A LOOK AT THE NEW TEXAS CONSTITUTION ARTICLE I, SECTION 11B

Heath Coffman*

I. INTRODUCTION

In the almost twenty years since Chief Justice Rehnquist penned the decision in *United States v. Salerno*,[1] preventive detention, the "pretrial custody of a defendant for the purpose of protecting some other person or the community at large,"[2] has become a largely forgotten topic. Not so long ago, however, the idea of preventive detention was a controversial one.[3] Courts argued that bail was not "to prevent the commission of crimes"[4]; such a purpose went against "traditional American law" and was "fraught with danger of excesses and injustice."[5] Commentators argued that preventive detention violated Blackstone's rule that "to make a complete crime . . . there must be both a will and an act."[6] In fact, aside from the imprisonment of Japanese-Americans during World War II, English and American history wholly lacks instances of "pure" preventive detention.[7]

Nevertheless, it is difficult to argue with the logic of denying bail to a defendant that is perceived to be dangerous. Preventive detention provides "increased safety to the public"[8] and combats fears that "pretrial releases . . . mean a greater amount of serious crime."[9] When the safety of the community is at risk, "it would be irresponsible judicial action to grant

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[*] Candidate for J.D., Baylor Law School, April 2007; B.A. in Political Science and English, *summa cum laude*, Texas Christian University, 2004. Upon graduation, the author will join Brackett & Ellis, P.C. in Fort Worth, TX.

[1] 481 U.S. 739 (1987).

[2] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3(a) (4th ed. 2004).

[3] For a sampling of the numerous law review articles that dealt with the subject of preventive detention prior to the *Salerno* decision, see Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 195 n.121 (1986).

[4] United States v. Foster, 79 F. Supp. 422, 423 (S.D.N.Y. 1948).

[5] Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (arguing that "[u]nless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). This judicial hostility was also evidenced in prosecutors' rare invocations of early statutory preventive detention schemes. *See* Schlesinger, *supra* note 3, at 189–90.

[6] Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 551 (1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *21).

[7] *Id.*

[8] Annotation, *Pretrial Preventive Detention by State Court*, 75 A.L.R.3d 956, 961 (1977 & Supp. 2006).

[9] LAFAVE, *supra* note 2, § 12.3(a), at 657.

bail."[10] Simply put, "sensible people usually do not allow murderers and highwaymen to roam among them."[11]

Echoing that sentiment, Texans have had a constitutionally authorized scheme for preventively detaining accused felons since 1956.[12] In November 2005, Texas voters added yet another dimension to that scheme by passing Proposition 4.[13] Proposition 4, which subsequently became article I, section 11b of the Texas Constitution, provides that a person accused of a felony that is released on bail may have his bail revoked or forfeited for a violation of a condition of release related to the safety of the victim or the safety of the community.[14]

The catalysts for the amendment were cases such as that of Michael Harris, a Jacksonville man "charged with burning down his ex-wife's house months after their divorce in 2003."[15] Mr. Harris was released on bail with the condition that he stay away from his ex-wife.[16] While out on bail, however, Mr. Harris was arrested for vandalizing his ex-wife's car and attacking her.[17] Prosecutors, realizing the danger that Mr. Harris presented

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[10] Carbo v. United States, 82 S. Ct. 662, 666 (1962) (Douglas, Cir. J.).

[11] Alschuler, *supra* note 6, at 556. Nor can it be said that such predictions run counter to the American justice system, for "judges already make predictions of future behavior when they set money bail, impose sentences, and approve parole." Schlesinger, *supra* note 3, at 198; *see also* Schall v. Martin, 467 U.S. 253, 278 (1984) (noting that predictions of future dangerousness "form[] an important element in many decisions").

[12] 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 16.164, at 350 (2d ed. 2001).

[13] Constitutional Amendments Search of the Legislative Reference Library of Texas, http://www.lrl.state.tx.us/legis/constAmends/amendmentDetails.cfm?amendmentID=617&article=1&sort=bill&section=11b (last visited Dec. 15, 2006).

[14] TEX. CONST. art. I, § 11b. Specifically, section 11b provides:

> Any person accused of a felony in this state who is released on bail pending trial and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial on a determination by a district judge in this state, at a subsequent hearing to set or reinstate bail, that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community.

Id.

[15] Maro Robbins, *Judicial Discipline, Bail Rule on Ballot*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 2005, at B-1, *available at* http://www.mysanantonio.com.

[16] Max B. Baker, *2003 Killing Inspires Proposition*, STAR-TELEGRAM, Nov. 4, 2005, at B1, *available at* http://www.dfw.com.

[17] Robbins, *supra* note 15, at B-1.

to his ex-wife, sought a hearing to revoke Mr. Harris's bond, but "before the hearing was held, Mr. Harris found and killed his ex-wife."[18] Though no one can be sure the mechanisms of section 11b would have saved Mrs. Harris's life, the hope of section 11b's proponents was that a presiding judge, under similar circumstances, would have had the authority to deny bail to such a violent offender.[19]

This Comment will analyze that authority as well as the implications of this new amendment to Texas law. In doing so, this Comment will first trace preventive detention from its English roots to its modern form in Texas. Then, it will analyze section 11b from a practical standpoint, contrasting section 11b with its earlier preventive detention counterpart, article I, section 11a of the Texas Constitution. Finally, the Comment will analyze section 11b from a constitutional standpoint, comparing section 11b to the parameters for preventive detention set forth by the United States Supreme Court in *Salerno*.[20] Such a comparison will, in turn, demonstrate that section 11b's departure from *Salerno*'s constitutional requirements renders the provision subject to challenge. This Comment, however, will also demonstrate that this challenge can be avoided through the judicial engrafting of simple procedural safeguards and will make recommendations accordingly.

II. THE HISTORY OF PREVENTIVE DETENTION

The right to bail has undergone numerous evolutions over the centuries. From its earliest days as a war tactic[21] to its modern incarnations in federal and state constitutions and statutes, the right to bail has developed from an almost universal right to release to a right where factors such as danger to

[18] *Id.*

[19] *See* HOUSE RESEARCH ORG., ALLOWING BAIL DENIAL TO DEFENDANTS VIOLATING CONDITIONS OF THEIR RELEASE 13 (2005), http://www.hro.house.state.tx.us/focus/prop79-4.pdf [hereinafter Constitutional Amendments] (stating that the amendment "could prove especially important in protecting victims of domestic violence" because "it is not uncommon for a defendant [in such cases], while free on bail, to be arrested for violating a restraining order after having threatened or harmed the victim").

[20] *See generally* United States v. Salerno, 481 U.S. 739 (1987).

