

Guidelines for Analyzing State and Local Pretrial Laws



Table of Contents

Preface.....	ii	The Analysis.....	22
Introduction.....	1	Conclusion.....	23
Getting Up to Speed on the Basics.....	2	Annotated Bibliography.....	26
Establishing a Normative Standard.....	6	Appendices.....	II-i
The Pretrial Issues.....	8	About the Author.....	III
Assembling a Universe of Material.....	10	References.....	IV
Case Study: Yakima County, WA.....	17		

This project was supported by Grant No 2012-DB-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice’s Office of Justice Program, which also includes the Bureau of Justice Statistics, The National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime and the SMART Office. Points of view or opinion in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



PREFACE

Guidelines for Analyzing State and Local Pretrial Laws is a resource for anyone undertaking a thorough legal review of bail or pretrial laws in a state or local jurisdiction. The guidance provided within is useful for any pretrial system improvement effort.

The Smart Pretrial initiative was born out of the collaborative efforts of the Pretrial Justice Working Group (PJWG), a collective of professional associations, advocates, funders, and practitioners who meet regularly to discuss solutions to the most pressing pretrial justice challenges. The PJWG is co-managed by the Bureau of Justice Assistance and the Pretrial Justice Institute (PJI). This group and BJA support bail reform across the country, including in Colorado, where one of the first comprehensive modern bail law analyses was completed.

In 2007, faced with budget shortfalls, Jefferson County, Colorado began a holistic review of its criminal justice system to increase efficiency. One result of this effort was an examination of pretrial justice policies and practices, including a thorough review of state and local bail laws. The lessons learned in Jefferson County about how to improve local pretrial justice systems and about the importance of understanding any potential legal roadblocks or unrealized opportunities apply to jurisdictions nationwide.

For example, despite Colorado’s success in implementing risk-based pretrial practices statewide by releasing more defendants who pose little pretrial risk and placing appropriate supervision conditions on those who demonstrate manageable risks, the Colorado State Constitution makes preventive detention—the practice of detaining

the highest-risk defendants without the opportunity for release—very difficult. Achieving this critical piece of high-functioning pretrial justice will require a constitutional amendment similar to the amendment passed in New Jersey in 2015, which broadened the state’s ability to lawfully detain defendants posing unmanageable pretrial risks. This is the kind of information that can be discovered through the legal analysis described in this manual.

PJI thanks the following individuals for their contributions to improve the quality and usefulness of this document:

- Amber Widgery, Policy Associate, Criminal Justice Program, National Conference of State Legislatures,
- Jessica Smith, W. R. Kenan, Jr. Distinguished Professor, School of Government, The University of North Carolina at Chapel Hill.
- Rebecca Miller, Legislative Aide, Office of Representative Tom Sannicandro (MA).
- Carol Oeller, former director of Harris County (TX) Pretrial Services and PJI Board Member.
- Larry Schwartztol, Executive Director, Harvard Law School Criminal Justice Policy Program, and
- Peter Ozanne, Justice System Consultant.

INTRODUCTION

CREATING a lawful, fair, transparent, and evidence-based pretrial release and detention process requires revising existing state or local laws. In fact, many existing laws are inadequate, and inconsistent with broader fundamental legal principles and laws of national applicability. Thus, contemporary reform is largely focused on implementing what are called “legal and evidence-based practices,” a term of art in bail (release) and “no bail” (detention) that focuses attention equally upon the law and the research.

This document is designed to provide a “how-to” guide for those who research and analyze governing pretrial laws and rules and who make recommendations for reform. It starts by summarizing the knowledge, skills, and abilities of a person best suited to perform such an analysis, followed by guidance on how to build a foundational understanding of pretrial justice issues and how to develop a normative standard—that is, an objective, ideal, and optimally universally correct standard—by which to measure the efficacy of bail laws. It concludes by explaining the how to assemble the various materials needed in each of the major sources of information:

1. constitutional provisions;
2. statutes and court rules;
3. case law;
4. local rules and laws; and
5. other materials.

The Yakima County, Washington Case Study described in this publication provides an example of how this manual’s step-by-step process of analyzing pretrial laws can be practically applied. The referenced case study was an integral part of

Yakima County’s successful participation in the Smart Pretrial Demonstration Initiative.*

Skills of Legal Review Staff

Formal legal training provides advantages when researching and analyzing laws because it provides familiarity with various legal databases. In addition to being a lawyer, a strong sense of curiosity and a desire to find answers to relevant questions and understanding what is applicable is also very useful. Whatever one’s previous experience, this document will provide tips and techniques for evaluating laws.

To create a formal document designed to help guide pretrial system improvements, the person chosen to undertake a formal pretrial legal analysis (henceforth referred to as the “analyst”) should be or work with a lawyer, have the ability to summarize complex legal concepts, and have working knowledge of the criminal justice system and preferably state and federal legal systems in particular.

* See the Appendix at the end of this Guide for a description of the Smart Pretrial Demonstration Initiative.



GETTING UP TO SPEED ON THE BASICS

AT ITS CORE, bail is the process of release from custody following arrest with conditions designed to provide reasonable assurance of public safety and court appearance. In rare and purposefully limited cases, jurisdictions either have or should have the ability to deny bail (i.e., deny release) due to an imminent threat to public safety or a clear flight risk posed by the arrested person. American law broadly requires a presumption of release under least restrictive conditions. That presumption can be express or implied within any particular state's laws, but it is primarily gleaned from the Supreme Court's express articulations concerning the right to release as well as the limited nature of pretrial detention. The principle of least restrictive conditions transcends bail law and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

Despite this legal presumption of release under least restrictive conditions, a legal analyst will quickly discover that the pretrial practices in most courts in the United States differ greatly both from the foundational purposes of bail and the written law. Specifically, the use of secured money bail—an amount the arrested person must pay prior to release—results in de facto detention for a large percentage of lower-risk people,¹ while many higher-risk, dangerous individuals pay high money bail amounts intended to restrict their release.²

Thus, there is a fundamental disconnect between current practice and the foundational goals of what

should be done in American pretrial release and detention. This disconnect has been happening for long enough (e.g., several decades) in the United States that these ineffective practices have been codified as law in many jurisdictions. For example, it is common for a law to declare a presumption of release, but to also contain multiple provisions that actually hinder release. Likewise, it may be common to see a fair and transparent preventive detention process in one part of the law, and yet see other provisions in the same law (such as those permitting money to lead to detention) that make it far too easy to forego that lawful detention process. A pretrial legal analysis can help flesh out these peculiarities.

The overall value of a pretrial legal analysis lies in a comparison of the major elements of any particular jurisdiction's laws with other state laws (including those currently considered to be “model laws”), the fundamental legal principles of national application, the national best practice pretrial standards, and other foundational concepts (such as the history of bail), to make realistic recommendations based on a national perspective of pretrial justice for each pretrial issue. Thus, it is important that the analyst who undertakes this work become knowledgeable about pretrial issues before starting the process.

To help with that knowledge, there are numerous materials that explain bail and pretrial issues[†] and that the analyst should consult before exploring any particular state's bail laws. For example, a pretrial issue gleaned from reading various resources concerns the use of citations versus arrests (and

[†] See the Annotated Bibliography at the end of this Guide.

summonses versus warrants, for judges). If, for example, the underuse of citations is an issue in a jurisdiction, the analyst can then begin searching for the relevant law concerning citations, which often fall outside of a state's main bail provisions. In the legal realm of bail, the more background information the analyst knows, the more he or she will understand whether a legal scheme is deficient, and how that scheme helps or hinders pretrial best practices.

To begin, the analyst should consult:

1. the Pretrial Justice Institute's website (www.pretrial.org) and bibliography, which contains numerous resource materials;
2. a 2014 document titled, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform (NIC), which provides a comprehensive summary of pretrial issues along with supporting resources;
3. a 2016 document from the Harvard Law School Criminal Justice Policy Program titled, Moving Beyond Money: A Primer on Bail Reform, which discusses issues directly pertaining to current state laws;
4. the American Bar Association Standards on Pretrial Release, which provide concrete recommendations for pretrial practice supported by law and research; and
5. the District of Columbia and Federal bail statutes, which follow the substance of the ABA Standards and can act as preliminary model statutory templates for state laws.

In particular, understanding these latter statutes and the parallel American Bar Association Standards will help the analyst see how a model legal scheme can follow the history, law, and pretrial research that together make a compelling case for an in-or-out system of release and detention. These preliminary resources provide the basic foundational knowledge necessary to identify pretrial issues. An annotated bibliography, with these

and other recent resources, is provided at the end of this guide.³

Accordingly, the analyst will need to undertake supplemental research—especially concerning the fundamentals of the legal foundations and relevant social science research findings—to remain current with the issues. A good starting point will be the Pretrial Justice Institute’s (PJI) website (which chronicles various new publications and notable court cases, for example), but amassing this information will require the researcher to do broad online searches (both through the Internet generally as well as online legal research services) within the limited time frame for any particular issue.

