bail reform legislation, like the 1966 federal Bail Reform Act.
5. Increase the use of summonses and citations versus arrests for "as many arrested persons as possible."[29]
6. Prosecutors should make discriminating charging decisions, "assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to noncriminal methods of treatment and control" by informal dismissal or disposition, or to diversion programs.[30]
7. Make sure plea agreements are done fairly, openly, and without abuse.
8. Prosecutors and defense counsel should share information at all points of the process.

The D.C. Act of 1970, The Bail Reform Act of 1984, and *Salerno*

In *Model Bail Laws,*[31] I chronicled the American struggles with both unintentional (typically caused by unaffordable money bonds and defined to be any detention that is either truly unintentional or merely ostensibly so) and intentional detention, exacerbated by the 1966 Bail Reform Act, which tried to drastically reduce money-based detention, but said very little about intentional detention. The case opinions, research, and discussions during that time led directly to Congress trying to solve the issue of both money-based detention as well as intentional detention, including intentional detention using a potentially new constitutional purpose for limiting pretrial freedom – public safety. The "fix," as I wrote, was found first in the D.C. Court Reform and Criminal Procedure Act of 1970[32] and later in the Comprehensive Crime Control Act of 1984, which contained the Bail Reform Act of 1984.[33]

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[28] It references the 1966 Act as a helpful guide for states contemplating legislation, but note how the recommendation seems to imply that money-based detention is lawful for high-risk persons.
[29] *Challenge of Crime, supra* note 27, at 133.
[30] *Id.* at 134. The pretrial field has moved away from using the word "offender" (which is prevalent in the sentencing or punishment literature) for the word "defendants" or merely persons merely accused of crimes.
[31] *See* CLEBP, *"Model" Bail Laws*: *Re-Drawing the Line Between Pretrial Release and Detention,* at 99, at 48-65 (2017) [hereinafter *Model Bail Laws*], found at http://clebp.org/helpchangingbaillaws.html.
[32] Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. Code Ann. §§ 23-1321-1332) [hereinafter *D.C. Act*].
[33] Pub. L. No. 98-473, 98 Stat. 1976 (1984) [hereinafter *1984 Act*].

As I wrote in 2017,

> The fix involved: (a) determining up front who should be purposefully released and detained through a detention eligibility net; (b) making sure intentional detention was further limited through a process capable of dealing with extreme cases of risk ultimately for both flight and public safety; and (c) attempting to eliminate unintentional detention altogether through significant limits on the use of money.[34]

One can look at the D.C. Act of 1970 as a "trial run" for the model of intentional release and detention found in the Bail Reform Act of 1984. Indeed, the pretrial release and detention provisions of the 1970 Act merely layered provisions on top of the Bail Reform Act of 1966 for the District of Columbia, leaving much of the 1966 Act in place but with three important changes.[35] Specifically, the 1970 Act: (1) allowed judges to consider danger to the community in setting nonfinancial conditions of release and expressly forbade setting financial conditions for public safety;[36] (2) provided a process for detaining high-risk, noncapital defendants for purposes of public safety by using a detention eligibility net and a "further limiting process;"[37] (3) added provisions to better deal with pretrial failure, considered to be a better way to respond to the difficulties inherent in pure prediction.

The Bail Reform Act of 1984 reflected on the law and research at the time, but also the overall failure in the D.C. system for judges and others to use the intentional detention provisions by continuing to use money to detain. Accordingly, part of the "fix" articulated in the 1984 law was designed to force bail setters to use the intentional process by stating: "The judicial officer may not impose a financial condition that results in the pretrial

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[34] *Model Bail Laws, supra* note 31 at 68.

[35] *Id.* at 68-74.

[36] Leaving money in the system meant that there would still be so-called "unintentional detention" at the same levels as was seen in the aftermath of the 1966 Act. The 1970 Act relied upon the protections of the 1966 Act to guard against money leading to detention, which was ultimately deemed unsatisfactory. Indeed, D.C. mostly used money to detain persons from 1970 to 1992, when it finally copied and enacted a provision of the BRA of 1984 forbidding detention resulting from the use of money.

[37] This was done to address public safety and also to eliminate "the hypocrisy of locking up defendants, without fixed standards, through the device of requiring a high money bond." H. Rep. No. 91-907, at 82. For a discussion of the net and limiting process, *see Model Bail Laws, supra* note 31, at 72-74.

detention of the person" (a line ultimately enacted into the law in D.C. in 1992).

Taking the 1984 Act as a "better" embodiment of bail practice than that found in the D.C. Act, and looking at the law as a sort-of template for the states to craft the same basic process, a list of general pretrial improvements can be created from the core provisions found in the 1984 statute. Moreover, because the BRA of 1984 was reviewed and approved by the United States Supreme Court in *United States v. Salerno,*[38] we can further glean an overall list of pretrial improvements based on both the Act and *Salerno* opinion, which is as follows:

1. Release and detention should be done intentionally; both the current D.C. Act and the BRA of 1984 begin by giving judges four alternatives – release on personal recognizance or unsecured bond, release on conditions, temporarily detention, and full detention prior to trial, with each requiring more justification and procedural due process as they increasingly limit pretrial freedom.
2. Eliminate money leading to pretrial detention.
3. Create an intentional release and detention substitute for money-based detention by crafting a detention eligibility net[39] and a finding of risk within the net.[40] If a judge sets a money bond that is unaffordable, the defendant must then be run through the intentional process to be detained pretrial or he must be released.
4. Be able to intentionally detain without money for both flight and risk to public safety.
5. The entirety of the detention provision must be "carefully limited" as articulated in *Salerno.*

[38] 481 U.S. 739 (1987).

[39] The Court in *Salerno* used the net's limited nature as a part of its rationale to uphold the BRA of 1984. We discuss nets in detail in the main paper, and provide reasons for why, even today, jurisdictions should strive to make them as narrow as possible.

[40] The finding of risk within the net was crafted specifically to fix a problem in the federal system at the time, and was based on laws, assumptions, and research that is either wrong or inapplicable to the states today. In the main paper, we provide numerous reasons for why this part of the BRA of 1984 should not be adopted by the states. The federal "limiting process" also includes rebuttable presumptions toward detention, which likewise should not be included in any part of any state or federal detention provision.

6. Intentional detention provisions must be justified and done for proper purposes.
7. Intentional detention must be done through a panoply of procedural due process provisions.[41]
8. Intentional detention must be preceded by temporary detention, which gives time to prepare for a full detention hearing.
9. Create a list of potential release conditions, which should be read as conditions of actual release and thus can be justified through mere rationality.
10. Create a list of factors to be used by judicial officials to help assess the appropriate risks of release and detention.
11. Provide adequate contents for release or detention orders.
12. (Implied due to other laws), create some sort of pretrial services function to help with release and detention.
13. Provide for penalties for failure to appear for court and arrest for new crimes while on release and sanctions for other breaches of conditions.
14. Provide an adequate process for revocation of release, which should include a net and finding of risk within the net, just like bail in the first instance based purely on prediction and not on failure while released.
15. States should recognize liberty – and not detention -- to be the "norm."[42]

It is important to once again note for emphasis that the so-called "federal process," which is the process articulated in the BRA of 1984 and reviewed by the United States Supreme Court in *Salerno* has far too many problems to be used as a template in the states. As I recount in detail in the main "pillars" paper, while intentional release and detention remain solid (and likely

[41] In *Salerno,* these included: (1) a "full-blown adversary hearing," with counsel, the ability to proffer evidence, witnesses, and cross examination; (2) judicial guidance through standards; (3) a requirement that the judicial official only detain after finding by clear and convincing evidence that the defendant "presents an identified and articulable threat" and that no condition or combination of conditions suffice to provide reasonable assurance of public safety or court appearance; (4) a requirement of a written findings for detention; and (5) the ability for an immediate and expedited appeal. *Salerno*, 481 U.S. 739, 742, 750-52 (1987).

[42] This statement found in the *Salerno* opinion can be referenced broadly as indicating some ratio of released to detained persons, but it is the second part of the quote – that detention be "carefully limited" – that is far more important. In the states, it is the scope of detention that gives meaning to the right to bail, or release.

inevitable) pretrial improvements for the states, the actual wording of those provisions should use language different from either the federal or D.C. process as well as any state that has since copied those processes into state law.

The National Standards on Pretrial Release and Detention (starting in 1968)

In many ways, the national standards most used by the pretrial field – the American Bar Association (ABA) Standards on Pretrial Release[43] and the National Association of Pretrial Services Agencies ("NAPSA") Pretrial Standards,[44] crafted recommendations that were, and in many ways still are, ahead of their time, with the ABA's and NAPSA's Standards first editions published in 1968 and 1978, respectively. As just one example, the ABA Standards called for intentional pretrial detention for purposes of flight or public safety as early as 1968.[45] Because these sets have been periodically updated through the years, however, I will summarize here a list from the latest ABA set published in 2004 (with commentary in 2007) but summarize a list based on the NAPSA Standards later due to more recent revisions, including the most recent revision done in 2024.

American Bar Association Standards (most current 2004, commentary in 2007)

If one were to synthesize the ABA Standards into a list of recommended improvements to the pretrial system, it would likely look as follows:

1. Follow general guiding principles for a safe, fair, and transparent pretrial release or detention decision, including balancing liberty, safety, and court appearance, using only proper purposes to limit pretrial freedom, and with a policy of favoring release.
2. Police should issue more citations (mandatory in some cases).
3. Judges should issue more summonses in lieu of arrest (mandatory in some cases).

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[43] Currently, the American Bar Association *Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2004, commentary in 2007), https://www.americanbar.org/groups/criminal_justice/resources/standards/pretrial-release/ [hereinafter *ABA Standards*].

[44] Currently, the National Association of Pretrial Services Agencies *Standards on Pretrial Release* (2024), found at https://www.neomed.edu/wp-content/uploads/CJCCOE_I2_StandardsPretrialRelease.pdf (newer editions found at https://www.napsa.org/standards [hereinafter *NAPSA Standards*].

[45] *See* H. Lynn Edwards, *A Comparison of the First and Second Editions to the ABA Standards for Criminal Justice,* 59 Den. L. Rev. 25 (1981), at 44 (1981).

4. There should be options for diversion and other adjudication alternatives.
5. There should be no use of a monetary bail schedule.
6. First appearances should be prompt.
7. First appearances should be fair and meaningful (including having defense counsel present).
8. Release and detention should be intentional.
9. There should be a presumption of release on recognizance.
10. If released on conditions, those conditions should be the "least restrictive" conditions to provide reasonable assurance of public safety and court appearance.
11. Money as a condition of release should never be set for purposes of public safety (or other improper purposes), and it should never result in the detention of the defendant.
12. Commercial sureties should be abolished.
13. Release orders should include certain minimum standards for content.
14. Judges should deal with failure on pretrial release (from sanctions, to re-assessing conditions, to revocation) in a manner spelled out by the Standards.
15. Judges and others should follow fair rules for temporary detention.
16. The pretrial detention provision consists of an eligibility net and a finding of risk to detain within the net for nonappearance or safety to any person. Revocation should work much the same way. The detention hearing should basically follow the due-process laden process (a "full adversary hearing") as reviewed by the Supreme Court in *United States v. Salerno.* While charge can be used as a predicate to detention, the judge should not give inordinate weight to the charge.
17. Jurisdictions should establish pretrial services agencies and follow further guidelines in the Standards.
18. Jurisdictions should have rules for speedy trials for detained persons.
19. Judges should review decisions for changes in circumstances.
20. Pretrial detainees should be housed separately from convicted persons.
21. The court should ensure that the jury is unaware of the defendant's detention at trial.
22. Pretrial detainees should receive credit for pre-adjudication detention and be given temporary release for compelling necessity.

