CHANGING BAIL LAWS

Moving From Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws

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American law requires a broad right to pretrial release, but allows jurisdictions to create rational and fair laws allowing pretrial detention in narrow categories of cases. When jurisdictions declare who is eligible for release and detention, they create a "release/detain" dichotomy, a notion extending back hundreds of years in both America and England. Until now, virtually all jurisdictions have expressly declared most persons eligible for release, but with limited exceptions articulated through detention eligibility laws based primarily on criminal charge as a proxy for pretrial risk. These release/detain dichotomies have been clouded through the use of money, which has led to the unwise release or (far more frequently) the unlawful detention of people accused of crimes. For a number of reasons, including increased focus upon the use of money as a condition of release or a mechanism of detention, many jurisdictions are now either choosing or being forced to craft new laws articulating – upfront and on purpose – which defendants are to be released, and which are to be eligible for, and ultimately held through, pretrial detention. In most cases, jurisdictions crafting these new laws have articulated a desire to move from a charge-based system to a "risk-based" or "risk-informed" system of release and detention.

Actuarial pretrial assessment instruments are a large reason for the desire to craft new laws based on "risk," as they provide enormous benefits when compared to the traditional money bail system. Among other things, these tools have sparked this generation of bail reform by shining a bright light on our previous, inadequate, and often extremely biased methods of risk assessment (such as by charge through a bail schedule, through non-predictive and unweighted statutory factors, or through the subjective notions of bail setters) and by allowing us to see the results of those methods when assessment is used to illuminate and evaluate jail populations. They appear to be the catalyst for moving from essentially a random and discriminatory money bail system, to a system of release and detention that is done (as all of criminal justice should be done) intentionally. In addition, these tools have proven better than clinical experience (indeed, as the current end product of a long evolution of risk assessment, they are better than any other risk prediction methods we have attempted in the history of bail), are evidence-based, can provide standardization and transparency, help judges follow both the risk principle and the law, and are likely a prerequisite to other bail reform efforts.

They can guide courts and justice systems with virtually all issues concerning release (including providing rationales for quick or early release, prioritizing resources through structuring and evaluating supervision strategies, crafting responses to violations, assessing the efficacy of bond types, helping to encourage more summonses and citations, changing or eliminating nonpredictive statutory or rule-based individualizing factors, and even providing some rationale for emergency releases, when necessary), and they can assist with detention. Using them can even lead to creating more confidence in data processes and systems policies. Finally, and most relevant to this paper, these tools – and the research used to create them – can be extremely helpful for jurisdictions seeking to re-draw the line between purposeful pretrial release and detention through changes to statutes, court rules, and constitutions. Indeed, it is those tools and that research which, together, reinforce the notion that pretrial detention be more "carefully limited" than we ever thought, simply because they amply illustrate that defendants are far less "risky" than we ever thought.

Due to these tremendous benefits, jurisdictions are rightfully asking whether actuarial pretrial assessment instruments may also be used

exclusively to determine initial pretrial detention based solely on risk rather than charge. Essentially, jurisdictions are asking about the interplay between actuarial assessment tools and charge in the pretrial detention decision. This paper raises a variety of issues jurisdictions must consider as they answer that question. Some of these issues highlight the fact that actuarial pretrial assessments can easily be *misused*, a fact requiring certain legal solutions when moving from "charge" to "risk." To address various concerns surrounding the misuse of actuarial pretrial assessment (as well as other general issues and concerns raised by the law and the history of bail), this author recommends meaningful legal backstops to rein in pretrial detention based on actuarial prediction alone. These backstops include, most importantly, the creation and justification of charge-based detention eligibility nets, along with a new and improved (over existing American processes) "further limiting process" designed to further limit purposeful pretrial incarceration only to defendants posing the sort of extreme risk manageable only through secure detention. The author provides a template of language articulating a model detention eligibility net and further limiting process at the end of this paper, which is further explained and justified in a longer paper titled, *Model Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* (found at www.clebp.org). Finally, the author lists other fundamental provisions and principles that likely should be included in any comprehensive bail scheme.

The Primary Question – "If We Change, To What Do We Change?"

America is currently immersed in the so-called "third generation" of bail reform.[1] This generation, like previous generations, seeks to adopt an array of improvements to the bail system using the best available research and a

[1] *See* Nat'l Ctr. For State Courts, *2017 Trends in State Courts: Fines, Fees, and Bail Practices,* at 8, found at https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx. *See generally,* National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* [hereinafter NIC *Fundamentals*] (NIC, 2014); National Institute of Corrections, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* [hereinafter NIC *Money*] (NIC, 2014). The two latter papers suggest that many of the concepts discussed within them will likely cause jurisdictions to recognize the need to change their release/detain dichotomies, but neither paper expressly articulates in detail exactly what those changes should be. Many of the concepts discussed in the present paper rely on the reader's comprehension (or at least familiarity) of the fundamentals of bail; accordingly, the author strongly recommends reading NIC *Fundamentals* and NIC *Money* as a prerequisite to reading this paper.

clear understanding of the law. In making these improvements, jurisdictions often articulate that they are using current research about defendant risk and money at bail to change from a mostly "charge-and-money-based" pretrial release and detention system to one that is mostly "risk-based" or "risk-informed." One of the hallmarks of this overall change is the adoption of strategies designed to help jurisdictions do pretrial release and detention without money. Another is the adoption and use of actuarial pretrial assessment instruments to help predict a defendant's probability of success or failure to appear for court and new criminal activity during release, rather than to rely solely on criminal charge as a proxy for defendant prediction.

These assessment tools, which represent evidence-based methods of determining certain aspects of defendant risk and of sorting defendants onto a success continuum, are the products of groundbreaking research on pretrial risk that has, in turn, formed the genesis of the entire bail reform movement. Through these instruments, jurisdictions often observe many "lower" and "medium" risk defendants in jail as well as certain "higher" risk defendants out of jail, a phenomenon that has been the catalyst of bail reform movements throughout history. Indeed, the groundbreaking nature of these tools cannot be understated; it is the tools themselves that call into question whether we should even use the word "risk" at bail at all.

At the same time, jurisdictions are recognizing that current bail laws hinder their ability to make what they believe to be evidence-based decisions during the pretrial phase of a criminal case. In particular, bail laws across America were created based on certain assumptions, including the assumption that if one is arrested on a certain serious charge, he or she is likely a "high risk" to commit the same or similar charge if released through the bail process. The current research on pretrial success and failure, however, highlights the errors of many of our historic assumptions about pretrial misbehavior. This has naturally led many jurisdictions in America to believe that their existing charge-based detention laws are either too broad or too narrow, and that therefore they do not necessarily reflect whom those jurisdictions might choose to release or detain if done more purposefully and based on current research.

Accordingly, jurisdictions across America are beginning to make changes to those laws to better facilitate purposeful release and detention using current research on pretrial success and failure. In some cases, jurisdictions hope to completely replace most or all remnants of a charge-based scheme with a

process based solely on defendant risk as measured by an actuarial pretrial assessment instrument. In its most simplistic articulation, this would allow jurisdictions to "detain all higher risk persons" as measured by an assessment tool. Detention based on prediction, however, is extremely complex, and thus the primary issue facing America today is how charge and "risk" must combine to reflect basic American principles surrounding liberty, public safety, and judicial effectiveness. In sum, as presented in a single question facing all American jurisdictions today, the issue is as follows: "If we change, to what do we change?"

Change

There is now good reason to believe that all American jurisdictions will, in fact, change their laws, policies, and practices in some manner to reflect the pillars underlying this generation of reform. Some of this change will be voluntary; indeed, from California to Maine, from Alaska to Florida, and from large jurisdictions like New York City to small ones like Mesa County, Colorado, criminal justice leaders are seeking to change by creating rational, fair, and effective release and detention systems to better follow the law and the research. For example, after studying both bail (release) and no bail (detention) for over one year, New Jersey voluntarily changed its entire pretrial system, including its constitutional right to bail provision and guiding statutes. Formal criminal justice demonstration projects, like the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative or the Pretrial Justice Institute's Smart Pretrial Demonstration Initiative, are helping dozens of jurisdictions and several whole states through the process of voluntary change. Most recently, the Laura and John Arnold Foundation released its Public Safety Assessment for mass use, with supporting documents indicating that the tools will be used to support jurisdictions' voluntary attempts to make more purposeful release and detention decisions.[2] Many more informal efforts to voluntarily improve the bail process are too numerous to count.

Some of this change, however, will likely be forced. For example, while some jurisdictions are currently fighting lawsuits designed to eliminate secured money bonds based on federal equal protection claims, many other jurisdictions have settled those suits by implementing significant changes to their pretrial processes. In one such case, a federal judge wrote: "No person

[2] *See* materials found at https://www.psapretrial.org/.

may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."[3] In another ongoing case, the judge wrote: "Certainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible."[4] In yet another case, the United States Department of Justice filed a statement of interest arguing that bail practices that incarcerate indigent persons before trial solely because of their inability to pay for their release violates the Fourteenth Amendment.[5] In still another, a federal judge in Louisiana wrote that due process includes, at a minimum, a judge's consideration of a defendant's ability to pay a financial condition and findings under a clear and convincing standard as to why a defendant might not qualify for alternative conditions of release, thus making the use of money bail as a means of detention much more difficult.[6]

Finally, in another ongoing case, a federal district court judge issued a preliminary injunction against Harris County, Texas (a county that had been setting bail in ways similar to counties across America), concluding that the plaintiffs were likely to succeed on the merits of their equal protection and due process claims as to how the County used money at bail.[7] A panel of the Fifth Circuit Court of Appeals largely upheld that order, with reference to a familiar hypothetical:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way – same charge, same criminal backgrounds, same circumstances, etc., – except that one is wealthy and one is indigent. Applying this County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to

[3] *Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo., June 3, 2015) (declaratory judgment).
[4] *Walker v. Calhoun, Georgia*, No. 4: 15-CV-0170-HLM, 2016 WL 36162 (N.D. Ga. Jan. 28, 2016) (order granting preliminary injunction) (the order was vacated and remanded on procedural grounds; the statement is used for example only).
[5] *See* United States Statement of Interest, *Varden v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).
[6] *See Caliste v. Cantrell*, No. 17-6197 (Order on Summary Judgment) (E.D. La. Aug. 6, 2018).
[7] *See O'Donnell v. Harris County, Texas,* Civ. No. H-16-1414 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion on motion for preliminary injunction).

> post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.[8]

All of this language is significant, and, if fully adopted by the courts, has the potential to force most jurisdictions to rapidly change their laws, policies, and practices to accommodate purposeful release and detention without money.

Federal equal protection and due process cases, however, are not the only means of forcing change. In *Lopez-Valenzuela v. Arpaio,*[9] the Ninth Circuit Court of Appeals reviewed an Arizona detention provision by merely holding it up to the United States Supreme Court's opinion in *United States v. Salerno,*[10] the 1987 opinion describing essential elements underlying any valid pretrial detention provision. After doing so, the Ninth Circuit held that the Arizona detention provision violated the federal constitution because that provision was not "carefully limited," as *Salerno* requires. Similarly, the Arizona Supreme Court recently declared another Arizona detention provision unconstitutional as violating *Salerno's* requirement that detention provisions be narrowly focused on accomplishing the government's objectives.[11] Like the money bail cases, these cases are significant precisely because most, if not all, detention provisions currently found in American bail laws have one or more constitutional vulnerabilities when held up to the requirements or guidance of *Salerno.*

Change can be forced through a catalyst within a state criminal justice system, as well. In New Mexico, for example, the state supreme court declared that a $250,000 financial condition causing the detention of a bailable defendant accused of murder was arbitrary, unsupported by the evidence, and unlawful, and, accordingly, ordered the defendant released on

[8] *O'Donnell v. Harris County, Texas,* No. 17-20333, slip op. at 20 (5th Cir., June 1, 2018).
[9] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014).
[10] *United States v. Salerno*, 481 U.S. 739 (1987).
[11] *Simpson v. Miller,* 387 P. 3d 1270 (Ariz. 2017). Most recently, using the same basic analysis as was used in *Simpson*, the Arizona Supreme Court concluded that yet another state "no bail" provision was facially unconstitutional in *Arizona v. Wein and Goodman,* No. CR 17-0221-PR (Ariz., May 25, 2018).

nonmonetary conditions.[12] Essentially, the New Mexico Supreme Court held that the bail-setting judge was not following *existing state law*, a routine occurrence happening in virtually all states. Indeed, the New Mexico Court expressly recognized this phenomenon in that state, writing as follows:

> We understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community. We also recognize that some members of the public may have the mistaken impression that money bonds should be imposed based solely on the nature of the charged crime or that the courts should deny bond altogether to one accused of a serious crime. We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular, particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one. As Justices Jackson and Frankfurter explained in reversing a high bond set by a federal district court, 'Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.' *Stack v. Boyle*, 342 U.S. at 8 (Jackson, J., joined by Frankfurter, J., specially concurring).[13]

This single opinion – addressing a claim raised by a public defender through the typical criminal appeals process – ultimately led to significant changes for New Mexico, including a new constitutional right to bail provision as well as an overhaul of the court rules used to provide the boundaries of bail practice.

[12] *See State v. Brown*, 338 P.3d 1276, 1278 (N.M. 2014).
[13] *Id*. at 1292-93.

Like all important issues, the bail issue will likely generate conflicting cases.[14] So far, however, all of these cases – almost regardless of the outcome – illustrate pressure to change. Moreover, jurisdictions should realize that change can be triggered for a variety of reasons beyond court opinions dealing exclusively with equal protection and due process.

In sum, if one looks at the history of bail in America, one sees that American states frequently use money to detain persons they believe are too high risk to release. This use of money as a detention mechanism allows states to ignore their current release/detain dichotomies (typically articulated in their right to bail provisions) for doing bail and no bail on purpose. Certainly, any court opinion telling states they cannot use money to detain based on equal protection or due process notions will force those states to change and to consider their dichotomies. Nevertheless, change can also be triggered by a number of other catalysts forcing states to retreat from using money as a detention mechanism, from other federal claims attacking money (such as federal excessive bail analysis), to state claims (such as right to bail), to jurisdictions merely deciding to do release and detention on purpose.[15]

The fundamental point is that America's use of money at bail is changing, and this change automatically forces states to consider moneyless pretrial release and detention models. The above examples merely reinforce the notion that jurisdictions are facing increasing challenges to their bail practices and existing laws from multiple sources. As more entities formulate national bail litigation strategies based on these and other legal theories, and as more jurisdictions recognize the inherent shortcomings of the traditional money bail system, it is unlikely that any jurisdiction will be immune from the need to change.

[14] Courts are currently struggling with discrete elements of the various injunctions, but also with basic issues over appropriate levels of scrutiny and when to apply them.

[15] Indeed, the Laura and John Arnold Foundation recently released its Public Safety Assessment to the general public, along with certain informational and training materials based on the underlying assumption that jurisdictions using the tool will want to make release and detention decisions on purpose. *See* materials at https://www.psapretrial.org/. It is often only when jurisdictions decide to do pretrial release/detention on purpose that they understand the deficiencies of their laws.

