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## What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail

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### Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law. I would like to thank my faculty advisor, Professor John Pfaff, for his brilliant insight and guidance, Carla Pasquale for showing me the ropes, Research Librarian Larry Abraham for his endless patience, and my family for their feedback and support.

# WHAT THE RIGHT HAND GIVES: PROHIBITIVE INTERPRETATIONS OF THE STATE CONSTITUTIONAL RIGHT TO BAIL

*Ariana Lindermayer\**

*Most state constitutions include a right-to-bail provision, commonly phrased, “All persons shall be bailable by sufficient sureties except for [certain offenses] when the proof of guilt is evident or the presumption great.” This Note examines conflicting interpretations of the effect this provision has on the cases excluded from its guarantee—specifically, certain offenses when the proof is evident or presumption great. Some courts read this provision to be silent regarding the excepted cases, allowing the legislature and judiciary to decide whether to permit bail. Others reason that the plain language of this right to bail is prohibitive with respect to the excepted cases even if the court concludes that the accused does not pose a risk of flight or danger. This Note concludes that the grammatical structure and history of this provision support the former, permissive interpretation. It further warns against reducing the standard for denial of bail to the strength of the proof of guilt alone, arguing that the bail decision should reflect the purposes of bail—to ensure the accused’s presence at trial and safety of the community—lest the practice venture into the dangerous territory of preconviction punishment.*

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## INTRODUCTION

Jeffrey Browne, a Virgin Islands police officer on sick leave, was arrested after a drive-by shooting in a small housing community on Christmas morning left two dead and four wounded.<sup>1</sup> Under the Virgin Islands statute, he would be presumptively eligible for bail, unless the government could show he posed a risk of flight or danger to the community.<sup>2</sup> The statute specified several factors for the court to consider in making its determination, including his family ties, employment, financial resources, character, and length of residence in the community.<sup>3</sup> Born and raised on St. Croix, home to his family, Browne had served on the police force for six years.<sup>4</sup> At his bail hearing, several residents of the island testified to his good character and strong community ties.<sup>5</sup> His parents offered to act as his third-party custodians and to post two parcels of property as bail.<sup>6</sup> Browne was also willing to surrender his passport and submit to home detention and electronic monitoring.<sup>7</sup>

Unfortunately for Browne, he faced two counts of first-degree murder because these homicides occurred during the commission of a first-degree assault.<sup>8</sup> As a result, if the prosecution had a strong enough case at the outset, conditional release under the territorial statute simply would not be an option.<sup>9</sup> The trial court would be obligated to detain Browne, even if satisfied that, if released, he would appear at trial and pose no threat to the public.<sup>10</sup> Tying the court's hands would be the strangest of culprits—the right-to-bail provision in the Virgin Islands' de facto constitution, the Revised Organic Act.<sup>11</sup>

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1. *Browne v. People*, No. 2008-022, 2008 V.I. Supreme LEXIS 33, at \*3 (Aug. 29, 2008).

2. The Virgin Islands Code provides for pretrial detention of a person charged with a dangerous crime, including first-degree murder, only if the government shows that "there is no one condition or combination of conditions which will reasonably assure the safety of the community or . . . that the person charged will appear for trial." V.I. CODE ANN. tit. 5, § 3504a(a)(1) (1982).

3. *Id.*

4. Fiona Stokes-Giffit, *Family Outraged When Court Closes Hearing on Christmas Day Murders*, V.I. DAILY NEWS, Jan. 3, 2008, at 9, available at [http://www.virginislandsdailynews.com/index.pl/article\\_home?id=17619082](http://www.virginislandsdailynews.com/index.pl/article_home?id=17619082).

5. *Browne*, 2008 V.I. Supreme LEXIS 33, at \*5.

6. *Id.*

7. *Id.*

8. *Id.* at \*3, \*45.

9. *Id.* at \*9.

10. The court ultimately remanded the case to determine whether the government met its burden of proof that Browne's guilt was evident or the presumption thereof great. *Id.* at \*49.

11. Congress passed the Revised Organic Act in 1954, and later amended it in 1984. Pub. L. No. 83-517, 68 Stat. 497 (codified as amended at 48 U.S.C. § 1561 (2006)); Pub. L. No. 98-454, 98 Stat. 1737 (codified at 48 U.S.C. § 1561 (2006)). The people of the Virgin Islands cannot amend the Organic Act, although courts refer to it as the "unofficial

Section 3 of the Revised Organic Act, titled "Rights and Prohibitions," reads, "All persons shall be bailable by sufficient sureties . . . , except for first-degree murder or any capital offense when the proof is evident or the presumption great."<sup>12</sup> In *Browne v. People*,<sup>13</sup> the Supreme Court of the Virgin Islands interpreted this right-to-bail provision to prohibit bail for defendants charged with first-degree murder when the proof is evident.<sup>14</sup> Read this way, the provision preempted the legislature's ability to set guidelines for bail in exceptional cases where less restrictive conditions would still ensure the defendant's presence at trial and the safety of the community.<sup>15</sup> In essence, the court shifted the focus of the conversation. The strength of the evidence went from being one of many factors for the court to consider in deciding whether the defendant poses a flight risk or danger, to being the sole determinant in the bail decision for capital defendants. Even though the right-to-bail provision guarantees the people a right that did not exist before, as a result of the Virgin Islands Supreme Court's interpretation, when the proof is evident, capital defendants lose their opportunity for bail.

At the heart of the *Browne* case is the effect of the right-to-bail provision on legislative and judicial discretion to determine whether bail is ever appropriate in the cases excluded from its guarantee. Alabama, California, Florida, Maine, Mississippi, Nevada, North Dakota, Oklahoma, Rhode Island, South Dakota, and Vermont have read their constitutions to leave room for either the legislature or the court to determine whether to allow bail in the excepted cases.<sup>16</sup> Arizona, Colorado, and Pennsylvania, on the other hand, join the Virgin Islands in holding that nearly identical provisions preclude this possibility, prohibiting bail for certain defendants when the proof is evident or the presumption great.<sup>17</sup>

To be sure, it is unusual for a judge to make an evidentiary finding against a defendant, determining that the proof of guilt is evident, and yet still feel compelled to grant bail.<sup>18</sup> When this situation does occur,

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constitution." *People v. Dowdye*, 48 V.I. 47, 56 (Super. Ct. 2006). Representatives of the people of the Virgin Islands are currently drafting a constitution for the territory. Susan Mann, *Final USVI Constitution Draft Sent to Government House*, CARIBBEAN NET NEWS, June 5, 2009, <http://www.caribdaily.com/article/167971/final-usvi-constitution-draft-sent-to-government-house/>.

12. Revised Organic Act § 3, 48 U.S.C. § 1561 (2006).

13. 2008 V.I. Supreme LEXIS 33.

14. *Id.* at \*9.

15. *Id.* \*29–30.

16. *See infra* Part II.A.1–II.A.11.

17. *See infra* Part II.B.1–II.B.4.

18. *See People v. Dist. Court*, 529 P.2d 1335, 1336 (Colo. 1974) (en banc) ("It occurs to us that it must be a rare instance when a court admits a defendant to bail in a capital case after making evidentiary finding adverse to the defendant. Most of the cases appear to be concerned with a matter in which some discretion is vested in the trial judge—the finding whether proof is evident or the presumption great.").

however, mandatory detention would have enormous implications for the defendant, depriving him of liberty before judgment, and hindering his ability to assist in his own defense.<sup>19</sup> This question is also deeply relevant to society at large, forcing us to reevaluate basic assumptions about state bail law in light of fundamental principles of justice, such as separation of powers and the presumption of innocence.

Part I of this Note discusses the history of this ambiguous state right to bail, including the common-law bail system out of which it emerged. It ends with a state-by-state analysis of the intersecting constitutional provisions, penal statutes, and case law, to determine in how many jurisdictions this question is relevant. Part II first organizes the jurisdictions whose courts have addressed this conflict into two categories: those that have clearly stated, in holding or dicta, that the constitutional provision is discretionary; and those that have clearly stated, in holding or dicta, that the constitutional provision is prohibitive. Part II then examines a third category of opinions that seem to assume one of these interpretations but do not consider the alternative, as well as the implications of recent state constitutional amendments on the present conflict. Part III argues that the right-to-bail provision preserves the discretion to grant or deny bail in the excepted cases, and that, while the proof of guilt is an important factor, the purposes of bail must drive the ultimate decision in every case.

## I. EXAMINING ELIGIBILITY FOR BAIL

Bail may seem perfunctory—until, that is, you get arrested. Then, it can become a matter of life and death. Besides the immediate loss of liberty and lasting financial impact on your family, pretrial detention may also diminish your hopes of ultimate acquittal by hindering the ability to participate actively in your own defense.<sup>20</sup> Part I.A begins with a basic description of a defendant's options while awaiting trial. Part I.B goes on to describe the common-law background that sets the context for understanding modern bail provisions. Part I.C provides a state-by-state analysis that isolates the jurisdictions in which this question remains relevant yet unanswered, and Part I.D introduces a recent trend in state constitutions.

### A. *The Basics of Bail*

Between arrest and trial, most defendants will be released on their own recognizance<sup>21</sup> or will have the opportunity to post bail.<sup>22</sup> Traditionally,

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19. See *infra* note 34 and accompanying text (attributing the correlation between release and conviction to the increased ability to assist in one's own defense).

20. See *infra* note 34 and accompanying text.

21. In this case, also called an "unsecured appearance bond," the accused takes an oath pledging his appearance at trial, and only pays a fixed monetary amount if the court orders it

bail has taken various forms designed to ensure the defendant's presence at trial,<sup>23</sup> from a financial exchange<sup>24</sup> to the posting of the defendant's or a close relative's property.<sup>25</sup> In order to persuade the court, the accused may also agree to certain conditions for release, such as electronic monitoring, drug testing, or a curfew, among others.<sup>26</sup> If the court is not satisfied that any of these conditions will ensure the defendant's presence, he may be detained.<sup>27</sup> At the end of trial, the accused generally receives his bail, whether convicted or acquitted, unless he fails to make all necessary appearances or fulfill the court's other guidelines, in which case he risks forfeiture.<sup>28</sup>

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forfeited. *See, e.g.*, Esmond Harmsworth, *Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 214 (1996); *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961) [hereinafter *Bail*]; Robert Webster Oliver, *Bail and the Concept of Preventative Detention*, N.Y. ST. B.J., Sept./Oct. 1997, at 8, 8.

22. *See* BLACK'S LAW DICTIONARY 150 (8th ed. 2004) (defining bail as a "security such as cash or a bond . . . required by a court for the release of a prisoner who must appear at a future time"); Boon-Tiong Lim et al., *The Economics of Bail Setting and Social Welfare*, 25 INT'L REV. L. & ECON. 592, 593 (2005).

23. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 17.01 (Vernon 2005); A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL; IN CIVIL AND CRIMINAL CASES vi (1791), reprinted in CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA (David S. Berkowitz & Samuel E. Thorne eds., 1978); CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL, IN CIVIL AND CRIMINAL PROCEEDINGS 475 (London, Joseph Butterworth & Son 1824); Alan L. Zegas, *Bail in the State and Federal Courts*, N.J. LAW., Feb./Mar. 1994, at 21, 22; John S. Goldkamp, *Bail—The Purposes of the Bail or Pretrial Release Decision, The Eighth Amendment of the Constitution and Defendant Rights*, <http://law.jrank.org/pages/563/Bail.html> (last visited Sept. 20, 2009).

24. Joseph Buro, Note, *Bail—Defining Sufficient Sureties: The Constitutionality of Cash-Only Bail*, 35 RUTGERS L.J. 1407, 1407 (2004).

25. A "surety" is a responsible third party, whether a relative or a bail bondsperson, who guarantees the defendant's appearance at trial and agrees to be responsible for his debt if he flees. *Id.*

26. Several statutes, including the Federal Bail Reform Act, allow the court to choose the least restrictive condition or set of conditions that will still ensure the defendant's presence at trial and the safety of the community. *See, e.g.*, Bail Reform Act of 1966, 18 U.S.C. § 3142(c)(1)(B) (2006).

27. *See id.*

28. *See* Oliver, *supra* note 21, at 8.



Bail is not punitive.<sup>29</sup> As mentioned above, courts have long stated that its primary purpose is to ensure the defendant's appearance at trial.<sup>30</sup> In practice, however, many courts have also reserved the right to adjust or deny bail if the accused may threaten the safety of the community or the integrity of the judicial process (by, for example, interfering with witnesses).<sup>31</sup> If the court denies bail altogether, this detention is civil, not criminal, as it is prospective and preventative.<sup>32</sup> At the same time, courts still frequently refer to the presumption of innocence as a strong reason to grant bail.<sup>33</sup> (The other reason courts most often consider is that release on bail allows the defendant to assist best in his own defense by making him more readily available to his counsel and by freeing him to initiate his own investigation.).<sup>34</sup>

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29. See, e.g., *United States v. Salerno*, 481 U.S. 739, 746–47 (1987) (“To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. . . . We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy.”); *State v. Pray*, 346 A.2d 227, 229–30 (Vt. 1975); 4 WILLIAM BLACKSTONE, COMMENTARIES \*300 (“Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county [jail] by . . . the justice . . . there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment . . .”). But see *Salerno*, 481 U.S. at 760 (Marshall, J., dissenting) (“The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as ‘regulation,’ and, magically, the Constitution no longer prohibits its imposition.”).

30. See, e.g., *People v. Purcell*, 778 N.E.2d 695, 700 (Ill. 2002); *In re Wheeler*, 406 P.2d 713, 716 (Nev. 1965); *State v. Johnson*, 294 A.2d 245, 250 (N.J. 1972) (explaining that the right to bail excludes capital cases because the temptation to flee is greatest when one’s life is at stake); *Commonwealth v. Truesdale*, 296 A.2d 829, 834 (Pa. 1972).

31. *Salerno*, 481 U.S. at 755 (upholding preventive detention based on the likelihood of defendant’s future dangerousness).

32. See, e.g., *id.*; *Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979); *L.O.W. v. Dist. Court of Arapahoe*, 623 P.2d 1253, 1256 (Colo. 1981).

33. There is considerable disagreement about the propriety of applying this presumption pretrial. While some courts reason that the presumption of innocence applies to all phases of a criminal proceeding, others limit it to the trial itself, sometimes even adopting a presumption of guilt for the purposes of bail. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (stating that, without the right to bail, “the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”); *In re Knast*, 614 P.2d 2, 3 (Nev. 1980); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 10 (2005) (arguing that the presumption of innocence must apply at all stages of the judicial process to be meaningful). But see *Ford v. Dille*, 156 N.W. 513, 521 (Iowa 1916); *State v. Green*, 275 So. 2d 184, 186 (La. 1973) (“There is little relationship between the right to bail and the presumption of innocence. The [latter] . . . protects against conviction, not against arrest.”).

34. See *Boyle*, 342 U.S. at 4; Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1052 (1954); Harmsworth, *supra* note 21, at 218; Lester, *supra* note 33 (arguing that defendants granted pretrial release are less likely to be convicted because they put a greater burden on the government to prove its case); *Bail*, *supra* note 21, at 969, 976.