23. Victims should be notified of relevant proceedings.
24. Appeals should be timely, expedited, and reviewed de novo.

A Period of Fewer "Lists" – 1987-2007

While I cannot be certain that absolutely no lists of improvements were created during the period immediately following the Bail Reform Act of 1984 and *Salerno,* it is certainly more difficult to find them. This may be due to a number of reasons. First, at that time the national standards (ABA, NAPSA, and in 1991, the NDAA Standards) provided fairly comprehensive recommendations that seemed unlikely to be improved upon in the short-term. Second, jurisdictions seemed quite busy with the big changes coming out of what John Goldkamp called the "second generation of bail reform," focusing on future dangerousness as a proper purpose for limiting pretrial freedom. For example, during this time nearly half of the states began or continued changing their constitutions, statutes, and court rules to not only allow consideration of dangerousness, but also, in many cases, to allow for intentional detention based on both flight and dangerousness. As another example, the introduction of pretrial services agencies into the American criminal system to recommend conditions and supervise persons released on a variety of non-financial conditions (typically set for dangerousness versus simply relying on money), led to numerous documents explaining how those agencies worked and should work by comparing them to commercial bail bonding entities.[46] The bail industry, in turn, fought back, turning the 1990s into a decade of industry-led arguments designed to eliminate pretrial services agencies (called "free bail" agencies), release on personal recognizance (called "criminal welfare programs") and ten-percent bonding options for accused persons.[47] The literature mostly reflected these debates, and thus the papers typically left off "lists" of substantive improvements for the entire pretrial system.

[46] An example is found in Barry Mahoney, Bruce Beaudin, John Carver III, Daniel Ryan & Richard Hoffman, *Pretrial Services Programs: Responsibilities and Potential* (NIJ, 2001). In 1993, numerous authors attempted to cover the entirety of pretrial issues at the time in a special edition of Federal Probation, 57 Fed. Prob. 23 (1993), which includes discussions on an "ideal" pretrial program as well as a piece recommending the elimination of bail bondsmen after enactment of the Bail Reform Act of 1984.

[47] *See* Michael Jones, Claire Brooker & Timothy Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District,* at 36-37, found at http://clebp.org/images/2009-02-19_Jeffco_Bail_Proposal.pdf.

Jail crowding, too, became important to the states at this time, and in 2009, I and my colleagues wrote that "[t]he most significant development affecting the administration of bail in the last 20 years is undoubtedly jail crowding," a proposition echoed by both the Pretrial Justice Institute and the American Bar Association.[48] Indeed, we wrote that, "[i]n 1984, officials responding to a National Institute of Justice survey described jail crowding as 'the most pressing problem facing criminal justice systems in the United States,'"[49] and in 2000 the Bureau of Justice Assistance wrote that "jail crowding continues to be a nationwide problem. This is somewhat surprising because in the intervening years [between 1985 and 1999] there was a boom in the construction of correctional facilities in many parts of the country and a decline in crime through the entire United States."[50]

Thus, the "lists" of pretrial improvements from this era often surrounded issues concerning jail crowding. For example, in BJA's document, *A Second Look at Alleviating Jail Crowding: A System's Perspective,*[51] the authors used jail crowding to stimulate discussions over collaboration and, by showing a variety of programs from around the country aimed at different decision points associated with different stakeholders, showed how each stakeholder had an overall role in reducing jail populations. While not a "list" per se, each decision point/stakeholder action includes examples that frequently implicitly point to recommendations. For example, BJA listed various jurisdictions providing early defense counsel participation and early prosecutor case screening for purposes of bail setting, at least implicitly endorsing recommendations to provide both. For this particular paper, the "list" is mostly the same list as that which can be crafted from the various sets of national standards (such as judges holding a "prompt" bond setting, but with specific examples from particular jurisdictions to amplify their feasibility.

Other groups focused on developing the elements for successful collaboration and using "evidence-based" or "research-based" guidance applied to decision points in

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[48] *Id.* at 35.
[49] *Id.* at 36 (quoting *National Assessment Program: Assessing the Needs in the Criminal Justice System* (Washington, D.C. (NIJ, 1984), at 4.
[50] *Id.* (quoting BJA/Pretrial Services Resource Center, *A Second Look at Alleviating Jail Crowding: A Systems Perspective* (2000)) [hereinafter *Jail Crowding*], at 1, found at https://s3.amazonaws.com/static.nicic.gov/info.nicic.gov/files/media/file/NCJ_1852507.pdf. .
[51] *Jail Crowding, supra* note 50.

order to address any particular issue – whether jail crowding, or simply a notion that bail settings might be unfair.[52] As noted in the main "pillars" paper, this was all at a time when NIC justice system assessments often responded to requests for help over jail crowding, which naturally led to more discussions over the pretrial population – typically the larger inmate population as compared to those who have been sentenced. The dearth of advisory "lists" would end, however, due to a convergence of the work of several different groups in various parts of the country as well as the rise of multi-jurisdictional actuarial risk assessment tools. This, in turn, sparked new interest in groups creating lists of improvements, as even the national standards had not fully addressed actuarial tools or the inevitable legal changes states would have to make in order to change from a "money-based" system to a "risk-based" one. Indeed, it is safe to say that the notion of replacing mostly subjective decision making with more scientific predictions was an integral part of this generation of reform, a movement toward more fair and transparent bail practices that accelerated starting in 2007.

2007: The Marriage of EBP and Pretrial Legal Foundations

In a truly exceptional paper, Dr. Marie VanNostrand wove the national pretrial standards, knowledge of "evidence-based" research, an expert understanding of actuarial risk assessment, knowledge of the pretrial legal foundations, and the current research-based post-conviction practices and applied it all to the pretrial field, resulting in a new phrase – "legal and evidence-based practices" – as well as a list of express and implied "improvements" to the pretrial process.[53] They are as follows, with implied recommendations articulated through my own understanding of the document:

1. Overall, lists of pretrial improvements based on research must also follow foundational pretrial legal principles (as well as the history intertwined with

[52] *See, e.g.,* Peggy McGarry & Becki Ney, *Getting it Right: Collaborative Problem Solving for Criminal Justice* (NIC/CEPP 2006), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/getting-it-right-collaborative-problem-solving-criminal-justice; NIJ, *What Does it Take to Make Collaboration Work? Lessons Learned Through the Criminal Justice System Project,* 251 NIJ Journal (July 2004), found at https://nij.ojp.gov/library/publications/what-does-it-take-make-collaboration-work-lessons-learned-through-criminal; NIC/CEPP/PJI/JMI/The Carey Group, *A Framework for Evidence-Based Decision Making in Local justice Systems,* updated documents found at https://cepp.com/project/evidence-based-decision-making-ebdm/.

[53] Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC, 2007), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/legal-and-evidence-based-practices-application-legal-principles.

those principles), and jurisdictions must build an understanding of those principles into any attempts to improve the system.

2. Overall, until the pretrial field catches up, lists of pretrial improvements based on research can be borrowed from the postconviction literature, but with an understanding of the differences in status, purposes, and outcomes between pre- and post-conviction processes, and with the caveat that the legal foundations might affect or even override usage when used in the pretrial phase.
3. Jurisdictions would be wise to follow the various sets of national standards on pretrial release.
4. When using a pretrial risk assessment instrument, jurisdictions should make sure that it is proven through research to accurately predict risk of failure to appear and danger to the community, should equitably classify defendants regardless of race, ethnicity, gender, or financial status, should have factors consistent with applicable state statutes, should use factors that are related only to risk of failure to appear or danger to the community pending trial.
5. Bail recommendations should be based on an explicit, objective, and consistent policy for identifying appropriate release conditions; conditions of bail should be the least restrictive conditions reasonably calculated the assure court appearance and community safety; financial terms of bail should only be recommended when no other term will reasonably assure court appearance; conditions should be restricted to those related to the risk of failure to appear or danger to the community posed by the accused.
6. Pretrial supervision should use contacts at a frequency that is reasonably necessary to monitor the conditions of release; reminding defendants to come to court has been proven through research to reduce failure to appear, and so it should be used.
7. Due to the dearth of research at the pretrial phase, jurisdictions can use the following eight principles gleaned from community corrections literature, which must nonetheless be tailored to the pretrial phase so as not to offend legal foundations: (a) assess actuarial risk/needs; (b) enhance intrinsic motivation; (c) target interventions using several subprinciples, including risk, need, responsivity, dosage, and treatment principles; (d) skill train with directed practice (use cognitive behavioral treatment methods); (e) increase positive reinforcement; (f) engage ongoing support in natural communities;

(g) measure relevant processes/practices; and (h) provide measurement feedback.

Specific Application of Standards: Our List of Recommendations Based on a Synthesis of ABA, NAPSA, and NDAA Standards (2007-09)

As mentioned in the main "pillars" paper, I and my colleagues drafted an analysis for a single Colorado jurisdiction[54] and compared its practices to the recommendations set forth the in the three sets of standards primarily being used by the field in 2007-08.[55] The recommendations – based on perceived deficiencies in one jurisdiction, but applicable throughout Colorado, were as follows:

1. Jurisdictions should articulate an express philosophy of bail or release including broad principles, like those found in the various standards, to guide system actors.
2. Jurisdictions should articulate preferences for citations over arrests and summonses over warrants for arrest, including for felonies. Summonses and citations should be crafted to allow for the collection of the accused's contact information for future reminders.
3. If all other recommendations are followed, the need for a money bail schedule will likely be unnecessary, but if not, jurisdictions should attempt to eliminate their use, and laws mandating such practices should be repealed.
4. Jurisdictions should focus on reducing and ultimately eliminating the use of money at bail; the issue of compensated sureties is a secondary issue, seemingly necessary due only to any particular jurisdiction's reliance upon secured money bail.

[54] Michael Jones, Claire Brooker, Timothy Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District* (2008-09), found at http://clebp.org/coloradobailprojects.html.
[55] We used the ABA Standards, currently found at https://www.americanbar.org/groups/criminal_justice/resources/standards/list/, the NAPSA Standards, currently found at https://www.napsa.org/standards, and the National District Attorneys Association Prosecution Standards, which are currently found at https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf. The NAPSA and NDAA Standards are now both different from those in effect in 2007-2009. This is especially true for the NDAA Standards; indeed, the earlier version was quite similar in scope and substance to the current ABA Standards while today's set says very little about pretrial release and spends a great deal of that space focusing on "factors a prosecutor or court may consider in determining the proper amount [of bail] to request." *Id.* at 59.

5. Jurisdictions without pretrial services programs should strive to create them, and jurisdictions with them should allow them to focus on using demonstrated, evidence or research-based practices (including in assessing pretrial risk) to make recommendations and provide supervision for conditions of release.
6. While a proper, intentional release and detention system will lead to less of a need for delegated release authority (either through jail staff or bond commissioners), whatever delegated release authority is left should adhere to NAPSA's standards.
7. First court appearances should be prompt, with an individualized bail hearing held no later than 24 hours after arrest. This implicitly meant that bail settings would occur seven days per week.
8. Jurisdictions should strive to have defense counsel present at first appearances, with at least provisional representation for accused persons.
9. Jurisdictions should stop looking at the bail process as being one primarily dealing with amounts of money and instead look at it as a decision to intentionally release or detain the accused. Money should not be used to detain, and instead should be used – if at all – only for motivation for released persons to appear for court, which implies crafting ability-to-pay provisions.
10. Jurisdictions should follow the current law concerning on-purpose detention found in the Colorado Constitution and repeated in statute.
11. Jurisdictions should monitor persons accused of crimes both for success on release and for unnecessary pretrial detention.
12. Jurisdictions should re-allocate funding to accomplish these recommendations.

Note that these recommendations were not written to assess current state law or to suggest new language for current state law, but only to help one jurisdiction create a better pretrial system within current state law, which, unfortunately, was premised on (and still relies a great deal on) the money-bail system. Thus, for example, state law required judges to set a money amount for each bond, and so the recommendations nudged those judges to use unsecured amounts, which would not lead to detention.

Various Organizational Stances (late 2000s to mid-2010s)

2007 was also the year that the Pretrial Services Resource Center changed to the Pretrial Justice Institute and began a new objective of advocacy by initially urging large, national stakeholder groups to take stances on issues in pretrial reform based on the research and law known at the time. These stances can all be seen and phrased as "lists" of pretrial improvements, some before and some after the PJI-led National Symposium on Pretrial Justice, some directed solely to the relevant stakeholders making up the group (albeit with some others reaching into other groups), and some longer or shorter than others, but with each articulating the changes to which the group felt comfortable. A few examples are as follows:

American Probation and Parole Association (2010)[56] (a limited list)

1. For a number of reasons, including the flaws of the commercial bail bonding system, jurisdictions should create pretrial services agencies to enhance public safety, provide access to treatment, reduce court caseloads, and replace the role of the commercial bail bondsman.