How Legal Challenges Forcing Change Affect the Primary Question

The legal challenges also illustrate that neither past nor future bail laws are immune from legal scrutiny of their rationales. Accordingly, when jurisdictions ask the primary question at bail – "if we change, to what do we change?" – the answer is not simply to replace charge with "risk" because it seems more rational to do so. Indeed, the legal challenges forcing jurisdictions to change are also requiring those jurisdictions to adequately justify their release and detention provisions, something that has not been done in America for decades. And thus, the answer to the primary question is that a jurisdiction can replace charge with risk, but only to the extent that the courts will declare it lawful. This issue is one of primary significance in the pretrial field. In 2007, the National Institute of Corrections (NIC) published a paper in which Dr. Marie VanNostrand coined the term, "legal and evidence-based practices" – versus simply "evidence-based practices" – when discussing the pretrial field and bail processes.[16] The new term was intentionally designed to remind jurisdictions that changes based on the research or evidence could only be adopted so long as they adhered to certain fundamental legal principles. The law, in short, is a check on the evidence.

Nevertheless, the evidence is also a check on the law. If a release or detention provision is based on certain assumptions, and if the research or evidence causes us to see that those assumptions are now faulty, then the laws must be changed. This is where jurisdictions find themselves today. Most of America's bail laws were built on assumptions about risk associated with charge – for the most part, that the more serious the charge, the higher the risk – without decent empirical evidence to support them, and now recent risk research is showing that many of these assumptions are flawed. Indeed, in many cases, persons facing much less serious charges are often higher risk for pretrial misbehavior than those facing more serious charges.

Thus, jurisdictions are faced not only with justifying new laws, but also with justifying old ones. The fundamental point is that all bail laws – past or present – must be justified to survive legal scrutiny by the courts. Jurisdictions cannot simply assume that the particulars of pretrial detention

[16] Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services,* at 17-18 [hereinafter VanNostrand] (NIC/CJI, 2007).

are currently lawful simply because they were once declared lawful. This generation of bail reform means that states must likely start with a clean slate, so to speak, and hold up both current and future laws to fundamental legal principles and to the most recent pretrial research to assess their legality. It is a process that must be done without any shortcut.

Unfortunately, many states are apparently tempted to take the significant shortcut of simply replacing "charge" with "risk" without adequate justification. Such a shortcut is tempting primarily because it appears logical: if jurisdictions can adequately determine defendant risk using an actuarial pretrial assessment instrument, then it makes sense to change their constitutions and statutes to allow for detention broadly based on risk and then to let the actuarial tool sort people out. But can a constitution be changed to include a broad detention eligibility net? Should actuarial risk assessment ever be used to determine detention eligibility or detention itself? These are questions that must be answered prior to the creation of any new detention law because the courts will undoubtedly require it at some later time. With the kind of justification that answers these questions, jurisdictions can create "model" bail laws and corresponding practices, which are based on fundamental legal principles and the most recent empirical research, and which lead to a purposeful in-or-out decision with nothing hindering it. Without that justification, however, bail laws and practices are likely to violate the constitutional rights of countless defendants until an appellate court can rectify the error.

In 2014, the National Institute of Corrections (NIC) published a paper written by this author titled, *Fundamentals of Bail,* which describes certain essential topics jurisdictions must know and understand to make meaningful changes to the pretrial phase of a criminal case.[17] The process of justifying both current and future bail laws requires knowing how those fundamentals should be used to guide jurisdictions in re-drawing the line between pretrial release and detention. The process of justification involves thinking through the various issues through the lens of lessons from the fundamentals so that answers to certain foundational questions at bail – "whom do we release, whom do we detain, and how do we do it" – are legally justifiable.

[17] *See* NIC *Fundamentals*, *supra* note 1. The fundamentals include: (1) why we need pretrial justice; (2) the history of bail; (3) the legal foundations of bail; (4) the pretrial research; (5) the national standards on pretrial release and detention; and (6) universally true definitions of terms and phrases at bail.

In 2016, NIC partnered with the Center for Legal and Evidence-Based Practices (CLEBP) to research model bail laws, legal and empirical justification, and the interplay between actuarial risk and charge to determine the issues jurisdictions will face if they must justify or make changes to current detention eligibility laws. This paper incorporates that research to describe those issues and to articulate potential solutions, focusing on broad concepts that jurisdictions will need to consider during the process of change.

Another paper, published by CLEBP in 2017, provides a more in-depth and detailed inquiry leading to the creation of this author's own release and detention model, which is then justified through a three-part analysis incorporating the fundamentals of bail.[18] That more detailed paper essentially argues that a model bail law is merely one that is legally justified in the way that it initially draws the line between purposeful release and detention. Once that line is drawn, it is a relatively simple exercise to make sure the persons who should be released actually get released, and the persons who should be detained are detained through a fair and transparent process. By recognizing the important issues as presented in the instant paper, and perhaps by looking at the more in-depth analysis leading to one author's "model" detention process, jurisdictions will begin to understand the need to engage in the difficult but necessary work of justifying their own laws so as not to violate fundamental legal principles. In sum, this shorter paper mostly just raises the issues (albeit with some tilting toward answers for the most important ones); the longer paper provides a template for how American states might analyze and respond with justification to those issues in their own "models."

Prerequisites to Understanding the Issues

There are certain prerequisites in the form of foundational principles or truths that jurisdictions must know before understanding the various issues and lessons from the fundamentals of bail presented in this paper. Virtually all of these principles are covered somewhat in the two previous NIC papers, *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder*. Moreover, they are explored in depth in the longer CLEBP *Model Bail Laws* document released in 2017. They are condensed and re-ordered for relevance

[18] *See* Timothy R. Schnacke, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* [hereinafter *Model Bail Laws*], found at www.clebp.org.

in this paper to help the reader fully understand the issues facing jurisdictions seeking to change their release/detain dichotomies. In this author's opinion, they are fundamental notions that address areas of confusion, and they must be understood (and hopefully embraced as true) in order to know how to resolve the various issues raised in this paper.

For example, it is crucial to know a foundational principle that preventive detention addresses both public safety and flight (versus the misconception that it only deals with danger), which is gleaned from various sources such as the history of bail. Knowledge of this basic truth helps the reader to better understand lessons from a more in-depth look at the history of bail, which raises issues surrounding intentional and unintentional detention for both flight and public safety. This, in turn, helps jurisdictions to change. Likewise, it is crucial to know that throughout history American law has required (or at least adopted) both "detention eligibility nets" and "further limiting processes"[19] designed to narrow those nets to persons of such high risk as to require pretrial detention. Knowing that basic truth helps the reader to better understand the lessons from a more in-depth look at the law, which provides more detailed legal justifications for crafting both nets and processes. The various foundational prerequisite principles are as follows.

1. There Has Always Been Both "Bail" and "No Bail"

First, ever since there was a thing that remotely resembled bail or pretrial release in America today, there was also "no bail," or pretrial detention. Jurisdictions may not impose excessive bail (i.e., conditions of release or detention that are excessive in relation to the government's lawful purposes), but they are free to determine – within proper legal boundaries – which classes of defendants might be denied bail or release altogether.[20]

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[19] These quoted phrases were adopted by the author to best describe their functions. Historically, they have apparently not been so labeled, a fact that has slowed reform. Nevertheless, understanding a "no bail" provision to contain, first, a "detention eligibility net" is crucial for understanding why state courts do not (and should not) allow intentional detention outside of a net; if a defendant is ineligible for detention, then detaining him negates the net and thus an entire constitutional provision. The "further limiting process" (which can be articulated broadly, as "proof evident, presumption great" or narrowly, as "but only when a judge finds clear and convincing evidence of substantial risk of harm . . . etc.), recognizes that this author has never seen any state allow automatic detention based on charge alone. In sum, America has always required a process that allows some way out of the net, even if the findings in that process seem minimal. In his dissent in *Salerno,* Justice Marshall noted that even an exception to the right to bail as ingrained in American history as capital crimes, if made irrebuttable, would likely violate due process. *See Salerno,* 481 U.S. 739, 765 n. 6 (1987).

[20] While not explicit, and while receiving relatively sparse attention in the bail literature, this notion is typically gleaned from a reading of *Salerno,* 481 U.S. 739, and cases cited therein. Over the decades many

2. All "No Bail" Provisions Are Preventive Detention Provisions

Second, all "no bail" or detention provisions should be viewed as preventive detention provisions. Preventive detention is simply lawfully detaining someone to prevent some stated behavior. In bail, the only two lawful purposes for detaining someone are to manage extreme risks of flight or dangerousness during the pretrial phase of the criminal case. Accordingly, even the earliest American formulations of the release/detain dichotomy, which often provided a right to bail for all persons except those facing capital crimes, singled out that small category of cases for potential detention based on the fear that defendants facing death would flee.[21]

For a number of somewhat complicated reasons, when preventive detention for noncapital defendants was being debated in the 1960s through the 1990s, it was debated primarily in the context of public safety, which led persons to erroneously conclude that preventive detention involves only danger. Moreover, the fact that *United States v. Salerno*, the Supreme Court case addressing pretrial detention in the Bail Reform Act of 1984, focused solely on arguments concerning public safety only added to the confusion. Nevertheless, jurisdictions should realize that the *Salerno* Court discussed preventive detention in the context of public safety only because those particular provisions were being argued before the Court; although the Act also included flight as a basis for detention, flight simply was not at issue, and detention based on risk of flight had been conceded and justified through other legal avenues. Accordingly, jurisdictions should understand that preventive detention involves purposefully detaining a defendant "without bail" based on a prediction of either flight or dangerousness – the two constitutionally valid purposes for limiting pretrial freedom.

3. All "No Bail" Provisions Are Made Up of "Detention Eligibility Nets" and "Further Limiting Processes"

Third, throughout American history, virtually all, if not literally all, "no bail" or detention provisions have included a detention eligibility net, from which certain defendants might potentially be confined pretrial, and a further

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American states have relied on the *Salerno* opinion's analysis to designate classes of defendants who are "unbailable" or "detainable." Other states adopted detention laws prior to *Salerno*, which, in some ways, makes those laws even more vulnerable to constitutional attack.

[21] *See United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Ct. App. 1981) (quoting Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 377-79, 397, 400-02 (1970)) [hereinafter Tribe].

limiting process, which weeds out only the riskiest defendants within the net for actual pretrial detention. The earliest of these net/process formulations comprised of a net consisting of capital defendants and a limiting process requiring judges to determine whether the "proof was evident or presumption great" as to the charge (i.e., if the proof was not evident or the presumption not great, the person would be released). Even the so-called detention cases, a series of cases that struggled to find rationales for detaining noncapital defendants on purpose (and outside of enacted law) in the 1960s and 1970s in America, often included an implicit net of "persons already participating in a trial," as well as a further limiting process that required judges to only allow detention in "extreme and unusual circumstances."[22]

More recent articulations of detention eligibility nets involve listing other crimes, such as treason, or classes of crimes, such as violent felonies. More recent "further limiting processes" have included language mirroring the federal law requiring judges to determine whether "no condition or combination of conditions" suffice to provide reasonable assurance of court appearance or public safety. Nets vary widely among the states (from capital offenses to a wide variety of charges, groups of charges, charges with preconditions, and even seemingly limitless nets that are likely too broad to survive constitutional challenge in all cases). Moreover, limiting processes other than the "no condition" process, listed above, exist (from "proof evident, presumption great" for an alleged charge to processes even more rigorous than the one approved in *Salerno*). Overall, net/process combinations are gleaned only by examining the entirety of any particular state's bail law.

Students of American federal bail law will recall that the Bail Reform Act of 1984 expanded pretrial detention greatly, and, in doing so, created a virtually unlimited net for flight by allowing judges to detain defendants in any case upon a motion by the prosecutor alleging the defendant posed "a serious risk that [he would] flee."[23] This was a significant shift, and yet it was a shift that had scant justification in the legislative history of the 1984 Act, was likely based on a flawed reading of the Bail Reform Act of 1966, and was never

[22] *See, e.g., United States v. Abrahams,* 575 F.2d 3, at 8 (1st Cir. 1978) ("This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); *United States v. Schiavo,* 587 F.2d 532, 533 (1st Cir. 1978) ("Only in the rarest of circumstances can bail be denied altogether in cases governed by § 3146.") (internal citations omitted). These detention cases are explained in detail in *Model Bail Laws, supra* note 18.

[23] 18 U.S.C. § 3142 (f) (2) (A) (1984).

reviewed by the Supreme Court. Indeed, had the Court reviewed detention based on flight for *any* case, it likely would have balked at the fact that the provision was not limited by charge (a requirement of the danger provision), and likely would have at least mentioned that the only justification for pretrial detention based on flight rested on dubious authority.

Specifically, when enacting the Bail Reform Act of 1984, Congress used *United States v. Abrahams*[24] as its singular precedent for "codify[ing] existing authority to detain persons who are serious flight risks."[25] Congress did so despite the fact that *Abrahams* rested on dicta from a federal district court opinion, which, in fact, refused to detain defendants based on flight. Moreover, the *Abrahams* holding never found its way beyond mere mention within the First Circuit Court of Appeals.[26] Indeed, among the cases cited within the *Abrahams* opinion, those that dealt with intentional detention with no conditions whatsoever were concerned almost exclusively with a court's authority only to purposefully detain to protect witnesses.[27] Purposeful detention for flight for noncapital defendants was a historical aberration as well as novel to even modern American justice. In sum, *Abrahams* was clearly aberrant, and yet it served as Congress' somewhat perverted foothold for pretrial detention based on flight. The fundamental point is that purposeful pretrial detention for risk of flight by noncapital defendants was not some deeply rooted American tradition when Congress began codifying it without any net. The release of all noncapital defendants was. The better practice, by far, is to rely on the same principles of justice that require a detention eligibility net for danger to require a similar net for flight.[28]

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[24] *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978).

[25] S. Rep. No. 98-225, at 18, 1983 WL 25404, at *8 (1984).

[26] The panel in *Abrahams* reviewed several cases for guidance, but was ultimately persuaded by three sentences from a 1969 district court opinion surmising, without support, that "it has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance at trial." *United States v. Melville*, 306 F. Supp. 124, 127 (S.D.N.Y. 1969). A review of all cases citing to *Abrahams* reveals that other circuits avoided the argument altogether or mentioned *Abrahams* in passing (including a fairly long list of New York Federal District Court cases extending beyond the Bail Reform Act of 1984); it was only the First Circuit that ever cited to *Stack v. Boyle* and *Abrahams* as twin authority for the proposition that courts could detain bailable defendants facing noncapital charges through some extra-statutory "inherent" authority when "no condition or combination of conditions" under the Bail Reform Act of 1966 would suffice to provide reasonable assurance of court appearance.

[27] For a lengthy discussion tracing the detention of bailable defendants through American history as well as research indicating the aberrational nature of *Abrahams*, *see Model Bail Laws*, *supra* note 18.