Overall, the true worth of the legal analysis comes not from a summary of a state’s bail-related laws; attorneys or others in any particular state may have already done that (and, indeed, such an existing summary will serve as a valuable tool for the current legal analysis.) Instead, the worth comes from the analyst’s ability to integrate his or her knowledge of pretrial issues with the law and to compare any particular state law to the laws of other states or to some normative standard based on the law and the research.

Moreover, the legal analysis can be a resource to help address specific jurisdictional needs. For example, as a part of their Smart Pretrial work, officials in Yakima County wanted to know which existing state laws might hinder legal and evidence-based pretrial practices, and how to adopt these practices despite the legal hindrances. While they had little immediate control over changing state law, knowing the legal boundaries helped them to assess and craft an aggressive local plan, and even to raise issues later at the state level. The Delaware Smart Pretrial team was in the position of being

able not only to understand which laws hindered pretrial improvements, but also to potentially change those laws more easily because the entire state was engaged in bail reform.

Bail Laws in General

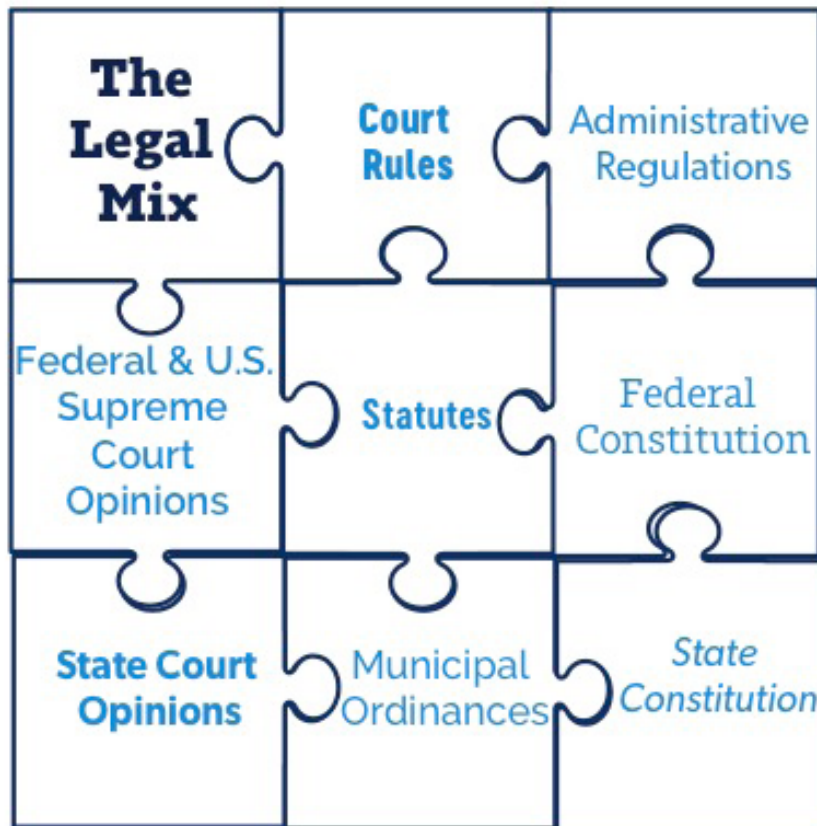
Before embarking on the research, the analyst must consider three key characteristics of bail laws generally. The first is that **the law and the history of bail are intertwined**, and thus knowledge of the history of bail is crucial to understanding a state’s bail laws. For example, knowing about the two previous generations of bail reform in the United States in the 20th Century will allow the analyst to understand why certain state statutory provisions were enacted during those periods as well as to fully understand why secured money bonds should not be a part of an ideal pretrial system. Knowing historical notions equating bail with release will likewise allow the analyst to understand why courts issue opinions favoring the release of bailable defendants and striking pretrial practices resulting in the unintentional detention of bailable defendants.

The second characteristic is that that **each jurisdiction has its own “mix” of sources of laws, making a true comparison of states difficult**. The mix is comprised of the federal constitution, state constitutions and statutes, state and federal court (including the U.S. Supreme Court) opinions, court rules, municipal ordinances, and administrative regulations. A single aberrational provision can have a profound effect on any particular state’s practices. Moreover, some of these provisions may be difficult to spot. For example, in Colorado, a single Colorado Court of Appeals opinion, written by a single panel of the appellate court with no binding authority on any

other panels of the same court, still affects bail practices across that state. For the legal analyst, it is crucial to articulate the interrelationship among the jurisdiction’s various laws, and it is helpful to know other jurisdiction’s legal combinations for context.

The third characteristic to consider is that **case law concerning bail is exceedingly sparse compared to case law addressing other legal topics**, such as criminal punishment. Normally, sparseness in a legal field makes it easier to scrutinize the law to help one more

closely follow the limited number of opinions that do exist. In bail, however, jurisdictions have historically been inclined not to follow those opinions. For example, in *United States v. Salerno* the United States Supreme Court gave the federal system and the states important guidance on how to do “no bail,” or detention, in order to follow basic concepts of due process. Nevertheless, many states have enacted “no bail” provisions or engage in detention practices that would fail if held up to *Salerno’s* clear language.⁴ The fundamental point is that the analyst should never assume that a state or local law is proper simply because it exists.



ESTABLISHING A NORMATIVE STANDARD

ESTABLISHING a normative standard—that is, an objective, ideal, and optimally universally correct standard—against which to gauge bail laws is crucial to a pretrial legal analysis. That normative standard can come from various sources; indeed, simply holding the state and local laws to the broader fundamental legal principles might be enough of a standard from which to judge any particular law. For example, a fundamental legal principle articulated by the U.S. Supreme Court is the notion that bail not be arbitrary and must thus use individualizing factors to separate different release treatments for different defendants.⁵ That notion, alone, might lead the analyst to conclude that any law requiring a so-called “blanket” condition of release—such as secured money conditions or even non-financial conditions for all defendants charged with one particular offense—would fall short of any ideal based on fundamental legal principles.⁶

Alternatively, a normative standard might be created from an understanding of the pretrial research—assuming, of course, that legal boundaries are followed. If so, the analyst might conclude that a state law requiring judges to consider subjective factors at bail is inferior to a law encouraging or requiring the consideration of empirical risk assessment, which the research has shown to be superior to clinical assessment.

Using the pretrial research and the law together to form a comprehensive framework for pretrial release and detention is the essence of the ABA Standards on Pretrial Release and, accordingly, those Standards are likely the best normative standard that the analyst can use for virtually all pretrial issues.⁷ For example, the ABA Standards contain detailed provisions for establishing “no-bail,”

or detention, processes that involve an in-or-out system that is transparent, fair, and based on the law and pretrial research. Comparing a particular state's law to the ABA Standards can allow the analyst to quickly determine whether the state has or uses such an in-or-out process, and whether that process contains the sort of procedural due process protections necessary to make it fair.

Note, however, that in some instances the ABA Standards are slightly dated, and so the analyst's knowledge of current pretrial research will need to supplement them. For example, the ABA Standards' provisions dealing with secured financial conditions of release still tolerate those conditions despite growing evidence that they are historically flawed, lacking in empirical value, and often violate fundamental legal principles.

Merely holding up one state's laws to other states' laws or using existing state laws for a normative standard is not sufficient for this kind of legal analysis, however, except to give context, some idea of language variation, or some limited sense of prevalence. Few states have laws that have fully adopted legal and evidence-based practices in pretrial release and detention. For example, using other state laws as a normative standard might lead one to assume that commercial surety bonds are a reasonable form of limiting pretrial freedom. Nevertheless, it is important to recognize—from whatever other normative standard is developed—that legal and evidence-

based methods are fairer and more objective and they result in better outcomes than commercial surety bonds as a method for determining pretrial release.⁸ Moreover, even today, when jurisdictions adopt legal and evidence-based practices that reduce the use of secured financial conditions at bail, legislatures may occasionally be persuaded by moneyed interests to create laws

designed to counter these practices by furthering the use of secured financial conditions. For these and other reasons, existing state laws, even when reflecting what might be considered widespread practice, are considered poor sources for a normative standard for best pretrial practices.

Overall, knowing the pretrial issues and having normative criteria by which to gauge the substance of bail laws will give the analyst the ability to answer what is often a jurisdiction's most frequently asked question: how do our laws “stack up” to other state laws in the context of a normative ideal? Broadly speaking, those legal schemes that come closer to the in-or-out system contemplated by the ABA Standards and manifested in the District of Columbia and Federal bail statutes will likely be deemed “better” than those that do not.⁹ More particularly, those that are closely aligned with the ideal for all pretrial issues will be better than those that line up only with some.

“Few states have laws that have fully adopted legal and evidence-based practices in pretrial release and detention.”



