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Determining the Meaning of a State's Constitutional Right to Bail Clause for Purposes of the Uniform Pretrial Release and Detention Act

Timothy R. Schnacke, April 28, 2021

It will be observed that the people, who are sovereign, have seen fit to provide that with but one exception, to wit, where a person has been charged with a capital offense, all persons are entitled to bail as a matter of right. Irrespective of the villainy of the accused or the heinousness of his offense, without regard for public opinion, or for the personal views of an individual officer as to the wisdom of the constitutional provision, such provision is binding without qualification upon the courts until the people have by inherited processes legally erased the constitutional mandate. . .. If the constitutional guarantees are wrong, let the people change them – not judges or legislators. In re Keddy (1951). [1]

The defendants' dissatisfaction is with Texas law, not with the plaintiffs' claims or the relief this court ordered. It may indeed be wise to keep risky defendants, including misdemeanor defendants, in jail from arrest forward. But Texas law makes a different choice. [The Texas Constitution] prohibits pretrial preventive detention of all but one category of misdemeanor cases, and in that exceptional category it provides nonfinancial conditions of pretrial detention with extra procedural safeguards. Jailing the indigent by setting secured money bail that they cannot pay makes an end run around a Texas-created liberty interest without providing due process. If the defendants believe that some misdemeanor defendants present such a high risk of nonappearance or of new criminal activity as to require pretrial preventive detention, the defendants' proper recourse is to petition the Texas Legislature to amend the Texas Constitution, not to accomplish a de facto amendment through imposing secured financial conditions of release that operate as detention orders only against those who cannot pay. O'Donnell v. Harris County (2017).[2]

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[1] *In re Keddy,* 105 Cal. App. 2d 215, 219-220 (1951). This case involved bail after appeal, but at the time persons in California were given the right to bail pursuant to the main constitutional bail clause from a judgment imposing imprisonment in a misdemeanor case. At that time, Article I, § 6 provided that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great."

[2] *O'Donnell v. Harris County*, Civil Action No. H-16-1414, slip. op. at 190 (Op. on Order Granting Preliminary Injunction., April 28, 2017) [hereinafter *O'Donnell*].

Summary

The Uniform Law Commission's Uniform Pretrial Release and Detention Act ("UPRDA" or "the Act") is already being considered by many American states as a significant improvement over the status quo in American bail. However, while the Act correctly recommends that states limit pretrial detention by enumerating "covered offenses," which are those charges potentially detainable by law (what I call a "detention eligibility net"), it also instructs that if a state interprets its current constitutional right to bail not as a right to release, but merely as a right to have one's bail "set," that state may enumerate its list of covered offenses "independently of its constitutional [no bail] provision" and allow the detention of constitutionally bailable defendants through unaffordable financial conditions.

Unfortunately, without research, every state will intuitively believe that the right to bail is not a right to release – after all, it is not currently a right to actual release in any state, and, sadly, there are a multitude of bailable defendants held in jail on money bonds across America to prove it. Accordingly, states may feel no need to look further into the issue. However, with even minimal research, a state will likely come to understand that the questions framed by the UPRDA present a false dichotomy; the right currently is neither a right to release nor technically a right merely to have one's bail set. Instead, research in any particular state will likely show that the right to bail – if not technically a right to actual release due to certain peculiarities of current excessive bail jurisprudence – is *a right not to be intentionally detained* in any manner not listed by charge or other lawful limiting criteria that make up the "no bail" exceptions.[3] If true, this would mean that states may not enlarge their list of "covered offenses" independently of their constitution, and they must do what other states have done when they have considered enlarging detention eligibility nets in the past – they must amend their constitutions. Given that intentionality is a hallmark of the current generation of American bail reform, and given that the UPRDA provides an otherwise outstanding blueprint for a more intentional (and fair and rational) release/detain process, this paper describes the research needed to understand how intentionality and the right to bail intersect.

[3] As explained *infra*, it is hard to articulate the right without a double – or even a triple negative, and this may have exacerbated the problem of America not being able to fully express the nature of the right beyond descriptors such as "absolute." Thus, it is akin to the right against self-incrimination in that the right to bail would be a right *against* intentional detention in any cases not expressly articulated in any lawful exceptions to that right.

Introduction and Statement of the Issues

In July of 2020, the Uniform Law Commission released its Uniform Pretrial Release and Detention Act (UPRDA), designed to "respond[] to the need for a general, comprehensive, and balanced statute to guide courts in making pretrial release and detention decisions for the hundreds of thousands of persons charged with crimes, serious or minor, each year in state courts."[4] In articulating the Act's goals, the ULC wrote that, among other things, it wished to "provide enough flexibility to accommodate variations in state constitutional structure and policy preferences, as well as evolving state and federal jurisprudence."[5]

Unfortunately, providing "flexibility to accommodate variations in state constitutions" meant leaving open an extremely wide hole, which states might use incorrectly to increase pretrial detention far beyond accepted American legal and historical limits. The UPRDA does this by telling states that although they need to designate which offenses are eligible for pretrial detention (what I call a detention eligibility net, and what the ULC describes as "covered offenses"), if a particular state determines that its right to bail is not a right to actual release and is merely a right to have one's bail set, then it can expand the constitutional exceptions to that right – found in the state's "no bail" clause of the right to bail provision typically after the word "except"– by adding categories eligible for pretrial detention in the statute. In short, it would allow states to detain outside of the constitutional net.[6]

Without research, a state will virtually always determine that its right to bail is not an actual right to release. Indeed, this belief will seem intuitive, and will be sadly confirmed by the multitude of "bailable" defendants currently found in its

[4] The Act, with and without comments, along with its progress among the states, may be found at Pretrial Release and Detention Act - Uniform Law Commission (uniformlaws.org). According to the Uniform Law Commission, "[a] uniform act is one that seeks to establish the same law on a subject among the various jurisdictions. An act is designated as a 'Uniform' Act if there is substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective." *See* at What is a Uniform Act? - Uniform Law Commission (uniformlaws.org).

[5] UPRDA at 2.

[6] I discussed in detail the historical and legal bases for "detention eligibility nets" in two papers: *Model Bail Laws*, found at http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf [hereinafter Model] and *Changing Bail Laws*, found at http://www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf [hereinafter *Changing*]. *Changing Bail Laws* is essentially a summary of *Model*, and should be read first, with the reader moving to *Model* only if deemed necessary to add information or detail. The need for such nets is also summarized in this paper.

jails. Moreover, cases articulating that bail is not a right to actual release are currently some of the most plentiful bail cases one can find. This will lead to states adding categories of detention eligible defendants to the statutes or court rules that are not listed in their current constitutional nets. And, in fact, states have already shown that they will travel this particular path; both California[7] and Washington[8] recently attempted to add to their constitutional detention eligibility nets through statutory provisions.

With research, however (and I note that the Act correctly encourages states to do their own research), I have come to believe that states will not be so quick to ignore their current constitutional "no bail" provisions. After all, until now, every state that has determined the need to expand its ability to intentionally detain persons pretrial (at last count, a total of twenty-two) has decided that its constitutional "no bail" provision has fundamental bearing on the issue.

There occasionally exists the belief that those twenty-two states are somehow different from what we call "broad right to bail" states, or states that have not amended their constitutions to add other detention categories, but that is wrong. In fact, those states are no different from broad right to bail states in the sense that all "no bail" provisions, whether including only capital crimes or all felonies, or any other categories, are preventive detention provisions providing for the possibility of the denial of bail when certain findings are made. Indeed,

[7] In California, the legislature passed S.B. 10, which included additions to the consensus constitutional net found in Article I, § 12. That law was ultimately rejected by voters in a recent statewide referendum. Also in California, in an otherwise monumentally positive opinion, a panel of the California Court of Appeals required certain restrictions on money bail pursuant to federal law, but included language that suggested judges could use money – with certain federally mandated due process protections – to detain persons outside of the state constitutional net. *See In re Kenneth Humphrey,* 19 Cal.App.5th 1006 (2018). The California Supreme took the case, ordered supplemental briefing and even heard oral argument on the "net" issue, but nonetheless chose not to address it in its recently issued opinion. *See In re Kenneth Humphrey,* S247278, slip op. at 21-23. In affirming the Court of Appeals opinion, the Supreme Court likewise provides important restrictions on the use of money bail in California, but, unfortunately, provides mixed messages concerning the scope of the constitutional detention eligibility net. This is troubling, as I personally considered the California Supreme Court to be the most bail-educated supreme court in America. Accordingly, other states will need even more education to be able to articulate legal principles at bail that do not erode the right to release.

[8] The UPRDA was introduced in Washington in 2021 with a statutory net larger than the constitution, but it failed to pass. I was unable to find any documentation that the State had researched its right to bail clause to determine whether such an enactment would be lawful. Nevertheless, at least a few groups or individuals provided input during the process and questioned the constitutionality of enlarging the net by statute.

those states that have amended their constitutions have typically enacted those amendments as expansions from what were once broad right to bail provisions.

Nevertheless, by suggesting that states can ignore their constitutional detention provisions by enacting new detention eligibility nets by statute, the UPRDA itself ignores not only history but, more importantly, state law, which I have found to be at least somewhat clear and consistent on the matter. In this document, I will outline the steps necessary to determine what, exactly, a state means when it provides a right to bail with certain exceptions. When this is done, I believe it will show that the UPRDA's recommendation to choose between a right to actual release and merely a right to have bail set is a false choice, which will likely nudge states toward the wrong legal answer concerning the right to bail.

The ramifications of sorting this issue out correctly are enormous. Without the proper research, it appears likely that states will ignore their current constitutions and dramatically increase the ability to detain persons pretrial both with and without money. With research, however, they will be more likely to start from the assumption that their current "no bail" provisions actually have meaning. Moreover, because those "no bail" provisions – for the most part – are limited,[9] it means that the states will begin working on new release/detain schemes with the far more appropriate assumptions that detention must always be extremely limited and that enlarging the pool of detainable defendants must be the result of deep thinking, hard work, and proper legal justification.

The fundamental problem, however, does not stem from the need merely to help states understand the research before deciding on changes to their release/detain dichotomies. Just some small amount of state research will undoubtedly illuminate the issue. Indeed, I am confident that it will show that while America started with a right to bail that equaled a right to release and that gave judges virtually no discretion to detain bailable defendants, American law eroded – no, killed – that right by allowing money to detain in the 1800s. That, in turn, gave judges ultimate discretion to detain *any defendant* so long as those judges articulated the right record when setting bail. Tolerance of that discretion for 180 years has masked the need for bail reform through a misunderstanding

[9] There are roughly four states with overly-wide constitutional detention eligibility nets, and to the extent that they have not done so already, they must limit these provisions by statute or court rule. The other states, for the most part, are limited in various ways.

of the law and history of bail to the point where states feel justified in ignoring their constitution and where virtually every person in America believes that the right to bail is the right merely "the right to have one's bail set." The fundamental problem on this part of the issue is that the same research points to the fact that we – and especially judges – have become culturally accustomed to this nearly unlimited discretion to detain.

Legal and historical research undoubtedly shows that reducing or eliminating the use of money bail (i.e., secured financial conditions) reverses all of this. Indeed, by merely deciding to do release and detention on purpose, a jurisdiction begins a process that inevitably reverses it. The unavoidable result – when following the law and the history – is a return to a right to bail that means a right to actual release grounded in the states' relevant constitutional right to bail provisions. That, in turn, means rolling back the enormous amount of discretion judges have enjoyed to detain persons pretrial since 1830. Moving from absolute to limited discretion to detain is likely the crux of the cultural shift that must take place in America to reduce mass pretrial incarceration. Unfortunately, it is a cultural shift that has the potential for opposition from all judges, even those in our highest courts.[10]

Moreover, tied to this problem is the fact that a return to consideration of the texts of the various constitutions will likely cause certain states to feel the need to change those constitutions. This is due to the fact that many states' current "bail/no bail dichotomies" – i.e., the line drawn between intentional release and intentional detention – are old, created under faulty assumptions about risk, and, having been ignored for nearly 200 years, likely do not reflect who that state would now decide to intentionally release or detain. Researchers like me in each state will need to help guide criminal justice stakeholders and others affected by bail practices in determining whether change is necessary, and, if so, to what that state must change.

Accordingly, bail researchers will need to (1) show states the research pointing toward a meaningful right to bail, (2) help even reluctant states to understand that a meaningful right to bail – a right that is constrained by state constitutional

[10] This needn't be the case. In creating my hypothetical "model" bail law, *supra* note 6, I have diminished discretion, but in a way that seems mostly unobjectionable to judges. It is clearly possible to re-draw a line between intentional release and detention that every criminal justice stakeholder can support.

boundaries – is what America intended all along, and (3) help, when necessary, to structure a fair and transparent intentional detention process so that the move from money bail does not make things worse.

The truly fundamental problem, as I see it, is that states will not want to go through the hard work of changing the structure of their bail laws to reflect intentional release and detention; indeed, I created my own model, and it was not an easy task. Moreover, the states may not necessarily want the people to have voter input via a constitutional amendment on who should be released and detained, even though I have previously argued that this is the quintessential bail issue requiring public participation. Accordingly, the states will be looking for reasons not to change their constitutions. Unfortunately, without research and education, states may find one such reason through the words of the UPRDA.

This notion bears repeating in different form for emphasis. There is one good way to allow persons affected most by bail to have meaningful input on intentional release and detention, to force various criminal justice stakeholders to cooperate in re-drawing the line between intentional release and detention and to be accountable to the citizens when justifying it, to keep from further diminishing racial equity, to avoid the sorts of legislative provisions that have, for decades, led to a system resulting in the mass incarceration of persons not even convicted of crimes, and, indeed, to get states to slow down and do bail and no bail correctly. That way is to: (1) require states to consider their current constitutions; (2) require states to bring in all affected groups to determine whether, and to what, a state may change its constitution; and (3) use the more onerous process of constitutional change from what are mostly limited detention eligibility nets as the compromise-forcing impetus to require states to listen to persons who believe that release should hold primacy over the fears inherent in prediction.

