



Winter 1983

Comment: The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention without Bail in New Mexico

Sarah Curry Smith

Matthew Holt

Recommended Citation

Sarah C. Smith & Matthew Holt, *Comment: The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention without Bail in New Mexico*, 13 N.M. L. Rev. 145 (1983).
Available at: <https://digitalrepository.unm.edu/nmlr/vol13/iss1/6>

NOTES AND COMMENT

COMMENT: THE CONSTITUTION IS CONSTITUTIONAL— A Reply to "The Constitutionality of Pretrial Detention Without Bail in New Mexico"

I. INTRODUCTION

In November 1980, the people of New Mexico voted to amend the existing bail provision of the New Mexico Constitution.¹ The original provision, which was a part of the Kearney Bill of Rights,² provided that "[a]ll persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."³ The 1980 amendment did not change the original constitutional provision, but added the following paragraphs:

Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances:

A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant. An appeal from an order denying bail shall be given preference over all other matters.⁴

To date, the authors have found no instance in which prosecutors have urged, or courts have applied, the new bail provision.⁵ The provision has, however, sparked much comment in the New Mexico legal community.

1. The amendment was proposed by H.R.J. No. 9 (N.M. Laws 1979), and was adopted at the general election held November 4, 1980. Historical Note to N.M. Const. art. II, § 13 (Cum. Supp. 1981).

2. That Bill of Rights was declared by Brigadier Gen. Stephen W. Kearney, Sept. 22, 1846. The Kearney Bill of Rights is reprinted in Vol. 1, N.M. Stat. Ann. (1978).

3. N.M. Const. art. II, § 13 (Cum. Supp. 1981). Cf. the bail provision in the United States Constitution, U.S. Const. amend. VIII, which does contain the first sentence but is otherwise identical to the New Mexico provision. The "capital offenses" language in the New Mexico bail provision apparently first arose in the Pennsylvania Colony, where Article XI of the Frame of Government of Pennsylvania of 1682 used identical language. 1 Laws of Pennsylvania 56 (Phil., ed. 1810), cited in Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 80 n. 277 (1977) [hereinafter cited as Duker].

4. N.M. Const. art. II, § 13 (Cum. Supp. 1981).

5. Telephone conversation with Bernalillo County Assistant District Attorney (April 26, 1982).

Professor Norwood and Mr. Novins, in a previous issue,⁶ argued forcefully that the new amendment to the bail provision of the New Mexico Constitution violates the eighth and fourteenth amendments of the United States Constitution. Their argument divided into four major parts. The first two arguments were general: (1) that the eighth amendment applies to the states through the fourteenth amendment,⁷ and (2) that the eighth amendment guarantees an absolute right to bail in all but capital cases.⁸ The second two arguments were more specific: (1) that the bail provision violates the fourteenth amendment of the United States Constitution under an equal protection and substantive due process analyses,⁹ and (2) that the bail provision violates the fourteenth amendment to the United States Constitution under a procedural due process analysis.¹⁰

Professor Norwood and Mr. Novins concluded that the excessive bail provision of the United States Constitution does, or should, apply to the states through the fourteenth amendment. The authors of this Comment have no quarrel with that conclusion.¹¹ Professor Norwood and Mr. Novins also concluded, however, that the eighth amendment does create an absolute right to bail in all but capital cases,¹² and that the New Mexico bail provision is unconstitutional under both due process and equal protection analyses.¹³ The authors' disagreement with those conclusions forms the basis of this Comment, which proposes a different historical and analytical view of both the eighth amendment and the New Mexico bail provision. Under the analysis presented here, the bail provision is constitutionally sound.

II. THE EIGHTH AMENDMENT—A GUARD AGAINST GOVERNMENT ABUSE

Professor Norwood and Mr. Novins admitted that neither the history of the eighth amendment nor a logical analysis of its meaning prove conclusively that the framers intended that the eighth amendment guar-

6. Norwood and Novins, *The Constitutionality of Pre-Trial Detention Without Bail in New Mexico*, 12 N.M.L. Rev. 685 (1982) [hereinafter cited as Norwood & Novins].

7. *Id.* at text accompanying nn. 16-31.

8. *Id.* at text accompanying nn. 32-69.

9. *Id.* at text accompanying nn. 72-107.