THE PRETRIAL ISSUES

AFTER getting up to speed on the basics of pretrial release and detention and establishing some aspirational normative standard from which comparisons or substantive evaluations can be made, the analyst should develop a list of pretrial issues unique to the jurisdiction being studied. The analyst should also create an initial list of broader, overarching issues likely to manifest during the search. The list of particularized or discreet pretrial issues will differ between jurisdictions, but the following list of issues is one typically found in most jurisdictions and can serve as a starting point in the legal analysis:

- Statements of purpose in the laws;
- Definitions of key pretrial terms and phrases, especially “bail;”
- Citations versus arrests and summonses versus warrants;
- Money bail bond schedules (if applicable);
- Compensated sureties (if applicable);
- Pretrial diversion options/programs;
- Specialty courts (drug court, mental health court, veterans’ court, etc.);
- Pretrial services programs/agencies and functions or limitations;
- Other delegated release authority (if applicable);
- First appearances—promptness;
- First appearances—nature of the proceeding, including defense and prosecution functions;
- Detention eligibility and process;
- Statutory provisions dealing with either release or detention for particular cases or circumstances (e.g., mental illness, veterans, methamphetamine cases);
- Release eligibility and process, with special emphasis on the use of money at bail (this is typically the most significant

- issue and it often requires the most work);
- Monitoring defendants during the pretrial phase and responding to compliance and violations for released defendants;
- Appeals;
- Data collection and performance measurement;
- Transferring data to sentencing courts; and
- Victim issues.

In addition to these particularized issues in pretrial release and detention, the analyst must also look for broader or overarching issues that the jurisdiction might have, such as whether a state Supreme Court case significantly affects how bail is set, or whether the state constitutional bail provision hinders implementation of legal and evidence-based practices at bail. To find the broader issues, the analyst must examine the main bail-related provisions in the constitution, statutes, court rules, as well as court opinions discussing those provisions, and assess them broadly for

- How the state determines its “bail/no bail” (release/detention) dichotomy based on its right to bail and eligibility for detention;
- How the state (or other relevant jurisdiction) broadly implements its “no bail” or detention process;
- How the state (or other relevant jurisdiction) broadly implements its “bail” or release process, including how it assesses and manages risk;
- Whether the state (or other relevant jurisdiction) has other provisions considered to be best-practice provisions based on the history, legal foundations, national standards, and pretrial research; and
- Whether the jurisdiction’s law, practices, or even culture points to other transcen-

dent pretrial justice issues, such as an overall lack of bail education, how the court rules and statutes interact, or the impact of special pretrial populations.

After thoroughly researching the constitution, statutes, court rules, local laws (when necessary), case law, and other materials, the analyst should then assess each of these potential issues for inclusion in the analysis, identify additional broad and particularized issues revealed by that research, and then prepare to assess the laws surrounding the revised list of broad and narrow issues.

Each jurisdiction will have its own broad, overarching issues, though they may not be clear until the research is complete. For example, from the case law through history, one might glean an overall tendency for a state's appellate courts to define bail or discuss pretrial release in ways that uphold notions of facilitating the release of bailable defendants. This issue is important, as it can lead to future opinions striking laws that allow for the detention of bailable defendants or otherwise impinging upon the right to bail. As another example, many states have constitutional or statutory right to bail language and other release provisions that are based on criminal charge and not risk of pretrial misbehavior, and this issue often transcends all other conversations about legal structure and change because a pillar of current pretrial reform today concerns replacing a charge-based system with one informed primarily by empirical pretrial risk. Finally, in many states the analyst might find "other materials" about bail—from a variety of sources, including state crime commissions and other official committees—and find that these materials are crucial to the state's current understanding of bail. The analyst may find it necessary to comment on these materials as a broad, overarching issue, since criminal justice practitioners may use the materials frequently

during discussions about bail hearings.

Each jurisdiction will also have certain particularized issues that require more urgent attention than others. For example, one jurisdiction might struggle mostly with secured financial conditions and have statutory provisions that hinder the use of legal and evidence-based practices in this area. Another jurisdiction might struggle primarily with issues at first appearance, including promptness and attorney representation. Still another might have acute difficulties with appellate review of release or detention decisions. At the end of the legal analysis, the analyst should address all issues and focus specifically on the primary issues facing any particular jurisdiction and give concrete recommendations, consistent with legal and evidence-based practices, designed to address each issue. Thus, the overall goal of this preliminary process is to start with some template of issues to guide the research, but then to let the research ultimately create the final list and to guide which issues are most important.

Finally, the analyst may also uncover issues considered somewhat tangential to the pretrial release and detention decision and that are not necessarily covered by the various resources the analyst uses (such as the ABA Standards), but which are very important to the overall picture of pretrial justice and can have a dramatic impact on a jurisdiction's pretrial population. These laws might include various diversion statutes operating beyond traditional pretrial services programs; law enforcement deflection; crime prevention laws; laws establishing various criminal justice coordination entities and planning functions; training options, such as crisis intervention team training; and treatment options for persons in the criminal justice system.

Assembling a Universe of Material

ONCE the analyst has become knowledgeable about pretrial issues and has established some defensible normative standard for purposes of comparison, he or she should assemble a universe of material that covers each of roughly five key areas:

1. the state's constitutional provisions;
2. the state's statutes and court rules;
3. the case law;
4. any relevant local laws or administrative regulations; and
5. any other relevant material.

Creating a universe of material for any particular jurisdiction often requires redundancy to ensure that misinterpretation is minimized or eliminated. The analyst must check multiple sources to be assured that the substance of the law or other materials has been captured and that the nuances of the law are fully understood. Available resources will necessarily shape that redundancy. For example, it can be exceedingly helpful to have access to full subscription and searchable versions of an online legal research service. There are also free Internet-based legal databases that are equally reliable and authoritative. Some states keep their own versions of legal documents, but beware of websites that can be either less-than-authoritative or out-of-date. It is good practice to compare findings through several online legal research services to some other authoritative source and at least one additional source, such as a criminal procedure treatise or law review article, to capture the subtleties and applications of the law.

The only major exception to this is case law, which

is best researched through an online legal research services for lawyers and legal professionals. There are also various online resources and collections produced by a growing number of prominent law schools. The overall goal is to check enough sources to make sure that the analyst's statements about any particular source of law are as accurate as possible within the time frame allotted for the assignment.

Finally, persons who live in the jurisdiction being studied should ideally shape the research process. Having a local attorney or other person who is knowledgeable in pretrial laws and who can guide the analyst to relevant statutes, rules, and cases, is invaluable to the overall analysis. Indeed, the analyst may learn about the "one" case or statutory provision that causes the most problems simply by asking as many local criminal justice practitioners (e.g., judges, prosecutors, defense attorneys, detention officials, pretrial services directors) as possible.

Constitutional Provisions

A state's constitutional bail provision often dictates aspects of the administration of pretrial release and detention. Each state typically has an excessive bail clause, which usually mirrors the federal constitutional excessive bail provision. Moreover, each state constitution will likely contain clauses with language similar or equivalent to other major federal constitutional provisions—such as due process and equal protection—which affect the administration of bail depending on how either

federal or state case law has molded them. Also, a state’s victims’ rights provision, if in the constitution, may or may not align with best practices depending on its content. By far, however, the constitutional provision with the most meaning in contemporary bail reform is any particular state’s “right to bail” provision.

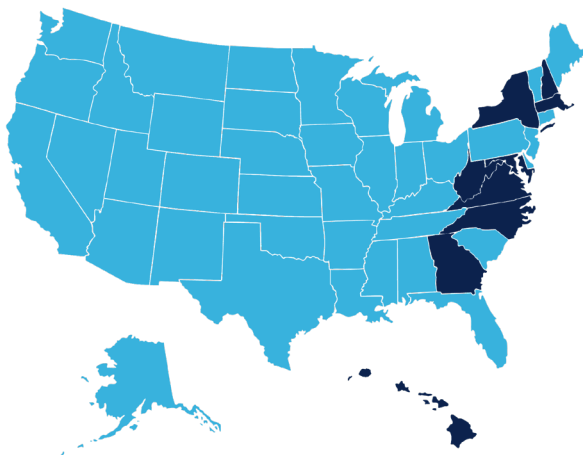
One should think of a state’s “right to bail” provision (which, if not found in the constitution, is typically in its statute) as its “bail/no bail” dichotomy: It establishes the release and detention eligibility roughly in the form of some ratio that is manifested through particular practices. While all bail schemes follow a “bail/no bail” or release/detention dichotomy, the Fundamentals of Bail paper (listed in the bibliography) describes how legal scholars have grouped state constitutional right

to bail provisions into three primary categories, which is current at the time of this writing:

1. states having no right to bail in their constitutions (nine states, akin to the federal system under the United States Constitution);
2. states having “broad” or “traditional” right to bail provisions (now approximately 19 states, modeled after the Virginia law of 1682);
3. states with constitutional “right to bail” provisions that have been amended since the 1980s to provide for additional preventive detention that is typically (but not always) charge-based and often premised on public safety (now approximately 22 states).

