CLEBP

Center for Legal and Evidence-Based Practices

Memorandum

To: Bail Reform/Pretrial Justice Advocates

From: Tim Schnacke

Date: August 31, 2023

Re: Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Preventive Detention) Provisions

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The unprecedented amount of recent activity concerning right to bail clauses in state constitutions compels me to write a few of what I call "bail basics," which are designed to help people work through any proposed changes to those clauses. In all of this activity, states are primarily attempting to lessen the right to bail (pretrial release) and broaden the ability to do "no bail" (intentional pretrial detention), and thus this discussion mostly concerns detention language.

In the next few years, you will see pressure being put on the states to adopt more rational ways to detain than by using money bail. That pressure may come from federal courts, state courts, grassroots or racial equity groups, the public after a particularly heinous news account of some crime, or even from education and the simple desire to begin doing bail and no-bail in an intentional way. Stakeholders –

in particular legislators – will initially want to make what they think are simple changes to the constitution, such as adding another single line discussing money, or adding additional charges to their detention eligibility net, often without sufficient bail education. Moreover, in many cases, they will be tempted to ask, "Why don't we just copy the constitutional change from New Jersey . . . or New Mexico?" Or, "Why don't we just copy the language in the federal or D.C. statutes?"

But all of that would be a mistake – indeed, such a big mistake that, when it happens, I urge you to convince those stakeholders to slow down and begin learning about bail until they, themselves, know why it is error. Opening up one's constitution to change is serious and should never be done in haste. As Justice Gorsuch wrote in a concurrence in *Sessions v. Dimaya,* "the adoption of new laws restricting liberty is supposed to be a hard business."

This brief memo is designed to help bail advocates take control of the narrative of flight, public safety, and pretrial detention. In my opinion, it is not enough to simply fight every state attempt to change its constitutional (or statutory) right to bail clause, because change is ultimately inevitable. Instead, the people who understand bail reform should be the ones to provide a better solution as well as to help the states recognize and enact the solutions molded to suit them best.

In sum, I think it must be bail reformers who provide the answer to "what replaces money bail?" We must be the ones who simultaneously fight money bail *and* provide its alternative, which is intentional release and extremely limited intentional detention. Indeed, based on all of my research, intentional release and detention is an alternative that I believe all advocates can live with, if not actually greatly prefer. And if we do it right – if we help the states create systems for intentional release and detention by using the law, research, and, indeed common sense – it will automatically reduce mass incarceration during the pretrial phase simply because moving from a random bail system to one based on law and research is bound to reverse decades of over-incarceration.

The Essence of Pretrial Release and Detention

Throughout history, pretrial release and detention have been concerned with two questions: (1) how risky is this person? and (2) risky to do what, exactly? It involves prediction, which is notoriously hard, yet lawful according to the U.S. Supreme Court. Nevertheless, one must remember – and remind the states – that risk is inherent in bail. In America, a country founded on liberty and freedom, we

take risks every day in the substantive criminal law by laying out offenses and their possible punishments and relying on moral persuasion, rather than government control for compliance. Similarly, and again due to American notions of liberty and freedom, we accept certain levels of risk associated with releasing persons pretrial. But the risks we must show to do things to persons who are released pretrial are different than the risks we must show to actually detain them through pretrial incarceration based solely on prediction.

In short, when releasing people, we are allowed to order release conditions to provide reasonable assurance (not complete assurance) of court appearance (missing court for any and all reasons) and public safety (as measured by committing any new crime or an attempt to commit any new crime, from traffic offenses to murder). On the other hand, when detaining people, we must show an elevated risk. The best articulation of how to measure that risk is through a process that says, essentially, that a judge may only incarcerate a detention eligible person pretrial when there is clear and convincing evidence of facts and circumstances showing an extremely high risk to either flee to avoid prosecution or to commit or attempt to commit a serious or violent crime against a reasonably identifiable person or persons (and possibly their property), *and* clear and convincing evidence that no existing release condition or combination of conditions suffice to reasonably mitigate that extremely high risk.

This articulation is radically different from what the states currently have in their constitutions, and, indeed, it is different from the articulations recently proposed in many changes to state constitutions. Nevertheless, it is the articulation that we must convince the states to use. Fortunately, it is based on the law, the research, the national standards, and even common sense. To summarize, in America, a country where liberty and freedom are paramount, and in a process in which prediction is so difficult, we intentionally detain persons pretrial only when we are convinced that they present a very high risk to do a very bad thing.

Moreover, in America, we have virtually always limited intentional detention to persons facing only certain serious or violent charges through a charge-based "detention eligibility net." In addition to excessive bail notions, this is based on notions of due process fair notice, whereby people are given notice as to what conduct can lead to incarceration. These detention eligibility nets are different in

every state, and my research shows that they can be fairly wide – indeed, likely wider than we would normally want so long as they are legislatively justified. Nevertheless, they are subject to certain hard legal boundaries, such as those imposed by excessive bail and due process, which should keep them from becoming unlimited.

The interplay between the first part of this section, which is a finding of high risk to do a very bad thing, with the second part of this section, which is limiting who is even eligible for that risk "assessment," should be evident. If a detention eligibility net is perceived to be too wide, the finding of risk must be extremely tight so as to keep the whole process "carefully limited," as mandated by the United States Supreme Court.

The Meaning of "Bail" v. Money

To adequately understand the right to bail and its exceptions in any particular state, one must first know the meaning of "bail." Historically and legally, bail is a process of conditional release. It is conditional because all bail bonds require at least one condition, which is to return to face justice. The justification for that legal and historical definition is found in my *Fundamentals of Bail* paper, and is based on history, law, the national standards, and pretrial research.

Bail is not money. Money is a sub-condition of the return to court condition. When used in secured form, money is typically the only pre-condition to release, which is why it leads to detention and usually makes it the most restrictive release condition. Other conditions might keep someone in jail, but secured money bonds are the worst offenders. The fact that bail is not money has already been recognized in several jurisdictions, including the federal system, which have replaced the word "bail" with "release." The notion also pops up in any lawsuit in which the government or the bail industry essentially argues that the right to bail equals a right to pay money for release – an argument that is typically rejected.

This matters when working on bail and "no bail" provisions in constitutions and statutes across the country. Occasionally, some jurisdiction (or a whole state, like New York) will define bail as money, and then speak of "eliminating bail" when it really seeks to eliminate what we call today money-bail or secured financial conditions of release. Unfortunately, this causes unnecessary confusion among all those states that have a right to bail in their laws (and especially their

constitutions) and that would balk at eliminating it. The blurring of money and release comes from 1500 years of having money or property coupled with a return to court requirement in England and America, with no real reform until the late 20th Century. Today, we seek to eliminate money – technically, secured financial conditions – at bail because they do not work and are unlawful when they lead to detention. We do not seek to eliminate bail, or the process of conditional release. Indeed, we seek to protect it.

The reason I still tell people to read my *Fundamentals* paper is because all bail actions – including crafting new constitutional language – are made easier by knowing the fundamentals of bail. Indeed, I apply the fundamentals to constitutional change in my papers, *Model Bail Laws* and *Changing Bail Laws.* Certainly, some of the fundamentals have evolved since I wrote that paper in 2014 – especially the law concerning due process and equal protection as well as defendant risk research – but catching up once you understand the fundamentals up to 2014 is fairly easy. You will find that during a constitutional change debate certain questions can only be answered through the pretrial research, the history, or the law, and so this knowledge is absolutely crucial to the process. Indeed, the pretrial research (especially studies on defendant risk) was so important to my own release/detain model that I simply cannot see a state changing a constitution without consulting that research.

The Purpose of "Bail" and "No Bail"

Historically and legally, the purpose of bail is to provide a mechanism for pretrial release. "No bail" is a process of potential detention; everyone in America is eligible for release because in this country there is no automatic detention based on charge. This is a historical notion adopted when the states gradually required an additional evidentiary finding to detain, but it is now likely enshrined in the law. Thus, the purpose of "no bail" is to provide a mechanism for an intentional process of *potential* detention.

The Meaning of Right to Bail Clauses and Their Exceptions

In theory, state right to bail clauses and their exceptions express an intentional release/detain system. When they were first enacted (with later states merely copying earlier language traced back to Pennsylvania in the 1600s), release was done through personal sureties making only promises to pay some amount of

money in the event the accused did not return to face justice – that is, with what we call today an "unsecured" bond, or, as it was termed then, a recognizance. Thus – and again, in theory – every bailable defendant was intended to be released. There were always exceptions, of course, with people unable to find personal sureties, but the theory of intentional release of all "bailable" defendants was sound.

Likewise, going through the "no bail" process potentially leads to on-purpose detention with no conditions of release; when a judge uses it, he or she means to intentionally detain the accused pretrial. Note again, being in the "no bail" bucket – or what I call the detention eligibility net – is no guarantee of detention. As already mentioned, the American model, as it has evolved, requires some additional finding of risk in order to detain a person who is eligible for detention. I call this a "further limiting process," because the eligibility net initially limits detention and the finding puts a further limit on that. Thus, you can think of it simply as some further finding of risk (beyond charge) needed to keep someone detained who is in the eligibility net. The first one of these limiting processes was "proof evident, presumption great," but different states now have different articulations of the necessary finding. Indeed, some have more than one in a single constitutional provision covering different eligibility nets, likely due to cobbling together constitutional changes over a period of several decades.

When "proof evident, presumption great" was used, people believed that heightened evidence of a very serious charge (typically a capital crime) meant higher risk to flee. Today, use of that particular limiting process has been shown to be constitutionally deficient, and so a better limiting process than "proof evident presumption great" is necessary. Nevertheless, all constitutional bail provisions today include: (1) right to bail or release language; (2) a detention eligibility net (wide or narrow, depending on the state); and (3) a "further limiting process," or a finding of risk needed to detain a defendant within the net, with states varying widely on how they are worded.

Note that the "further limiting process" should not be confused with "due process," the requirements of which will likely be forced upon the states. As mentioned above, the further limiting process began not as a legal requirement, but as a historical feature of American bail clauses. It is only now that courts

would likely balk at eliminating the finding of risk, for that would allow detention based solely on charge. Thus, as I like to say, the "further limiting process" was a historical addition to the English system of allowing detention based solely on charge, but it is now likely an American legal requirement.

