The Single Biggest Issue in American Bail Reform Today

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For 180 years, the states have been doing bail (release) and "no bail" (detention) a certain well-defined, albeit irrational, way; that is, by looking at the defendant's charge at arrest, assigning a money amount to that charge, and waiting to see what happens. Today, states are aiming to do things differently by looking at individual defendant risk, using less or no money at bail, and making an intentional release/detain decision. These changes, especially the notion of doing bail and no bail intentionally, means states might have to alter the underlying legal structures found in their current constitutions, statutes, and court rules. This means we are at a critical time in the bail reform movement, when we must make sure that those changes do not result in a system that is worse than the traditional money bail system. This short paper attempts to lay out the reasons for why certain changes appear inevitable as well as to document the things that I think those of us wanting bail reform can do to help states so that the new system is not worse than the old.

How We Got Here/Bail Means Release

Since the first legislatively enacted provision describing the process in the Statute of Westminster of 1275, bail (release) and no bail (detention) have been recognized as the only two alternatives for pretrial status in English and American law. This is called the bail/no bail or release/detain dichotomy because an accused is either in or out of jail. Bail/no bail or release/detain is important because it is still often expressly articulated in every state in America. Typically, though not always, the dichotomy is addressed in the state constitution.

Moreover, since 1275 in England until the 1800s in America, being bailable meant being released. In various writings I have described this notion as the "big rule," which is that bailable defendants were supposed to be released, unbailable defendants were supposed to be detained, and anything that interfered with bail as release or no bail as detention violated this rule and thus led to bail reform. Historically, a rule of thumb is that anytime people think that the wrong individuals are in or out of jail pretrial, history demands correction in the way of bail reform. Reform to "no bail" has happened less frequently than reform to "bail," but it has happened enough to bail that another historical rule of thumb is that whenever we see "bailable" defendants in jail, bail reform happens. I have described having bailable defendants in jail as presenting a paradox precisely

because bail is supposed to mean release and is properly defined as a process of conditional release. The fact that America has bailable defendants in jail today is actually an historical aberration because bail reform is typically inevitable when that marker exists.

The way that England and early America made sure that all bailable defendants were released was through the use of "personal sureties," which were persons chosen by the bail-setter to watch over the accused during the pretrial phase. Those sureties were not allowed to profit or even be indemnified (paid back in the event they paid out any money), and so the only place in which money played a part in bail was through the financial condition of the bond. That condition – the condition that says, "come back to face justice or pay some amount of money," has been around since 400 A.D. Before money, it was property, before property it was a live person standing in the place of the accused.

Importantly, though, for hundreds and hundreds of years – from 1275 all the way up to the 1800s in America – that financial condition had only ever been what we call today an "unsecured financial condition." Its actual name was a "recognizance," and it meant that people were never forced to put down any security prior to release. They were only required to promise to pay some amount upon default if the accused did not return to face justice. Thus, for centuries, the "big rule" requiring the release of bailable defendants was followed by using personal sureties (which were plentiful) administering unsecured bonds.

The American Overlay

1. America Enlarged the Right to Bail

America initially borrowed virtually all of English bail law. Bail meant release. The right to bail meant the right to release. Bailable defendants were released through the use of personal sureties and what we call today unsecured bonds. Nevertheless, America, being a country based on liberty and freedom, made three important changes to the English system. First, the right to bail was gradually enlarged to the point where the only persons who were potentially unbailable were capital defendants, and then America began slowly reducing the number of crimes that were capital crimes.