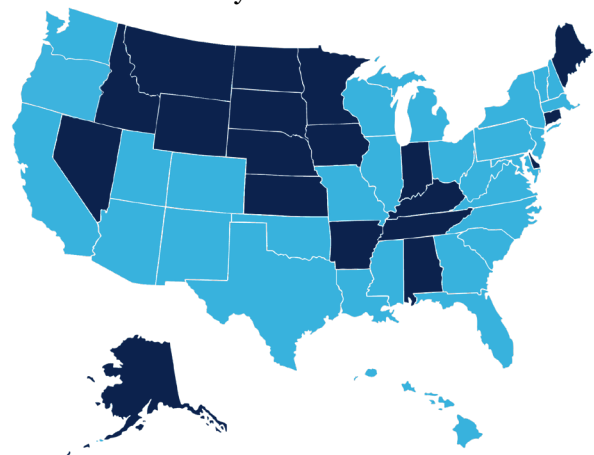
9 STATES WITHOUT CONSTITUTIONAL RIGHT TO BAIL

- Georgia
- Hawaii
- Maryland
- Massachusetts
- New Hampshire
- New York
- North Carolina
- Virginia
- West Virginia



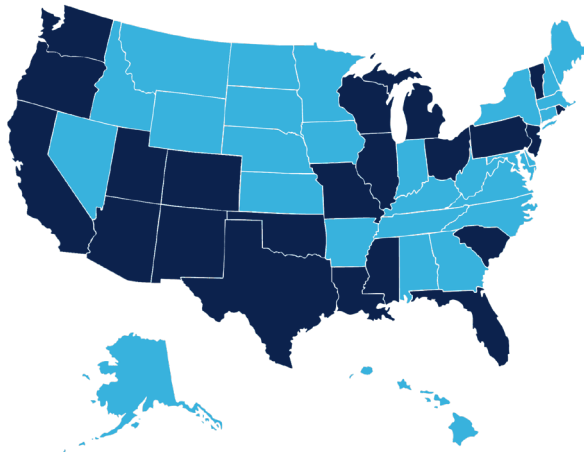
19 BROAD RIGHT TO BAIL STATES

- Alabama
- Alaska
- Arkansas
- Connecticut
- Delaware
- Idaho
- Indiana
- Iowa
- Kansas
- Kentucky
- Maine
- Minnesota
- Montana
- Nebraska
- Nevada
- North Dakota
- South Dakota
- Tennessee
- Wyoming



22 AMENDED PROVISIONS STATES

- | | |
|-------------|----------------|
| Arizona | Ohio |
| California | Oklahoma |
| Colorado | Oregon |
| Florida | Pennsylvania |
| Illinois | Rhode Island |
| Louisiana | South Carolina |
| Michigan | Texas |
| Mississippi | Utah |
| Missouri | Vermont |
| New Jersey | Washington |
| New Mexico | Wisconsin |



The analyst will find it helpful to be familiar with these groupings and their ramifications, with the understanding that even a broad “right to bail” provision (such as one giving all persons the right to bail except for capital offenses) is technically a form of preventive detention, usually enacted to

address extreme or unmanageable risk of flight. In modern pretrial reform, states are beginning to seek changes to their right to bail provisions to incorporate what we have recently learned about empirical pretrial risk. Indeed, across the country, antiquated constitutional provisions based on old assumptions tying pretrial risk to certain charges is likely the biggest issue facing any jurisdiction wanting to create a more rational and effective bail system based on risk.

Finding the relevant constitutional provision seems straightforward, but there are some caveats. “Right to bail” provisions are typically found in a section dealing with the declaration of rights, but may also be embedded into victims’ rights provisions, making a thorough examination of all constitutional provisions through multiple sources necessary. Also, errors are known to exist in more than one Internet source, and so the analyst must also carefully check the substantive language. Finally, in at least three states (e.g., Colorado) the statutory “bail/no bail” eligibility dichotomy is different from the dichotomy set out in the constitution. This requires more research to flesh out, but it can be due to a legislature unconstitutionally enlarging the class of defendants who may be denied bail. Getting the constitutional provision wrong undermines the credibility of the entire legal analysis, and so the analyst must take extraordinary care to understand the state’s constitutional “right to bail” provision.¹⁰

A well-informed and open discussion of a state’s constitutional “right to bail” provision and its ramifications on legal and evidence-based practices at bail is crucial to pretrial reform. While it is desirable to “categorize” a state’s constitutional provision, it is often more desirable to fully explain the notion of the release/detention dichotomy (which all states have), and to show how changing those

dichotomies using legal and evidence-based knowledge might be a necessary first step toward achieving pretrial justice.

Statutes and Court Rules

Second only to the state constitutional provisions are the state statutes and court rules dealing with pretrial release and detention. A prerequisite to researching these sources, however, deals with the issue of supremacy between them. States vary in how court rules interact with state statutes, and so one must first determine what that interaction entails. **Some court rules concerning bail actually trump conflicting state statutes (e.g., New Mexico and Washington)**, an important fact to keep in mind when analyzing a state's legal scheme. Discovering this involves using mostly secondary source research or asking people from the jurisdiction to provide guidance to the appropriate primary sources, as they are often difficult to find. Resources like Reinhart and Coppolo's *Court Rules in Other States*,¹¹ or others like it, can serve as a starting point for understanding the interplay in any particular state, but the analyst will likely have to consult more than one source to articulate a definitive answer.

To achieve legal and evidence-based pretrial practices, it may actually be desirable for court rules—which, in most states lie outside of political and corporate influence—to supersede conflicting state bail statutes. Even when they are not supreme, however, court rules can serve both as important provisions to fill in gaps (e.g., they could create a mandatory presumption for release on recognizance when the statute only provides the option), or as provisions hindering legal and evidence-based practices (e.g., they might require the use of a monetary bail bond schedule to implement statutory directives about money). Occasionally, a court rule might conflict with case law (discussed briefly below), requiring a different analysis to determine its substantive validity.

While the analyst can research statutes or rules through hardcopy annotated laws and similar books found in various law schools or libraries, he or she is more likely to research these things online. Most states have authoritative sites that compile statutes and court rules,¹² but the best starting point for this research is through an online legal research service, using other sources for purposes of at least minimal redundancy. It is often also helpful to begin with secondary sources simply to give an idea of where the main bail provisions are found. For example, are they mostly in Title 17? Do some sources list both Title 17 and court rules? Or do sources list multiple titles? These initial determinations can keep the analyst from wandering too far off track. Finally, if dealing with a municipality, the analyst will have to find the relevant code, and these codes are not always online.

When analyzing a universe of bail laws from a statutory database, it is beneficial to go systematically through nearly the entire substantive criminal law and criminal procedure sections of any particular jurisdiction. Most states have a main bail section, but often many of the pretrial issues are addressed in other sections of the statutes. For example, and as noted previously, issues concerning the issuance of citations in lieu of arrest by police are not typically in the main bail section, but are often found in other portions of the criminal procedure

laws dealing with arrests. Still other provisions dealing with articulated pretrial issues might be found in sections dealing with courts, with counties and municipalities, with criminal appeals, or with even more tangential topics. Finding definitions dealing with “bail” and “no bail” can be especially frustrating, as those definitions might not be in the main bail section, and instead might be found in general statutory provisions or even the insurance code provisions dealing with regulation of commercial bail bondsmen.

“Finding definitions dealing with ‘bail’ and ‘no bail’ can be especially frustrating, as those definitions might not be in the main bail section.”

Searching the main substantive criminal law provisions for bail references can seem daunting and even unnecessary, but many states add lines to particular substantive criminal laws dealing with bail for those particular crimes. A search function can help, but one must be sure to search multiple terms besides merely the term “bail.” For example, a substantive law dealing with drug manufacturing might include a line dealing with bail, but the law might phrase that line by using the words “release,” or “bond.” As a very general rule of thumb, most states that have decided to add bail provisions to substantive criminal laws have done so primarily for extremely serious crimes. A search of certain offenses such as murder, attempted murder, sexual assault, kidnapping, etc., may help uncover bail-related provisions outside of the main bail section. If provisions dealing with bail for those “serious” crimes cannot be found, they are unlikely

to be found for “lesser” offenses.

A comprehensive compilation of bail laws that includes substantive bail provisions in addition to bail industry regulatory laws can be found on the website of the National Conference of State Legislatures (NCSL). Through it, the analyst can get a very good idea of where, exactly, the laws exist for a variety of pretrial issues and may use it as a beginning resource. The NCSL is continually revising and updating the database, but given the intense interest in bail laws, and recognizing the desirability of research redundancy, this database should not be used exclusively.¹³

Good secondary sources, such as treatises on criminal procedure outlining the statutory provisions, are particularly useful but—as mentioned before and for a variety of reasons—should not be used exclusively to assemble the universe of materials.