[28] Those principles include due process and excessive bail as articulated in *Salerno* (*Abrahams* was decided before *Salerno*) as well as principles gleaned from the research, which indicates that very few defendants willfully flee to avoid prosecution, and that the vast majority of court appearance issues for less serious cases can be addressed with less restrictive release conditions and bond revocation.

Thus, overall (and as further discussed *infra* in the sections raising other issues gleaned from the history and the law), it is correct to say that both the history of bail and the law likely require limiting the possibility of pretrial detention to some group of persons through the creation of a detention eligibility net, and then winnowing down that number through some further limiting process. American federal law has never allowed a truly unlimited net for danger, and its allowance of a virtually unlimited net for flight is significantly flawed. Moreover, and importantly, the federal law has never allowed any part of a net automatically to lead to detention. This is also true in virtually all states, even though the issue is clouded by a variety of complicating factors, including states using money to detain, a scarcity of case law providing the appropriate boundaries, and the continued use of limiting processes such as "proof evident presumption great" for so-called "categorical" no bail provisions.

From a release standpoint, a detention eligibility net should be viewed as a carefully limited, justifiable exception to an overall purposeful process that requires pretrial release. From a detention standpoint, a detention eligibility net should be viewed only as an initial, rational limit to unlimited potential pretrial detention based on a legitimate finding of presumed risk. It allows some small number of defendants to be considered for detention, but then requires a defendant's release if the government cannot show a further, higher level of individual risk to do the things traditionally leading to pretrial detention. Simply put, because America has never been, and should never be, a place where pretrial detention is potentially available to everyone in every case, jurisdictions must draw purposeful lines between release and detention by using legally justified and limited detention eligibility nets and further limiting processes.

4. Nets and Limiting Processes Require Legal Justification

Fourth, throughout history, both detention eligibility nets and further limiting processes required legal justification through fundamental legal principles mandating at least some findings indicating the need for the provisions. For example, in the detention cases of the 1960s and 1970s, noted above, court opinions articulated justifications and limits for various individual instances of detention. Similarly, in 1970, the District of Columbia Court Reform and Criminal Procedure Act (the first law to allow pretrial detention based on danger) articulated a net designed to allow

examination for potential detention of "selected defendants, in categories of offenses characterized by violence," "the most dangerous" of defendants who commit crimes while on bail, and "dangerous defendants in certain limited circumstances."[29] This detention eligibility net was further narrowed by a limiting process, which included a due process-laden hearing from which a judge was required to conclude that: (1) there was clear and convincing evidence that the person was eligible for detention; (2) based on the relevant factors, there was "no condition or combination of conditions of release which [would] reasonably assure the safety of any other person or the community;" and (3) except for persons believed to be obstructing justice, there was substantial probability that the defendant committed the offense charged.[30] In 1981, the D.C. Court of Appeals reviewed the 1970 Act for constitutionality and, in addition to general analyses based on principles of due process and excessive bail, the court specifically listed the various studies, statistics, and reports used to justify that particular net and further limiting process.[31]

As another example, the Bail Reform Act of 1984 copied, in the main, the limiting process articulated by the 1970 D.C. Act (albeit adding certain rebuttable presumptions) but significantly widened the detention eligibility net. Nevertheless, Congress justified that wider net through legislative findings that those within the net were a "small but identifiable group of particularly dangerous defendants" who posed an "especially grave risk" to the community and for whom neither conditions nor the prospect of revocation sufficed to protect the public.[32] In *United States v. Salerno,* the United States Supreme Court reviewed both the Act's net and the process under traditional legal principles, but also specifically noted that the law:

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[29] H. Rep. No. 91-907, at 82, 83, 91, 181 (1970). The net included defendants charged with "dangerous crimes," "violent crimes," (more expansive than dangerous crimes), and any crime in which the defendant threatened to harm a witness or juror during the criminal proceeding. This latter category should not be seen as an "unlimited net," as it was significantly narrowed by the witness/juror distinction. Indeed, until then, detaining persons accused of threatening witnesses and jurors had been accepted as a part of a judge's inherent or contempt power, and the provision was drafted merely to reflect that fact.

[30] *See* D.C. Code Ann. § 23-1322 (b) (1970).

[31] *See United States v. Edwards,* 430 A.2d 1321, 1326 (D.C. Ct. App. 1981).

[32] S. Rep. No. 98-225 at 6-7, 10, 20, 1983 WL 25404 (1984). The 1984 Act had six categories of detention eligible defendants: (1) those charged with "violent" crimes; (2) those charged with a crime punishable by life in prison or death; (3) those charged with drug offenses punishable by 10 years or more in prison; (4) those charged with any crime in which they posed a serious risk of obstructing justice via witnesses and jurors (like the 1970 Act); (5) those charged with any felony after two or more convictions of crimes found in the first three categories; and (6) those charged with any crime posing a serious risk that the defendant would flee. This final category represents a virtually unlimited net for flight, but, as noted previously, the provision was never reviewed by the Supreme Court, had no decent rationale, and was based on a strained reading of the law at the time.

"(1) 'narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming,' [and] (2) 'operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses' – individuals that 'Congress specifically found' were 'far more likely to be responsible for dangerous acts in the community after arrest.'"[33] Once again, the fundamental point is that jurisdictions may not simply create new nets and processes without justification, and they may not even assume that old bail laws are currently lawful prior to justification based on better pretrial research in this generation of reform.

5. Most Nets and Processes Have Not Been Adequately Justified and Virtually All Have Also Been Ignored Due to the Use of Money

Fifth, most jurisdictions have not adequately justified their current detention eligibility nets and limiting processes, and have ignored even the best ones by opting, instead, to allow the use of money to make release and detention decisions. More importantly, jurisdictions appear to be largely unaware that bypassing a lawfully created detention eligibility net by using money to detain defendants on purpose is unconstitutional.

This lack of knowledge often surfaces through a pervasive question concerning the legality of money as an intentional detention mechanism. That question deals with the right to bail, and the fact that this author (as well as the United States Supreme Court)[34] equates the right to bail to a right to release, and also teaches that, historically speaking, whenever one sees bailable defendants in jail, it is a marker and a cause of bail reform. In response, people understandably ask, *"Wait, I see bailable defendants in jail all the time. In fact, people are 'held on bail' routinely. That's not unlawful or I would have heard about it, and it's been going on for as long as I have been alive without any sort of meaningful reform to fix it. Why is that?"*
The answer is fairly simple, but relies on a bit of history to understand.

Early American formulations of the right to bail were largely attempts to eliminate the discretion left in the English bail system, and thus the earliest constitutional provisions (which were later copied by most American states)

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[33] *Lopez-Valenzuela v. Arpaio*, 770 F.3d at 772, at 779-80 (9th Cir. 2014) (quoting *Salerno*, 481 U.S. at 748-755) (internal citations omitted).
[34] *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) (equating the right to bail with "the right to freedom before conviction" and "the right to release before trial").

created a broad and absolute right to bail for noncapital defendants.[35] Bright line bailabilty (in the form of "all persons are bailable except," the exceptions being articulated in detention eligibility nets and further limiting processes) was an attempt to set forth, up front, who would be released and who would be potentially detained. Bailable defendants were expected to be released, and the release of bailable defendants was effectuated by using personal sureties and "recognizances," meaning that the sureties (and sometimes the defendant) would promise to pay an amount to be assessed only upon default, akin to what we call "unsecured" bonds today. There were no commercial bail bondsmen charging fees or taking collateral, and so as long as a defendant could offer up persons as sureties, they were typically released. This all worked well until the 1800s.[36]

In the 1800s, America started running out of the once-plentiful personal sureties. This lack of sureties led to the detention of bailable defendants, which, as it always had before in England, led to efforts at reform simply because bailable defendants were expected to be released. Before judges turned to commercial sureties around 1900, however, those judges first tried to see if the defendants could "self-pay" the financial conditions. They could not, and so defendants lacking sureties began bringing legal claims arguing that the amounts were excessive. It was precisely at that moment in time that the Excessive Bail Clause of the United States Constitution (and similar clauses in state laws) could have come into play for judges to declare a right to a financial condition that one could afford. Instead, however, judges crafting excessive bail jurisprudence held the opposite: the defendant did not have the right to an amount of bail he could "make." This line of cases is routinely cited today by the commercial bail industry, as it relies on unaffordable financial conditions to justify its insertion into the criminal justice system. [37]

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[35] *See* Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139, 1162 (1971-1972).

[36] This history has been detailed in *Fundamentals* and with copious citations in *Money*, *supra* note 1, as well as reviewed and further explained in *Model Bail Laws*, *supra* note 18.

[37] This excessive bail jurisprudence is discussed as "the unfortunate line of cases" in NIC *Money*, *supra* note 1, at 32. 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 are based on 14th Amendment jurisprudence, and could also effectively erase the unfortunate line of cases based on excessive bail. 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

Importantly, however, this jurisprudence only applied to so-called "unintentional detention." Unintentional detention happens when a judge sets bail, signs a release order, and picks an amount but *does not make any record of wanting the defendant to remain in jail*. When this happens, the law assumes the judge meant to release the defendant and treats the resulting detention as simply the unfortunate byproduct of a conditional release system.

Nevertheless, this jurisprudence did not apply to *"intentional detention."* Indeed, whenever judges would refuse to set bail for a bailable defendant, or whenever judges would set bail but make a record indicating they intended the defendant to stay in jail, both state and federal appellate courts would declare the practices unlawful.[38] The rationales – especially in state courts – include the unlawfulness or dishonesty of judges adding an exception to the right to bail as well as articulating that purposeful detention outside of the eligibility net negates the exception clause altogether. In deciding a recent motion for preliminary injunction in Harris County, Texas, the federal judge indicated that detaining otherwise bailable defendants outside of a detention eligibility net on purpose was "doing an end run" around Texas' constitutional exception to bail for misdemeanor defendants.[39]

There are significant problems with drawing a line between unintentional versus intentional detention of bailable defendants – for example, once a

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Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 Wm. & Mary Bill Rts. J. 589 (2018).

[38] For state cases, *see, e.g., Locke v. Jenkins*, 253 N.E. 2d 757 (Ohio 1969) (ordering judge to set bail for bailable defendant); *Simms v. Oedekoven*, 839 P.2d 381 (Wyo. 1992) ("The State, in effect, is seeking to invoke an exception to what is a clear extension to the right to bail. . . . 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."); *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."). For federal cases, *see, e.g., Galen v. County of Los Angeles,* 477 F.3d 652, 660 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir.1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail); *see also Stack v. Boyle* 342 U.S. 1 (1951) (in addition to equating the right to bail with the "right to release before trial," and the "right to freedom before conviction," Justice Jackson wrote in concurrence that setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail."). *Id.* at 4, 10.

[39] There are many compelling reasons based on federal and state law to never detain on purpose beyond a state's lawfully enacted "detention eligibility net." Perhaps the most compelling, however, is that by allowing purposeful detention outside of a net, a state is essentially allowing unlimited discretion to detain virtually any defendant into a process that was, when it was created, designed to dramatically limit discretion to detain. In short, purposeful detention outside of a net negates the net.

defendant is held for a day or two, does not the unintentional detention become intentional? But the most serious problem with what this author calls the "excessive bail loophole" (allowing unintentional detention through money) is that it has the result of allowing detention (de facto "no bail") for *any* charge through the bail process, thereby skipping whatever process for lawful purposeful detention a state may have enacted through exceptions to a bail clause. Based on current excessive bail jurisprudence today, if any particular judge desires to detain a defendant on purpose, that judge can do so simply by not making a record of intent to detain.

This situation is especially distressing given the history of bail because it allows unlimited discretion to detain back into a release and detention system designed initially to drastically reduce, if not eliminate, discretion at bail. Moreover, it masks the need for bail reform because it looks as though American law has erased the notion that bailable defendants must be released (a notion prompting bail reform when bailable defendants are detained) and has given the practice of detaining bailable defendants a gloss of legality.[40]

Thus, the answer to the question quoted in italics above is that one sees bailable defendants in jail today because of a loophole in American law that allows for the unintentional detention of bailable defendants. Even though it does not extend to intentional detention, intent to detain can be easily masked by judges simply not making a record of intent. The excessive bail loophole has confused bail practice, has masked the need for bail reform, and has led to the unfortunate impression that the right to bail is merely a right to have one's bail "set." Perhaps most importantly, it has given discretion to judges to detain virtually anyone they want – the opposite of what America intended when it initially crafted right to bail clauses. It is actually a paradox to "hold someone on bail" – it is absurd; a contradiction in terms. Historically, it was simply never supposed to happen.[41]

Today, there is also some movement toward jurisdictions creating "guidelines," "praxes," or "matrices," which provide system-approval of

[40] All of this is being rectified through the equal protection cases being brought by Civil Rights Corps and others. Those cases are showing constitutional violations that do not rely on whether the detention was intentional or unintentional. In short, if the money causes an equal protection violation, it must not be used, and if that money stands in the way of release, the defendant must then be released.

[41] *See* NIC *Fundamentals, supra* note 1, at 13 (introduction).

various responses to assessed risk (and often with a combination of charge and risk or probabilities of success). While these documents are helpful in many ways, and while they provide a needed, purposeful system response to a historically neglected area of the law, to the extent that they declare a category of defendants otherwise bailable by law "detainable" or "presumptively detainable," they are simply not following the law. This should be evident to those jurisdictions because detaining bailable defendants is only possible in those instances by using unattainable financial conditions, and, as noted above, using money to purposefully detain an otherwise bailable defendant (thereby bypassing the lawfully created detention eligibility net) is unconstitutional. The practice of allowing intentional detention of bailable defendants through matrices (and money) only bolsters the need for jurisdictions to recognize that money should be removed as a tool at bail. The history of bail illustrates that secured money bonds have interfered with both lawful pretrial release and detention ever since America began using them, and so it is likely that the elimination of secured financial conditions is a necessary requirement of meaningful bail reform.

Removing secured financial conditions at bail will force states to cease ignoring their existing nets and processes for purposeful detention. In some cases, this will cause states to seek to create new nets and processes. This can be done, but, again, those elements must be narrowed and justified legally. In this author's opinion, every element of a system of potential detention must be narrowed and justified *independently*. Thus, it should not be allowable to create an unjustified or overbroad detention eligibility net with the assumption that the limiting process alone will ultimately sort defendants within the net. Thus, for example, states should not be able to reserve for potential detention defendants arrested on "all charges," or even for "all felonies," without some justification for why all charges or all felonies should be considered for detention, and with only the hope that a further limiting process will save the overbroad or unjustified net. Also, in this author's opinion, presumptions toward detention can never be adequately justified.

6. Current Nets and Processes Are Flawed

Sixth, all current nets and processes contain certain flaws as illuminated by the history and the law. Historically, detention eligibility nets have always gradually been widened, likely due to the fact that detention proves itself;

that is, when a defendant fails while on release, jurisdictions believe that he should have been detained, and when a defendant does not fail while he is detained, jurisdictions believe that detention has worked.[42] Thus, there is a bias toward creating ever-wider nets, and yet those wider nets have typically not been justified by findings supported by any evidence. Instead, the nets are typically widened due to public opinion about crime generally, changes in attitudes concerning particular crimes in the news, and politics.