In this paper, I will attempt to lay out the argument for coming to the conclusion that any particular state's right to bail was likely enacted as a right to actual release and only became a "right merely to have one's bail set" after what I have called "the line of unfortunate cases," which established the "excessive bail loophole" starting in the 1800s. In any particular state, research will likely show that while "unintentional detention" through money might be tolerated,

"intentional detention" – whether by refusing to set bail for a bailable defendant or by setting an unattainable money condition with the intent to detain – is limited by the state's constitutional "no bail" provision. Accordingly, that part of the UPRDA that allows intentional detention based on money outside of a state's constitutional "no bail" eligibility net should never be used. Instead, any particular state's constitutional "no bail" provision should be seen as a hard boundary for intentional pretrial detention, which a state must change in order to increase on-purpose pretrial incarceration. This, in turn, will eliminate any need for money at bail (for a state will likely only desire money to purposefully detain bailable defendants), and will thus illustrate the importance of following the basic structural frameworks of the ABA Standards, the federal law, and the D.C. law, which the UPRDA claims to follow.[11]

In a proper paper – say, one written with an array of research resources, including the time and money afforded law professors to do their work – I would have preferred to have provided a comprehensive treatise on this subject along with an appendix with cases firmly settling the issue in each state. Unfortunately, I am not a professor, I have little time, and my access to sources such as Westlaw and Lexis has been essentially eliminated due to the global pandemic. Thus, in this paper, I provide guidelines and example cases, and it will be up to persons in each state to more comprehensively and definitively determine the relevant answer. If necessary, I can provide specific assistance for any particular state.[12]

Common Sense and Bail

Bail is – or should be – all about common sense, and it is common sense to believe that if one has a right to something, like bail, that right must be meaningful. Indeed, in one of the very first papers I ever wrote about bail, I countered a prosecutor's statement that "bail is merely a right to have one's bail set" by broadly arguing that the claim presupposes money bail and misreads

[11] The ULC claims to have modeled the UPRDA on existing statutory frameworks found in the federal and D.C. systems as well as the ABA and NAPSA Standards, but those systems and standards prohibit money-based detention. It also claims to have followed New Jersey and New Mexico, but did not mention that those states appear to have determined that the constitutional "no bail" eligibility net provided a hard boundary on intentional detention. It appears that the ULC followed a great many of these law's and standard's provisions designed to reduce or eliminate the use of money, but then followed no particular research or existing framework to allow states to intentionally bypass their constitutions, for there appears to be none.

[12] My website is at www.clebp.org, which contains my contact information.

state law pronouncements of bail being an "absolute" right, and also by analogizing to U.S. Supreme Court precedent suggesting that the right to a fair hearing must have meaning, and may not provide merely superficial or futile access to participate in the judicial process. At the time, I was merely engaging in rapid-fire refutation of various arguments being used to thwart bail reform, but this particular argument seems to have triggered my desire to, whenever possible, apply common sense to the issue. Accordingly, I wrote an answer emphasizing that it was simply common sense to believe that the right to bail must have meaning. I think most people would agree, and so this premise should require little in the way of argument.

Concomitantly, it is common sense to believe that the exceptions to the right to bail – those words found in a state's constitutional "no bail" provision – also have meaning. That is, they should not be ignored. Moreover, it is the acme of common sense that, as the only two pretrial alternatives (in or out) articulated since America's founding, "bail" and "no bail" must have meanings that are different from each other, for to equate them would be to deny them meaning altogether.

Accordingly, because "no bail" has always meant detention in both England and America, it is common sense to think (without the intellectual cloudiness forced upon us through the baggage of America's current law) that "bail" – which must be substantively different than "no bail" – is, or at least should be, a right to actual release from detention. Now, American law confounds that premise, but even if we cannot shake the knowledge of current American law, at the very least we should conclude that if "no bail" is intentional detention (a way of keeping someone in jail on purpose, upfront, using prediction), then "bail" should never be intentional detention.

This notion is tied to all three laws of human thought. It is tied to the law of identity in the sense that it seems sometimes "bail" is not identical with "bail," which leads to equivocation when we use the same name to describe both release and detention. It is tied to the law of the excluded middle; if the statement "bail is release" is true, then it cannot also be the case that "bail is not release" is true. It is also tied to the law of noncontradiction; as stated by Aristotle, "nothing can both be and not be at the same time in the same

respect." In other words, and even without definitions, "bail" cannot be both "bail" and "no (or not) bail" at the same time. Common sense – and logic – would tell us that there must be some meaningful difference between the two. If we define "no bail" as any kind of detention, then "bail" may not be any kind of detention. If we define "no bail" merely as intentional detention, then "bail" may not also be intentional detention at the same time.[13]

More specifically, and once again before looking at confounding American law, common sense would tell us that to keep "bail" from being "no bail," nothing should stand in the way of the release of bailable defendants. But America does not follow that train of thought; it allows money to stand in the way of release. Accordingly, even when looking through the lens of current American law, one can see the tension in court opinions from judges who struggle to make the distinction meaningful while still bending, if not altogether disregarding, all three fundamental laws of human thought.

At their core, federal and state excessive bail clauses exist to draw some distinction between bail and no bail, and thus common sense should also tell us, and tell judges, that if a financial condition is set, it must be affordable because if it cannot be met, "bail" equals "no bail." And even if one restricts the "no bail" clause to mean intentional detention, then at the very least, money may not be used to purposefully detain. Moreover, the tension becomes greater even with so-called "unintentional detention" the longer the amount is not met; indeed, at some point, it must be concluded, the mere passage of time shows that the judge must have meant for the bailable defendant to stay in jail, and "bail" at that point would fully equal "no bail." The fundamental point is that if bail is used as a mechanism of intentional detention, then it is indistinguishable from no bail. Common sense says that we may not allow that to happen.

To a point, common sense at bail has been illuminated and reflected throughout history.[14] The first legislatively articulated "bail/no bail" dichotomy was enacted

[13] Of course, a person might argue that if "no bail" is defined as not having one's bail set, then "bail" would not be contradictory, unless a judge were to refuse to set bail. This begs the question of the definition of bail, which this paper will summarize. In the end, and as already mentioned, it may be more useful to think of the right to bail today (taking into account money) not as the right to actual release, but as the right not to be intentionally detained.

[14] For more complete histories of bail, see *Fundamentals of Bail,* found at Center for Legal and Evidence-Based Practices (clebp.org) [hereinafter Fundamentals] and *Money as a Criminal Justice Stakeholder,* found at

in England in 1275 primarily because prior to the Act, the two alternatives had become blurred; in short, sheriffs were letting non-bailable defendants out of jail, and keeping bailable defendants in jail. As a consequence, when bail developed in England, there emerged what I have called the "big rule," which is simply that bail equals release, no bail equals detention, and anything that gets in the way of those two things leads to bail reform. It is a "big" rule because of the very big reforms it has produced whenever something violates it, that is, when something gets in the way of "bail" as release or "no bail" as detention. The "big rule" leads to a historical rule of thumb that really only follows common sense, which is that having bailable defendants in jail typically leads to bail reform. This was always the case in England, and it was the case in America until about the mid-1800s.[15]

Indeed, and as I have written many times before, when America brought bail over from England, it followed the big rule the same way as did England – by using personal sureties (which were initially plentiful) who administered what we call today "unsecured bonds," which are merely promises to pay some amount of money upon the failure of the accused to show up and face justice. Plentiful personal sureties and the use of unsecured bonds meant that even very large financial conditions did not typically lead to the detention of bailable defendants. The "big rule" was thus upheld in America through practices that virtually assured that "bail" equaled release.

Moreover, America did even more than England to bolster the notion that bail should equal release. For example, to eliminate judicial discretion to detain "bailable" defendants in England (the practice had surfaced a few hundred years after the Statute of Westminster), America took out all discretion and created what I like to call "bright line bailability." Bright line bailability is merely a reflection of the "big rule" by interpreting the bail and no bail clauses so that if one were charged with a bailable crime, he or she would always be released, but if one were charged with a crime found in the exceptions to the right to bail, he or she might be detained. My surmise is that in addition to wanting to eliminate

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http://www.clebp.org/moneyasacriminaljusticestakeholder.html [hereinafter *Money*]. To see how the history of bail affects both current and future legal structures surrounding bail, *see Model* and *Changing*, *supra* note 6.

[15] Of course, there are always exceptions, and so historically one can find instances of "bailable" defendants being detained, but those cases are extremely rare and were practically non-existent in Colonial America.

the judicial discretion that was being abused in England, America was also following notions of due process fair notice, or vagueness, by simply laying out the charges for bail and no bail so that people would have notice of how to manage their lives in order to stay out of jail. There are other reasons for why a given state might want to have bright line bailability, but the important point is that it did a good job of keeping bail and no bail from meaning the same thing.

You can read various histories of bail, and you see the same notions again and again. Bail was meant to mean release, and anything getting in the way of bail as release led to reform, both in England and America. In its amicus brief in *Walker v. Calhoun,* the Cato Institute traced the right to bail as protecting a right to liberty that precluded detention of bailable defendants, whether on purpose by denying bail or unintentionally by setting the financial condition at an unaffordable amount. In my own documents, I also show how America treated the right to bail as a right to release. In *Fundamentals of Bail*,[16] for example, I wrote as follows:

> *Indeed, given our country's foundational principles of liberty and freedom, it is not surprising that this parallel notion of bailable defendants actually obtaining release followed from England to America. William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, reported that denying the release of a bailable defendant during the American colonial period was considered itself an offense. In examining the administration of bail in Colonial Pennsylvania, author Paul Lermack reported that few defendants had trouble finding sureties, and thus, release.*
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> *This notion is also seen in early expressions of the law derived from court opinions. Thus, in the 1891 case of United States v. Barber, the United States Supreme Court articulated that in criminal bail, "it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time."[17] Four years later, in Hudson v. Parker, the Supreme Court wrote that the laws of the United States*

[16] *Fundamentals, supra* note 14, at 45-46.
[17] *United States v. Barber*, 140 U.S. 164, 167 (1891).

"have been framed upon the theory that [the accused] shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment."[18]

Indeed, it was Hudson upon which the Supreme Court relied in Stack v. Boyle in 1951, when the Court wrote its memorable quote equating the right to bail with the right to release and freedom: "From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[19]

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning: "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction."[20]

And finally, in perhaps its best-known expression of the right to bail, the Supreme Court did not explain that merely having one's bail set, whether that setting resulted in release or detention, was at the core

[18] *United States v. Hudson*, 156 U.S. 277, 285 (1895).
[19] *Stack v. Boyle,* 342 U.S. 1, 4 (1951) (internal citations omitted).
[20] *Id.* at 7-8.

of the right. Instead, the Court wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[21]

While often overlooked (if not intentionally ignored), Justice Jackson's opinion in *Stack* also bolsters the notion that bail may not be set to intentionally detain a person pretrial. When faced with the possibility that bail may have been set in that case not to provide reasonable assurance of return after release, but rather with intent to detain, Justice Jackson wrote that such a practice would be "contrary to the whole policy and philosophy of bail."[22] This notion was repeated in *Bandy v. United States*,[23] when Justice Douglas, sitting as Circuit Justice and citing to *Stack,* wrote, "It is unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom." It is also reflected in the opinion from *Galen v. County of Los Angeles*,[24] in which the court wrote, "The [bail setting] court may not set bail to achieve invalid interests," while noting that setting bail to prevent a person from posting bail would be invalid.[25] This same notion has been articulated even very recently, both in federal[26] and state[27] courts.

Thus, it is unsurprising that when asked to write a working paper for reference at Robert Kennedy's National Conference on Bail and Criminal Justice in 1964, Daniel Freed and Patricia Wald summarized American bail by writing: "In sum, bail in America has developed for a single purpose: to release the accused with assurance he will return at trial. *It may not be used to detain,* and its continuing validity when the accused is a pauper is now questionable."[28]

Historically speaking, then, bail is best defined as a process of conditional release. Indeed, historically, the word bail *means* release and has been equated with release until only the last several decades. That is why, in one of my first

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[21] *United States v. Salerno,* 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"). Of course, there is no express right to bail in the federal constitution, but that only further illustrates that state bail right to bail clauses should be interpreted to foster an even greater emphasis on release.

[22] *Stack*, 342 U.S. at 10.

[23] *Bandy v. United States,* 81 S. Ct. 197, 198 (1960).

[24] *Galen,* 477 F.3d 652 (9th Cir. 2007).

[25] *Id*., 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 a person from posting bail).

[26] *O'Donnell v. Harris County*, 892 F.2d at 158 (5th Cir. 2018) ("[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused.").

[27] *State v Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("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.").

[28] Freed and Wald, *Bail in the United States: 1964*, at 8 (emphasis added).

foundational papers about bail, I wrote that we speak a paradox whenever we say someone is "being held on bail." While technically true, it is absurd when read through bail's long history, which shows it to be a legal and historical aberration for anyone who is bailable not to obtain actual release.

The Retreat From Common Sense – The Excessive Bail Loophole

As we have seen, courts have historically equated bail with release, and whenever bailable defendants were in jail, history has demanded correction in the way of bail reform. But there are bailable defendants in jail now. Indeed, there have been bailable defendants in jail for as long as anyone can remember, and certainly before *Salerno* and *Stack,* or any other court still opining that bail equals (or should equal) release. What is the cause of this phenomenon? Why has bail reform not fixed it? Surely if it were unlawful, wouldn't the courts have said so by now?

These questions get at the key to understanding not only bail reform today, but also at previous generations of bail reform and why the fixes enacted during those generations have not taken hold in the states. The answer to all these questions is that we have a thing in America that I have called before "the unfortunate line of cases,"[29] but what I like to call now more comprehensively the "excessive bail loophole."[30] The loophole provides the key to understanding a state's right to bail clause, and it helps people to understand why the UPRDA's question for states to answer – whether the right to bail is a right to release or simply a right to have one's bail set – is at least confusing.

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[29] *Money*, *supra* note 14, at 32. I termed these cases "unfortunate" primarily because they appeared to retreat from common sense notions of the law, the history, and even other country's bail practices, and, in my opinion, ultimately stalled the sort of bail reform historically triggered whenever bailable defendants are detained. Jurisdictions such as the federal system and the District of Columbia have largely erased these cases by declaring, legislatively, that a financial condition may not be set that causes the detention of a defendant. The claims in the current equal protection cases against money bail are based primarily on 14th Amendment jurisprudence, and could also effectively erase the unfortunate line of cases. Moreover, as this paper suggests, they could also be erased simply through a more nuanced view of the Excessive Bail Clause. Two scholars have dissected the federal cases comprising this "unfortunate line" (which are most frequently used by the for-profit bail industry to argue for keeping money bail), and have found them to be "illegitimate." *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail,* 26 Wm. & Mary Bill Rts. J. 589 (2018).

[30] In *Model Bail Laws* (page 49), I referenced the "unfortunate cases," citing to *Money,* but I elaborated on – and coined the term – the "excessive bail loophole" in *Changing Bail Laws, supra* note 6, at 19-23. Discussion of the "unfortunate line of cases" involves only looking at part of the loophole, which, technically, is made up of three separate lines of cases showing that excessive bail often turns on intentionality.

To understand the loophole, you must take on faith (or read my earlier papers) the fact that, while both England and America relied on personal sureties administering what we call today "unsecured" bonds (promises to pay in the event of default) so as to make sure all bailable defendants were released, in the early 1800s, both England and America began running out of those personal sureties. A likely reason for this is that personal sureties were never allowed to profit or be indemnified at bail, and so, quite frankly, people may have gradually soured on the idea of performing the duty for no money. I have recounted in detail how America shifted from one form of release – personal sureties administering unsecured bonds – to another form of release – commercial sureties administering mostly secured bonds – but it took America many decades (if not most of the 1800s) to fully make that switch. Accordingly, after losing personal sureties but before the advent of commercial sureties in 1898, judges tried various other things to get bailable defendants out of jail and to follow the "big rule."