It is also helpful to compile all relevant statutory and court rule provisions dealing with pretrial issues into one document for reference. This document can easily reach over one hundred pages, but it will be useful for drafting analyses and for future reference. One simplifying strategy in the analysis, which will undoubtedly lead to a smaller reference document, is to exclude statutes and rules related to commercial sureties. Because the use of commercial sureties leads to an enormous number of pages dedicated to the laws dealing with regulation, forfeitures, exonerations, and other provisions dealing with the industry, the analyst’s recognition that these laws and rules rarely have any impact on foundational bail law will undoubtedly impact the universe of materials. Unless a jurisdiction is particularly persistent in knowing the details of laws concerning the regulation of the commercial bail industry, following legal and evidence-based

practices using virtually any normative standard likely means ceasing to use that industry as it currently exists. By excluding its consideration, one can keep the size of the research manageable.

Case Law

Case law is an important part of any legal analysis, but because finding and analyzing case law is the most time-consuming part of any pretrial legal analysis, it is the one topic most likely to be incomplete. This should not be a surprise, and no jurisdiction should expect the analyst to find and analyze every relevant bail decision. Even though bail opinions are relatively rare compared to opinions dealing with other criminal justice issues—such as probation or other sentencing options—the analyst will often have to sort through hundreds of bail cases to find anything of value. While some online legal research services are available for free, for the purposes of accuracy, reliability and expediency, the bulk of state and local case law research is best accomplished through more established legal research database options, most of which are fee-based.

As a prerequisite to researching state cases, the analyst must know how a particular state’s judicial system is organized. States vary in defining their individual court levels, and it is important to know the function of each court level and how each level operates within the overall process of bail-setting or appeal. Moreover, when it comes to researching case law, knowing what to discard is as important as knowing what to keep. For a number of reasons, including expediency, a good strategy is to focus only on state supreme court (highest court) or intermediate appellate court opinions, with the occasional trial court opinion (when issued) or the occasional federal court



opinion applying a state's bail laws only if those opinions are especially relevant.

When researching bail case law, the analyst should look for a variety of themes. For example, it is helpful to know how the courts have defined bail and the purposes of bail over time, so the analyst should perform searches (such as “bail/s purpose” or “pretrial/s purpose” or even “bail is”) designed to learn the courts’ various definitions and articulated purposes evolving through time. Also, it is useful to know how state courts deal with certain fundamental legal principles at bail, such as due process, equal protection, or excessive bail, and so searches designed to learn about these principles could also yield fruitful results. If one has the time, certain search terms and phrases, such as “ABA Standards,” or “Stack v. Boyle” or “Salerno” (the latter two being the two primary United States Supreme Court cases dealing with bail) should be run to see if the state courts have referenced or discussed those Standards or cases. Finally, the analyst should quickly scan multiple cases using basic search terms such as “bail” or “pretrial release” for relevance. Ironically, it is the relative scarcity of bail opinions that makes such a quick scan even possible. The more state appellate courts fully flesh out their bail jurisprudence, the more that jurisprudence becomes difficult to assess.

Any case explaining bail in any detail is worth saving and using in a legal analysis, but the primary reason for case law research is to determine: (1) general themes; and (2) whether there are any key cases that either dramatically help or hinder what are known to be legal and evidence-based practices in pretrial release and detention. Finding those themes and those key cases, if they exist, requires a number of different search terms and phrases, depending on the courts in question.

ANALYST'S CHECKLIST

1. Get up to speed on the basics
 - Visit www.pretrial.org which holds the most comprehensive pretrial-related library
 - Read the NIC publication, *Fundamentals of Bail*
 - Read ABA and other professional organizations' standards
 - Research key statutes
 - Research findings and methods of current reforms efforts
2. Establish a normative standard
 - Start with ABA Standards as a baseline
 - Avoid using existing laws as a standard
3. Create a list of pretrial issues, broadly and unique the jurisdiction
 - Start with suggested list from this manual
 - Edit this list using localized information from the jurisdiction in question, including recent rulings, interviews, etc.
4. Assemble a universe of materials
 - State's constitutional provisions
 - State's statutes and court rules
 - Case law
 - Relevant local laws or administrative regulations
 - Other relevant material
5. Write the analysis

CASE STUDY: YAKIMA COUNTY, WA

In 2015, Tim Schnacke, Executive Director of the Center for Legal and Evidence-Based Practice (CLEBP), completed a legal analysis for Yakima County, Washington, for the jurisdiction's Smart Pretrial work. Mr. Schnacke used the process described in this manual to perform his analysis.

Mr. Schnacke was provided approximately 20 days to complete the research and writing. The end product was a 67-page document comparing the various state and local laws to his normative standard, and then making recommendations as to how the local jurisdiction might attempt to implement legal and evidence-based practices given the existing local, state, and federal law. Since Mr. Schnacke had many years of experience researching and writing about bail and pretrial legal issues, he had no need to get up to speed on the basics (step 1) of the topic. Likewise, he had already developed a normative standard (step 2), which was based primarily on the law, the existing pretrial research, and the ABA Standards, augmented by his knowledge of all other state bail statutes and constitutional provisions.

Starting the project, Mr. Schnacke had in mind his list of pretrial issues, both broad and unique to Yakima County (step 3)—including some that were required by Smart Pretrial—and he was working with one or two local people, who forwarded him documents about bail, as well as a formal secondary source in the form of a treatise on criminal procedure. As he progressed, he

continued on next page

For example, and as noted previously, in a legal analysis for Colorado, the analyst discovered a single Colorado Court of Appeals bail-related opinion that affected pretrial release and detention practices in fairly significant ways.¹⁴ Likewise, in several states the state Supreme Court may have explained the meaning of certain constitutional phrases, such as “sufficient sureties,” leading to an opinion with the potential either to dramatically help or hinder best practices. The analyst is looking primarily for these key cases that have some significant effect on the administration of bail. While it is helpful to know how a state Supreme Court articulates the definition or purpose of bail, that court's statement of purpose might quickly change with a simple alteration to the statute. Key cases, on the other hand, have the kind of opinions that are not easily overturned and that require in-depth analysis to help jurisdictions adopt legal and evidence-based practices based on the law and pretrial research.¹⁵

After spending some time with a jurisdiction's relevant case law, the analyst may quickly learn that there are only a few bail cases that are used repeatedly for a variety of topics. If the same cases are seen over and over, through multiple redundant research tools (such as a few online legal research services, annotated statutes, secondary sources, and local expertise), they are likely the most relevant bail cases to the jurisdiction.

It is helpful to read and analyze cases chronologically to develop insight into how the courts have progressed or regressed in their general bail jurisprudence. Moreover, with time, the analyst can even construct a “statement of bail standards.” This is a statement of the various articulated standards for bail cases—the sort of standards typically written by an appellate court prior to discussing the substantive legal issue—that can, in turn, be analyzed for



Yakima—continued

would ask these local people various questions about how pretrial decisions were routinely made in court, and they would find or attempt to find the answers by asking other local stakeholders.

Mr. Schnacke began to assemble a universe of materials (step 4) by using several sources to compile in a single document all relevant constitutional, statutory, and court rule provisions. In his document summarizing the interplay between statutes and rules, he read that Washington was a state in which the court procedural rules supersede conflicting state statutes. That led to more research where this was confirmed, and where he learned that the State Supreme Court had ruled that bail was a procedural matter; accordingly, the court rules in this particular analysis became paramount. Indeed, knowing this issue in advance helped him to better understand the statute, as there were many big statutory gaps that were obviously being filled by the rules.

Mr. Schnacke then spent approximately four days reviewing case law online at a local law library, running a variety of searches and saving those cases that did a decent job of articulating or explaining whatever issues that he believed were relevant. During this broad search, he learned many things that made their way into the analysis, such as how the courts had defined bail over the last 100 years, how they described the purpose of bail, and how they dealt specifically with his identified issues. However, he was primarily looking for “key” cases, which tended to somehow help or hinder the way bail was being practiced in Washington. In fact, he found such a case, decided by the State Supreme Court in 2014, and it became a major part of the

their tendency or lack of tendency to follow fundamental legal principles. For example, in 2009, after studying the Colorado Supreme Court’s various bail opinions, a legal analyst constructed the following statement of standards, which was augmented by certain federal standards to fill gaps:

The Colorado Constitution states that “[a]ll persons shall be bailable by sufficient sureties except for capital offenses, when the proof is evident or the presumption great.” Colo. Const. Art II, §19. “This court has held that the quoted constitutional provision confers an absolute right to bail in all cases, except for capital offenses, where the proof is evident and the presumption is great that the accused committed the crime.” *Gladney v. Dist. Ct.*, 535 P.2d 190, 191 (Colo. 1975) (citing *Orona v. Dist. Ct.*, 518 P.2d 839, 840 (Colo. 1974)). “The mandate of the constitutional provision is that persons charged with offenses are bailable with the one exception mentioned. The mention of the one exception excludes other exceptions.” *Palmer v. Dist. Ct.*, 398 P.2d 435, 437 (1965) (internal citations omitted). However, “[n]either the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial.” *People v. District Court*, 529 P.2d 1335, 1336 (Colo. 1974) (quoting *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964)). Hence, further exceptions to, or limitations on this general right to bail, such as those found in Article II, Section 19 of the Colorado Constitution or Section 16-4-101, C.R.S. 2008, may be constitutionally permissible. *See* Colo. Const. Art. II, § 19(1); 16-4-101(1), C.R.S. 2008. Nevertheless, the Supreme Court has warned that “[u]nless this right to bail is preserved, the

continued on next page

Yakima—continued

analysis. After writing a draft of the analysis, certain holes led him to return to the case law, once again, to find the answers to these additional questions.