2. "Bright Line Bailability"

Second, America made a change in response to certain English bail practices evolving in the centuries after the Statute of Westminster. Over several centuries, and only with certain cases, discretion began to seep into the English bail-setting process so that judges could look at an accused's criminal history, for example, and then declare that person bailable or unbailable upfront. Of course, it is easy to follow the "big rule," which says all bailable defendants should be released, if one is able to declare the person bailable prior to applying the rule. America did not like that discretion, however, and so it settled on what I call "bright line bailability," which meant that in America, the charges in the "no bail" category were the only charges even eligible for detention; everyone who was bailable was to be released, even when they were deemed "risky." Creating bright line bailability follows from American notions of due process fair notice, which, along with guarding against arbitrary enforcement and upholding separation of powers, says that the way we do criminal law and procedure in this country is to give people ample notice of how they can manage their daily lives and stay out of jail. Just as the substantive criminal law can provide people with notice of how to stay out of jail or prison by not committing certain crimes, bright line bailability also provided notice to people that so long as they did not commit certain crimes, they would not be placed in jail, if at all, unless or until they were convicted.

When people questioned what a judge should do when he or she was aware of things showing risk such as, for example, the accused's criminal history, the answer – in America – was to use that knowledge of risk or lack of risk to adjust the financial condition up or down. It is important to remember, however, that until the 1800s, that financial condition was not allowed to keep anyone in jail. Historians have noted the release of virtually all bailable defendants in Colonial America even when the amount of the unsecured financial condition would have bankrupted all sureties upon default. Likewise, "sufficiency" of the sureties was never allowed to keep a defendant in jail. Only non-bailable defendants were supposed to face any possibility of detention.

3. A "Further Limiting Process"

Third, America did not want anyone to be automatically detained solely based on charge, and so it added a requirement that courts make some additional finding so that even those in the "no bail" exception to release might be freed in certain circumstances. This additional finding is what I call the "further limiting process" to the "no bail" side of the dichotomy. The first of these further limiting processes

was a finding that the "proof is evident or the presumption great," which meant that even persons in the no bail category might be released if the proof were not evident or the presumption not great. Adding this process to a no bail provision necessarily means that the no bail provision is, in the first instance, merely a "detention eligibility net," meaning that if someone commits a charge articulated in the no bail category, they are only potentially eligible for detention if the further limiting finding is made. Today, many states still have this particular limiting process. Other states have added additional limiting processes, such as "clear and convincing evidence of a substantial risk" or a finding that "no conditions or combination of conditions" suffice to manage extreme risk.

More recently, courts have also articulated the need to provide certain procedural due process protections to the no bail side of the equation, and so sometimes this "further limiting process" is listed as one of many elements of the overall package of procedural due process necessary for intentional pretrial detention. But the "further limiting process" came first, and can be described best as simply a further finding that must be made so that people in the "no bail" category are not automatically detained based on charge. Because it came first, and because it is crucial to determining whether a state's pretrial detention provision is adequate, it is important to think of the further limiting process separately from the rest of the other procedural due process elements (such as having an adversarial hearing with defense counsel present). The fundamental point is that America has never been a country in which anyone is automatically detained based on charge. Everyone is technically eligible for release.

"No Bail" or Preventive Detention Provisions

This all means that a state's "no bail" provision should be viewed – when it was created as now – as providing a particular state's articulation, upfront, of whom that state has determined may be detained on purpose based solely on prediction (meaning without pretrial failure in the current case, as all bail-setting involves prediction). All no bail provisions are preventive detention provisions (the earliest ones were based on preventing flight, and current ones may be based on flight or public safety). Moreover, for both legal and historical reasons, all no bail or detention provisions in America are comprised of "detention eligibility nets" and "further limiting processes." As I have already written when creating my own moneyless release/detain model found here, both current law as well as what I call future-hypothetical law would seemingly require limited and justified charge-based detention eligibility nets. Today, most nets are flawed in that they were based on inaccurate assumptions of defendant risk. Moreover, current articulations of

limiting processes in America are severely flawed, and so my model creates a new limiting process that overcomes those flaws. The fundamental point is that all proposed changes to detention provisions will primarily involve questions surrounding the detention eligibility net and the further limiting process.