[21] Daniel J. Smith, Comment, *The Constitutionality of Preventive Detention in Texas*, 40 BAYLOR L. REV. 467, 468 (1988). See William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–43 (1977) for a discussion of the history of bail in Anglo-Saxon code.

the community may be considered.[22] The right to bail in Texas law followed this pattern as well, transforming from a right in which bail may be denied only in capital offenses to one that is now subject to preventive detention schemes.[23]

A. Early History of the Right to Bail

Commentators have long argued that "inherent in the common law is a profound regard for a man's personal freedom."[24] This regard was reflected in the practices of the early English bail system.[25] Under this system, a defendant who was admitted to bail "almost invariably" was released by the English sheriffs who ran the program.[26] However, the broad discretion sheriffs had in granting bail led to abuses in the system.[27] To combat this problem, the English passed the Statute of Westminster I in 1275.[28] The statute limited the sheriffs' discretion by providing a statutorily authorized general right to bail: Bail was guaranteed for those charged with crimes "for which one ought not to lose life nor member" or charged with serious crimes when the accusation is based on "light suspicion."[29] This statute would become the "backbone of the law relating to pre-trial release."[30]

Early American law also incorporated this general right to bail. Most

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[22] *Compare infra* Part II.A *with infra* Part II.B.

[23] *See* discussion *infra* Part II.B.

[24] Duker, *supra* note 21, at 33.

[25] It should be noted, however, that while such a regard was reflected in the early bail system, the system was primarily designed to avoid the "costly and troublesome" nature of imprisoning the accused. *Id.* at 41–42 (citing 2 SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 584 (2d ed. 1898)). For a general discussion of the origins of the bail system, see generally Duker, *supra* note 21.

[26] *See* Alschuler, *supra* note 6, at 552–53. Under the early system of bail, a third party would vouch for the defendant to secure his release. FRANK W. MILLER, CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS 618–19 (5th ed. 2000). If the defendant failed to appear, the court required the payment of a sum of money. *Id.*; *see also* Smith, *supra* note 21, at 468–69.

[27] Alschuler, *supra* note 6, at 553; Duker, *supra* note 21, at 45.

[28] Duker, *supra* note 21, at 45–46.

[29] Alschuler, *supra* note 6, at 554–55 (quoting Statute of Westminster I, 3 Edw., ch. 15 (1275)). The statute, however, also provided that bail should be denied to "thieves openly defamed and known," formal confessors of felonies, and those implicated by admitted co-felons. *Id.*

[30] Duker, *supra* note 21, at 62.

states modeled their bail laws after the Pennsylvania Frame of Government of 1682,[31] which allowed that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident, or the presumption great."[32] At the federal level, this same general right to bail was recognized in the Judiciary Act of 1789.[33]

During this early period of American law, the state bail systems were used only "to ensure the appearance of the accused at trial."[34] By allowing this release in exchange for a guarantee of trial attendance, both the accused and the state were relieved of the burdens of imprisonment.[35] In terms of the accused, release enabled him "to better prepare his defense and to avoid any premature, and perhaps, unnecessary punishment."[36] Constitutional jurisprudence confirmed this policy.[37]

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[31] Alschuler, *supra* note 6, at 555–56. Forty states have adopted this formulation of the right to bail. *Id.* at 556 (citing New Jersey v. Konigsberg, 164 A.2d 740, 742 (N.J. 1960)).

[32] *Id.* at 555 (quoting PENNSYLVANIA FRAME OF GOVERNMENT art. XI (1682), *reprinted in* 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3061 (Francis Newton Thorpe ed., 1909)).

[33] The Judiciary Act of 1789 provided that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death." Judiciary Act of 1789, ch. XX, § 33, 1 Stat. 73, 91.

[34] Michael W. Youtt, Note, *The Effect of* Salerno v. United States *on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805, 806 (1988).

[35] Annotation, *supra* note 8, at 960.

[36] Mark Stevens, Comment, *Preventive Detention and Equal Protection of the Law in Texas*, 10 ST. MARY'S L.J. 133, 133 (1978) (citing Stack v. Boyle, 342 U.S. 1, 4 (1951)); *see also* United States v. Graewe, 689 F.2d 54, 57 (6th Cir. 1982) (per curiam). Additionally, pretrial detention can lead to loss of employment, social stigma, and unnecessary psychological stress for the accused. Schlesinger, *supra* note 3, at 176. For the state, "the direct economic costs of detaining the accused in jail, paying welfare benefits to his dependents, providing public defense counsel, and the loss of tax revenue from the defendant's wages are enormous." *Id.* at 178.

[37] *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 5 (1951) (the purpose of bail is the "assurance of the presence of an accused" at trial); Hudson v. Parker, 156 U.S. 277, 285 (1895) ("a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment"); United States v. Barber, 140 U.S. 164, 167 (1891) ("in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time"); *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) ("[a] recognizance of bail, in a criminal case is taken to secure the due attendance of the party accused"); United States

Despite the limited nature of the state's ability to detain one accused of a crime, some forms of preventive detention crept into the early bail system. English common law allowed the detention of "those who were suspected of planning crime unless they could find someone who would pledge to their good character."[38] Furthermore, Highmore's *Digest of the Doctrine of Bail* noted that English criminal law had departed from universal bail so "that the safety of the people should be preserved against the lawless depredations of atrocious offenders."[39] In America, the Massachusetts Body of Liberties of 1641 mandated that "[n]o man's person shall be . . . imprisoned . . . before the law hath sentenced him thereto, if he can put in sufficient security . . . for his appearance *and good behavior* in the meantime."[40] Additionally, if a court felt that a particular defendant was too dangerous to be released, it would often set bail at a rate beyond the means of the defendant.[41] This sub rosa method of preventive detention was "especially [common] in earlier days when there was almost exclusive reliance upon money bail and little opportunity for a defendant to obtain review of his bail setting."[42]

B. The History of Preventive Detention in Texas

The beginnings of modern preventive detention did not come into being

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v. Melendez-Carrion, 790 F.2d 984, 1001 (2d Cir. 1986) ("[t]he liberty protected under [the criminal justice] . . . system is premised on the accountability of free men and women for what they have done, not for what they may do").

[38] Smith, *supra* note 21, at 467 n.3 (citing ALAN M. DERSHOWITZ, ON PREVENTIVE DETENTION, CRIME, LAW, AND SOCIETY 307, 310 (Abraham S. Goldstein & Joseph Goldstein eds., 1971)).

[39] Alschuler, *supra* note 6, at 550 (1986) (quoting A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL, at vii (1783)). Highmore's treatise justified this departure as a necessary restriction resulting from "increasing corruption," swelling population, and an "influx of inhabitants from other countries." *Id.* at 569 n.173 (quoting A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL, at vii (1783)).

[40] *Id.* at 550 (quoting MASSACHUSETTS BODY OF LIBERTIES § 18 (1641), *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 37 (W. Whitmore ed., 1889)) (emphasis added; spelling and punctuation modernized).

[41] Smith, *supra* note 21, at 467.

[42] LAFAVE, *supra* note 2, § 12.3(a), at 657. The prevalence of such a practice, however, does not justify it. Not only does it violate the Excessive Bail Clause of the Constitution, it also "casts doubt on the honesty of the American criminal justice system and prevents the development of objective standards of dangerousness." Schlesinger, *supra* note 3, at 188.

until the mid-twentieth century.[43] During this time a bail reform movement was afoot with one side arguing for the elimination of money bail and the other side arguing for legislatively approved preventive detention.[44] Texas, following this trend, enacted its first preventive detention measure in 1956 when voters added article I, section 11a to the Texas Constitution.[45] The original language of the section, however, limited the denial of bail to persons accused of a non-capital felony who had two prior felony convictions.[46]

In 1977, Texas voters expanded the section to permit the denial of bail to persons who committed a felony while out on bail for a prior-indicted felony, as well as to convicted felons accused of a subsequent crime involving the use of a deadly weapon.[47] Further expansion followed in 1993 when voters approved an amendment to the section that allowed for the denial of bail to those accused of a violent or sexual offense committed while on community supervision or parole.[48]

In addition to its authorization for denial of bail in certain circumstances, section 11a also provided several procedural safeguards designed to assuage the fears of those that find preventive detention

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[43] *See* Annotation, *supra* note 8, at 961 n.5.