One of the things they tried was to see if an accused person could pay his or her own financial condition upfront, in what would be seen as the first use of secured bonds. Because we had no words like "unsecured" or "secured" at the time, it was simply called "self-pay," and, in fact, America quickly learned that many people could not pay the financial conditions themselves. Those people argued legal claims against the practice – mostly based on excessive bail – and it was at that point in American history that the excessive bail clauses found in either the federal or any particular state constitution could have formed the basis for announcing that unaffordable bail is excessive. Indeed, common sense dictates that a financial condition of release cannot motivate return until the person is actually released; until then, it is ineffectual at its own purpose.

Instead, however, American courts uniformly retreated from common sense and announced that unaffordable bail is not necessarily excessive bail. You have heard it said like this – "you do not have a right to bail you can make." This is undoubtedly the rule in America, a country in which money bail is the predominant mechanism leading to pretrial detention. In another paper, I surmised the rationale for these cases was simply necessity in trying to deal with indigent persons faced with a monetary system of release. Today, I would likely express the opinion that although the history of bail requiring the release of

bailable defendants was a powerful theme that could not simply be ignored, judges in the mid-19th Century were either ignorant of alternatives or simply unwilling to believe that a defendant might act as his own surety or even tell the truth about his own financial condition. A search for a coherent justification for the rule is elusive. In 2017, I unsuccessfully tried to make sense of the rule and wrote as follows:

> *Courts frequently cite to the rule with no rationale. When they do, the most frequent rationale is simply that the constitutional test for excessiveness is whether the condition provides reasonable assurance of a lawful purpose (or, in other words, whether the condition is greater than necessary to achieve a lawful purpose), not necessarily whether it is or is not attainable.*[31] *"Reasonable assurance," however, implies the requirement of some decently objective way of determining whether the amount is unconstitutional, and, ironically, it is likely attainability that best provides that objective standard. Comparison of the amount of the financial condition, which is largely arbitrary to begin with, to other largely arbitrary amounts associated with other charges, or to the subjective notions of reasonableness of any particular judge, should not be deemed to meet any objective test. Too often judges choose an amount of money, declare it to be "reasonable assurance" without justification, and then move to the next case. In his dissent in Allen v. United States, Judge Bazelon complained of this practice when he gave the following reason for why a district court bail decision to set a financial condition at $400 should not be affirmed when the defendant argued that he could only afford to pay $200: "Nothing in the record supports the determination that a $400 deposit will insure appellant's appearance while a $200 deposit will not. Without such support, it appears that he is being deprived of pretrial release solely because he cannot raise the additional $200. This*

[31] *See, e.g., Galen v. County of Los Angeles,* 468 F.3d 563, 572 (2006). Other rationales include the fact that the various statutory factors do not include "financial condition of the defendant" or that the other factors outweigh the financial condition factor. Occasionally, a court will explain that permitting defendants to be released based on their lack of resources would place the defendants in control of the bail process. In 1965, Caleb Foote reported on the "barren state of the case law" surrounding how to reconcile excessive bail in the case of an indigent defendant. He noted the "circular reasoning" employed by current legal encyclopedias in attempting to reflect the "unfortunate" state of the law in which it was simultaneously said that bail may not be set in a prohibitory amount lest it deny one of the right to bail, and that setting an amount in a prohibitory amount was not necessarily excessive. *See* Foote, Caleb Foote, *The Coming Constitutional Crisis in Bail I,* 113 U. Pa. L. Rev 959, 967 (1965).

deprivation plainly violates both the letter and basic purpose of the Bail Reform Act."[32]

But what makes it a loophole? What makes it a loophole is that this line of cases only deals with what I call "*unintentional detention*" and not "*intentional detention*." To make things less complicated, simply consider unintentional detention to be anything that is not intentional detention. Therefore, unintentional detention can be truthful (or pure), such as when a judge may truly desire the accused be released and erroneously set a number higher than the accused can afford, or it can be *sub rosa* – or done with a secret reason to detain. When a judge announces an amount, and that amount keeps a defendant in jail, so long as the judge remains silent as to his or her motives, appellate courts will give the judge the benefit of the doubt that he or she meant for the defendant to be released – if only the defendant can come up with the money. And thus, it is motive as seen in the record made during bail setting that is all important, as it tells us when to apply the cases allowing money to detain at bail.

Most importantly, though, the cases *do not apply* to instances of *intentional* detention. A judge can engage in intentional detention in one of two ways: (1) by refusing to set bail for a "bailable defendant;" or (2) by setting bail but expressly articulating on the record a desire to keep the accused in jail through the use of an unaffordable financial condition. In each of these instances, appellate courts reverse bail-setting judges, based either on excessive bail claims or – quite often – as an abuse of discretion standard applied to bail settings generally.

Cases in category one are easy to find, and are often decided in opinions published by state supreme courts, but they are often old and can be overlooked. In a "broad right to bail" state in which I recently spoke, a law professor claimed that if a judge wanted to detain any particular "bailable"

[32] *Allen v. United States,*386 F.2d 634 (D.C. Cir. 1967). There appear to be few, if any, good reasons for setting a financial condition just beyond the reach of a defendant's stated limits. When a judge knows the financial limit of any particular defendant, and nonetheless sets a financial condition either much higher or even slightly above that limit without some record adequately explaining the difference, appellate courts should presume that the condition to release was set with an improper purpose to detain, which should lead to analysis for excessiveness and/or a denial of due process.

defendant, that judge could simply deny bail pursuant to a reading of *United States v. Salerno.* However, state constitutional bail provisions provide more rights than the federal law, and the professor had missed a case from 1910, in which the state supreme court announced forcefully that judges simply could not deny bail to a bailable defendant. As noted previously, it is simply common sense to make sure that constitutional provisions have meaning.

The second type of case – a case in which a judge expressly articulates an intent to detain on the record – is harder to find, but I have found them in every state in which I have looked. Moreover, in every case the bail-setting judge is reversed. Finding the case often means going through a myriad of state bail cases (both state supreme court and courts of appeals) under the "excessive bail" or "abuse of discretion" categories and reading fact patterns. Later in this document, I will provide clues for finding these cases, including running particular search terms likely to unearth a relevant opinion.

The bottom line, though, is that in every state in which I have done the research, I have found that the excessive bail cases turn on intentionality. If there is no express intent to detain, then a judge setting even egregiously large amounts of money leading to detention may be affirmed. But if there is an express intent to detain, a judge setting those same amounts – no matter how low – will be reversed. And thus, one sees the loophole. By simply making the right record, American judges can detain anyone they want, and appellate courts will mostly uphold the detention under the "excessive bail loophole."

Interestingly, and quite important to any discussion of the meaning of a state constitutional "bail" or "no bail" provision, is that the articulated rationales appellate courts give in reversing bail setters for using money to intentionally detain are similar, focusing on the importance of the constitutional "no bail" provision as a boundary and with only slight differences in wording. When they provide a reason, these courts typically say that a bail-setting judge may not use money to keep a bailable defendant in jail on purpose because either: (1) doing so is a dishonest way of doing something the judge may have been able to do honestly under the "no bail" provision; (2) if one looks at the "no bail" provision as exceptions to the bail clause, then doing so would be adding an exception to that clause that does not currently exist; or (3) doing so would altogether negate

the “no bail” provision. This last point is important to repeat. If states – through courts or legislatures – are able to detain otherwise bailable persons on purpose using money, then the “no bail” provision is meaningless and may as well not exist.

Failure to fully understand the loophole and its associated problems can be fatal to anyone hoping to appropriately assess what a state’s right to bail provision truly means. As noted previously, when American states enacted their right to bail provisions, they settled on “bright line bailability” – either to eliminate judicial discretion or to further notions of due process fair notice – so that anyone in the “bail” category would know that he or she would be released, and that only persons facing charges in the “no bail” category might be detained. The excessive bail cases of the 1800s, however, opened up a loophole through which judges now have unlimited discretion to detain anyone so long as those judges make the right record. Over time, judges have been very adept at making the right records, and perhaps they now know intuitively that if they make an express record of intent to detain using money, they will be reversed.

Moreover, by providing this loophole, the excessive bail cases also mean that states can ignore their constitutional bail and no bail provisions, and, indeed, they have ignored them for a very long time. And because – until very recently – every bail case was decided through the excessive bail lens, the entire practice of release and detention using money – loophole and all – has been given a deceptively legitimizing legal gloss. Accordingly, despite hundreds of years of history in England and America showing that having bailable defendants in jail is unlawful and leads to reform, the excessive bail loophole has masked the need for reform, and confused states as to the way to accomplish reform even when they see the need.

More importantly, when they were enacted (and for various reasons), the right to bail provisions in American states likely reflected rights to actual release.[33] And while the excessive bail cases made the right seem to be something less –

[33] This is more likely the older the constitutional provision. If a state enacted its right to bail anytime after about 1820, the researcher will have to account for the fact that (1) bail practice in the state may have already allowed the detention of bailable defendants through the excessive bail loophole, or (2) that the provision was copied without reflection from a state that had enacted its provision before money-based detention was ever allowed. Practically speaking, this should not be fatal to what I am articulating as a more appropriate meaning of the right to bail, which is the right not to be intentionally detained pretrial, a notion that has been consistent through time.

something like only a right to have one's bail set – they never allowed the state to set bail with an express intent to detain. Intentional detention is the sole province of the "no bail" provision of any particular state bail clause. States can give more rights to persons than the federal government, and so when a state provides a right to bail with only certain excepted charges, that right – and the exceptions – must be read to be meaningful extensions beyond mere federal law.

And finally, understanding the loophole is extremely important because while federal and state case law seems clear that using money to intentionally detain someone pretrial is unlawful, current bail reform efforts *all* involve moving toward a more intentional release/detain system. Indeed, if I had to provide one key feature of the entire bail reform movement today, it would be "intentionality." Thus, common sense, alone, should tell us that given intentionality as a goal, money should never be used in any serious effort to reform the American bail system.[34]

Thus, the excessive bail loophole naturally causes people to believe that the right to bail is merely a right to have one's bail set, when this interpretation has never been technically correct throughout the history of bail and no bail in England and America. Moreover, the loophole never allowed intentional detention using money – it only provided a way around that rule, which has been abused for nearly 200 years. Intentionality, then, and the law surrounding it, must be emphasized in any attempt at bail reform. As states move toward more intentional release/detain practices, the distinction becomes crucial.

Moreover, attempting to build money's ability to detain into a "uniform" or "model" law completely ignores factors tending to show that money will likely be entirely eliminated at bail. In the primary house report to the bail act enacted for the District of Columbia in 1970, the Committee on the District of Columbia

[34] Indeed, the best model for bail reform is to copy, broadly, the "big fix" from American bail reform of the 1970s and 1980s (and reflected in my *Model Bail Laws* paper), which involves fixing unintentional detention by eliminating money as a detention mechanism, and fixing intentional detention by crafting new intentional release/detain dichotomies through limited, charge-based detention eligibility nets and a "further limiting process" that solves the problems associated with other processes found in current state and federal bail laws today.

wrote as follows:

> Ten years from now, court decisions based on equal protection of the law may give the indigent defendant the means to force his release before trial if money is the barrier between jail and freedom. Such a development could not be welcomed by a society besieged with crime unless that society were empowered to protect itself against the truly dangerous defendant. In the judgment of a majority of your Committee, the only effective means of protection is pretrial detention.[35]

This quote indicates that the Committee knew the outcome of any decent equal protection analysis when dealing with liberty: when the means used by the government to achieve some compelling end are not narrowly tailored (or, indeed, are arbitrary) the government may not use those means. The cases articulating this analysis are happening now and present a ticking time bomb for the states, as both equal protection and due process analysis have the potential to completely eliminate money as a detention mechanism. If that is so, then even in a state without the guidance of case law showing the difference between intentional and unintentional release through money, that state will be unable to "set bail" with some unaffordable amount in order to detain a person outside of the constitutional net simply because money will not be "necessary" under heightened scrutiny.[36] Instead, states will be forced either to change their constitutions or attempt to deny bail to persons outside of the net. And this latter practice – denying bail to a bailable defendant – has been consistently rejected by virtually every state supreme court in America.

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[35] H. Rep. No. 91-907, at 85. In presentations, I have given as many as ten or eleven ways that money may cease to be used as a detention mechanism. Two of the most obvious (besides specific arguments based on equal protection and due process) are that (1) money is often used arbitrarily, and arbitrariness in the law is rarely tolerated, and (2) as noted previously, a jurisdiction's mere desire to do bail intentionally will likely lead to the disuse of money.

[36] This can create a circular issue caused by using money to detain without detailed thought. Money is typically found not to be "necessary" when the goal is release, and when other less restrictive conditions can be used to address the government's compelling purpose. Money becomes necessary, however, if one wants to detain and there is no alternative transparent and lawful method for detention. But because money is not supposed to be used to intentionally detain, that second "necessary" use for money is – or should be – unlawful, which causes people to revise their goals to ostensibly argue for release.

In sum, while common sense may have been eroded by state and federal cases indicating that money may "unintentionally" result in a person's pretrial detention, the traditional common-sense notion that a person may not be detained on purpose using money – primarily due to the state's right to bail clause and its protections exceeding the federal law – remains. Intentionality is the issue upon which people must focus when doing bail reform. Ignoring that notion does the states an immense disservice.

The Issues Brought Home

The prefatory note to the UPRDA states as follows:

> Fifth, the most complex open jurisprudential question is whether state constitutions require the release of "bailable" defendants. Many state constitutions provide that all arrested persons have a "right to bail on sufficient sureties," with narrow exceptions for defendants charged with certain very serious crimes. The issue is whether this right to bail amounts to a right to release or just a right to the setting of *some* bail amount (whether or not the defendant can satisfy it). In more practical terms, the issue is whether the right to bail translates to a right to "affordable bail" (or other guarantee of release) or just a right to have the court authorize release on conditions that the court deems sufficient. The Act accommodates the debate by requiring states to enumerate the "covered offenses" for which a person may be held in jail pending trial, *either* by a formal detention order *or* as a result of imposition of a financial condition that the defendant cannot meet. If a state's constitution includes a right-to-bail provision that the state interprets as a right to release, then the state must limit its "covered offenses" to only those offenses that are excluded from its constitutional right to bail. If a state's constitution includes a right-to-bail provision that the state does not interpret as a right to release, then the state may enumerate its "covered offenses" independently of its constitutional provision, and may, if it chooses, authorize unaffordable bail even for

> some "bailable" defendants, provided the other requirements of the Act are met (§§ 102, 308, 403 and Comments).[37]

In a footnote embedded in this section, the UPRDA also states:

> Historically, there is good evidence that the right to bail was understood as a right to release. *E.g.* 1 Joseph Chitty, A Practical Treatise on the Criminal Law 131 (1816) ("The rule is, . . . bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge."). Nonetheless, a number of modern courts have rejected claims that state constitutional bail clauses create rights to affordable bail. *See generally* Colin Starger and Michael Bullock, Legitimacy, Authority, and the Right to Affordable Bail, 26 WM. & MARY BILL RTS. J. 589 (2018).[38]

The various definitions found expressly or implicitly in the UPRDA are also necessary for inclusion here. In the first comment, the UPRDA writes that it does not even use the word "bail" due to "needless confusion."[39] This is admirable, and the comment even notes Supreme Court usage of the term as a "process of pretrial release," which is the definition upon which I landed after dedicating a year to researching it.[40] The comment also mentions the very real issue that states will nonetheless face even if they do not use the term, as they will quickly find that the term "bail" will still be found in various places, such as case law and constitutional provisions. Accordingly, researchers should seriously consider the various parts of this paper in which I quote earlier attempts to describe bail as release.