NLADA and the American Council of Chief Defenders (2011)[57] (a much more comprehensive list)

After a lengthy introductory statement of the history, law, pretrial research, and various national pretrial standards, the list – separately addressing defenders, pretrial services agencies, prosecutors, judges, and policymakers included the following:

Public defenders can and ought to take the following steps:

1. Dedicate sufficient resources to the bail hearing and/or first appearance, where pretrial release terms are set.
2. Obtain and use crucial risk assessment information for making relevant and persuasive arguments regarding appropriate release conditions for their

[56] APPA, *Resolution on Pretrial Supervision* (June 2010).
[57] NLADA/ACCD, *Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011).

clients. Ensure they are equipped with the necessary tools, strategies, mutual support, and training to meet their pretrial-release advocacy responsibilities.
3. Collaborate on publications and media efforts to raise awareness regarding the importance and benefits of pretrial release and to promote best practices for public defenders in the pretrial stage.
4. Educate and train defenders on the value and function of pretrial service programs within their local justice systems.
5. Advocate for the use of alternatives to detention when appropriate, such as diversion programs, drug and mental health treatment programs, or other community programs, so as to allocate criminal justice resources judiciously and prevent unnecessary detention.
6. Work collaboratively with judges, prosecutors, and pretrial service agencies to develop cooperative, productive, and sustainable pretrial-release practices, in conformance with national standards.
7. Be prepared to challenge or appeal unfavorable or erroneous pretrial release decisions or practices through available legal channels.

Pretrial services agencies should implement the following practices:

1. Make available the objectively-obtained information on each person to every other necessary and appropriate criminal justice actor, including judges, prosecutors, and defenders.
2. Tailor objective release recommendations narrowly to the specific risks posed by each defendant, in conformance with appropriate national standards.
3. Collect and disseminate data on all pretrial release practices in order to assess the efficacy of pretrial-release decision-making policies.
4. Educate and train judges, prosecutors, and defenders on their value and role in effective, fair, and safe pretrial-release practices.

Prosecutors should participate in reform as follows:

1. Allocate appropriate resources to the bail hearing, where pretrial release terms are set.

2. Obtain and use crucial risk assessment information to identify accurately the risks posed by each defendant and to seek narrowly-tailored conditions designed to address those risks.
3. Ensure they are equipped with the necessary tools, strategies, mutual support, and training to meet their pretrial release advocacy responsibilities.
4. Educate and train prosecutors on the value and function of pretrial services programs within their local justice systems.
5. Proactively seek the use of alternatives to detention when appropriate, such as diversion programs, drug and mental health programs, or other community programs, so as to allocate criminal justice resources effectively and prevent unnecessary and expensive detention.
6. Work collaboratively with judges, defenders, and pretrial service agencies to develop information-sharing and productive pretrial release practices, in conformity with national standards.

Judges should participate in reform as follows:

1. Serve as leaders in their local criminal justice systems to establish effective and fair pretrial release practices.
2. Employ individualized risk assessment information to identify accurately the risks posed by each defendant. Impose narrowly tailored release conditions designed to address those risks.
3. Eliminate use of bail schedules and imposition of bail based upon charge or criminal history alone.
4. Educate and train other judges on the value and function of pretrial services programs within their local justice systems.
5. Proactively employ alternatives to detention where appropriate, such as diversion programs, drug and mental health treatment programs, or other community programs, so as to allocate criminal justice resources effectively and prevent unnecessary and expensive detention.
6. Work collaboratively with prosecutors, defenders, and pretrial services agencies to develop information sharing and productive pretrial release practices, in conformity with national standards.

Policymakers should support reform as follows:

1. Ensure that each jurisdiction has adequate resources to ensure that defense counsel is provided at every bail hearing.
2. Equip local justice systems with the training and resources to implement fair, cost effective, and constitutional pretrial release practices.
3. Encourage and support the development and appropriate use of effective pretrial release alternatives, including diversion programs, drug and mental health treatment programs, and other community-based treatment programs.
4. Ensure jurisdictions have high-functioning pretrial services programs that equip all criminal justice actors with evidence-based risk assessments and crucial information to determine the appropriate release conditions for each defendant.
5. Collect and disseminate pertinent data to ascertain actual practices and the efficacy of those practices.
6. Assist local criminal justice actors in developing and communicating messages to local communities about the fair, effective, and safe pretrial release practices.

This list is admirable for several reasons, including its inclusion of recommendations for other system stakeholders, but especially judges, which were often left out of other lists. Of course, like many lists at the time, this included recommendations primarily aimed at release and alternatives to detention, rather than how to do detention itself.

National Association of Counties (2010-2011)[58]

1. All persons booked into the jail should have a thorough intake interview conducted prior to the pretrial release decision, including a screening for substance abuse and mental illness.
2. Counties should establish written policies that ensure the interview and assessment of all arrestees; the investigation of information provided to judges to help with the release and detention decision; and the use of methods in compliance with the law, least restrictive conditions, and

[58] NACO, *American County Platform, 2010-11: Excerpts from Justice and Public Safety/Criminal Justice System.*

conditions designed to protect the community and assure appearance, including release on recognizance, non-financial supervised release, and preventive detention.

3. Counties should do things to help the accused eventually take a more productive place in the community.
4. Counties should establish an intake process to screen for needs and risks, so as to select the right persons for various forms of release and conditions of release. When used, pretrial services agencies should provide regular data and outcome reports.
5. Counties should minimize the cost of incarceration and maximize the use of community services and other alternatives to incarceration.
6. Changes should be made to federal policy that will allow incarcerated persons to continue to be eligible for Medicare, Medicaid, SSI, or SDDI benefits until such time as they may be convicted and sentenced to an institution.
7. All states should enact defendant-based percentage bail laws and use options such as non-financial release, citation release or release on recognizance when public safety is not threatened.
8. All states should have legislation requiring judges to consider public safety at bail and to provide for the preventive detention of those shown to be "incorrigible, repeat, violent crime offenders."
9. All counties should have policies aligned with state law, national standards, and best-practices on the pretrial release decision.

Conference of State Court Administrators ("COSCA") (2012-13)[59]

In another document meticulously recounting the law, pretrial research, and the consequences of needless pretrial detention (with examples that could theoretically be articulated as implied recommendations for improvement (such as a statement that actuarial assessments have higher predictive validity than professional or clinical judgment, thus implicitly recommending their use), COSCA nonetheless listed the following broad recommendations for state court leaders:

[59] Arthur Pepin, *2012-2013 Policy Paper: Evidence-Based Pretrial Release* (COSCA, 2012-13).

1. Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions of those arrested.
2. Ensure that non-financial release alternatives are available and that financial release options are available without the requirement for a surety.
3. Collaborate with experts and professionals in pretrial justice at the national and state levels.
4. Take the message to additional groups and support dialogue on the issue.
5. Use data to promote the use of data; determine what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release.
6. Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

For a number of reasons listed in the introductory portion of the **Conference of Chief Justices** resolution on pretrial release (including certain flaws of the traditional money-based system), that group specifically endorsed the COSCA recommendations in 2013.[60]

International Association of Chiefs of Police (2014)[61]

1. Law enforcement leaders should advocate in their jurisdictions for the use of a validated, empirically based risk assessment tool in making pretrial release and detention decisions;
2. Law enforcement leaders should advocate for the establishment of legislation giving judges the ability to do moneyless detention;
3. Law enforcement leaders should advocate for the establishment of more robust pretrial supervision services, with the purposes of improving public safety.

Many of the stances included several "whereas" statements to indicate a certain rationale for the lists, and in the case of IACP, the gist of the "whereas" statements could lead to a strongly implied recommendation, which would be to: (4) move

[60] CCJ, *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* (Resolution 3, 2013).
[61] IACP, *Pretrial Release and Detention Process* (October 21, 2014).

away from all of the flaws associated with the traditional money-bail system by using less money.

As mentioned in the main "pillars" paper, all of these came at a time when “risk” as measured by an actuarial tool made it clear that the “wrong” people were both in and out of jail, and that by looking at individualized risk, jurisdictions could make more intelligent decisions about whom to release and detain. Through this exercise, jurisdictions also became better educated on how, exactly, to release and detain (although the answer would not be definitive until 2017), and what research-based interventions they could use to address the inherent risk created by releasing more persons accused of crimes. In short, many of the stances recommended using actuarial risk tools, creating pretrial services agencies, and using research-driven conditions or supports for those persons released pretrial. While many mentioned “preventive detention,” with some calling for states to enact it, virtually no stance provided detail into template language for detention provisions.

John Goldkamp’s List of Nine Recommendations from the National Symposium on Pretrial Justice (2011)[62]

These recommendations were presented primarily as principal challenges to evidence-based reform in the pretrial field.

1. We must “skip the dollar game,” and move states to direct decision making with mechanisms for feedback and review.
2. Involve judges and other principal players in creating their own reform – the system cannot be imposed on them.
3. Continue to actively research risk, as it is central to improving judicial decision making.
4. We should look at specific categories of defendants and work to improve our response to risk in those categories.
5. Strive to empirically assess release options and supervision approaches – a concept already familiar to probation and parole practitioners.

[62] National Symposium on Pretrial Justice: *Summary Report of Proceedings* at 23-24 (Statement of Dr. John Goldkamp) (PJI/BJA 2011) [hereinafter *National Symposium*], found at https://www.scribd.com/document/92690596/NSPJ-Report-2011.

6. Develop a measure of the effectiveness of pretrial release that we can begin to use to dynamically compare similar categories of defendants across jurisdictions and within jurisdictions.
7. We need decisionmaker, defendant, and system accountability.
8. We must use targeting strategies that might be based on such things as geography or stage-of-process considerations.
9. We must transform the culture of resistance among defendants who believe that there is no meaningful penalty to appear for court.

Dr. Goldkamp ended by saying that we need to look at things much more broadly, involving more system actors, which, as I discuss in the main "pillars" paper, involves essential system collaboration and education. While Dr. Goldkamp, who passed away in 2012) was an expert and pioneer in the area of pretrial release, working through the 1980s and 1990s even when very few others even thought about bail, I note that his recommendation number nine would likely change today given the enormous amount of research showing that most defendants do not miss court intentionally. Earlier lists, of course, recommended penalties for failure to appear primarily to effectuate the release of more defendants or to eliminate the need for money bail due to the difficulties of predicting risk as well as the draconian nature of pretrial detention. While those penalties can certainly be left in place for extreme cases involving willful flight, the research surrounding flight actually points to court appearance being a far less important issue than public safety at bail.

The National Symposium on Pretrial Justice (2011)

After gaining the needed support of many national professional groups and associations, in 2011 the Pretrial Justice Institute, the Office of Justice Programs, and the Bureau of Justice Assistance (both DOJ) helped convene the National Symposium on Pretrial Justice, hosted by Attorney General Eric Holder. The summary report of the proceedings mostly recounted important points raised by the various speakers, but ended with two large lists of recommendations gleaned from the participants and their discussions.

One list systematically singled out various stakeholder groups and summarized ways that each could help improve pretrial justice. It was in recognition of the fact

that lists of particular improvements – such as those found within the national standards, seemed to elude the states to the point that some culture change was necessary. These recommendations were designed to address the need to change the culture and provide the necessary groundwork to achieve pretrial justice, and included the following:

1. For OJP, establish a multidisciplinary pretrial justice working group; provide regional pretrial justice symposiums; convene a judicial roundtable to develop a strategic approach to training and educating judges; have government officials incorporate pretrial justice into their speeches, publications, webinars, etc.; create a dedicated BJA grant program to demonstrate the effectiveness of best practices; collect a comprehensive set of pretrial data concerning pretrial success and failure; advance rigorous, gold-standard research in the pretrial field.
2. For legislators, review proposed bills for compatibility with the ABA National Standards on Pretrial Release; introduce and pass bills that collect adequate data on the commercial surety business; county legislatures should make sure local ordinances are consistent with state law.
3. For stakeholder groups, create a policy statement or resolution calling for reform to the pretrial phase; educate members regarding pretrial justice.
4. For philanthropies, convene a philanthropic roundtable to identify areas to support; examine state statutes and develop a model code, which would prohibit bail schedules, require actuarial risk assessment, impose only proven and accountable conditions of release, prohibit using money to achieve public safety, and authorize preventive detention modeled after the federal system.