## B. *The Constitutional Right-to-Bail Provision*

### 1. The History

The U.S. Constitution does not guarantee the right to bail.<sup>35</sup> The Eighth Amendment provides that, when bail is granted, “[e]xcessive bail shall not be required.”<sup>36</sup> It is silent, however, as to the initial determination of whether to grant bail at all. The U.S. Supreme Court has long dismissed the argument that the Eighth Amendment implies that the absolute denial of bail (the most “excessive” of bails) is likewise prohibited.<sup>37</sup> In 1789, the same year it introduced the Bill of Rights, Congress enacted the Federal Judiciary Act.<sup>38</sup> This Act conferred the right to bail on all noncapital defendants, while preserving the court’s discretion to grant or deny bail in capital cases.<sup>39</sup> The Bail Reform Act has replaced the bail provisions of the Judiciary Act with a standard for release based on the least restrictive condition, or set of conditions, that will ensure the defendant’s appearance at trial and the safety of the community.<sup>40</sup>

Like the U.S. Constitution, several state constitutions only prohibit excessive bail without guaranteeing any right to bail.<sup>41</sup> A majority of states, however, have adopted stronger protections than those secured by federal law, by guaranteeing a constitutional right to bail in noncapital cases.<sup>42</sup> Most of these bail provisions (and the 1787 bill of rights of the

35. *See, e.g., Salerno*, 481 U.S. at 752; *Carlson v. Landon*, 342 U.S. 524, 545 (1952).

36. U.S. CONST. amend. VIII.

37. *See, e.g., Salerno*, 481 U.S. at 752 (“[The Excessive Bail] Clause, of course, says nothing about whether bail shall be available at all.”); *Carlson*, 342 U.S. at 545–46. Interestingly, on appeal, *Salerno* conceded that this implicit right to bail extended only to noncapital offenses. Brief for Respondent at 21, *Salerno*, 481 U.S. 739 (No. 86-87).

38. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended in scattered sections of 28 U.S.C.) (“And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by [the judges of certain courts,] who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”).

39. *Id.* Several courts and scholars have reasoned that, by guaranteeing a right to bail in the Judiciary Act, the Framers demonstrated their awareness of the distinction between the right to bail and a prohibition against excessive bail. The exclusion of any express right to bail in the Constitution, therefore, must have been intentional. *See, e.g., United States v. Edwards*, 430 A.2d 1321, 1329 (D.C. Cir. 1981); 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3(c) (4th ed. 2004). *Contra* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 972 (1965) (discussing the scant record of any debate in Congress on the right-to-bail provision of the Judiciary Act or the Excessive Bail Clause of the Eighth Amendment, and overall lack of evidence of any intention to exclude such a right).

40. Bail Reform Act of 1966, 18 U.S.C. § 3142(c)(1)(B) (2006).

41. *See, e.g., State v. Pett*, 92 N.W.2d 205, 206 (Minn. 1958); *see infra* note 110 and accompanying text.

42. *See, e.g., Martin v. State*, 517 P.2d 1389, 1393 n.16 (Alaska 1974); *Commonwealth v. Baker*, 177 N.E.2d 783, 786 (Mass. 1961); 4 LAFAVE ET AL., *supra* note 39, § 12.4(a); Foote, *supra* note 39, at 977.

Northwest Ordinance<sup>43</sup>) are modeled after the Pennsylvania Frame of Government of 1682<sup>44</sup>: “all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great . . . .”<sup>45</sup> This right to bail prevents the legislature from prohibiting bail in all cases except for capital offenses and, even then, only when the proof of guilt is evident or the presumption great.

Although the constitutional standard is based on the strength of the proof of guilt, courts adamantly warn that this finding reflects the defendant’s incentive to flee or potential dangerousness, due to the higher likelihood of conviction for a serious crime.<sup>46</sup> It refers to the strength of the case against the defendant rather than his ultimate guilt or innocence. This basic framework has survived until today, despite significant expansion of the

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43. Some early courts cited article 2 of this ordinance (formally called the Ordinance for the Government of the Territories of the United States North-West of the River Ohio) as the first occurrence of the language at dispute in this Note. See, e.g., *In re Thomas*, 93 P. 980, 981 (Okla. 1908) (referring to the Northwest Ordinance as the “first appearance” of this wording in American statutory or constitutional law and stating that the provision is expressly incorporated into at least half of the states’ constitutions and is the rule of practice in all the rest).

44. See Buro, *supra* note 24, at 1412; Heath Coffman, Note, *A Look at the New Texas Constitutional Article I, Section 11B*, 59 BAYLOR L. REV. 241, 245–46 (2007).

45. Foote, *supra* note 39, at 975; Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 129 (2009). For ease of reading, this Note uses the phrase “disputed language” to refer to the basic grammatical structure “shall be bailable . . . except.” The “excepted cases” refer to those offenses excluded from the bail guarantee—that is, whatever follows the “except” in the disputed language, including both the class of offense and any qualifier, most commonly that the proof is evident or the presumption great. This Note focuses on those provisions that preserve this disputed language, absent further direction on how to handle the excepted cases. That is, a bail provision that goes on to specify that bail shall be denied in capital offenses when the proof is evident is irrelevant to the present study. See *infra* notes 113–15 and accompanying text. To clarify, the excepted cases in one state may be only capital offenses when the proof is evident or the presumption great, but in another jurisdiction they may also include sexual assault when the proof is evident or the presumption great, or simply any felony where the person has already been convicted of a felony offense. See *infra* note 121 and accompanying text.

46. See, e.g., *In re Steigler*, 250 A.2d 379, 383 (Del. 1969); *Bergna v. State*, 102 P.3d 549, 552 (Nev. 2004) (noting the relevance of the strength of the evidence of guilt to the defendant’s potential danger if released); *State v. Konigsberg*, 164 A.2d 740, 745 (N.J. 1960) (“Guilt or innocence is not the issue; there can be no evaluation of evidence with that result in mind . . . .”); *In re West*, 88 N.W. 88, 90 (N.D. 1901). If this nuanced distinction seems confusing, imagine a murder case in which the judge is absolutely certain that the defendant is innocent, yet the prosecution has an exceptionally strong case. In other words, even though the judge knows the accused is not guilty, the proof of guilt is evident. In a jurisdiction that interprets the constitutional provision to prohibit bail in the excepted cases, the judge must deny bail. The reasoning is that, even though the defendant is innocent, the strength of the case against him alone will tempt him to flee or otherwise obstruct justice. In this manner, the decision whether the proof of guilt is evident is divorced from an inquiry into the defendant’s actual guilt or innocence.

category of offenses in which the courts may—or, depending on the jurisdiction, must—deny bail.<sup>47</sup>

Courts disagree about whether this right to bail is absolute or conditional.<sup>48</sup> Jurisdictions in which the right is absolute read the qualification of “sufficient sureties” to mean that the court can detain the defendant only if he is unable to post the amount of bail that it sets.<sup>49</sup> Courts that interpret the right as conditional read this qualification to mean that the court always retains discretion to deny bail, even in the cases covered by the bail guarantee, if unconvinced that any amount of bail will assure the defendant’s appearance at trial.<sup>50</sup> The position that the right to bail is only conditional does not necessarily compel the conclusion that the court must deny bail in the excepted cases. Rather, under this understanding the focus may simply shift in the excepted cases. That is, for bailable cases, the court would need an extraordinary reason to deny bail, whereas for the excepted cases, the court would need an extraordinary reason to grant bail.

## 2. The Language

The right-to-bail provision’s archaic wording<sup>51</sup> poses several linguistic challenges beyond the inherent tension of weighing the presumption of guilt while avoiding a determination of guilt. Courts have traditionally read “shall” as compulsory.<sup>52</sup> Complicating the present question somewhat, the disputed language involves not just “shall” or its negation, which

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47. See *infra* notes 121–22 and accompanying text.

48. See, e.g., *Sprinkle v. State*, 368 So. 2d 554, 559 (Ala. Crim. App. 1978); *Duncan v. State*, 823 S.W.2d 886, 887 (Ark. 1992). *Contra Rendel v. Mummert*, 474 P.2d 824, 828 (Ariz. 1970); *People ex rel. Hemingway v. Elrod*, 322 N.E.2d 837, 840–41 (Ill. 1975).

49. See, e.g., *Sprinkle*, 368 So. 2d at 559 (holding that the right is absolute, provided the defendant can make bail).

50. See, e.g., *Rendel*, 474 P.2d at 828 (defining “sufficient sureties” as a reasonable assurance to the court that the defendant will appear for trial if admitted to bail).

51. See *Simpson v. Owens*, 85 P.3d 478, 496 (Ariz. Ct. App. 2004) (Foreman, J., concurring); *State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993).

52. See, e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001); *State v. Sutherland*, 987 P.2d 501, 503 (Or. 1999); BLACK’S LAW DICTIONARY, *supra* note 22, at 1407 (8th ed. 2004) (noting that the obligatory meaning of “shall” is the only acceptable definition “under strict standards of drafting”). While scholars have critiqued the common assumption that the word “shall” is imperative, the argument that it has also taken on a permissive meaning applies to contemporary usage and is not relevant to interpreting a provision that originated in the seventeenth century. BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 720–21 (2003). *But see Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930) (stating that “shall” is equivalent to “may” in certain situations).

A related question is whether “may” is permissive. Although not directly relevant to the constitutional provision, this ambiguity surfaces in the penal statutes and the case law. *E.g.*, *State v. Kauffman*, 108 N.W. 246, 246 (S.D. 1906). *Contra Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198–99 (2000) (noting that “the mere use of ‘may’ is not necessarily” intended to be permissive or discretionary).

presumably is “shall not,” but rather something broader—not the opposite of “shall” but an exception carved out of “shall”: “shall be bailable . . . unless [or except].”<sup>53</sup>

In addition, “bailable” may mean entitled to bail<sup>54</sup> or simply eligible for bail.<sup>55</sup> The choice between these definitions is connected to the interpretation of the right to bail as either absolute (“entitled to bail”) or conditional (“eligible for bail”).<sup>56</sup> If the right to bail is conditional, then the provision merely guarantees the defendant the opportunity to be considered for bail. That is, the legislature cannot outright prohibit bail as a matter of law but, because the accused would only be “eligible,” the court could ultimately deny bail anyway. As discussed in the previous section, the distinction between these two positions regarding the bailable cases is not dispositive of the treatment of the excepted cases.<sup>57</sup> Because this provision involves an exception carved out of “shall be bailable,” rather than its complete negation, the fact that bailable defendants are guaranteed eligibility for bail does not logically imply that nonbailable defendants are necessarily ineligible.

Structurally, the beginning of the right-to-bail provision (usually “all persons shall be bailable”) is the operative clause.<sup>58</sup> The clause acts upon the bailable cases, to which it extends the right to bail, and out of which it carves an exception.<sup>59</sup> As a result, the language is grammatically silent

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53. See, e.g., *In re Estate of Barg*, 752 N.W.2d 52, 64 (Minn. 2008) (holding that exceptions from a general statement of policy are to be construed narrowly); *McNeil v. Hansen*, 731 N.W.2d 273, 276–77 (Wis. 2007) (holding that exceptions within a statute should be strictly interpreted). One court, for example, read “shall” as mandatory, expressly holding that the language is not discretionary and that the exception carved out from “shall” is also mandatory. *State v. Garrett*, 493 P.2d 1232, 1234 (Ariz. Ct. App. 1972).

54. See, e.g., *State v. Williams*, 133 S.W. 1017, 1018 (Ark. 1911); *Fredette v. State*, 428 A.2d 395, 406 (Me. 1981); *Sutherland*, 987 P.2d at 503; *Oliver*, *supra* note 21, at 8. Several states have modernized their constitutional provisions in order to eliminate this archaic and confusing language. See, e.g., ALASKA CONST. art. I, § 11 (reading “entitled . . . to be released” instead of “shall be bailable”); CAL. CONST. art. I, § 12 (“shall be released”); CONN. CONST. art. I, § 8 (“shall have a right . . . to be released”); FLA. CONST. art. I, § 14 (“[S]hall be entitled to pretrial release”); R.I. CONST. art. I, § 9 (“[O]ught to be bailed”); WIS. CONST. art. I, § 8 (“[S]hall be eligible for release”); P.R. CONST. art. II, § 11 (“[S]hall be entitled to be admitted to bail”).

55. See, e.g., *Watts v. Grimes*, 161 S.E.2d 286, 287 (Ga. 1968); *Parker v. Roth*, 278 N.W.2d 106, 115 (Neb. 1979); BLACK’S LAW DICTIONARY, *supra* note 22, at 150.

56. See, e.g., *People ex rel. Hemingway v. Elrod*, 322 N.E.2d 837, 840 (Ill. 1975). *But see Ex parte Colbert*, 805 So. 2d 687, 688 (Ala. 2001); *Fredette*, 428 A.2d at 406 (holding that murder is not a “bailable” offense because the accused does not have an absolute right to bail).

57. See *supra* notes 48–50 and accompanying text.

58. See *Fredette*, 428 A.2d at 402 (analyzing the grammatical relationship between the two clauses forming the disputed language).

59. See *People v. Purcell*, 778 N.E.2d 695, 700 (Ill. 2002) (holding that the disputed language “creates a rebuttable presumption that the accused is eligible for bail”).

with respect to the excepted cases contained in the subsidiary clause.<sup>60</sup> Courts often refer to the common law to fill in gaps in statutory text.<sup>61</sup> The state of bail at common law, therefore, provides the necessary background for understanding the intended implications of this provision on the excepted cases.

### C. *The State of Bail at Common Law*

Two things are striking about the history of bail at common law: (1) the only limitation on the authority to grant bail was by statute<sup>62</sup>; and (2) these statutes did not limit the discretion of the judges of the Court of King's Bench, only of the sheriffs and the justices of the peace.<sup>63</sup>

#### 1. English Common Law

At early common law, bail in criminal cases was entirely discretionary; every defendant was eligible for bail before conviction.<sup>64</sup> Even people accused of homicides could seek release through a writ *de odio et atia* ("for hatred and malice"),<sup>65</sup> the forerunner to the writ of habeas corpus.<sup>66</sup> A sheriff could grant the writ *de odio et atia* upon determining that the charge was malicious and baseless, either because the defendant was not guilty or because he had a justifiable defense.<sup>67</sup> Although the writ seems to carry a rather clear standard for granting bail—whether the charge is baseless—sheriffs considered additional factors in granting or denying bail, including the circumstances and character of the person charged.<sup>68</sup>

60. Cf. U.S. CONST. art I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755 (repealed 1873) (authorizing but not requiring the President to suspend the writ during the Civil War when necessary for the public safety and placing restrictions on this suspension).

61. See, e.g., *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 447 (2003); *United States v. Texas*, 507 U.S. 529, 534 (1993); see also *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–05 (1959) (refusing to construe a statute in derogation of the common law unless expressly stated).

62. BLACKSTONE, *supra* note 29, at \*298.

63. *United States v. Melendez-Carrion*, 790 F.2d 984, 997 (2d Cir. 1986) (noting that historically, denial of bail was left to a court's discretion in capital cases, depending on the accused's risk of flight); BLACKSTONE, *supra* note 29, at \*299; 1 J. CHITTY, *A PRACTICAL TREATISE ON CRIMINAL LAW* 93, 98 (London, A.J. Valpy 1816).

64. CHITTY, *supra* note 63, at 93; PETERSDORFF, *supra* note 23, at 476; see *United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981); *Street v. State*, 43 Miss. 1, 29 (1870); BLACKSTONE, *supra* note 29, at \*298 ("By the ancient common law . . . all felonies were bailable, till murder was excepted by statute . . ."); HIGHMORE, *supra* note 23, at vii; Thos. F. Davidson, *The Power of Courts To Let To Bail*, 24 AM. L. REG. 1, 1 (1876).