[44] *See generally* Sheldon Portman, *"To Detain or Not to Detain?"—A Review of the Background, Current Proposals, and Debate on Preventive Detention*, 10 SANTA CLARA L. REV. 224 (1970).

[45] DIX & DAWSON, *supra* note 12, § 16.164, at 350. While it is true that Texas already allowed for the denial of bail for persons accused of capital offenses under section 11 of the constitution, this was not considered a preventive detention measure, because such a denial has been a traditional category for the denial of bail and has been based on considerations of the defendant's flight prior to trial, not danger to the community. *See* LAFAVE, *supra* note 2, § 12.3(a), at 357. Under the same reasoning, this first provision of section 11a may have been "an attempt to restrain those defendants who were likely to flee" and not a true preventive detention measure. Smith, *supra* note 21, at 479 n.99.

[46] DIX & DAWSON, *supra* note 12, § 16.164, at 350.

[47] Stevens, *supra* note 36, at 138 (citing TEX. CONST. art. I, § 11a).

[48] DIX & DAWSON, *supra* note 12, § 16.207, at 367–68. Preventive detention in Texas was also expanded in 1993 by amending article 17.15 of the Texas Code of Criminal Procedure to provide that "[t]he future safety of a victim of the alleged offense and the community shall be considered" in setting the amount of bail. TEX. CRIM. PROC. CODE ANN. art. 17.15 (Vernon 2005 & Supp. 2006). Because the provision is not relevant for an analysis of section 11b, this Comment will not evaluate it. For further discussion of article 17.15, see DIX & DAWSON, *supra* note 12, § 16.56 (2001 & Supp. 2005).

"abhorrent to the American system of justice."[49] First, the accused is entitled to a hearing.[50] This hearing is to be conducted exclusively by the district court[51] and is governed by the Texas Rules of Evidence.[52] Second, the state must present "evidence substantially showing the guilt of the accused of the offense for which bail is to be denied."[53] There is no "yardstick" by which to define a substantial showing,[54] but such a showing is said to be greater than a mere "conclusory allegation that the defendant has been charged with another offense"[55] but less than a showing of beyond a reasonable doubt.[56] Third, defendants denied bail under section 11a are entitled to a trial within sixty days, or "the order denying bail shall be automatically set aside."[57] Fourth, orders to deny bail must be "issued within seven calendar days subsequent to the time of incarceration of the accused."[58] The time period begins on the day after arrest,[59] and the order must be written.[60] Finally, the defendant may directly appeal to the Court of Criminal Appeals from any order denying bail.[61] Such an appeal is to be given "preference."[62]

The state has the duty to show compliance with these procedural safeguards on appeal.[63] Further, even if these procedural safeguards are

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[49] Taylor v. State, 667 S.W.2d 149, 152 (Tex. Crim. App. 1984).

[50] TEX. CONST. art. I, § 11a.

[51] *Id.* (stating that the decision to deny bail is that of the "district judge"); *Ex parte* Moore, 594 S.W.2d 449, 451 (Tex. Crim. App. [Panel Op.] 1980).

[52] DIX & DAWSON, *supra* note 12, § 16.191, at 359; *Ex parte* Graves, 853 S.W.2d 701, 703–04 (Tex. App.—Houston [1st Dist] 1993, writ ref'd) (applying the Texas Rules of Criminal Evidence to hearing under art I, section 11 of the Texas Constitution).

[53] DIX & DAWSON, *supra* note 12, § 16.203, at 365 (citing TEX. CONST. art I, § 11a).

[54] *See* 1 BARRY P. HELFT & JOHN M. SCHMOLESKY, TEXAS CRIMINAL PRACTICE GUIDE § 12.02[3], at 13–14 (Frank Maloney & Marvin O. Teague eds., 2006).

[55] *Id.*

[56] *Ex parte* Moore, 594 S.W.2d at 452.

[57] TEX. CONST. art. I, § 11a.

[58] *Id.*

[59] Bills v. State, 796 S.W.2d 194, 195 (Tex. Crim. App. 1990).

[60] Westbrook v. State, 753 S.W.2d 158, 159–160 (Tex. Crim. App. 1988).

[61] TEX. CONST. art. I, § 11a. Because of the sixty-day time limit on orders denying bail, however, appeals sought after this period will be presumed moot. *See* Taylor v. State, 676 S.W.2d 135, 136 (Tex. Crim. App. 1984) (per curiam).

[62] *See* TEX. CONST. art. I, § 11a.

[63] Lee v. State, 683 S.W.2d 8, 9 (Tex. Crim. App. 1985).

met, the denial of bail is not automatic; rather, it is subject to the district judge's discretion.[64] Because "the general rule favors the allowance of bail,"[65] section 11a is "strictly construed in favor of bail."[66] Although Texas has allowed preventive detention since 1956, courts have held such detention to be a limited exception to "the general rule [that] favors the allowance of bail."[67]

III. ARTICLE I, SECTION 11B OF THE TEXAS CONSTITUTION

In November 2005, Texans voted overwhelmingly to add Proposition 4, the proposition which would become article I, section 11b, to Texas's preventive detention scheme.[68] Supporters of the amendment saw section 11b as closing a loophole in Texas law.[69] The loophole, according to the section's supporters, was article 17.40 of the Texas Code of Criminal Procedure.[70] Under article 17.40, the law that was in effect at the time of Mrs. Harris's murder, the magistrate had the authority to "impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community."[71] The magistrate also had the authority to "revoke" the defendant's bond if he found that a violation of such a condition had occurred.[72] The problem for section 11b supporters

[64] TEX. CONST. art. I, § 11a (stating that the accused "may be denied bail"); DIX & DAWSON, *supra* note 12, § 16.208.

[65] *Lee*, 683 S.W.2d at 9 (citing *Ex parte* Davis, 574 S.W.2d 166, 168 (Tex. Crim. App. [Panel Op.] 1978)).

[66] Westbrook v. State, 753 S.W.2d 158, 159 (Tex. Crim. App. 1988).

[67] *Lee*, 683 S.W.2d at 9 (citing *Ex parte Davis*, 574 S.W.2d at 168).

[68] The proposition passed with almost eighty-five percent of the vote. *See* Constitutional Amendments Search of the Legislative Reference Library of Texas, *supra* note 13. Final results of the vote had 1,813,290 Texans voting in favor of the amendment, and 322,168 voting against it. *Id.*

[69] Baker, *supra* note 16, at B1.