It should be noted here that at the time of these recommendations, the people mostly in charge of nationally communicated content refused to speak in great detail about money bail. Only later, after 2014, did we begin to see lists more forcefully focusing on reducing (and later eliminating) money bail. The call for a model code has been mostly done by the groups mentioned in the my main "pillars" paper who have created “hypothetical” release/detain models, including that done by the Uniform Law Commission. And finally, these recommendations were made at a time when nobody had adequately analyzed the “federal model” to assess its ability to be used by the states. Now, pretrial justice advocates are

uniformly recognizing that using the federal model for template language in the states would be extremely bad.

5. For academics, research and write papers, teach on the topic of pretrial justice, and work in communities to create better bail practice.

This final recommendation has seen a great deal of progress since 2011. As I note in the main "pillars" paper, there is now a large outpouring of research and teachings on bail and “no bail,” and there are many academics working on bail projects, acting as expert witnesses in bail litigation, and speaking to wider audiences about the current research.

The second list was included in the Summary Report so as to give some tangible items that jurisdictions could do to make immediate progress. As mentioned previously, I modeled this list after the one I and my colleagues created by synthesizing the various sets of national standards, with this list coupled with (or merely confirmed by) various stances or discussions occurring during the Symposium. The list said that states and local jurisdictions should do as follows:

1. Use citation releases by law enforcement in lieu of custodial arrests for non-violent offenses when the individual’s identity is confirmed and no reasonable cause exists to suggest the individual may be a risk to the community or any other individual, or to be a risk to fail to appear in court.
2. Eliminate the use of automatic, predetermined money bail set with regard only to the arrest charge, and require all arrestees to be assessed for risk of rearrest and flight, prior to any pretrial release.
3. Screen criminal cases by the prosecutor’s office before the initial appearance to make sure that the charge before the court at that first appearance is the charge on which that the prosecutor is moving forward.
4. Make sure of the presence of defense counsel at the initial appearance who is prepared to make representations on the defendant’s behalf for the court’s pretrial release decision.
5. Make sure of the presence of a judicial officer at the initial appearance who has received thorough training on pretrial release decisionmaking, including on the laws that govern how the decisions are to be made and the research showing evidence-based decisionmaking practices.

6. Create or bolster a pretrial services program or similar entity that: (a) interviews all defendants who are in custody before the initial court appearance; (b) compiles the information that the court is required by law to take into consideration in making a pretrial release decision; (c) assesses each defendant's level of risk to be a danger to the community and to fail to appear in court using scientifically validated risk criteria; (d) recommends to the court viable, least restrictive release options to address identified risks; and, (e) provides crime victims and others with mechanisms for reporting apparent violations of pretrial release conditions.
7. Create and use detention without bail for defendants who pose unmanageable risks to public safety.

Post Symposium Lists of "Key" or "Essential" Elements

Crime and Justice Institute (2012)

In 2012, the Crime and Justice Institute at Community Resources for Justice created a survey to gauge jurisdictional adherence to a number of elements deemed critical to pretrial justice.[63] Put in the form of a list, that list follows:

1. Support more citations and summonses over arrests as well as other methods to divert lower-level cases away from custodial arrests.
2. Reduce or eliminate the use of money bail schedules.
3. Reduce money's role in release, instead using risk of pretrial misconduct to be the leading factor.
4. Experienced prosecutors should screen cases before first appearance, be present at first appearance, and advocate for least restrictive conditions based on risk.
5. Defense counsel (for indigent defendants) should be present at first appearance, have time to gather appropriate information, and advocate for the accused.
6. People with release authority should have set criteria for making decisions, including an evidence-based assessment.
7. Jurisdictions should have a broad continuum of release options to address varying levels of risk.

[63] CRJ/CJI, *Pretrial Justice System Assessment: Survey Version: Companion to the Pretrial Justice System Assessment* (2012), found on file with author.

8. All persons accused and booked should be targeted for pretrial interviews prior to first appearance, with regular reviews, and with information relevant to the objective assessment of risk or supervision strategies.
9. Use an evidence-based pretrial risk assessment, validated on the local population, and with a quality assurance process in place to ensure accuracy and consistency.
10. Release recommendations should be consistent with assessed risk, and those with release authority should adhere to the recommendations.
11. Supervision resources should be prioritized for higher risk defendants and less restrictive options for lower-risk persons; responses to violations should be standardized; and every defendant should get court date reminders.
12. Jurisdictions should collect and compile accurate data to guide continuous improvements efforts.

The authors of this survey indicate that most of the topics came from a review of various documents, including the national standards, VanNostrand's 2007 paper on legal and evidence-based practices, and various papers published over the years by the National Institute of Corrections.

I note, again, that such lists – or, in this case, a survey to be given to a jurisdiction but translated into a list of important elements – will be different if applied to a local jurisdiction versus a statewide system. Accordingly, today a list like this would likely be quite different if the intended audience were people capable of actually changing the laws versus altering various policy guidelines. In this particular case, various elements of a "proper" or typical legal framework are only used as review documents for baseline information leading to policy change. In the main "pillars" paper, I speak of processes that should be essential to any jurisdiction, whether state or local, and the substantive essential element – creating an intentional release or detention system – can be achieved by either state or local jurisdictions, albeit with greater ease by the state, which can change laws, and need not find ways to work around bad laws.

Smart Pretrial Demonstration Initiative (2014-17)

Between 2014 and 2017, the Bureau of Justice Assistance launched the Smart Pretrial Demonstration Initiative, later teaming with the Pretrial Justice Institute to

provide training and technical assistance. At one point in the process, BJA and PJI released a document containing "key elements," which are as follows:

1. Jurisdictions should provide immediate (or early) release of eligible arrestees, after identification and risk assessment.
2. Jurisdictions should assess persons booked for risk of flight and pretrial crime using a BJA-approved risk assessment tool.
3. Experienced prosecutors should review charges early, prior to first appearance.
4. Defense counsel should be present at first appearances and provide effective representation at the earliest hearing that could result in pretrial detention.
5. Release and detain decisions are informed by the outcome of the risk assessment and adversarial hearing. Judges should make deliberate decisions, and ensure that those decisions are immediately effectuated. States should use their current preventive detention provisions.
6. Jurisdictions should use court reminders and risk-based supervision (for individualized, least restrictive conditions) and/or diversion for released defendants demonstrated by research to mitigate pretrial risk.
7. Jurisdictions should transfer information on pretrial release outcomes to appropriate persons connected to post-conviction processes.

As an ongoing initiative, other documents provided more evolved lists of elements, including the need to do legal analysis, collaboration, and even identifying potential disparities based on race or ethnicity. The above list came soon after NIC's, *Money as a Criminal Justice Stakeholder,* in which I basically concluded that if a judge follows the so-called fundamentals of bail, then the release or detain decision would be an intentional one, immediately effectuated, with nothing standing in the way of the "in or out." This explains element number five, but the list had not yet evolved to clearly explaining how a state might need to change its constitution or other laws to effectuate fair and transparent preventive detention. Overall, this list appears to be a brief amalgam of elements from the Standards and the National Symposium, with additions touching on money bail but without answering the question of whether a risk tool could be used to actually make a detention decision or, indeed, what the proper language for intentional detention should be.

Another Generic List Generated Soon After 2014 But Before 2018 (Author Unknown)

The following list of "elements of a high functioning pretrial system"[64] is indicative of lists following the 2014 paper, *Money as a Criminal Justice Stakeholder,* but far enough away from 2017's *Model Bail Laws* so as to avoid (1) discussion of the state constitutional question dealing with intentional release and detention; (2) more nuance for risk assessment tools, including potential bias; and (3) tellingly, a reference to use assessment tools "in the field" for persons such as police, which was a notion raised soon after the release of the Arnold Foundation's PSA.[65] The list is as follows:

1. **Guiding Principles** of making decisions based on risk reduction, following fundamental American legal foundations, and using research to guide the pretrial release or detention decision. These principles may be adopted formally through a criminal justice coordinating committee made up of criminal justice leaders in the community.
2. **Infrastructure:**

    (a) Legal – A bail scheme based on fundamental American legal principles and research or evidence that directs an in-or-out pretrial release and detention decision, immediately effectuated, based primarily on risk instead of charge, and that uses less or no money as a condition of release. The scheme should provide for: (1) the ability to detain, without bail and after a due process hearing, extremely high-risk defendants; and (2) the immediate release of virtually everyone else under supervision levels from very low to high.

    (b) Risk Assessment – The ability to assess all defendants for their predicted potential success for coming to court and not committing new crimes while on pretrial release.

    (c) Risk Assessment/ Risk Management/Supervision – Dedicated pretrial entity to: perform risk assessment; review release/detention eligibility; provide information to the court; perform risk-informed management from low to high; keep

[64] The author of this list is unknown, but certain words seem to borrow from papers I have written (such as "immediately effectuated" and "extremely" high risk), implying at least my own tangential participation.

[65] The first PSA was actually called the PSA-Court, with the idea that other risk tools would be created and used by other stakeholders at other decision points, such as police issuing citations in lieu of arrests. The overall plan to use multiple actuarial tools gradually waned.

performance/outcome measurements; communicate pretrial performance to sentencing judge.

3. **Release in the Field** – Preference (if not mandatory in certain cases) for citations over arrest and summonses over warrants for arrest. Use of actuarial risk tools if possible.

4. **Delegated Release Authority –** Replace money bond schedules with risk-based criteria; other delegated authority should be carefully limited, risk-based, and designed to effectuate quick release to avoid risk and harm to society.

5. **Pre-Advisement Screening** – Early screening by an experienced prosecutor to place defendants into diversion alternatives or to avoid the justice system altogether.

6. **First Appearances**:

   (a) Timing – Prompt first appearance to avoid increasing risk of harm to the community.
   (b) Nature – Defense attorneys and prosecutors present at first advisement; judges make a definitive in or out decision, immediately effectuated, with no condition of release (such as money) standing in the way. Each condition should be individualized and assessed for its legality and effectiveness.

7. **Allocating Resources** to Effectuate the Highly Effective Pretrial System.

Other Pre-2018 Lists, Still Focusing on "Risk," But More Forcefully Recommending the Disuse of Money Bail, Albeit Without Recommendations Explaining What Replaces Money Bail

The various lists of key or essential elements created prior to 2018 reflect a few different issues overlapping at this particular time in American history. First, these lists are still largely focused on using "risk" to determine virtually everything at bail, which was primarily shorthand for using an actuarial tool not only to decide release or detain, but also for other entities such as police, prosecutors, or pretrial services using "risk" to determine their own unique decisions at the various criminal system decision points. Again, it reflected the mood of the field that actuarial assessment was the answer to virtually every question at bail, and yet the lists simply left out how state laws might be crafted in order to accommodate

such a system.[66] Second, the lists began to more forcefully argue against using money at bail (a phenomenon traced to certain documents produced in 2014), but, again, with no clear explanation of how the states might need to change their laws to accommodate moneyless, intentional detention. For example, the 2017 NIC Framework document actually called for "prohibition or restrictions on the use of secured financial conditions," albeit with no detailed explanation as to how such a move would immediately lead to calls to drastically overhaul foundational bail laws in the states.[67] Third, and finally, the "debate" over potential bias in tools (which I discuss in some detail in the main "pillars" document) often led certain lists to expand on the use of tool, with some actually attempting to list ways to avoid potential bias.

PJI's List Used to Grade States on Pretrial Justice (2017)

In 2017, the Pretrial Justice Institute released a novel paper titled, *The State of Pretrial Justice in America,*[68] in which states were held up to a list of elements (or measures) that can be used as implicit recommendations. They included the pretrial incarceration or detention rate for local jails (implying that it should be low),[69] the percent of a state's population living in a jurisdiction using evidence-based pretrial assessment (implying that it should be high),[70] the percent of a state's population that has functionally eliminated secured money bail (implying it should be high), and awarding a "bonus" point for those jurisdictions who have

[66] In particular, it was at this time that we saw entire states using an assessment tool and matrix that allowed detention at the highest risk levels, but which ignored the state's constitutional boundaries on intentional detention and how to change those boundaries even to accommodate a purely "risk-based" release and detention system.

[67] To its credit, the 2017 Framework document went exactly as far as the research had gone – warning states of the likelihood of constitutional or statutory change, but cautioning them about the complexity and potential debates awaiting such a project.

[68] PJI, *The State of Pretrial Justice in America* (2017), found at https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf.

[69] We note that the use of ratios for this measure can be misleading, even though this generation of bail reform caught the attention of many people simply by showing the average percentage of persons in jail who had not been convicted. In fact, if a jurisdiction has not sentenced any persons to jail, then the percentage of persons in jail on pretrial status might be very nearly 100%.