65. PETERSDORFF, *supra* note 23, at 476.

66. BLACK'S LAW DICTIONARY, *supra* note 22, at 467–68.

67. PETERSDORFF, *supra* note 23, at 476.

68. *Id.* at 477.

By Charles Petersdorff's account, this standard gave way to the sheriff's ultimate discretion: "The privilege of obtaining the writ *de odio et atia* was in the time of [Lord] Bracton unrestricted, and in all other instances an uncontrolled discretionary power was vested in the sheriffs, of liberating persons charged with crimes of the utmost enormity."<sup>69</sup> Lacking a clear standard, sheriffs often abused their discretion, leading to inconsistent, oppressive, and overly frequent use of the writ.<sup>70</sup>

Lord Edward Coke qualifies Petersdorff's observations, noting that the courts generally followed a rule, articulated by Lord Bracton, that "in every wrong and [trespass] against the Peace of the King, although the offence reach to [felony], every one that is appealed or indicted (is wont to [be] Bailed) except only in the case of the death of a man."<sup>71</sup> The ultimate discretion of the court to grant bail led to a "diversity of opinions,"<sup>72</sup> out of which patterns of judicial custom emerged.

Both scholars agree, however, that a complicated statutory scheme developed to eliminate this unregulated and often arbitrary exercise of discretion, beginning with statutes that implemented the Magna Carta's prohibition against excessive fines.<sup>73</sup> In 1275, the Statute of Westminster<sup>74</sup> revolutionized the bail system, precisely defining three categories of offenses: those in which the defendant must be admitted to bail, may be admitted to bail, and cannot be admitted to bail.<sup>75</sup> The latter category was the largest, including all capital offenses and other serious crimes, unless the accusation was of "light suspicion," or not well founded, in which case the decision to admit to bail was discretionary.<sup>76</sup> Because so many felonies

69. *Id.* at 476–77.

70. See PETERSDORFF, *supra* note 23, at 477; Buro, *supra* note 24, at 1411.

71. See SIR EDWARD COKE, A LITTLE TREATISE OF BAILE AND MAINEPRIZE 4 (London, William Cooke 1635), reprinted in CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA (David S. Berkowitz & Samuel E. Thorne eds., 1978); see also HIGHMORE, *supra* note 23, at vii (explaining that, initially, bail was so favored that increases in corruption and population made it necessary to impose restrictions, starting with murder cases).

72. COKE, *supra* note 71, at 4.

73. See MAGNA CARTA, ch. 14 (1215) ("A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment . . ."); COKE, *supra* note 71, at 3–4, 22–23; PETERSDORFF, *supra* note 23, at 477; see also PHILIP WYATT CROWTHER, THE HISTORY OF THE LAW OF ARREST IN PERSONAL ACTIONS 10 n.n (London, J & W.T. Clarke 1828) ("Anciently felonies wereailable by the sheriff, before actual conviction . . . The sheriff's power of so bailing was abolished by [the Statute of Westminster].").

74. Statute of Westminster I, 1275, 3 Edw., ch. 15 (Eng.).

75. See BLACKSTONE, *supra* note 29, at \*298; CHITTY, *supra* note 63, at 95–97; HIGHMORE, *supra* note 23, at 150–51; see also PETERSDORFF, *supra* note 23, at 489–99.

76. 3 Edw., ch. 15. The relevant portion of the Statute of Westminster reads as follows: "[S]uch prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manour, and those which have broken the King's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living . . . and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the King's seal,

were punishable by death at that time,<sup>77</sup> bail was guaranteed only for minor offenses.<sup>78</sup>

As a result of Westminster, bail went from entirely discretionary to “only allowed where manifest injustice would accrue from the privilege being withheld.”<sup>79</sup> Suspicious of the flexibility that previously dominated, the legislature used the category of offense, sometimes qualified by the probability of guilt, as a proxy for the likelihood that the accused would actually appear for trial.<sup>80</sup> As a practical matter, commentators at that time viewed the risk of flight when charged with a capital offense to be so great that no bail could serve as security equivalent to the actual custody of the person.<sup>81</sup> It was, therefore, by statute and not by common law that entitlement or eligibility for bail became contingent on the category of offense charged.<sup>82</sup>

Mistrust of the justices of the peace propelled the ensuing statutory scheme.<sup>83</sup> After Westminster, additional procedural requirements were necessary to ensure compliance with its guidelines.<sup>84</sup> Subsequent statutes

or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the King himself, shall be in no wise relevisable by the common writ, nor without writ . . . but such as be indicted of [certain petty offenses] shall from henceforth be let out by sufficient surety . . . .”

*Id.*; see also BLACKSTONE, *supra* note 29, at \*298–99 (listing offenses made bailable and nonbailable by the Statute of Westminster); HIGHMORE, *supra* note 23, at 150–51; PETERSDORFF, *supra* note 23, at 477–78.

77. There were more than two hundred capital crimes in English common law; in American colonial common law, this number dropped to fewer than twenty. *Simpson v. Owens*, 85 P.3d 478, 485 & n.8 (Ariz. Ct. App. 2004).

78. See BLACKSTONE, *supra* note 29, at \*298; HIGHMORE, *supra* note 23, at 150–51.

79. PETERSDORFF, *supra* note 23, at 476.

80. See BLACKSTONE, *supra* note 29, at \*298–99; HIGHMORE, *supra* note 23, at 149–51, 173.

81. BLACKSTONE, *supra* note 29, at \*297; HIGHMORE, *supra* note 23, at 170; PETERSDORFF, *supra* note 23, at 475–76. At common law, defendants in civil actions were bailable in all cases. Civil actions have long been treated differently because, in the event of nonappearance, the sureties posted as bail could adequately compensate the plaintiff for his injuries, while no bail is equivalent to the public safety threatened by the flight of a criminal defendant. In civil actions, therefore, bail accomplishes the same goal as detention would. BLACKSTONE, *supra* note 29, at \*297; HIGHMORE, *supra* note 23, at 170; PETERSDORFF, *supra* note 23, at 475–76.

82. See BLACKSTONE, *supra* note 29, at \*298 (“But the statute [of Westminster] takes away the power of bailing in treason, and in [diverse] instances of felony.”).

83. See HIGHMORE, *supra* note 23, at vii; PETERSDORFF, *supra* note 23, at 477; Buro, *supra* note 24, at 1411. The Statute of Westminster also provided that a sheriff who released nonbailable defendants “shall lose his fee and office for ever.” Statute of Westminster I, 1275, 3 Edw., ch. 15 (Eng.); see also HIGHMORE, *supra* note 23, at 151 (describing the fines imposed on justices of the peace for improperly bailing nonbailable defendants). “He that hath *dangerously hurt* another, may go under bail till the party is dead. But for this the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender do[es] not appear, such justice is in danger of being severely fined.” *Id.*

84. See HIGHMORE, *supra* note 23, at 175–78; PETERSDORFF, *supra* note 23, at 478–81.



abolished the authority of individual justices of the peace to bail felonies in cases of “light suspicion.” Whereas under Westminster admission to bail in such cases fell within the discretion of the justice of the peace, afterwards this discretion could only be exercised by two justices or in open session.<sup>85</sup> As a result, individual justices were only able to bail minor crimes.<sup>86</sup> These statutes, however, also proved ineffective as justices of the peace continued to release many criminals not legally bailable, easily evaded the two-signature requirement, and did not exercise the caution imposed by the statute.<sup>87</sup> Further statutes were enacted to constrain these unauthorized practices, making bail more difficult to attain.<sup>88</sup>

This new bail system was a vehicle of social justice, heralded for combating the oppression that reigned previously.<sup>89</sup> Before Westminster’s enactment, malicious imprisonment and overly frequent granting of bail to the wealthy threatened to undermine the legitimacy of the bail system.<sup>90</sup> The rigid definition of bailable offenses was a way to protect the public, as well as the rights of the poor, by equalizing all defendants’ access to bail.<sup>91</sup>

While this statutory scheme strictly regulated the duties of coroners, sheriffs, and justices of the peace, it prescribed no rule for the King’s Bench judges, who tried the accused<sup>92</sup> and whom the accused could petition for bail if detained.<sup>93</sup> The Court of King’s Bench maintained “absolute and unlimited” discretion to accept bail “for any crime whatsoever,” even high treason, murder, or any other felony.<sup>94</sup> Blackstone reasons that to allow

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85. See HIGHMORE, *supra* note 23, at 176; PETERSDORFF, *supra* note 23, at 488.

86. See HIGHMORE, *supra* note 23, at 178; PETERSDORFF, *supra* note 23, at 481.

87. See PETERSDORFF, *supra* note 23, at 480.

88. *Id.* at 480–81.

89. See, e.g., *id.* at 477; Buro, *supra* note 24, at 1411; Foote, *supra* note 39, at 966.

90. See HIGHMORE, *supra* note 23, at vii; PETERSDORFF, *supra* note 23, at 477.

91. WILLIAM SAMPSON, THE CASE OF ROBERT M. GOODWIN, ESQ. CHARGED WITH KILLING JAMES STOUGHTON, ESQ. 30 (New York, Elam Bliss 1821) (including an opinion from the Court of Sessions of New York that refers to the rule by which felons may only be granted bail upon slight suspicion as “absolutely necessary to a due and impartial administration of law; of that administration which shall put the poor and the rich on an equal footing in a court of justice.”); see also PETERSDORFF, *supra* note 23, at 477.

92. See *Simpson v. Owens*, 85 P.3d 478, 484 (Ariz. Ct. App. 2004) (discussing early English common law); *Ford v. Dille*, 156 N.W. 513, 521 (Iowa 1916) (remarking that the legislature could not have intended to trust the decision to a county judge, thereby interfering with the constitutional jurisdiction of the circuit court); BLACKSTONE, *supra* note 29, at \*299; HIGHMORE, *supra* note 23, at 178; PETERSDORFF, *supra* note 23, at 483, 514 (citing cases and treatises stating that the judges of the Court of King’s Bench “may in their discretion admit persons to bail in all cases whatever, although committed by justices of the peace, or any other tribunal.”); SAMPSON, *supra* note 91, at 188. According to Lord Coke, justices of the peace had such limited authority to bail because “it were absurd to say, and directly contrary to the Etymology of the Word,” that someone other than the judge of that person could admit him to bail. COKE, *supra* note 71, at 15.

93. See PETERSDORFF, *supra* note 23, at 485.

94. BLACKSTONE, *supra* note 29, at \*299; PETERSDORFF, *supra* note 23, at 483; see *Wright v. Henkel*, 190 U.S. 40, 63 (1903); *Simpson*, 85 P.3d at 484; HIGHMORE, *supra* note

bail routinely for such enormous crimes would threaten public safety, but that "there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence."<sup>95</sup> He emphasizes the importance of preserving this judicial discretion: "And herein the wisdom of the law is very manifest."<sup>96</sup>

In practice, however, these judges generally acted in conformity with the guidelines established by Westminster, paying "due regard to the rules prescribed by it."<sup>97</sup> They applied the so-called *Hawkins* rule, named for the case that held that for felony offenses, the strength of the evidence of guilt should be the primary factor in bail decisions, but that the court may grant bail anyway in special circumstances.<sup>98</sup> In addition to the veracity of the accusation, the court also considered "the length of the imprisonment, . . . the nature and tendency of the crime, [and] the dignity of the court, or authority of the party by whom the prisoner was committed."<sup>99</sup> Despite this discretion, in practice the court was usually deferential to the initial decision to commit the prisoner.<sup>100</sup>

## 2. American Common Law

American courts picked up English bail law fairly seamlessly; they similarly retain great discretion to grant bail in all cases, yet in practice follow a standard based on the category of offense and strength of the evidence.<sup>101</sup> The Supreme Court of New York, for example, compared its authority to that of the Court of King's Bench<sup>102</sup> and exercised its discretion to grant bail with similar restraint, choosing to follow the *Hawkins* rule.<sup>103</sup> In general, no defendant could demand bail as of right for

23, at 178 ("This court may bail . . . for treason, murder, or any crime whatsoever, if they see good cause."); SAMPSON, *supra* note 91, at 188.

95. BLACKSTONE, *supra* note 29, at \*299.

96. *Id.*

97. *See, e.g., In re Thomas*, 93 P. 980, 981 (Okla. 1908); 1 MATTHEW BACON ET AL., A NEW ABRIDGEMENT OF THE LAW 484 (London, A. Strahan 1832); PETERSDORFF, *supra* note 23, at 484; Davidson, *supra* note 64, at 1-2.

98. *See, e.g., HIGHMORE*, *supra* note 23, at 150; PETERSDORFF, *supra* note 23, at 484; Davidson, *supra* note 64, at 2-3. It bears noting that, in *Hawkins*, the court cited rather formal and definite processes, such as attainder and confession, as establishing the presumption of guilt. *Street v. State*, 43 Miss. 1, 19 (1870).

99. PETERSDORFF, *supra* note 23, at 484.

100. *See id.* ("But they will seldom exercise this superintending jurisdiction, unless there appear particular circumstances of ignorance, mistake, corruption, or irregularity, in the commitment.")

101. *See, e.g., Commonwealth v. Baker*, 177 N.E.2d 783, 785-86 (Mass. 1961); *State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960); *In re Thomas*, 93 P. at 981; *Fontaine v. Mullen*, 366 A.2d 1138, 1143 (R.I. 1976); 2 EDMUND HASTINGS BENNETT & FRANKLIN FISKE HEARD, A SELECTION OF LEADING CASES IN CRIMINAL LAW 587-88 (Boston, Little, Brown & Co. 1857).

102. BENNETT & HEARD, *supra* note 101, at 570.

103. SAMPSON, *supra* note 91, at 188; *see* BENNETT & HEARD, *supra* note 101, at 584-85.

any felony charge but had to appeal to the court, which had the discretionary power to grant or deny bail.<sup>104</sup> Murder generally was not bailable.<sup>105</sup> While the likelihood of the accused's guilt and the category of offense were the central factors in bail decisions, they served only as a proxy for the risk of flight.<sup>106</sup>

Beginning with Connecticut in 1818, some states began to offer greater protection to defendants by guaranteeing a constitutional right to bail.<sup>107</sup> This right to bail developed to prevent an excessively prohibitive bail system by placing the definition of certain offenses as nonbailable beyond the authority of the legislature.<sup>108</sup>

#### D. *Bail Law Today: A State-by-State Analysis*<sup>109</sup>

##### 1. State Constitutional Right-to-Bail Provisions

Nine state constitutions and Guam's Organic Act follow the U.S. Constitution by only prohibiting excessive bail without including the right to bail.<sup>110</sup> Forty-one state constitutions, Puerto Rico's constitution, and the

104. See, e.g., *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955); *Fredette v. State*, 428 A.2d 395, 401–02 (Me. 1981); *Baker*, 177 N.E.2d at 786; *Street v. State*, 43 Miss. 1, 20–21 (1870); BENNETT & HEARD, *supra* note 101, at 573; Leonard MacNally, Address to the Whig Club of Ireland, with an Essay on Fiats 21–22 (1790) (discussing Lord Coke's position that discretion be guided by legal rules).

105. See, e.g., *Street*, 43 Miss. at 29–31 (collecting other cases in which an indictment for murder was found to be a conclusive basis for the denial of bail); *Territory v. Benoit*, 1 Mart. (o.s.) 142, 142 (Orleans 1810) (“Bail is never allowed in offences punishable by death, when the proof is evident or the presumption great.”).