Unfortunately, the "bail/no bail" intentional release/detain process has been clouded by America's adoption of secured financial conditions in about 1830, which can detain both unintentionally or even intentionally, so long as a judge does not make a clear record of intent to detain. The ability to detain persons intentionally by merely thinking about it but not articulating or showing it through activity showing intention creates a loophole – what I have termed the "excessive bail loophole" – which allows judges to get around the "no bail" part of the state constitution or statute without any hearing to satisfy due process. Indeed, the loophole gives judges 100% discretion to detain on purpose using money so long as those judges do not say out loud that they're detaining on purpose or otherwise show any other evidence of intentionality. I have written about the loophole at length in my *Changing Bail Laws* and *Right to Bail* papers, but I also explain it further in Appendix A of this memo.

By the way, when America created its release/detain model, it specifically eliminated the somewhat large amount of judicial discretion that had crept into the English bail system begun around 1275. Thus, it is important to recognize that America never meant to allow 100% discretion to detain in its early "consensus" bail articulations. Thus, moving away from a money-based system in favor of intentional release and detention means not only going back to original notions of "bail" and "no bail," but also stripping away at least some of that unwanted discretion to detain that is hidden within a money-based process.

The loophole is the fundamental reason why so many "bailable" defendants are in jail on unaffordable money bonds. Not all accused persons face amounts that were intended to detain them, but what we tend to see is that using money bail in order to detain allows money to seep into the rest of the system, causing a great many more people to be detained through unaffordable financial conditions, including persons that the judge might otherwise say he or she wanted to be released. Secured money bail is like a cancer, which spreads to all areas of the system. In my opinion, money is *only* good at detaining persons

pretrial; it provides no motivation either to come to court or to refrain from criminal activity, and thus states keep money bail primarily for its ability to easily detain. That is why getting rid of money bail – or even eroding it — inevitably leads states to search for some alternative to money-based detention.

Typically, that alternative would be found in the state constitution (or, in nine states, in the bail statutes or court rules). However, the existence of this loophole since the mid-1800s in America has allowed states to completely ignore their constitutional (or statutory) articulations of intentional release and detention simply because detaining with money is much easier. As a result, because the states have ignored those provisions for so long, current state constitutional articulations of release and detention virtually all need revision. But the need for revision – or, indeed, even the widespread use of money to detain – should not lead to a conclusion that current right to bail clauses have lost all meaning. Indeed, they must be read to have some meaning, even after decades of neglect and even in states immersed in the money bail system.

Given our current money-based system, it is tempting to say that the right to bail is merely the "right to have bail set," which takes advantage of the loophole, ignores the "no bail" provision, avoids due process, and rests on the fallacy that a bailable defendant being held on a money bond always has some realistic chance of obtaining release. But this is a poor definition when used by itself, as it does not take into account the entirety of American law. Instead, even with money in the mix, a proper articulation of the right to bail should be – at the very least and until money is not capable of detaining persons pretrial – not only the right to have bail set, but also the right not to be detained on purpose beyond those charges found in the exceptions (the "no bail" provision) to the right to bail. For more on this, read my *Right to Bail* paper, found on my website. Research into a state's right to bail provision can unearth stronger statements of the right, but, again, the clause *must mean something.* One simply cannot go on ignoring the right to bail or provide some workaround to the clause through legislation, court rule, or judicial practice.

This articulation of the right recognizes court opinions in virtually every state and in the federal system that say, essentially, that you cannot use the bail or release process to detain by setting an amount of money designed to keep someone in

jail. This is just common sense; if you allow money to *intentionally* detain beyond the charges listed in the "no bail" or exceptions clause, then you effectively negate the "no bail" provision in any particular constitution, which, in turn, renders meaningless the entire right to bail.

The fundamental point is this: if the right to bail means, at the very least, the right not to be intentionally detained pretrial for a charge not listed in the "no bail" provision of a constitution, then any sort of erosion of the excessive bail loophole – coming from either using less money or by inserting more intentionality into the bail process – will inevitably lead to examination of the constitutional provision. Accordingly, to the extent that states want simply to begin to do pretrial release and detention intentionally (for example, by using less money, by using assessments, by making money affordable, by holding due process detention hearings, etc.), then they will have to deal with their constitutions. I believe that this generation of bail reform is, at its core, primarily concerned with moving from a random (money-based) system to a fair, transparent, and intentional system. If I am right, then constitutional change is inevitable because a constitutional right to bail must have meaning and that meaning, at least for now, is based on intentionality.

And if I am right that constitutional change is inevitable, then please realize that a bad constitutional amendment, that is, one making it extremely easy to detain non-monetarily, will overshadow and possibly render meaningless any other big reforms currently being discussed during this generation of bail reform. It will simply not matter how a state uses an actuarial tool, or whether or not defense attorneys are present in the courtroom, or if racial equity is being adequately addressed if lawful detention is easier than the money-based detention it replaces.

Forms of Constitutional Clauses in the States

Right to bail clauses are largely defined by their exceptions, or intentional detention provisions. Historically, states with right to bail clauses have been divided into three categories: (1) broad right to bail states, which provide the right and very few exceptions – such as treason, murder, or even crimes leading to a potential sentence of life imprisonment often coupled with a "limiting process" (finding of risk within the net) of "proof evident, presumption great"; (2)

amended right to bail states, which have added to the crimes eligible for detention, and which, in some ways, have strengthened the finding that must be made in order to detain those who are eligible, often for purposes of public safety; and (3) no right to bail states, which makes them like the federal system, which has no right to bail in the federal constitution, but which includes the release/detain language in the bail statute.

Because bail (or release) is foundational to our American system of laws, even the nine states without a constitutional right to bail must provide for the release of defendants pretrial and must abide by the law that liberty be the norm and detention be the "carefully limited exception." Accordingly, one should look for an articulation of the in and out, the "bail/no bail," or release/detain dichotomy even in these states without constitutional provisions. If it is difficult to find (and some are), then it is very likely that the state relies heavily on money bail to detain and has not yet seen a need to use any intentional detention process.

These categories are helpful in thinking about constitutional provisions, and yet they share elements that lead to an even easier way to discuss them. Essentially, all right to bail provisions – be they constitutional or statutory – are the same. Virtually all provide for some fairly broad right – if only in theory – to release, and the "no bail" provision, whether in a broad right to bail state or an amended state, provides for preventive detention; even the broadest of rights, for example, a clause saying that everyone has a right to bail except in capital cases, is saying that in capital cases a person may be detained on purpose to prevent something – typically, flight. There is a common misunderstanding that preventive detention only involves public safety, but this is simply not true. Indeed, if this issue arises, you should contact me for more information as it involves certain misapprehensions about bail held during the 1960s through the 1990s. In sum, I often find it helpful to look at all states as already having preventive detention whenever any "no bail" provision exists.

Nevertheless, knowing both ways of looking at bail clauses is helpful. For example, Alabama recently amended its constitution by adding more charges to the detention eligibility net. One could say, therefore, that it moved from a "broad right to bail state" to an "amended right to bail state." But one could also

say that the state merely widened its existing ability to preventively detain by adding to what was, before, a very narrow net.

Whether The States in Each Category Will Change

As noted above, because money is often used unlawfully to detain on purpose, the elimination or *even the erosion* of money's ability to detain (along with any insertion of intentionality into the process) will pressure the states to look for some other means to detain on purpose. Typically, this will begin by states examining their constitutional bail provisions, or, in those states without a constitutional right to bail, in their articulation of release and detention in a statute or court rule.

Bail reform advocates must begin to watch for the kinds of pressures that tend to lead to constitutional examination. For example, a single supreme court opinion in Ohio saying that money bail could not be used for purposes of danger (a correct conclusion based on the law, history, and pretrial research) led to an unfortunate constitutional amendment in that state designed to allow for money to address public safety. In Colorado, the supreme court recently wrote that, because that state had eliminated capital punishment, judges could no longer deny bail pursuant to the "capital crimes" exception; that is, they would now have to set bail. That opinion, too, is currently causing people to think that they need to change the constitution. Practically anything having to do with existing detention provisions, money bail, or even revocation, in addition to states simply deciding to do things on purpose, will cause virtually all states to begin to examine their constitutions. Then, when they look at existing constitutional provisions, they will likely realize that having ignored them for decades or even over one hundred years has made it inevitable that the provisions will require change.

In my opinion, there are very few constitutions that will not be changed. States with "categorical" no bail or "broad right to bail" provisions will want to change, simply because the net is too narrow. States with "charge plus precondition" amended provisions will want to change to eliminate the preconditions (again, due to the net being perceived as too narrow). Many states with amended constitutions will want to change because they did not adequately address flight or they relied on faulty assumptions during the previous amendment process.

States with inadequate limiting processes will want to change, but only once they know how those provisions should be drafted.

There are actually four or five state constitutions that are currently so wide in their ability to detain that they might not need the typical alterations. What they need, however, are voluntary changes (or lawsuits to force changes) to *narrow* what are mostly extremely broad or loose detention provisions. And while it would be preferable to narrow those detention provisions through constitutional amendments, that narrowing could also be done by statute or court rule. In sum, all states have flaws with nets, limiting processes, assumptions, and justifications, all of which necessitate constitutional change. States with no constitutional provisions will likely change their bail/no bail dichotomies more quickly via statute or court rule, but they run the risk of having to work through numerous iterative amendments before stakeholders and the public can agree on a consensus process of release and detention.

"Nets" and "Further Limiting Processes" (Risk Within the Net)

To fully understand the flaws causing states to desire change, you must also fully understand what these right to bail clauses entail in some detail. As mentioned above, if you live in the 41 states with a constitutional right to bail, your bail provision will be made up of three major parts: (1) the articulated right to bail or release; (2) a detention eligibility net, sometimes known as "exceptions to bail;" and (3) what I call a "further limiting process," which is some further finding of risk that must be made in order to detain someone in the eligibility net. As I mentioned above, states without a right to bail *should* include some articulation of the same things in their statutes or court rules, but some don't – likely due to the accepted use of money as a detention mechanism.