[70] Again, this was at the height of advocating for use of the tools; future research would bring more nuance to creating, gauging the worth, and using the tools to avoid problems, some of which are inherent in actuarial assessment. We note also that PJI ultimately withdrew its support for using an actuarial tool for anything during the pretrial phase.

both adopted actuarial risk assessment and elimination of money bail.[71] Overall, the paper was an acknowledgement that removing money-based detention was an overall good. Again, however, there was no detailed discussion of the things that inevitably happen when money bail is eliminated or even eroded. Nevertheless, it should not be inferred that the limitations of this list meant that other important pretrial improvements – such as those listed in the Smart Pretrial list, above, should not be pursued.

Example of a List Found in an Academic Publication (2017)

Also in 2017, Megan Stevenson and Sandra Mayson published *Pretrial Detention and Bail,*[72] which, by listing a variety of bail reform initiatives, confirmed an emphasis on a particular group of recommended elements being taught to the states prior to 2017 - 2018. While mostly recounting what the states had already been doing in the way of pretrial reform with great detail, the authors produced the following list:

1. Limit money bail as a condition of release to prevent detention on the basis of poverty.
2. Substitute citation or summons for arrest where possible, and release most arrested defendants immediately after booking.
3. Conduct thorough hearings with defense counsel before imposing detention or other serious infringement of liberty (e.g., electronic monitoring).
4. Detain defendants only if there is a substantial probability they will commit serious crime in the pretrial phase or abscond from justice, and if less intrusive methods cannot adequately reduce that risk. [73]

[71] Once again, any discussion of eliminating money bail must include some discussion of whether the current, transparent release and detention mechanism is adequate to the task of replacing money-based detention.
[72] Stevenson, M. & Mayson, S. (2017, revised 2018), *Pretrial Detention and Bail,* Academy for Justice: A Report on Scholarship and Criminal Justice Reform, found at https://scholarship.law.upenn.edu/faculty_scholarship/1745/.
[73] In the text, the authors write that jurisdictions must decide when and whether pretrial detention is justified as well as whether they must change foundational legal provisions found in constitutions, court rules, and statutes. It is our view that so long as it is lawful, and so long as a jurisdiction can articulate even one hypothetical fact pattern that would require pretrial detention, then the system for intentional pretrial detention must be created. This is more important when considering dangerousness, and not flight, for even when there is a person who can hypothetically pose the highest flight might still not justify creating a mechanism for detention based on flight due to the incredibly small base rates as well as the relatively low costs of false negatives compared to mis-predicting public safety.

5. Use conditions of release sparingly, since few have been demonstrated to be effective and many involve non-trivial impositions on liberty.
6. Support released defendants by expanding access to services, providing reminders of upcoming court dates, and making court websites easy to navigate. [74]
7. Implement actuarial risk assessment cautiously and transparently, with continuous evaluation by an independent third party. [75]
8. Pilot new pretrial initiatives in collaboration with an academic partner, in order to measure their effectiveness and identify necessary improvements.

This list seems to turn a corner to more nuanced recommendations dealing with risk, intentional detention (coming close to articulating template language), conditions, and actuarial assessment, and is an early proponent of jurisdictions teaming with academic partners, likely due to the authors' deep work concerning pretrial research.

NIC's Framework for Pretrial Justice (2017)

And finally, in 2017, the National institute of Corrections also listed "essential elements," which, at the time, were are as follows:

1. Pretrial release and detention decisions based on risk and designed to maximize release, court appearance, and public safety (i.e., an emphasis on "risk-based" decision making at each decision point);
2. A legal framework that includes: a presumption for release on least restrictive nonfinancial conditions; restrictions or prohibition on the use of secured financial conditions of release; and detention for a limited and clearly defined type of defendant.
3. Release options following or in lieu of arrest, including citations, summonses, alternatives to arrest, diversion, and delegated release;

[74] This is a recommendation based on a recent trend in the pretrial field to slowly depart from using more restrictive conditions requiring supervision and control (and for which the research does not always support) to less-restrictive "supports," designed to help an accused person succeed on pretrial release.
[75] This document provides much detail and context for each element, but is especially good at providing it for actuarial risk assessment tools – especially in 2017.

4. Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute;[76]
5. Experienced prosecutors screen criminal cases before first appearance;
6. Defense counsel is active at first appearance;
7. A collaborative group of stakeholders that employs evidence-based decision-making to ensure a high functioning system;
8. A dedicated pretrial services agency, with proper independence and resources; and additional essential elements to make it a "high functioning" agency, including (a) operationalized mission; (b) universal screening; (c) use of validated pretrial risk assessments that are reliable and valid; (d) sequential bail review; (e) risk-based supervision based on the pretrial research showing effective supervision options; (f) performance measurement and feedback using several suggested measures.

A List of Essential Elements for Bail Statutes or Court Rules (2018)

In my 2018 paper, *Changing Bail Laws,* I summarized the process and provided template language for creating an intentional release and detention provision, primarily found in state constitutions. Due to that primary focus on intentional detention, I believed it necessary to at least list a number of other provisions that might be considered crucial for a typical bail statute or set of court rules even when a state has crafted such an "intentional release/detain" process. Such topics will be unearthed by whatever deep research is done in any particular state, and their importance will be determined by individual state practice. For example, New Jersey's transformation relied a great deal on changing its speedy trial provisions, which is not always deemed a pressing or acute issue in other states.

The list was compiled from many sources, including: the Pretrial Justice Institute's *Key Features of Holistic Pretrial Justice Statutes and Court Rules*; Harvard Law School's *Moving Beyond Money: A Primer on Bail Reform*; NIC's *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder* papers; the American Bar Association and National Association of Pretrial Services Agencies Standards; the D.C. and federal release and detention statutes; and conversations primarily with Alec Karakatsanis (Civil Rights Corps) John Clark (Pretrial Justice Institute), Mike

[76] We have often said that in America, everyone is eligible for release as even potentially "unbailable" defendants can still obtain release when a judge does not make the requisite finding of risk needed to detain those in the eligibility net.

Jones (Pinnacle Justice Consulting), Larry Schwartztol (Harvard Law School Criminal Justice Policy Program (former), Claire Brooker (independent pretrial consultant for CLEBP and Justice System Partners), and the Honorable Truman A. Morrison, III, (Senior Judge, District of Columbia Superior Court). The list is as follows:

1. Provisions articulating the state's purposes and goals behind pretrial release and detention, and definitions of key terms and phrases.
2. As a part of those goals, provisions expressly articulating a strong presumption of release for all defendants and that no condition of release – particularly a financial condition – shall cause or lead to detention. This was specifically tied to the jurisdiction already creating a safe, fair (carefully limited), and transparent method for intentional detention. This language could also be put into a constitutional right to bail provision.
3. Provisions favoring (or mandating) release on citation and summons over arrest and arrest warrants, and expressing preferences of release through citation for all misdemeanors and nonviolent felony offenses.
4. Provisions allowing for evidence-based pretrial diversion of appropriate defendants.
5. Provisions eliminating all financial conditions at bail, including amounts on warrants.
6. Provisions allowing or mandating pretrial services agency functions (assessment, recommendations, and supervision) based on the law and the research.
7. Provisions articulating prompt first appearances.
8. Provisions giving defendants a meaningful right to counsel at first appearance.
9. If not already in a constitution, release provisions, including presumptions of release on a promise to appear; the use of least restrictive and individualized conditions designed to provide reasonable assurance of court appearance and public safety; various factors to be used by judges relevant to the release decision; contents of the release order; provisions articulating the procedure for dealing with violations of conditions, including those violations that result in the defendant being considered for pretrial detention; provisions expressly encouraging or mandating the use of actuarial pretrial assessment instruments for released defendants by favoring the assessment over pure clinical assessment, but by balancing the

tool with other elements of risk relevant to flight and the danger we seek to address; provisions encouraging or mandating the use of research-based least restrictive conditions of release.

10. If not already in a constitution, detention provisions, including provisions articulating the detention eligibility net, further limiting process, and procedural due process hearing for detention; various factors judges should use in making the detention determination using principles articulated in the papers titled *Model Bail Laws* and *Changing Bail Laws*; other details made necessary by the enabling language from the main right to release provision.
11. If not already in a constitution, the requirement that judges provide written records of the reasons for imposing any and all limitations on pretrial freedom, up to and including detention.
12. If not already in a constitution, provisions dealing with speedy trial, periodic review of detained defendants, and physically separating defendants from sentenced offenders.
13. If not already in a constitution or statute, provisions dealing with victims and victim's rights, so long as they do not interfere with defendant rights.
14. Provisions mandating data collection and performance measures by all persons in the justice system to help assure that the underlying purposes of bail are met as well as to foster conversations over the proper context for pretrial release and detention within a state.

Another Academic List (2019)

In 2019, Brook Hopkins, Chiraag Bains, and Colin Doyle wrote, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*,[77] and honed in on conditional release (which they considered an improvement over money bail) by providing a list of principles that jurisdictions should adopt even when working on the release-side of the equation.

1. Maximize Release on Recognizance;
2. Follow the Principle of Parsimony;
3. Support Rather than Supervise;

[77] Brook Hopkins, Chiraag Bains & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms,* 108 J. Crim. L. and Criminology 679, found at https://www.academia.edu/79408594/Principles_of_Pretrial_Release_Reforming_Bail_Without_Repeating_its_Harms?email_work_card=view-paper.

4. Don't Charge Fees;
5. Conditions of Release and Restrictions on Liberty Should be Evidence Based.

State Task Force Recommendations

Occasionally, a state will create a task force or commission to look into pretrial practices and make recommendations for state improvements. These lists can vary from extremely short to incredibly long and detailed, and thus we only provide five examples here. Again, notice the difference between the substantive recommendations found in lists before 2017-2018 and those found after that period of time, primarily in the latter lists providing far more detail concerning intentional, moneyless detention.

New Jersey (2014)

In 2014, New Jersey released the *Report of the Joint Committee on Criminal Justice*,[78] which was produced after a year-long study of bail in that state, and which contained the following recommendations:

RECOMMENDATION 1. New Jersey should move from a largely "resource-based" system of pretrial release to a "risk-based" system of pretrial release.

RECOMMENDATION 2. A statute should be enacted requiring that an objective risk assessment be performed for defendants housed in jail pretrial, using an assessment instrument that determines the level of risk of a defendant.

RECOMMENDATION 3. Nonmonetary conditions of release, that correspond to the level of risk, should be established.

RECOMMENDATION 4. A supervision mechanism should be developed to ensure compliance with release conditions.

RECOMMENDATION 5. A mechanism for effective enforcement of noncompliance should be established.

[78] *Report of the Joint Committee on Criminal Justice* (NJ Courts, 2014), found at https://www.njcourts.gov/sites/default/files/finalreport3202014.pdf.

RECOMMENDATION 6. The Constitution should be amended and a preventive detention statute should be enacted as a component of recommendations 1-5.

RECOMMENDATION 7. Recommendations 1-6 should not be considered individually but rather as an interdependent proposal for change to New Jersey's system of pretrial release.

RECOMMENDATION 8. Recommendations 1-6 should not be enacted without sufficient funding to ensure their success and community safety.

RECOMMENDATION 9. Resources for technological applications to assist in both determining risk and providing supervision must also be provided.

The first recommendation, seeking to move from a "resource-based" to a "risk-based" system, was oft repeated in other states, eventually being so misunderstood as to mean exchanging the use of money at bail with actuarial risk assessment. As I mention in the text of the main "pillars" paper, one does not move from money to risk; instead, one moves from a money-based system to one in which money either does not exist or – at least – does not lead to detention, and one moves from one risk-based system (albeit likely fallible) to another risk-based system based on new research illustrating better ways to assess risk.

California Pretrial Detention Reform Workgroup (2017)

After a similar period of in-depth study of bail in California, the Supreme Court's Pretrial Detention Reform Workgroup issued a report, in which it made the following recommendations:[79]

1. Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.
2. Expand the use of risk-based preventive detention.
3. Establish pretrial services in every county.
4. Use a validated pretrial risk assessment tool.
5. Make early release and detention decisions.
6. Integrate victim rights into the system.

[79] Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (Oct. 2017), found at https://courts.ca.gov/sites/default/files/courts/default/2024-08/pdrreport-20171023.pdf.