"Covered offenses" (which is a new term given to what I call a "detention eligibility net," which itself is based on "detention eligibility," a phrase used in bail history by American officials doing bail reform in the 1970s and 1980s) is not

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[37] UPRDA (prefatory note) at 4 (footnotes omitted).

[38] *Id*. (further citation omitted). Of course, this last sentence reflects cases (already mentioned and further explained later), in which the courts hold, essentially, that the accused does not necessarily have a right to bail he or she can make. Interestingly, the citation to Starger and Bullock after this sentence is to their paper actually criticizing the cases that reject a right to affordable bail and calling them "illegitimate."

[39] *See id*. at 8, 9.

[40] One can read about this confusion and the reasons for what I call the "legal and historical" definition of bail in *Fundamentals of Bail, supra* note 14.

technically defined in the definitions section, nor technically justified – the UPRDA leaves that for commentary in a later section, which I note in later pages. Nevertheless, it does include a bracket after the term, which states: "insert the offenses for which the state authorizes pretrial detention or the imposition of a financial condition that cannot be paid within the time prescribed in Article 3."[41] Moreover, comments to the definitions section provide as follows:

> This Act provides for each state to specify the offenses, or offense classes or types, for which a person may be held in custody pending trial (whether on the basis of a detention order or on the basis of a financial condition of release that the accused person cannot satisfy). *See* Section 308 and Article 4, *infra*. Each state should enumerate these offenses or offense classes or types in the definition of "covered offense," *supra*. Some possibilities include: (i) violent felonies; (ii) all felonies; (iii) all felonies and violent misdemeanors; or (iv) all felonies, violent misdemeanors, and misdemeanors involving domestic violence, stalking, driving under the influence, unlawful firearms possession or use, or contempt. Each state should consult its constitution and case law interpreting relevant state-constitutional provisions when determining what offenses to include as "covered offenses." For further discussion, *see* the Comment to Section 308, *infra*.[42]

Given the previous discussion, and despite the suggestion that states research case law on the matter, one can now clearly see how the Act might cause confusion in dealing with the "right to bail" issue. In an otherwise outstanding and substantively beneficial document, in which the UPRDA correctly (and rather forcefully) nudges states toward intentional release and detention with adequate due process protections, it nonetheless allows intentional detention of bailable defendants through the use of money, which minimal research would suggest is unlawful in "right to bail" states no matter how much due process may be given.

Moreover, it does this after offering states the following confusing, if not altogether false dichotomy to inform them of their course: states are to

[41] UPRDA at 9.
[42] UPRDA, at 11 (comments to "covered offense" definition).

determine whether the right to bail is (1) a right to release, or (2) a right merely to have bail "set." As we have seen, at first glance and without research, virtually every state will say that the right to bail is merely a right to have bail set simply because there are so many bailable defendants in jail. Relying on this answer will undoubtedly lead to efforts – as in California and Washington recently – to add to the constitutional detention eligibility nets by statute. However, even minimal research shows the more nuanced and correct answer, which is that the right to bail was historically a right to release, and is once again becoming a right to release as money-based detention is being reduced or eliminated. Indeed, a more meaningful and accurate meaning of the "right to bail," even in these times found between monumental shifts in bail practice, is likely that it is the *right not to be intentionally detained* outside of any lawful exceptions.

More accurately, when discussing the creation of any particular list of "covered offenses," the comments accompanying the UPRDA should have said something like the following, so as not to confuse states and to make sure they begin research in the right direction: "If a state interprets its right to bail clause to provide more protection than the relevant federal law [or if the state believes its right to bail clause to be a right not to be intentionally detained pretrial], and if the state believes its 'no bail' provision must have meaning, if not to provide a clear outer boundary to intentional pretrial detention, then it must consider that constitutional provision when creating a list of 'covered offenses.'" In short, while tempting, states should not follow the path of ignoring their constitutional "no bail" provisions.

The fundamental point is this: if states with constitutional rights to bail are allowed to create new, statutory detention eligibility nets (as allowed by the UPRDA under "covered offenses"), those nets will essentially abrogate or render meaningless the existing constitutional nets, which are found in 41 American states. Moreover, if a judge detains a bailable defendant (i.e., outside of the "no bail" net) by denying bail altogether, that judge will run afoul of state cases requiring judges to set bail for all bailable defendants. If the judge sets bail and thus uses money to detain on purpose, he or she will run afoul of state cases reversing judges who do so based primarily on rationales surrounding the importance of the constitutional provisions.

After research, it is extremely likely that a state will determine that changing its constitution is the only proper way to alter that state's ability to intentionally detain someone pretrial.[43] This is likely how it should be. The initial line drawn between intentional release and detention for any particular state was drawn, in most cases, in the constitution. This means that the most important aspect of the pretrial phase of the case – who should be released and who should be detained – was constructed with the assent of the people. Yes, changing a state constitution is harder than simply adding to the net by statute. Indeed, it means addressing all of the issues I addressed when I created my hypothetical (or "uniform" or "model") bail law in 2017.[44] In that document, I made a strong case for abiding by constitutional detention eligibility nets. Indeed, the concept of a state creating a new net by statute – thus ignoring or adding to the constitutional net – seemed so foreign and obviously wrong to me that I barely discussed it. The fundamental point is that new release/detain schemes are hard, but this is the way it should be. As Justice Gorsuch recently wrote in *Sessions v. Dimaya,* "Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business."[45] Indeed, common sense would tell us the same thing.

Research Necessary to Determine the Meaning of the Right to Bail

The Fundamentals of Bail

Helping a state determine the meaning of its right to bail provision can be simple or difficult, depending on the state. In New Mexico, the meaning can be gleaned from a single state supreme court opinion, *State v. Brown,*[46] which was decided in 2014. Indeed, the first line of the opinion gave some hint as to that meaning, when the New Mexico Supreme Court took its right to bail provision – at the time stating that all persons "shall be bailable by sufficient sureties" – and rephrased it as a guarantee that "all persons before conviction are *entitled to release* from custody pending trial . . . subject to limited exceptions in which release may be denied in capital cases and for narrow categories of repeat offenders."[47] This simple change of language was indicative of the opinion's declaration of a sea

[43] Again, this will only apply to the forty-one states with constitutional right to bail clauses. States with a statutory right can more easily make changes to the net, but will still face challenges to intentional detention using money.
[44] *See Model, Changing, supra* note 6.
[45] *Sessions v. Dimaya,* 584 U.S. ___, slip op. at 9 (2018).
[46] *State v. Brown*, 338 P.3d 1276 (N.M. 2014).
[47] *Id*. at 1278 (emphasis added).

change to come, in which bail equaled release, the right to bail – if it were to mean anything – meant a right to release, and the "no bail" provision was the only appropriate means of denying that release.

Make no mistake, this sort of determination by a state's high court (and using only state law) causes exactly the kind of anxiety the ULC likely predicted for the states when it crafted its "right to bail" compromise. The *Brown* opinion strongly suggested that a judge could only detain someone through the lawful and transparent process as found in its constitutional "no bail" provision. It clearly stated that judges could not use money to detain on purpose. And it methodically attacked money at bail to the point that it would be highly unlikely to lead even to so-called unintentional detention. Most relevant to this paper, the *Brown* opinion made it clear that a legislature or court (New Mexico being guided primarily by court rules at bail) could not simply add to its current detention eligibility net and allow intentional detention using money outside of that net. It was a groundbreaking opinion, and it led, inevitably, to a constitutional revision, a complete overhaul of the court rules, and some amount of anxiety as a result of the state being forced to change so quickly.

In other states, the researcher may find the need to dig deeper, but do note that the *Brown* decision, above, was the inevitable result of following what I call the "fundamentals of bail" (meaning the history, the law, the pretrial research, the national standards, and a proper use of terms and phrases).[48] To the extent that other courts also follow those fundamentals, they will likely come to the same conclusions as the New Mexico Supreme Court, including the need to pay heed to the state constitution.

Accordingly, without a clear opinion for guidance on all issues – which is likely due simply to the scarcity of bail jurisprudence – it is important for the researcher to understand the fundamentals of bail to provide that guidance and to help a state understand its own right to bail clause. The history is especially important, and should never be left out. Indeed, nearly every important bail

[48] *Fundamentals, supra* note 14. For the fundamentals as applied specifically to money bail, *see Money, supra* note 14. For application of the fundamentals to creating new bail laws, *see Model Bail Laws and Changing Bail Laws, supra* note 6. Interestingly, while *Brown* followed the fundamentals of bail to reach its conclusion, it did not glean the fundamentals from my paper, which was released within a day or two of the opinion. Instead, the court and I came to the same conclusion of a need to follow the various fundamental categories through entirely separate processes.

decision in this generation of reform has summarized the history of bail to make various points.

Research Necessary to Determine the Meaning of the Right to Bail

Showing States the Value of Detention Eligibility Nets

In addition to learning and following the fundamentals of bail, researchers can help states with their right to bail provisions by then explaining the need for charge-based "detention eligibility nets." A full explanation of the history and use of those nets since America's founding can be read in my *Model Bail Laws* and *Changing Bail Laws* papers,[49] but for ease of reference, I am including the following short summary of nets that may help. The UPRDA's current comment concerning "nets" – something the Act calls "covered offenses" – is good, but the researcher might need more information to help drive the point home. I initially crafted the following summary to help people with an earlier draft of the UPRDA, which mentioned "detention eligible offenses" rather than "covered offenses," and which leaned toward allowing states to actually choose whether to limit detention through a charge-based net, a recommendation that begged for some better explanation of why nets have been used in America since its founding. Fortunately, the UPRDA changed the language allowing states to choose, and now appears to urge states with some vigor to include charge-based detention eligibility nets into their laws. Some of the language I wrote for the summary, below, includes verbiage from others who were crafting the comments for the earlier drafts.[50]

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[49] *Model, Changing, supra* note 6. The paper concludes that limited charge-based detention eligibility nets are required both for legal, historical, and pretrial research reasons. This means, in turn, that states may not enact "no bail" or detention provisions that detain based on defendant "risk" without a charge-based net or include what I have sometimes called "unlimited" charge-based nets. The term "detention eligibility net" is supported by historical and legal factors, and provides the best descriptor of a "no bail" provision based on a consideration of the entire history of bail.

[50] For purposes of reference and comparison, the current comment in the UPRDA explaining "nets" is as follows:

"*Covered offense.* The Act requires that a state designate the charges on which a person may be held in jail pending trial if the person presents a relevant risk under Section 303 that no less-restrictive measure can adequately reduce. *See* Comment to Section 102(4), *supra*. The Act leaves to states the determination of which offenses or offense classes or types to designate as 'covered offenses.' The intention of this provision, though, is to limit the pool of defendants for whom detention or unaffordable bail may be imposed."

"Historically, most state constitutions authorized pretrial detention without bail in capital cases only. Wayne LaFave *et al.*, 4 CRIM. PROC. § 12.3(b) (4th ed.). A number of states expanded their detention-eligibility nets in the

The summary is as follows:

> *"The individual is charged with a detention eligible offense" recognizes a fundamental issue facing states today, which is how to interpret their current lists of exceptions to their bail clauses. When states first created exceptions to their constitutional rights to bail (sometimes called "no bail" or detention provisions, which allow for preventive detention without signing a release order), those exceptions were functionally detention eligibility nets simply because bail was carried out in such a way that all "bailable" defendants were released.[51] It is called "detention eligibility" because an accused was simply not detainable unless he or she were in the net. It is called a "net" because in every state there is still a way – some evidentiary finding that must be made – that would allow for people to obtain release, even if they have been charged with an offense found in the net. The issue (and associated confusion) arises from the fact that, although these nets were created as clear demarcations and boundaries of intentional detention, American bail jurisprudence became distorted in the 1800s, when cases decided under the Excessive Bail Clause began to allow detention using money outside of those nets – so long as the judge did not provide an express record of intentional detention.*

1980s and 1990s. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56 (1985). Many states, however, still limit detention eligibility to a relatively narrow class of charges. LaFave *et al.*, § 12.3(b); *see also* National Center for State Legislatures, PRETRIAL DETENTION, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx (June 7, 2013). It may even be the case that due process requires states to limit the offenses eligible for pretrial detention. The Supreme Court has affirmed that '[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' *United States v. Salerno*, 481 U.S. 739, 755 (1987). In *Salerno*, the Supreme Court held that the preventive detention provisions of the federal Bail Reform Act satisfied due process in part because the Act limited detention eligibility to 'a specific category of extremely serious offenses.' *Id.* at 750. The Court did not specifically say whether due process required this limitation. But this feature of the federal pretrial detention regime contributed to the Court's conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. *Id.* at 548-55. Due process may additionally require states to specify the charges on which a person may be held in jail pending trial in order to provide fair notice to individuals and to appropriately constrain judicial discretion. *Scione v. Commonwealth*, 114 N.E.3d 74, 85 (Mass. 2019) (holding a portion of Massachusetts pretrial detention statute in violation of Massachusetts' state-constitutional due process provision on vagueness grounds for failure to adequately specify the offenses eligible for detention). A narrow and clearly defined detention-eligibility net can help to ensure that pretrial liberty remains the norm and that detention is a constitutional and 'carefully limited exception.' *Salerno*, 481 U.S. at 755." UPRDA (commentary), at 33, 34.

[51] Again, the literature mentions exceptions to this rule, in which one sees persons accused of crimes who could not obtain release even under a personal surety/unsecured bond system, but those exceptions were exceedingly rare.