When Bail Began Not to Equal Release

The way America did bail and no bail began gradually changing in the early to mid-1800s, however, when the country began running out of personal sureties – that is, people who were willing to watch over defendants for no money. Losing personal sureties caused bailable defendants to be in jail, which historically has led to bail reform.

Ultimately, America turned to the commercial surety industry in 1900 to try to fix this problem, but not before the country took an extremely important jurisprudential turn by adopting what I call "the excessive bail loophole." Understanding the excessive bail loophole is the key to understanding this generation of bail reform and the massive cultural or adaptive change that is necessary to see it succeed.

The "Excessive Bail Loophole"

The excessive bail loophole was adopted when judges were looking for alternatives for release due to the lack of personal sureties starting in the early 1800s. One of the first alternatives they tried – long before they turned to the commercial surety industry – was called "self-pay," which meant trying to find out whether the defendant himself, without any surety, could pay a financial condition of release in order to get out of jail. This was the first instance of the use of a secured bond, even though the words "secured" and "unsecured" were little used at the time.

Many defendants could not pay this money upfront, however, and so their cases began working their way through the appellate courts. The defendant claims were all roughly the same: "I have a constitutional right to bail that I can afford"; "An unaffordable bail bond is an excessive bail bond." And it is precisely at that moment in American history that the Excessive Bail Clause of the United States Constitution (or any state excessive bail clause) could have been used as a basis to declare the practice of unaffordable bonds to be unlawful. Had that happened, unaffordable bail bonds would never have been allowed, the rest of bail law would have developed around that fact, and America likely would not be in a generation of bail reform today. But that is not what happened. Instead, all over America

judges ruled that just because a financial condition is unaffordable, it does not necessarily mean it is excessive. That is, a defendant does not have a right to a financial condition that he or she can afford. The primary rationale that I have found in many of these older cases is that requiring release on affordable bonds would open the jail doors to anyone simply declaring themselves to be poor. It is a flawed rationale, and likely only adopted due to lack of both education and alternatives.

1. "Unintentional" Detention

These excessive bail cases create a loophole because they draw a jurisprudential distinction between what I call "unintentional detention" and "intentional detention," which are terms that vary slightly from their superficial meaning. Unintentional detention happens when a judge orders the release of a bailable defendant, sets an unattainable condition, but makes no statements or other indications of any intent to detain the defendant on purpose. This happens frequently today when a judge signs an order of release, sets the financial condition, and then merely states that the amount is necessary to provide assurance of court appearance (or, albeit very rarely for several reasons, public safety). In cases such as these, if the defendant remains detained, the excessive bail cases treat that detention as just an unfortunate byproduct of a conditional release system. It is "unintentional" not only because it might cause detention when a judge literally did not intend it to, but also because appellate courts will assume that judges would be content with releasing these defendants so long as the condition is met. I call it unintentional detention to describe all cases in which a defendant is not intentionally detained.

2. Intentional Detention

But the excessive bail cases do not allow so-called unlawful "intentional" detention, which can happen in two ways. First, intentional detention can happen when a judge refuses to set bail for a bailable defendant. When that happens, the judges are virtually always reversed and this principle – that a bailable defendant must have bail set – is so fundamental that one finds the cases articulating it early in a state's history. Second, intentional detention can happen when a judge sets bail, orders a condition, but then makes an express statement on the record that he or she has set the condition with the purpose of keeping the defendant in jail. Any time this happens (I have found it whenever I have done deep dives into any state's body of case law, and when it is hard to find, it is only because judges likely know intuitively not to do it), appellate courts virtually always declare the practice to be

an abuse of discretion under state excessive bail analysis. Occasionally, but rarely, amounts are so high that appellate courts send them back for recalculation even without a record of intentional detention, but that is likely because the high amounts make it appear as though intentional detention is happening. Keeping bailable defendants in jail on purpose using money is also unlawful under federal excessive bail law.