The current nets and limiting processes vary across the country, but virtually all of them are deficient, if not unlawful, as they have been ignored and/or amended using flawed legal justifications and assumptions about defendant risk. For example, the nets and limiting processes found in the federal statute (and mirrored in the ABA Standards) were seemingly based initially on the assumption that a serious charge equaled high defendant risk to commit the same serious crime. Thus, answering the question, "How risky is this person," meant, at least initially, looking to the charge. Today we know that charge is a bad proxy for

defendant risk, which means that better articulations of "how high the risk" must be added to our laws.

Moreover, after doing a detailed legislative history on the D.C. Act of 1970 and the Bail Reform Act of 1984 in my *Model Bail Laws* paper, I was able to point out numerous flaws in various studies used to justify the D.C. and federal detention provisions. As in the federal system, the states were not immune to these deficiencies when they crafted their constitutional or statutory amendments both before and after the federal changes. The bottom line is that current nets and limiting processes vary widely across the U.S., but – depending on when they were created and how much they have been ignored – most of them are entirely unsuited to adequately guide intentional detention today.

For legal, historical, and research reasons, it is highly unlikely that states can stray from a limited and justified *charge-based* eligibility net/further limiting process form of release and detention (versus, say, a so-called "risk-based" form). For details as to why, you can read either my *Model Bail Laws* or *Changing Bail Laws* papers. Moreover, and as mentioned above, there are likely limits that govern the legality of these elements in addition to the Supreme Court's admonition that detention be "carefully limited" (for that analysis, *see, e.g., Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (2014). For example, a state that enacts an "unlimited" detention eligibility net may someday have problems with both excessive bail and due process fair notice. As another example, using an actuarial tool by itself – that is, as the sole basis to detain – is likely unlawful as compared to more accurate expressions of the risk necessary to detain. I have also already mentioned the dubious use of the "proof evident, presumption great" limiting process as potentially violative of the requirements found in *U.S. v. Salerno.*

Occasionally you may find a state, having learned the fundamentals of bail and having analyzed its constitution, that decides, for various reasons, it can live with the existing language, depending on how close that language adheres to better templates. As just one example, I spent much time explaining constitutional language alternatives to stakeholders looking into detention in one particular state and, in the end, those stakeholders chose not to recommend any constitutional change to what was otherwise a recommendation for a complete overhaul of the bail statute. In sum, those stakeholders decided that they could

live with their current constitutional provision, but only after an informed analysis of the elements of a better "model" provision. Likewise, in Illinois, stakeholders chose not to change the constitution despite a complete overhaul of the bail statute, a decision that might change after full implementation of that statute.

In other states, constitutional change is already happening. Until recently, only New Jersey and New Mexico had fully changed their constitutions based on the kinds of pressures being seen in this generation of reform. But in the last year alone, I have seen seven states seeking to change their constitutional right to bail provisions, with some unfortunate successes. These attempts have mostly been haphazard and deficient; indeed, in some cases, legislators, being ignorant of the kind of bail education needed to make substantive changes, have sought to amend constitutions in ways that are completely ineffective (most recently, for example, in Ohio), thus ensuring the need for some further amendment at a later date.

Preliminary Research Required Before Change

Prior to changing a state constitution, it is imperative that someone do the research necessary to understand exactly what the right to bail means in that particular state as well as whether any laws might currently conflict with bail-setting now or in the future without constitutional alteration. For the most part, what the researcher will find are varying definitions of bail and the right to bail, often changing with the various eras seen through the history of bail. Occasionally, however, one will find a case – something I call a "glitch" case – which fundamentally alters bail in the state, and which can only be changed by amending the constitution.

For example, the Colorado Supreme Court recently held, essentially, that once a defendant is bailable, he or she stays bailable no matter what he or she does while on release. Accordingly, if a person commits a new crime while on release, the opinion says that the person may not be "revoked," except only temporarily so that a new release order can be crafted. Essentially, it is a "once bailable, always bailable" case, which I have seen in other states.

In most instances, and especially in a system immersed in money bail, such an opinion might be seen as beneficial to defendants in that it curbs automatic or cursory detention based on pretrial failure. Unfortunately, it completely

forecloses the ability to revoke bail, which is a fundamental element to be considered in constitutional change, and relies on money in that it tends to hint that judges can protect the public in such cases by setting unattainable money amounts on the newly crafted release orders. Because it is tied to the constitution, Colorado will have to deal with this either through constitutional amendment or not at all, depending on any new model it intends to produce. In my opinion, the Colorado Supreme Court would not have held this way if, in fact, money was not a major part of the state bail system.

Other research will uncover other issues. For example, if a state has a fairly robust history of opinions dealing with the so-called "categorical" exceptions (those charge-based nets with only a finding of "proof evident, presumption great" to detain), that state will have to weigh keeping that jurisprudence intact with recent cases calling the constitutionality of categorical provisions into question.

What to Change When Change is Necessary

If a state finds it necessary to change the constitutional bail provision (I do not think it is possible to know if it is necessary to change without at least some education and research on bail and defendant risk), there are five main variables that must be considered: (1) the detention eligibility net, which can be made wider or narrower; (2) the "further limiting process" (the finding of risk necessary to detain someone within the net, which can be made looser or tighter); (3) the "secondary net and process," or bail revocation; (4) how the state uses money; and (5) sometimes, how a state uses an actuarial tool.

Note also the following three rules of thumb: (a) Your detention provision defines how wide your right to bail is; accordingly, in addition to other legal problems, creating an unlimited net (or allowing a legislature to create the net) or leaving out the limiting process from the constitutional provision – basically, having a constitutional detention provision with seemingly no constitutional boundaries – can occasionally effectively eliminate any substantive constitutional right to bail despite leaving in words like "right to bail"; (b) if you do not eliminate money as a detention mechanism, nobody will use your "no bail" provision, no matter how perfect it may seem; and (c) the government will likely push for a wider net and "looser" process to detain than, say, a civil rights group, which will likely push for a much narrower net and limiting process than the government. The end result

will likely entail compromise through changes in language surrounding the five main elements.

These five elements are the primary elements, but states should realize that there are many more issues – and thus, potential statutory or rule provisions – that must be analyzed and likely enacted along with the main constitutional language. These issues might include things like details concerning temporary detention, the due process requirements for full detention hearings, provisions for speedy trial, restrictions on secured financial conditions, and other provisions based on best-practice language. In my papers, *Model Bail Laws* (at 198-200) and *Changing Bail Laws* (at 56-58), I provide resources and lists of the various "extra" elements that states will likely need to consider and possibly address during any decent bail law overhaul.

The element concerning the use of money is crucial, and deserves special emphasis. The entire endeavor of creating a preventive detention provision in a state constitution is premised on eliminating the current use of money to detain through the excessive bail loophole. Moreover, the creation of a new constitutional detention provision, no matter how well done, will be completely ignored unless the issue of money-based detention is addressed. Indeed, we know this from history through jurisdictions, which have, in fact, ignored their otherwise lawful intentional detention provisions for decades due to money's ability to easily detain. For example, Congress created preventive detention in Washington D.C. in 1970, but it was not until 1992 – when Congress added a single line forbidding money as a detention mechanism – that judges began to use the intentional detention process.

It is my opinion that money as a detention mechanism will inevitably be eliminated or simply eroded, which makes designing an optimal "bail/no bail" provision so important, even if a state still uses money to detain and has no desire to hasten money bail's demise. Accordingly, at the very least, states must act *as if* money will be taken away from them when designing a new constitutional provision, so that it represents a comprehensive and consensus-driven model of intentional release/detain in the event that money-based detention goes away.

The compromise – and I do believe it should be a compromise, with varying stakeholders and affected persons educated in the fundamentals of bail all

agreeing to the constitutional amendment – comes from everyone knowing as much about this process as possible, so that they know how to offset one element with another. For example, a wide net can be cured with a stricter limiting process, a narrow net or limiting process can be cured through a good "secondary net and process" (my term for revocation), and creating an optimal primary and secondary net and process can lead to the elimination of money that detains.

Be Careful With Words

Sometimes people confuse a "release standard" with a "detention standard," which requires a different articulation of risk. As mentioned previously, risk is inherent at bail, but the standard for placing limitations on release short of detention is obviously different than the risk we must show to detain through pretrial incarceration based solely on prediction.

If someone says that "a person may be detained if no conditions provide reasonable assurance of court appearance and public safety," they are basically articulating a release standard for a detention provision. The standard derives from *Stack v. Boyle* (a release case), which tells us that when releasing people, we are only allowed to get "reasonable assurance" (not complete assurance, or to ensure or insure, like a guarantee) of court appearance and public safety. *Stack* is not a detention decision, and thus, again, it was articulating the risk needed to do things to persons who are actually released. Thus, if someone is crafting a new detention provision and uses this type of *Stack* language, they are doing it wrong. "Court appearance" involves missing court for any reason whatsoever, just as "public safety" can involve any crime whatsoever, and so using those terms, while appropriate for release, does not adequately describe the risk needed to detain. In America, we simply do not detain for risk to commit any crime or to miss court for any reason. This warning is not academic. In addition to New Jersey and New Mexico, most of the seven attempts to change constitutions last year involved using "release" language to detain.

There are other reasons to be careful with words. For example, recently a state proposed changing its bail provision from one saying that everyone has a right to bail unless it was designated as "unbailable" later in the constitution to saying that everyone has a right to bail unless it was designated as "unbailable" later in the constitution "or by statute." By simply adding three words, the proposal was

effectively giving the legislature the power to gut the constitutional right to bail by allowing it to enact a list of detention eligible crimes to grow to any size through statute. Because there were no significant boundaries left in the constitutional bail provision, the amendment – through only a few words – would have basically rendered the constitutional right to bail meaningless.

As another example, I have seen recent constitutional amendments using the word "ensure," which means to guarantee, versus "assure," which means to provide confidence when talking about providing assurance of court appearance. Because bail is based on prediction, and because we can never be completely sure of our predictions, using the word "ensure" in a detention provision will provide a far too lenient standard to detain; because nobody can guarantee that someone will not flee or commit a serious or violent crime, the word "ensure" would theoretically justify detention in all cases.