Historically, most state constitutions authorized pretrial detention without bail only in capital cases (or other extremely limited classes of crimes). Wayne LaFave et al., 4 Crim. Proc. § 12.3(b) (4th ed). In the latter part of the Twentieth Century, states expanded those nets to include additional classes of defendants who might be detained on purpose while also providing express authority to detain for purposes of public safety. John S. Goldkamp, Danger and Detention: A Second Generation of Bail Reform, 76 J. Crim. L. & Criminology 1, 56 (1985). This means that there are currently three broad categories among the states based on their particular constitutional provisions: (1) Nineteen states with narrow constitutional detention eligibility nets covering capital crimes, treason, and sometimes other "high" crimes (often justified as means of preventing flight from prosecution and with the requirement that the state show some level of evidence for the charge, such as "proof evident, presumption great," leading to scholars calling these "categorical no bail" or "categorical detention" provisions); (2) Twenty-two states with broader detention eligibility nets covering more crimes, justified on both flight and public safety grounds, and typically with more stringent findings necessary for intentional detention; and (3) Nine states with no right to bail in their constitutions, but typically with either an express or implied statutory detention eligibility net. See LaFave et al., § 12.3(b); see also National Center for State 32 Legislatures, Pretrial Detention, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx (June 7, 2013) (last visited Jan. 1, 2020); Guidelines for Analyzing State and Local Pretrial Laws, at 10-13 (PJI, 2017).

The States in category two have concluded that changes to their constitutional "nets" were unavoidable in order to carry out the kind of on-purpose detention based on public safety being discussed in the middle to latter part of the Twentieth Century. Moreover, it is very likely that federal due process (fair notice) requires states to limit pretrial detention in this way, but because money bail has served as the primary detention mechanism in the states for so long, issues surrounding "detention eligibility nets" have not been adequately addressed by the courts. Nevertheless, the Supreme Court has affirmed

that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). Indeed, in Salerno, the Supreme Court held that the preventive detention provisions of the federal Bail Reform Act satisfied due process in part because the Act limited detention-eligibility to "a specific category of extremely serious offenses." Id. at 750. The Court did not specify whether due process required this limitation or not, as it was present in the law and not the primary issue being argued on appeal. But this feature of the federal pretrial detention scheme (as it existed in 1987) contributed to the Court's conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. Adopting a detention-eligibility net can thus help to ensure that pretrial liberty is, in fact, the norm and that detention remains a "carefully limited exception." Id. at 755.

In the wake of states recently articulating a desire to move away from detention based on charge as a proxy for defendant risk and toward detention based on the individual risk posed by a particular defendant based on other variables, scholars and other national groups have nonetheless concluded that limited detention eligibility nets based on charge are still legally necessary, based, in large part, on due process fair notice or vagueness principles. See Schnacke, Model Bail Laws, found at http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf (calling for limited, charge-based detention eligibility net and rejecting detention based on wide or unlimited nets); Civil Rights Corps Model Pretrial Release and Detention Act, found at https://cdn.buttercms.com/1ted5IrSx2ynPT8kitB5m (relying on limited, charge-based detention eligibility); ACLU, A New Vision for Pretrial Justice in the United States, found at https://www.aclu.org/report/new-vision-pretrial-justice-united-states (same); NAPSA, standard 1.6 and 3.4 recognizing need for detention eligibility; Arnold Ventures/CEPP Advancing Pretrial Policy and Research Initiative (recognizing existing state charge-based detention eligibility nets) at https://advancingpretrial.org/guide/guide-to-the-pretrial-decision-

framework/; See also ABA Standards for Criminal Justice: Pretrial Release (3rd ed. 2007) (recommending limited, charge-based or charge plus pre-condition based detention eligibility nets for detention based on flight and public safety).

At their core, these proposals point uniformly toward a state acting intentionally in the pretrial release/detain decision, which necessarily leads to that state adhering to its current articulation of whom it may intentionally detain pretrial, which is found in its detention eligibility net (for to allow intentional detention outside of such a net is to essentially negate or render meaningless the constitutional provision altogether). Intentionality is attained, in large part, by restrictions on money bail, such as the restriction articulated in [the UPRDA] that money may not be used to intentionally detain a defendant pretrial without, as a minimum, affording procedural due process protections. Accordingly, intentional detention, when it is done, must adhere to due process, which includes articulating a limited, charge-based detention eligibility so that it (1) informs citizens of the crimes for which they may potentially be detained pretrial; (2) guards against arbitrary decision-making leading to unlawful detention; and (3) upholds separation of powers notions by requiring the legislative branch, and not the judicial or executive branch, to draw such important lines.

Since these various proposals were written, courts have begun to affirm previously unexamined premises used to justify a requirement for a limited, charge-based detention eligibility. In Scione v. Commonwealth, the Supreme Court of Massachusetts applied vagueness principles to a pretrial detention provision, writing "We have held other statutes that fail to give notice of conduct to be avoided and provide unfettered discretion to police or the courts to be unconstitutionally vague under due process principles where the defendant's liberty interest is at stake." 114 N.E.3d 74, 80-81 (Mass. 2019). In Sessions v. Dimaya, a case in which the Supreme Court struck for vagueness the residual clause to the federal definition of "crime of violence" for purposes of the Immigration and Nationality Act, the Court emphasized the importance of vagueness as providing fair notice, avoiding arbitrary or discriminatory enforcement, and

upholding separation of powers by requiring legislators, and not judicial or executive officers, to define sanctionable conduct even in non-criminal settings. 584 U.S. ___, slip op. (2018). In his concurrence, Justice Gorsuch expanded on these notions and, calling fair notice historically the "most basic" of due process protections and applicable beyond the substantive criminal law, wrote: "From this division of duties, it comes clear that legislators may not abdicate their responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in a vague phrase. For if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large, this would, to some extent, substitute the judicial for the legislative department of government. Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. Dimaya at 584 U.S. ___, slip op. at 8 (2018) (internal citations and quotations omitted). The UPRDA recognizes that all of these concerns are avoided when states articulate limited, charge-based detention eligibility somewhere in their laws.

Future cases will undoubtedly cast more light on this topic, but until then states are urged to work within the boundaries of their current detention eligibility nets, and to widen them only with justification and adherence to broad American legal principles applicable to bail.

As noted previously, many persons had hoped that the California Supreme Court would provide one of the first state supreme court analyses of detention eligibility nets in *In re Kenneth Humphrey,* No. S247278, slip op. (Cal. March 25, 2021). Unfortunately, however, even though the court was fully briefed on the matter, it avoided deciding the net question even as it provided mixed messages concerning how to treat intentional detention in California, both with and without money.[52]

[52] As merely one example of those mixed messages, while providing some verbiage seemingly disapproving of using money to detain, the court nonetheless cited to a federal case, *U.S. v. Fidler* (9th Cir. 2005) 419 F.3d 1026, 1028, for the proposition that a court might declare that a particular money-based detention is not "solely" due to poverty if the court can also articulate that the amount of the bond "is necessary to reasonably assure the

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Determining Your State's Constitutional "Category"

After (1) learning and applying the fundamentals of bail and (2) discussing the need for a limited charge-based detention eligibility net, the next part of the process involves determining, more specifically, the constitutional category within which the state belongs (summarized above) and finding the existing net. This will only prove difficult in a very few states. For example, New York does not have a constitutional right to bail, and its statute is rather opaque, but most scholars have agreed that – at least until the most recent changes – the net was "all felony offenses." As another example, North Carolina also has no constitutional right to bail, and there are differing opinions as to its statutory net.[53] Realize that it would be impossible for a state to detain everyone pretrial,

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defendant's attendance at trial or the safety of the community," thus taking advantage of the excessive bail loophole to allow detention through unaffordable financial conditions. *Fidler*, however, is flawed, and seemingly only used to provide justification or to mask an unlawful practice. Indeed, in *Model Bail Laws*, when discussing the D.C. and federal prohibition on money leading to pretrial detention, I wrote as follows: "Despite the prohibition, courts have occasionally determined that it is not a violation of the statute if defendants are detained when they are unable to raise the money of the financial condition. These cases are based on faulty reasoning, however, and are undoubtedly incorrect. *See, e.g., United States v. Fidler,* 419 F.3d 1026, 1028 (9th Cir. 2005) (reasoning that when a defendant is unable to meet the financial condition but the court has determined that the amount is sufficient, it is "not because [the defendant] cannot raise the money, but because without the money, the risk of flight [or danger to others] is too great"). The proper interpretation of this and similar case rationales is actually found in an unpublished order in *United States v. Clark,* No. 1:12-CR-156, 2012 WL 5874483 (W.D. Mich. Nov. 20, 2012) (memorandum detention order), in which the court reveals that virtually every case upholding release orders with unmet financial conditions in the federal system has only done so because the unmet condition triggered a proper federal detention hearing, which follows the overall intent of the Bail Reform Act. *See id.* at *3 ("If *Fidler* were to be read to say only that a court may circumvent the procedural safeguards of a full detention hearing by attaching heavy financial conditions to a release order that a defendant could not meet, using as excuse that without such financial imposition the risk of flight would be too great, the court would clearly be defying the intent of Congress and inviting a re-examination by that body of a court's role in setting bond. Fortunately, the reading of the statute is seldom so circumscribed."). Importantly, this court did not shed light on the broader issue of how to handle a person held on a money bond under the federal system who is not within the federal net, which is quite wide. The premise of this paper is that a state judge could not detain him or her outside of a state detention eligibility net, despite the amount of process provided, due to the legal force of the constitutional provision.

[53] The North Carolina statute is likely the most confusing bail/no bail dichotomy one will encounter. Technically, everyone in that state enjoys a "right to have conditions set," which is akin to the question asked in the UPRDA. Nonetheless, the statute also provides a list of situations in which there are rebuttable presumptions that no conditions will suffice to mitigate risk, thus hinting at the ability to intentionally detain. And yet, there is no clearly articulated detention process, such as the one analyzed by the Supreme Court in *United States v. Salerno*. This

and so some expressly articulated right to release typically exists. Moreover, a few nets are extraordinarily broad, but because they are so infrequently used (with courts opting to detain using money instead) there have often been no challenges to their constitutionality based on the "carefully limited" requirement found in *United States v. Salerno.*

For some time now people (including me, although I do not currently use these categories for various reasons, which I will explain below) have placed states into three broad categories based on their constitutional bail provisions.

In *Guidelines for Analyzing State and Local Pretrial Laws,*[54] I wrote:

> *One should think of a state's 'right to bail' provision (which, if not found in the constitution, is typically in its statute) as its 'bail/no bail' dichotomy: It establishes the release and detention eligibility roughly in the form of some ratio that is manifested through particular practices. While all bail schemes follow a 'bail/no bail' or release/detention dichotomy, the Fundamentals of Bail paper (listed in the bibliography) describes how legal scholars have grouped state constitutional right to bail provisions into three primary categories, which is current at the time of this writing:*
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> 1. *states having no right to bail in their constitutions (nine states, akin to the federal system under the United States Constitution);*
> 2. *states having 'broad' or 'traditional' right to bail provisions (now approximately 19 states, modeled after the Virginia law of 1682);*
> 3. *states with constitutional right to bail provisions that have been amended since the 1980s to provide for additional preventive detention that is typically (but not always) charge-based and often premised on public safety (now approximately 22 states).*

States in the first category are currently as follows: Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, West Virginia.

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confusing mixture is currently causing problems for those who seek answers as to how to do intentional release or detention without money in that state.

[54] *Guidelines for Analyzing State and Local Pretrial Laws*, 11-13 (PJI, 2017) [hereinafter *Guidelines*].

States in the second category are currently as follows: Alabama, Alaska, Arkansas, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Montana, Nebraska, Nevada, North Dakota, South Dakota, Tennessee, Wyoming. These states typically limit "no bail" to capital offenses, but sometimes to other groups of extremely serious crimes, including those that trigger life in prison as a penalty, treason, etc.

States in the third category are currently as follows: Arizona, California, Colorado, Florida, Illinois, Louisiana, Michigan, Mississippi, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, Wisconsin.

These groupings are primarily helpful when comparing and contrasting one state with another. However, and as mentioned previously, when currently presenting to any particular state, I tend to emphasize that all "no bail" provisions, whether broad or amended, are preventive detention provisions (including those that are found in the nine states with statutory rights only), meaning that they are the provisions allowing for intentional detention without bail for purposes of preventing either risk of flight or public safety. Even the narrowest "no bail" exception – allowing detention for capital offenses – was designed to prevent something, most likely flight. I have found it easier to explain how all states are alike – by all having "no bail" or detention provisions – versus how they are different through these various categories. This, in turn, helps to avoid confusion over other difficult issues, such as the scope of preventive detention.

The categories are also helpful when combined with the history of bail. For example, knowing when a state changed its constitutional detention eligibility net can provide a range of years upon which to focus for case law interpreting what, exactly, that change meant relevant to the state's right to bail. It is in these cases that courts often discuss the "absolute" right to bail, and how and why it was changed through constitutional amendment.

States with no constitutional right to bail should still provide for release and detention, and the right may be gleaned either by an express articulation or by determining the extent of allowable detention, thus showing the remainder to be people entitled to "bail" or release. Note that states often ignore their detention provisions, when they exist, by using money. Moreover, a state might not have

any detention provision whatsoever – leading the researcher to believe that the right to bail is the broadest possible – only to find out that the state does all of its detention through the use of money. It simply has no process for lawful and transparent intentional detention in the law.

Finally, many states repeat these constitutional provisions in their statutes or court rules, so the researcher should take note of these sections, too.[55] Very rarely, a state might provide for additional groups of persons who may be detained by statute that are outside of the groups found in the constitutional provision. I have only seen these two or three times, and in each case criminal justice stakeholders in those states agreed that the statutory provision was likely unconstitutional. In Colorado, such a provision was enacted by floor amendment (meaning that those of us who drafted the bill could not easily object) and even though it passed, the offending provision was quickly recognized as unconstitutional, never reviewed, and, to date, never used.

Accordingly, even though it seems obviously wrong to enact statutory additions to the constitutional detention eligibility net, it happens, often because the traditional money-based bail system tends to cloud consideration of the state constitutional provision and allows states even to ignore it. Moreover, the researcher will also notice certain glitches in reporting, such as a constitutional provision that has not been removed from the online source even though it has been struck by a reviewing court, or a statutory provision that is not removed due to some publishing rule. As a rule of thumb, though, the researcher will typically find the "no bail" provision of a state's constitution repeated verbatim in the statutes or court rules. If the researcher does not find that to be the case, he or she must do deeper research.

Importantly, while I have seen the odd statutory addition to a constitutional detention eligibility net, I have *never* seen a case in which a state court has approved of such an addition. This may be due to any number of reasons, such as the state's use of money to detain, but under the thesis of this paper, it should be unlikely that such a case exists. Nevertheless, the bail provisions from both the constitution and the statutes provide important clues – and associated case law – to help determine how a state views its right to bail.

[55] Of course, states with no constitutional right to bail will address the right – or however it is articulated – in the statute only.