The reasons given by state courts when reversing judges for detaining a bailable defendant on purpose by not setting bail for a bailable defendant or by making a record of intentional detention are typically articulated three different ways: intentional detention of a bailable defendant using money: (1) is a dishonest (or indirect) way of doing something the judge might have been able to do (or not do) honestly (or directly) through the existing "no bail" provision; or (2) is creating another exception to the right to bail clause where it did not exist before; or (3) completely negates the "no bail" or constitutional/statutory detention provision altogether.

Accordingly, the excessive bail loophole allows the detention of *any* defendant so long as the judge makes no record of intentional detention. Realize, though, just how far away this practice is from what America first settled upon with so-called bright line bailability. At the time, America did not want any judicial discretion whatsoever to detain bailable defendants, but these excessive bail cases allow virtually unlimited discretion to detain any defendant pretrial. The shift in culture from a system in which all defendants are technically detainable through money back to the system first created in America in which virtually all defendants were released is enormous. It will be difficult to change without deep education, coaching, and ongoing monitoring.

The excessive bail cases creating the loophole have also given American bail practices a misleading legal gloss that makes people think that all of monetary bail setting is lawful and that having bailable defendants in jail is normal. In fact, the excessive bail loophole allows so-called "sub rosa" detention, or secretive detention for unlawful purposes, a practice with which America has struggled over the past 60 years. Moreover, historically speaking and as I have written about extensively, having bailable defendants in jail is aberrational and has typically been a primary catalyst for bail reform in both England and America.

Why American Bail and No Bail is Changing

Thus, in its most simple description, the way America has done bail for roughly 180 years is to look at one's criminal charge, set some amount of money, and wait around to see what happens. Since the 1800s, virtually all bail cases have been decided under the Excessive Bail Clause, which has allowed the detention of bailable defendants using money and which has given people the impression that seeing bailable defendants in jail is normal. These cases have also allowed states to ignore their existing express "no bail" provisions, simply because money as a detention mechanism, while unlawful, is easier to do and extremely effective at keeping people in jail. All this is changing, however, as states are gradually being forced to eliminate money as a detention mechanism. This force is primarily being applied in two ways.

First, there is now emerging a relentless stream of federal and state cases in which the parties are not pleading the Excessive Bail Clause at all. Instead, the parties are claiming that any detention using money – whether intentional or not – violates the Equal Protection and Due Process (both substantive and procedural) Clauses of the United States Constitution. The cases are slightly split on fairly complicated yet important issues, but in the majority of cases, federal district court judges are finding a fundamental liberty interest and using strict or heightened scrutiny to analyze whether money is necessary to achieve the government's goals. In doing so, these courts are finding constitutional violations, and thus if the rule in these majority cases becomes the law in America, then money will likely be effectively eliminated as a detention mechanism altogether. This, in turn, will leave states with no ability to detain defendants except through their existing "no bail" or detention provisions, as they represent any particular state's articulation of whom it can detain up-front, on purpose, using only prediction (without pretrial failure in the current case).

Even under the most lenient of scrutiny required by the minority cases, though, states will also likely be forced to change their traditional bail-setting practices by having meaningful due process laden hearings, conducting individual analyses of release conditions (including ability to pay money conditions), and following other aspects of existing state law. Indeed, all of New Mexico's bail laws (including its constitutional provision) were changed after a single state supreme court opinion merely articulated how the judges in that state were violating existing New Mexico law by ignoring the constitutional detention eligibility net.

Occasionally a federal court will rule in a way that allows money to remain as a detention mechanism without violating the federal constitution if certain procedural due process protections are applied. In those cases, however, the federal

courts typically do not apply state law, through which a state court would likely conclude that whenever bail setters go through the procedural motions and findings typically associated with an intentional detention hearing, then they intend to intentionally detain. In short, when a federal court forces a state to treat a release order that results in detention as a detention order, state law will simply not permit it to happen in all instances or the state risks negating its current constitutional detention provision altogether.