106. See, e.g., *State v. Arthur*, 390 So. 2d 717, 718 (Fla. 1980) (“In capital cases [at common law], ‘bail was usually denied, on the theory that a defendant faced with the death penalty would flee, no matter what promises or security were offered to secure his presence at trial.’”) (quoting *Arthur v. Harper*, 371 So. 2d 96, 98 (Fla. Dist. Ct. App. 1978)); SAMPSON, *supra* note 91, at 189 (“[I]f the punishment be death or corporal imprisonment, a consciousness of guilt would probably induce to flight, and an evasion of the punishment; and in admitting to bail, therefore, regard must be had to the probable guilt of the party, and the nature of the punishment denounced.”) (recounting the New York Supreme Court's opinion in *People v. Robert M. Goodwin*).

107. *State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960).

108. See generally 8A AM. JUR. 2D *Bail & Recognizance* § 11 (2009) (describing the colonial trend to limit by legislation the discretion of the trial court to deny bail, and observing that that discretion to grant bail was a “necessary ingredient of the court's ability to conduct judicial proceedings”).

109. See *infra* Appendix (diagramming the following analysis in a table).

110. These states include the following: Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia. In addition, Guam's Organic Act contains no right to bail. 48 U.S.C. § 1421b (2006) (only prohibiting excessive bail). The Hawaiian excessive bail clause goes even further than those of the other states: “The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.” HAW. CONST. art. I, § 12. While its constitution does not expressly guarantee a right to bail, the Supreme Court of Hawaii held that it does protect

Revised Organic Act of the Virgin Islands additionally guarantee the right to bail.<sup>111</sup>

Of these forty-three jurisdictions, thirty-five have preserved the ambiguous language and basic grammatical structure at issue in this Note; that is, they have preserved some variation of “shall be bailable . . . except” without providing further guidance.<sup>112</sup> Eight jurisdictions have significantly modified the disputed language, either by expressly prohibiting bail<sup>113</sup> or by permitting its denial<sup>114</sup> in the excepted cases. By providing further direction on how to handle the excepted cases, these jurisdictions are excluded from this analysis.<sup>115</sup> Puerto Rico also falls

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against arbitrary or unreasonable denial of bail, in addition to excessive bail. *State v. Handa*, 657 P.2d 464, 466–67 (Haw. 1983); *Huihui v. Shimoda*, 644 P.2d 968, 979 (Haw. 1982) (reading this provision to clarify the discretionary powers of the court in bail decisions and, accordingly, striking down a statute that required the denial of bail in certain cases).

111. ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 9; KY. CONST. § 16; LA. CONST. art. I, § 18; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; P.R. CONST. art. II, § 11; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; VT. CONST. ch. 2, § 40; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14; Revised Organic Act of 1954, 48 U.S.C. § 1561 (2006); *see also* *Petition of Humphrey*, 601 P.2d 103, 105 (Okla. Crim. App. 1979) (counting thirty-five states with similar constitutional right-to-bail provisions); 8A AM. JUR. 2D *Bail and Recognizance* § 11 (2009). Before 1838, Maine’s constitution contained an express right-to-bail provision: “All persons, before conviction, shall be bailable, except for capital offences, where the proof is evident or the presumption great.” *Fredette v. State*, 428 A.2d 395, 402 (Me. 1981). The people then amended it to read, “No person before conviction shall be bailable for [capital offenses] when the proof is evident or the presumption great . . . .” *Id.* While the provision no longer expressly confers the right to bail, the Supreme Judicial Court of Maine held that the new language carries the same guarantee as before. *Id.*

112. *See infra* notes 117, 118, 121, 122 and accompanying text.

113. IND. CONST. art. I, § 17 (specifying that murder and treason “shall not be bailable, when the proof is evident, or the presumption strong”); ME. CONST. art. I, § 10 (“No person . . . shall be bailable for any . . . capital offenses . . . when the proof is evident or the presumption great . . . .”); OR. CONST. art. I, § 14 (stating that murder and treason “shall not be bailable, when the proof is evident, or the presumption strong”). Despite the strongly and uniquely prohibitive language found in its constitution, the Supreme Judicial Court of Maine still held that the decision to grant bail remains discretionary. *See infra* Part II.A.4.

114. MICH. CONST. art. I, § 15 (“[E]xcept that bail may be denied for the following persons when the proof is evident or the presumption great . . . .”); OKLA. CONST. art. II, § 8; S.C. CONST. art. I, § 15; WIS. CONST. art. I, § 8 (“The legislature may by law authorize, but may not require, circuit courts to deny release . . . .”); *see supra* note 52 (discussing whether “may” is permissive).

115. Several states also specify that certain offenses “shall not be bailable” or that bail “may be denied” when the proof is evident or the presumption great, upon a further finding that the accused is dangerous or a flight risk. Although the requirement of this further

outside the scope of this analysis because its constitutional right to bail is absolute for all offenses.<sup>116</sup>

Of the thirty-five remaining jurisdictions, seventeen have left the traditional language intact<sup>117</sup> or varied it only slightly in order to modernize the language.<sup>118</sup> Of these seventeen jurisdictions that only exclude capital offenses from their constitutional right to bail, Alaska, Iowa, Minnesota, New Jersey, and North Dakota have since abolished the death penalty.<sup>119</sup> Supreme courts in three of these five states have held that all offenses are now bailable under the constitution,<sup>120</sup> making the present inquiry moot

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finding presents other questions, discussed in Part I.D.4, these states' provisions are still relevant to this analysis to the extent that they preserve the disputed language ("shall be bailable . . . unless") for some offenses. FLA. CONST. art. I, § 14 (providing that any defendant may be detained if necessary to assure public safety, presence at trial, or the integrity of the judicial process); LA. CONST. art. I, § 18(B) (providing that certain offenses when "the proof is evident and the presumption of guilt is great, shall not be bailable" if the judge finds that the accused may pose a flight risk or imminent danger, but preserving the original language for capital offenses); MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20, N.M. CONST. art. II, § 13. Similarly, while Texas's right to bail preserves the original language with respect to capital offenses, its constitution deviates by providing that specified noncapital defendants "may be denied" bail upon evidence "substantially showing" their guilt. TEX. CONST. art. I, §§ 11, 11a. As a result, only the former section is within the scope of this analysis.

116. P.R. CONST. art. II, § 11 ("Before conviction every accused shall be entitled to be admitted to bail.").

117. That is, these provisions preserve the basic wording that "all persons shall be bailable by sufficient sureties, unless [or except] for capital offenses when the proof is evident or the presumption great." ALA. CONST. art. I, § 16; ARK. CONST. art. II, § 8; DEL. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 9; KY. CONST. § 16; MINN. CONST. art. I, § 7; MONT. CONST. art. II, § 21; N.J. CONST. art. I, § 11; N.D. CONST. art. I, § 11; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; WASH. CONST. art. I, § 20; WYO. CONST. art. I, § 14.

118. ALASKA CONST. art. I, § 11 ("[E]ntitled . . . to be released . . . except . . ."); CONN. CONST. art. I, § 8 ("[S]hall have a right . . . to be released . . . except . . .").

119. *Martin v. State*, 517 P.2d 1389, 1394 n.17 (Alaska 1974); *State v. Pett*, 92 N.W.2d 205, 206 (Minn. 1958); see generally Amnesty International USA, Death Penalty in States, <http://www.amnestyusa.org/death-penalty/death-penalty-in-states/page.do?id=1101153> (last visited Sept. 21, 2009) (listing states that have abolished capital punishment).

120. *Martin*, 517 P.2d at 1394 n.17; *Pett*, 92 N.W.2d at 208; see *State v. Johnson*, 294 A.2d 245, 249 (N.J. 1972). Before abolition of the death penalty, the Supreme Court of New Jersey held that the right to bail only excluded treason, because murder was no longer punishable by death. *Johnson*, 294 A.2d at 249. Presumably, since the death penalty has been abolished entirely, all offenses are now bailable as of right. The Supreme Court of South Dakota had also ruled that the abolition of the death penalty made the right to bail absolute, but then reenacted the death penalty in 1979. See *Sioux Falls v. Marshall*, 204 N.W. 999, 1001 (S.D. 1925); Death Penalty Information Center, State by State Database, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Sept. 21, 2009). The Iowa and North Dakota courts have not had occasion to decide whether the right to bail is now absolute. *State v. Fuhrmann*, 261 N.W.2d 475, 477 (Iowa 1978) (declining to address this question because decided on other grounds); *State v. Fowler*, 248 N.W.2d 511, 515 (Iowa 1976); *State v. Stevens*, 234 N.W.2d 623, 625 n.1 (N.D. 1975). If, like New Jersey, they define capital offenses as those offenses currently punishable by death, all offenses probably would be bailable as of right (known as the "penalty theory"). See, e.g., *People ex rel.*

unless the provisions are amended, and leaving thirty-two jurisdictions in which this question is still relevant.

Ten of these thirty-two jurisdictions have expanded the category of excepted offenses beyond capital offenses, to also include first-degree murder, offenses punishable by life imprisonment, and/or other serious felonies, when the proof is evident or presumption great.<sup>121</sup> Seven also include a public-safety or flight-risk exception for some or all offenses within the structure of the disputed language.<sup>122</sup> Their constitutions exclude certain felonies from the guarantee when the proof is evident or presumption great, but only upon a further finding that no condition or set of conditions can ensure the accused's presence at trial or the safety of the community.

## 2. Corresponding Penal Statutes and Court Rules

The present issue centers on how much room these constitutional right-to-bail provisions leave for legislative and judicial discretion in the excepted cases. If the legislature prohibits bail anyway, this question is moot. Whether this act is an exercise of legislative discretion or constitutionally mandated is largely academic and unlikely to be adjudicated.<sup>123</sup> A potential conflict may arise if the statute expressly provides a different standard for bail that may authorize release even if the proof is evident<sup>124</sup> or if the statute is silent, ambiguous, or identical to the

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Hemingway v. Elrod, 322 N.E.2d 837, 839–40 (Ill. 1975). If they define capital offenses as those offenses that received the death penalty at the time the right to bail was ratified, certain offenses may still fall within the exception (known as the “classification theory”). *See, e.g., Ex parte Bynum*, 312 So. 2d 52, 55 (Ala. 1975); *Roll v. Larson*, 516 P.2d 1392, 1393 (Utah 1973).

121. ARIZ. CONST. art. II, § 22 (also exempting, inter alia, capital offenses and sexual assault); FLA. CONST. art. I, § 14 (life imprisonment); ILL. CONST. art. I, § 9 (life imprisonment); NEB. CONST. art. I, § 9 (murder, treason, and certain sexual offenses); NEV. CONST. art. I, § 7 (life imprisonment); PA. CONST. art. I, § 14 (life imprisonment); R.I. CONST. art. I, § 9 (life imprisonment, weapons offense with prior conviction, and controlled substance offenses); UTAH CONST. art. I, § 8 (arrests while on probation); VT. CONST. ch. 2, § 40 (life imprisonment); Revised Organic Act, 48 U.S.C. § 1561 (2006) (first-degree murder).

122. ARIZ. CONST. art. II, § 22 (public safety exception for felony offenses); CAL. CONST. art. I, § 12 (public safety exception for sexual assault and violent felonies); COLO. CONST. art. II, § 19 (public safety exception for violent felony committed while on probation); ILL. CONST. art. I, § 9 (public safety exception for felonies); OHIO CONST. art. I, § 9 (public safety exception for all felonies); PA. CONST. art. I, § 14 (public safety exception for all felonies); UTAH CONST. art. I, § 8 (public safety and flight exception for any felony charge designated by statute and supported by substantial evidence).

123. *See Tijerina v. Baker*, 438 P.2d 514, 518 (N.M. 1968) (declining to decide on constitutional grounds whether the trial court could bail a defendant in the excepted cases because the statute prohibited bail anyway).

124. For example, the Virgin Islands statute struck down in *Browne v. People*, No. 2008-022, 2008 V.I. Supreme LEXIS 33 (Aug. 29, 2008), discussed in the Introduction, provided a standard based on the safety of the community and the defendant's appearance at trial. In addition to the weight of the evidence, it listed other factors for the court to consider, such as

constitutional language, creating an opportunity for the judiciary to apply a different standard.

Of the thirty-two relevant jurisdictions, ten have penal statutes that expressly<sup>125</sup> or implicitly<sup>126</sup> prohibit bail in the excepted cases, making this issue moot unless the legislature amends the statute.

A potential conflict, therefore, may arise in the twenty-two remaining jurisdictions. The penal statutes of six of these jurisdictions provide a standard other than merely the strength of the evidence, possibly permitting bail in the excepted cases and creating a direct conflict with the constitutional provision if the latter is read to be prohibitive.<sup>127</sup> The

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the person's "past and present conduct, . . . family ties, employment, financial resources, character and mental condition, length of residence in the community, [and] record of convictions . . ." V.I. CODE ANN. tit. 5, § 3504a(a)(1) (1997); *see infra* Part II.B.4.

125. ALA. CODE § 15-13-3(a) (1995) ("A defendant cannot be admitted to bail when he is charged with an offense which may be punished by death [if the proof is evident or the presumption great.];"); ARIZ. REV. STAT. ANN. § 13-3961(A) (2001) ("A person in custody shall not be admitted to bail if the proof is evident or the presumption great that he is guilty of the offense and the offense charged is [one of the offenses specified in the constitutional provision.];"); CAL. PENAL CODE § 1270.5 (West 2004) ("A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his or her guilt is evident or the presumption thereof great."); DEL. CODE ANN. tit. 11, § 2103 (2007) ("A capital crime shall not be bailable . . . . The Superior Court may admit to bail a person charged with a capital crime if, after full inquiry . . . there is good ground to doubt the truth of the accusation . . ."); IDAHO CODE ANN. § 19-2903 (2004) ("A defendant charged with an offense punishable with death can not be admitted to bail, when the proof of his guilt is evident or the presumption thereof great."); 725 ILL. COMP. STAT. 5/110-4 (2006), *invalidated in part by* *People v. Purcell*, 758 N.E.2d 895 (Ill. App. Ct. 2001) (while subsection (a) is practically identical to the constitutional provision, (b) provides, "A person seeking release on bail who is charged with a capital offense or [life imprisonment] shall not be bailable until a hearing is held wherein such person has the burden of demonstrating that the proof of his guilt is not evident and the presumption is not great."); LA. CODE CRIM. PROC. ANN. art. 331 (2003) ("A person charged with the commission of a capital offense shall not be admitted to bail if the proof is evident and the presumption great that he is guilty of the capital offense.");

126. KAN. STAT. ANN. § 22-2716 (2007) ("Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment . . . a judge . . . may admit the person arrested to bail . . ."); NEB. REV. STAT. § 29-506 (1995) ("[If] it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail . . . to remain until he is discharged by due course of law; Provided, if the offense be bailable, the accused may be [conditionally] released . . ."); NEV. REV. STAT. § 178.484(4) (2006) ("A person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great . . . , giving due weight to the evidence and to the nature and circumstances of the offense.");

127. IOWA CODE ANN. § 811.1 (West 2003) ("All defendants are bailable both before and after conviction, by sufficient surety, or subject to [conditional] release . . ."); N.D. R. CRIM. P. 46 (providing for conditional release based on flight risk rather than the offense charged); R.I. GEN. LAWS § 12-13-5.1 (2002) (providing for a rebuttable presumption of danger once the proof is evident or presumption great, leaving the court discretion to grant bail if rebutted, despite evident proof); S.D. CODIFIED LAWS § 23A-43-2.1 (1998) (providing for conditional release of a defendant charged with a capital offense, unless no conditions of release can assure his appearance at trial and the safety of the community); WASH. R. CRIM.

statutes of sixteen jurisdictions provide no more information than their respective constitutional provisions concerning bail for the excepted offenses, either because they are identical to the corresponding constitutional provision,<sup>128</sup> silent as to which offenses are bailable,<sup>129</sup> or otherwise ambiguous.<sup>130</sup>

### 3. The Case Law

As the Supreme Judicial Court of Massachusetts stated, the “case law on this subject is extremely meager.”<sup>131</sup> Fifteen jurisdictions have directly addressed the present question at some point, either in a holding or in clear dicta. Eleven read the constitutional provision as silent, leaving the

P. 3.2(g) (“Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not significantly interfere with the administration of justice and will not pose a substantial danger to another or the community.”); V.I. CODE ANN. tit. 5, § 3504a(a)(1) (1997), *invalidated in part by Browne*, 2008 V.I. Supreme LEXIS 33 (providing for conditional release of persons charged with first-degree murder unless no set of conditions can reasonably assure the safety of the community or person’s presence at trial, even though the Revised Organic Act’s guarantee expressly excludes first-degree murder). Because the Iowa and North Dakota courts have not confronted this issue since abolishing the death penalty, their permissive penal statutes may simply reflect an understanding that the right to bail is now absolute, or may create a conflict if, for the purposes of the bail statute, the court interprets capital offenses to include offenses that used to be punishable by death. *See supra* note 120 and accompanying text.