In short, every word matters, and if you are not sure why a particular word has been used, find out why and demand that correct and accurate words be used instead.

Articulating the Detention Eligibility Net

I have found that when discussing detention, most people focus on the net, and most issues they raise are what I call "net issues." For example, they might say, "I think people facing DUI charges should be detained." What they really mean, however, is that they think people facing DUI charges should face the *possibility* of detention and that only persons facing DUI charges who present the highest future risk should actually be detained. Being overly focused on the net has caused many people to assume that the net is the most crucial aspect to the constitutional provision.

Personally, however, I think that the limiting process (the finding necessary to detain within the net) is far more important. Indeed, based on everything I now know, I assume that states can articulate a fairly broad net – for example, all violent charges, or all felonies and violent misdemeanors – and have it hold up under legal scrutiny. But it is precisely this fact – the fact that states can likely legally justify wider nets – which means that the limiting process is the crucial aspect upon which to focus. This is not to say that stakeholders cannot collaboratively limit a net, charge by charge, by working together and agreeing

that certain charges, no matter how risky one who is accused of the charge might be, should simply not lead to detention based purely on prediction. They can and they have.

As I have already mentioned, there are certain hard limits on nets. For example, I believe that the net must be charge-based and cannot be "unlimited," lest it run into legal problems. Moreover, and again, advocates for bail reform will likely resist agreeing to wider nets, but they should realize that a good limiting process can cure a wide net. Likewise, state stakeholders may resist narrow nets, but they should realize that the pretrial research likely points to using narrow nets, and, in any event, a narrow net can be cured by a good "secondary net and process," also known as a revocation provision.

The process for creating a proper eligibility net for pretrial detention based solely on prediction (i.e., bail in the first instance and not revocation) necessarily requires people to have: (1) general knowledge of defendant risk; and (2) some notion of what it takes to provide legislative justification for charges within the net. In my paper, *Model Bail Laws,* I was able to justify my model net of "violent charges" (felony and misdemeanor) through both empirical studies and common sense, but legislative justification can come from other sources far less exacting than empirical studies. It depends on the state, what sort of issues it sees, and what sort of justification it can amass.

Overall, creating a charge-based net likely involves working from both ends – serious and non-serious crimes – inward toward the middle. For example, the first question might be, "Should first degree murder be detention eligible, so long as we are able to show future risk of the particular defendant in any particular case?" Most would answer "yes." The second question might be, "Okay, then, what about parking tickets?" Most would answer "of course not." But what about traffic offenses? Most traffic charges would likely be left out of detention eligibility based solely on prediction, but I have seen arguments to include DUIs. To include any particular charge, one will need legislative justification (which, as I said, might be anything, including testimony from various advocacy groups) as well as the understanding that adding a charge that is not completely clear cut might lead to a tightening of the "limiting process," or finding of risk needed to

keep the eligible defendant in jail (just as leaving out certain charges might lead to a "looser" revocation process).

Of course, there are other ways to engage in the process, such as starting with "all violent offenses" or "all felonies" and going through those categories to eliminate individual charges perceived as unnecessary to the detention eligibility net. The fundamental point is that it is reasonable, if not necessary, for a state to decide that certain charges will not lead to pretrial detention based solely on prediction; that is, there are certain people facing those charges who will simply not be detained, no matter how risky they may be. That is because people are already risky or not risky, before they are even charged. Accordingly, and as only one example, the state might decide that no matter how risky persons might be who are accused of, say, trespassing, that charge will simply not lead to detention in the primary net based solely on prediction. Intentional release/detention is, at its core, an exercise in drawing lines.

In creating the net, there is much room for creativity, nuance, and compromise. For example, if a seemingly intractable argument arises over whether to include DUIs as a category in the net despite limiting language in the risk finding, one could also consult the research. If there is research showing that, after some set number of DUI convictions, persons are higher risk to have accidents involving injuries, then a charge-plus precondition solution (for example, persons charged with a DUI having been convicted two previous times for DUI) might be appropriate. This sort of justification would also help considerably in the event of any court challenge to the detention provision.

I firmly believe that a group of diverse stakeholders can do this exercise and come to consensus on a limited net that will survive both excessive bail and due process fair notice claims as well as any analysis done pursuant to *United States v. Salerno*. Indeed, in Colorado, a group of diverse stakeholders came up with exactly that – a moneyless replacement constitutional provision to our current bail clause. That replacement allowed detention only for "eligible offenses," which could be determined by the legislature, albeit with certain firm constitutional boundaries concerning the seriousness or violent nature of the charges, and including a proposed requirement that charges become detention eligible only through a supermajority in the General Assembly. In a proposed

statutory amendment, the group then listed the specific detention-eligible charges based on the constitutional boundaries, which meant that only "serious" or "violent" charges were considered.

It also includes nuance. As an example, the group agreed to potential detention for certain misdemeanor offenses, but not for municipal offenses, including municipal offenses that mirrored the eligible state misdemeanors. This sort of consensus over a nuanced list is entirely doable, but leaving boundaries in the constitution is the key to maintaining substantive meaning for the right to bail clause.

In the end, the group came to consensus on a net, included boundaries about the net in the constitution, crafted a better constitutional "limiting process" (or finding of risk within the net), and even included a revocation provision in the constitutional language.

The "Further Limiting Process:" Articulating the Risk Needed to Detain Within the Net

The idea that states can likely legally justify wider nets means that the articulation of risk needed to detain within the net must be very limiting and crafted with care. As mentioned above, the best articulation will likely require clear and convincing evidence of substantially high or extremely high risk to do something very bad, like flee to avoid prosecution or commit or attempt to commit a serious or violent crime against a reasonably identifiable person or persons (and possibly their property). In short, it will focus mainly on how high the risk must be as well as answering the question of "risk of what." In an optimal "further limiting process," a state should also add a requirement that a judge must find that no other release conditions or combination of conditions suffice to address that high risk. This "no conditions suffice" language is inferior when used as the *sole limiting process* (*See* Appendix A), but there are benefits, such as how it parallels strict scrutiny findings necessary to detain, to using it with the rest of the risk finding.

The above model articulating the risk necessary to detain was not necessarily easy to figure out. I spent two years digging into it – going through nearly every federal case that was working through intentional detention back when nobody was sure it was even lawful – and looking at fact patterns showing exactly what the risk to

detain should be. Thus, the risk needed to detain that I articulate in this memo comes from the facts and language from various American court opinions during the 1960s through the 1980s, which lend themselves to certain broad themes adopted by my detention provision in *Model Bail Laws.* In the end, the model articulation of risk needed to detain follows the law, which, among other things, requires detention to be "carefully limited," and the pretrial research, which gives some indication of how risky defendants actually are as well as the difficulties inherent in risk prediction. If you read my paper, you will see that the template language holds up against three different methods of assessing model detention provisions.

(1) How High is the Risk?

Older articulations of intentional detention occasionally assumed high risk based on the seriousness of the charge. This has not been borne out by the research, however, and so charge alone should not be used to articulate future risk. Likewise, at the other end of the spectrum, the risk measured solely by an actuarial tool will cause stakeholders to overestimate riskiness because those tools typically look at the risk of missing court for any reason and committing virtually any crime whatsoever. Accordingly, instead of charge or sole use of a tool, one should require a judge to examine relevant facts and circumstances *beyond an actuarial tool* to determine risk, and the answer to "how high" that risk must be will likely be settled through the use of some modifier, such as "high," or "substantial," or "extremely high" along with statutory or rule-based factors to be used in assessing risk. In my *Model Bail Laws* paper, I used facts and circumstances beyond the use of a tool showing "extremely high risk" only because the "extremely" modifier is the word I saw used the most by judges in the 20th Century who were struggling with just how rare pretrial detention should be. I think a modifier is crucial, but I acknowledge that it will ultimately be filled out by facts in particular cases.

New Mexico changed its constitution, but did not include any precise language of how high the risk should be to detain. Instead, it merely hinted at it by saying detention was available when "no conditions sufficed" to protect the "safety" of any persons or the community, thus also using release language and sole use of the federal limiting process. Accordingly, its Supreme Court was required to issue

an opinion explaining what it meant by "danger" leading to detention and how to assess it through its court rules. Other states might not benefit from a supreme court capable of rendering such an opinion, and, in any event, it is a step that can be avoided by using the proper words in the constitutional amendment itself.

(2) Answering the Question, "Risk of What?"

This is the most important part of the limiting process, mostly because it is the thing that we have lacked the most in any articulated detention provision to date. Again, in my *Model Bail Laws* paper, an examination of the so-called "detention cases" of the 20th Century made me confident that America should not allow intentional pretrial detention for risk of missing court for any reason or committing any crime from a traffic offense to murder. And again, this is also why an actuarial tool – while very helpful in release (it helps you to sort people so that you can provide supports to those who need them) and also helpful when used in addition to these other considerations in detention (because it mostly shows defendants are not generally risky) – should never be used as the sole basis to detain. It simply does not give you an adequate answer to the "risk of what" question. In my model, I say that the person must be extremely high risk either to willfully flee to avoid prosecution (some people corrected me by saying that flight assumes willful behavior, but I am okay with redundancy on this point) or to commit a serious or violent crime on release.

As with the nets, above, all of the words matter, and can be somewhat negotiable. Do remember, however, that just as a secondary net and process (revocation) can help cure a narrow primary net, that secondary process can also allay fears that the primary limiting process is too "tight." In my revocation model, which is admittedly tight in that it makes it harder than most states to revoke, being charged with any jailable offense or missing any court date while on pretrial release will nonetheless put a person in my secondary (revocation) net, and the process for detention, while much better than any existing state process, is nonetheless looser than my process for detention based solely on prediction.

On the other hand, a detention provision that is too loose overall, that is, makes it too easy to detain, while theoretically capable of being limited by statute or court rule, will likely be difficult to change in practice. Indeed, such a provision will tend to make people think that the language works simply because detention proves

itself; the more people a state detains, the more that state will think it has done detention correctly.

Are There Any Templates for Language Out There?