Second, and perhaps more importantly, the mere desire to move to an intentional system of release and detention leads states to the exact same place as the recent litigation based on due process and equal protection. Because federal law (and, typically, state law) does not allow using money to detain a bailable defendant on purpose, states desiring to do things on purpose with less or no money are, once again, left with their current articulations of who can be detained pretrial through express "no bail" or detention provisions.

In short, this generation of reform is focused on following the law and the research. Following the law and the research naturally guide states toward more intentional pretrial practices. When doing release and detention on purpose, though, intentional detention is legally available only through the state's existing "no bail" or detention provisions. All other defendants – typically called "bailable" (not eligible for intentional detention) defendants – should be rapidly released on the least restrictive conditions to provide reasonable assurance of public safety and court appearance.

In various presentations, I have shown roughly ten ways in which money will likely be eliminated as a detention mechanism beyond the two listed above. It seems inevitable that this will happen, and thus we must focus immediately on what states will do to replace it.

What Will Replace the Traditional Money Bail System

When states understand everything that I have written thus far, those states will naturally be tempted to change their existing "no bail" provisions. States such as New Jersey and New Mexico have already done it, and other states are thinking of doing it. Nevertheless, it is important for states to realize that it may not be necessary to change an existing constitutional provision, and, even if change is necessary, roughly 95% of what the field considers to be bail reform or pretrial justice can be achieved without changing constitutional or statutory detention provisions. Determining whether a state even needs to change its bail/no bail

dichotomy (or release/detain model) can be gleaned from reading either of my latest papers, found through link, above.

Likewise, states that feel the need to change their release/detain models will be tempted to craft new provisions that allow for the potential detention of virtually all defendants, simply because that is what the states are used to. There are many ways to allow for the potential detention of virtually all defendants, but what I see typically are attempts to create virtually unlimited charge-based detention eligibility nets or "risk-based" nets, with further limiting processes that are extremely loose, making it very easy to detain anyone within the already wide nets.

When states create wide or virtually unlimited detention eligibility nets and loose limiting processes, it does not matter how the state assesses "risk." Whether through subjective notions, statutory factors, charge on a bail schedule, or actuarial tool, the change in structure can itself lead to widespread moneyless detention. Therefore, it is the change in legal structure – or the retention of existing structure in some states – that can keep pretrial detention rates at the smallest possible percentages and decrease racial inequality while maintaining good court appearance and safety rates. The fundamental point is that if America wants to limit moneyless detention by replacing it with an intentional release/detain process, one of the best ways to do it is to make sure that detention is simply unavailable in the vast majority of cases.

A Critical Moment

This is the critical moment at which we find ourselves in 2019. Last year I personally fought four separate attempts by states to create wide-open, moneyless detention provisions that would likely result in far more detention than by bail-setting done through the traditional money system. Next year I predict more. Moreover, the current debate over whether to use actuarial tools has taken precedence over the issue of states attempting to change their foundational release/detain structures, and, in my opinion, has kept people from focusing and addressing the far bigger issue. Unless we re-focus on changes to state bail/no bail dichotomies, I fear that our grand attempt to create a rational, fair, and transparent system of release and detention without money will fail.

Realize that nineteen states have "broad right to bail" provisions in their constitutions, which means those states will likely see themselves as extremely limited as to whom they can detain on purpose using prediction through a primary net and process. They will likely all want to change. Twenty-two other states have

added language to their "no bail" provisions eroding their once broad right to bail provisions, but those additions are old, likely based on flawed notions of defendant risk, and often still very narrow. Virtually all of those states will want to change, too. Nine states do not have constitutional right to bail provisions; their bail/no bail or release/detain dichotomies are statutory. In my opinion, they will want to change as well, but will be able to do so without the hurdles associated with constitutional amendment. This all means that we will soon begin to see a large number of state attempts to change constitutional and statutory right to bail provisions over the next several years. What we end up with will determine whether we have succeeded in this effort to truly make pretrial liberty the American norm.