[70] *See* Constitutional Amendments, *supra* note 19, at 13. Specifically, supporters of section 11b argue that defendants "routinely are successful in obtaining release or reduced bail amounts" when a judge sets bail too high or not at all. *Id*. Setting tighter or different conditions for bond would also be ineffective "because these defendants already have demonstrated an inability to abide by the conditions of their previous release." *Id.*

[71] TEX. CRIM. PROC. CODE ANN. art. 17.40(a) (Vernon 2005 & Supp. 2006). Interestingly, the statute states that these conditions are "[t]o secure a defendant's attendance at trial." *Id*. The implication of this language is unclear. *See* DIX & DAWSON, *supra* note 12, § 16.76 (Supp. 2005).

[72] *See* TEX. CRIM. PROC. CODE ANN. art. 17.40(b) (Vernon 2005 & Supp. 2006). A court

was the meaning of "revoke" in article 17.40.[73] Though never defined by the article, "revoke" was believed by most courts and commentators to mean only the invalidation of previously set bail and not the complete denial of the right to bail.[74] Thus, a judge or magistrate may have been able to invalidate the bail of a violent offender such as Mr. Harris, but he would be powerless to completely deny it. The goal of section 11b was to remedy this problem.[75]

A. The Showing Required Under Section 11b

In order to deny bail to dangerous offenders such as Mr. Harris, section 11b requires its own unique showing. A showing to deny bail under the amendment requires proof of the following: 1) the defendant is accused of a felony in this state, 2) the defendant was released on bail pending trial for the felony, 3) the defendant, subsequent to his release, had his bail revoked or forfeited for a violation of a condition of release, and 4) the condition was "related to the safety of a victim of the alleged offense or the safety of the community."[76] The following sections will address each of these elements.

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must make such a finding "at a hearing limited to determining whether the defendant violated a condition of bond." *Id.*

[73] *See* Constitutional Amendments, *supra* note 19, at 13.

[74] *See*, *e.g.*, *Ex parte* Marcantoni, No. 14-03-00079-CR, 2003 WL 1887883, at *3 (Tex. App.—Houston [14th Dist.] Apr. 17, 2003, no pet.) (per curiam) (unreported mem. op.) (holding that a defendant who violates a condition of bond "is constitutionally entitled to a new bond in a reasonable amount"); Constitutional Amendments, *supra* note 19, at 13 (stating that "a defendant whose bond has been revoked still has a constitutional right to new and reasonable bail"); DIX & DAWSON, *supra* note 12, § 16.153 (2001 & Supp. 2005) (arguing that "[d]enial of bail completely has traditionally been regarded as a matter that must be explicitly authorized in [article I, sections 11 and 11a of] the Texas Constitution" and that "revoke" has the same meaning as the action authorized in article 17.09 of the Texas Code of Criminal Procedure—that is, a magistrate may order the accused to be rearrested and require that he give another bond).

[75] *See* Constitutional Amendments, *supra* note 19, at 13. Specifically, supporters of section 11b argue that defendants "routinely are successful in obtaining release or reduced bail amounts" when a judge sets bail too high or not at all. *Id.* Setting tighter or different conditions for bond would also be ineffective "because these defendants already have demonstrated an inability to abide by the conditions of their previous release." *Id.*

[76] TEX. CONST. art. I, § 11b.

1. The Defendant Is Accused of a Felony in This State

The requirement that a defendant be accused of a felony in this state is common to both sections 11a and 11b.[77] Section 11b, however, drops the requirement that the felony be one "less than capital,"[78] thus implying that capital offenses are included under this section. The purpose behind such a change is unclear, for under section 11 of the Texas Constitution, bail may already be denied for those accused of capital offenses without the requirement that a condition of bail must first be violated.[79] Section 11b appears to provide a mechanism for a judge to subsequently deny bail in the rare instances in which a person accused of a capital felony is released on bail.[80]

Section 11b does not specify what the state must show to prove that the defendant was accused of a felony, but jurisprudence under section 11a indicates that an accusation of a felony "require[s] at least arrest and incarceration."[81] Under section 11a, the state must demonstrate an "accusation, charge, or complaint was . . . filed"; mere proof of the felony was insufficient.[82] The choice to retain the same language of "accused" indicates that these same requirements were to remain intact under section 11b.

2. The Defendant Was Released on Bail Pending Trial for the Felony

Section 11a provides no direct guide on the requirement for this element of proof, and case law relating to section 11a indicates no special requirements for a showing of release of bail under the provision. It is unclear whether the state must provide mere proof of release or a formal order for bail.

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[77] *Id.* §§ 11a–11b.

[78] *See id.*

[79] *Id.* § 11.

[80] Because the language of section 11 indicates that the trial court has no discretion to refuse to deny bail once the state has met its burden of proof under the provision, the failure to deny bail in capital cases is rare. *See* DIX & DAWSON, *supra* note 12, § 16.175 (citing *Ex parte* Greer, 152 Tex. Crim. 513, 215 S.W.2d 630, 632 (1948)).

[81] Holloway v. State, 781 S.W.2d 605, 607 (Tex. Crim. App. 1989) (Clinton, J., concurring).

[82] Taylor v. State, 667 S.W.2d 149, 152 (Tex. Crim. App. 1984).

3. The Defendant, Subsequent to His Release, Had His Bail Revoked or Forfeited for a Violation of a Condition of Release

Section 11a provides no guidance on the requirement for this element of proof either, but the legislative history of section 11b indicates that it was based on article 17.40 of the Texas Code of Criminal Procedure.[83] Article 17.40 provides that a revocation of a defendant's bond must occur "[a]t a hearing" and "only if the magistrate finds by a preponderance of the evidence that the violation occurred."[84] Documentation of this finding should be sufficient to satisfy this element of proof.

4. The Condition Was Related to the Safety of a Victim of the Offense or to the Safety of the Community

Judges and magistrates have "quite general authorization" to place upon defendants bail conditions relating to the safety of the victim or the community.[85] Such a condition need only be "reasonable," "secure a defendant's attendance at trial," and "be related to the safety of the alleged victim or the community."[86] The Court of Criminal Appeals has never directly addressed what would not constitute such a condition,[87] but examples authorized elsewhere under Texas law include home confinement, electronic monitoring, and drug testing,[88] as well as prohibiting communication with the victim and restricting access to specific locations associated with the victim.[89] The danger in such a provision is that "'safety of the victim' or 'safety of the community' could be interpreted to include almost any circumstance—including technical violations such as failure to keep a job or pay a fee."[90]

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[83] *See* Constitutional Amendments, *supra* note 19, at 13.

[84] TEX. CRIM. PROC. CODE ANN. art. 17.40(b) (Vernon 2005).

[85] *See* DIX & DAWSON, *supra* note 12, § 16.76, at 324.

[86] *Ex parte* Anderer, 61 S.W.3d 398, 401–02 (Tex. Crim. App. 2001).

[87] The Court of Criminal Appeal's decision in *Ex parte* Anderer addressed reasonableness of conditions on bail pending appeal, not bail prior to trial. *Id.* at 402; *see also* DIX & DAWSON, *supra* note 12, § 16.76 (Supp. 2005).

[88] *See* TEX. CRIM. PROC. CODE ANN. art. 17.44 (Vernon 2005).

[89] *See id.* arts. 17.41(b) & 17.46(a).