Yes, there are templates, but states are warned not to use any other state or jurisdiction (such as D.C.) as a structural "model" for re-drafting parts of their constitutional bail provisions. They are all, quite simply, deficient. They are mostly deficient because judges have ignored them (for 190 years, money bail has been allowed to serve as a detention mechanism), but also for other reasons that you can read in my various papers, including lack of proper justification, bad assumptions and lack of knowledge about defendant risk, insufficient language, and a dearth of bail jurisprudence to help with drafting, which has only recently begun to change.

Instead, states should use one of the growing number of what I call "hypothetical models," such as the detention templates I created in 2017 and 2018 to help guide the state constitutional drafting process. In addition to my model, Civil Rights Corps, ACLU, the Uniform Law Commission, and the 2020 NASPA Standards can be used to help with drafting. Theoretically, the new bail law passed in Illinois also represents a potential model of moving to moneyless, intentional release and detention, but I note that it was done by statute without any changes to the constitutional language, something that might require some fix, depending on issues raised in implementation.

Do realize that the newer, "hypothetical" models – along with the NAPSA Standards – all seem to fully understand the notion of a some "higher" level of risk necessary to detain and they all represent moving from a money-based system to one that centers around intentional release and detention. These newer articulations are far better than any state model currently in use, and were mostly created by looking at the history of intentional detention in America during the 20th Century, along with the law and the pretrial research (especially risk research). These hypothetical articulations also follow common sense and fix a fundamental problem caused by states wanting to use the detention language from the federal statute as their primary template, which I discuss below.

Warning About the ABA Standards

One note of caution, however, about the ABA Standards. Those Standards are now close to 40 years old (meaning they do not have the benefit of a burgeoning supply of pretrial research), and they admit to being similar to the federal and D.C. bail statutes, which have certain design flaws in addition to structural misapprehensions and erroneous assumptions about defendant risk. The NAPSA Standards, on the other hand, have been recently updated (released in 2020), and have a much better understanding of how to craft a proper detention provision.

Warning About the D.C. Model

Many jurisdictions look to D.C. as a "model" jurisdiction based primarily on outcomes; D.C. only detains about 6% of all defendants (non-monetarily) and still gets court appearance and safety rates near 90%. Moreover, D.C. is a model in nearly every other pretrial element – pretrial services, proper use of a tool, evidence-based language, judicial training, etc., and has been used as a beacon to guide states in pretrial reform ever since this generation of bail reform began. Nevertheless, the structure of the model (the actual words of the statute, in particular the net and limiting process) is such that a great deal more detention might happen if the judges were not "enlightened" through somewhat extensive training about the proper purposes of bail, pretrial detention, and the research.

After speaking to several people in D.C., it seems clear to me that directly copying the D.C. legal bail structure into some state constitution could never guarantee the same outcomes without first creating a significant judicial culture of release. This appears to be true as well in New Jersey, which copied much of the D.C. model, but which also has an "enlightened" judiciary that can produce high rates of release despite a legal structure that would seemingly allow far more detention. New Jersey's model also has other issues, such as a virtually unlimited net, the "no conditions suffice" limiting process as well as problems with the DMF, which I address in *Model Bail Laws.* And both jurisdictions have issues to the extent that they mirror the federal statute, which I discuss below. Truly, both D.C. and New Jersey have shown ways of achieving successful pretrial reform, from which all states can learn. Nevertheless, we must distinguish between D.C. and New Jersey acting as "models" based on outcomes and practice, versus based on

the words of their legal structure, which might not work well in some other state without significant guardrails to avoid over-detention.

Warning About the Federal Model

Likewise, the federal model should not be used for anything except as a historical lesson showing that if a jurisdiction eliminates money-based detention, it will likely need to create an intentional release/detain scheme to replace it. It is quite like the model enacted in D.C., and yet, due to an entirely different judicial and pretrial culture, detention rates are extremely high – sometimes as high as 80%, versus 6% found in D.C.

In short, the federal statute has big flaws, including poor justification, false assumptions about defendant risk, a too wide net, presumptions toward detention, and a faulty limiting process.

That limiting process (finding of risk to detain someone within the net) specifically says that a judge may detain someone within the net if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." As mentioned previously, this process is articulated through the words of release, not detention. Moreover, it was developed to answer a particular question happening in the federal system at a particular time in American history, which simply does not easily translate to the states.

Specifically, the BRA of 1966 provided for release on conditions, but gave no authority to detain non-capital defendants. Accordingly, many cases began to spring up in an attempt to answer the question, "What do we do if the listed conditions aren't enough?" The answer came in the BRA of 1984, in which Congress said that if no conditions sufficed to address risk, it would be proper to intentionally detain, but chose not to articulate how much risk should be proven by the government in order to make the finding that "no conditions" sufficed. Moreover, the limiting process was based on the resources found in the federal system, which had conditions of release (indeed, the BRA of 1984 added many conditions to help with the detention issue) and pretrial services agencies in every district to supervise those conditions.

After several decades, we now know all of the many problems with the federal standard. In sum, the federal limiting process suffers from (1) an improper mixing with the release standard, as mentioned above, (2) being subjective, (3) being resource-driven, and (4) being ineffective (i.e., it simply doesn't work to dampen detention so that release is "the norm)." Indeed, as a rule of thumb, if anyone, anywhere says that they found language they want to use from either the federal or D.C. statute (which is quite similar in many ways), just tell them to stop.

Using the federal model is one of two main mistakes I see states making today (the second being changing only one or two release/detain elements without considering all the elements together) and so I have attached an appendix dealing with both mistakes in more detail (Appendix A).

Warning About Money Language in a Constitution

There is virtually no reason to put the word "money" or "financial condition" or, indeed, any other specific condition of release into a constitutional provision, unless it is subsumed in a broader sentence that says something like, "No release conditions may result in the pretrial detention of the accused." Nobody would allow you to add a line to your constitution discussing drug testing or pretrial check-ins – the notion would defy any common sense – and so you should treat money the same way. Even if people think that adding money to a constitution will provide some level of public safety, it does not. Money simply does not keep people safe; indeed, nearly all states do not even allow for the forfeiture of money for new criminal activity, making the use of money for public safety to be irrational and thus unlawful. Money only keeps people safe when it detains, and money that detains intentionally or even unintentionally is likely unlawful for several reasons.

The way to affect public safety through release is through non-financial conditions, and the way to affect public safety through detention is to alter the primary net and/or limiting process in the intentional "no bail" provision or through revocation. Talking about money bail in a constitution is moving backward in the bail reform movement. Instead, the discussion needs to be over replacing money as a detention mechanism with a rational, intentional release and detain system that is fair and transparent.

And finally, related to the immediately preceding paragraphs, if for-profit bail bondsmen or their insurance company lobbyists say they can help you with your constitution, politely decline the help. All constitutional bail/no bail provisions are based on intentional release and detention to prevent flight or threats to public safety. After a long period of waffling, the bail industry has finally come to the obvious conclusion that they are against preventive detention simply because it threatens to reduce the industry's profits. Instead, they want things as they are: everyone gets a money bond – some can afford it and some cannot, and defendant risk simply does not matter. If the industry suggests that you add references to money into your constitutional provision (which they occasionally do), realize it is only to further their completely unfounded position that the right to bail is a right to pay money to them. In their minds, putting references to money bail in the constitution apparently helps with their – so far – completely unsuccessful arguments to keep money bail in America.

The Fundamentals of Bail

I alluded to my paper, *Fundamentals of Bail,* above, but you should realize that all of my papers have been built around the fundamentals, simply because, as I said before, those substantive fundamentals help with every aspect of bail, from recommending conditions, to writing court opinions, to changing constitutions. If you want to learn the six fundamentals (why we need pretrial justice, the law, the history, the research, the national standards, and terms and phrases, current to 2014) as well as to begin finding detailed information that helps to explain why, for example, bail is defined as a process of release and how the history of bail can help with crafting fair and transparent detention language, read that paper. If you want to know what it looks like to set bail using the fundamentals of bail, including how to use money, read my *Money as a Justice Stakeholder* paper. If you want to know how to use the fundamentals of bail to analyze your current state and local bail laws, read my "*Guidelines for Analyzing*" paper. If you want to use the fundamentals of bail to compare pretrial release with probation, read my *Pretrial Release v. Probation* paper.

My *Fundamentals* and *Money* papers clearly taught that to follow the fundamentals of bail, states would almost uniformly switch from using money to doing pretrial release and detention on purpose, which, in turn, would likely

necessitate changing their laws. Nevertheless, those papers never answered the question, “If we change, to what do we change?” Accordingly, if you want to know how to use the fundamentals of bail to move away from money-based detention and craft a new constitutional or statutory provision providing for a limited, transparent, fair, and safe means of doing “no bail,” or moneyless intentional detention, read my *Model Bail Laws* or *Changing Bail Laws* papers (for what it’s worth, *Changing* is merely a shorter summary of *Model*). If you want to know what the right to bail likely means in your state based on the fundamentals of bail so that you can complete the task of revision, read my *Determining the Right to Bail* paper. And finally, if you want to know details as to why you should not use the federal limiting process, and instead use one of the hypothetical ones by the groups I mentioned earlier, read my excursus in Appendix A to this memo.

Everything can be found on my website at: www.clebp.org.

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Appendix A:

Changing State Constitutional Preventive Detention ("No Bail") Provisions: Avoiding the Two Biggest Mistakes Being Made in This Generation of Reform

"Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business."

Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (Gorsuch, J. concurring)

Introduction

All states with constitutional right to bail provisions have two primary methods for detaining persons pretrial based solely on prediction: (1) unaffordable money bonds; and (2) on-purpose, moneyless preventive detention using their constitutional "no bail" (or "exceptions") language.[1] Detention using unaffordable money bonds has been baked into American law by something known as the "excessive bail loophole," which is a combination of three lines of cases that, together, require a judicial official to set bail for bailable defendants, but then allow that judicial official to set an unaffordable money bond so long as he or she avoids showing actual intent to detain, whether by expressly saying so on the record or by doing other things showing evidence of intentionality.