Realize, too, that because so many states either have broad right to bail or extremely narrow detention eligibility nets (sometimes due to adding certain preconditions to charge in the net) that the status quo for intentional "no bail" or detention provisions in America is on the side of those who want extremely limited moneyless detention. Only about five states have extremely wide nets, and those provisions can actually be slowly reined in through litigation. Accordingly, if money as a detention mechanism is eliminated, and if nothing else changes, the narrowness of virtually all detention provisions that exist today will automatically mean fewer pretrial inmates.

Also realize that anyone wanting to debate who should be detained pretrial in a moneyless system will mostly be arguing about the "detention eligibility net." Whenever a person articulates some hypothetical defendant charged with a particular offense as being so risky that they must be detained pretrial, that person is likely making a "net" argument; they are saying that they want the ability to detain people who are charged with a particular crime. What they tend to overlook – and this is the key to making sure that detention is the "carefully limited exception" to release – is the "further limiting process." Indeed, I predict that nets all across America will be of varying widths, and will differ based on things like geography or whatever legislative testimony has been gathered. Moreover, nets are easier to justify than one thinks.

Accordingly, a crucial aspect of addressing wide eligibility nets will be to make concessions on nets only after *insisting* on a further limiting process like the one in my papers, which includes: (1) a clear and convincing evidence burden of proof; (2) the need for a finding of extreme risk for either flight or to public safety, or both; (3) a statement answering the "risk of what" question, so that the extreme risk necessary to detain is only for intentional flight to avoid prosecution or to

commit a serious or violent crime while on pretrial release to reasonably identifiable persons or their property; (4) a statement allowing detention only if "no conditions or combination of conditions are necessary" to address risk (or any other language requiring judges to compare potential conditions couched in the wording of strict scrutiny); and (5) if needed, language making sure an actuarial tool cannot be used solely to detain. This process, coupled with language making sure money (or other conditions) may not result in detention, a secondary net and process for bail revocation, and articulation of the sorts of procedural due process requirements reviewed by the U.S. Supreme Court in *United States v. Salerno*, should, in my estimation, keep detention rates between 5% and 10% even in the most conservative jurisdictions. Please remember that my particular release/detain model takes detention out to its furthest point; I simply do not think people can legally justify anything broader than my model. Narrower detention models, however, are likely lawful if they follow certain principles outlined in the papers.

Finally, realize that all of these variables can be used to negotiate a properly limited detention provision. Theoretically, we can allow more moneyless detention than already lawfully allowed so long as money is eliminated as a detention mechanism as it will likely result in a substantial net gain in release and less racial disparity. We can allow a slightly broader detention eligibility net so long as the limiting process answers the "risk of what" question and does not use an actuarial tool solely to detain. We can allow detention for violent misdemeanors so long as detention based solely on prediction of flight is not allowed. We can give ground on a variety of fronts so long as we reduce or eliminate certain burdensome release conditions that do not necessarily cause detention. And so on. In the end, realize that the states will likely be forced to change; accordingly, the support of bail reformers and community groups can come with a variety of important conditions.

Focusing on the Law and the Research to Guide Change

Thus, the law and research are on the side of bail reformers when it comes to (1) retaining already narrow detention provisions; (2) creating new narrow and lawful moneyless detention provisions (which may be a pre-requisite to eliminating money bail) or (3) fighting over-broad or unjustified detention provisions when fighting is necessary. It is only when we do not know the law or the research that we can possibly lose against the people who seek the ability to detain virtually all defendants. How to use the law and research in order to retain, shape, or fight detention provisions is found in my two papers, with some aspects (such as the importance of vagueness or due process fair notice on detention provisions)

confirmed since those papers were published. Nevertheless, and in my opinion, the following is a list of things that we should all come together to accomplish:

1. Help states understand bail/no bail dichotomies and defendant risk (which is relatively low) so that they are comfortable with releasing virtually all defendants pretrial, reserving detention only for the few defendants who pose an extreme and unmanageable risk to willfully flee to avoid prosecution or to commit a serious or violent crime against reasonably identifiable persons or their property.
2. Convince states to abandon any notion of using an actuarial tool solely to detain anyone pretrial. I am on record as being one who thinks that the tools are extremely helpful for release; if I know the relative risks between two released persons, I can help the riskier person succeed by providing supports while they await trial.
3. Help states to recognize that in order to detain anyone pretrial, they must have, at some point, detention limited by expressly articulated charges so that the overall detention process follows not only current law (such as under *United States v. Salerno*), but also legal principles – such as due process fair notice – that have not yet been fully applied in this generation of reform.
4. Require states to justify why detention may be necessary for the charges they intend to include in a detention eligibility net. Most states fail at justification, and yet it is a primary reason for why an appellate court would strike a detention provision later.
5. When they are deciding on potential charges for a charge-based net, require states to leave out any charges historically associated (through data or otherwise) with racial or ethnic disparity. For example, if the charge of assault on a police officer is primarily (unintentionally or intentionally) charged against people of color, we should insist that the state leave that category of offenses out of the detention eligibility net – at least temporarily until the racial or ethnic disparity is addressed and fixed. This would be akin to leaving out certain predictors from actuarial tools that have a high likelihood of racial disparity.
6. Require states to adopt a "further limiting process" that looks like the one in my papers. Such a process focuses on individual risk (versus aggregate risk) and answers the "risk of what" question by only allowing detention upon clear and convincing evidence (beyond that found in an actuarial tool) of substantial or extreme risk to flee to avoid prosecution (not mere FTA) or risk to commit a serious or violent crime (not all crime). Requiring a state to adopt a process such as this – a process grounded in common sense – will "fix" a wide net. The law is such that I can see very little hindrance to states

freely adopting fairly wide eligibility nets. Thus, requiring them to adopt this limiting process is absolutely crucial. Note: most states will simply want to adopt a process allowing detention when "no condition or combination of conditions suffice to provide reasonable assurance of court appearance or public safety." This particular "further limiting process" is subjective, resource driven, and has not worked where adopted, and thus this process should never be adopted without some additional requirement of a finding of extreme risk only to do the things that should lead to pretrial detention. In sum, while the "no conditions" process is helpful in forcing courts to compare conditions, it should only be acceptable as an *additional requirement* to the rest of my proposed limiting process based on extreme risk. Like the net, data concerning how the limiting process is applied can help gauge whether that process is harming certain discreet groups of people.

7. Require states to create meaningful limits on bail revocation, so that any gains from reining in the states in the primary "no bail" net and process is not lost through ease of detention after pretrial failure. In my paper, I call bail revocation a secondary detention eligibility net and further limiting process so that people will treat it as seriously as the primary net based solely on prediction. Indeed, helping states with the secondary net can cure many of the legal issues that arise only when states solely use prediction without actual pretrial failure as the basis to detain.
8. Require states to include community groups and people most affected by changes in "no bail" provisions to be a part of the creation of any new detention provisions.
9. Do all the same things with conditions of release. Our culture of release must be one that focuses on how best to assist defendants to succeed, and not how best to supervise or control them.

The single biggest issue in American bail reform today is to make sure whatever replaces the traditional money bail system is not worse than that system. This issue transcends all other issues, and likely must be confronted sooner than we would like. Even though states such as Washington and New Mexico are already discussing new constitutional right to bail provisions even after already changing those provisions in this generation of reform, we should assume that we will likely have only one good opportunity at making sure constitutional changes are done properly in any particular state. Changing a right to bail provision twice in a relatively short time period should be seen as unlikely and aberrational.

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