The researcher will need the cites to the constitutional and statutory right to bail provisions[56] to do Westlaw or Lexis searches for cases decided under these particular provisions. To the extent that particular terms, such as "bail," are defined by statute, that section, too, will be an important one to search within a state court database. Also, the researcher will need to be familiar with any relevant court rules, which might also provide some indication of how the courts view the right to bail in any particular state. I have seen states with little to no statutory and case law language dealing with the right to bail, but with powerful court rules either expressly articulating or inferring "bail" to be a right to release pretrial.[57]

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Determining How The State Has Defined "Bail" or the "Right To Bail" Over Time

The next step involves a fairly broad search into state case law – typically only state supreme court case law – to determine how the courts have, themselves, defined "bail" and the right to bail. This search is also designed to determine how any particular court has defined such terms over time, so the researcher should be prepared to go back into the 1800s for helpful language to show if a court has changed its position over the years. Using a database like Westlaw, I typically run not only the specific constitutional and statutory citations, but also the word "bail,"[58] the "right to bail," "pretrial release," etc., and then read as many cases as I can, weeding out those that, for example, use the word only in passing. While one might think that the word "bail" would yield far too many cases, it is surprising how few bail cases actually exist. In any particular state, I have often found that I use less than twenty cases total to make my various points. Cases will point to other cases, too, and so as the researcher moves along, he or she will inevitably find the opinions that are cited most frequently in the bail context.

[56] Note that there is a trend toward deleting reference to "bail" and replacing the word with pretrial release, as is found in the Florida Constitution, Art. I, § 14, and the recently enacted New Mexico Court Rules. For a discussion of why "bail" should be defined as a process of pretrial release, see NIC, *Fundamentals of Bail, supra* note 14.

[57] Indeed, some states are what I call "court rules states," meaning that their bail provisions are found almost exclusively in rules rather than statute. Knowing the interplay between statutes and court rules in bail is also crucial, and is covered in *Guidelines*, supra note 54, at page 13.

[58] Simply searching for the word "bail" in any particular database might provide far too many cases to digest. Nevertheless, due to the scarcity of bail opinions, it is sometimes fruitful and, occasionally, necessary. This is why, however, that using a database that allows one to search opinions under specific constitutional or statutory citations can be so helpful.

I try to be creative in my searches, sometimes using the word "bail" in the same sentence as "defined" or "definition" to see what comes up. Moreover, I try to stay within state supreme court opinions, though occasionally I have to search within state courts of appeals. This can pose problems, however, as states frequently differ as to the precedential value of these other opinions. For example, in Colorado, individual panels on the court of appeals may disagree with other panels, which sometimes leaves two competing sets of legal principles in published form.

Again, in states with amended provisions the researcher should be particularly mindful of opinions issued during the time that any constitutional amendments were enacted. Remember that for any number of reasons these states did not feel that they could simply add to their constitutional detention eligibility nets statutorily – instead, they felt compelled to change their constitutions. Cases can help flesh this out, as can legislative history, if necessary, designed to determine how the legislature or courts assessed their own right to bail provisions.

There are often also "backdoor" methods for determining the same answer. For example, in 1951 the United States Supreme Court decided *Stack v. Boyle,* in which the Court equated the right to bail with the right to release and freedom before conviction.[59] Nearly every state supreme court has cited favorably to *Stack,* and so running that case within the state database might yield results, including a state supreme court quotation of the liberty-leaning language. Less frequently, a state will cite to *Salerno* in ways that help define the right to bail. Even less frequently (though I have seen it) a court will cite to one of two cases named *Bandy*,[60] which, although both decided by a United States Supreme Court Justice sitting as Circuit Justice, contain powerful statements of bail as release and the prohibition on setting bail with a purpose to detain.

Also, many states have interpreted their constitutional "sufficient sureties" clauses of their right to bail provisions, and these cases, too, can provide insight into how the state supreme court defines "surety" or thinks about bail as release. I have done a good deal of research into these cases, and I can say with confidence that most state supreme courts decide them with a bent toward bail

[59] *Stack v. Boyle,* 342 U.S. 1 (1951).
[60] *See Bandy v. United States*, 81 S. Ct. 197, 198 (1960); *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).

as a process of release. Even those courts finding, for example, that "cash only" bonds not to violate the "sufficient sureties" clause of a particular constitutional provision have felt the need to add language cautioning judges not to engage in practices that result in the absolute deprivation of actual release. Moreover, it is fairly routine in these cases that the courts define the word "surety." Those definitions, too, can provide insight into the right to bail. I discuss these cases in a separate section later in this paper.

In addition to just the word "bail" and phrases like "right to bail," this initial research can help you determine how a state also defines terms such as "admitted to bail," which in some states has been equated with liberty or release. Do remember that the federal system eventually discarded the word "bail" for pretrial release, and many states in this generation of reform are doing the same. Indeed, the UPRDA has done so, and there are good reasons for that.

The researcher may not find a case definitively defining bail as release, but he or she may find a number of cases – one defining the right as "absolute," one saying that judges have to set bail for all bailable defendants, one equating being "admitted to bail" with release, and one saying that judges may not use money to detain on purpose or it will erode the right. The goal for any researcher is to come up with a coherent line of cases (preferably at the state supreme court level) showing exactly what the courts have articulated (or suggested or hinted) to be the definition of bail as well as the right to bail in any particular state. Sometimes this definition changes over time, and sometimes it does not, but it is important to get the entire picture. Even though this task might seem daunting, compared to other areas of criminal justice, I have found that the dearth of bail cases has allowed me to search comprehensively and still often finish with a manageable number of relevant cases.

The result might end up being something like a narrative of the word "bail" and "right to bail" that changes over time in any particular state. For example, I once supplied a chronological narrative to one state supreme court working group. That narrative focused on the fact that the legislature had revised the state statutes to eliminate the word "bail" (despite inclusion of the word in the constitution) and to replace it with the word "release." And, in that instance, several state supreme court opinions showed a progressively nuanced definition of "bail," including an opinion stating that the differences in wording between

the constitution (which used the word bail) and statute (which used "release") were not substantive differences at all. As mentioned previously, it has been my experience that most state supreme courts look at bail primarily through a "release" lens, and this can be documented in any particular state with proper research.

Moreover, researchers should look for any comparison of the state's right to bail with the federal system, which has no constitutional right to bail. I have found that state courts often describe bail to be an "absolute" right, and occasionally contrast the state bail clause with the federal constitution, so as to emphasize the inclusion of greater state rights for people accused of crimes. These discussions in the state law can be especially important with crafting a narrative of how a state might describe its own right to bail.

Finally, I have never seen a case in which a state court speaks of the importance of bail while simultaneously including caveats indicating that the right might be eroded simply by providing a better hearing, or the presence of counsel, or some elevated statement of risk. This might happen in the future, but as of this date the courts appear mostly to equate bail with release, and although they have allowed money to detain under the excessive bail loophole, they draw the line at using money to intentionally detain, as we will see in subsequent pages of this paper. Remember that while federal law may provide certain protections from abuse that will emerge from the current wave of money bail litigation, the right to bail is an instance of a state providing more rights than the federal system, and it must be read in ways to make those rights meaningful and in addition to federal procedural due process.

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Showing the Excessive Bail Loophole in Any Particular State

The next step is to illustrate the "excessive bail loophole" by finding examples in three broad categories of cases. The "excessive bail loophole" is merely my term for describing the law allowing money-based detention so long as a judge does not expressly articulate any intent to actually detain and, concomitantly, forbidding a judge to use money with an express intent to detain.

The loophole is important to recognize because the UPRDA has advised states that if they believe that the right to bail is not a right to release – i.e., that it is merely a right to have one's bail set, which might be gleaned from two of the three categories of cases explained below – they can ignore their constitutional "no bail" provisions and add new categories of detention eligible charges to their statutes or court rules. This advice, however, ignores the fact that the loophole turns on intentionality. And, while every state will have numerous cases showing that people can be detained using money, the UPRDA does not go further in advising that the states dig deeper to determine whether they can detain people *on purpose* or *intentionally* outside of the eligibility net.

The excessive bail loophole includes three categories of cases. The first category consists of cases showing that bail must be set for bailable defendants, which means that a judge may not intentionally detain a person by using "no bail" outside of the constitutional net. The next category includes those cases holding that setting bail with an express intent to detain using money is no different than not setting bail at all. Since the rest of the UPRDA focuses on a state doing release and detention "on purpose," then it is crucial that the state understand the limits that the excessive bail loophole places on its ability to detain intentionally. The final category, which includes the plentiful cases showing that the accused does not necessarily have a right to bail he or she can afford, illuminates only one small part of the American right to bail narrative.

Showing The Excessive Bail Loophole
The First Category of Cases

The first category would be shown by a case (or cases) articulating that the constitutional right to bail involves, at the very least, the judge actually setting bail. This sort of case is one that I typically find fairly early in the state's history, often going back to the early 1900s or 1800s, when a judge decides simply to not set bail for a "bailable" defendant. Even though these are often old cases, I almost always find them if I look hard enough, typically in a state supreme court database. Moreover, they are not always old. In a recent analysis for Arkansas, I found a 1996 opinion holding that the trial judge erred in refusing to set bail for a bailable defendant, writing: "As can be seen from the constitutional provision and the criminal procedure rule, a non-capital defendant's absolute right to bail

may only be curbed by the setting of certain conditions upon his release, and not its complete denial."[61]

Again, if I do not find this particular type of case in a supreme court database, I go deeper into courts of appeals. Nevertheless, the case is an important one to find, as it typically emphasizes that the constitutional provision – made up of the right to bail and the exceptions to that right – actually matters. Sometimes a court will indicate that the judge may not refuse to set bail unless the defendant is facing charges in the "no bail" category, which is basically the same thing. Fundamentally, the case illustrates clearly that denial of bail for bailable defendants, which is intentional detention, is forbidden by the bail clause and its exceptions. Or, put another way, one cannot intentionally detain outside of the "no bail" net.

Even if the researcher feels that the notion merely follows common sense, these cases are crucial if only to show the emphasis a state places on recognizing the difference between "bailable" and potentially "non-bailable" defendants. In sum, they show that the provisions have meaning. Moreover, they can show that practices making "bail" and "no bail" functionally equivalent will likely not be tolerated. And, finally, the right cases can include a rationale that ties the practice of intentional detention to the constitutional "no bail" provision. In the Arkansas example, if I had more time, I would likely go back and look for earlier cases, if only to find one with a more expansive rationale for its holding.

Showing The Excessive Bail Loophole
The Second Category of Cases

Finding a case in the second category might take some digging, but I have found it in every state in which I have worked. That type of case will essentially hold that a judge setting bail – i.e., signing an order of release, albeit with some unattainable release condition – is either a violation of excessive bail or, at the very least, an abuse of judicial discretion *when the condition is designed or expressly articulated to keep the person in jail*. As previously mentioned, at least two circuit courts of appeals in the federal system have noted that setting money

[61] *Henley v. Taylor*, 918 S.W.2d 713 (1996).

with an intent to detain is an improper purpose, and thus fails in the balancing test for federal excessive bail.[62]

Sometimes it will be easy to find, and sometimes the researcher will find the legal principle stated even without facts showing an express record of intent to detain. For example, in 2014, the New Mexico Supreme Court wrote:

> 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. *See* N.M. Const. art. II, § 13; Rule 5–401; *see also Bandy,* 81 S.Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."). Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise, the defendant is entitled to release on bail, and excessive bail cannot be required. N.M. Const. art. II, § 13; *cf.* 18 U.S.C. § 3142(c)(2) (providing that a federal "judicial officer may not impose a financial condition that results in the pretrial detention of the person"), *held unconstitutional on other grounds by, e.g., Karper,* 847 F.Supp.2d 350.[63]

Note that the rationale behind the statement of using money to intentionally detain – that it is merely a "less honest" method of denying bail – is like the kind of rationale I also look for (and often find) in this as well as the first category of cases, which deal with a judge refusing to set bail altogether. Courts often state the principle with little or no rationale, however, so it is important for the researcher to keep looking until he or she finds something helpful. This "*State v. Brown*" kind of opinion, which is from a state supreme court, and which follows the fundamentals of bail while checking all the boxes in terms of how money can affect a state constitutional provision, is a treasure to find.

[62] *Galen v. County of Los Angeles,* 477 F.3d 652 (9th Cir. 2007) (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 a person from posting bail).
[63] *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

In other states, though, the researcher may have to dig deeper to find that kind of treasure. Often it means scouring through all of the cases under the heading of "excessive bail" on Westlaw to find the one with a fact pattern in which the judge makes an express statement of intent to detain. The reason that these cases are hard to find is simply because judges seem to know intuitively that setting bail with an intent to detain is likely unlawful, and so they avoid making a record of intentional detention. Moreover, it appears that judges have known this for a very long time, which is why the researcher may need to go back quite some time to find a relevant case. Nevertheless, as I have said, I have always found the case in every state in which I have looked.

For example, most recently (and with very few research resources), I found a state supreme court case indicating that a judge had abused his discretion when he set the amount to purposefully detain while ignoring all of the other statutory considerations for setting bail. That case involved a bail-setting judge asking defense counsel how much the defendant could make, "'so I can set it above what he can make. I don't think this Defendant should be out. I'm going to set it at a bond so high I don't think that he can....' The court then set bond 'at $1,000,000, which will be cash only. That means he may not post a surety. He must come up with cash money to make this bond.'"[64]

In its opinion reviewing that decision, the state supreme court wrote as follows:

> The record here clearly establishes that the circuit court, in setting the amount of bail, purposely set the bond out of Foreman's reach and did not take into account 'all facts relevant to the risk of wilful nonappearance,' such as those examples appearing in Ark. R. Crim. P. 9.2(c). Consequently, we have no choice but to hold that the circuit court's action in setting bail at so high a figure was arbitrary and exceeded its discretion.

While this opinion is not perfect, in that it did not divorce intentional detention from failure to consider all statutory factors, even the dissenting Justice believed

[64] *Foreman v. State,* 875 S.W. 2d 853 (Ark. 1994).

intentional detention would be a denial of the right to bail, when that Justice wrote:

> This court has said that the Arkansas Constitution confers an absolute right to bail before conviction. Here, the trial judge effectively denied that right, if we consider only the aggravated assault charge, by stating that he was going to set bail so high that Foreman could not make it.

I found this case with minimal effort, and I am confident that other cases would only bolster the conclusion in that state.

Indeed, a case like this can place the researcher on the right path to dig deeper to find more context. And, in fact, I quickly found another Arkansas case in which the Supreme Court quoted with approval and at length from the United States Supreme Court's opinion in *Stack v. Boyle,* including the very relevant (but often unquoted) discussion in the concurrence concerning the impropriety of using money to intentionally detain.[65] All of this helps to build a cumulative case for articulating an authoritative meaning of "right to bail" in any particular state.

As another example of cases in this category, in *People v. Snow*[66] the bail-setting judge set a financial condition of release at $50,000, stating: "If I thought he would get out on that I would make it more." Reversing, the Illinois Supreme Court wrote: "The amount of $50,000 could have no other purpose than to make it impossible for him to give the bail and to detain him in custody, and is unreasonable. The constitutional right to be admitted to reasonable bail cannot be disregarded."[67] Virtually every American state supreme court defines "excessive bail" as "unreasonable" bail, and so this language is tied to excessive bail analysis, however minimal.