128. COLO. REV. STAT. ANN. § 16-4-101 (2008) (practically identical); FLA. R. CRIM. P. 3.131; KY. R. CRIM. P. 4.04 (practically identical); MONT. CODE ANN. § 46-9-102 (2007) (practically identical); 42 PA. CONS. STAT. ANN. § 5701 (West 2004) (identical regarding capital offenses and silent as to all other excepted cases); TENN. CODE ANN. § 40-11-102 (2006); UTAH CODE ANN. § 77-20-1 (2003) (practically identical); WYO. R. CRIM. P. 46.1. The Pennsylvania General Assembly is now considering a bill that would amend the penal statute to be identical to the constitutional provision. S.B. 256, 119th Gen. Assem. (Pa. 2007).

129. ARK. CODE ANN. § 16-84-116(a) (2005) (“The court . . . may [detain the defendant and revoke bail] . . . (3) Upon an indictment’s being found for an offense not bailable.”); MO. ANN. STAT. § 544.676 (West 2002) (does not provide specifically for capital offenses); N.M. R. CRIM. P. 5-401 (“[A]ny person bailable under [the constitution] shall be ordered released pending trial [on recognizance or bond].”).

130. CONN. GEN. STAT. ANN. § 54-53 (West 2009) (“Each person detained . . . for an offense not punishable by death shall be entitled to bail and shall be released . . . .”); MISS. CODE ANN. § 99-5-35 (2006) (providing only that “[a]ny person having been twice tried on an indictment charging a capital offense, wherein each trial has resulted in a failure of the jury to agree upon his guilt or innocence, shall be entitled to bail”); OHIO REV. CODE ANN. § 2937.222 (LexisNexis 2006) (providing for a bail hearing in case of noncapital felonies, to determine whether the proof is evident and the defendant poses a danger, but silent regarding capital offenses, for which the constitution only specifies that the proof be evident); TEX. CODE CRIM. PROC. ANN. arts. 17.151, 17.21 (Vernon 2005) (providing for release in “a bailable case,” and providing generally for release of any offense upon excessive delay); VT. STAT. ANN. tit. 13, § 7553 (1998) (“A person charged with an offense punishable by life imprisonment when the evidence of guilt is great may be held without bail. If the evidence of guilt is not great, the person shall be bailable . . . .”).

131. *Commonwealth v. Baker*, 177 N.E.2d 783, 785 (Mass. 1961).



decision to the discretion of the legislature and judiciary,<sup>132</sup> and four interpreted it to prohibit bail in the excepted cases.<sup>133</sup> Of the twenty-two jurisdictions in which this conflict is currently relevant,<sup>134</sup> nine are among those whose courts have settled the issue or addressed the conflict in dicta.<sup>135</sup> Therefore, there are thirteen jurisdictions in which the present question is relevant yet still undecided by the courts.<sup>136</sup>

Although only a minority of jurisdictions has directly addressed this conflict, a cursory glance at the case law reveals many more decisions that may mislead a reader into thinking that the court has taken a decisive position.<sup>137</sup> As discussed in the Introduction, courts rarely question whether they have discretion to grant bail to defendants charged with capital or other serious felonies once they have found that the proof is evident.<sup>138</sup> Judicial practice supports the denial of bail anyway, so courts often have no reason to consider whether the constitution mandates this detention. More often, when courts examine the constitutional right to bail, they consider intersecting issues, such as the quantum of proof needed to satisfy the proof-evident standard,<sup>139</sup> or whether the right to bail, when conferred, is absolute.<sup>140</sup> Because the topics overlap, emphatic language defining the cases in which bail is not guaranteed can be misread to suggest that bail is additionally prohibited in these cases.<sup>141</sup>

132. See *infra* Part II.A.

133. See *infra* Part II.B.

134. Some jurisdictions may have decided this issue in the past, but since amended their constitutions or revised their statutes, removing the matter from judicial determination. For example, California courts have held that the constitutional provision is discretionary, but the issue is no longer relevant because the penal statute expressly prohibits bail in the excepted cases. See CAL. PENAL CODE § 1270.5 (West 2004); *People v. Tinder*, 19 Cal. 539, 542 (1862).

135. These jurisdictions are Colorado, Florida, Mississippi, Pennsylvania, North Dakota, Rhode Island, South Dakota, Vermont, and the Virgin Islands. See *infra* Part II.B.2, II.A.3, II.A.5, II.B.3, II.A.7, II.A.9–11, II.B.4.

136. The remaining jurisdictions are the following: Arkansas, Connecticut, Iowa, Kentucky, Missouri, Montana, Ohio, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wyoming.

137. See, e.g., *State v. Larsen*, 415 P.2d 685, 693 (Idaho 1966) (“[T]he Idaho constitution explicitly excludes the right to bail in capital offenses.”); *People v. St. Lucia*, 146 N.E. 183, 187 (Ill. 1924).

138. See *supra* note 18 and accompanying text.

139. See, e.g., *Doe v. State*, 487 P.2d 47, 51 (Alaska 1971).

140. In order to emphasize that bail is guaranteed in noncapital cases, courts often use language that only seems to further imply that capital defendants are ineligible for bail when proof is evident. See, e.g., *Brooks v. Gaw*, 346 S.W.2d 543, 543 (Ky. 1961); *State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960) (“[A] person accused of a capital offense is entitled to bail unless the proof is evident or the presumption great . . . .”); *Tijerina v. Baker*, 438 P.2d 514, 517 (N.M. 1968) (“[One accused of a capital crime] is not entitled to bail until that presumption [that the proof is evident] is overcome.”).

141. In other cases, the court may speak clearly about its discretion to grant bail to capital defendants but, upon further examination, this “discretion” actually refers to the decision of whether the proof is evident or the presumption great. That is, the court may decide whether

#### 4. The Recent Amendments

In the past thirty years, several states have amended their right-to-bail provisions to expressly incorporate another standard in addition to whether the proof is evident.<sup>142</sup> Within the structure of the disputed language, these amended provisions permit (or mandate, depending on the jurisdiction) the denial of bail for certain offenses only upon a further finding that no condition or set of conditions can reasonably ensure the defendant's presence at trial or the safety of the community.<sup>143</sup> Because these amendments usually layer the flight or harm exception over the proof-evident standard, they create a complicated right-to-bail provision. Most of the case law that considers this issue addresses simpler provisions.<sup>144</sup> As a result, the courts have not had the opportunity to consider the impact of these amendments on the present question.

### II. RIGHT TO BAIL OR WRONG TO BAIL?

Part II begins by dividing the jurisdictions that have directly addressed this obscure conflict into two categories: (A) those that have actively considered the issue, whether in holding or in dicta, and interpreted the constitutional provision to permit bail in the excepted cases at the discretion of the legislature or court; and (B) those that have actively considered the issue but held or stated clearly in dicta that the constitution prohibits bail in the excepted cases. Part II.C then discusses a common problem throughout the case law: a third category of opinions in which the court seems to presume that bail is either discretionary or prohibited, without considering the alternative interpretation. Finally, Part II.D examines the implications of the recent constitutional amendments for this conflict.

#### A. Jurisdictions That Adopt the Discretionary Interpretation

##### 1. Alabama

In one of the earliest cases on the subject, *Ex parte Croom*,<sup>145</sup> the Supreme Court of Alabama held that the constitutional right-to-bail provision did not preempt a statute that granted bail to any capital defendant

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the proof is evident, and the indictment alone does not compel that decision. *See, e.g., In re Wheeler*, 406 P.2d 713, 715-16 (Nev. 1965). Use of this language does not signify that the court has decided it retains discretion to grant bail, even if the proof is evident or the presumption great.

142. *See supra* note 122 and accompanying text.

143. *See supra* note 122 and accompanying text.

144. *See infra* Part II.A-B.

145. 19 Ala. 561 (1851).

whose trial had been delayed for certain reasons.<sup>146</sup> The court reasoned that the provision was not intended to deny the legislature the power to provide for bail in the excepted cases; rather, its purpose was to prevent the legislature from prohibiting bail outright in certain cases, as occurred previously.<sup>147</sup> The constitutional provision affected only those individuals to whom it extended the right to bail. That is, it guaranteed all noncapital defendants and capital defendants for whom the proof is not evident and presumption not great, a right to bail they did not enjoy at common law.<sup>148</sup> The constitutional provision was silent, however, as to the excepted cases—capital defendants for whom the proof is evident or the presumption great—leaving their situation at common law unchanged. Therefore, the court concluded, for this category there was no restriction on the legislature to permit or prohibit bail.<sup>149</sup>

As further evidence, the court noted that the same legislature that included this provision in the bill of rights just days later also provided for bail in all cases of treason or felony in which excessive trial delays not caused by the accused occurred.<sup>150</sup> The court explained that it “would seem somewhat paradoxical to hold, that in a bill of rights, the convention should have put the negative of a common law right beyond the power of legislative control, however much necessity might exist for legislative action.”<sup>151</sup>

## 2. California

In *People v. Tinder*,<sup>152</sup> the Supreme Court of California declared that the “admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases.”<sup>153</sup> The statute in that case made bail discretionary in capital cases generally but prohibited bail in capital cases when the proof is evident or presumption great.<sup>154</sup> The court struck down the former clause as unconstitutional because it made bail discretionary in all capital cases, including those in which the proof is not

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146. *Id.* at 570.

147. *Id.*; see *supra* note 108 and accompanying text.

148. See *Croom*, 19 Ala. at 572 (noting that the statute, in providing for bail in cases of delay, must be referring only to capital offenses when the proof is evident or presumption great, since in all other cases the constitution guarantees the right to bail).

149. *Id.*

150. *Id.* at 571.

151. *Id.*; see also *Fredette v. State*, 428 A.2d 395, 404 (Me. 1981) (reading implicit right to bail into amended constitutional provision because “it seems anomalous that the negation of such right of the individual as against the government would be retained as a part of a constitutional ‘Declaration of Rights’”).

152. 19 Cal. 539 (1862).

153. *Id.* at 542.

154. *Id.* at 542–43.

evident and bail should be guaranteed as of right. The court upheld the latter clause as the proper exercise of the legislature's discretion to prohibit bail in capital cases when the proof is evident.<sup>155</sup>

After holding that the indictment creates a presumption of guilt for all purposes except the trial, the court noted that, independently of the strength of the prosecution's case, there may be circumstances that justify bail after indictment for a capital offense.<sup>156</sup> Even if the proof is evident, the court may allow bail in special cases, including unreasonable delay or repeal of the law defining the offense,<sup>157</sup> qualifying the statute's clear prohibition against bail.

In 1993, 131 years later, the California Supreme Court reaffirmed its earlier holding without actually citing *Tinder* or any other case. *People v. Superior Court*<sup>158</sup> clarified the relationship between the constitutional provision and the penal statute, which in this case prohibited bail, by distinguishing the purposes of the two provisions. The court explained that the constitution guarantees the right to bail to all defendants except those charged with capital offenses when the facts are evident, whereas the penal statute prohibits the setting of bail in such cases.<sup>159</sup> As in *Tinder*, the court upheld the statute as the proper exercise of the legislature's discretion to prohibit bail.<sup>160</sup>

### 3. Florida

In *State v. Arthur*,<sup>161</sup> the Supreme Court of Florida recognized that, while several jurisdictions have construed their constitutional provisions to prohibit bail in the cases excepted from the guarantee,<sup>162</sup> more have interpreted theirs to allow courts the discretion to grant release on bail even in those excepted cases.<sup>163</sup> The court chose to join the latter group<sup>164</sup> and affirmed the appellate court's holding that the court still has discretion to grant or deny bail in a capital case, even if the proof is evident.<sup>165</sup>

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155. *Id.* at 542.

156. *Id.* at 549–50.

157. *Id.*

158. 25 Cal. Rptr. 2d 38 (Ct. App. 1993).

159. *Id.* at 40.

160. *Id.* at 40–42.

161. 390 So. 2d 717 (Fla. 1980).

162. *Id.* at 718 & n.2 (citing *State v. Garrett*, 493 P.2d 1232 (Ariz. Ct. App. 1972); *People v. District Court*, 529 P.2d 1335 (Colo. 1974) (en banc)). *Garrett* and *District Court* are discussed in Part II.B.1 and Part II.B.2, respectively.

163. *Id.* at 718 & n.3 (citing *State v. Hartzell*, 100 N.W. 745 (N.D. 1904); *Ex parte Howell*, 245 P. 66 (Okla. Crim. App. 1926); *Fontaine v. Mullen*, 366 A.2d 1138 (R.I. 1976); *State v. Toomey*, 223 A.2d 473 (Vt. 1966)). *Hartzell*, *Howell*, *Fontaine*, and *Toomey* are discussed in Part II.A.7, Part II.A.8, Part II.A.9, Part II.A.11, respectively.

164. *Arthur*, 390 So. 2d at 719.

165. *Id.* at 718–19.

The court first reasoned that the plain language of the constitution seems to compel this interpretation.<sup>166</sup> It went on to analyze the historical background to the constitutional right-to-bail provision.<sup>167</sup> At common law, it explained, the court had discretion to grant bail in all cases, but the accused had no right to bail in any case.<sup>168</sup> In capital cases, the court usually denied bail because of the great risk of flight in order to save one's life, but retained discretion to grant bail if satisfied by the defendant's assurances.<sup>169</sup> When the states decided to guarantee bail in certain cases, they included an exception for capital cases, but only when the proof is evident or the presumption great.<sup>170</sup> Since the constitutional provision purported to grant additional rights not recognized at common law, the courts should not interpret it as limiting or removing the capital defendant's opportunity for release on reasonable conditions.<sup>171</sup> Finally, the court concluded that the state's interest in ensuring the accused's presence at trial "does not so outweigh [his] interest in retaining his liberty as to justify denying completely the opportunity to convince the court that release on bail is appropriate."<sup>172</sup>

#### 4. Maine

In *Harnish v. State*,<sup>173</sup> the Supreme Judicial Court of Maine stated that the right to bail does not affect the discretionary power of the court to grant bail in any case, including capital cases when the proof is evident.<sup>174</sup> *Harnish* defined the procedures owed to the defendant at the bail hearing, equating the "proof evident" standard to that of probable cause.<sup>175</sup> The court continued that a finding of probable cause, while extinguishing the right to bail, leaves the court's discretionary power to grant bail intact.<sup>176</sup> It further stated that this discretionary power to admit any defendant to bail is "beyond the scope" of the constitutional right to bail and, therefore, unaffected.<sup>177</sup>

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166. *Id.* (finding that the plain language does not support the state's argument that denial of bail is mandatory because of the high risk that a capital defendant will flee when the proof of guilt is evident).