Writing the analysis (step 5) took approximately the same amount of time he had devoted to research. The value in this type of analysis is not from summarizing the law; such summaries, often accurate and comprehensive, may have already been done by someone local. Instead, the value is in the analyst’s ability to identify the issues, compare the laws to some normative standard, and then make recommendations based on that knowledge. A simplifying factor in all pretrial legal analyses is that most states today are facing the same essential issues with their laws: Moving from a charge- and money-based system to a risk-informed system less reliant upon money means that virtually all bail laws in the United States are in need of revision for primarily the same reasons.

This was the case in Yakima County, Washington, where the state constitutional right to bail provision based on charge, coupled with a supreme court opinion requiring a third-party surety option for any bond having a secured financial condition, caused some concern among criminal justice officials who recognized that a transition to a risk-based pretrial system might be achieved only by amending the state constitution. Nevertheless, because stakeholders in Yakima County were not necessarily in the position to make immediate changes to the laws, the legal analysis focused more on how that jurisdiction could implement legal and evidence-based practices at this time, despite the legal hurdles.”

presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *L.O.W. v. Dist. Ct.*, 623 P.2d 1253, 1256 (Colo. 1981) (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). Finally, “[t]he right to bail does not amount to a guarantee that every defendant who is charged with a crime will be released without bail if he is indigent.” *People v. Jones*, 489 P.2d 596, 599 (Colo. 1971).

“The burden of proof, of course, rests with those opposing bail.” *Orona*, 518 P.2d at 840; accord *Gladney*, 535 P.2d at 191 (“[T]he burden is upon the prosecution to show that the constitutional exception to the right to bail is applicable; and only with that showing can the conditional freedom secured by bail properly be denied.”). “The mere fact that an information has been filed – or for that matter that the defendant has been bound over for trial – is not equivalent to a determination that the proof of guilt is evident or the presumption great.” *Orona*, 518 P.2d at 840; see also *Goodwin v. Dist. Ct.*, 586 P.2d 2, 3 (Colo. 1978) (“[T]he fact that charges may have been made that the offense allegedly committed by defendant is a capital offense which meets the constitutional standard for denial of bail does not satisfy the prosecution’s burden.”) (citing *Shanks v. Dist. Ct.*, 385 P.2d 990 (1963)); *Lucero v. Dist. Ct.*, 532 P.2d 955, 957 (1975) (“The mere filing of an information or the production of evidence which would establish probable cause that the crimes charged were committed will not meet our constitutional standard.”). “By definition, the standard which the constitution requires before bail may be denied is greater than probable cause – though less than that required for a conviction.” *Orona*,



518 P.2d at 840 (citing *In Re Losasso*, 24 P. 1080 (1890)). “In a bail hearing, guilt or innocence of the accused is not the issue.” *Gladney*, 535 P.2d at 191. Nevertheless, pursuant to Statute, the “likelihood of a conviction and the possible sentence” is a proper factor for the court to consider (see Colo. Rev. Stat. 16-4-105(1)(h)). At least in capital cases, “when the proof is evident or the presumption great, denial of bail is mandatory.” *Goodwin*, 586 P.2d at 3 (Colo. 1978) (quoting *People v. Dist. Ct.*, 529 P.2d 1335, 1336 (Colo. 1974)).

“If evidence of the proper nature and kind is not presented by the district attorney, ‘it is incumbent upon the court, looking to the guidelines laid down in our new statute and in the case of *Stack v. Boyle*, to set reasonable bail in compliance with our Constitution and the Eighth Amendment of the Constitution of the United States.’” *Lucero*, 532 P.2d at 957 (quoting *Dunbar v. Dist. Ct.*, 500 P.2d 358, 359 (Colo. 1972)) (internal citations omitted). “A trial court may revoke or modify bail, but in doing so, it must comply with the provisions of [the bail statutes].” *Stephenson v. Dist. Ct.*, 629 P.2d 1078, 1079 (Colo. 1981).¹⁶

It is not always possible to create such a fully fleshed statement of bail standards because many states lack bail cases dealing with anything more than the most basic of bail issues. Moreover, and as mentioned previously, this takes time; indeed, the very nature of case law (with often lengthy opinions describing the various courts’ analyses) requires additional time to review and digest even a single case. Finally, such a statement often leads to additional questions, such as why certain funda-

mental articulations of the law conflict with other articulations or are seemingly inaccurate when viewed as a whole.

Local Rules and Laws

Depending on the assignment, the analyst may find it necessary to research local rules or laws, if only to answer questions raised by research from other sources. However, local materials can be harder to find than state statutes, for example, and so local experts will be useful to guide the research. In Yakima County, Washington, the legal analysis performed as a part of its Smart Pretrial work required looking at local court rules in addition to state rules because the project was designed to help that county assess all of the laws helping or hindering the legal and evidence-based local administration of bail. Likewise, pretrial justice stakeholders in the City and County of Denver, Colorado’s Smart Pretrial site had specific questions about Denver’s municipal code and possible conflicts with state statutory amendments. On the other hand, because the Smart Pretrial stakeholders in Delaware were involved as part of an entire state acting as a demonstration site, those stakeholders were interested primarily in state law, how Delaware’s law compared to other state’s laws, and how they could be changed to better reflect legal and evidence-based bail pretrial practices.

Depending on the request and the issues the analyst has been asked to assess, it may be necessary also to look into administrative rules and regulations, and these resources can provide important information, such as defini-

tions of key terms and phrases. For example, one key recurring question for all legal analyses is the question of whether money may or may not be forfeited for anything but a defendant's failure to appear for court. The answer to that question helps the analyst to assess other laws that, for example, hint at using money to achieve public safety—a seemingly ineffective use of money if it cannot lawfully be forfeited for that purpose. The question is important, but the answer is occasionally only answered through a review of administrative rules or regulations.

Other Materials

Other materials can give extraordinary guidance to bail law analyses. These materials come from a variety of sources, such as traditional secondary sources, bar journal articles, Attorney General Opinions, committee reports from state criminal justice committees or other organizations studying bail, articles or internal documents written by various criminal justice actors, and even descriptions of the bail process on websites. Despite some possibility of misinformation, the analyst can find information about how bail is actually practiced by sampling a number of local defense attorney websites that discuss and explain how release and detention is practiced in their jurisdictions.

Sometimes this information only confirms certain fundamental misunderstandings about bail in a particular jurisdiction. Other times, however, this information can help to answer persistent questions. For example, a recent legal analysis uncovered a court rule suggesting

that the financial condition of bond could be forfeited for reasons other than court appearance. If true, it would be an exceedingly rare, if not the only such provision in any American state that still had commercial sureties. There was no other documentation addressing the issue, and local contacts did not know the answer. Nevertheless, by reading numerous website descriptions of the bail process the analyst discovered that, in practice, money was never forfeited for anything except for failure to appear for court. Eventually, the analyst found a relatively obscure court opinion explaining why the courts would never require a bondsman to be responsible for defendant behavior, such as the kind of behavior that endangers the public. The court rule existed, but was never used.

Finally, before beginning a legal analysis, the analyst should always ask local sources of expertise for help assembling anything summarizing pretrial and detention in that particular jurisdiction—whether published or not—so as not to miss anything. This task is not as daunting as it may sound, as very few jurisdictions have such documents. Nevertheless, the analyst may uncover some gem, such as some seemingly little-known summary document, which provides an excellent discussion of the relevant issues. The best documents may be internal documents, and the most relevant bail resources may be materials that others believe to be tangential to the analysis.



THE ANALYSIS

ONCE the analyst has created a list of relevant issues, crafted a normative standard, and collected the universe of materials, he or she will begin to understand which issues are most important to a particular jurisdiction. In many cases, this will come as no surprise to local stakeholders. In other cases, the stakeholders will be surprised and perhaps somewhat enlightened by looking at release and detention in a different way. Boiling down the entirety of the research into a manageable message can take time, but the process is no different from any other legal research and writing assignment. Time constraints on the project will obviously dictate the length and depth of the finished product.