In *State v. Miles,*[68] the Missouri Supreme Court wrote that "[t]he 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

[65] *Thomas v. State*, 542 S.W.2d 284, 289 (1976).
[66] *People v. Snow,* 340 Ill. 464, 173 N.E. 8 (1930).
[67] *Id.* at 469.
[68] *State ex rel. Corella v. Miles,* 303 Mo. 648, 262 S.W. 364 (1924).

bail under the Missouri Constitution]. *For that is saying the offense is not bailable when the Constitution says it is."*[69] This is an old case, but a deeper search revealed another opinion in which the same court discussed a more current version of the state constitution. In that version, enacted in 1992, the provision allowed judges to deny bail "upon a showing that the defendant poses a danger to a crime victim, the community, or any other person." Looking at this language, the Missouri Supreme Court concluded that while it authorized courts to *deny* bail when the requisite showing was made, it did not "permit [the] use of bail to keep a defendant from being released."[70]

In *Gusick v. Boies,*[71] the Arizona Supreme Court wrote:

> Bail is exacted for the sole purpose of securing the attendance of the defendant in court at all times when his presence may be lawfully required, and his surrendering himself in execution of any legal judgment that may be pronounced against him [and] excessive bail is not to be required for the *purpose of preventing the prisoner from being admitted to bail*.[72]

In the same case, the court articulated the traditional rule that a financial condition is not necessarily deemed excessive merely because the accused cannot pay it, showing a clear demarcation in that state between intentional and so-called "unintentional" detention.

In *Simms v. Oedekoven,*[73] the Wyoming Supreme Court dealt with the denial of bail of an otherwise bailable defendant, but also spoke to using money to detain by writing that either course – denying bail or setting a financial condition that results in pretrial detention – would violate the Wyoming Constitution.[74] Moreover, the Court used one of the rationales mentioned previously in this paper: "[t]he State appears to invert the applicable concepts

[69] *Id*. at 652 (emphasis added).
[70] *State v. Jackson,* 384 S.W.3d 208, 215 (Mo. 2012).
[71] *Gusick v. Boies,* 72 Ariz. 233, 235-238, 233 P.2d 446 (1951).
[72] *Id.* at 237 (citations omitted) (emphasis added).
[73] *Simms v. Oedekoven,* 839 P.2d 381, 385 (Wyo. 1992).
[74] *Id.* 385-86. This case includes good language concerning denying bail to a bailable defendant, but also language helping with the notion of "sufficiency," which is discussed *infra:* ("There is a clear exception for capital offenses only when the proof is evident or the presumption great, and there is no indication that there is an exception to be found with respect to the right to bail if the only sufficient surety is detention.").

relative to constitutional application. The State, in effect, is seeking to invoke an exception to what is a clear extension of a right to bail.").[75]

Sometimes the researcher can find relevant cases in other sources, including federal opinions. For example, in its order granting a preliminary injunction in the Harris County money bail case, a federal judge did the work of finding relevant state cases showing much of the excessive bail loophole in that state. In *O'Donnell v. Harris County*,[76] the judge first cited a Texas case to show that the state "prohibit[ed] preventive pretrial detention except in specific and narrow circumstances set out in constitutional amendments."[77] The judge then summarized the history of bail to forbid unattainable bonds, discussed federal bail as a "mechanism of pretrial release," and, indeed, scrutinized the holding of a case named *McConnell* (the federal case typically cited by both federal and state courts as well as bail industry lawyers to allow money to detain) in the way I describe in footnote 82 and accompanying text, *infra*.

More importantly and most relevant to this paper, the judge then discussed numerous Texas cases and concluded that, "Texas courts are careful to distinguish between transparent pretrial detention orders and de facto pretrial detention orders imposed by setting bail higher than the defendant can pay."[78] The judge then provided examples of Texas cases in which judges who set money bail with an express intention to detain were overturned for abuse of discretion.[79] Again, the rationale adopted by this particular federal judge to explain the notion is tied to the constitutional bail/no bail dichotomy – "Jailing the indigent by setting secured money bail that they cannot pay makes an end run round a Texas-created liberty interest [i.e., bailable offenses] without providing due process."[80] Note, this is a federal case applying federal law, and so it should not be employed for the proposition that a state bail setter may intentionally detain a bailable defendant so long as some minimum level of due process is maintained. That is a state law question, and I use this federal opinion only to illustrate creative ways to find the relevant state cases.

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[75] *Id*. at 385. This would fall under rationale number two of the three main rationales that I have earlier summarized, and which focuses on the "no bail" exceptions.
[76] *O'Donnell, supra* note 2, slip op. at 24, 35-38.
[77] *Id.* at 24, citing *Ex parte Davis*, 574 S.W. 2d 166, 169 (Tex. Cr. App. 1978) (describing the constitutional exceptions and the "strict limitations and other safeguards" found in them).
[78] *Id.* at 36.
[79] *Id.* at 36-37.
[80] *Id.* at 190.

Finally, do recall that common sense would tell us that a financial condition that *unintentionally* detains can, theoretically, be evidence of *intentional* detention after some period of time. Thus, while relatively rare, the researcher should nonetheless look for cases articulating that notion. For example, in *State v. O'Steen,*[81] a Tennessee court wrote: "The petitioner has now been confined nearly three months due to his inability to secure bail set by the General Sessions Judge. This is tantamount to a denial of bail."[82] This type of case is also related to those in which courts find intent to detain simply from the enormous amount of the financial condition leading to pretrial detention. Depending on what is said in the opinion, these latter cases can also be useful in showing that intent to detain using money is forbidden.

As I have already mentioned, I have found this particular type of case in every state in which I have looked. Nevertheless, even if the researcher cannot find it, he or she can rely on various federal cases, such as *Stack, Bandy,* and *Galen,* or on other sources to make the same basic point – keeping a person in jail by setting a money amount to intentionally detain is unreasonable and no different than "no bail," and is thus unlawful. Indeed, and as mentioned previously, the researcher might find state case law citing to these other sources to provide a backdoor method of showing this proposition under state law. Moreover, some states make certain statements that lead, inevitably, to the same conclusion. For example, in Colorado, a state supreme court opinion articulating that the "mention of the one exception [to bail] excludes other exceptions," can be cited to show a fundamental premise of not allowing "bail" to be construed in a way that allows it to become an exception itself.[83]

Showing The Excessive Bail Loophole
The Third Category of Cases

The third category of cases includes the type of case upon which the UPRDA is overly focused. It is far too easy to find, and will simply say something along the lines of, "The defendant does not have a right to bail they can make." Often,

[81] *State ex rel. Hemby v. O'Steen,* 559 S.W.2d 340, 341, 342 (Tenn. Crim. App. 1977).
[82] *Id.* at 342.
[83] *See Palmer v. Dist. Ct.,* 398 P.2d 435, 437 (Colo. 1965).

states cite to the main federal case on the issue, *United States v. McConnell,*[84] and so searching for that particular federal case in a state court database will often bring results. As the footnote makes clear, though, there are aspects to even these cases that can bolster an argument not to allow *intentional* pretrial detention using money. Indeed, these kinds of cases, like the cases dealing with "sufficient sureties," often include what I call the "language of release," which helps to form an adequate assessment of any particular state's right to bail.

This category includes the typical excessive bail case – a case within the line of "unfortunate cases" that derailed American bail staring in about 1830. They are ubiquitous, and, read in isolation, will undoubtedly mislead states into thinking that the right to bail is merely a right to have one's bail set. Indeed, looking at cases like these in isolation can be so misleading that it can persuade states not to perform any research at all. Due to its prevalence, I do not need to provide specific examples.

Summary of the Excessive Bail Loophole

In sum, the excessive bail loophole, which seemingly illuminates both the problem and the solution to money at bail, provides nuance, if not the definitive answer to the question, "What does our state right to bail really mean." It is shown by three categories or threads of cases. First are cases holding that bailable defendants must have their bail "set," which points states to their constitutions and implies the importance of both a meaningful right to bail clause as well as the all-important "no bail" or exceptions provision. Second are cases that declare a violation of the Excessive Bail Clause or, more typically, an abuse of discretion, when a judge sets a financial condition of release with an express purpose to detain. These cases are somewhat rare, only because judges appear to intuitively understand not to engage in the practice. Third, there are those often extremely numerous cases allowing high financial conditions of release to

[84] *See United States v. McConnell,* 842 F.2d 105 (1988) ("But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."). Interestingly, the *McConnell* court concluded the unattainable financial condition was not excessive despite language in the federal statute articulating that, "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." Relying on the legislative history of the federal law, however, the court wrote that while unattainable conditions of release may lead to detention, they should also trigger higher scrutiny and procedural processes such as those provided in the federal detention hearing. Despite its recognition of the need for a due process detention hearing, however, it appears that the *McConnell* court did not remand for that hearing because arguments concerning its absence were not raised on appeal. *See id.* n. 5 and accompanying text.

result in pretrial detention when judges *do not* make an express record of intentional detention.

The loophole is universally found in states in which money bail is used as a detention mechanism, and especially where no express detention provisions have been enacted to give life to the constitutional "no bail" provision. When those states decide to do release and detention more intentionally, however, which often means becoming less reliant on money bail, the loophole will begin to lose its force as an explanation of, or a justification for, pretrial detention.

Looking at the excessive bail cases in a particular state through a lens of intentionality can better illuminate bail practices that have bedeviled American states for decades. In the National Conference on Bail and Criminal Justice in 1964, an entire plenary panel was dedicated to "Setting High Bail to Prevent Pre-Trial Release." In 2015, while ostensibly a complicated case, the Supreme Court of Connecticut's decision in *State v. Anderson* – at its most basic level – turned out to be a disagreement between the majority, who believed the trial judge only set bail that the defendant was merely unable to post, and the dissent, who believed that the trial judge set bail at an amount designed to detain,[85] a classic illustration of the "excessive bail loophole."

By finding cases from the three categories showing that the state participates in the excessive bail loophole, however, the researcher can at least begin to discuss how the right to bail in that state includes a right not to have anyone set bail with an express intent to detain. Indeed, it will likely lead to a more nuanced articulation of a state right to bail clause, which is that the right to bail is likely a right *not to be intentionally detained beyond the charges in the "no bail" exceptions.* This is crucial because intentional release and detention is seemingly the goal of the UPRDA, and thus it means that the state must deal with its current "no bail" provision when doing detention on purpose. That, in turn, means that a state likely cannot simply create new categories of detention eligibility by statute or court rule that do not already exist in its constitution, something the UPRDA would unfortunately allow.

By following this process, I have virtually always found the cases sufficient to show that any particular state has either: (1) expressly articulated a right to bail

[85] *State v. Anderson,* 127 A.3d 100 (2015).

to mean more than simply a right to have one's bail set; or (2) at the least, follows the excessive bail loophole based on intention so that it can never disregard or ignore its own "no bail" provision. If, for some reason, I were ever to come up short in this effort – that is, if I were to find virtually nothing showing the importance of the right to bail or "no bail" limitation, I believe my next step would be to find opinions articulating broader legal principles, such as the principle that statutes should not be read in ways that would negate constitutional provisions. Fortunately, the remaining kernels of common sense at bail have allowed me to avoid that step.

Determining Whether a Sufficient Sureties Clause is an Impediment to Liberty

When discussing a state's right to bail, the "sufficient sureties" clause will inevitably arise, and the real issue with this clause for purposes of this paper is whether it somehow erodes whatever liberty interest might be created by the bail clause.

I had occasion to research this question fairly recently, and I came to the conclusion that it does not. The following statement was drafted by me to respond to the argument that, somehow, "sufficiency" could diminish or significantly erode the liberty interest created by a state right to bail that forms the basis of the various money bail cases claiming violations of equal protection and due process:

> *Moreover, the "sufficient sureties" clause of any particular state right to bail provision should not be read as limiting or eroding any overall liberty interest created by that provision.*
>
> *Through one lens, the history of bail in England and America demonstrates a steady advance toward pretrial liberty by restricting the discretion of bail setters to detain pretrial and to curb abuses resulting in the detention of bailable defendants. (See NIC, Fundamentals of Bail, at 21-36; NIC, Money as a Criminal Justice Stakeholder, at 11-30; CLEBP, Model Bail Laws, at 26-30, 44-81) From ancient times, bail evolved in England to provide customary categories of "bailable" and "unbailable" defendants. (See William F. Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 33, 45 (1977-78); see*

also Hermine Herta Meyer, Constitutionality of Pretrial Detention, 60 Geo. L. J. 1139, 1154 (1971-72)) Nevertheless, discretionary abuses by the sheriff bail setters, including denying the release of bailable defendants or requiring payment as a precondition to release, prompted Parliament to pass the Statute of Westminster in 1275. (See 3 Edw., ch. 15 (recounting abuses and providing for release "by sufficient surety"); Duker, supra, at 45-49; Elsa De Haas, Antiquities of Bail, at 91-97 (AMS Press, NY 1966)) The Statute "eliminated the discretionary power of the sheriffs and local ministers by carefully enumerating those crimes which were not replevisable [i.e., unbailable] and those crimes which were replevisable [i.e., bailable] by sufficient sureties without further payment." (Duker, supra, at 46 (internal footnotes omitted)) More dramatically, the Statute required the release of bailable defendants and, according to Blackstone, actually made the detention of bailable defendants a crime. (See Meyer, supra, at 1156; De Haas, supra, at 95-96; F.E. Devine, Commercial Bail Bonding: A Comparison of Common Law Alternatives, at 4-5 (Praeger Publishers, 1991)) Historically, the actual release of bailable defendants was made possible through the use of unpaid and unreimbursed personal sureties (a person or persons taking responsibility for the defendant) and recognizances (the use of a third-party promise or pledge to pay an amount due only upon default and not through a condition precedent to release, akin to what we call unsecured bonds today). (See Devine, supra, at 5)

Thus, the inclusion of the phrase "sufficient surety" to the Statute of Westminster must be read with the overall thrust of the Statute in mind, which was to dramatically reduce discretion at bail by categorizing certain persons as bailable and then requiring their release. One bail researcher has termed the historical rule requiring the release of bailable defendants "The Big Rule," simply because throughout history anything violating that rule by getting in the way of the release of bailable defendants was deemed an abuse and led to reform. (NIC Model Bail Laws, supra, at 44; PJI, The History of Bail and Pretrial Release, at 3-4 (PJI 2010) (chronicling abuses and resulting reforms)