Although this loophole was eliminated in the federal system, it is ubiquitous in the states, and still accounts for the myriad of "bailable" defendants who have had bail set, but who are nonetheless held in jail today because they cannot pay for release. More importantly, however, the loophole has allowed the states to ignore the method for pretrial detention found in their constitutional "no bail" provisions. That is because, compared to a theoretically limited, transparent, fair, and intentional constitutional detention scheme with adequate due process safeguards, money detains easily and swiftly, albeit by avoiding due process and resting on the fallacy that so long as bail was set, the accused can realistically obtain release at any time. And because the states have ignored their constitutional provisions, some for nearly 200 years, it means that

[1] Forty-one states have constitutional right to bail provisions with "no bail" exceptions/preventive detention language. *See Guidelines for Analyzing State and Local Pretrial Laws* (PJI, 2017), found at Center for Legal and Evidence-Based Practices (clebp.org). The nine states that do not have them are not immune to the analysis in this paper, as they, too, must articulate in their statutes or rules some release/detain process, whether or not couched in terms of "bail." The Uniform Law Commission has recently published a model hinting at a third method, through which states might be able to ignore their constitutions and add "no bail" exceptions to statutes or court rules. While a good, justified model overall, the U.L.C.'s analysis on this issue is flawed. *See Determining the Meaning of a State's Constitutional Right to Bail Clause for Purposes of the Uniform Pretrial Release and Detention Act* (CLEBP, 2021) [hereinafter *Determining*]. Detention based "solely" on prediction means "no bail" in the first instance, and not revocation, which includes prediction as well as pretrial misbehavior.

those provisions are structurally inadequate for pretrial detention based on our knowledge of the law and pretrial risk research today.[2]

Doing bail (pretrial release) and "no bail" (pretrial detention) through the loophole is precarious, however. Indeed, if the loophole is in any way eliminated or even eroded in the states, either by reducing money's ability to detain or by states merely moving to a more intentional process, the forty-one states with constitutional "no bail" provisions would be forced to rely on that detention language, which, as mentioned above, is likely to be deemed inadequate for pretrial detention due to disuse and neglect.

And erosion of the excessive bail loophole is, in fact, what we are seeing today. It comes from multiple sources, including: successful lawsuits reducing or eliminating the unfair use of money bail and bail schedules; grassroots and racial equity groups showing the egregious racial bias of the money bail system; attempts by courts and others to make financial conditions "affordable" or to require that money-based detention is "necessary;" research showing that secured money bonds do not achieve their stated purposes; and news reports of heinous crimes committed by persons released on money bonds, thus showing the ineffectiveness of using money for public safety. Indeed, even bail education and a simple desire to do release and detention on purpose naturally leads to the erosion of money-based detention due to, again, those state and federal cases declaring it unlawful to use money to intentionally detain a "bailable" defendant (one of the three jurisprudential lines of cases making up the loophole). These things put enormous pressure on states to use less money at bail, which leads to the inevitable erosion of money leading to detention. And that erosion, in turn, forces the states to look at the second primary method to detain persons pretrial.

Accordingly, many states are currently examining their constitutional "no bail" provisions, recognizing their flaws, and making changes – and at an increasingly rapid pace. Indeed, although this generation of bail reform led gradually to new constitutional detention provisions in New Jersey in 2014 and New Mexico in 2016,[3] in just the last year, there has been an unprecedented

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[2] *See generally Changing Bail Laws, passim,* (CLEBP, 2018) [hereinafter *Changing*], found at Center for Legal and Evidence-Based Practices (clebp.org). Both this paper and *Model Bail Laws* use the history, law, pretrial research, and national standards to create a moneyless release/detain model template. Oddly, the states ignore their constitutional provisions despite acknowledging the importance of both (1) state constitutions generally, and (2) right to bail provisions specifically.

[3] S.C.R. 128, Pub. Question 1, (NJ 2014); S.J.R. 01, Const. Amend. 1 (NM 2016).

number of constitutional bail amendments (or serious attempts at amendments), including proposals in Alabama, Connecticut, Delaware, Indiana, Ohio, Texas, and Wisconsin.[4] This trend will undoubtedly continue, as all state constitutional pretrial detention provisions share many of the same basic flaws with the ones that have already been targeted for change.

Unfortunately, however, the most recent amendments designed to fix perceived legal and practical flaws in the state constitutions only reveal their own significant problems. Those problems include states: (1) mistakenly changing preventive detention language piecemeal without optimally addressing – at a minimum, and through consensus – all five major variables for constitutional change at the same time; and (2) mistakenly borrowing language found in flawed models from other states, or, more often, from the federal pretrial system, while ignoring the most recent legal, historical, and social science research (including risk research) available to guide them to successful change. This second error is especially egregious because if money as a detention mechanism is eliminated or even eroded, then using these dated and flawed templates as substitutes for money can easily lead to extremely high rates of moneyless intentional detention. This, in turn, would make "bail reform" arguably worse than the money-based system it seeks to replace. After some background, the remainder of this paper will address these two fundamental mistakes.

Background

While America had the chance to adopt its English-ancestor bail model in every respect, it ultimately chose a model with three significant deviations. First, America expanded the right to bail, so that eventually only capital offenses (or a few other extremely serious charges) were included in the "no bail" exceptions provisions. Second, America removed the discretion that had permeated the English system, and through which English judges could use non-charge "risk factors" to determine bailability; in America, bailability would be based on charge alone, and risk factors could be used only to add or subtract from the financial condition, which was, at the time, an "unsecured" condition (i.e., merely a promise to pay) so that it rarely, if ever, got in the way of release. Third,

[4] Amend. 1 (AL 2022); H.J.R. 261 (CT 2023); S.B. 11 (DE 2022); S.J.R. 1 (IN 2023); S.J.R. 44 (TX 2023). Ohio (Issue 1, 2023) and Wisconsin (Quest. 2, 2023) made changes not to their net/process couplings, *see* discussion *infra,* but rather to attempt to make it easier to allow for money bail to detain, and thus both states moved backward in the bail reform movement and will likely be forced to change their constitutions again in the near future.

America added the requirement that bail-setters make an additional finding of risk for those in the "no bail" category so that everyone was eligible for release and no one was detained on charge alone. The first of these required findings was "proof is evident, or the presumption great," but better articulations – such as clear and convincing evidence of a substantial risk to flee or to commit a serious or violent crime – have occasionally been adopted or recommended over time. Thus, in theory, the consensus American bail clause was an intentional release/detain model, with bailable persons expected to be released, and unbailable persons only eligible for detention. It was, and is today, made up of right to bail language, exceptions to that right (more appropriately called a "detention eligibility net"), and a "further limiting process," or a finding of risk needed to actually detain persons within the net.[5] All state constitutional bail provisions still contain these three main elements, although the language varies widely.

This intentional release/detain model worked relatively well in America until, gradually, the number of willing personal sureties diminished, leading to a tipping point in the early to mid-1800s that caused an unacceptable number of bailable defendants to remain in jail.[6] Judges reacted by experimenting with other ways to make sure bailable defendants would obtain release, including setting a financial condition that the accused could pay upfront as a precondition to release. It was the first use of a "secured" financial condition, and it led, unsurprisingly, to even more bailable defendants in jail.

Detained defendants objected to the practice, leading American courts to develop three lines of early cases, which held that: (1) while judges had to set bail for bailable defendants, (2) an unaffordable bail amount was not necessarily unconstitutional, but (3) judges could not set an unaffordable bail amount *with intent to detain*. As mentioned previously, these three lines of cases make up the

[5] *See generally Model Bail Laws* (CLEBP, 2017) at 26-48 [hereinafter *Model*], found at Center for Legal and Evidence-Based Practices (clebp.org); *Changing, supra* note 2, at 13-25. The phrase "further limiting process" expresses the notion that the charge-based net, itself, is the first limitation on detention. From within that limitation, there is a "further limiting process" designed to determine who, inside of the net, should actually be detained. It should not be confused with current notions of "due process" at bail, which, although also serving a limiting function, came later. The "proof evident, presumption great" limiting process was essentially a finding of risk within the net based on an assumption that proof of guilt for someone facing a capital crime indicated likelihood to flee.

[6] While there were always exceptions – people who could not find willing sureties – and while those exceptions may have seemed somewhat high in the late 18th Century, *See* Kellen R. Funk and Sandra G. Mayson, *Bail at the Founding*, Harv. L. Rev. (forthcoming 2024) (manuscript on file with author), it appears that they did not fundamentally alter the bail system until they reached a tipping point starting in the early to mid-1800s, when judges began to seek alternatives.

"excessive bail loophole," which gives bail-setters 100% discretion to intentionally detain any person using money, so long as those bail-setters avoid showing outward intent to detain, whether by expressly saying so on the record or by doing other things that might be deemed evidence of intentionality.[7] It is a loophole because it provides a convenient method for intentional detention while avoiding the constitutional "no bail" process, and since its creation, bail setters have been quick to understand the importance of making the "right" record or no record at all.