10. *Id.* at text accompanying nn. 108-126.

11. In *Robinson v. California*, 370 U.S. 660, 667 (1962), the Supreme Court ruled that the cruel and unusual punishment clause of the eighth amendment was applicable to the states through the fourteenth amendment. The Court has never decided whether the excessive bail clause applies to the states. That issue was recently presented to the Court in *Murphy v. Hunt*, argued at 50 U.S.L.W. 3613 (U.S. Feb. 9, 1982). Most commentators expected that the Court would rule that the excessive bail clause does apply to the states. The Court, however, vacated the case as moot. *Murphy v. Hunt*, ___ U.S. ___, 102 S. Ct. 1181 (1982).

12. Norwood & Novins, *supra* note 6, at text accompanying n. 69.

13. *Id.* at text accompanying nn. 72-126.

antee an absolute right to bail. They concluded, however, that policy dictates such an interpretation.¹⁴ The eighth amendment descended, however, from English statutory law.¹⁵ Historical analysis shows that bail was never an absolute right in England,¹⁶ and that the framers of the United States Constitution did not necessarily intend that the eighth amendment create an absolute right to bail.

As the English criminal law system evolved, certain crimes were defined by statute to be non-bailable.¹⁷ For those crimes which were bailable, the judges and sheriffs had broad discretion in the amount of bail which was required before the accused was released. This discretion led to abuse. Unreasonably high bail¹⁸ or arbitrary denials of bail became the norm.¹⁹ Parliament, in an effort to cure the problem, passed laws which were designed to eliminate the abuses.²⁰ These efforts were largely unsuccessful. In 1626, Parliament delivered to the King the Petition of Right, which required that no "[f]reeman may be taken or imprisoned . . . but by lawful judgment of his peers, or by the law of the land. . . . [N]o man, . . . should be . . . put to death, without being brought to answer by due process of law."²¹ The final section of the Petition of Right read that the King's subjects had been "returned back to several prisons, without being charged with anything to which they might make answer according to law."²² The Petition of Right required the courts to provide the defendants with due process rights by informing them of the charges for which they were being held. To enforce the Petition, Parliament required that prisoners who were not advised of the charges against them within three days of their arrests be taken to trial or be released on bail.²³

The Petition of Right, however, provided no relief for procedural delay mechanisms.²⁴ The Habeas Corpus Act of 1677 closed that loophole, but opened another. A clause in the Habeas Corpus Act permitted discretion

14. See *id.* at text accompanying n. 69.

15. This article does not discuss in detail the history of bail. That subject was covered in remarkable depth by William F. Duker in 1977. See Duker, *supra* note 3, at 44. See also Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L.J. 1140 (1972) [hereinafter cited as Meyer]; Foote, *The Coming Constitutional Crises in Bail*, 113 U. Pa. L. Rev. 959 (1965) [hereinafter cited as Foote].

16. See *infra* text accompanying notes 17-29.

17. See Duker, *supra* note 3, at 44-45. Those crimes included murder and committing an offense in the King's forest. *Id.* Forgery, arson and treason were added to the list at the Assize of Northampton in 1176. Meyer, *supra* note 15, at 1153 n. 76.

18. See Duker, *supra* note 3, at 45; Foote, *supra* note 15, at 967; Meyer, *supra* note 15, at 1154-56.

19. See Duker, *supra* note 3, at 47-58.

20. *Id.*

21. 3 St. Tr. 221-24, cited in Duker, *supra* note 3, at 64.

22. *Id.*

23. Habeas Corpus Act of 1677, reprinted in relevant part in Duker, *supra* note 3, at 66.

24. One example of procedural delay was the sheriff's slowing down returns on habeas corpus. Courts could also delay in calendaring cases. Duker, *supra* note 3, at 65-66; Foote, *supra* note 15, at 967.

and allowed judges to set bail at prohibitively high amounts.²⁵ In 1689, Parliament corrected this problem in the great statutory Bill of Rights, which mandated that "excessive bail ought not to be required."²⁶

Thus, the English bail scheme was composed of three distinct elements. The first element was that each crime in England fell into one of two categories—bailable or non-bailable—which were firmly defined by a series of statutes.²⁷ For those crimes which were bailable, the second element of the scheme, habeas corpus, prevented unreasonable denial of bail.²⁸ The excessive bail clause of the statutory Bill of Rights, the third element in the English scheme, protected against the judges' setting bail too high.²⁹