Indeed, current risk research contradicts many of the older justifications for inclusion of various charges within detention eligibility nets. Moreover, the further limiting processes currently found in American law are either ignored, or considered to be woefully inadequate to the detention decision. Indeed, the "proof evident" process is likely facially unconstitutional in any state, and the further limiting process most often used today for more recent preventive detention provisions – that "no condition or combination of conditions suffice to provide reasonable assurance," is subjective, resource driven (larger jurisdictions often have more resources, such as supervision techniques, to help with conditions than smaller ones), has never adequately defined certain key terms such as danger or flight, and has shown, in fact, to be insufficient in adequately limiting pretrial detention. In *Salerno,* the United States Supreme Court emphasized the need to determine the "nature and seriousness of the danger posed by the suspect's release,"[43] but most of America's current limiting processes do not do this. In sum, most current detention eligibility nets and further limiting processes are constitutionally vulnerable.[44]

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[42] According to Professor Laurence Tribe, "The pretrial misconduct of [released] persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible." Tribe, *supra* note 21, at 375. In other words, "the degree to which judges wrongfully detain defendants is unknowable because their decisions are 'unfalsifiable.'" Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment,* 86 J. of Crim. L. and Criminology 415, 428 (1996) [hereinafter Fagan & Guggenheim] (quoting John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform,* 76 J. Crim. L. & Criminology 1, 28 (1985)); *see also* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform,* (2016) at 19 ("[I]f . . . almost all 'high risk' defendants are detained, it becomes impossible to test whether individuals who receive that designation actually have high rates of pretrial failure.") [hereinafter Harvard *Primer*].

[43] *Salerno*, 481 U.S. at 743.

[44] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure,* at 12.2 (4th ed., West Pub. Co. 2015) [hereinafter LaFave, et al.]. LaFave, et al., specifically point out the vulnerabilities from lack of procedural safeguards, but the provisions are equally vulnerable due to many other aspects found in the *Salerno* opinion, including lack of justification for the detention process to begin with. After reviewing some of the concepts in this paper, the reader will likely correctly conclude that some constitutional right to bail (and detention) provisions are worse than others, and thus some more likely than others to fail under judicial scrutiny.

7. These Flaws are Being Discovered by the Courts

Seventh, these flaws and vulnerabilities are now being more closely examined. While relatively few cases have been decided at the time of this writing, there is now the possibility of a wave of cases with courts holding up jurisdictions' current release and detention schemes to fundamental legal principles and declaring them unlawful. This is due not only to flaws that existed when the provisions were enacted, but also to flaws illuminated by the current pretrial research. When they examine detention provisions, the courts will look not only at a constitutional provision, but also to implementing statutes or rules to see if, overall, detention practices as implemented throughout the law are rational, limited, and fair. In many cases, courts will find flaws with practices that will suggest changes in the law. In other cases, courts will find flaws with the laws themselves. In some cases, these flaws will not be easily fixed.

8. States Should Thus Consider Starting With a Clean Slate

Accordingly, eighth, jurisdictions should recognize the possibility of needing to start with a clean slate when developing release and detention eligibility nets and processes. As noted previously, just because a detention eligibility net was once declared lawful does not mean it is currently lawful, and jurisdictions should not therefore think, for example, that certain charges found by a previous legislature to present a high pretrial risk would be found to present that same high risk today.

9. Addressing the Use of Money at Bail is Necessary For Change

Finally, ninth, all of this is academic if jurisdictions do not take precautions to address the things that are likely to interfere with actualizing any new release and detention provisions. As noted above, this necessarily requires jurisdictions to address the use of secured money bonds as a prerequisite to changing (or simply using) a release/detain framework or dichotomy, as secured money bonds interfere with both purposeful release and detention. Moreover, it may also require them to address the cultural or adaptive change necessary to create purposeful in-or-out processes, to embrace the risk of intentional release, and to fully understand the need for certain additional resources (such as pretrial services functions) required to make the release process work in a moneyless system.

Lessons From the History of Bail

When jurisdictions seek to change their bail laws, they must have some understanding of the history of bail for perspective.[45] Understanding bail's history means understanding that America chose to initially create a broad right to pretrial release – primarily to all but capital defendants – to further the country's fundamental notions of liberty and freedom. Additionally, America took traditional English factors going to discretionary bailability – nature of the charge, criminal history, and evidence of guilt – and relegated them merely to informing the adjustment of the financial condition.

Moreover, and importantly, these financial conditions were never supposed to lead to detention. Indeed, early America equated the right to bail to the "right to release before trial,"[46] and so it used England's system of personal sureties administering mostly what we call today unsecured bonds (requiring sureties only to promise to pay an amount of money if the defendant fled) to make sure that bailable defendants actually obtained release. This system worked until the 1800s, when America began running out of personal sureties. As noted previously, faced with this dilemma, judges attempted to allow defendants to self-pay, but quickly realized that requiring money upfront (i.e., in the form of so-called "secured bonds") also led to the detention of bailable defendants.

As more defendants were detained for lack of money, American law interacted with the history to allow so-called "unintentional detention," which happened whenever a judge ordered the defendant released but the defendant nonetheless remained detained due to lack of money. In sum, so long as a judge did not expressly articulate a purpose to detain the defendant intentionally, the law allowed detention due to lack of money.[47] America

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[45] For a broad overview of bail's history, *see generally* NIC *Fundamentals, supra* note 1, at 32-56; NIC *Money, supra* note 1, at 13-37. *See also, A Brief History of Bail,* found in the American Bar Association's Judges' Journal, at https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer.html (ABA, Summer 2018).

[46] *Stack v. Boyle,* 342 U.S. 1, 4 (1951). Likewise, the Court in *United States v. Salerno* has noted that "liberty" – a state obtained only through release – is the essence of the right. *See* 481 U.S. 739 at 755 (1987). It is only through the adoption of the "excessive bail loophole," discussed *infra* notes 36-40 and accompanying text, that America began slowly disassociating the right to bail with the right to release before trial.

[47] As explained previously, by making "unintentional detention" through the bail process legitimate, the law blurred that practice with the traditionally unlawful practice of "intentional detention" of bailable defendants, thus masking the need for bail reform over the last century. *See* discussion *infra* at notes 34-41 and accompanying text.

continued to struggle with unintentional detention through 1900 (with the creation of commercial sureties), through the 1920s – 1960s (with the so-called First Generation of Bail Reform), and still struggles today (as states still see many bailable defendants detained pretrial).

In the 1900s, judges also became gradually concerned that there were some bailable defendants whom they wanted to detain *intentionally*, often when noncapital defendants confined "unintentionally" (that is, ordered released, but detained due to money) came up with the sometimes staggering amounts of money set with hidden purposes to detain. Various detention cases decided in the 1960s and 1970s illustrated how American courts struggled with trying to justify detaining noncapital defendants based on the idea that no condition would suffice to keep those defendants from fleeing to avoid prosecution or to harm witnesses and jurors.[48] A review of those cases reveals that, overall, the courts were perplexed with how to deal with both unintentional and intentional detention, pretrial danger, and money at bail.

The struggles over both unintentional and intentional detention led to America's "big fix," as manifested in the 1970 District of Columbia Court Reform and Criminal Procedure Act and the Bail Reform Act of 1984.[49] Those two laws attempted to solve the various complex issues at bail by: (1) determining upfront who should be purposefully released and potentially detained through a detention eligibility net; (2) making sure intentional detention was further limited through a process (along with certain procedural due process protections) designed to focus on cases presenting extreme instances of risk ultimately for both flight and public safety; and (3) attempting to eliminate unintentional detention altogether by significantly limiting the use of secured money bonds. These elements came into existence only after years of debate in which persons argued, albeit unsuccessfully, that detaining a person based on a prediction of something he or she may or may not do in the future is unlawful and practically un-American.

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[48] *Compare United States v. Leathers*, 412 F. 2d 169, 171 (D.C. Cir. 1969) (holding that setting an unreachable bond amount was "tantamount to setting no conditions at all" and a "thinly veiled cloak for preventive detention"), *with United States v. Gilbert*, 425 F. 2d 490, 491 (D.C. Cir. 1969) (approving a court's intentional preventive detention of a bailable defendant to avoid harm to future witnesses through that court's "inherent power").

[49] *See* District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. Code Ann. §§ 23-1321-1332); Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

Fully understanding the struggles leading to the extremely limited nature of pretrial detention when it was first enacted in America is helpful to understanding the meaning of the United States Supreme Court's 1987 statement that detention must be "carefully limited."[50] Nevertheless, even as this "big fix" attempted to create rational and fair detention procedures, it also involved a somewhat significant expansion of pretrial detention itself – a stark departure from earlier and much more limited release and detention notions.[51] Accordingly, narrowing detention to encompass only extremely serious public safety and flight risks through a detention eligibility net, a further limiting process, and other procedural due process safeguards theoretically lessening the overall use of detention as a response to risk, were pivotal parts of the solution. Unfortunately, however, the interrelated parts to this fix did not successfully spread to the states, and have become eroded to near unrecognizable levels in the federal system due to an ever-widening detention eligibility net, the use of rebuttable presumptions, and local cultures or policies. Overall, the primary lesson of perspective from the history of bail teaches that America only recently allowed purposeful pretrial detention of noncapital defendants. Even then, pretrial detention was intended to be used only in rare instances of extreme pretrial risk of flight to avoid prosecution or to commit a serious or violent crime while on pretrial release.

Lessons From the Law

When jurisdictions seek to change their bail laws, they must also have some understanding of current foundational legal principles, which provide the boundaries and parameters for both old and new release or detention provisions. Normally, analyzing a release or detention provision under current law would be sufficient. In this generation of bail reform, however, a complication is added by the pretrial research, which suggests new release/detain dichotomies that might lead to different analyses from current law. For example, when the United States Supreme Court decided *Salerno* in 1987, it based a portion of its due process analysis on the fact that the federal detention provision was limited to certain extremely serious charges. Today,

[50] *Salerno*, 481 U.S. 739, 755.

[51] In a comprehensive review of various modes of American preventive detention, the authors note that the expansion of adult criminal pretrial detention as manifested in the Bail Reform Act of 1984 tended not to follow the other modes, which greatly narrowed what had been traditionally broad common law powers to detain. *See* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice,* 2 Harvard National Security J. 85 (2011).

persons are naturally wondering whether, in a similar case, the Supreme Court might hold that a "risk-based" net – for example, a detention scheme based solely on an actuarial pretrial assessment instrument – would also survive legal scrutiny. Thus, there are two issues dealing with the law: (a) what the *current* law requires for any release/detain scheme; and (b) whether fundamental principles underlying current law might also allow any new release/detain scheme based solely on actuarial risk.[52]

Current law broadly tells us how to do bail, or release, and no bail, or detention, and this lesson is somewhat simplified by the fact that we really only have two Supreme Court opinions to guide us on bail – one for release, and one for detention. The opinion in *Stack v. Boyle*[53] guides us through the release side of the equation. It does this by: (1) equating the right to bail with the "right to release before trial" and the "right to freedom before conviction;"[54] (2) telling us that this release is nonetheless conditional upon having "reasonable" and "adequate" assurance to further the legitimate purposes of bail (currently court appearance and, in virtually every jurisdiction, public safety);[55] (3) warning of the need for standards in bail-setting to avoid arbitrary government action;[56] (4) requiring those standards to be applied to every individual being assessed through the bail process and not allowing those standards to be replaced with blanket conditions based on charge alone (a warning that throws considerable doubt on the use of traditional money bail schedules);[57] (5) expressly articulating that the "spirit of the procedure" of bail is to release people;[58] and (6) further noting that setting a financial condition of release with a purpose to detain a bailable defendant is "contrary to the whole policy and philosophy of bail."[59]

If the United States Supreme Court's opinion in *Stack* guides us in matters of release, its opinion in *United States v. Salerno*[60] guides us in matters of detention. It does this by: (1) settling, at least for the time being, the debate

[52] The reader should note that even when an actuarial assessment tool is not used for purposes of detention, judges deciding whether to preventively detain a defendant pretrial purposefully without money are still assessing pretrial risk using prediction based on other facts and circumstances through whatever process is dictated by law.
[53] *Stack v. Boyle*, 342 U.S. 1 (1951).
[54] *Id.* at 4.
[55] *Id.* at 4-5.
[56] *Id.* at 5.
[57] *Id.*
[58] *Id.* at 7-8
[59] *Id.* at 10.
[60] *United States v. Salerno*, 481 U.S. 739 (1987).

as to whether the Eighth Amendment to the United States Constitution confers some federal right to bail thus affecting the states – it appears not to, even though the language of *Salerno* could be read to provide a basis for future decisions going either way;[61] (2) settling, once and for all, whether flight is the only permissible purpose for limiting pretrial freedom – it is not, and public safety is now equal to flight as a valid reason for conditions of release or detention;[62] (3) articulating liberty as a fundamental interest, which has led courts applying *Salerno* to use strict or at least heightened scrutiny in pretrial detention cases;[63] (4) allowing pretrial detention despite substantive due process concerns that it imposes punishment before trial;[64] and (5) allowing pretrial detention despite concerns that it is based on a prediction of risk of something a defendant may or may not do in the future.[65]

Because allowing detention based on prediction comes dangerously close to offending fundamental legal principles, however, the *Salerno* Court expressly articulated the need for detention to be "carefully limited."[66] To make sure that detention was carefully limited in the Bail Reform Act of 1984, the Court, in turn, emphasized three important requirements: (1) that the law addressed and focused on a "particularly acute problem in which the government interests [were] overwhelming;"[67] (2) that the law was limited to a "specific category of extremely serious offenses," which included persons found to be "far more likely to be responsible for dangerous acts in the community after arrest" (this goes to the detention eligibility net, which, as noted above, would now likely include legally justified classes of persons

[61] On the one hand, the Court quoted from *Carlson v. Landon,* 342 U.S. 524 (1952), which cited historical notions to provide support for Congress's ability to extend pretrial detention to noncapital cases. On the other hand, the Court said, "*Carlson v. Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Id.* at 754. For the various arguments, *see* LaFave, et al., *supra* note 44, at § 12.3 (c). LaFave, in turn, points to *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), which, though later vacated for mootness, noted that, "If a $1,000,000 bond set arbitrarily by legislative fiat [for defendants all facing the same charge] is excessive there is little logic to support the proposition that Congress could arbitrarily deny bail for any or all criminal charges whatsoever." *Id.* at 1160-61. An overall reading of the cases implies that legislatures can deny bail to certain classes of defendants so long as the denials have lawful justification and are carefully limited.

[62] *Salerno,* 481 U.S. 739, *passim.* Notably, New York does not allow consideration of dangerousness at bail, and the debate over whether to allow it has endured for decades.

[63] *See, e.g., Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (9th Cir. 2014).