For over 100 years after the creation of this loophole, America struggled with any sort of pretrial detention, whether money-based or moneyless. This struggle ultimately led to two generations of American bail reform in the 20th Century that are reflected in state constitutional amendments in varying degrees. In particular, the second generation of reform, a generation focused

[7] *Changing Bail Laws, supra* note 2, at 19-23. The first line of cases, along with other cases explaining the right to bail, is significant primarily to show the importance of the bail clause. The second line of cases is ubiquitous in both federal and state courts, and is still used today to justify detaining bailable defendants with money. The third line is comparatively rare, but crucial to understanding the loophole itself. The rationale behind category three cases in the federal courts is that using money to keep a person in jail on purpose is "invalid" or an improper purpose of bail. *See,* e.g., *Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir.1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail); *see also Stack v. Boyle,* 342 U.S. 1, 10 (1951) (setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail.") (Jackson, J. concurring); *Bandy v. United States,* 81 S Ct. 197 (1960) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom"). The rationale in state cases most often focuses on the state constitution using the following logic: if judges are able to use money to intentionally detain a bailable defendant, that practice ignores, if not negates, the "no bail" constitutional provision, thus rendering it meaningless. *See, e.g., Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release....") (citing other state cases); *Foreman v. State*, 875 S.W. 2d 853, 854 (Ark. 1994) (judge reversed after asking defendant's counsel how much defendant can make, "so I can set it above what he can make"); *People v. Snow*, 173 N.E. 8, 9 (Ill. 1930) (judge reversed for stating, "If I thought he would get out on that I would make it more"); *State ex rel. Corella v. Miles*, 262 S.W. 364, 365 (1924) ("The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [the right to bail under the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is."); *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951) ("[E]xcessive bail is not to be required for the purpose of preventing the prisoner from being admitted to bail."). Even without a case reciting explicit facts showing a judge setting money to detain, states uniformly accept the principle through court rule or by citing or quoting other cases, such as *Stack, Bandy, or Galen*, with approval. Going back to the early 1960s, using money to intentionally detain a bailable defendant on purpose has been called "unlawful," "dishonest," an "end run" around the state constitution, an "abuse," a "game," and furthering an improper purpose of bail (i.e., detention) "sub rosa" or in secret. *See generally Determining, supra* note 1, 42-51. Its dishonesty is made more evident when, after two or three days, it becomes clear that the accused will not possibly post the amount, thus leaving intent to detain as the only rational explanation. The loophole, which forces states to focus on intentionality, is key to understanding why this generation of reform, which mostly seeks intentionality at bail, makes the elimination or erosion of money bail inevitable.

primarily on pretrial detention and public safety, ended with the federal system eliminating the excessive bail loophole by replacing money-based detention with an intentional release/detain scheme made up of a detention eligibility net and further limiting process. That fix, in turn, inspired many states to change their constitutions, and those changes almost uniformly resulted in widening state constitutional eligibility nets and allowing for intentional detention based on predictions of danger.[8]

Details of the language in changes to the state constitutions in the various generations are beyond the scope of this brief paper, but that language varied mostly based on when the amendments were enacted, and thus helps explain why they are considered inadequate today.[9] Nevertheless, by 2017, twenty-two states had amended their constitutions, often more than once, resulting in a mixed bag of detention eligibility nets (some too wide, some too narrow)[10] and limiting processes (some good, some bad), often with significant flaws and little to no justification. On the other hand, nineteen states had not meaningfully amended their constitutions at all, leaving in place extremely narrow nets (typically capital offenses) and substandard, if not unconstitutional, limiting processes (typically "proof evident, presumption great").[11]

More importantly, however, is that unlike the federal system, which eliminated the excessive bail loophole by forbidding money bail leading to

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[8] *See generally* Hegreness, *America's Fundamental and Vanishing Right to Bail,* 55 Ariz. L. Rev. 909, app. (2013). Note: the appendix does not include Oregon and Missouri bail provisions that were enacted via victim's rights amendments.

[9] For example, prior to *United States v. Salerno,* 481 U.S. 739 (1987), many states, fearing that preventive detention might be deemed unlawful, would merely amend their constitutional "categorical" no bail provisions by adding one or two charges requiring a finding of something like "proof evident, presumption great" to detain, *see, e.g.,* Hegreness, *supra* note 8, app. (SC 1971), or by adding charge plus pre-condition language in the eligibility net so that actual defendant conduct played a larger part in the detention decision. *Id.* (CO 1983). Post *Salerno* amendments, although also widening the nets, tended toward better articulations of the limiting process, such as that found in Louisiana. *Id.* (LA 1998, requiring "clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community").

[10] New Mexico considered its "charge plus precondition" net to be too narrow and thus expanded it to all felonies in 2014. An example of a "too wide" net would be a nearly unlimited net, allowing for detention of virtually all or a significant number of charges in possible violation of due process fair notice principles. *See Changing, supra* note 2, at 34 (arguing vagueness in addition to excessive bail as a limitation on nets); *See also* Uniform Law Commission, *Uniform Pretrial Release and Detention Act,* at 34 (raising the issue and arguing for a limited and narrow detention eligibility net). A "too wide" net, unlike one perceived to be too narrow, may nonetheless be narrowed through statute or court rule. Attempts to widen a constitutional net through statute or rule, however, should be considered unconstitutional.

[11] The constitutionality of so-called "categorical 'no bail' provisions," requiring only some level of proof of commission of the underlying charge in order to detain, has been raised in cases such as *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014).

detention, the states never addressed money as a detention mechanism even while they were amending their constitutions. They held onto money – and the loophole – and thus ultimately retained money-based pretrial detention with unlimited discretion while completely ignoring their constitutional provisions, whether amended or not. Money-based detention was, quite simply, easier than doing detention on purpose with appropriate due process. And although the federal government had warned the country of the erosion or elimination of money-based detention as early as 1970,[12] the states simply brushed that warning aside.

Today, though, and as mentioned above, money that detains is gradually being taken away from the states, forcing them to examine and potentially amend their constitutions once again or, sometimes, for the first time. Unfortunately, however, they are not using the most recent legal, historical, and social science research to help them in this process. Instead, they are looking at one or sometimes two of the five key variables needed to change a constitutional detention provision. Moreover, they are borrowing language primarily from the federal template (or one or two states that have already adopted the federal template), which is fifty years old, poorly worded, and based on faulty assumptions about defendant risk. The states are making other significant errors, but it is these two fundamental mistakes to which I now turn.

Mistake Number One: Not Considering All Five Variables Minimally Needed to Craft a Good Preventive Detention Provision

This mistake can be summed up briefly. There are two types of pretrial risk: (a) the risk needed to place limitations on persons who are released; and (b) the risk needed to detain, which is much higher.[13] To address the risk needed to detain, there are five important variables a state should consider when crafting a constitutional detention provision: (1) the detention eligibility net; (2) the "further limiting process," or finding of risk within the net; (3) the "secondary net and process," or bail revocation; (4) the use of money; and (5) sometimes,

[12] *See* H. R. Rep. No. 91-907, at 85 (1970) (warning that equal protection will likely force states to abandon money-based detention and to replace it with intentional release/detain).

[13] The main difference between the two "risks" is that the risk needed to do things to persons who are released is the risk to miss court for any reason and the risk to commit any crime, both of which can be adequately measured by an actuarial tool. The risk to detain involves finding clear and convincing evidence of facts and circumstances showing a substantial or extremely high risk to flee or commit or attempt to commit a serious or violent crime against a reasonably identifiable person, for which a tool is far less helpful. *See Model, supra* note 5, *passim.*

the use of an actuarial tool.[14] These variables are intertwined and (along with best-practice/legal language to be placed into statute or court rule) should be considered and crafted all at once – like a puzzle – with jurisdictions seeking consensus through give and take on the variables. So, for example, if a net is perceived to be too wide, it can be cured through a "tight" limiting process (i.e., making it harder to detain within the net). Likewise, if a net is perceived to be too narrow, it can be cured through variations of language found in the revocation process. All of this is known because weighing these variables – with an understanding of bail's history, legal foundations, and, especially, pretrial risk research – was crucial to this generation's first so-called "hypothetical" and moneyless detention model in 2017 (with others following) designed to help guide the states through constitutional change.[15]

Unfortunately, states today appear to be skipping any comprehensive change addressing all five variables either from lack of education or for short-term political victories. They are, instead, focusing on only one or two variables, even though consideration of the five together is essential to crafting optimal language and gaining consensus on any new constitutional model. This is especially true with the variable dealing with money. Indeed, the entire endeavor of creating a rational, transparent, and fair preventive detention model is to replace money-based detention based on the excessive bail loophole. Removing money as a detention mechanism was a primary motivator for Congress to create the first modern preventive detention law in 1970.[16] Moreover, from history we know that when money-based detention is not addressed, states will simply ignore even the best preventive detention language.[17] Finally, when crafting a new, intentional release/detain scheme,

[14] Other important elements, such as procedural due process hearings, will likely be forced on the states. Still others, such as temporary detention or other best-practice language, may be fleshed out in rules or statutes.

[15] The paper *Model Bail Laws* includes the first hypothetical model (with justification), and has been summarized in *Changing Bail Laws.* Other models include those created by Civil Rights Corps, ACLU, NAPSA (based on its 2020 Standards), and the Uniform Law Commission. The new Illinois bail law (only recently upheld by the Illinois Supreme Court, but not yet in force) can also provide template language based on its moneyless, intentional release/detain model.

[16] *See* Committee Print, *Statement of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, The President's Crime Legislation for the District of Columbia,* at 34 (1970) ("It is inconceivable that for decades *de facto* detention through high money bond and absent any procedural protections could avoid constitutional condemnation, while a measured response to bail recidivism fully surrounded by due process protections, the net result of which will guarantee the release of many persons wrongfully detained, will not pass Constitutional muster.").

[17] For example, the District of Columbia rarely, if ever, used its preventive detention provision enacted in 1970 until it added a line in 1992 nearly identical to the federal statute expressly forbidding money-based detention. *See The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth,* at PJI-DCPSACaseStudy.pdf.

states are often trying to enlarge their current, mostly narrow constitutional provisions to provide for more moneyless pretrial detention, and thus having money on the table as a sort-of bargaining chip can help convince states to give up a bad practice – use of money – for consensus over a new, relatively wider "no bail" process.

This does not mean, however, that states must simultaneously eliminate money bail or wait until money-based detention is taken from them before crafting a transparent and intentional detention provision. Nevertheless, and at the very least, states must act *as if* all money-based detention has or will be eliminated. Doing so will motivate them to craft the most comprehensive and effective moneyless intentional detention provisions to provide a rational, unbiased, and clearly lawful alternatives to random detention based on high money bonds in the event that the states are forced or choose to abandon money-based detention.

In sum, in scholarship published between 2017 and today, researchers and other bail reform groups have provided guidance to the states for changing constitutional bail provisions through "hypothetical" model templates, which are superior to any existing state bail model.[18] Ideally, the changes guided by these models should be the result of a broad consensus of stakeholders and other affected groups tasked with analyzing and agreeing to all of the interconnected variables of any proposed release/detain structure. Because the states' existing bail laws, including their constitutions, are antiquated, flawed, and, in some cases, likely unlawful, the guidance is premised on achieving consensus by working collaboratively on what will likely be seen as a major overhaul of bail – including statutes and court rules – in any particular state.[19] At the very least, states should consider and address the five major variables necessary for changing any pretrial detention or "no bail" provision. Only by addressing these variables can a state hope to find an adequate, permanent alternative to money-based detention that will resist political backlash or future, less-thoughtful attempts at bail "reform."