[90] Constitutional Amendments, *supra* note 19, at 14. Advocates of the amendment argue, however, that such conditions "would not apply to a person accused of a misdemeanor, nor would it apply to an accused felon who committed a technical violation [such as] . . . a defendant who

B. Procedural Safeguards for the Denial of Bail Under Section 11b

Not only must the state make the showing required under section 11b, it must do so following the procedural safeguards of section 11b. In order to deny bail, section 11b requires that a hearing be conducted before a trial judge.[91] Because this requirement tracks the hearing language requirement of section 11a, the same rules for the hearing presumably apply.[92] The hearing is to be conducted exclusively by the district judge, and the Texas Rules of Evidence apply.[93] The validity of searches and seizures are not to be considered in the hearing,[94] and an order denying bail must be in writing to be valid.[95] Again, the decision to deny bail is at the discretion of the trial judge.[96]

The one change to this requirement is that the hearing must be subsequent to the revocation or forfeiture of bond.[97] The judge first revokes or forfeits the bond under article 17.40 of the Texas Code of Criminal Procedure; then, the trial judge must conduct a hearing to determine if the defendant violated a condition related to the safety of the alleged victim or community.[98]

In addition to the requirement that a hearing be held before bail may be denied, section 11b also implicitly provides for the right to appeal. Though not mentioned in the language of the amendment, legislative history states that in the event that bond is denied, "[t]he defendant . . . could appeal" the

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lost his job." *Id.*

[91] TEX. CONST. art. I, § 11b.

[92] *See* Constitutional Amendments, *supra* note 19, at 14 (noting that "[d]efendants described by Proposition 4—like those denied bail currently under the Constitution—would retain all their rights to due process and other protections" and citing the hearing requirement as an example of these rights).

[93] *See* discussion *supra* Part II.B.

[94] DIX & DAWSON, *supra* note 12, § 16.191 (citing Thain v. State, 721 S.W.2d 354, 356 n.1 (Tex. Crim. App. 1986)).

[95] Westbrook v. State, 753 S.W.2d 158, 159–60 (Tex. Crim. App. 1988).

[96] TEX. CONST. art. I, § 11b (stating that the accused "may be denied bail"); *see also supra* note 64 and accompanying text.

[97] TEX. CONST. art. I, § 11b. It is unclear what the implication of the addition of the "forfeited" language is; article 17.40, the provision that section 11b tracks, only mentions revocation. TEX. CRIM. PROC. CODE ANN. art. 17.40(b) (Vernon 2005).

[98] TEX. CONST. art. I, § 11b.

decision.[99] This procedural safeguard differs from the right to appeal found in section 11a, a difference that will be discussed further in the following section.

C. Distinctions Between Section 11b and Section 11a

Though section 11b does provide the defendant with a right to a hearing and a right to appeal, stark differences in the procedural safeguards provided by sections 11a and 11b exist. Section 11b was designed to function differently than Texas's earlier preventive detention provisions.[100] By adding another section to the constitution instead of amending section 11a, the framers of the provision were recognizing what they perceived to be "fundamental"[101] differences between the defendants described in section 11a and the defendants described in section 11b: The defendants in section 11b "already have been released on previous bond, have failed to abide by the conditions of that bond, have endangered the victim or community, and are being held not necessarily on a new felony or other criminal violation, but for a bond violation."[102]

In accordance with this articulated difference, the framers of section 11b omitted many of the procedural safeguards guaranteed to defendants under section 11a. To the framers of section 11b, the state should not be inconvenienced simply because a defendant could not follow certain conditions of his release.[103] One such example of a missing procedural safeguard is section 11b's right to appeal. Under section 11b, a defendant has a right to appeal,[104] but he no longer has a "specifically authorized [right to] interlocutory appeal" as he had under section 11a.[105] Instead, he must rely on a writ of habeas corpus in the district court.[106] Further, this right no longer provides for a guaranteed direct appeal to the Texas Court of Criminal Appeals.[107] Now, appeals take place in the courts of appeals.

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[99] Constitutional Amendments, *supra* note 19, at 14.

[100] *See id.*

[101] *See id.*

[102] *Id.*

[103] *See id.*

[104] *See* discussion *supra* Part III.B.

[105] DIX & DAWSON, *supra* note 12, § 16.193, at 361.

[106] *See* 38 TEX. JUR. 3d *Extraordinary Writs* § 75 (1998 & Supp. 2006).

[107] TEX. CONST. art. I, § 11b; *see also* discussion *supra* Part II.B.

This right to appeal is more akin to the right of appeal under section 11 of the Texas Constitution, the section that provides for the denial of bail in capital cases, since both provisions lack specific authorization for appeal.[108] Accordingly, a defendant may analogize an order to deny bail under section 11b to that of section 11. Under section 11, an appellate court must give weight to the decision of the district judge hearing the habeas corpus application and must review the decision to deny bail under the "insufficient evidence" standard.[109] By analogy, an appellate court must follow the same standards under section 11b.

Another procedural safeguard absent from section 11b is the requirement of "evidence substantially showing the guilt of the accused."[110] The accused may be detained on some lesser showing of guilt; what that showing may be is unspecified as of yet. This unspecified showing of guilt in section 11b may not be analogized to section 11's showing of guilt because, unlike the above comparison between section 11 and section 11b where both sections failed to provide for appeals provisions, the showing of guilt is not similarly unspecified in both section 11 and section 11b. Rather, where section 11b fails to specify a proof standard, section 11 specifically states that courts are to follow an "evident" proof standard.[111] Thus, section 11 has a constitutionally-mandated showing of guilt while section 11b does not, making any analogies between their showings of guilt unsustainable. Although this lack of an analogy makes section 11b's required showing of guilt unclear, the section's placement apart from the other bail sections indicates that its framers intended its showing to be a lesser one than the one required in section 11a,[112] a change that raises concerns among critics of the amendment that "[i]nnocent persons may be detained unnecessarily

[108] *See* TEX. CONST. art. I, § 11.

[109] *See* DIX & DAWSON, *supra* note 12, § 16.173 (2001 & Supp. 2005).

[110] *See* TEX. CONST. art. I, § 11a; *see also* discussion *supra* Part II.B.

[111] *See* TEX. CONST. art. I, § 11 (stating that bail may be denied for capital felonies "when the proof is evident").

[112] *See* Constitutional Amendments, *supra* note 19, at 15. The House Research Organization report states that "[b]y adding a new section to the Constitution, instead of amending the current list of exceptions, the proposed amendment would not require that there be presentation of 'evidence substantially showing the guilt of the accused' in order to deny bail." *Id*. The report indicates that the section's opponents believe section 11b should use either the substantial evidence standard or "another high standard" and not the intended lesser standard. *See id.*

and unfairly."[113]

A third missing procedural safeguard is section 11a's requirement that orders to deny bail must be "issued within seven calendar days subsequent to the time of incarceration of the accused."[114] Section 11b contains no such requirement.[115] Retaining the exact language of this requirement would be impractical for denials of bail for violations of bail conditions related to the safety of the victim or the community since such a violation would most often occur seven days subsequent to the defendant's original incarceration. Thus, if the section 11a language were retained, denying bail under section 11b would almost always be impossible since the order to do so would necessarily have to be issued more than seven days subsequent to the accused's original incarceration. The problem with section 11b, however, is that it contains no time frame for a decision whatsoever.[116] A defendant detained for violating a condition of his parole related to the safety of the victim or the community could not only be held longer than seven days subsequent to his original incarceration but also longer than seven days subsequent to the latter detention before an order that actually denies his bail is issued. Under section 11b, a Texas judge has no time constraint for issuing this bail denial order.