Typically, a legal analysis on pretrial issues should be documented and contain key areas, including an introduction (including any caveats or important considerations about the project); a recitation of methods or process; a discussion of the broad, overarching pretrial issues of primary importance; a more narrow discussion of the remainder of the relevant pretrial issues and how the law either helps or hinders legal and evidence-based practices for each; a conclusion; and recommendations for areas to address, including examples or ideas of strategies for consideration. These issues may be grouped in any logical manner (such as chronological as to when they occur in the pretrial process or by their perceived importance), and will likely be addressed as follows:

- An articulation of the issue (using other

sources, when necessary, to explain it fully);

- If possible, some discussion of varying language seen in other state or local laws (for example, “The better American laws articulate an explicit presumption for release on recognizance, and the worst laws actually require secured financial conditions for certain charges.”);
- A statement of what might be required or desirous by following the normative standard (for example “The ABA Standards state that . . .” or “The law and the research would point to . . .”);
- A statement of the current law for the particular jurisdiction; and then
- A discussion including recommendations about whether to keep or change the law, or how to implement pretrial improvements despite the law. The discussion generally follows the IRAC method of legal writing¹⁷ (or some slight variant of that method), which is still taught by many law schools.

In the end, if the analysis merely serves as a starting point for continued conversations, then the analyst will have succeeded. Even the best legal analyses will change over time simply because new cases will be heard, new statutes will be enacted, and new court rules will be implemented. The law is constantly changing, and so the analysis is best viewed as merely the beginning of a process designed to continually assess the law so that each jurisdiction can implement and sustain legal and evidence-based pretrial practices.



CONCLUSION

THE BEST pretrial legal analyses use the analyst's background, knowledge of pretrial issues, and some normative standard or standards to give jurisdictions sensible recommendations for implementing legal and evidence-based practices as well as for improving the laws themselves. In other words, they are not merely summaries of existing law.

As pretrial justice improvements occur, many states and local jurisdictions are learning that the law itself can sometimes thwart the implementation of best practices for pretrial release and detention. Pretrial legal analyses are therefore acutely necessary for all jurisdictions committed to substantive changes in pretrial policies or practices. However, a legal analysis is not only an essential first step toward recognizing which laws help and which laws hinder improvements. The analysis is also a catalyst, sparking additional conversations and illuminating additional steps that, over time, may affect a wide range of matters, from the broadest of pretrial legal principles to the most precise questions of language and intention.

Thanks to a strong interest in pretrial practice and broad-based efforts to improve these practices,

policy makers embarking on this process will not be moving through uncharted territory. Several national initiatives, including the Bureau of Justice Assistance's Smart Pretrial Demonstration Initiative, the MacArthur Foundation's Safety and Justice Challenge, the National Institute of Corrections' Evidence-Based Decision Making Initiative, and technical assistance provided by the Laura and John Arnold Foundation, have already been helping jurisdictions identify what works, in terms of process and reform models. A number of states, including New Jersey, Colorado, and Kentucky, have already embarked upon this path. PJI's own 3DaysCount campaign is supporting statewide reform initiatives across the nation, with the goal of setting a new national standard for pretrial justice by 2020.

Thus, while a pretrial legal analysis can help move a jurisdiction or state down the path of pretrial improvement, it need not be a lonely journey. Indeed, most jurisdictions will find that the change they are embarking upon has national consensus, and involves only proven, commonsense steps that are predicated on a firm commitment to justice and the best interests of the communities they represent.

ANNOTATED BIBLIOGRAPHY

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, (NIC 2014)—a comprehensive document intending to get all American states at the same level of knowledge when thinking about improvements to the criminal pretrial process.

Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial (NIC 2014)—a document that illustrates how the fundamentals of bail lead naturally to a particular way of looking at the judge’s release or detention decision; that is, as an in-or-out proposition, effectuated immediately and with nothing left to chance. Knowledge of the fundamentals of bail helps to explain both exemplary and less-than-exemplary statutes, rules, opinions, and other legal sources.

Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision. (PJI, at www.pretrial.org/glossary-terms)—a periodically updated list of the most common terms and phrases used in pretrial and bail law and practice. Accurate and consistent use of these terms is necessary for decision-makers’ and practitioners’ comprehensive understanding of and effective communication about pretrial justice.

American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007)—a compilation and integration of decades of American law and research into national best practice standards that can serve as the foundation for model bail laws.

Stack v. Boyle, 342 U.S. 1, 4 (1951)—U.S. Supreme Court opinion equating the right to bail with a right

to release, and holding that bail conditions higher than are necessary to ensure presence at trial are excessive and thereby a violation of the 8th amendment.

United States v. Salerno, 481 U.S. 739 (1987)—U.S. Supreme Court opinion upholding the Bail Reform Act of 1984 against facial due process and excessive bail challenges, and giving constitutional validity to public safety as a limitation on pretrial freedom.

Moving Beyond Money: A Primer on Bail Reform. (Harvard Law School, Criminal Justice Policy Program 2016)—a resource that describes basic pretrial legal principles and the practical, legal, and policy issues for states considering changing their pretrial laws to be more legal and evidence-based.

A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado’s First Judicial District (Jefferson County, Colorado 2009)—a template for direction on which issues might be relevant and how to address them, using the various pretrial issues in chronological fashion as they arise in the criminal case.

National Association of Pretrial Services Agencies Standards on Pretrial Release (3rd Ed.) (2004)—professional standards of the National Association for Pretrial Services Agencies. The standards include legal principles governing the pretrial process, types of release and grounds for detention, and functions and operations of pretrial services agencies.

Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based



Process (PJI/MacArthur 2012)—a document recommending and providing guidelines for implementing a rational and transparent risk-based bail process. The authors provide evidence that money bond, supported by the private bail bonding industry, is driving the wasteful and unnecessary pretrial detention of large numbers of individuals who could be safely released to the community. Previous and current reform efforts to replace a cash-based with a risk-based release process are discussed.

Pretrial Policy: State Laws (NCSL, at <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws.aspx>)—a resource provided by the National Conference of State Legislatures. It provides links to topic summaries and charts containing statutory provisions for each state.

State of the Science of Pretrial Risk Assessment (PJI 2011)—a summary of what the field knows about predicting the likelihood of failure to appear or new criminal activity for pretrial defendants. Summarizes the research and provides examples of existing risk assessment instruments. Discusses challenges and provides recommendations for research and practice.

State of the Science of Pretrial Release Recommendations and Supervision (PJI 2011)—partner document to *State of the Science of Pretrial Risk Assessment*, it focuses on appropriately matching release conditions to risk assessment results to effectively manage risk. The document reviews both the legalities of common pretrial release conditions and the existing evidence for the effectiveness of various risk reduction practices.

Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail (JPI 2012)—a document

that describes problems with the use of money bail and suggests more effective, just, and cost-saving alternatives. Includes thirteen recommendations, including the elimination of money bail.

For Better or for Profit: How the Bail Bonding Industry Stands in the way of Fair and Effective Pretrial Justice (JPI 2012)—provides a history and description of bail bonding, compares and contrasts the bail bonding function with that of pretrial services agencies, explains why the bail bond industry is ripe for corruption, and recommends ending for-profit bail bonding. It also details the political influence of the industry, in particular, the American Bail Coalition’s link to the conservative corporate-financed partner, the American Legislative Exchange Council (ALEC).

Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants (PJI 2015)—an issue brief explaining empirically-derived pretrial risk assessment tools, risk levels, and what the tools can tell us about forecasting pretrial success. It also describes common risk factors that appear in existing tools and discusses the challenges and limitations of risk assessment.

Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making (Federal Sentencing Reporter Vol. 27 No.4, 2015)—Discusses the use of research-based pretrial risk assessment tools to enhance pretrial decision making and improve fairness.

Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option (PJI 2013)—a study providing empirical evidence that unsecured bonds (personal recognizance with a monetary amount set) are as effective as secured bonds (surety and cash) for achieving the pretrial outcomes of public safety and court appearance. However, unsecured

GUIDELINES FOR ANALYZING STATE AND LOCAL PRETRIAL LAWS

bonds use much less jail beds than do secured bonds to achieve those same outcomes.

Washington, D.C. pretrial statute at <http://www.pretrial.org/download/advocacy/District%20of%20Columbia%20Pretrial%20Code.pdf>—The 2012 District of Columbia code section 23-1321 describes pretrial release. It includes types of release and release conditions that may be ordered to assure appearance in court and/or public safety.

Federal pretrial statute at <https://www.law.cornell.edu/uscode/text/18/part-II/chapter-207-18> U.S.C §§ 3141-3156 on Release and Detention Pending Judicial Proceedings, including release and detention, responses to pretrial misconduct, and pretrial services.

APPENDICES

A: Smart Pretrial

The Bureau of Justice Assistance’s (BJA) Smart Pretrial initiative “seeks to build upon analysis-driven, evidence-based pretrial justice by encouraging local and tribal jurisdictions to effectively implement risk assessment and appropriate supervision and/or diversion strategies targeting pretrial outcomes within their jurisdictions.”¹⁸ The goal of the initiative “is to test the cost savings and public safety enhancements that can be achieved when jurisdictions move to a pretrial model that uses risk assessment to inform decision-making and employs improved risk management strategies (supervision and diversion).”¹⁹

All three Smart Pretrial sites realized their state’s preventive detention laws were inadequate because they do not fully incorporate all that we know about pretrial risk today. To address this, as of the date of publication, the state of Delaware has convened a work group to finish analyzing its mix of pretrial laws and draft legislative and/or constitutional fixes that will enable courts to lawfully detain the highest-risk defendants with the guarantee that these defendants cannot be released from pretrial detention (like they can today by posting money bail, even in very high amounts). The Smart Pretrial teams in Yakima County and the City and County of Denver have begun discussing the need for collaborating with legislators and/or the high courts in their states for passing similar legislation.