States, too, have shown the same trend of ignoring lawfully enacted preventive detention provisions. *See also In re White*, 21 Cal.App.5th 18, 26-27 (Cal. Ct. App. 2018), *aff'd,* 463 P.3d 802, 805 (Cal. 2020) (reviewing preventive detention for the first time, decades after enactment).

[18] *See* list in footnote 15, *supra.*

[19] States that have put together collaborative groups to study bail have often concluded that comprehensive overhaul is necessary. *See, e.g., Pretrial Detention Reform, Recommendations to the Chief Justice of the Pretrial Detention Reform Workgroup,* at 56 (Cal. 2017).

Mistake Number Two: Copying the Federal System's Detention Process into a State Constitution

It is natural for states to want to borrow legal language from other jurisdictions to enact into their own laws. This is true in bail, in which virtually every state that has amended or attempted to amend its constitutional net and limiting process in the last ten years has borrowed language from the federal system and from a few states which, themselves, have also borrowed the federal language.[20] That language includes some limited, charge-based detention eligibility net (as interpreted by the U.S. Supreme Court) coupled with a limiting process (finding of risk within the net) that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[21] Nevertheless, states should be aware of the general rule in bail that borrowing language from any American jurisdiction is often a mistake based on those laws also being antiquated (and ignored in favor of using money-based detention), cobbled together, and premised on flawed assumptions of defendant risk.[22] In particular, and for the following reasons, borrowing the federal language is highly inadvisable.

As it pertains to the eligibility net, the Supreme Court in *United States v. Salerno*, citing the legislative history of the Bail Reform Act of 1984 and its discussion of two social science studies, approved the federal model based, in part, on the notion that detention was limited to "a specific category of extremely serious offenses" committed by persons that "Congress specifically found . . . are far more likely to be responsible for dangerous acts in the community after arrest."[23] While there are signs that Congress, in fact, held the flawed assumption of what might be called "risky offenses,"[24] it did not make

[20] Prior to this generation of reform, states using the federal language included Arizona, Florida, Missouri, Oklahoma, Pennsylvania, and Vermont. In this generation, states using or proposing it include New Jersey, New Mexico, Alabama (net in constitution, "no conditions" limiting process in statute), Delaware, Indiana, Connecticut, and Texas. Again, Wisconsin and Ohio did not change or attempt to change their nets or limiting processes.

[21] 18 U.S.C. § 3142 (e).

[22] *See Changing, supra* note 2, at 14-25.

[23] *United States v. Salerno,* 481 U.S. 739, 750 (1987). This legislative "finding" has been repeated in *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring), and *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014).

[24] The BRA of 1984 copied many parts of the D.C. Act of 1970, which, in turn, defined "dangerous crimes" eligible for detention to be crimes "with a high risk of additional public danger if the defendant is released." H. Rep. 91-907, at 79 (1970); *See also id.* at 93 (using risk to the victim from the charged offense to infer future risk); S. Rep. No. 98-225, at 19-20 (equating "significant risk of pretrial recidivism" with nature of the charge).

that particular finding. Instead, it found that there were crimes being committed generally by persons on release, thus providing broad justification for consideration of dangerousness and preventive detention in the federal system. Moreover, the two studies included therein did not support the notion of certain crimes being "risky" crimes. Those studies found, instead, that: (1) there was a lack of relevant data and research on the issue of accurate predictors (with one study actually arguing against preventive detention versus releasing more defendants and using speedy trials and revocation for reducing pretrial crime); (2) the numbers of persons convicted of new crimes while released was, relatively speaking, very low; and (3) the crimes committed by released persons were mostly "economic" in nature, which tracks current research showing that, along with drug crimes, larceny, theft, and fraud are the most common crimes committed while on release.[25]

Today, the notion of a single, serious detention eligible charge demonstrating serious future defendant risk has been complicated, if not refuted by research,[26] and thus consideration of the charge-based net requires more thought to the issue than that given by the Supreme Court in 1987 (or by Congress in creating other parts of the federal statute, such as its rebuttable presumptions), which seems to bless a false assumption that a serious charge equals a serious risk to commit the same serious crime. Accordingly, people looking to *Salerno* for justification of a very limited eligibility net focusing on so-called "risky" crimes, should, more appropriately, turn to current legal and social science (especially defendant risk) research and newer release/detain models for a more nuanced method for creating a limited and properly justified eligibility net.[27]

Moreover, the Supreme Court also approved the use of a loose (easy to detain) limiting process – the "no condition . . . will reasonably assure" process – perhaps as a seemingly logical fit when paired with a net made up of persons assumed to be "risky" defendants based on their charge. Nevertheless, apart from issues associated with the net, using the "no conditions" finding solely to determine risk is problematic on its own.

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[25] *See* S. Rep. No. 98-225 at 6,7 (1984); *Pretrial Release and Misconduct in the District of Columbia (INSLAW* Study, 1980); *Pretrial Release: A National Evaluation of Practices and Outcomes* (LAZAR Inst. Study, 1981). Larceny, theft, fraud, and drug offenses are also most strongly correlated with any new offense.

[26] *See Model*, supra note 5, at 96-103; 172-81 (showing justification for a net consisting of all "violent" offenses rather than individual charges).

[27] *Id.* at 172-77; *Changing, supra* note 2, at 48-50.

It derives from the 1951 case of *Stack v. Boyle* and the fact that it, and the Bail Reform Act of 1966, only discussed release, and not detention, of noncapital defendants.[28] *Stack* was a "release" case, and it was somewhat clear in holding that if a judge wanted to place some limitation on release (versus detention), he or she could do so only to provide reasonable (and not complete) assurance of court appearance. Likewise, the Bail Reform Act of 1966 was a "release" act, with "release on conditions" the most intrusive alternative for noncapital defendants. Accordingly, federal courts struggling with intentional detention after 1966 would often query if they could detain someone when "no conditions" listed in the statute sufficed to provide – using the release language of *Stack* – "reasonable assurance of court appearance."[29] In case after case, though, judges articulated the kinds of risk needed to detain, and it was typically extremely (or substantially) high risk either to flee or to commit a serious or violent crime.[30]

Likely due to the struggle illuminated by these cases, Congress ultimately adopted the "no condition . . . will reasonably assure" finding for the Bail Reform Act of 1984, but, curiously, not any language from the court cases expressly stating how high the risk must be or a more appropriate answer to the question, "risk of what." Again, historically, the risk needed to detain in America has been an extremely high risk of flight to avoid prosecution or (when consideration of public safety was allowed) to commit a serious or violent crime against reasonably identifiable persons, and not to miss court for any reason or to commit any crime whatsoever while on release. Using the "release" language of *Stack,* however, Congress allowed detention in the federal system based on a finding that no conditions sufficed to provide reasonable assurance of "appearance" (theoretically, missing court for any reason) and public "safety" (theoretically, by committing any crime).[31] Using what is, essentially, the language of risk applied to release is obviously flawed for use in a detention provision and results in a legal structure likely to over-detain based on differing base rates for pretrial misbehavior.

In sum, the "no conditions" limiting process should never be used *solely* to determine a finding of risk to detain. It is phrased in release rather than more

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[28] *See Stack,* 342 U.S. at 9; Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214 (1966).

[29] *Model, supra* note 5, at 48-65 (discussing America's struggles with money-based and intentional, moneyless detention).

[30] *Id. See also Changing, supra* note 2, at 26-35 and *passim.*

[31] *See* Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3150) at § 3142(e).

appropriate detention language, and it was likely thought to be adequate due to faulty assumptions about defendant risk based solely on charge, which was reflected in *Salerno's* discussion of the original net as well as other statutory provisions such as rebuttable presumptions. Moreover, it was crafted as a unique solution to a federal problem fifty years ago at a specific time in history, it only hints at the level of risk (i.e., so risky that "no conditions" provide assurance), and is complicated by being dependent on the research showing effectiveness of release conditions; that is, any research showing the ineffectiveness of release conditions will make it much easier to show that "no conditions" suffice to address risk. Finally, and perhaps most importantly, it is highly subjective, resource-driven, and its use has led to unconstitutionally high detention rates in the federal system.[32]

On the other hand, there is some merit to including the "no conditions" language as an add-on to a much better limiting process simply because comparing alternative conditions is similar to what courts would require under a heightened or strict scrutiny standard involving limitations on pretrial liberty. Thus, that "much better" limiting process would include (1) a clear and convincing burden of proof; (2) a statement of how high the risk; (3) an answer to the question, "risk of what?" based on historic notions of detention; and (4) then, and only then, a finding that no other conditions suffice to mitigate the stated risk.[33]

Accordingly, states should absolutely avoid using the federal detention process, by itself, as some sort of template for constitutional change. Instead, they should use the more recent and appropriate formulas for net/process combinations found in such documents as *Model Bail Laws*, *Changing Bail Laws*, or other similar "hypothetical" models that better justify detention eligibility and that use a process designed to better articulate the risk needed to detain. Importantly, using the Supreme Court's foundational legal standard for detention provisions as an overall boundary – i.e., that they be "carefully limited" – this likely means crafting a slightly wider but properly justified detention eligibility net to account for the lack of any singular "risky charge," but pairing that net with a far more robust and exacting "further limiting process" that is designed to

[32] *See* Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis,* found at Freedom Denied (uchicago.edu). In 2019, the *average* detention rate in the federal system was roughly 75%.
[33] *See Model*, *supra* note 5, at 190-196; *Changing*, *supra* note 2, at 50-56; other resources can be found at Center for Legal and Evidence-Based Practices (clebp.org).

focus a judge's attention on the risk needed to detain, which is extremely high risk of flight or to commit a serious or violent crime.

Conclusion

This generation of bail reform involves American states switching from a random, unfair, racially biased, non-transparent, and irrational system of money-based detention to an intentional, fair, equitable, transparent, and rational detention process, often by changing their constitutional "no bail" provisions. To do so, however, it is crucial that the states avoid certain fundamental mistakes seen in the most recent proposed constitutional amendments, and that they use the latest bail research designed to guide them toward proper constitutional language. Otherwise, any proposed solutions can easily become worse than the problems the states hope to solve.