167. *Id.* at 718.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 718–19.

172. *Id.* at 719.

173. 531 A.2d 1264 (Me. 1987).

174. *Id.* at 1269.

175. *Id.* at 1268.

176. *Id.* at 1269.

177. The court ultimately affirmed the denial of bail. *Id.*

### 5. Mississippi

While the case law in Mississippi is inconsistent on this issue, its clearest holding has been that the decision to grant bail remains a matter of discretion in the excepted cases.<sup>178</sup> In *Ex parte Wray*,<sup>179</sup> the Mississippi Supreme Court stated in dicta that after finding that the proof is evident in a capital case “a court might, in the exercise of a sound discretion admit a party to bail, [although] he could not certainly claim it as a right.”<sup>180</sup>

Just fourteen years later, the Mississippi Supreme Court cited *Wray* for its holding that the indictment alone does not establish evident proof but, after a long description of the common law, endorsed the view that bail should be denied for a capital offense when the proof is evident.<sup>181</sup> In accordance with custom at common law, the court read its constitution to permit bail in the excepted cases only if induced by “some special motive,” such as delay or illness, and ultimately affirmed the lower court’s denial of bail.<sup>182</sup>

### 6. Nevada

In *In re Wheeler*,<sup>183</sup> the Supreme Court of Nevada began its analysis by noting that the language of the constitutional provision generally favors bail and comports with the presumption of innocence, by disfavoring punishment before conviction.<sup>184</sup> The court explained that, for this reason, all offenses are bailable.<sup>185</sup> While the right to bail is otherwise absolute, in capital cases it is subject to the limitation of “when the proof is evident, or the presumption great.”<sup>186</sup> Within this “area of limitation a court is invested with a judicial discretion to resolve the matter.”<sup>187</sup> The court then cited cases indicating that this ‘discretion’ actually applies to the decision

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178. See *Ex parte Wray*, 30 Miss. 673 (1856); see also *Huff v. Edwards*, 241 So. 2d 654, 656 (Miss. 1970) (quoting *Ex parte Bridewell*, 57 Miss. 39 (1879)) (holding that bail remains discretionary, but arguably limiting this discretion to “extraordinary circumstances” such as serious health problems or excessive trial delay). *Contra Street v. State*, 43 Miss. 1, 25–26 (1870).

179. 30 Miss. 673.

180. *Id.* at 679.

181. *Street*, 43 Miss. at 26–28.

182. *Id.* at 23, 31.

183. 406 P.2d 713 (Nev. 1965).

184. *Id.* at 715.

185. *Id.*

186. *Id.*

187. *Id.* at 715–16 (noting that its “view of the constitutional emphasis” may conflict with earlier opinions and rejecting any contrary statements as incompatible with the presumption of innocence).

of *whether* the proof is evident, not the decision of whether to grant bail when the proof *is* evident.<sup>188</sup>

In *Wheeler*, the legislature forbade bail in the excepted cases.<sup>189</sup> Despite the particularly strong statutory language prohibiting bail, the court held that the finding that the proof is evident is not necessarily dispositive.<sup>190</sup> Once the court makes that determination, it may also consider other information unrelated to the accused's guilt but related to the main purpose of bail—ensuring the accused's presence at trial.<sup>191</sup> Therefore, even in light of a clear statutory prohibition, the court retains some discretion to consider information beyond the weight of the proof of guilt and, presumably, to grant bail when appropriate. Ultimately, however, the defendant did not convince the court to reverse the order denying bail.<sup>192</sup>

### 7. North Dakota

*In re West*<sup>193</sup> held that the constitutional bail provision does not forbid bail in the excepted cases.<sup>194</sup> Rather, the Supreme Court of North Dakota read the provision to be “silent as to granting or withholding bail in a capital case where the proof of guilt is evident or the presumption thereof is great.”<sup>195</sup> Although the provision does not grant the right to bail to this category of defendants, it does not prohibit the legislature from doing so.<sup>196</sup> The court cited *Tinder*<sup>197</sup> as support.<sup>198</sup> Ultimately, however, it declined to grant bail because the accused had not presented any special facts or circumstances that appealed to the court's discretion.<sup>199</sup>

Three years later, the North Dakota Supreme Court reiterated its earlier holding that bail is a matter of discretion in capital cases when the proof is evident or the presumption great.<sup>200</sup>

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188. *Id.* at 716 (citing cases in support of the proposition that indictment alone does not decide question of evident proof, leaving room for a further judicial determination).

189. The legislature had expressly provided, “No person shall be admitted to bail where he is charged with an offense punishable with death when the proof is evident or the presumption great . . . .” *Id.* at 715.

190. *Id.* at 716.

191. The court listed the accused's community associations, employment opportunities, and any prior criminal record and attempted escapes as examples. *Id.*

192. *Id.* at 717.

193. 88 N.W. 88 (N.D. 1901).

194. *Id.* at 89.

195. *Id.*

196. *Id.*

197. See *supra* notes 152–57 and accompanying text.

198. *In re West*, 88 N.W. at 89.

199. *Id.* at 90.

200. *State v. Hartzell*, 100 N.W. 745, 746 (N.D. 1904) (ultimately denying the application for bail after finding that the proof was evident because the defendant did not convince the court to exercise its discretion favorably to him).

## 8. Oklahoma

In 1926, the Criminal Court of Appeals of Oklahoma remarked in dicta that it is “the uniform holding of this court” that the granting or denial of bail in capital cases when the proof is evident or presumption great is “a matter of judicial discretion.”<sup>201</sup> It cited no cases, however, and ultimately held that bail was a matter of right anyway because the proof was not evident.<sup>202</sup> The court did not mention earlier opinions that seemed to take for granted that bail would be refused upon a finding that the proof was evident or presumption great.<sup>203</sup> These opinions did not discuss the existence of any further discretionary power to grant bail, reflecting the practice that prevailed at common law.

## 9. Rhode Island

In *Fountaine v. Mullen*,<sup>204</sup> after holding that the lower court did not err in finding that the proof of guilt of first-degree murder was evident,<sup>205</sup> the Supreme Court of Rhode Island remanded the case for a hearing to decide whether bail should be granted as a matter of discretion.<sup>206</sup> The court noted that Arizona courts have expressly held that bail is prohibited in such cases,<sup>207</sup> while other courts have said so in dicta, without explanation or support.<sup>208</sup> The court then noted that at least Vermont and North Dakota have expressly held that bail may still be granted as a matter of discretion in the excepted cases.<sup>209</sup>

The court ultimately found the latter interpretation to be more persuasive, based on the history of these bail provisions.<sup>210</sup> At common law, the court

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201. *Ex parte Howell*, 245 P. 66, 66 (Okla. Crim. App. 1926); see also *Ex parte Womack*, 71 P.2d 494, 495 (Okla. Crim. App. 1937) (observing that “it is generally held” that the constitutional provision preserves the discretion enjoyed by the judiciary at common law).

202. *Howell*, 245 P. at 66.

203. *Ex parte Harkins*, 124 P. 931, 938 (Okla. Crim. App. 1912) (noting that bail “should be refused” and “must be refused” in the excepted cases). *But see In re Thomas*, 93 P. 980, 982–83 (Okla. 1908) (noting that, while bail “should” and “must be refused” in capital cases when the proof is evident, it is still within sound judicial discretion to grant bail under extraordinary circumstances, such as delay or illness).

204. 366 A.2d 1138 (R.I. 1976).

205. *Id.* at 1142.

206. *Id.* at 1144.

207. *Id.* at 1143 (citing *State v. Garrett*, 493 P.2d 1232 (Ariz. Ct. App. 1972)). For a discussion of *Garrett*, see *infra* notes 227–32 and accompanying text.

208. *Id.* (citing *State ex rel. Murray v. Dist. Court*, 90 P. 513 (Mont. 1907)); see *infra* note 255 & accompanying text (citing *State ex rel. Murray v. District Court* for the proposition that some opinions suggest that in the excepted cases bail must be denied).

209. *Fountaine*, 366 A.2d at 1143 (citing *State v. Hartzell*, 100 N.W. 745 (N.D. 1904); *Ex parte Dexter*, 107 A. 134, 138 (Vt. 1919)). For a discussion of *Ex parte Dexter* and *Hartzell*, see *infra* notes 220–25 and accompanying text and *supra* note 200 and accompanying text, respectively.

210. *Fountaine*, 366 A.2d at 1143; see also *State v. Currington*, 700 P.2d 942, 944 (Idaho 1985) (noting that the fixing of bail is a matter traditionally left to the judiciary); *Witt v.*



retained the inherent authority to grant or deny bail in its discretion.<sup>211</sup> The court opined that the people included liberal bail provisions in their state constitutions “because judges exercised their discretion adversely to the accused so frequently.”<sup>212</sup> The court concluded that, against this background, the constitutional bail provision was intended to expand the bail rights enjoyed at common law.<sup>213</sup> It added that “it would be highly dubious to treat a provision that was enacted as a guarantee of rights in such a way as to retract rights previously enjoyed by defendants, absent clear evidence that the framers intended that result.”<sup>214</sup>

#### 10. South Dakota

Before the statewide abolition of the death penalty made bail “a matter of absolute right in all cases,”<sup>215</sup> the Supreme Court of South Dakota held that admission to bail for capital offenses when the proof is evident or the presumption great is discretionary.<sup>216</sup> The court, quoting *Tinder*,<sup>217</sup> held that the legislature may permit or forbid bail in the excepted cases.<sup>218</sup> It went on to validate a statute that did the latter, but ultimately granted the defendant bail because the proof was not evident.<sup>219</sup>

#### 11. Vermont

In 1919, the Supreme Court of Vermont held that the court retains discretion to admit the accused to bail, even when the offense charged is capital and the proof is evident or presumption great.<sup>220</sup> *Ex parte Dexter*<sup>221</sup> reasoned that at “common law a person accused or indicted of any felony whatsoever was bailable in the discretion of the court, upon good sureties, until he was convicted.”<sup>222</sup> Against this historical background, the court continued, it is more reasonable to interpret the constitutional provision to

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Moran, 572 A.2d 261, 266 (R.I. 1990) (basing its holding that bail and detention are “within the judicial sphere of government and cannot be entirely delegated to the Legislature” on separation of powers principles); *Demmith v. Wis. Judicial Conference*, 480 N.W.2d 502, 509 (Wis. 1992) (“Because bail is an area of shared powers, the legislature may set forth standards . . . as long as [it] does not infringe on the judiciary’s power.”).

211. *Fontaine*, 366 A.2d at 1143.

212. *Id.* (quoting *State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960)).

213. *Id.* at 1144.

214. *Id.*

215. *Sioux Falls v. Marshall*, 204 N.W. 999, 1001 (S.D. 1925).

216. *State v. Kauffman*, 108 N.W. 246, 246 (S.D. 1906).

217. *See supra* notes 152–57 and accompanying text.

218. *Kauffman*, 108 N.W. at 246.

219. The court struck down a provision of the statute that made bail discretionary in capital offenses regardless of whether the proof is evident. If the proof is not evident, bail is a matter of right even for capital offenses. *Id.* at 246–47.

220. *Ex parte Dexter*, 107 A. 134, 138 (Vt. 1919).

221. 107 A. 134.

222. *Id.* at 138.

preserve this discretion in the cases excluded from the bail guarantee, rather than to limit implicitly the protections available at common law.<sup>223</sup> The court is not, however, free to make arbitrary decisions; rather, "certain and well defined and established rules" must control and contain this discretion.<sup>224</sup> Accordingly, courts ordinarily deny bail in the excepted cases, absent special circumstances.

In *Dexter*, the reviewing court admitted the defendant to bail because the lower court had ruled against her as a matter of law, and she was entitled to the benefit of judicial discretion.<sup>225</sup> The Vermont Supreme Court rearticulated this holding in 1966.<sup>226</sup>

### B. Jurisdictions That Adopt the Prohibitive Interpretation

#### 1. Arizona

In *State v. Garrett*,<sup>227</sup> the Court of Appeals of Arizona reversed the trial court's grant of bail despite evident proof of guilt, holding that the constitution mandates denial of bail in the excepted cases.<sup>228</sup> For this proposition, however, it cited no authority, supporting this conclusion only by the relevant provision's purposes.<sup>229</sup> The people amended the constitution to expand the exceptions from the bail guarantee in order to prevent abuses of the bail system by arrestees who commit additional crimes while released on bail.<sup>230</sup> The court reasoned that, in this context, to read the constitutional language as merely directive would subvert the provision's purposes, reverting to the looser bail conditions that existed

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223. The court employed the principle of statutory interpretation that "rules of the common law are not to be changed by doubtful implications, nor overturned except by clear and unambiguous language." *Id.* at 136 (citing *State v. Shaw*, 50 A. 863 (Vt. 1901)).

224. *Id.* at 138.

225. *Id.*

226. *State v. Toomey*, 223 A.2d 473 (Vt. 1966). The court also listed several factors to consider in determining the amount of bail: the ability of the accused to give bail; nature of the offense, penalty for the offense charged; character and reputation of the accused; health of the accused; character and strength of the evidence; probability of the accused appearing at trial; forfeiture of other bonds; and whether the accused was a fugitive from justice when arrested. *Id.* at 475; see also *State v. Blackmer*, 631 A.2d 1134, 1138-39 (Vt. 1993) (holding that the defendant was entitled to the court's discretion, even though he fell within the excepted cases).

227. 493 P.2d 1232 (Ariz. Ct. App. 1972).

228. *Id.* at 1234.

229. See *id.*

230. According to the court, due to the length of time until trial, people were able to commit several crimes while on bail, knowing that they could raise bail for the subsequent offenses. If convicted of the first offense, they could plea bargain as to the rest and possibly obtain concurrent sentences. In this case, the trial court had admitted the defendant to bail on a forgery charge allegedly committed while he was on bail for another forgery and an armed robbery charge. *Id.* at 1233-34.

before.<sup>231</sup> The court refused to do so and emphasized that the “only determination” for the court to make is whether the proof is evident or the presumption great.<sup>232</sup>

Interestingly, in 1913 the Arizona Supreme Court cited *Tinder*'s<sup>233</sup> holding that in capital offenses when the proof is evident or presumption great the legislature may prohibit bail or leave it as a matter of judicial discretion.<sup>234</sup> Because the legislature had chosen to prohibit bail in the excepted cases, “the granting of bail is not even discretionary, but the right of the person thereto is forbidden by the law.”<sup>235</sup> The *Garrett* court did not discuss this case.