The final missing procedural safeguard is the absence of section 11a's speedy trial provision. Under section 11a, a defendant could only be preventively detained for sixty days prior to trial or the order denying bail would be set aside.[117] Under section 11b, no time limit exists for pretrial detention.[118]

D. The Constitutionality of Section 11b

Finally, no analysis of the new preventive detention provision would be complete without evaluating its constitutionality under the standards set

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[113] TEX. LEGIS. COUNCIL, ANALYSES OF PROPOSED CONSTITUTIONAL AMENDMENTS 30 (2005), http://www.lrl.state.tx.us/scanned/Constitutional_Amendments/amendments79_tlc_2005-11-08.pdf.

[114] TEX. CONST. art. I, § 11a; *see also* discussion *supra* Part II.B.

[115] *See* TEX. CONST. art. I, § 11b.

[116] *Id.*

[117] *Id.* § 11a; *see also* discussion *supra* Part II.B.

[118] TEX. CONST. art. I, § 11b.

forth by the United States Supreme Court in *United States v. Salerno*.[119] In *Salerno*, the government charged two officers of the Genovese crime family with various racketeering, fraud, extortion, and gambling violations.[120] The government preventively detained the officers pursuant to the Federal Bail Reform Act of 1984 (FBRA).[121] The FBRA statutorily provided nationwide federal preventive detention for the first time,[122] allowing federal judges to deny bail when "no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community*."[123] In *Salerno*, the officers challenged the constitutionality of the act, arguing that the FBRA, by allowing for preventive detention, violated their due process rights.[124] Specifically, the officers argued the FBRA violated substantive due process by allowing for "impermissible punishment before trial,"[125] and that the statute violated procedural due process because its procedures weighed in favor of detention under the *Matthews v. Eldridge* test.[126] The Court rejected these arguments,

[119] *See generally* 481 U.S. 739 (1987).

[120] *Id.* at 743.

[121] *Id.* Specifically, the officers were detained pursuant to 18 U.S.C. § 3142(e) (Supp. III 1985) (current version at 18 U.S.C. § 3142(e) (Supp. IV 2004)).

[122] Michael Harwin, Note, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1094 (1993).

[123] 18 U.S.C. § 3142(e) (Supp. III 1985) (current version at 18 U.S.C. § 3142(e) (Supp. IV 2004)).

[124] 481 U.S. at 746. Respondents also brought forth an additional substantive due process argument and an Eighth Amendment Excessive Bail Clause argument. *Id.* Regarding the substantive due process argument, Respondents argued that due process "erect[s] an impenetrable 'wall'" against preventive detention in general. *Id*. at 748. This argument was dismissed by the Court's reference to "the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction." *Id.* at 749; *see also* Smith, *supra* note 21, at 473–75. Regarding the Excessive Bail Clause, Respondents argued that the Eighth Amendment required a determination of bail based only upon considerations of flight. *Salerno*, 481 U.S. at 752. The Court rejected this argument as well, stating that "[t]he only . . . limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." *Id.* at 754. The Bail Clause does not, however, limit "considerations [of bail] solely to questions of flight." *Id.* Because these arguments were summarily dismissed in *Salerno*, they will not be evaluated as challenges to section 11b.

[125] *Id.* at 746. For additional discussion of the challenges brought forth in *Salerno*, see Smith, *supra* note 21, at 472–78.

[126] Brief for Respondent at 46–47, United States v. Salerno, 481 U.S. 739 (1987) (No. 86-87).

though, and upheld the facial validity of the FBRA.[127]

Importantly, the Court, in upholding the FBRA, emphasized that the constitutionality of the FBRA's preventive scheme hinged on the particular procedural safeguards guaranteed by it.[128] This emphasis on procedural safeguards, in turn, suggested the minimum procedural safeguards that other preventive detention provisions must guarantee, effectively creating a template by which to evaluate the procedural and substantive due process permissibility of other preventive detention provisions.[129] It is under this template that the constitutionality of Texas's preventive scheme may be subject to challenge,[130] and it is under this template that the constitutionality of section 11b must be evaluated.[131]

1. The *Salerno* Substantive Due Process Template and Section 11b

In terms of substantive due process, the *Salerno* decision "provide[s] an effective tool with which to test the substantive due process validity of other preventive detention statutes."[132] Section 11b is no exception to this

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[127] *Salerno*, 481 U.S. at 755.

[128] *Id.* (stating that the FBRA's "provisions . . . fall within [the] carefully limited exception" for preventive detention given its limited scope and "numerous procedural safeguards").

[129] *See* Youtt, *supra* note 34, at 810 (stating that the *Salerno* decision sent a message "to those states which currently have preventive detention legislation . . . that all such legislation must contain certain minimum statutory provisions protecting the substantive and procedural due process rights of the detainee"); Smith, *supra* note 21, at 479–85 (analyzing article I, section 11b of the Texas Constitution under the holding set forth in *Salerno*).

[130] *See* DIX & DAWSON, *supra* note 12, § 16.165; Smith, *supra* note 21, at 479–85.

[131] Some may argue, however, that because *Salerno* did not address "the constitutionality of statutes that only allow the preventive detention of individuals . . . who were on pre-trial release . . . when the alleged [bail-denying] acts were committed," its procedural safeguard template would not apply to such a statute. Youtt, *supra* note 34, at 825. Such an argument would be compelling especially if it is assumed that the government would have a heightened interest "in detaining repeat criminal offenders . . . because such individuals pose a statistically greater danger to the community." *Id.* at 826. Such an assumption, however, does not apply to an offender detained for a violation committed while on pretrial release, for "[t]he only difference between an individual detained solely because he was on a pretrial release and any other individual suitable for preventive detention is that the former has been accused twice rather than once." *Id.* Thus, the increasing danger rationale would be inapplicable to a provision such as section 11b, and *Salerno*'s procedural safeguard template would continue to be applicable.

[132] *Id.* at 821.

statement. The Court, in addressing the substantive due process challenge in *Salerno*, first noted that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment";[133] rather, detention may be permissible if it is regulatory and not punitive in nature.[134] The Court then established a three-part test for determining whether a detention is a permissible regulatory detention or an impermissible punitive detention.[135] First, the Court must look to legislative history of the statute to determine if the legislature intended to impose punitive restrictions.[136] If the statute is not punitive, the Court then must determine whether the legislature could rationally have intended to have a purpose other than punishment.[137] Finally, if the legislature could have intended another purpose, the Court must then determine if the statute "appears excessive in relation to th[at] [other] purpose."[138]

Applying this test to section 11b reveals that it may be vulnerable to a facial substantive due process attack. Section 11b passes the test's first prong that the drafters did not intend to impose punitive restrictions. The legislative history reveals that the motivation behind the detention was to protect the victim of the alleged offense or the community from the propensities of violent offenders who are out on bail; it was not to punish those offenders.[139] Section 11b passes the test's second prong as well. The drafters rationally intended that section 11b have the same non-punitive purpose as the FBRA: "preventing danger to the community" that results from crimes committed while on release.[140]

The difficulty arises in the test's third prong that the statute must not appear excessive in relation to its preventive detention purpose. In *Salerno*, the Court determined that the FBRA met this requirement, but in doing so,

[133] *Salerno*, 481 U.S. at 746–47 (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)).