7. Apply pretrial procedures to violations of community supervision.
8. Provide adequate funding and resources.
9. Deliver consistent and comprehensive education.
10. Adopt a new framework of legislation and rules of court to implement these recommendations.

Each recommendation had extensive explanation, so that, for example, it was clear that the group did not believe there was a need to amend the California Constitution. Recommendation number two led to some confusion by civil rights groups, who read it as a recommendation to add to the Constitutional net/limiting process for preventive detention. In fact, the recommendation is better worded as, "Expand the use of intentional release and detention by using the proper constitutional provision and thus reduce the amount of money-based preventive detention."

Nevertheless, the document was full of the language of "risk," and the importance of the use of an assessment tool, which became evident in the first attempt to enact these recommendations into law through S.B. 10. A combination of things, including civil rights group opposition due to the use of tools, bail bondsmen opposition to virtually everything, and even neutral group opposition to including detention eligible offenses in the statute that were not found in the constitution led to S.B. 10's demise. Since then, California has been gradually working on a variety of pretrial improvements, while inching toward true, historic bail reform (i.e., the complete replacement of money-based detention with intentional detention) through litigation and court opinions.

Hawaii (2018)

In 2018, the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawaii issued its report,[80] including the following list of recommendations:

1. Revise HRS § 803-6 to reinforce that police and law enforcement officers have discretion to issue citations for traffic offenses, violations, petty

[80] *Hawai'I Criminal Pretrial Reform: Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawai'I* (2018), found at https://hcsoc.hawaii.gov/wp-content/uploads/2023/03/HCR-134-Task-Force-Final-Report.pdf.

misdemeanor and misdemeanor offenses, instead of effecting an arrest. In addition, discretion should be broadened for officers to issue citations in lieu of arrest for appropriate non-violent Class C felonies.

2. Expand the use of diversion initiatives to (1) improve communication and coordination between law enforcement and social service agencies and (2) maximize diversion from arrest for appropriate low-risk defendants, including those charged with non-violent, misdemeanor or petty misdemeanor offenses.
3. Provide ISC with necessary funding, personnel, training, facilities, access, information and technical support to meet current and projected future responsibilities in conducting timely risk assessments, efficiently disseminating bail reports and supervising pretrial defendants.
4. Expand attorney visiting hours and telephone time at DPS facilities to allow broad access to defendants in custody and avoid infringement of defendant's right to counsel.
5. Provide sufficient information and resources to all participants (courts, ISC, prosecutors, and defense attorneys) to ensure a meaningful opportunity to address bail at the defendant's initial court appearance.
6. Provide a mechanism for courts to automatically address pretrial detention or release, without the filing of a motion, in situations where bail reports are received after the initial appearance.
7. Establish a court hearing reminder system for all pretrial defendants released from custody.
8. Implement and expand alternatives to pretrial detention, including home detention and electronic monitoring, clean and sober residences, structured living facilities, treatment programs and other community-based resources.
9. ISC should conduct regular reviews and surveys of the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision.
10. Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center.
11. Inquire and report on the defendant's financial circumstances.
12. Evaluate the defendant's risk of violence.

13. Integrate victim rights by considering a victim's concerns when making pretrial release recommendations.
14. Include the fully executed pretrial risk assessment as part of the bail report.
15. Periodically review and the further validate the risk-assessment tool to evaluate the effectiveness of the tool and the procedures associated with its administration at least every 5 years. The findings of any such review should be publicly reported.
16. Judges should receive regular education and training concerning scientific research, evidence-based principles, risk assessments and best practices relating to criminal pretrial justice matters. This should include training concerning the risk assessment tool and the process utilized by ISC.
17. Require monetary bail to be set in reasonable amounts based upon all available information, including information concerning the defendant's financial circumstances.
18. Permit monetary bail to be posted with the police, other law enforcement agency, or the county correctional center where the defendant is held, on a 24/7 basis.
19. Require prompt bail hearings.
20. Eliminate the use of money bail and require defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor and non-violent misdemeanor offenses, with certain exceptions.
21. Create rebuttable presumptions regarding both release and detention and to specify circumstances in which they apply.
22. Require release under the least restrictive conditions required to assure the defendant's appearance and protection of the public.
23. Under the office of the Chief Justice, create a permanently funded Criminal Justice Institute, a research institute dedicated to examining all aspects of the criminal justice system.
24. A centralized statewide criminal pretrial justice data reporting and collection system should be created.
25. The Task Force respectfully defers to the HCR 85 Task Force regarding the future of a jail facility on Oahu.

At the end of the list, the report stated:

> The recommendations in this report seek to achieve a more efficient and just pretrial system that upholds Hawai'i's laws while preserving our community principles and local values. Some of these reforms will require statutory changes; others, education, policy and ideological shifts. Our recommendations are interdependent on each other and are proposed for implementation as a whole. True comprehensive pretrial reform, however, will only be possible through the further collaborative efforts and strong support of all three branches of government: to legislate and prioritize resources for change, to execute in everyday operations the guiding principles herein, and from the bench, to embrace the prospect of change – that we can, and must, move towards a more equitable system of case-by-case adjudication.

Importantly, Hawaii is one of nine states without a constitutional right to bail, having only a statutory right akin to the federal system. Despite citing to *Fundamentals of Bail, Money as a Criminal Justice Stakeholder,* and *Model Bail Laws,* these recommendations did little in the way of suggesting meaningful rules against using money bail, and were even more silent on changing the Hawaii statute to perfect its intentional detention provision as a replacement to money bail. Recommendation 20 seems to suggest a system in which money bail would not be allowed for certain charges, but not others, violating my rule that designing a moneyless, intentional release and detention provision must completely replace money used to detain for all charges so as to eliminate all arbitrariness and random outcomes.

Moreover, creating rebuttable presumptions toward detention (recommendation 21) is simply a bad legal and/or research-based practice when crafting release and detention provisions. When I began writing *Model Bail Laws,* I, too, thought that one answer to crafting a new, intentional release and detention scheme would be to use rebuttable presumptions going in each direction. After roughly two years of research, however, I came to the conclusion that rebuttable presumptions toward detention should never be used. Moreover, I assumed the practice to be so obviously bad when held up to the history, law, and pretrial research that I did not see the need to spend a great deal of time justifying my stance. Thus, I wrote succinctly, "No rebuttable presumptions should be used in this model, for two reasons. First, the research (as well as various limitations of risk prediction) simply

does not support any rebuttable presumption toward detention, and because of that, it is even more unfair to force defendants to attempt to prove they are not dangerous, that they will not do some unknown but forbidden act, and that they will not flee. Second, our country's history of using rebuttable presumptions has only led to their misuse, causing jurisdictions to treat them more like un-rebuttable presumptions. The only presumption should be a general presumption of release in all cases or more specific presumptions similarly guiding courts toward release that must be overcome by the government."[81]

In hindsight, I should have been more thorough in my opposition, as I still see states trying to enact rebuttable presumptions toward detention for a variety of improper reasons, including simply making it easier to detain persons accused of crimes by forcing them to prove their lack of dangerousness.

Illinois (2020)

While in 2014 it may have been enough simply to acknowledge the fact that risk tools illuminated having the "wrong" people in and out of jail and to thus call for a move to a more risk-based system, Illinois showed exactly how intricate things could become with two years of deep research, education, and the addition of dealing with the issue of intentional release and detention, which had become better known after 2017-18. Its list is as follows:[82]

Arrest and Pre-Arraignment Decisions

1. Encourage all involved in the criminal justice system to divert individuals with mental and behavioral health issues and substance abuse disorders to alternative support, medical, or clinical services prior to entry into the criminal justice system.

2. Law enforcement shall issue a citation in lieu of custodial arrest, upon proper identification, for those accused of Class B and C traffic and criminal

[81] *Model Bail Laws, supra* note 31, at 184. *See also "Rebuttable Presumptions Toward Detention?"* in the main paper.
[82] *Illinois Supreme Court Commission on Pretrial Practices: Final Report* at 5-11 (2020), found at https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/227a0374-1909-4a7b-83e3-c63cdf61476e/Illinois%20Supreme%20Court%20Commission%20on%20Pretrial%20Practices%20Final%20Report%20-%20April%202020.pdf.

misdemeanor offenses, or of petty and business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety. Those released on citation shall be scheduled into court within 21 days. Subsequent court reminder notification shall be provided via mail, electronically, text or telephone.

3. If an arrestee is not eligible for citation in lieu of arrest, upon booking, a trained designated jail or pretrial services staff shall have delegated release authority from the court to release defendants who: (a) are assessed as low risk (utilizing a state-wide validated risk assessment tool); (b) are charged with non-violent Class A misdemeanor and/or non-violent Class 3 and 4 felony offenses; (c) pose no obvious threat to the community or any person; or (d) have no obvious medical or mental health issues that pose a risk to their own safety, with specific guidelines, defined by the court. Pre-arraignment releases shall exclude weapons-related and sex offenses, as defined by the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/100-1 et seq.). Upon release, defendants shall be provided written notification of their scheduled court date, to occur within 21 days, and conditions of release, and shall receive subsequent court reminder notification by mail, electronically, text or telephone.

Meaningful First Appearance

4. The criminal justice system will ensure a meaningful first appearance consistent with the essential elements of an effective pretrial system, to maximize public safety, maximize court appearance and maximize release. The core elements necessary for the judiciary to have proper information needed to make informed bail decisions include: (a) prosecutor-screened and clearly defined charges; (b) use of an objective and validated risk assessment; (c) trained prosecutor input; and (d) active and engaged defense.

5. A trained prosecutor should review all available reports from law enforcement, witness statements, summaries of known facts, validated

pretrial risk assessment instrument scores, and criminal histories of defendants and complainants prior to the first appearance and shall identify defendant's eligibility for diversion, specialty courts or other alternative prosecution with recommendations for release or detention.

6. A trained public defender shall be appointed prior to the defendant's first appearance, with sufficient time for meaningful attorney-client contact to gather information in order to advocate effectively for defendant's pretrial release under the least restrictive conditions to reasonably assure community safety and court appearance. Defense counsel shall have access to the same documentary information relied upon by the prosecution and presented to the court.

7. If feasible, the defendant shall appear before the court in person at the first appearance, but based on geographical or other constraints, may appear through remote access.

8. A pretrial services agency shall screen all defendants who are statutorily eligible for release before the initial court appearance and provide a written report for bail hearings. The screen shall include a defendant interview, criminal history investigation, verification of interview information, administration of a validated pretrial risk assessment instrument, and any other information as required to assist the court in making informed release or detention determinations.

9. Judicial bail decisions shall presumptively favor nonfinancial release under the least restrictive and individualized conditions designed to provide reasonable assurance of public safety and court appearance.

10. No defendant shall be detained due to his/her inability to meet a financial condition of release.

11. Sequential review procedures shall be adopted to review pretrial release and detention decisions throughout the pendency of the case.

12. Defendants shall receive verbal and written notification of all court-imposed bail conditions with clear instructions for each condition. Defendants shall also receive verbal and written notification of subsequent court dates, including date, time and courtroom.

13. All counties shall establish procedures to ensure that the rights of victims are recognized at the pretrial stage. The rights afforded victims should include, but are not limited to, notification of all pretrial hearings, all bail decisions, conditions of release related to the victim's safety, the defendant's release from custody, and instructions on seeking enforcement of release conditions.

Preventive Detention

14. Pretrial detention should be permitted only for arrestees charged with defined "violent" offenses. A clearly defined "eligibility net" set forth in statute, narrowly drawn in design and intentional in its implementation should trigger a detention decision-making procedure. The "eligibility net" should be limited to enumerated offenses identified by statute as "violent."

15. The Court may order the pretrial detention of a defendant only upon clear and convincing evidence as shown through relevant facts and circumstances that (a) the person poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, as defined by the Code of Criminal Procedure of 1963, while on pretrial release against a reasonably identifiable person or groups of persons, and (b) that no condition or combination of conditions will reasonably assure public safety or manage the person's unmanageable level of risk.

16. No single offense or aggravating factor should mandate a denial of bail.

17. At the initial pretrial court appearance, the court, upon written motion by the prosecution, may order the defendant's temporary detention, pending a full pretrial detention hearing within three (3) calendar days, provided: (a) the court finds probable cause for the crime charged; (b) the defendant falls within the narrowly drawn detention-eligible criteria; and (c) the court finds by the preponderance of the evidence that the defendant poses an unmanageable level of risk to commit or attempt to commit a "violent" offense, and/or intentional failure to appear for scheduled court appearances, setting forth the factual basis for temporary detention.