[64] *Salerno,* 481 U.S. at 746-51.

[65] *Id.* at 751.

[66] *Id.*

[67] *Id.* at 750.

tied to extreme risk of flight);[68] and (3) that the law included a further limiting process designed to individualize bail setting to provide important procedural due process protections as well as to focus only on the kind of extreme and unmanageable pretrial risk necessary to trigger detention.[69]

Beyond the specific lessons of *Stack* and *Salerno,* jurisdictions should also recognize that broader notions of fundamental legal principles will likely also have some impact on creating new release and detention provisions. For example, the legal tests for excessive bail, due process, and equal protection all require courts to balance the means and ends of government action. Because pretrial liberty is a fundamental interest, these balancing tests will likely include "strict" or "heightened" scrutiny,[70] requiring the government to show that various components of any new laws are necessary to protect a compelling interest. In this generation of bail reform, it is becoming harder for jurisdictions to make this showing when, overall, the pretrial research illustrates high levels of pretrial success even for those deemed to be "high risk" as well as an overall inability to associate risk to particular charges.[71]

Apart from balancing issues, the current pretrial research also raises additional legal concerns with bail provisions that are not carefully drafted and thoughtfully justified. For example, state supreme courts often call non-excessive bail "reasonable" bail based on a finding that some condition provides "reasonable assurance" of public safety or court appearance.[72]

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[68] *Id.*

[69] *See id* at 742-43, 751-52. While courts have looked to *Salerno* to guide them on what the phrase "carefully limited" means, *see Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (2014), other courts have begun to employ the Supreme Court's test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which was cited by the Court in *Salerno,* in determining the particular boundaries of procedural due process. Of course, *Salerno* provides guidance for both substantive and procedural due process claims.

[70] *See Lopez-Valenzuela v. Arpaio,* 770 F.3d 772, 780 (2014) (applying heightened scrutiny and noting that "if there was any doubt about the level of scrutiny applied in *Salerno,* it has been resolved in subsequent Supreme Court decisions which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny.").

[71] Indeed, the same research is causing bail scholars to question use of the term "risk" altogether in the field of pretrial release and detention.

[72] *See Stack v. Boyle,* 342 U.S. 1, 10 (1951). Most state courts define non-excessive bail as "reasonable bail" and excessive bail as "unreasonable bail." *See, e.g., In re Losasso,* 24 P. 1080, 1082 (Colo. 1890) ("bail must be reasonably sufficient to secure the prisoner's presence at the trial"); *People v. Lanzieri,* 25 P.3d 1170, 1175 (Colo. 2001) ("The right to reasonable bail . . . following arrest lessen[s] the impact of an unlawful arrest."); *Ex parte Ryan,* 44 C. 555, 558 (Cal. 1872) (Bail is excessive when it is "unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case."). Use of "reasonableness" as a standard has allowed courts to compare factual elements with amounts of money to assess whether a particular financial condition is "out of line" with typical amounts. These courts, however, apparently never question the logic or arbitrariness of the amounts themselves.

Accordingly, if the research shows that a court cannot adequately predict individual risk of relatively rare events like willful flight or the commission of a serious or violent crime while, at the same time, it shows that the aggregate risk from an actuarial tool indicates a high level of success when attempting to predict for those events, is it not reasonable to release all defendants? Thinking about excessive bail generally, jurisdictions will likely (and correctly) conclude that some offenses – perhaps misdemeanors or non-violent property offenses – are simply not serious enough to trigger the blunt hammer of detention (or even assessment) no matter how risky some defendants may be. This is the essence of excessive bail analysis, which says that certain responses are simply too harsh for certain triggering events.[73]

As another example, if due process and equal protection are concerned with fairness, is it not unfair to detain persons based on certain charge-based nets that are no longer justified by the pretrial research? Similarly, if due process also requires jurisdictions to articulate, in advance, the kind of conduct that might lead to detention so as to provide fair notice to persons seeking to conduct themselves in ways to stay out of jail, can jurisdictions base detention on a nebulous concept like "dangerousness" or "risky" without a charge-based boundary?

This latter concept is so important that it warrants further discussion surrounding the second legal issue – that is, whether fundamental legal principles might allow an entirely new release/detain scheme based solely on actuarial assessment. Overall, jurisdictions seeking to change from charge to risk by creating a risk-based detention eligibility net (i.e., likely a virtually unlimited charge-based net) or otherwise using an assessment tool as the sole basis for detention would likely violate due process based on the fundamental premise that in America, "we insist upon limiting the criminal law to enforceable rules about the specific conduct in which men may or may not engage rather than confining all persons with criminal propensities before their deeds are done."[74] Put another way, "[i]t is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people for what they do and not

[73] This is not academic. Most persons would agree that a jurisdiction allowing the detention of persons stopped on routine traffic offenses for trials occurring some three weeks later would be an excessive response to whatever risk those defendants posed. Thus, the question only becomes at what point a jurisdiction draws the line in making the potential assessment and detention determinations.
[74] Tribe, *supra* note 21, at 394-95.

for what they are."[75] Accordingly, "'the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it.' Due process forbids punishment that one has no assured way to avoid."[76] In sum, people must be allowed to manage their lives so as to be able to stay out of jail, and the law should be written in clear ways to discourage discriminatory enforcement. Author Christopher Slobogin writes as follows:

> The constitutional version of this principle is vagueness doctrine, which as a matter of due process requires invalidation of statutes that do not sufficiently define the offending conduct. The purposes of vagueness doctrine are to ensure citizens have notice of the government's power to deprive them of liberty and concomitantly to protect against the official abuses and the chilling of innocent behavior that can occur if government power is not clearly demarcated.[77]

This concern should be foremost in our minds even though the Supreme Court has labeled preventive detention "regulatory restraint" and not "punishment" in the traditional sense.[78] In short, "Vagueness doctrine should govern the scope of preventive detention laws even if it is assumed . . . that such laws are not 'criminal' in nature."[79] This is in accordance with the analyses by other legal scholars, who have commented on the Court's application of "fair notice" outside of the criminal law.[80] Indeed, Eugene Volokh writes that at least one recent Supreme Court opinion likely means that "fair notice" might apply "whenever there's any legal effect, even a modest one that falls far short of criminal punishment."[81]

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[75] Christopher Slobogin, *Defending Preventive Detention*, at 70 (quoting Herbert Packer, *The Limits of the Criminal Sanction*, 74 (1968)), in *Criminal Law Conversations* (Eds. Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan) (Oxford Press, 2011).

[76] Tribe, *supra* note 21, at 395 (quoting L. Fuller, *The Morality of Law*, 105 (1964)).

[77] Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 N.W. U. L. Rev. 2, 18 (2003) (internal footnotes omitted).

[78] Slobogin writes that despite a logical syllogism that preventive detention is not punishment (i.e., punishment occurs after conviction; with preventive detention there is no conviction; accordingly, there is no punishment), "[I]f a liberty deprivation pursuant to a prediction fails to adhere to the logic of preventive detention . . . then it can become punishment" when held up to the general due process requirement that "'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Id*. at 13 (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)).

[79] *Id*. at 18.

[80] *See, e.g.*, Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 So. Cal. L. Rev. 193 (2013).

[81] Eugene Volokh, The Void-for-Vagueness/Fair Notice Doctrine and Civil Cases (June 21, 2012), found at http://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/, accessed on 09-

Vagueness has been largely ignored in the past when bail schemes were designed to detain persons based, in part, on terms such as "dangerousness" and "community safety," but it is highly relevant today as jurisdictions try to make sense of the risk research and how that research applies to making an initial determination about release and detention. In sum, the notion of adequately describing triggering conduct is crucial to the substantive criminal law, and equally crucial to pretrial detention. Indeed, the fact that we have laws on the books describing failure to appear for court or committing new crimes while on release is a way of giving advance notice to persons that those things will bring some governmental response. Under a theoretically pure charge-based detention eligibility net, a person may reasonably believe that he or she will not be detained pretrial unless he or she commits a crime within the net. That reasonableness evaporates with detention schemes based solely on aggregate risk[82] as well as somewhat subjectively broad definitions and labels of "risk," "public safety," and "flight," when there is nothing a person can do to avoid being labeled. While the Supreme Court has said that "there is nothing inherently unattainable about a prediction of future criminal conduct,"[83] it wrote that statement in a case in which prediction was buffered by the significant legal backstop of a charge-based detention eligibility net.

Accordingly, due process (including fair notice) as well as equal protection and excessive bail jurisprudence place critical limits on a jurisdiction's ability to craft release and detention provisions, and so justifying current bail laws as well as any changes to them requires thinking about those limits in advance.

Overall, the lesson from studying the current law at bail is that jurisdictions must justify not only new release and detention provisions, but old ones as

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22-2018. In that opinion, from the case of *FCC v. Fox Television Stations,* 132 S. Ct. 2307 (2012), the Court applied the fair notice doctrine to a regulated entity, and even mentioned "reputational injury" – beyond even regulatory "punishment" – as a basis for relief. *Id.* at 2318-19. Vagueness applies both to ensure that affected persons know what is required of them so they may act accordingly as well as to ensure that "those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 2309. A "risk-based" detention eligibility net (or an extremely wide or unlimited charge-based net limited by risk) implicates both concerns: persons will not be able to assess how to keep from being "risky," and the arbitrary nature of the risk assessments scoring categories themselves (along with the ability for overrides) can easily lead to arbitrary enforcement.

[82] As noted in the Harvard *Primer*, *supra* note 42, at 22-23, and n. 195, "While an individual's conduct is within his control, that individual cannot control the aggregate conduct of others who share some characteristic deemed relevant for the risk assessment instrument."

[83] *United States* v. *Salerno,* 481 U.S. 739, 751 (1987) (quoting *Schall v. Martin,* 467 U.S. 253, 278 (1984)).

well. Current law places firm boundaries on all bail laws – e.g., they must be fair, they must be reasonable, and they must follow, in the main, what the Supreme Court has said about them – and thus, jurisdictions are cautioned to carefully consider those boundaries, especially when crafting detention provisions. Nevertheless, jurisdictions must also recognize the complexity arising from the research that is causing many current laws to lose their legal justification. Creating new and justifiable detention provisions thus requires knowledge of the current law, albeit bolstered by knowledge of how the Supreme Court might respond to a different model than the one presented in *Salerno*. Finally, and perhaps most importantly, given the many issues raised in this paper, jurisdictions should carefully weigh using any current provisions from other jurisdictions as "models," as those provisions are now likely vulnerable to constitutional attacks under a variety of legal theories.

Lessons From the National Standards on Pretrial Release and Detention

The national standards on pretrial release and detention – primarily the American Bar Association's (ABA's) Standards on Pretrial Release – provide jurisdictions with legal and evidence-based recommendations for creating new (or retaining existing) bail laws.[84] For the most part, the current Standards follow America's big fix by recommending: (1) a purposeful release/detain process consisting of a charge-based detention eligibility net; (2) a further limiting process capable of dealing with extreme cases of flight and public safety; and (3) methods for eliminating unintentional detention altogether by significantly limiting the use of secured money bonds. The current set of Standards, however, did not appear from nothing. Beginning in 1968, the Standards largely mirrored the federal law by slowly progressing toward more opportunities for purposeful detention, primarily by widening the eligibility net, but without major revision to the primary limiting process. In the current Standards, that process involves allowing pretrial detention only after a due process hearing in which "the government proves by clear and convincing evidence that no condition or combination of conditions of

[84] *See* NIC *Fundamentals, supra* note 1, at 108-110; *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* [hereinafter ABA Standards] (2007). The National Association of Pretrial Services Agencies has standards similar to the ABA Standards, but at the time of this writing they were in the process of being revised.

release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person."[85]

Like the big fix, however, these Standards are now slightly out of date. For example, the black letter ABA Standards, published in 2002, (1) still retain many of the assumptions concerning risk associated with serious charges, (2) note only in commentary the first of what is now many multi-jurisdictional actuarial pretrial assessment instruments,[86] and (3) retain elements concerning money bail that would likely be changed today from a reading of the pretrial literature. And while those Standards briefly mention the conundrum concerning a high-risk defendant facing a relatively minor crime,[87] they do not wrestle with the fundamental question of whether the law would ever allow detention based solely on actuarial assessment, or how the limiting process might be re-worded to better focus on the "risk" necessary to detain.

The lesson from the ABA Standards is that while they provide invaluable guidance for jurisdictions seeking overall justification for a more rational and fair release and detention process, they may not provide a definitive answer on how to craft a workable detention eligibility net and limiting process based on today's research.

Lessons From the Pretrial Research

Pretrial research in all its forms (e.g., historical, legal, opinion, observational, social science) drives the field, but in this generation of bail reform, social science research – and particularly research concerning defendant success and failure while on pretrial release – provides jurisdictions with compelling data to help in determining aspects of the release and detention decision. Indeed, it is the notion of empirical pretrial assessment, as measured by an actuarial pretrial assessment instrument, which has sparked much of bail reform today. While perhaps oversimplifying the concept, jurisdictions are rightfully alarmed by having empirical proof that certain "low risk" persons are in jail pretrial, while

[85] *Id.* Std. 10-5.7, at 124. As discussed previously, this "no condition" limiting process is subjective, resource-driven, and has proven ineffectual at limiting detention in the federal system.
[86] *See id.* Std. 10-1.10 (b) (i) (commentary) at 57, note 22.
[87] *Id.* Std. 10-5.1 (commentary), at 104.

certain "high risk" persons are not in jail, often due to money.[88] As noted previously, having the "wrong" people in or out of jail, historically speaking, inevitably leads to eras of bail reform.

Looking at "risk" historically, one sees that there is nothing new about assessing it; ever since England had something resembling a pretrial period of a criminal case, officials have been concerned with defendant risk, and thus they have found ways to gauge whether a defendant is risky. Moreover, throughout history, judicial officials in both England and America have improved on answers to the two overarching questions designed to address defendant risk: "How risky is this defendant? and "Risk of what?" Even today, once a jurisdiction articulates the type of risk it seeks to address, the answers to these two questions make release and detention decisions simpler.

As America began grappling with defendant risk in the twentieth century, it also gradually began to articulate the two types of risks it wanted to address through pretrial detention, which were: (1) the risk that a defendant would willfully fail to appear for court to avoid prosecution; and, later, (2) the risk that a defendant might commit a new serious or violent crime while on pretrial release. Those articulations were found in the so-called detention cases of the 1960s and 1970s, in the legislative histories of the 1970 D.C. Act and 1984 Bail Reform Act, and in the national standards on pretrial release and detention. Indeed, they are still typically articulated today whenever someone is asked to answer the question "Risk of what?" in the context of pretrial detention. This is an important point to repeat. History – and the law intertwined with that history – has shown us that although we care about all missed court dates and all new crimes committed while on pretrial release, it is the risk of willful flight to avoid prosecution and the risk of committing a serious or violent crime that should guide our laws and policies on the drastic response of pretrial detention based on prediction.