Additionally, Delaware policy-makers were aware that their statute contains a mandate to use a validated pretrial risk assessment instrument. They were able to integrate the project to empirically validate this tool with their plans for developing risk-based release-or-detain decisions as part of their Smart Pretrial work. The legal analysis

provided to Denver’s Smart Pretrial team discussed how the city’s municipal and county court practices conflicted with state statute. Specifically, Colorado’s pretrial statute requires individualization and expressly urges jurisdictions to use empirical risk assessment instruments to help do so. However, the courts had been using a monetary bond schedule that allowed defendants to be released from jail after paying a scheduled amount. To remedy this, the Denver team began working toward eliminating the monetary bond schedule and implementing a risk-based release-or-detention framework. Finally, the legal analysis performed for Yakima County revealed that Washington state would likely not need statutory revision to implement legal and evidence-based pretrial practices because the state legal framework allows for this to be done through court rule. The Yakima team, equipped with this information, established local policy to implement an actuarial pretrial risk tool that judges began using to guide release-or-detention decisions, while discarding the monetary bond schedule that had been in effect previously.

B: Using the ABA Standards to Guide the Legal Analysis

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA).



Among these sets of standards, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they reflect “consensus of the views of representatives of all segments of the criminal justice system,”²⁰ which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system’s use of the ABA Criminal Justice Standards as important sources of authority. The ABA’s Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts had used the Standards to implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, “the Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects.”²¹

The ABA’s process for creating and updating the Standards is “lengthy and painstaking,” but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) “are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply

involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years.”²²

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationales for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognition and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Foundation’s Manhattan Bail Project, discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the absence of evidence, i.e., “the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety.”²³

The ABA Standards provide recommendations spanning the entirety of the pretrial phase of the criminal case, from the decision to release on citation or summons, to accountability through punishment for pretrial failure. They are based, correctly, on a ‘bail/no bail’ or ‘release/detain’ model, designed to fully effectuate the release of bailable defendants while providing those denied bail with fair and transparent due process hearing prior to detention.

Drafters of the 2011 Summary Report to the National Symposium on Pretrial Justice recog-



nized that certain fundamental features of an ideal pretrial justice system are the same features that have been a part of the ABA Standards since they were first published in 1968. And while that report acknowledged that simply pointing to the Standards is not enough to change the customs and habits built over 100 years of a bail system dominated by secured money, charge versus risk, and profit, the Standards remain a singularly important resource for all pretrial practitioners. Indeed, given the comprehensive nature of the ABA Standards, jurisdictions can at least use them to initially identify potential areas for improvement by merely holding up existing policies, practices, and even laws to the various recommendations contained therein.

ABOUT THE AUTHOR

Timothy R. Schnacke is the Executive Director of the Center for Legal and Evidence-Based Practices (www.clebp.org), a Colorado nonprofit corporation that provides research and consulting for jurisdictions exploring and/or implementing improvements to the administration of bail. In addition to his consulting role, he serves as a pretrial faculty member and has authored pretrial materials for the National Institute of Corrections within the United States Department of Justice. Tim served as the 2014-15 Co-Chair of the American Bar Association's Pretrial Justice Committee, and received the John C. Hendricks Pioneer Award from the National Association of Pretrial Services Agencies for his work promoting pretrial justice. Tim's legal career includes private practice in Washington, D.C., and public work with the City of Aspen, Colorado, the United States Court of Appeals for the Tenth Circuit as both a Law Clerk and as Staff Counsel, and the Colorado Court of Appeals, where he was a Staff Attorney specializing in state criminal appeals. He has lectured at the University of Colorado at Denver and the Metropolitan State University of Denver, and has taught at the Washburn University School of Law. Tim received his Bachelor of Science and Bachelor of General Studies degrees from the University of Kansas, his Juris Doctor degree from the University of Tulsa College of Law, his Masters of Laws degree from the George Washington University's National Law Center, and his Master of Criminal Justice degree from the University of Colorado.



REFERENCES

1. Gupta, A., Hansman, C., & Frenchman, E. (2016). The Heavy Costs of High Bail: Evidence from Judge Randomization. *Journal of Legal Studies*, 45(2). At [#https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774453##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774453).
2. Laura and John Arnold Foundation, (2013). Developing a National Model for Pretrial Risk Assessment. At <http://www.arnoldfoundation.org/>.
3. It should be noted that, due to the fast pace of pretrial reform, even relatively new documents may already appear somewhat dated in some respects. For example, the Fundamentals of Bail document, referenced above, mentions an overall reluctance toward courts using the Equal Protection Clause in bail cases. Yet, in the months following its publication, the Equal Protection Clause has been used more frequently as a basis to overturn practices using secured money bail. See <http://equaljusticeunderlaw.org/wp/> and <http://www.civilrightscorps.org/>.
4. Indeed, the Ninth Circuit compared an Arizona “no bail” constitutional provision to the opinion in *Salerno* and declared the Arizona provision unconstitutional. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014).
5. See *Stack v. Boyle*, 342 U.S. 1 (1951).
6. For example, Colorado’s pretrial statute prior to 2013 listed at least 3 offenses for which the court had to set a secured monetary condition of bond (e.g., \$10,000, \$50,000); When the statute was rewritten in 2013, these provisions were removed because the legislature realized that these amounts were arbitrary, did not protect the safety of victims or the public, and did not assure the appearance in court of persons accused of these crimes.
7. Many courts, including the United States Supreme Court, have cited to the ABA Standards as important sources of authority. See Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 *Crim. Just.* (Winter 2009); see also Using the ABA Standards to Guide the Legal Analysis in the Appendix for a more detailed explanation.
8. See Bechtel, K., Clark, J., Jones, M. R., & Levin, D. J. (2012). *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*. Washington, DC: Pretrial Justice Institute.
9. The analyst should note that both the D.C. and federal statutes contain certain provisions that might be used as “model” provisions, but also certain provisions that might not be so used. Overall, though, both the D.C. and federal in-or-out processes, which are, for the most part, based on pretrial risk and have attempted to eliminate the deleterious effects of money bail, may be held up as model processes.
10. In some instances, local criminal justice actors, themselves, do not fully understand their own constitutional provisions, and thus it is not altogether unusual to find criminal justice leaders who are unsure of, or mistaken as to, the substance of their state’s right to bail.
11. Christopher Reinhart & George Coppola, *Court Rules in Other States – Legislative Approval* (2008), found at <http://www.cga.ct.gov/2008/rpt/2008-R-0430.htm>.
12. As with all things on the Internet, beware of sites that are not official, and that therefore are not always up to date or otherwise completely accurate.
13. For example, in creating its list of pretrial issues for inclusion in the NCSL database, found at <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy.aspx>, that organization included the issue of police issuing citations in lieu of arrests, but not the parallel issue of judges issuing summonses in lieu of arrest warrants, the laws of which might be located separately from the citation in lieu of arrest provisions. Being redundant in this area would mean combining the list from this database with lists gleaned by looking at other pretrial sources, including the sources listed in the text of this article.
14. The case is *Fullerton v. Cty. Ct*, 124 P.3d 866 (Colo. App., 2005), in which the court commented on the constitutional propriety of “cash-only” bonds. This example also illustrates the importance of using local expertise to help guide the research. Based on how the Colorado courts are structured, the low precedential value of court of appeals opinions, and time constraints to perform the analysis, it seemed unlikely that an analyst would have found any important opinions from that court. However, after several local criminal justice leaders mentioned hearing about a Court of Appeals opinion that somehow limited bail, the analyst looked deeper and found the relevant case.
15. One such key case, for example, is *State v. Brown*, 338 P.3d 1276 (N.M. 2014) (equating the right to bail in New Mexico with the right to pretrial release, and noting that, “Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”).
16. This statement of standards would undoubtedly be longer and likely different today due to increasing court claims brought under the 2013-14 revisions to the state’s bail statute.
17. The IRAC method is a framework for organizing information in the format of: Issue, Rule, Application (or Analysis), and Conclusion.
18. Smart Pretrial Demonstration Initiative FY 2014 Competitive Grant Announcement (BJA) at 4, found at <https://www.bja.gov/Funding/14SmartPretrialSol.pdf>.
19. *Id.* at 6.
20. Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 *Crim. Just.* (Winter 2009).
21. *Id.* (internal quotation omitted).
22. *Id.*
23. *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.3 (a) (commentary) at 111.

Copyright © 2017 by the Pretrial Justice Institute.
All rights reserved.
Rockville, MD