## 2. Colorado

Just two years after *Garrett*, the Supreme Court of Colorado also read the language of its constitution to mandate denial of bail.<sup>236</sup> Unlike the decision of the Arizona court, however, this opinion examined how other jurisdictions have decided the issue, noting that the majority rule “may well be” that admission to bail still remains discretionary.<sup>237</sup> Nevertheless, this court read the provision to mandate the denial of bail based on its plain language.<sup>238</sup> The court cited six cases in support of its departure from the majority rule, but upon closer examination only two of these cases, from the late 1800s, arguably support such a proposition and, even then, only in dicta.<sup>239</sup>

Significantly, the court began its analysis by noting that, if any discretion remained in the court, the record would “amply justif[y]” the granting of

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231. *Id.* at 1234.

232. *Id.*

233. See *supra* notes 152–57 and accompanying text.

234. *In re Haigler*, 137 P. 423, 424 (Ariz. 1913).

235. *Id.*

236. *People v. Dist. Court*, 529 P.2d 1335, 1335–36 (Colo. 1974) (en banc).

237. *Id.* at 1336 (citing *In re West*, 88 N.W. 88 (N.D. 1901); *Ex parte Howell*, 245 P. 66 (Okla. Crim. App. 1926); *State v. Toomey*, 223 A.2d 473 (Vt. 1966)). For a discussion of *In re West*, *Howell*, and *Toomey*, see *supra* notes 193–99 and accompanying text, *supra* notes 201–03 and accompanying text, and *supra* note 226 and accompanying text, respectively.

238. See *Dist. Court*, 529 P.2d at 1335.

239. *In re Losasso*, 24 P. 1080, 1082 (Colo. 1890) (“[R]elease upon bail should not be permitted, unless the court feels clear that the constitutional exception does not apply.”); *State v. Crocker*, 40 P. 681, 686 (Wyo. 1895) (holding that indictment is not conclusive of evident proof, while noting in dicta that the constitutional right to bail terminates the common-law discretion of the courts, “so as to give bail as a matter of right in those cases where it is allowable”). The other three cases do not directly address this issue; they merely contain vague dicta that only seem to carry such an inference. *People ex rel. Dunbar v. Dist. Court*, 500 P.2d 358, 359–60 (Colo. 1972); *Shanks v. Dist. Court*, 385 P.2d 990, 992 (Colo. 1963) (en banc); *People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962) (en banc), *overruled on other grounds by People v. Kirkland*, 483 P.2d 1349 (Colo. 1971) (en banc); see *supra* Part I.D.3. Finally, the court cites *People v. Tinder*, 19 Cal. 539 (1862), which actually discredits this proposition. See *supra* Part II.A.2.

bail in this case.<sup>240</sup> It referred to expert testimony that confinement in jail was having a “deleterious effect upon the defendant,” to other testimony regarding her good character and reputation, and to the fact that her five children attended school in the community where she resided.<sup>241</sup> Other evidence indicated that she was not a flight risk, while no evidence supported the argument that she might flee.<sup>242</sup> Despite the lack of binding precedent, and the district attorney’s concession that bail remained discretionary in the excepted cases, the court stated that it felt compelled to rule otherwise, without providing further explanation why.<sup>243</sup>

### 3. Pennsylvania

An 1838 case from the Court of Common Pleas of Philadelphia County, *Commonwealth ex rel. Chauncey v. Keeper of the Prison*,<sup>244</sup> read the constitutional provision to prohibit bail in the excepted cases.<sup>245</sup> The court reasoned that the purpose of the right to bail was to limit, not enlarge, the judicial discretion enjoyed by the higher courts at common law.<sup>246</sup> While it is inconsistent with civil liberty to make the right to bail dependent on judicial discretion, it is also “inconsistent with the certainty of punishment due to atrocious offenders” to allow discretion in capital cases when the proof is evident.<sup>247</sup> (For this latter point, the court cited no authority.) Accordingly, the constitutional provision is mandatory in both theailable cases and the excepted cases. The court ultimately held that the proof of guilt of a capital offense was not evident and, therefore, released the defendant on bail.<sup>248</sup>

### 4. Virgin Islands

As discussed in the Introduction, the Virgin Islands Supreme Court recently held in *Browne* that the right-to-bail provision in the Revised Organic Act preempted the local bail statute to the extent that the latter provided for release of certain first-degree-murder defendants.<sup>249</sup>

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240. *Dist. Court*, 529 P.2d at 1335.

241. *Id.*

242. *Id.* at 1335–36.

243. *Id.* at 1336. The dissent described this holding as a deprivation of the court’s discretion, reasoning that the wording of the constitution does not require such an interpretation. *Id.* at 1336–37 (Erickson, J., dissenting). To support its interpretation, the dissent cited several cases from the jurisdictions listed in Part II.A, as well as *In re Lossasso*, 24 P. 1080, which the majority also used to support its holding. *Id.*

244. 2 Ash. 227 (Pa. Ct. C.P. 1838).

245. *Id.* at 233.

246. *Id.* at 232.

247. *Id.* at 232–33.

248. *Id.* at 235–36, 238.

249. *Browne v. People*, No. 2008-022, 2008 V.I. Supreme LEXIS 33, at \*24 (Aug. 29, 2008); see *supra* notes 1–15 and accompanying text.

According to the court, by its plain language the right-to-bail provision required detention of any defendant in the excepted cases.<sup>250</sup> At the same time, the defense argued that the territorial statute governed release, preempting the Revised Organic Act; it did not argue for an alternative reading, under which the Revised Organic Act is consistent with the legislature's decision to permit bail in the excepted cases.<sup>251</sup> Ultimately, the court remanded the case to determine whether the proof was evident.<sup>252</sup>

*C. Vague Statements Reflecting an Unquestioned Presumption—Either That Bail May Be Granted or That Bail Must Be Denied*

In addition to the opinions that have directly addressed the present conflict, countless others include suggestive, though indirect, dicta that a reader could mistake for a decisive position.<sup>253</sup> Some suggest that in the excepted cases bail may be denied;<sup>254</sup> others that bail must be denied.<sup>255</sup> Although courts in only four jurisdictions have directly held that the constitutional provision prohibits bail in the excepted cases, a significant number of jurisdictions seem to take for granted the fact that bail will be denied anyway.<sup>256</sup> These dicta do not necessarily indicate how the court would rule if confronted with the issue, but rather may reflect that the court has never had cause to question its presumed reading.

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250. *Browne*, 2008 V.I. Supreme LEXIS 33, at \*24; *see also* *Tobal v. People*, No. 2008-070, 2009 V.I. Supreme LEXIS 11, at \*8–9 (Feb. 11, 2009) (explaining the prohibitive interpretation upheld in *Browne*).

251. *Browne*, 2008 V.I. Supreme LEXIS 33, at \*16–17.

252. *Id.* at \*2; *see also* *People v. Austrie*, No. ST-08-CR-370, 2008 V.I. LEXIS 15, at \*7–9 (Super. Ct. Oct. 6, 2008) (citing *Browne*, 2008 V.I. Supreme LEXIS 33, at \*43) (deciding to detain the defendant after finding that the proof of guilt of first-degree murder was evident).

253. This misleadingly presumptive language also appears in opinions from jurisdictions in which there has been a direct holding or clear dicta. *See supra* notes 181–82, 203 and accompanying text.

254. *See, e.g.*, *State v. Engel*, 493 A.2d 1217, 1229 (N.J. 1985) (“If the court concludes that the State has met its burden in this respect, it may properly deny . . . bail.”); *Commonwealth v. Truesdale*, 296 A.2d 829, 835 (Pa. 1972) (noting in dicta that the drafters failed to expand the cases in which “bail may be denied” to include those punishable by life imprisonment); *Roll v. Larsen*, 516 P.2d 1392, 1392 (Utah 1973).

255. *See, e.g.*, *Ex parte Burgess*, 274 S.W. 423, 426 (Mo. 1925) (en banc) (“[B]ail is not a matter of right, and should be refused.”); *State ex rel. Murray v. Dist. Court*, 90 P. 513, 514 (Mont. 1907); *In re Thomas*, 93 P. 980, 982 (Okla. 1908) (using the phrase “bail should be refused” while considering the standard for proof is evident).

256. *See, e.g.*, *Renton v. State*, 577 S.W.2d 594, 595 (Ark. 1979) (en banc) (holding that the burden rests on the state “to prove its assertion that the petitioner is constitutionally precluded from being released on bail because the proof is evident or the presumption great”); *Ford v. Dilley*, 156 N.W. 513, 530 (Iowa 1916) (“[T]he proof cannot be said to be so evident as to preclude admission to bail.” (citations omitted)); *State v. Hamilton*, 190 N.W.2d 862, 863 (Neb. 1971) (“[The constitution] renders murder a nonbailable offense ‘where the proof is evident or the presumption great.’” (quoting NEB. CONST. art. I, § 9)).

For example, the dicta that bail “may be denied” may reflect either an understanding that bail would still be discretionary in the excepted cases or an intention to use the word “may” strongly.<sup>257</sup> The dicta that bail “should be denied” may convey the limits of judicial authority or may simply describe a rule of judicial custom, imposed on the courts by their own practice, as occurred at common law.<sup>258</sup> This judicial practice is so well entrenched, and this provision so open ended, that it is understandable that some courts simply do not question the presumptive meaning.<sup>259</sup> In such cases, as at common law, the determination whether the proof is evident often collapses into a decision whether the defendant poses a flight risk or a danger to the community.<sup>260</sup>

#### D. *Implications of the Recent Constitutional Amendments for This Conflict*

The amendments discussed in Part I.D.4 permit (or mandate, depending on the jurisdiction’s interpretation of the disputed language) the denial of bail for certain offenses if necessary to ensure the defendant’s appearance at trial and/or the safety of the community.<sup>261</sup> These flight and harm exceptions add an additional level of analysis to the right to bail, accompanying the traditional qualification that the proof be evident or the presumption great. Reconciling the implications of these amendments is difficult for both sides of the conflict. The addition of these flight and harm exceptions may herald the increasing relevance of the proof-evident standard, as it applies to an expanding category of excepted cases, or the beginning of its obsolescence, as this dual standard exposes the weaknesses of the proof-evident standard.

On one hand, this additional standard may make it harder to argue that the constitutional provision preserves discretion to grant bail in the excepted cases upon a further finding that the defendant does not pose a risk of flight or danger. The drafters knew how to specify that in some cases the court should consider, first, whether the proof is evident and,

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257. See *supra* note 52.

258. See, e.g., *Allen v. State*, 174 So. 2d 538, 540 (Fla. 1965) (stating in dicta that bail is “not obtainable” in capital offenses unless the proof is not evident); *Blackwell v. Sessums*, 284 So. 2d 38, 39 (Miss. 1973); *State v. Konigsberg*, 164 A.2d 740, 745 (N.J. 1960).

259. Several cases seem to take for granted that the sole factor to consider is whether the proof is evident. See, e.g., *State v. Williams*, 133 S.W. 1017, 1018–19 (Ark. 1911); *State v. Menillo*, 268 A.2d 667, 670 (Conn. 1970).

260. See, e.g., *Konigsberg*, 164 A.2d at 743 (“The underlying motive for denying bail in the prescribed type of capital offenses is to assure the accused’s presence at trial. . . . But when it does not appear on the facts adduced. . . that the defendant is reasonably in danger of a conviction of murder in the first degree, not only is the strong flight urge missing, but the basic right to conditional release is imperatively present.”); *Ex parte Kittrel* 20 Ark. 499, 507 (1859) (“If there is a probability that the accused is guilty of a capital offence, his detention for trial is of the utmost importance to the public, and a bail bond is a doubtful mode of securing his presence at the trial. . . .”).

261. See also *supra* note 122 and accompanying text (describing the relevant provisions).

second, whether the defendant is dangerous or a flight risk. By not specifying this second step in all cases, courts could interpret the lack of an express flight or harm exception not as silence, but as direction to end analysis after determining that the proof is evident, effectively prohibiting bail in the excepted cases.<sup>262</sup>

On the other hand, if bail is prohibited in the excepted cases, the further determination of whether the defendant poses a flight risk or danger for only some offenses is likewise problematic. It begs the question whether the proof-evident standard adequately represents the primary purposes of pretrial detention—that is, ensuring the defendant’s presence at trial and protecting the public safety. If the strength of the evidence truly reflects the likelihood of flight risk or danger, then the extra step added by these recent amendments would be redundant. If it does not reflect this likelihood, however, the traditional state constitutional right-to-bail standard would be uniquely divorced from the underlying purposes of bail, unlike other state and federal bail standards.<sup>263</sup> By interpreting the provision to prohibit bail in some cases when the proof is evident, and in other cases when the proof is evident and the defendant poses a flight risk or danger, it becomes difficult to argue that the strength of the evidence is an airtight proxy for the underlying purposes of bail.

### III. LOOKING FORWARD

This Note has examined what, if anything, the state constitutional right to bail leaves to legislative and judicial discretion. Statutory interpretation begins and ends with the plain language of the provision only if that language is unambiguous.<sup>264</sup> If it is ambiguous, other considerations, such as the drafters’ intent and policy implications, become relevant. In this case, the plain language, drafters’ intent, and policy implications of the provision all compel the conclusion that the right to bail leaves room for

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262. By the maxim *expressio unius est exclusio alterius*, or “the expression of one is the exclusion of the other,” the clear expression of a general flight or harm exception implicitly negates the existence of this further determination for capital offenses and offenses punishable by life imprisonment when the proof is evident. *Cf.* *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Russello v. United States*, 464 U.S. 16, 23 (1983). *But see* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234–35 (1975); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 282 (1985) (noting that this maxim has become disfavored, as it is based on the assumption of legislative omniscience).

263. *See* WIS. CONST. art. I, § 8, cl. 2 (“All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses.”); *Bail Reform Act of 1966*, 18 U.S.C. § 3142(c)(1)(B) (2006).

264. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

judicial and legislative discretion to permit or deny bail in the excepted cases.

Part III.A argues that the provision's grammatical structure, combined with its drafters' intent, implies that it is silent regarding the excepted cases, leaving room for the legislature and judiciary to decide whether to permit bail. Part III.B advises that, while the strength of the evidence is an important factor in bail decisions, policy considerations require that this factor be relevant only to the extent that it serves the primary purposes of bail—assuring the defendant's presence at trial and the safety of the community.

*A. The State Constitutional Right to Bail Preserves the Common-Law Discretion To Grant Bail in Any Case*

The operative language of the constitutional provision—"shall be bailable"—acts directly upon all cases except those excluded from the guarantee.<sup>265</sup> The provision, therefore, is silent regarding the excepted cases.<sup>266</sup> Although not dispositive of the question, several canons of interpretation favor a narrow construction of the exception to the right to bail. To begin with, exceptions within a statute generally should be read narrowly.<sup>267</sup> Courts also should construe strictly statutes that derogate from the common law or have a punitive component.<sup>268</sup> Moreover, the provision's location in the constitutional bill of rights reinforces the need to read the exception narrowly.<sup>269</sup> It would be strange, and perhaps even dangerous, to deny implicitly an opportunity enjoyed at common law in a vehicle purported to define and guarantee individual rights.<sup>270</sup> Such a limitation on individual rights should require an express statement so that the people understand the legal implications of the provision when ratifying it. Because this provision is silent regarding the excepted cases, it must be read to preserve their treatment at common law.<sup>271</sup>

As discussed in Part I.C, the decision to grant bail at common law was ultimately discretionary in all cases.<sup>272</sup> The only external limitations on early English bail were statutory, and they bound only the sheriffs and the

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265. See *supra* notes 58–60 and accompanying text.