Until very recently, jurisdictions have attempted to employ the answers to the two overarching questions addressing risk ("How risky?" and "Risk of what?") to create bail systems by making certain assumptions about criminal

[88] Prior to being shown empirical "proof" of having the wrong people in and out of jail, most jurisdictions declared that they were releasing and detaining all the right people by using bail schedules, unpredictive and unweighted statutory factors, and subjective experience. In this author's own jurisdiction, a prior elected district attorney actually argued that there was no such thing as "unnecessary pretrial detention;" the mere fact of being in jail, he argued, was proof that the detention was necessary.

charges. For example, and as noted previously, when early America narrowed the eligibility for detention to mostly capital offenses, it did so not to protect the community, but instead to protect against flight from a defendant charged with a capital crime; it was commonly assumed that a person facing death would flee to avoid the punishment.[89] Later, jurisdictions assumed that persons facing certain "serious" or "high" charges were likely to flee or to commit the same or similar serious charges while on pretrial release, even when there was virtually no decent empirical evidence to confirm the assumptions.

Today's pretrial research is now providing jurisdictions with the knowledge necessary to make rational release and detention decisions based not on assumptions, but on empirical data. Thus, to the extent that our current methods of actuarial assessment measure how likely a particular defendant is to succeed or fail at something we seek to address, those methods are crucial to the bail determination. And, indeed, if using actuarial pretrial assessment instruments do not otherwise offend fundamental legal principles underlying the bail decision, then they might, in fact, form the basis for a massive overhaul of America's bail laws based on prediction of defendant success and failure by crafting new nets and processes for detention. Pretrial assessment tools and the research used to create them are invaluable to this process because, overall, they tend to show that defendants are far less "risky" than we think, that they are certainly not very risky to do the things (willful flight or commit a serious or violent crime) that might lead to detention, and that those relatively rare detention-triggering things are difficult to predict in any event. Knowing this, in turn, allows us to create legally justified and carefully limited detention provisions based on the reality illuminated by the pretrial research.

Thus, as noted previously, a fundamental question facing America today is whether it can simply switch from mostly charge-based detention eligibility nets to mostly risk-based ones. For example, in a purely risk-based process, a jurisdiction might change its right to bail provision to create a much more expansive net – perhaps a nearly limitless net – by articulating broadly that courts have the ability to detain all so-called "high risk" persons. In implementing legislation, that jurisdiction might then create a "further limiting process" that uses an actuarial pretrial assessment instrument to help officials make the release and detention determinations. By strictly

[89] *See* Tribe, *supra* note 21.

following the current law, a court might declare such a process unlawful because it is not limited by charge. Moreover, in as-applied claims, courts might also declare the use of detention based on risk for certain "low level" offenses to be excessive. As noted previously, however, complications in this generation of bail reform require us to look beyond literal application of the current law to fundamental legal principles that can be applied to new risk-based schemes.

Accordingly, the question is whether such a pure risk-based or risk-informed system is legally justifiable, and perhaps more rational than a charge-based one. Because *Salerno*[90] does not dictate any discreet elements for detention provisions (instead, as mentioned above, jurisdictions should focus more on *Salerno's* broad principles in justifying and applying detention), the more specific question is whether the Supreme Court might find a "pure risk" model (as measured by a tool) to be equally fair and lawful as the charge and risk (as measured by the federal limiting process) model reviewed in *Salerno*. The idea that the Court might indeed approve of such a pure risk-based detention process is enticing, but it is complicated by the risk research itself in several ways.

These complications are shown by looking deeper within the risk research and, specifically, by looking at the research used to create actuarial pretrial assessment instruments. After doing so, jurisdictions will likely recognize the following concerns:

1. As noted above, ever since America began articulating the type of risk it sought to address through pretrial detention, that risk has always been defined to encompass only "extreme and unusual" cases presenting the risk to willfully fail to appear for court to avoid prosecution or to commit a serious or violent crime while on pretrial release.[91] Generally speaking, today's

[90] 481 U.S. 739 (1987).

[91] For flight, *see, e.g., United States v. Abrahams*, 575 F.2d 3, at 8 (1st Cir. 1978) ("This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); *United States v. Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) ("Only in the rarest of circumstances can bail be denied altogether in cases governed by § 3146."). For danger, *see, e.g.*, H. Rep. 91-907, at 82-83 (1970) (articulating Congress' desire to "reduce violent crime" during the pretrial period, committed by "the most dangerous of … defendants;" S. Rep. 98-225, at 5-6, 12-13 (1984) (articulating Congress' desire only to use detention for a "small but identifiable group of particularly dangerous defendants" who pose "an especially grave risk to the safety of the community."). The Court in *Salerno* also mentioned the necessity of factors designed to gauge the "nature and seriousness of the danger posed by the suspect's release." *Salerno*, 481 U.S. 739, at 743.

actuarial pretrial assessment instruments do not clearly measure the risk of flight that might lead to preventive detention; instead, they typically measure the risk of all failures to appear for court (sometimes, but not always with some finding of willfulness), and do not clearly measure the risk of serious or violent crime, but instead measure the risk of all new criminal activity, which, depending on the tool, can range from traffic offenses to murder. In sum, the instruments do not adequately tell us "risk of what" – i.e., the risk that we seek to address through detention – and thus they likely do not adequately distinguish between defendants at risk for either flight or safety to the extent that we can use them solely to detain.[92]

This issue is not unknown to the pretrial field; in 2007, Dr. Marie VanNostrand noted that, "Although pretrial risk assessment instruments in most instances do well in predicting the likelihood of danger to the community (often measured by new arrest pending trial) there is no known research that explores the nature and severity of the new arrest."[93] Although we are likely getting closer to exploring that nature and severity – the Arnold Foundation's Public Safety Assessment tool separates risk for failure to appear from risk to public safety, and includes a violence flag, which "flags defendants presenting an elevated risk of committing a violent crime"[94] –

[92] Professor Lauryn Gouldin makes a compelling argument for more nuance and precision in defining the risk surrounding court appearance. *See* Lauryn Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677 (2018). This author makes the same point throughout the *Model Bail Laws* paper. The instant summary paper focuses primarily on issues surrounding the use of actuarial pretrial assessment instrument as the sole basis to determine detention through a nearly limitless charge-based net or as the net itself. Again, in this author's opinion, these tools can possibly be used as one minor part (or could also be avoided altogether) of an overall decision to detain within a lawful net, but they provide a superior method of assessing pretrial success and failure in all aspects of release. Even without a tool, judges asked to detain a person pretrial are necessarily assessing risk, but they are doing so through other means.

[93] VanNostrand, *supra* note 16, at 17-18; *see also* Charles Summers & Tim Willis, *Pretrial Risk Assessment: Research Summary*, at 4 (BJA, 2010) [hereinafter Summers & Willis] ("For a full evaluation of the risk to community safety posed by an offender, research is needed on the severity or type of risk identified by PRAIs."); Harvard *Primer*, *supra* note 42, at 22 ("Even when tools make that basic distinction [between risk of flight versus new crimes], a simple designation of 'high risk' may not tell a decision-maker whether that reflects risk of arrest for a serious violent crime"). Finally, risk instruments "vary in whether or not technical violations are considered pretrial failure," which can have a profound effect on judicial behavior assessing risk. Summers & Willis, *supra*, at 4.

[94] Public Safety Assessment: Risk Factors and Formula, at 1 (Arnold Found. 2016), found at http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf, accessed on 09-22-2018. Practitioners are warned to use extreme caution about reading too much into the "violence flag," as it represents such a rare event.

we are still far from the kind of research that would settle nagging doubts about using actuarial assessment tools for certain functions, like detention based purely on an actuarial tool's prediction of either flight or danger before any individual triggering event.

2. While based on empirical science (thus making the calculations within the tools inherently objective), elements of actuarial pretrial assessment instruments can later become somewhat subjective and sometimes political – with scoring categories created by researchers and changed by policy stakeholders to reflect who they think is "risky." Once created, the cutoffs distinguishing between "low," "medium," and "high" risk can be changed for any reason, and sometimes merely for political reasons.[95]

3. Actuarial pretrial assessment instruments do not tell us individual risk, only aggregate risk. Thus, while an actuarial tool can give us some indication of how a particular defendant might perform by comparing him or her to other, similar defendants described in the aggregate, the tool can never tell us if he or she is actually one of the individuals predicted to succeed or fail. This leads to problems with base rates (for example, when there are few failures in a given defendant population – i.e., when base rates are low – it is unlikely that using a tool solely to predict the risk of those failures can do better than by simply releasing everyone, which would at least reduce or eliminate certain fundamental legal issues),[96] and

[95] In Colorado, for example, the Colorado Pretrial Assessment Tool was initially divided into risk categories based on quartiles; those cutoffs were later changed by criminal justice stakeholders to better reflect their own perceptions of risk and risk tolerance.

[96] As Gottfredson explains, when base rates are low, prediction is only good if it improves upon the base rate. *See* Stephen D. Gottfredson, *Prediction: An Overview of Selected Methodological Issues*, at 25, in 9 *Prediction and Classification: Criminal Justice Decision Making* (U. of Chicago Press, 1987). One reason why today's actuarial pretrial assessment instruments are good at predicting pretrial misbehavior is because they predict conduct (such as any FTA and any new alleged crime) that occurs more frequently than flight or serious and violent crime while on pretrial release. As noted previously, however, these more frequently occurring behaviors are not necessarily the kinds of risks America seeks to address through pretrial detention. Very recently researchers have begun to surmise that unequal base rates among groups can lead to unequal error rates and ultimately to unfair prediction, even when fairness may be deemed satisfied through predictive parity. *See, e.g.*, Alexandra Chouldechova, *Fair Prediction With Disparate Impact: A Study of Bias in Recidivism Prediction Instruments* (Cornell Univ. Oct. 2016), found at

false positives (people detained based on risk who will never fail if released).[97] In short, actuarial pretrial assessment instruments likely significantly over-estimate risk in order to capture the types of risk we seek to address. Indeed, many jurisdictions have learned that they can release so-called "high risk" persons with minimal supervision and see them perform as well as "medium risk" persons.[98] As noted above, we cannot easily assess this phenomenon because detention proves itself – its errors remain invisible.[99] Because actuarial pretrial assessment instruments do not measure individual risk, using those tools solely to determine release and detention will undoubtedly lead to detaining persons deemed "high risk" who will not fail, and releasing persons deemed "low risk" who will fail.

4. Most actuarial pretrial assessment instruments do not consider so-called "protective factors," which are "variables that can be

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https://arxiv.org/abs/1610.07524, accessed on 09-22-2018. While unfair prediction can lead to higher bond amounts and conditions of release, it is most disturbing when it leads to pretrial detention.

[97] Generally speaking, if predicting risk of violence, for example, a true positive would be a person predicted as violent who subsequently commits a violent offense. A true negative would be a person predicted to be nonviolent who does not subsequently commit a violent offense. A false positive would be a person predicted as violent who proves to be nonviolent (a prediction that is largely unfalsifiable if that person is detained), and a false negative would be a person predicted to be nonviolent who subsequently commits a violent offense. While false negatives are also important in bail, they are not unfalsifiable because the defendants are released. See Dean J. Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook*, at 73 (Greenwood Press, 1994). Caleb Foote called the people we allow to be in the category of false positives, "a dehumanized second-class category of persons" who are, in fact, "expendable." Caleb Foote, *Comments on Preventive Detention,* 23 J. of Legal Ed. 48, 52 (1970). Authors Jeffrey Fagan and Martin Guggenheim write that it is helpful to view false positives as "individuals deprived of their liberty for utilitarian purposes" – that is, persons "jailed not to stop them from any wrongdoing but in order to throw a wide enough net to cover others, who, if not stopped, would endanger society." Fagan & Guggenheim, *supra* note 42, at 428. Nevertheless, and as those authors also suggest, while decisions diminishing the rights of *convicted* persons for the collective good might in some instances be acceptable, at bail they are decidedly less so. Moreover, as explained by Andrew von Hirsch, false positives still pose a serious problem – even when detention is not considered punishment – because if we confine a defendant who is not dangerous merely for precautionary purposes, "what we have left is gratuitous suffering imposed upon a harmless individual." Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 Buff. L. Rev. 717, 743, n. 74 (1971-72) [hereinafter von Hirsch].

[98] Denver Dept. of Pub. Safety, Denver Pretrial Servs. Prog. CY15 Ann, Rep. at 7, available from the author. This is consistent with national research showing that general supervision can increase court appearance and public safety rates for released defendants showing moderate and high risk in significant numbers compared to defendants without such supervision. *See* Harvard *Primer, supra* note 42, at 16-17.

[99] *See Model Bail Laws, supra* note 18, at 13-14. Indeed, there are four outcomes in any given prediction based on what was predicted and whether the prediction was correct. Three of these outcomes, true positives, false negatives, and false positives tend to result in and/or confirm detention. Accordingly, we must use extraordinary caution in using prediction to detain.

shown to decrease the likelihood of failure," and which can help to better determine individual versus aggregate risk.[100]

5. Actuarial pretrial assessment instruments can vary jurisdiction to jurisdiction, although this phenomenon is also seen through existing bail laws.

6. Many actuarial pretrial assessment instruments tend to send a subtle message that all defendants are "risky" simply by labeling them so. Again, the pretrial research illustrates that defendants are simply not very risky during the pretrial period, are certainly not very risky to actually flee or to commit a serious or violent crime while on pretrial release, and those things are difficult to predict in any event.[101] Indeed, if one looks at the research behind any particular pretrial assessment instrument, one will quickly see that lower risk defendants are highly successful, as illustrated by predicted risk categories with success rates in the 90th percentiles.[102] Moreover, "high" or "higher" risk defendants in most instruments are often predicted to succeed more than half of the time, even when those tools score as "failures" any and all failures to appear for court and any and all new criminal activity.[103] The consequences of calling all relatively non-risky persons "risky" are so damaging that the field has even begun discussing ways to articulate defendant pretrial behavior without using the word "risk" at all.

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[100] Summers & Willis, *supra* note 93, at 4-5; *see also* John Jay College Prisoner Re-Entry Institute, *Pretrial Practice: Building a National Research Agenda for the Front End of the Criminal Justice System*, at 29 (statement of the Vera Institute of Justice describing the need for some assessment of strengths instead of just risks) (Oct. 26-27, 2015). This document provides an invaluable overview of pretrial research, including what is currently available and what is still needed as of the date of publication. In Maine, researchers created "one of the very few" pretrial assessments to include protective as well as risk factors. *See* Two Rivers Reg. Jail/USM Muskie School of Pub. Serv./Vols. of America, *M Risk: Pre-trial Risk Assessment, Maine Demonstration Project*, 2 (BJA, 2011).

[101] This can be due to many reasons, including, logically, the shorter periods of time defendants are under pretrial supervision. The need only to assess risk during the pretrial period is nonetheless one reason why jurisdictions should use caution when looking at research that examines outcomes beyond the pretrial window.

[102] *See, e.g.*, Pretrial Justice Institute/JFA Institute, *The Colorado Pretrial Assessment Tool*, at 18 (PJI/JFA, 2012) [hereinafter PJI/JFA].