*Importantly, this included the detention of bailable defendants through the means of finding sureties "insufficient." Even though sufficiency might be seen as some remnant of power or discretion allowed to bail setting sheriffs after 1275, common law commentators who have discussed the phrase have uniformly written that when the accused offered sureties, an examination of the sufficiency of those sureties should not lead to detention. Thus, Chitty wrote: "In criminal cases . . . bail is absolute in the first instance. The magistrate may, however, examine them on oath as to the sufficiency of their estate. And it is said, that if he be deceived, he may require fresh sureties." (J. Chitty, A Practical Treatise on the Criminal Law, at 82, *100, 101 (William Brown, Philadelphia 1819) Nevertheless, after warning of the offense of taking "insufficient bail" (unless the defendant appears in any event), Chitty writes: "On the other hand, justices must take care that in cases they are bound by law to bail the prisoner, they do not, under the pretense of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a denial of bail, which is a grievance expressly prohibited [by the excessive bail clause and common law crimes including wrongful imprisonment]." (Id. at 84, *102-03)*[86]

Likewise, Petersdorff writes, "But extreme caution should be observed, that under pretense of demanding sufficient sureties, the magistrate does not require bail to such an amount as is equivalent to an absolute refusal of bail, and in its consequences, leads to a protracted imprisonment." (Charles Petersdorff, A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings, at 512 (London, Jos. Butterworth & Son 1824)) In discussing "sufficient" bail, Hawkins writes mostly of the numbers of personal sureties allotted to any particular offense and that, at least in capital cases, they be "sufficient" to answer the sum to which they are bound. Nevertheless, Hawkins essentially repeats Chitty's and Petersdorff's general warning that, "Justices must take care, that under pretense of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail;

[86] The burden was on the defendant, however, to offer "bail," and he could be detained if he did not make the offer.

for this is looked on as a great grievance." (William Hawkins, A Treatise on the Pleas of the Crown, Vol II, at 139 (London, 1824))

This system of bail and no bail followed into America, and, as in England, the rule favoring, if not demanding the release of all bailable defendants was given effect through the personal surety system, the use of recognizances, and the notion that anything standing in the way of release of bailable defendants was an abuse. In Colonial America, it has been reported by at least one researcher that virtually all defendants in the state studied were able to find sureties and were thus released (See Paul Lermack, The Law of Recognizances in Colonial Pennsylvania, 50 Temp. L.Q. 475 at 504-505 (1977))

Indeed, America did even more to eliminate the kind of discretion at bail that might limit release. While England gradually enacted a complicated set of rules, exceptions, and grants of discretion that governed bailability, America leaned toward more simplified and liberal application by granting a nondiscretionary right to bail to all but those charged with the gravest offenses and by settling on bright line demarcations to effectuate release and detention. According to Meyer, early American statutes "indicate that [the] colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases." (Meyer, supra, at 1162) Risk factors – i.e., the sorts of things like criminal history or character of the accused – used by bail setters in England to determine bailability in some cases, were only allowed to affect the amount of the financial condition of release, which, as mentioned previously, was in the form of a recognizance or what we might call today an unsecured bond with personal sureties. (See NIC Money, supra, at 19) Accordingly, even when amounts were high, they did not restrict liberty)

Thus, for much of America's history the word "bail" was equivalent to the word "release," and the right to bail was assumed to equal a right to release. This is illustrated by several U.S. Supreme Court opinions, including the opinion in Stack v. Boyle, (342 U.S. 1, 4 (1951)), which equated the right to bail to the "traditional right to freedom before conviction" and "the right to release before trial."

Since the mid-1800s, however, excessive bail jurisprudence has gradually and unfortunately allowed the detention of bailable defendants through courts holding, essentially, that defendants do not have the right to bail "they can make." (See NIC Money, supra, at notes 73-82 and accompanying text) While technically limited only to cases in which defendants are detained "unintentionally" (that is, the judge issues a release order and makes no record of purposeful use of a release condition to detain), for practical purposes this jurisprudence has also allowed for sub rosa "intentional" detention of bailable defendants (which has always been unlawful when not done in secret) when judges simply make no record of intent to detain. This, in turn, has led persons to incorrectly articulate the right to bail as merely a "right to have one's bail set." This excessive bail jurisprudence is unfortunate for many reasons, but perhaps primarily because it has allowed sub rosa intentional detention through unchecked discretion back into a process in which Americans initially chose to include no discretion to detain except in the limited enumerated exceptions. Practically speaking, with the right record a judge can detain anyone pretrial, eroding the fundamental right to bail to mere illusion. See Changing Bail Laws, at 20-22 (CLEBP, 2018) (explaining the so-called "excessive bail loophole" by showing how cases turn on intentionality)

Current cases addressing due process and equal protection violations through the use of money bail, however, do not rely upon excessive bail analysis and apply to either intentional or unintentional detention. Accordingly, courts should recognize that apart from their own merits, these newer cases are making the American right to bail meaningful once again. By eliminating blatant constitutional violations arising from the use of secured money bonds, these cases are also forcing states to re-examine their existing right to bail provisions and detention eligibility nets for purposeful detention without money. While this may cause tension in states that believe their constitutional language is insufficient in some respect, the solution is not to allow for an "end run" around the current provisions. (O'Donnell district court order at 190) Indeed, "[i]f the constitutional guaranties are wrong, let

the people change them – not judges or legislators." In re Underwood, 9 Cal. 3d 345, 508 P.2d 721 (Cal. 1973)

State supreme court cases[87] examining "sufficient surety" language in right to bail clauses are somewhat scarce, relatively recent, and fairly narrow, looking primarily at whether a denial of bail, setting a "cash only" bond, or forcing a defendant to pay a percentage bond in cash violates the "sufficient sureties" language of a right to bail provision by denying the defendant a "surety." The opinions in these cases virtually never cite to legislative or constitutional documents shedding light on the meaning of the clauses at enactment; indeed, many articulate looking for such documentation and finding none. Accordingly, the opinions in these cases often refer to the history of bail, dictionary definitions of "surety," and statements of the purpose of bail to guide their decisions. (See e.g., State v. Brooks, 604 N.W. 2d 345 (Minn. 2000) (finding a constitutional violation); State v. Briggs, 666 N.W.2d 573 (Iowa 2003) (finding no violation) In 2015, the Wyoming Supreme Court analyzed the various relevant cases and wrote, "The purpose of bail proves to be the fulcrum upon which the meaning of 'sufficient sureties' is tipped one way, in favor of a broad definition, or tipped the other way, in favor of a narrow definition. In evaluating the cases from other jurisdictions that interpret 'sufficient sureties' differently, the definition ultimately adopted was informed by the stated purpose of bail in those jurisdictions." (Saunders v. Hornecker, 344 P.2d 771, 780 (Wyo. 2015))

The courts in these cases typically limit discussion only to the narrow issue concerning the form of bond – e.g., is a "cash only" bond

[87] I am purposefully not including state courts of appeals opinions in the following section for at least two reasons. First, depending on how they are decided, they run the risk of being negated by a state supreme court opinion using the knowledge of bail and no bail in this generation of reform. For example, the discussion in *State v. Gutierrez,* 140 P.3d 1106 (N.M. Ct. App. 2006), seems absolutely antiquated when compared to the state supreme court's opinion in *State v. Brown,* 338 P.3d 1276, 1277 (2014). Also, courts of appeals can be complex in terms of precedential value. One case out of the Colorado Court of Appeals (*Fullerton v. County Court,* No. 02CV834 (Colo. Ct. App. 2005)) is fairly on point, but it is written by a single panel of a court that does not even have precedential value over other panels of the same court. Moreover, even though it discusses the propriety of "cash only" bail, I have also not included one high court case from New York (*McManus v. Horn*, 967 N.E. 2d 671 (N.Y. 2012), because New York does not have a constitutional right to bail, and the statute apparently did not have any phrase equivalent to "sufficient sureties."

considered a "surety" or denial of a "surety" for purposes of the clause – and largely avoid expressly deciding questions concerning, for example, whether a cash bond deemed a surety but set at an unattainable amount would violate the constitution, likely under excessive bail analysis. (See e.g., State v. Jackson, 384 P.2d 208, 216 (Mo. 2012) (writing that "[c]oncerns about the misuse of cash-only bail to keep a defendant in jail are not addressed by [the right to bail clause] but rather by the [excessive bail clause] of the Missouri Constitution," which was not raised)) Though rare, the denial of bail expressly discussed as a form of assurance under a "sufficient surety" clause (and not as a part of revocation) has been found unconstitutional by at least one court (see Simms v. Oedekoven, 839 P.2d 381, 385, 86 (Wyo. 1992) (addressing the state's argument that denial of bail was the only "sufficient" option) State courts far more frequently hold that the denial of bail for bailable defendants is unconstitutional without express reference to sufficiency. (See, e.g., Locke v. Jenkins, 253 N.E.2d 45, 46 (Ohio 1969) (the right to bail is "absolute," and so refusal to set bail for a bailable defendant was unconstitutional))

On the narrow issue of whether a form of bond (cash or cash-percentage) violates a sufficient sureties clause, the cases are split, with some declaring that cash-only or cash percentage bonds violate a state's sufficient sureties clause and some declaring that they do not. (Compare State v. Brooks, 604 N.W. 2d 345 (Minn. 2000) (finding a violation); State v. Hance, 910 A.2d 874 (Vt. 2006) (same); State v. Neal, 14 N.E. 3d 1024 (Ohio 2014) (same) with State v. Briggs, 666 N.W.2d 573 (Iowa 2003) (finding no violation); State v. Jackson, 384 S.W.2d 208 (Mo. 2012) (same); Saunders v. Hornecker, 344 P.3d 771 (Wyo. 2015) (same)

Of these cases, the better rationale is found in the first group, as they correctly view the term "surety" broadly, more accurately comprehend the history of bail to be primarily concerned with liberty and the release of bailable defendants, and appear to better understand the practicality that a form of bond that tends to detain bailable defendants is no different from denial of bail altogether. If anything, a

more detailed and accurate understanding of the history of bail in England and America as well as universally true definitions of terms and phrases at bail would only bolster these conclusions. That is, that while the primary purpose of a money condition might be court appearance, the overall primary purpose of a right to bail clause is release, and thus the "sufficient surety" limitation should not be read to diminish that purpose. Indeed, this purpose – to foster release and limit detention – becomes even more acute when states enact additional exceptions to the right to bail through, for example, preventive detention provisions. See Smith v. Leis, 835 N.E.2d 5, at 318 (Ohio 2005) (noting "the Attorney General similarly concedes that 'the constitutional amendment, by providing for outright denial of bail [through preventive detention] further strengthens the case against achieving a de facto denial of bail without satisfying the rules for a true denial of bail'")

The latter group of cases, on the other hand, improperly focuses on court appearance as the primary purpose of bail, likely due to misunderstandings between the purpose of bail when "bail" is defined as a process of release versus the purpose of bail when "bail" is defined as money. (See Hance, supra at 365-66 and note 5 ("Briggs gave short shrift to the role of bail via a surety in preventing excesses in pretrial confinement" and the opinion is "internally confusing")) The primary purpose of bail is to provide a mechanism for conditional release, and the primary purpose for money at bail is (and can only be) to provide reasonable assurance of court appearance. (See Model Bail Laws, supra, at 39) Court opinions focusing on court appearance as the primary purpose are often improperly blurring bail with one of its conditions or sub-conditions, which is money.

Opinions declaring that limitations on bond forms (such as "cash only" bonds) violate a sufficient sureties clause necessarily lean toward liberty, as providing options to defendants for payment of a money condition automatically increases the chances of release. Concomitantly, opinions declaring those limitations not to violate the clause naturally lean toward detention because fewer options equal a higher chance of incarceration. Nevertheless, courts writing these

latter opinions seem to struggle with the potential effect of their holdings on pretrial liberty, and so one sees a variety of statements in those opinions as evidence of that struggle. (See, e.g., Briggs, supra (writing that while using a cash-only bond does not violate the constitution, if a court finds that the defendant is "absolutely bar[red] his or her utilization of a surety in some form, a court is constitutionally bound to accommodate the accused's predicament"); Gendron v. Ingram, 24 Ill. 2d 623, 626 (Ill. 1966) (explaining that the law mandating the cash percentage bond was actually designed, in part, to foster liberty); Jackson, supra, at 215-17 (reiterating that purposeful detention of a bailable defendant is unlawful, and justifying cash bonds because they help defendants avoid the commercial surety industry)

In sum, "sufficiency" through history was never allowed to stand in the way of the release of bailable defendants, and, despite a fairly complicated history of cases splitting on the precise issue of "cash only" bonds in our system of bail, to date no American court has expressly held otherwise.

The Final Steps

Once a state determines that it cannot ignore its constitutional "no bail" or detention provision, the question remains whether it must be changed at all. At one time I believed that that all states would have to change their constitutional provisions for a number of reasons, but after reviewing them all, I can now say with fairly objective neutrality that some states will not need to change. This is due not only to how certain provisions are worded – broadly following the steps from my *Model Bail Laws* and *Changing Bail Laws* papers to create a good "detention eligibility net" and "further limiting process." It is also due to the nature of defendant risk itself, which would indicate that even the narrowest of constitutional detention provisions (i.e., those states with the broadest right to bail) might be sufficient, if not optimal. In short, the research concerning defendant risk tends to show that: (1) defendants are not all that risky; (2) they are certainly not risky to do the things that America has historically or legally used as a basis for pretrial detention, which is extreme risk to commit a serious or violent crime or to intentionally flee to avoid prosecution; and (3) the "risk" in

number two may be difficult or impossible to predict in any event. In sum, the nature of prediction should lead to the narrowest of detention provisions, and many states will do quite fine without amendment.[88]

Time and space considerations preclude any lengthy summary of the issues raised in my two papers dealing with changing a "bail/no bail" dichotomy, but I feel it is important to stress that no state can know definitively whether it must change its detention provision, let alone to what it should change, without working through the various issues raised in those papers. States should consider those papers as providing two important functions: (1) they can help a state craft a lawful release/detain scheme, with justification sufficient to help it hold up under court review; and (2) they can help a reviewing court determine exactly how a state may have erred in crafting that scheme, and thus principles from the papers to overturn the state effort.

Conclusion

The Uniform Law Commission's Uniform Pretrial Release and Detention Act leaves it up to states to research and then make certain determinations prior to crafting "covered offenses" for purposes of pretrial detention eligibility. If states follow the Act's instructions on what to look for in making those determinations, however, they might be confused, if not misled as to what the states' own laws likely say about the right to bail and the boundaries of "no bail" in their constitutions. With the kind of minimal research outlined in this paper, however, I believe that a researcher can help any particular state to better understand its constitutional right to bail, and this, in turn, will lead to a substantively better attempt – one that is far less likely to be overturned on review – to enact the UPRDA. In sum, research into any particular state will likely show that the constitutional right to bail, if not an absolute right to actual release, is certainly not merely a "right to have one's bail set." Indeed, to have meaning, a state right to bail clause should be interpreted – at the very least – as a right not to be intentionally detained beyond the charges listed in the constitutional "no bail" exceptions.

[88] Both *Model Bail Laws* and *Changing Bail Laws* also discusses the importance of a good "secondary net and process" (what most states call bail revocation) in order to avoid pitfalls in the endeavor of detaining someone pretrial based purely on prediction.