266. See *supra* note 195 and accompanying text.

267. See *supra* note 53 and accompanying text.

268. See *supra* notes 61, 223 and accompanying text; see also *Bergna v. State* 102 P.3d 549, 551 (Nev. 2004) (discussing the general rule that the court liberally construe ambiguous criminal provisions in the defendant's favor).

269. See *supra* notes 151, 171, 214 and accompanying text.

270. See *supra* note 151 and accompanying text (discussing the Supreme Court of Alabama's statement in *Ex parte Croom*, 19 Ala. 561, 571 (1851), that it "would seem somewhat paradoxical to hold, that in a bill of rights, the convention should have put the negative of a common law right beyond the power of legislative control").

271. See *supra* notes 61, 223 and accompanying text.

272. See *supra* notes 64, 101–03 and accompanying text.



justices of the peace.<sup>273</sup> These limitations did not apply to the Court of King's Bench, to whom state judges are best analogized.<sup>274</sup> Even though these judges usually followed the clear statutory guidelines in setting or denying bail, this custom was a self-imposed practice, not a limitation on their judicial authority.<sup>275</sup> Therefore, at common law, bail was fundamentally discretionary for the excepted cases.<sup>276</sup>

At best, the provision's plain language favors the retention of discretion to permit bail in the excepted cases. At worst, it is ambiguous. *Arthur, Harnish, West*, and the dissent in *District Court* either expressly or effectively based their conclusions that bail remains discretionary on the plain language alone.<sup>277</sup> The courts in *District Court* and *Browne* interpreted the provision to prohibit bail on its face.<sup>278</sup> This disagreement demonstrates a level of ambiguity that requires consideration of other factors, beginning with the drafters' intent.

One of the strongest arguments for the prohibitive interpretation is the historical fact that the definition of bailable and nonbailable offenses emerged to prevent abuses of judicial discretion.<sup>279</sup> In order to equalize access to bail and to limit the excessive granting of writs by the justices of the peace, Westminster strictly regulated bail according to the category of offense and strength of proof.<sup>280</sup>

This argument, however, has several flaws. To begin with, as discussed above, the early English bail statutes restricted the discretion of the justices of the peace, not of the King's Bench judges.<sup>281</sup> Even though these rigid statutory guidelines still influenced the King's Bench judges, the state constitutional right to bail served an entirely different purpose than the early statutory scheme did. While the statutory scheme developed to prevent abuses of judicial discretion,<sup>282</sup> the right to bail developed to protect against this draconian legislation.<sup>283</sup> The statutory scheme had become so rigid that only misdemeanors were bailable as of right.<sup>284</sup> The purpose of the constitutional right to bail was to eliminate the authority of

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273. See *supra* note 92 and accompanying text.

274. See *supra* notes 92–102 and accompanying text.

275. See *supra* notes 97–100 and accompanying text.

276. See *supra* notes 176, 211, 222–23 and accompanying text.

277. See *supra* notes 166, 174, 193–96, 243 (reasoning based on the language of the provision alone that bail remains discretionary).

278. See *People v. Dist. Court*, 529 P.2d 1335 (Colo. 1974) (en banc); *Browne v. People*, No. 2008-022, 2008 V.I. Supreme LEXIS 33 (Aug. 29, 2008); *supra* notes 238, 249 and accompanying text (reasoning that the plain language requires the denial of bail).

279. See *supra* note 73 and accompanying text.

280. See *supra* notes 75–78, 89–91 and accompanying text.

281. See *supra* notes 92–102 and accompanying text.

282. See *supra* notes 70, 89 and accompanying text.

283. See *supra* note 147 and accompanying text; see also *supra* notes 212–13 and accompanying text (explaining that states included liberal bail provisions in their constitutions because judges exercised their discretion oppressively).

284. See *supra* note 78 and accompanying text.

the legislature to define certain offenses as nonbailable.<sup>285</sup> Therefore, the intent to limit judicial discretion cannot be imputed to the constitutional right to bail.

The case law supports this explanation of the original intent. *Croom* and *Arthur* agreed that the purpose of the right to bail was to prevent excessively prohibitive legislation.<sup>286</sup> Only *Chauncey* clearly reasoned that the right to bail was intended to remove judicial and legislative discretion entirely, due to early abuses.<sup>287</sup> That case, however, is of weak precedential value, as it is from a Philadelphia county court and is not commonly followed in Pennsylvania.<sup>288</sup>

Finally, the recent amendments to the constitutional bail provisions do not support the prohibitive interpretation.<sup>289</sup> While these amendments raise questions for both sides of the conflict, they do not necessarily reflect a deliberate decision to interpret the provision as prohibitive. Since the initial drafting of this disputed language, some states have made their provisions expressly prohibitive,<sup>290</sup> perhaps because they were alerted to the ambiguity of the initial wording. Presumably, if the drafters of the recent amendments intended to prohibit bail upon the determination that the proof is evident, they had access to more direct models of how to do so.

It is more likely that the discrepancies highlighted by these amendments simply reflect the ambiguous and confusing nature of the disputed language, which caused the drafters to specify that flight and safety must be relevant to the bail determination. The inclusion of this further step highlights the inadequacy of a single factor determination based on the strength of the evidence. The proof-evident standard has long been a proxy for the purposes of bail—ensuring the defendant's appearance at trial and protecting the public safety. It is disturbing to assume that, because the flight and harm exceptions are not expressly stated for some cases, they are not to be considered. After all, these are the very considerations presumed to be captured by the proof-evident standard.

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285. See *supra* note 147 and accompanying text.

286. See *Ex parte Croom*, 19 Ala. 561 (1851); *State v. Arthur*, 390 So. 2d 717 (Fla. 1980); *supra* notes 147, 167–71 and accompanying text.

287. See *Commonwealth ex rel. Chauncey v. Keeper of the Prison*, 2 Ash. 227 (Pa. Ct. C.P. 1838); *supra* notes 245–46 and accompanying text.

288. The reasoning of this case is also questionable because it describes pretrial detention as “punishment” without any qualification. *Supra* note 247 and accompanying text. Although *State v. Garrett*, 493 P.2d 1232 (Ariz. Ct. App. 1972) made a similar argument, the intent to which that court referred was the intent of the drafters to amend the provision to expand the excepted cases, not the intent of the earlier drafters who had written the disputed language. See *supra* note 230 and accompanying text.

289. See *supra* Part II.D.

290. See *supra* note 113 and accompanying text.

B. *The Ultimate Decision To Detain or Release a Defendant Before Trial Must Always Be Tethered to the Purposes of Bail*

Bail is not intended to punish the accused.<sup>291</sup> Rather, bail and conditional release are designed to ensure that the accused appears at trial and does not threaten the public safety in the meantime.<sup>292</sup> Historically, the only reason to treat capital defendants differently than others was the greater risk they posed of defeating the purposes of bail.<sup>293</sup> While the strength of the prosecution's case is a good proxy for the likelihood that a defendant will flee or be dangerous, it is subsidiary to the primary purposes of bail. The connection between this proxy and the purposes of bail is not airtight.

Over time, the tail has begun to wag the dog. The proof of guilt, which should be subsidiary to the risk of flight and danger,<sup>294</sup> has become dominant over the defendant's interest in liberty, the judiciary's interest in retaining authority over bail decisions, and society's interest in the separation of powers and presumption of innocence. Detention is civil, as opposed to punitive, because of its prospective interest in ensuring the public safety and integrity of the judicial process.<sup>295</sup> If a factor, such as the strength of the proof of guilt, comes to dominate these regulatory purposes, then detention comes dangerously close to punishment before conviction.

*People v. District Court* is a prime example of the severing of the bail decision from its regulatory purposes. In that case, the court observed that the defendant did not pose a risk of flight.<sup>296</sup> The court cited ample evidence supporting her release but felt compelled by the language of the constitutional provision to order detention.<sup>297</sup>

In fact, none of the courts that interpreted the provision as prohibitive based their decisions on the policy implications of using proof of guilt as a substitute for flight risk and danger. That is, not one reasoned that bail should be prohibited because the connection between the proxy and the primary purposes of bail is airtight. Rather, they based their decisions to deny bail on the text of the provisions or on the historical role that the strength of the evidence has played in bail decisions, as opposed to the actual correlation between the proof of guilt and the likelihood of flight or danger in the cases before them.<sup>298</sup> Disturbingly, it is in the very cases

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291. See *supra* note 29 and accompanying text.

292. See *supra* notes 30–31 and accompanying text.

293. See *supra* note 81 and accompanying text.

294. See *supra* note 46 and accompanying text.

295. See *supra* note 32 and accompanying text.

296. See *People v. Dist. Court*, 529 P.2d 1335, 1335–36 (Colo. 1974) (en banc); *supra* note 242 and accompanying text.

297. See *Dist. Court*, 529 P.2d at 1335; *supra* note 241 and accompanying text.

298. See generally *supra* Part II.B.

where the strength of evidence fails to serve as a good proxy that this disconnect is most likely to arise.

The constitutional provision is only half the battle, as the legislature can prohibit bail in the excepted cases anyway. An outright prohibition on bail based on the category of offense and strength of the evidence, however, is unnecessary and has grave policy implications. To begin with, as pretrial detention hinders the ability of the accused to assist in his own defense, the proof-evident standard becomes a self-fulfilling prophecy. That is, detained defendants are more frequently convicted, not necessarily because they are guilty, but often simply because they were imprisoned before trial.<sup>299</sup>

In addition to increasing protection of individual rights, the discretionary interpretation is preferable because it preserves the separation of powers.<sup>300</sup> The "power to bail is incident to the power to hear and determine."<sup>301</sup> The ultimate discretion to grant bail is essential to performing the judicial function.<sup>302</sup> Even though it is within the authority of the legislature to define bailable and nonbailable offenses, it should do so with respect for the fact that the court, drawing on its vast experience, is in a better position to determine the credibility of the defendant. The creation of the right to bail left behind a small percentage of cases in which the court has discretion to order pretrial detention or conditional release if convinced that the defendant will not pose a risk of flight or danger. Perhaps very few defendants will appeal to this discretion. In these special cases, however, it is unjust and improper to prohibit the court from exercising its power to release the accused on bail.

The justice system should preserve the spirit of historical practice without tethering itself to enmeshed, outdated values. The category of the offense and the weight of the evidence have long been fundamental to the organization of the American bail system. These factors continue to be useful in defining the category of defendants excluded from the bail guarantee and in illuminating the defendant's likelihood to flee, to be dangerous, or to tamper with witnesses.<sup>303</sup> They should not, however, dispose of the issue. When this archaic language took root in the American bail system, the proof-evident standard made more sense in its role as a

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299. See *supra* note 19 and accompanying text (listing scholarly work that argues that this correlation is due to the increased difficulty of assisting in one's own defense while in prison); see also *supra* note 172 and accompanying text (weighing the individual's interest in liberty against the state's interest in obtaining his appearance at trial, and holding that the latter does not so outweigh the former as to justify the denial of bail as a matter of law).

300. See *supra* note 210.

301. *E.g.*, *People v. Shattuck*, 6 Abb. N. Cas. 33, 37 (N.Y. Sup. Ct. 1878); see, *e.g.*, *In re Chin Wah*, 182 F. 256, 258 (D. Or. 1910); *Bottom v. People*, 164 P. 697, 698 (Colo. 1917) (noting, however, that this power can be limited by statute).

302. *Shattuck*, 6 Abb. N. Cas. at 37; *cf.* *United States v. Burr*, 25 F. Cas. 25 (C.C.D. Va. 1807) (No. 14,692b) (noting that the power to detain is necessary to the discharge of the court's functions and, although not expressly granted, implied in judicial powers).

303. See *Lim*, *supra* note 22, at 601-02.

single-factor determinant than it does today. At that time, the strength of the evidence may well have been the best way to predict whether the defendant would appear at trial.<sup>304</sup> Today, however, courts have greater resources to protect against flight, including electronic monitoring, passport surrender, and advanced communication in law enforcement.<sup>305</sup> Additionally, other factors, such as the defendant's reputation, resources, or community ties, may actually be more accurate predictors of flight risk than the strength of the prosecutor's case before trial.<sup>306</sup>

#### CONCLUSION

Bail has changed drastically since early common law, and yet it has not changed at all. Although modern society offers more accurate ways to predict which defendants pose a risk of flight or danger to the community, some jurisdictions cling to an outdated standard based purely on the category of the offense and the strength of the evidence. This standard has long been a useful proxy for the true purposes of bail, and the framers of the various state constitutional right-to-bail provisions intended it to be no more and no less. While the standard limits the cases in which bail may be denied, other factors, such as the defendant's financial resources, character, community ties, and employment, should also influence whether the defendant is detained or conditionally released. To transform this standard into the sole, determinative factor in bail decisions would subvert the framers' intention.

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304. See *supra* notes 44–51 and accompanying text; see also *Bail, supra* note 21, at 967 (suggesting that the expanding frontier and consequent ease of flight made the bail system more rigid).

305. See *supra* note 26 and accompanying text; see generally *Lim, supra* note 22, at 601 (discussing the correlation between the likelihood a defendant will appear at trial if released on bail and the probability of capture if he flees).

306. See *United States v. Salerno*, 481 U.S. 739, 751 (1987) (“[T]here is nothing inherently unattainable about a prediction of future criminal conduct.”) (quoting *Schall v. Martin*, 467 U.S. 253, 278 (1984)); JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 92–95 (1979).

## APPENDIX: DIAGRAM OF THE STATE-BY-STATE ANALYSIS

Right to Bail (43) <sup>307</sup>				No Right to Bail (10) <sup>308</sup>	
Preserves Disputed Language (35) <sup>309</sup>			Changes Language (8) <sup>310</sup>		
Still Relevant (32) <sup>311</sup>			Irrelevant Because All Now Bailable (3) <sup>312</sup>		
Statute Denies Bail → Moot (10) <sup>313</sup>	Statute Permits Bail → Direct Conflict (6) <sup>314</sup>	Statute Silent or Vague → Potential Conflict (16) <sup>315</sup>			
Alabama*	Iowa	Arkansas	Alaska	Indiana	Georgia
Arizona**	North Dakota*	Colorado**	Minnesota	Maine*	Guam
California*	Rhode Island*	Connecticut	New Jersey	Michigan	Hawaii
Delaware	South Dakota*	Florida*		Oklahoma*	Maryland
Idaho	Washington	Kentucky		Oregon	Massachusetts
Illinois	Virgin Islands**	Mississippi*		Puerto Rico	New Hampshire
Kansas		Missouri		South Carolina	New York
Louisiana		Montana		Wisconsin	North Carolina
Nebraska		New Mexico			Virginia
Nevada*		Ohio			West Virginia
		Pennsylvania**			
		Tennessee			
		Texas			
		Utah			
		Vermont*			
		Wyoming			

\* Court held discretionary

\*\* Court held prohibitive

() Numbers in parentheses refer to the number of states in each category

307. See *supra* note 111 and accompanying text.308. See *supra* note 110 and accompanying text.309. See *supra* note 112 and accompanying text.310. See *supra* notes 113–14 and accompanying text.311. See *supra* notes 117–20 and accompanying text.312. See *supra* notes 119–20 and accompanying text.313. See *supra* notes 125–26 and accompanying text.314. See *supra* note 127 accompanying text.315. See *supra* notes 128–30 and accompanying text.