18. At all pretrial detention hearings, the defendant shall be represented by counsel and have the right to cross examine the prosecution's witnesses and present evidence.

19. At all pretrial detention hearings, the prosecution shall have the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community or the defendant's appearance in court.

20. At all pretrial detention hearings, when detention is ordered, the court shall make a written finding, explaining why less restrictive conditions of release would be insufficient to protect community safety or reasonably assure the defendant's appearance at future court hearings.

21. When a defendant's liberty is substantially impaired prior to trial, the pretrial period should be limited; therefore, the defendant shall be brought to trial within 90 days, unless good cause is shown.

Pretrial Risk Assessment

22. Results of a validated pretrial risk assessment instrument, which is approved by the Illinois Supreme Court, shall be one of the factors considered during the pretrial release decision-making process. The use of a pretrial risk assessment instrument does not restrict the judge from considering all other statutory factors but adds information the judge shall use in the exercise of the judge's adjudicatory duties.

23. In the interest of providing a state-specific tool to be utilized in bail hearings, Illinois shall develop a pretrial risk assessment instrument based on research of the local defendant population utilizing a comprehensive and robust source of statewide data with the ability to differentiate as follows: (1) Risk of failure to appear; (2) Risk of willful failure to appear; (3) Risk of new criminal offense; (4) Risk of new violent criminal offense and risk of new domestic violence criminal offense.

24. The Illinois General Assembly should allocate sufficient and sustainable state funding for development of a validated statewide pretrial risk assessment instrument.

25. In the interim of developing a statewide risk assessment instrument, counties may continue to utilize their current pretrial risk assessment instrument. Counties that are not currently using a risk assessment instrument shall adopt, in consultation with AOIC, one of the following validated pretrial risk assessment instruments when determining release and detention decisions: (1) Revised Virginia Pretrial Risk Assessment; (2) Public Safety Assessment (PSA); (3) Ohio Pretrial Risk Assessment.

26. Develop a process to evaluate and improve the quality, completeness and availability of data needed and collected to develop and validate a statewide pretrial risk assessment instrument.

Pretrial Supervision and Conditions

27. The Administrative Office of the Illinois Courts should adopt a mission and vision statement for pretrial supervision.

28. Conditions and supervision shall be based on the least restrictive means and focus only on requirements directly related to reasonably assuring community safety and a defendant's appearance as required in court.

29. Conditions and supervision shall not mandate rehabilitative services (substance abuse, mental health, partner abuse intervention programs, etc.) unless the court finds them to be a risk factor directly related to further criminal behavior and failure to appear at court hearings. The inability to pay for such court-ordered services shall not interfere with release.

30. Conditions and supervision shall not include punitive measures (community service, restitution).

31. Once an individual is ordered to pretrial supervision, pretrial services agencies shall meet with the individual to review the court-ordered conditions, establish expectations during pretrial supervision, answer questions and review future court appointments.

32. Pretrial services agencies shall monitor and maintain records of defendants' compliance with conditions of release.

33. Pretrial services agencies shall implement a system of court date reminders (including location, date, and time of the court appearance). Reminders should be provided 1-3 days prior to each scheduled court appearance.

34. Each jurisdiction shall develop and approve a local process to promptly notify the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and of any arrest of an individual released pending further court appearances. Additionally, the response to the defendant's conduct shall be timely and meaningful.

35. Electronic monitoring is available for pretrial supervision; however, its use should be limited and specific to a condition that requires close monitoring. Should electronic monitoring be ordered as a condition of release, no defendant shall remain in jail or have their supervision revoked due to their inability to pay electronic monitoring fees. Further research on electronic monitoring and its impact on pretrial success is recommended.

36. It is recognized there will be protected person(s) identified as a part of defendants' pretrial release. In these instances, conditions of no contact and/or stay away orders are appropriate. Judges should determine, based on risk, whether these conditions may require electronic monitoring as detailed in the Domestic Violence Surveillance Program (730 ILCS 5/5 8A-7).

37. Office visits shall be purposeful and used only to promote pretrial success. Office visits should not interfere with defendant protective factors, such as work and school.

38. Research shall be conducted on home and field contacts in relation to pretrial success.

39. Court ordered conditions of release shall be individualized in accordance with the defendant's identified level of risk to reasonably assure public safety and guard against non-court appearance during the pretrial phase of the case.

Performance Measurements

40. AOIC should establish and adopt performance measurements to analyze the criminal justice system's effectiveness in administering pretrial justice.

41. AOIC should adopt the following goals of performance measurements in identifying data metrics: (1) Highlight opportunities for pretrial system improvements; (2) Obtain a view of the landscape of pretrial in our state; (3) Allow for county comparisons; (4) Highlight data collection issues and quality; (5) Identify model/high functioning county systems; (6) Allocate sufficient resources to counties for data collection

42. AOIC shall establish a Pretrial Division to assist and support statewide implementation of pretrial recommendations.

43. The Illinois General Assembly should allocate sufficient state funding to implement and sustain a robust individual-level data collection system for statewide uniform reporting.

44. The Illinois Supreme Court should request additional state resources for counties to add required data elements to their existing data collection system.

45. AOIC shall allow for agreements with external research entities (e.g. Illinois Criminal Justice Information Authority, universities) to use the data to further study pretrial practices, risk assessment instrument development and validation.

Pretrial Operational Structure

46. Illinois shall have dedicated and independent Pretrial Services Agencies.

Legislative

47. Several Illinois statutes are in direct conflict with the legal underpinnings of pretrial justice. The Illinois Supreme Court and the Illinois General Assembly should implement rules and statutes to reflect the evolving goals of pretrial justice and resolve internal conflicts within the statute(s) that are inconsistent with the presumption that conditions of release will be non-

monetary, least restrictive, and considerate of the financial ability of the accused.

Communication and Training

48. Create and deliver a strategic plan for comprehensive education and training for all criminal justice stakeholders, providing a roadmap for the Supreme Court's pretrial goals, and including training videos and webinars regarding a meaningful first court appearance.

49. Training should include the utility of risk assessment instruments, offered not only for those who will implement the instruments, but those receiving the results, including judges, prosecutors and defense counsel.

50. Encourage collaborative training with judges, probation and pretrial service agencies through the Illinois Judicial College.

51. Partner with other stakeholder organizations to provide joint training regarding legal and evidence-based pretrial practices.

52. Each of the twenty-four (24) judicial circuits shall be required to create a criminal justice coordinating council, to interface with other criminal justice stakeholders and to be chaired by the Chief Judge of the circuit.

53. Create and maintain a central repository on the Illinois Courts website, available to all criminal justice stakeholders, the public and media, to easily access information regarding pretrial reform.

54. Create a traveling press team to visit editorial boards at the state's major media outlets and provide education, training and outcome data of pretrial decision making.

Each recommendation is discussed in more detail below at pp. 22-71. This discussion includes brief commentary explaining the rationale and purpose, as well as by implementation steps that would help ensure that the recommendation achieves its goal.

This list was pivotal in showing us that a much smaller list of "essential" elements might not provide enough bases to adequately help the states in their quest for pretrial justice. Indeed, this group was merely instructed to operationalize NIC's

2017 Framework, and yet through collaboration and education came up with over 50 important recommendations (far beyond the Framework recommendations), which included both process and substantive recommendations, recommendations concerning money, intentional detention and actuarial risk, and suggestions to modify particular state laws, Supreme Court rules, and practices and procedures across the state.

Minnesota (2025)

Most recently, the Minnesota Legislature tasked the Minnesota Justice Research Center to study bail and develop recommendations. After eighteen months of research and outreach, it created the following list, with explanations and justifications:[83]

1. Strengthen and expand cite and release policies.
2. Guarantee the right to counsel at bail hearings.
3. Create an intentional release/detain system that does not use monetary bail.
4. Direct judges to order the least restrictive release conditions necessary to maximize court appearance and safety.
5. Establish and fund Pretrial Service Organizations (PSOs) statewide.
6. Collaborate with victim/survivor advocates to craft policies that address risk assessments, domestic violence programming, wraparound services, and court notifications.
7. Afford ample time between the passage and implementation of any new pretrial law and establish an implementation committee to guide stakeholder collaboration, technology upgrades, training, funding, and monitoring.

The importance of this list is evidenced by its inclusion of the need to create an intentional release/detain system, with explanatory guidance in the text along with cautionary warnings. That, alone, likely led the authors to say that what they were advising was technically a complete "transformation" of the way bail has been done in Minnesota, likely for over 100 years.

[83] Minnesota Justice Research Center, *Toward Safety, Liberty, and Equity: A Community-Centered Framework for Redesigning Minnesota's Pretrial System,* found at 1cbe3f55-c72f-c377-28bc-0ae3472a1aeb_file.pdf.

Other Lists Found Online

Civil Rights Corps

Other groups have recently crafted express or implied lists of "essential elements," which can typically be found on their various websites. For example, Civil Rights Corps has developed several resources, which, together, provide numerous comprehensive lists of elements, including: (1) a list to help provide a more holistic framework for pretrial justice; (2) lists veering jurisdictions away from money bail; (3) a list of essential practices mandated by certain constitutional principles; (4) a model pretrial release and detention act; (5) a list describing the flaws of using money for public safety; (6) a list of facts based on research concerning money bail; (7) a list of considerations for "risk assessment;" and (8) a list of basic statutory principles, each of which contains recommendations based on research and the law. For example, a single document concerning the legal background on cash bail systems lays out the rationale for change, and then includes the following recommendations for policymakers:

1. Pursue Alternatives to Money Bail. Using cash bail threatens a number of important constitutional rights. The easiest way to address this involves eliminating or, at the least, minimizing the use of financial conditions of pretrial release. There are many alternatives to pretrial jailing that are cheaper, easier, and more humane. These alternatives – from unsecured bail to text messages – have proven more effective at both assuring court appearances and keeping the community safe.
2. Require Inquiry into Ability to Pay. Numerous Supreme Court cases have held that the government cannot jail someone solely based on poverty. This means that, if money bail is being considered, the court needs to know – can this person pay? Policymakers should require "ability to pay" determinations whenever a financial condition of release is considered. If this inquiry shows inability to pay, the court cannot set unattainable [money] bail except in narrow and exceptional circumstances and only when the court justifies such an order in the same way that it would justify an order of transparent pretrial detention.

Note, again, that deciding to make sure that financial conditions of release are affordable automatically triggers the need to assess and likely to change

constitutional and statutory right to bail and "no bail" (preventive detention or exceptions to the right to bail) provisions simply because virtually every state relies to some extent on money as a detention mechanism and making money affordable leads to intentional release and detention.

3. Ensure Robust Procedural Safeguards Before Requiring Pretrial Detention. If the court is considering pretrial detention, robust procedures are required. The government must allow an adversarial hearing in open court and provide counsel. Before ordering pretrial detention, courts must meaningfully consider alternatives and make specific findings that no less restrictive conditions of release are available to "reasonably assure" court appearance or community safety.
4. Immediately Release Low-Level Charges. When designing pretrial systems, policymakers should maximize pretrial liberty for all arrestees. This means that several categories of criminal charge, such as misdemeanors and non-violent felonies, should trigger expedited release to avoid the serious harms of even a few days in jail. Other crimes should have a presumption of unconditional release, though an individualized assessment could reveal a need for other non-monetary conditions.
5. Minimize the Pretrial Detention Net. Most categories of crime should never yield pretrial detention. In the narrow situations that are eligible for pretrial detention, policymakers must use an individualized determination to examine whether "less restrictive alternatives" are possible.
6. Avoid Replacement Policies with Unintended Consequences. When considering bail reforms, policymakers should take care to design policies that do not create unintended consequences – consequences that could, in some cases, produce new Equal Protection or Due Process issues. For example, algorithmic risk assessment tools replicate many of the current issues surrounding racial discrimination and other bias. For this reason, they should not be implemented as part of bail reform.
7. Remove Money from the System. Policymakers should ensure that the inequities of the cash bail system are not reproduced by ensuring that indigent people are not charged fees or costs for nonfinancial conditions of pretrial release.