[103] *See* Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants*, at 4 (PJI, 2015) [hereinafter PJI Issue Brief] (showing even Kentucky's overall success rate for level 5 (higher risk) defendants is 64 %. A risk instrument could be created to include a "high risk" category in which defendants failed at, say, 80% levels, but the number of defendants covered by that category would be significantly lowered).

7. Actuarial pretrial assessment instruments can make good predictions about all failures to appear and all new criminal activity simply because the base rates for those things are higher than for flight and new serious or violent crime while on pretrial release.[104] It is likely that actuarial pretrial assessment instruments will continue to have a difficult time predicting these latter behaviors because they are so rare, and perhaps these tools may never be able to predict them sufficiently to overcome certain fundamental statistical or legal issues surrounding detention.

8. Using an actuarial pretrial assessment instrument solely for determining detention or detention eligibility would create the possibility of detention for all charges using potentially vague terms, likely violating due process, equal protection, and excessive bail under the legal analyses mentioned above. Given the state of the science today, it is unlikely that any current tool could survive heightened scrutiny when used as the sole basis for determining pretrial detention.

Due to all of these concerns, if two fundamental questions are whether an actuarial pretrial assessment instrument can *ever* be used as the *sole or substantial basis* (anything more than a small part) for pretrial detention through the creation of a risk-based net or a virtually unlimited charge-based net, and whether the Supreme Court would ever allow such a process, the answer to both questions is likely no. Viewed another way, when the *Salerno* Court required a charge-based detention eligibility net, risk was already a part of the overall detention process; just as now, courts then were attempting to determine defendant risk to release or detain, albeit based on

[104] When it comes to danger, Andrew von Hirsch explains that what makes criminal conduct generally resistant to prediction is as follows: "(1) It is comparatively rare. The more dangerous the conduct is, the rarer it is. Violent crime-perhaps the most dangerous of all – is the rarest of all. (2) It has no known, clearly identifiable symptoms. Prediction therefore becomes a matter of developing statistical correlations between observed characteristics of offenders and criminal conduct." Indeed, von Hirsch explains, violence is difficult to predict due both to its rarity and "situational quality;" that is, violence does not apparently adhere to certain individuals, but, instead, can happen to any person based on a number of variables beyond the characteristics of the person. *See* von Hirsch, *supra* note 97, at 733-36. Predictions of flight based on failures to appear can pose similar difficulties. Indeed, because state data collection of failures to appear was so corrupted in Colorado, "prior failure to appear" was not even listed as a predictor of future failure to appear (let alone flight) in the statewide assessment. *See* PJI/JFA, *supra* note 102, at 13. The numerous, replicated studies on the efficacy of court date notification to reduce failure to appear rates indicate that when defendants miss court, the vast majority of them are simply not fleeing to avoid prosecution.

charge as a proxy for risk combined with some further limiting process. Believing now that a different kind of risk assessment – that is, risk as determined by an actuarial pretrial assessment instrument – might somehow lead the Court to approve of a nearly limitless net, especially given the concerns listed above, is likely misguided.

Nevertheless, this conclusion should not be used to denigrate in any way the importance of using actuarial risk assessment instruments at the pretrial phase of a criminal case. This generation of pretrial assessment using actuarial tools is better than any other generation of assessing risk we have experienced in the past,[105] and the literature suggests that using these tools results in prediction that is significantly better than clinical (i.e., largely subjective) prediction. As noted by researchers Sarah Desmarais and Jay Singh, "There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches."[106]

This is likely true in the pretrial setting, and using these tools – empirically-based actuarial instruments that classify defendants by differing levels of pretrial probabilities of success and failure through weighted factors – is considered to be an evidence-based practice (in the sense that, like all actuarial science, the tools accurately sort people) and is often a critical prerequisite to adopting other best practices in the pretrial field.[107] They are the evolutionary result of over 1,000 years of "risk assessment," and 100 years of using research and statistics to inform pretrial assessment.

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[105] For a good review of the history and then-current research of pretrial risk assessments as well as a description of how one was constructed, *see* Christopher T. Lowenkamp, Richard Lemke, & Edward Latessa, *The Development and Validation of a Pretrial Screening Tool*, 72 Fed. Prob. 2 (2008). For a description of risk assessment generations generally, *see* Sarah L. Desmarais & Jay P. Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States: An Empirical Guide* (CSG, 2013) [hereinafter Desmarais & Singh]. The American Bar Association Standards on Pretrial Release trace the development of empirical risk since the 1920s, ending with VanNostrand's Virginia Pretrial Risk Assessment Instrument. *See* ABA Standards, *supra* note 84, Std. 10-1.0 (b) (i) (commentary), at 57, n. 22; *see also* Council of State Governments, *Risk Assessment: What You Need to Know* (2015) ("Risk assessments are absolutely, statistically better at determining risk than the old ways of doing things."), found at https://csgjusticecenter.org/reentry/posts/risk-assessment-what-you-need-to-know/, accessed on 09-22-2018; *see generally* Summers & Willis, *supra* note 93.

[106] Desmarais & Singh, *supra* note 105, at 4 (citing Stefania Aegisdottir, et al., *The Meta-Analysis of Clinical Judgement Project: Fifty-Six Years of Accumulated Research on Clinical Versus Statistical Prediction)* 34 the Counseling Psychologist, 341(2006)).

[107] *See generally* PJI Issue Brief, *supra* note 103.

These tools have shined a bright light on our previous, inadequate and often extremely biased methods of assessment (such as by charge, through a bail schedule, through non-predictive and unweighted statutory factors, or through subjective notions of bail setters) and have allowed us to see the results of those prior methods when assessment is used to illuminate and evaluate jail populations. In many cases, empirical pretrial assessment has been the catalyst for questioning and reforming an essentially random money bail system to one that is fairer, more effective, and purposeful.

The good assessment tools (and, importantly, the reader should recognize that not all tools are good tools) provide standardization and transparency, help avoid arbitrary decision making, help to assess bond "types," and can help to achieve the pretrial goals of maximizing release, maximizing public safety, and maximizing court appearance. Moreover, by telling us pretrial "risk" in a more accurate way, these tools also help us to follow the so-called "risk principle," which instructs jurisdictions to expend less or no resources on lower risk persons and more resources on higher risk persons, and which thus includes a requisite finding of risk to allocate resources properly. The risk principle is well known in the post-conviction field, and has equal relevance to pretrial release decisions.[108]

Using these tools to better follow the law – by helping courts to determine reasonable assurance of court appearance and public safety,[109] by making sure that pretrial liberty on least restrictive and otherwise lawful conditions is the "norm" (with no intentional or unintentional pretrial detention outside of any particular lawful process for doing so), by helping to assure that pretrial detention is done in a carefully limited way, and by helping courts to follow other fundamental legal principles – is a "legal and evidence-based practice" (one that follows both the law and the research), the very thing that American jurisdictions are attempting to achieve in the pretrial field.

[108] *See* Anne Milgram, Alexander M. Holsinger, Marie VanNostrand, & Matthew W. Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 Fed. Sentencing Rep., No. 4, at 216-17 [hereinafter Milgram, et al.]; Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (Washington, D.C.: Office of Federal Detention Trustee, 2009).

[109] Some have argued that pretrial assessment tools violate the notion of individualized bail settings merely because the defendants are compared to aggregate success and failure rates, but, in fact, the opposite is true. These tools require those performing the assessment to analyze each individual defendant on a variety of measures that are superior to the typical "charge assessment" with blanket conditions done through bail schedules and disapproved of by the U.S. Supreme Court in *Stack v. Boyle*, 342 U.S. 1 (1951). It is only after the individualized assessment that the defendant is then compared to the aggregate for purposes of scoring. This notion is entirely different from the notion of then using those aggregate scores to detain. In sum, the actuarial tools are infinitely superior to bail schedules (and other previous methods of assessing risk), but not so superior that they can then be used solely to detain a defendant pretrial.

Actuarial pretrial assessment instruments are not designed to replace professional discretion, but rather to enhance pretrial decision making by coupling instinct and objective assessment, which research has shown produces the best results.[110]

Overall, actuarial pretrial assessment instruments are invaluable to the release process, likely a necessary component to comprehensive reform, and provide additional justification for eliminating money at bail. As noted previously, they can guide courts and justice systems with virtually all issues concerning release (including structuring and evaluating supervision strategies, crafting responses to violations, assessing the efficacy of bond "types," evaluating jail populations, helping to encourage more summonses and citations, and even providing some rationale to emergency releases, when necessary), and they can assist – through cautionary legal backstops – with detention. Using them can even lead to more confidence in data processes and systems policies.[111]

Moreover, they are always improving; as noted previously, the Arnold Foundation's pretrial assessment tool, developed in 2013, has various attributes tending to ameliorate some of the concerns listed above. Nevertheless, if the issue is whether a jurisdiction can simply replace charge

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[110] *See* Milgram, et al., *supra* note 108, at 219-20.

[111] Some researchers have raised additional concerns with assessment tools that are adequately addressed through various other avenues discussed in this author's *Model Bail Laws* paper, such as regular validation to account for changes through ongoing reforms and by using the tools almost exclusively for purposes of release. Those who argue against using an assessment instrument entirely typically fail see them as an evolutionary process and thus fail to explain what to do with current assessment methods (such as charge and money) or to explain how to create a viable release and detention model when the tools are not used. Moreover, even those few persons who argue against their use entirely admit that there are certain benefits to using the tools, such as to foster quick release or to help jurisdictions to refrain from over-conditioning. These two beneficial uses (and this author has many more) provide ample justification for a jurisdiction to adopt an assessment tool, and this automatically changes the debate from whether to use the tools at all to how to use them properly and to avoid their misuse in the areas identified as concerns. This has been the stance of research done by this author and other "neutral" pretrial reformers, which is to identify and address concerns but not to dismiss assessment instruments altogether. *See, e.g.*, Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform*, (2016); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, found in *Reforming Criminal Justice* (Acad. Of Justice/Ariz. State Univ. College of Law, 2017) [hereinafter Stevenson & Mayson] at http://academyforjustice.org/; various documents issued by the Pretrial Justice Center for Courts (NCSC), found at https://www.ncsc.org/Microsites/PJCC/Home.aspx; various documents issued by the Pretrial Justice Institute, found at http://university.pretrial.org/libraryup/topics/assessment; National Institute of Corrections, *A Framework for Pretrial Justice* (NIC, 2017); *Model Bail Laws, supra* note 18. All agree that assessment tools should not exacerbate bias, but the best research on the topic appears to show that existing bias will necessarily be reflected due to the nature of prediction itself, thus requiring "more fundamental changes in the way the criminal justice system conceives of and responds to risk." Sandra G. Mayson, *Bias In, Bias Out,* 128 Yale L. J. ___ (forthcoming 2019).

with risk, then the various concerns over using such a tool to determine initial detention based on prediction requires a deeper analysis than that previously given to the topic. More specifically, if a jurisdiction seeks to change its primarily charge-based detention eligibility net to one based solely on actuarial risk alone (or to otherwise use actuarial risk in any significant way in the detention process), then that jurisdiction must overcome both the substantial legal challenges as well as the significant limitations associated with using "risk" as the sole basis to detain in order to provide proper justification.

In sum, a lesson from the pretrial research is that while that research is causing jurisdictions to question assumptions forming the basis of detention eligibility, those jurisdictions will likely find that actuarial assessment cannot replace a charge-based detention eligibility net. Moreover, and to put things somewhat simplistically, a lesson from the research is that currently in America there are likely two types of risk: (1) the risk defendants pose as measured by current actuarial pretrial assessment instruments; and (2) the risk needed to trigger detention in the first instance based solely on prediction. While current assessment instruments are helpful, if not essential, to 98% of what we are trying to achieve at bail, actuarial scores from assessment instruments are perhaps, *at most*, a "necessary, but not sufficient basis to trigger a [detention] hearing."[112] Until these tools can adequately predict the type of risk necessary to detain under (2), and until jurisdictions can reduce if not eliminate the various legal hurdles associated with using actuarial assessment (no matter how accurate) as the sole or substantial basis for detention, those jurisdictions are advised to work cautiously to adequately justify current and future bail laws incorporating actuarial assessment, and to implement serious legal backstops to guard against potential misuse.

The Overall Conundrum of Charge and Risk

When jurisdictions study the risk research generally, they will quickly learn that there is little research justifying the creation of a detention eligibility net based on any single criminal charge. Whenever it is studied (for example, whenever researchers evaluate predictors of pretrial misbehavior), criminal charge is measured as only a small part of defendant risk, to the extent that basing detention eligibility on criminal charge alone would likely require

[112] Harvard *Primer*, *supra* note 42, at 27.

legal justification beyond empirical literature. For example, if a jurisdiction chose to create a detention eligibility net for persons charged with sex offenses, it would have a difficult time finding empirical research showing that being charged with a sex offense, by itself, leads to higher risk to fail to appear for court or to commit new crimes while on pretrial release. This becomes a conundrum when one simultaneously concludes that actuarial assessment, alone, also cannot serve as a detention eligibility net (which is the equivalent of a virtually unlimited charge-based net). Indeed, for the reasons listed in this paper, it is likely that the law will always require some charge-based net – articulated in advance – whether or not that net operates before or after pretrial assessment.

Jurisdictions can come to various solutions to this conundrum. One solution has been crafted by this author in *Model Bail Laws*, in which I use the history, the law, the national standards, and the empirical evidence (including five empirical studies showing some correlation between arrest for a violent charge and committing a subsequent violent charge while on release) to conclude that a net consisting of defendants charged with "violent criminal offenses" (but no broader) might be legally justified.[113] This charge-based net for detention ultimately based on prediction is then coupled with a secondary net of "failure while on pretrial release for the current case."[114] The two nets are then combined with two new and separate "further limiting processes," which are designed to assure that detention addresses only the kinds of extraordinary risk that America has sought to address since first attempting to intentionally detain noncapital defendants pretrial. Finally, these nets and processes are done through the sort of procedural due process protections necessary for detention that were discussed by the

[113] States might lawfully differ on how wide the nets should be (i.e., violent felonies, felonies, or some combination of charge and preconditions), and in how they are justified (i.e., through empirical evidence or by other valid legislative findings), but through the creation of new and better limiting processes focusing on the risk states seek to address through detention – the answer to the question, "Risk of what?" – even the widest nets will be significantly less likely to lead to over-detention. States are advised, however, to treat pretrial detention as it was recently described by Brandon Buskey from the ACLU's Criminal Law Reform Project – as the "death penalty of the pretrial system" – so that states recognize the extreme legal and evidentiary safeguards that must exist before they impose it. *See* Preventive Detention in Policy and Practice, found at https://university.pretrial.org/viewdocument/preventive-detention-in-policy-pr, accessed on 09-22-2018.

[114] While this is more commonly known as bail or bond revocation, the author describes it as a "secondary net" to emphasize the seriousness of pretrial detention even after pretrial failure and to avoid the perfunctory nature of most bond revocation proceedings.