[134] *Id.* at 746.

[135] *Id.* at 747; *see also* Schall v. Martin, 467 U.S. 253, 269 (1984).

[136] *Salerno*, 481 U.S. at 747.

[137] *Id.*

[138] *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1962) (internal quotation marks omitted)).

[139] Constitutional Amendments, *supra* note 19, at 14 (noting the importance of Proposition 4 in "protecting victims of domestic violence"); *see also* discussion of Mrs. Harris's murder *supra* Parts I, III.

[140] *Salerno*, 481 U.S. at 747.

it emphasized certain procedural safeguards found in the FBRA.[141] First, the FBRA "carefully limits the circumstances under which detention may be sought to the most serious of crimes."[142] Second, the FBRA entitles an arrestee to a "prompt detention hearing."[143] Third, any detention under the FBRA is "limited by the stringent time limitations of the Speedy Trial Act."[144] Finally, the FBRA provides for separate facilities for those detained under its provisions.[145]

These safeguards are missing from section 11b. Section 11b has no provisions for a prompt detention hearing or a speedy trial.[146] Nor does it contain any requirement for separate housing facilities.[147] At best, section 11b limits its application to a narrow set of circumstances: the violation of a bail condition by an individual released on bail and accused of a felony.[148] Section 11b is arguably limited to only the most serious crimes, too, because the violated bail condition must be "related to the safety of a victim of the alleged offense or to the safety of the community."[149] In fact, even the critics of section 11b admit the narrow nature of the problem.[150]

This argument, however, may present problems to its constitutionality given the broad nature of the conditions that may fulfill this requirement,[151] conditions that may even "includ[e] technical violations such as failure to

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[141] *Id.* at 747–48.

[142] *Id.* at 747 (citing 18 U.S.C. § 3142(f) (Supp. III 1985) (current version at 18 U.S.C. § 3142(f) (2000 & Supp. IV 2004))). The court, in a parenthetical following its statement, notes that these crimes include "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 748.

[146] *See* TEX. CONST. art. I, § 11b. Such provisions, however, are present in section 11a. *Id.* § 11a (mandating the issuance of an order denying bail within seven days of detention as well as placing a sixty-day limit on the detention). Nevertheless, the addition of even these procedural safeguards may not be sufficient to save section 11a from substantive attack. *See* DIX & DAWSON, *supra* note 12, § 16.165; Smith, *supra* note 21, at 480–81.

[147] *See* TEX. CONST. art. I, § 11b.

[148] *Id.*

[149] *Id.*

[150] *See* Constitutional Amendments, *supra* note 19, at 14 (noting critics' complaints that the amendment applies to a "very limited" problem).

[151] *See supra* Part III.A.4.

keep a job or pay a fee."[152] At any rate, the conditions' broad nature may subject section 11b to an as-applied challenge in instances where judges deny bail for violation of a condition that was not of the requisite seriousness. In such a case, a court would be ignoring *Salerno*'s suggestion "that federal due process considerations may entitle a defendant to a focused inquiry into, and a determination of, whether he *specifically* presents an adequate threat to the relevant interests to justify pretrial detention."[153] This lack of a focused inquiry would be especially subject to challenge if "[a] judge could set different, more restrictive, conditions on the new bond using the concepts of progressive sanctions and supervision strategies to better protect the victim and the community."[154] For instance, the denial of bail may be inappropriate for a defendant who violated a restraining order when the safety of victim or the community could just as easily have been protected by placing that defendant under house arrest or under electronic monitoring. Thus, under the right circumstances, the broad circumstances that may constitute a condition related to the safety of the victim or the safety of the community may render section 11b unconstitutional.

2. The *Salerno* Procedural Due Process Template and Section 11b

In terms of procedural due process, the Court's reliance on the FBRA's procedural safeguards in its constitutionality analysis sets forth a set of protections that will be sufficient to comply with procedural due process.[155] Noting its assertion in *Schall v. Martin* that "there is nothing inherently unattainable about a prediction of future criminal conduct," the Court stated that for the FBRA's procedures to survive a procedural due process

[152] Constitutional Amendments, *supra* note 19, at 14.

[153] DIX & DAWSON, *supra* note 12, § 16.165 (emphasis added).

[154] Constitutional Amendments, *supra* note 19, at 15.

[155] At least one analysis of *Salerno* has stated that the case "implicitly sets forth minimum . . . protections that preventive detention legislation must contain to satisfy constitutional scrutiny." Youtt, *supra* note 34, at 821. Importantly, however, such an analysis overlooks the fact that the *Salerno* decision stated that less sufficient procedures were found sufficient in *Schall v. Martin* and *Gerstein v. Pugh.* United States v. Salerno, 481 U.S. 739, 752 (1987). Indeed, the court never explicitly established the minimum procedural safeguards to comply with procedural due process requirements. Smith, *supra* note 21, at 477. Nevertheless, *Salerno*'s parameters set forth an important guide for complying with procedural due process.

challenge, they need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes."[156] The Court found these procedures more than accurate: In fact, the Court stated that the procedures were "specifically designed to further the accuracy of th[e] determination" of future dangerousness.[157] In particular, the FBRA procedures noted by the Court include the "[d]etainee's . . . right to counsel at the detention hearing,"[158] the detainee's right to testify on his or her own behalf;[159] and the detainee's right to "present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing."[160] The judicial officer overseeing the detention hearing, who has the responsibility to determine whether detention is suitable, relies on factors set out by statute, including, "the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community."[161] Additionally, the government's burden of proof is clear and convincing evidence, while the judicial officer must provide "written findings of fact and a written statement of reasons for a decision to detain."[162] Finally, "[t]he Act's review provisions . . . provide for immediate appellate review of the detention decision."[163]

The Court found these procedures to be sufficient to survive procedural due process requirements.[164] Overall, the procedures elaborated "suggest[] that . . . a defendant [may be entitled] to a focused inquiry into, and a determination of, whether he specifically presents an adequate threat to the

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[156] *Salerno*, 481 U.S. at 751 (quoting Schall v. Martin, 467 U.S. 253, 264 (1984) (internal quotation marks omitted)).

[157] *Id.*

[158] *Id.* (citing 18 U.S.C. § 3142(f) (Supp. III 1985) (current version at 18 U.S.C. § 3142(f) (2000 & Supp. IV 2004))).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 751–52 (citing 18 U.S.C. § 3142(g) (Supp. III 1985) (current version at 18 U.S.C. § 3142(g) (2000 & Supp. IV 2004))).

[162] *Id.* at 752 (citing 18 U.S.C. § 3142(i) (Supp. III 1985) (current version at 18 U.S.C. § 3142(i) (2000))).