Likewise, the Center for Effective Public Policy/Arnold Foundation initiative titled Advancing Pretrial Policy and Research is a major hub for all resources connected to bail and pretrial justice, and it includes a "roadmap for pretrial advancement," including both a "policy roadmap" and an "implementation roadmap." Note the similarities between the process and substance elements discussed in my current "pillars" paper and APPR's lists. The policy roadmap contains the following recommendations:

APPR Policy Roadmap

1. Adopt policies to use citations/summonses instead of custodial arrests in appropriate circumstances.
2. Create diversion options to be used by law enforcement, the prosecution, and the judiciary.
3. Authorize releases before first appearance hearings (often referred to as "delegated release authority").
4. Conduct meaningful first appearance hearings, where the person charged is represented by counsel and has the opportunity to be released.
5. Detain a person pretrial only when state law allows and no conditions can reasonably assure pretrial success.
6. Use a locally validated actuarial pretrial assessment to inform decisions about pretrial release conditions.
7. When setting release conditions, make individualized determinations and use the least restrictive conditions—if any are deemed necessary—that reasonably assure court appearance and community safety.
8. Offer supportive pretrial services to the people most likely to benefit from them.
9. Implement clear, consistent, and equitable policies for responding to a person's behavior on pretrial release.
10. Process cases swiftly and effectively.
11. Institute a practice of regularly reviewing the pretrial jail population to determine why each person is detained and whether they should be released.

The APPR "implementation roadmap' contains the following elements:

1. Convene an inclusive policy team composed of both community and system stakeholders, and start by defining the vision, goals, and purposes of the pretrial system.
2. Continuously educate system and community stakeholders about pretrial justice.
3. Increase public understanding of pretrial justice.
4. Evaluate pretrial performance measures regularly, and continually improve policies and practices.

Overall, the APPR Roadmap is quite similar to my "pillars" document, albeit with two main differences. First is our notion that when acting collaboratively and with sufficient education, it is very likely that the research might unearth something not even listed on any particular substantive list. While it is extremely helpful to know what the field has expected in the way of “essential elements” over the decades, it is the process that will generate the items necessary for any particular jurisdiction to get ever closer to pretrial justice. The point is to recognize that when working with any number of pretrial justice groups in America, you are likely to find that they have some “list” of improvements that have often been molded over years of practice. It will be collaboration and education, however, that will guide your jurisdiction toward the list it deems essential.

Second, APPR essentially recommends following the intentional release and detention provision already found in state constitutions or statutes, whereas I believe that most states will very likely change those provisions as being antiquated and based on poor assumptions. This is why I consider creating an intentional release and detention process to be the only true substantive "pillar" or pretrial justice, which all jurisdictions will face and which is the resolution to true, historic bail reform. As I mentioned in my "pillars" paper, out of 70 national bail organizations – including industry groups – only roughly one dozen have articulated some position or (better yet) articulated template language for an intentional detention provision. When you search for help in the way of implementing “best practices,” “evidence-based practices,” or just “essential elements,” check first to see if the resources you use include detail and nuance to the issue of intentional release/detain.

2024 NAPSA Standards

I end with the NAPSA Standards because, like the ABA Standards, they are comprehensive and justified, and yet, unlike the ABA Standards, have been updated regularly (indeed, both in 2020 and 2024) to reflect the very latest in pretrial law and research. If, as I did with the ABA Standards, I was to create a list of recommendations based on the NAPSA Standards, they would be as follows:

NAPSA Standards (2024)

1. Follow general guiding principles for a safe, fair, and transparent pretrial release or detention decision based on the proper purposes of bail and on individual risk.
2. There should be a presumption for release on own recognizance.
3. If not, judges should use least restrictive nonfinancial conditions.
4. Financial conditions of release should be prohibited.
5. Pretrial detention includes detention eligibility and finding of risk for willful flight or to commit a dangerous or violent crime; the Standards provide detailed guidance on how to intentionally detain without money; there are slightly different standards in order to detain temporarily; detention hearings must have procedural due process of the kind approved by the Supreme Court in *United States v. Salerno;* judges should provide written records for detention; speedy trial rules should govern detained persons; appeals should be immediate and expedited.
6. Revocation proceedings have similar, detailed recommendations for a safe, fair, and transparent process.
7. Other constitutional rights should be protected.
8. Bail decisions should not be discriminatory.
9. The rights of victims should be protected.
10. Law enforcement should have an array of options for early release versus arrest.
11. Bail laws need certain minimum standards, including setting out the framework to follow the guiding principles.
12. There should be no locally imposed pretrial restrictions.
13. Experienced prosecutors should screen all cases before first appearance.
14. There should be defense counsel at first appearance.

15. There should be a process to review release and detention decisions.
16. There should be a dedicated pretrial services agency, and there are many detailed recommendations going to the purpose, function, organization, and management of a pretrial services agency.
17. Jurisdictions should use a validated "pretrial outcome assessment;" the Standards include detailed recommendations on the use of these assessments.
18. Supervision or supports should be individualized, again using the least restrictive conditions; there are detailed recommendations dealing with monitoring and supervising persons pretrial; there are detailed recommendations dealing with workload and caseload ratios, and confidentiality of certain information.
19. Courts should have alternatives to in-person court appearances.
20. Jurisdictions should engage in performance measurement and feedback.
21. Courts should be made aware of anyone still in custody 72 hours after a release order.
22. The Standards provide detailed recommendations for both release and intentional detention, consequences for pretrial failure, and revocation of release.
23. There should be a process to allow temporary release when necessary.

Note the big differences in a list crafted in 2024 from other, older lists. This list recommends the elimination of money bail altogether, and includes recommendations based on the latest research discussing, for example, actuarial tools and intentional detention provisions.

Nevertheless, the topics in all of these lists – old or new – can become part of the collective knowledge of a criminal system trying to manage and improve the pretrial phase of a criminal case. Studying them provides an historical guide, but can also lead to elements missing from other lists or current discussions from a particular jurisdiction. For example, older lists may include defense and prosecutor participation at first appearance, but newer lists might point to research on collaborative pretrial teams or deal with shackling defendants, issues that may or may not been considered before. No list should be definitive, but all lists can be informative.

Themes

What themes might we glean from all these lists crafted over the last 100 years?

First, notice that the recommendations concerning bail are – and have been – fairly ubiquitous, and have almost uniformly addressed the evils of the traditional money-bail system layered with commercial sureties. Indeed, in 1922, a mere twenty years after the creation of the commercial bail industry, Pound and Frankfurter focused their list almost entirely on ways to either "eliminate" commercial bail by removing the need for bail altogether or by adopting strategies to make it less burdensome.

Second, the various early lists make clear that we knew the central problem with American bail – as Beeley said, "The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe,"[84] a statement recognizing the historical theme that when people perceive the "wrong" people in and/or out of jail, bail reform happens. For the most part, we can say that all recommendations over the last 100 years have attempted to fix this problem, with only a few recent years (between 2007 and 2014) during which the persons compiling the lists were reluctant to even discuss money bail. Indeed, it was Beeley who, in 1927, floated the idea of constitutional amendments (which would thus allow "no bail" in more cases) as one way to render money bail unnecessary.

Third, the various sources of the lists show that when the entire criminal system is explored, lists of recommendations concerning bail tend to be fewer than when bail only is explored. As one example, Beeley's singular focus on bail in Chicago resulted in far more recommendations than those found in Pound and Frankfurter's exploration of the entire criminal process in Cleveland. This theme is still evident today; as I wrote in my main "pillars" paper, Alaska's state task force, looking at the entire justice system, gave far fewer bail recommendations than the task force in Illinois, which only studied pretrial release and detention.

Fourth, even though lists of recommendations could be applied to states as well as the federal system, the century can be split into two periods, with the federal system using various recommendations as well as "action research" done by the

[84] *Beeley, supra* note 6.

various bail projects in the states to actually attempt an overall fix to the entire system after roughly sixty years. Accordingly, one can look at the last century as one during which the "fix" was unknown for 60 years, but became known in the federal and D.C. systems after 60 years.

That fix, though, came only after hard lessons. For example, the federal system's first attempt to fix bail resulted in the Bail Reform Act of 1966, an Act designed to foster the release of bailable defendants, but with certain flaws that inevitably led to big changes reflected in the D.C. Act of 1970 and the Bail Reform Act of 1984, through which both "bail" and "no bail" – then re-named release and detention – could be done without money. Since 1984, we see the states undergoing the same basic journey, and while we have seen states try unsuccessfully to fix bail by working on, for example, only release and not detention (or vice versa), the most current lists of pretrial improvements address both release and detention – trying to avoid the trial-and-error approach that took so long in the federal system.

Fifth, one can nevertheless look at the last forty years as its own trial-and-error period in the states, with states doing the project of "bail reform" only halfway, or by only working at the edges of eliminating the evils of money-based release and detention. Only very recently have people begun to understand the scope of change that is necessary, with lists of recommendations addressing what is required to fix bail through a pretrial transformation that is designed to be permanent, even if capable of improvement.

Sixth, the last forty years can also be split into three eras, in which: (1) an era in which lists of recommendations or improvements (beyond the national standards, *see supra*) were scarce; (2) an era in which lists of recommendations focused on "risk" as assessed through actuarial tools, while avoiding the topic of money bail or its replacement; and, most recently (3) an era in which lists more forcefully addressed money, risk, intentional release and detention, and a process for determining the nature and scope of other pretrial improvements.

Seventh, once the national standards on release and detention were adopted, they became the de facto source of nearly all lists of substantive pretrial improvements. Indeed, they were used to craft an oft-used list of pretrial improvements articulated in the Summary Report to the 2011 National Symposium on Pretrial Justice. Unfortunately, many older lists of improvements

suffer from the fact that the standards upon which they rely – with the sole exception of the NAPSA Standards – have simply not kept up with the research and law on bail.

Eighth, academics occasionally craft “lists” – for example, Caleb Foote in 1954 and Sandra Mayson and Megan Stevenson in 2017 – and such lists can be incredibly valuable in weaving the research and law together to provide justification for various proposed solutions to the bail “problem.” In sum, a list with justification for its elements is far better than a list without.

Ninth, throughout the last forty years, pretrial practitioners have become aware that a “list” of pretrial improvements can be incredibly long or short, that the various groups of people involved in pretrial justice have grown, and that the “crucial" nature of any particular improvement might be subject to debate. Moreover, the research has revealed a great deal of information applicable to states seeking not only to do true, historic bail reform but also to merely make any number of improvements to the pretrial phase, including many that are not on any current list or that may only be revealed in the future.

Tenth, the best sets of lists should include the need to educate system stakeholders and the public and to allow for collaborative solutions to whatever issues face a particular jurisdiction, but with some indication of how to do true, historic bail reform by replacing the traditional money-based system in the states. Moreover, while one can piece together lists from various organizations’ websites, many of which contain numerous lists based on particular topics, people should be drawn to those lists that provide ample justifications for their recommendations. For example, the current NAPSA Standards include process (such as collaboration and education) as well as substantive recommendations, address the need for an intentional release and detention process, and provide justification for all of these things in the way of commentary.

My list of "pillars" flows naturally from the progression of simple repetition of summaries of the national standards to a more nuanced list, which provides extensive justification for both its process and substantive elements while improving on stakeholder inclusion and the numerous current substantive solutions based on the law and the research. It is primarily the limited nature of the old lists to which I object today. As I have written in the text of the "pillars"

paper, the lists created starting around the end of the 2000s until very recently, have not typically included the increasing number of groups active in helping states make transformative change. Even the National Symposium Report, while making recommendations for philanthropies and academics, did not see the significant addition of grass roots/civil rights groups to the movement. Moreover, those lists have been limited to a fairly static number of predictable topics – created at a time when people were reluctant to call out judges or even directly question money-bail, let alone articulate its replacement. Finally, the latest and likely most impactful recommendations to the states, which include looking into holistic responses to the root causes of crime, were on no list, but are something that any decent CJCC must address.

To those who believe that I am recommending something radical or even new through the main "pillars" paper, remember that we find ourselves in much the same position as Pound and Frankfurter in 2022, who emphasized addressing the “foremost evil” in the bail system, which today is the use of secured financial conditions. Or, even more on point, in the same position of Arthur L. Beeley in 1927, who studied bail and recommended (1) a collaborative Joint Administrative Councils (akin to CJCCs), (2) a “thorough” investigation of the criminal system (i.e., education), and (3) addressing the most important issue at the time – the primary evil of money bail – which, Beeley wrote, might only have a solution in changing the very structure of the “bail” and “no bail” provisions in state constitutions.