United States Supreme Court in *Salerno.* In *Model Bail Laws,* I noted:

> [My] model attempts to answer the three big questions we have asked ever since a thing called the pretrial phase of a criminal case has been in existence – whom do we release, whom do we detain, and how do we do it? It does so by following the history, the law, and the research to adequately define the level of risk and the kind of risk we fear to justify secure detention prior to trial.[115]

Jurisdictions can conduct their own research to determine justification for a detention provision, or they may rely on expert testimony to make adequate findings. Moreover, in some cases, jurisdictions may decide that their current nets and limiting processes are sufficiently justified and adequately limited already. The fundamental point, however, is that in this generation of bail reform, all detention provisions must be legally justified and "carefully limited." It is simply unacceptable for states to enact laws providing for the potential detention of large categories of defendants without reason.

The Answer to the Primary Question

The answer to the question, "If we change, to what do we change?" is thus relatively simple: jurisdictions need to create legally justified (and likely charge-based) detention eligibility nets and better "further limiting processes" designed for purposeful release and detention decisions. Creating a detention eligibility net is, perhaps, a more intriguing endeavor (it is apparently easier or perhaps more satisfying to debate which broad categories of defendants should potentially be detained, whether by charge or by risk), and yet it is the creation of a new "further limiting process" – a process that improves upon the older, mostly subjective ones by articulating the risk that detention seeks to address and that avoids reliance on actuarial assessment to detain – that provides the ultimate solution. Indeed, jurisdictions can disagree on the breadth of detention eligibility nets (so long as they are justified), as it is ultimately the limiting process that will enforce rational and fair limits on pretrial detention. Overall, then, the solution to overcoming the various issues found in crafting rational and fair detention provisions lies primarily in crafting better limiting processes.

[115] *Model Bail Laws*, *supra* note 18, at 171.

As noted previously, when states (and the federal system) have enacted such provisions in the past, they have often limited detention to those defendants within the eligibility net for whom "no condition or combination of conditions suffice to provide reasonable assurance of court appearance or public safety," or with various other processes that are inadequate to a determination of release or detention. Also, and as noted previously, this default "no conditions" process is subjective and resource driven, and, quite candidly, has not always worked to constrain pretrial detention in those jurisdictions, such as the federal system, in which money has been eliminated as a confounding factor. Accordingly, an example of a new process for initial detention based on prediction (which references, but which could also include an express detention eligibility net) might be worded something like this:[116]

> All persons charged with a criminal offense shall be released on the conditions that they return to court and abide by all laws. If needed, a court may impose such further and least restrictive conditions necessary to provide reasonable assurance of court appearance and public safety, except that a court may confine a person who is eligible for pretrial detention [i.e., the detention eligibility net, which might be defined elsewhere or, preferably, included here; in my *Model Bail Laws* paper, the net is "violent offenses" but, of course, a net could be made much narrower through various means] when the court finds, in addition: (1) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk of intentional flight to avoid prosecution, or; (2) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk to commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person or groups or persons or their property; and, for all persons in (1) or (2), the court finds clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's extremely high level of risk. In considering the facts and circumstances necessary to detain a defendant pretrial,

[116] States must consider where to enact these sorts of legal backstops. Including them in state constitutions is this author's choice, simply to avoid erosion of the various elements by future legislative bodies. Nevertheless, there are many variables that might lead a state, for example, to create a broad constitutional provision to be coupled with significant limiting language enacted into statutes or court rules.

> the court may consider the risk assessed through an actuarial pretrial assessment instrument, however the court may not detain based solely on the results of that instrument and must, instead, articulate and provide a written record of additional evidence to support the clear and convincing burden. The court may not impose a condition of release that results in the pretrial detention of the person. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person. The legislature shall enact laws designed to carry out this provision, including specific and reasonable laws allowing for the temporary detention of defendants awaiting a full detention hearing not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to define the terms "serious" and "violent" crimes [which could, instead, be defined here], to create a due process hearing required for pretrial detention, and to provide for speedy trials and immediate and expedited appeals for detained defendants. At a minimum, the detention hearing shall contain [insert procedural due process requirements from *Salerno* here].

This is but one example. Nevertheless, the example addresses the question, "risk of what," and attempts to answer it in a way that is supported by the history, the law, the pretrial research and the national standards. Moreover, this limiting process provides a lawful and rational backstop to prevent over-detention based on broad or ever-widening detention eligibility nets. Accordingly, and as mentioned above, jurisdictions might differ over specific nets up to constitutional boundaries; indeed, one jurisdiction may justify a net allowing potential detention only for capital defendants, while another may justify a net allowing potential detention only for defendants facing "violent felonies" or all "violent offenses." For each of these nets, however, this further limiting process better separates those defendants who should be released from those who are extremely high risk and unmanageable by articulating the risk America is attempting to address through detention based on prediction. Finally, a wider net may also lead to a further narrowing of the limiting process; for example, to shorten the days

allowed for temporary detention or to more thoroughly articulate the speedy trial provision.

Addressing risk for detention in the first instance based solely on aggregate prediction is different from addressing risk after pretrial failure, which provides courts with at least some concrete proof of individual risk. Many states currently have bond revocation processes to deal with pretrial failure, but others do not, and, even when they exist, they are often perfunctory (indeed, often nearly automatic) and tend to focus solely on the failure itself rather than the future risk, which may be informed by the failure. Accordingly, jurisdictions should consider creating a secondary detention eligibility net along with another limiting process, similar to the above, for instances in which defendants have failed on pretrial release by willfully failing to appear for court or committing a new crime. Such a process might look something like this:

> The court may also order the pretrial detention of a person when the court finds probable cause that a person already on pretrial release for any jailable offense willfully failed to appear for court to avoid prosecution or has committed a new jailable offense, and is shown through clear and convincing evidence of relevant facts and circumstances that: (1) the person poses an extremely high risk either to willfully fail to appear for court to avoid prosecution or to commit or attempt to commit any new jailable offense against persons or their property; and (2) clear and convincing evidence that no condition or combination of conditions will suffice to manage the extremely high risk. In considering the facts and circumstances to detain under this provision, the court may rely substantially on the assessed risk from an actuarial pretrial assessment instrument. The court may not impose a condition of release that results in the pretrial detention of the person. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person. The legislature shall enact laws designed to carry out this provision, including specific and reasonable laws allowing for the temporary detention of defendants awaiting a full detention hearing not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional

> periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to create a due process hearing required for pretrial detention, and to provide for speedy trials and immediate and expedited appeals for detained defendants. At a minimum, the detention hearing shall contain [insert procedural due process requirements from *Salerno* here].

This limiting process is different from the prior process for preventive detention based purely on prediction in several ways. First, it allows judges to consider detention by assessing risk of flight after any willful failure to appear, and to consider detention by assessing the risk of danger after the commission of any new jailable offense while on release, thus avoiding the need to allow multiple failures (possibly leading to multiple open cases) to trigger the heightened scrutiny. Second, for public safety it guides judges toward releasing these persons except where there is clear and convincing evidence that no condition or combination of conditions can provide reasonable assurance, but it allows judges to consider the risk of the person committing any new jailable crime while on release (of course, this aspect of the provision could be narrowed further by requiring judges to detain based, once again, on a risk to commit only a serious or violent crime).[117] Third, it allows judges to now consider to a greater degree aggregate risk, so that a single failure while on pretrial release (not including so-called technical violations), along with the risk assessed by an actuarial tool for any crime, might provide significant evidence of future risk.

As noted in the examples, this author expects that either or both of these limiting processes would also be paired with the various crucial procedural due process protections – adversary hearing, right to counsel, judicial standards, etc. – similar to those approved by the United States Supreme Court in *United States v. Salerno.* Overall, like the net and "further limiting

[117] There is a good argument for not treating persons arrested while on pretrial release with a more lenient process than that used for persons being detained based solely on prediction due to the fact that the former persons are merely accused twice rather than once. *See* LaFave, et al., *supra* note 44, at 87. This issue can be addressed through language tightening up who may be detained in such cases (for example, by limiting the triggering crime or even both crimes to be "serious" crimes) and by making sure that courts apply the full complement of due process protections found in *Salerno*. According to LaFave, "more extensive use of [a] revocation procedure [what this author of this paper calls the secondary net and process], with expedited trials for those so detained, might well make considerable inroads upon the crime problem cited by preventive detention advocates." *Id.* at 88-89.

process," it is preferable to include these significant due process protections within a constitutional bail provision to reinforce their importance.

Both nets and limiting processes reflect complex attempts at drawing lines between release and detention. For example, if a state chooses a detention eligibility net of "violent charges," then even the highest risk defendants charged with lesser crimes (such as shoplifting) will simply not be eligible for detention in the first instance based on prediction alone, and this would be proper for all of the legal and evidence-based reasons listed throughout this paper. Nonetheless, if a defendant initially charged with shoplifting commits another shoplifting offense while on pretrial release, he will be eligible for detention under the secondary net, but not detainable without the requisite findings of future risk and that no conditions again suffice to manage the risk if the person is released. Jurisdictions will likely differ reasonably (but within some fairly straightforward boundaries) on the elasticity of the overall process, with some elements chosen for their overall limiting effect, and other elements chosen to allow for common sense and justifiable responses to pretrial failure. Nevertheless, jurisdictions should know that, overall, the history, law, research, and standards – i.e., the fundamentals of bail – all point to constantly *narrowing* detention whenever and wherever possible.

Such line drawing means that, necessarily, there will be compromises as well as some likely rare hypotheticals that will seemingly fall outside of the model. For example, some persons, such as mentally ill or homeless persons who habitually fail to appear for court for reasons other than to willfully avoid prosecution, will theoretically not ever be detainable in the above model despite these numerous violations (detention in those rare instances, instead, would likely be left to a judges' contempt power or through a perhaps reasonable finding that multiple FTAs eventually evince willfulness). The line drawing in the model simply reflects a decision that society's legitimate interests in addressing court appearance do not rise to the level of requiring pretrial detention in these cases. Indeed, this model is premised on the fact that solutions to certain hypothetical situations such as these are simply not found at bail. The solutions, instead, are found through commencing trials for high risk persons much more quickly, through sentencing (to begin the punishment or rehabilitative process for persons who habitually violate the law), or through crime prevention efforts designed to eliminate certain negative and systemic behaviors. Finally, the entire endeavor recognizes that judges in America have historically found ways to

detain the persons they want to detain, and thus perhaps the fundamental point is that aberrational cases should not be used to create policy.

Ultimately, however, line drawing is inevitable when jurisdictions decide to move from an arbitrary, random, and likely unconstitutional system of money bail to one making purposeful in-or-out release and detention decisions. By far, the traditional money bail system led to many more cases – indeed, over 100 years of cases – routinely "not fitting" within the secured money bond model erected in 1900. Moreover, the money bail system drew its own lines, giving Americans the false sense that, somehow, the difficult work of bail had already been done. Purposeful line drawing, in this sense, simply means taking the random lines drawn by the money bail system, and re-working them and justifying them based on the law, the research, and common sense. Purposeful line drawing is the essence of criminal law and procedure, and it is time for pretrial release and detention to catch up.

After the Line is Drawn: Essential Elements of Bail Statutes or Court Rules

As mentioned at the beginning of this paper, once a jurisdiction has done the difficult work of articulating its bail/no bail, or release/detain dichotomy based on the history, the law, the research, and the standards, the rest includes merely creating an in-or-out framework so that nothing interferes with either intentional release or fair and transparent detention. In short, once a jurisdiction has decided whom to release and whom to detain, model laws simply make this happen by using legal and evidence-based practices to achieve the constitutionally valid purposes of bail and no bail.

Nevertheless, there are certain fundamental themes or principles that likely should be included in any comprehensive bail scheme. The following list is derived from many sources, including: the Pretrial Justice Institute's *Key Features of Holistic Pretrial Justice Statutes and Court Rules*;[118] Harvard Law School's *Moving Beyond Money: A Primer on Bail Reform*;[119] NIC's *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder*

[118] *Key Features of Holistic Pretrial Justice Statutes and Court Rules* (PJI, 2016), found at https://university.pretrial.org/viewdocument/key-features-of-holi.
[119] *See* Harvard Law School *Primer*, *supra* note 42.

papers;[120] the American Bar Association and National Association of Pretrial Services Agencies Standards; the D.C. and federal release and detention statutes; and conversations primarily with Alec Karakatsanis (Civil Rights Corps) John Clark (Pretrial Justice Institute), Mike Jones (Pretrial Justice Institute (former) and Pinnacle Justice Consulting), Larry Schwartztol (Harvard Law School Criminal Justice Policy Program (former) and Protect Democracy, Claire Brooker (independent pretrial consultant for CLEBP and Justice System Partners), and the Honorable Truman A. Morrison, III, (Senior Judge, District of Columbia Superior Court). The list is as follows:

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

[120] *See* NIC *Fundamentals*, *supra* note 1; NIC *Money*, *supra* note 1. When initially assessing their laws, states might also benefit from reading *Guidelines for Analyzing State and Local Pretrial Laws* (PJI, 2017), found at https://university.pretrial.org/viewdocument/guidelines-for-analyzing-state-and.

assessment instruments for released defendants by favoring the assessment over pure clinical assessment, but by balancing the tool with other elements of risk relevant to flight and the danger we seek to address; provisions encouraging or mandating the use of research-based least restrictive conditions of release.

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

Conclusion

As jurisdictions work through this generation of bail reform, they will likely realize that some changes to their laws may be inevitable. If so, this paper identifies the various issues jurisdictions will face when determining – upfront and on purpose – whom to release, whom to detain, and how to do it. The notion of legal and evidence-based practices cautions jurisdictions that research is subservient to the law, and thus jurisdictions must provide lawful justifications for any changes to laws based on the research, and especially changes to laws concerning pretrial detention. Nevertheless, the pretrial research also affects laws by demonstrating a need to justify both old and new preventive detention models based on our current understanding of pretrial risk. When providing this justification, jurisdictions should not be surprised to conclude that actuarial pretrial assessment instruments, while extraordinarily valuable to every other area of the pretrial process, should never be used either solely to detain a defendant pretrial or even as a

substantial part (i.e., anything more than a small part) of a lawful detention process.

The overall solution to the issue of change thus involves each jurisdiction justifying an existing or new detention eligibility net – likely based on criminal charge – and enacting a "further limiting process" (with procedural due process protections) that is different from and superior to any previous American process. Again, risk research and actuarial pretrial assessment tools will be an invaluable part of creating and justifying these nets and processes, with the only caveat being that jurisdictions should never rely *solely* or *substantially* on assessment tools to detain (versus release) defendants before trial. Once the somewhat difficult decision is made about purposeful detention, legal and evidence-based practices will then guide jurisdictions so that both release and detention are lawfully effectuated.

About the Author

Timothy R. Schnacke is the Executive Director of the Center for Legal and Evidence-Based Practices (www.clebp.org), a Colorado nonprofit corporation that provides research and consulting for jurisdictions exploring and/or implementing improvements to the administration of bail.

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