[163] *Id.* (citing 18 U.S.C. § 3145(c) (Supp. III 1985) (current version at 18 U.S.C. § 3145(c) (2000))).

[164] *Id.*

relevant interests to justify pretrial detention."[165]

Again, section 11b lacks these procedural safeguards. In fact, the only procedural safeguards found in section 11b are the right to a hearing and the right to appeal.[166] Supporters of the amendment state that this right to a hearing is sufficient to "protect[] the due process rights of the accused,"[167] and to be sure, defendants denied bail under section 11b are entitled to a hearing conducted by a district judge and pursuant to the Texas Rules of Evidence and have a right to a written order from the judge denying bail.[168] Such an argument, however, overlooks such vital procedural safeguards as the clear and convincing evidence standard and the statutorily enumerated factors for determining the appropriateness of detention. This argument is further diluted by the fact that some construe the provision to effectively deny the judge any discretion in making the decision to deny bail,[169] effectively eliminating any focused inquiry into the defendant's dangerousness.[170] Finally, at least one evaluation of section 11a of the Texas Constitution has determined that it violates procedural due process,[171] a prospect that does not bode well for section 11b given its jettisoning of what few procedural safeguards 11a had to offer.[172] Thus, section 11b may not survive a procedural due process attack.[173]

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[165] DIX & DAWSON, *supra* note 12, § 16.165; *see also* Smith, *supra* note 21, at 482–484 (applying the procedural due process test of Matthews v. Eldridge, 424 U.S. 319, 335 (1976), to article I, section 11a of the Texas Constitution and determining that the section unconstitutionally denies the defendant the individualized determination of his danger to society to which the defendant is entitled).

[166] TEX. CONST. art. I, § 11b.

[167] TEX. LEGIS. COUNCIL, *supra* note 113, at 30.

[168] *See supra* Part III.B.

[169] *See* DIX & DAWSON, *supra* note 12, § 16.165; *see also* Constitutional Amendments, *supra* note 19, at 14 (acknowledging critics' fears that "[b]ecause judges must stand for reelection, they could feel pressure to deny bail to most or all accused felons who violate conditions of a previous bond" and "could use the [amendment's] broad cover . . . to abdicate their responsibilities to evaluate individual cases").

[170] Though this argument, according to supporters of section 11b, "really is an objection to Texas' system of elected judges" and not the particulars of section 11b, Constitutional Amendments, *supra* note 19, at 14, it nevertheless may also be a basis for an as applied procedural due process challenge to the denial of bail.

[171] Smith, *supra* note 21, at 482–84.

[172] *See supra* Part III.C.

[173] The one argument that might save section 11b is that, due to the narrow nature of section

3. Solutions to Section 11b's Conflicts with Constitutional Due Process Requirements

Fortunately, even if section 11b is subject to due process attack, the addition of certain minor procedural safeguards could fortify it against judicial scrutiny.[174] First, the procedural safeguards missing from section 11b but present in section 11a should be added to section 11b. These provisions include the substantial showing of guilt standard, the seven-day order provision, the provision limiting detention to sixty days, and the provision for appeal directly to the Texas Court of Criminal Appeals.[175] Such requirements "further ensure the protection of the arrestee's substantive rights,"[176] and since they are already part of the requirements for section 11a, they would require little additional judicial resources. Second, "[t]o the extent practicable, detained defendants should be housed in facilities separate from those which house convicted persons serving sentences."[177] Third, and perhaps most importantly, the provision should be "construed so as to permit or require, once the required showings were made, that the trial judge proceed to a case-specific inquiry as to whether the defendant . . . presents a high enough risk of a sufficient sort to justify denial of bail."[178] Such a requirement would match FBRA's requirement

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11b's application, the defendant does, in fact, receive a focused inquiry into the danger he presents to the community. TEX. CONST. art. I, § 11b. In other words, the odds of a particular defendant falling under the provision of section 11b are so small that by falling into this category, the defendant is receiving, in essence, an individualized determination of dangerousness. *See* Constitutional Amendments, *supra* note 19, at 13 (characterizing section 11b as "narrowly tailored"). Though there may be credence to such an argument for the provisions of section 11a, it is not applicable to section 11b because of the broad nature of what may constitute a condition "related to the safety of the victim of the alleged offense or to the safety of the community." *See supra* Part III.A.4.

[174] *See* Youtt, *supra* note 34, at 832–33 (stating that "the inclusion of additional provisions further protecting the due process rights of the arrestee will . . . better allow the state [preventive detention] provision to survive case-by-case constitutional scrutiny").

[175] TEX. CONST. art. I, § 11a.

[176] *See* Youtt, *supra* note 34, at 833–35 (listing such safeguards as suggested changes to states' preventive detention provisions).

[177] Schlesinger, *supra* note 3, at 194.

[178] DIX & DAWSON, *supra* note 12, § 16.165; *see also* Schlesinger, *supra* note 3, at 193 (recommending a judicial determination of "the degree of the defendant's dangerousness"); Stevens, *supra* note 36, at 146 (remarking that "[c]ommon to the other systems is the requirement that the bail applicant be determined *presently dangerous* before he is denied bail").

that certain factors be considered in accessing the danger an individual defendant presents to a victim or the community[179] as well as assuage fears that the lack of individualized inquiry under the Texas preventive detention scheme results in "non-dangerous persons . . . being detained [ostensibly] to protect the safety of the community."[180] Further, these additions need not come through the conduit of an additional constitutional amendment; rather, they may be judicially engrafted by Texas courts.[181]

IV. CONCLUSION

Ultimately, however, due process concerns are not at the forefront of voters' minds when new constitutional amendments are voted upon. After all, the average citizen has a tough time mustering sympathy for the "not very nice people" whose controversies have frequently given rise to new safeguards of liberty.[182] Instead, the motivation behind passing amendments such as section 11b is instances such as Mrs. Harris's murder, a tragic homicide committed by a man who undoubtedly should not have been free on bail.[183] And perhaps section 11b could have saved Mrs. Harris's life if prosecutors had had enough time to seek the denial of bail. Certainly, the prevention of such a murder is a laudable goal.

Nevertheless, such a murder may not be prevented if the procedures for denying bail under section 11b are not understood. Section 11b's requirements of proof and procedural mechanisms are different from any other Texas preventive detention provision. Nor may such a murder have been prevented if section 11b is subject to constitutional attack, a possibility that cannot be dismissed given the section's departure from both the procedural safeguards outlined under *Salerno* and provided by section 11a. Section 11b, though, is a first step to stopping such murders. Whether or not it will succeed remains to be seen.

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[179] 18 U.S.C. § 3142(g) (2000 & Supp. IV 2004).

[180] Smith, *supra* note 21, at 486.

[181] *See* DIX & DAWSON, *supra* note 12, § 16.165 n.3 (citing Brill v. Gurich, 965 P.2d 404, 407–09 (Okla. Crim. App. 1998)). *Brill* was an Oklahoma Court of Criminal Appeals case that "adopted a variety of requirements to implement the state's constitutional authorization for denial of bail." *Id.*

[182] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

[183] Baker, *supra* note 16, at B1. *See also* discussion of Mrs. Harris's murder *supra* Part I.