Colonial America followed the English pattern, enacting statutes which restricted the discretion of the judiciary in the area of bail.³⁰ The original Constitution did not include the first ten amendments,³¹ known as the Bill of Rights. In 1789, Congress adopted both the Bill of Rights³² and the Judiciary Act of 1789.³³

The bail provision of the Judiciary Act, which passed without debate,³⁴ provided the following:

[U]pon 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 supreme or a circuit court, or by a justice of the supreme court, . . . who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.³⁵

With this clause, Congress created a statutory right to bail except in capital cases. The clause also provided that the judges use their discretion and carefully examine the accused and the offense.

The excessive bail clause of the eighth amendment, passed on the same day as the Judiciary Act,³⁶ states only that "[e]xcessive bail shall not be

25. Duker, *supra* note 3, at 66. The provision provided: "[T]he said Lord Chancellor or Lord Keeper, or Justice or Baron . . . shall discharge the said Prisoner . . . taking his . . . [surety] . . . in any sum according to their Discretion. . . ." *Id.* (citing 31 Car. 2, c. 2).

26. Bill of Rights, 1681, 1 W. & M., c. 2, *cited in* Duker, *supra* note 3, at 66 n. 171.

27. Foote, *supra* note 15, at 968.

28. *Id.*

29. *Id.*

30. Duker, *supra* note 3, at 78–81; Meyer, *supra* note 15, at 1163. Some Colonies guaranteed that the "subjects of the colony would enjoy the same liberties and immunities as if they had been born within the realm of England." In England, however, citizens had no right to bail beyond that granted by the parliamentary acts previously described. Duker, *supra* note 3, at 81.

31. Duker *supra* note 3, at 83.

32. U.S. Const. amends. 1–X. See Duker, *supra* note 3, at 83–86; Foote, *supra* note 15, at 971.

33. Judiciary Act of 1789, 1 Stat. 73, ch. XX [hereinafter cited as Judiciary Act].

34. Duker, *supra* note 15, at 86; Foote, *supra* note 15, at 972.

35. Judiciary Act, *supra* note 33.

36. Duker, *supra* note 3, at 86. The only debate recorded about the bail clause of the eighth amendment was that of Mr. Livermore, who wondered what "excessive bail" meant, and wondered who was to judge what "excessive" was. *Id.* (citing 1 Cong. Deb. 754 (Gales & Seaton eds. 1834)).

required. . . ."³⁷ The eighth amendment makes no mention of a "right" to bail. It merely proscribes "excessive bail."³⁸ The logical interpretation of the drafters' intent is that they created a statutory right to bail at the federal level, which could or could not be adopted by the states and preserved, through the eighth amendment, a defendant's rights against abuses of the statutory grant.

A close look at the Bill of Rights also leads to the conclusion that the framers did not intend to create an absolute right to bail in the eighth amendment. The Bill of Rights created no rights at all; nor was it intended to. The Bill of Rights merely recognized certain rights which the framers considered important and protected those rights from abuses by the government. For example, the fifth amendment does not create the rights to life, liberty and property; it simply provides that the government must observe due process requirements before it can deprive a defendant of these pre-existing rights.³⁹ Similarly, the first amendment does not create an absolute right to free speech; it merely prevents Congress from creating laws which unreasonably deprive persons of that right.⁴⁰ The logical inference is that the purpose of the Bill of Rights was to protect those rights which were already considered fundamental. When Congress created a federal statutory right to bail in all but capital cases in the Judiciary Act, and on the same day passed the eighth amendment, it passed the eighth amendment to protect the statutory right from governmental abuse, just as it created the other amendments to protect against governmental abuse.

This view is consistent both with the intent of the framers of the Bill of Rights and with the history of the English statutory right to bail, which was also designed, not to provide an absolute right to bail, but to prevent abuse. The right to bail has been the subject of debate since the Magna Carta.⁴¹ Nothing in the history of bail indicates that bail was ever an

37. U.S. Const. amend. VIII.

38. See *Carlson v. Landon*, 342 U.S. 524 (1952): "[T]he very language of the Amendment fails to say all arrests must be bailable." *Id.* at 546. Professor Foote, in his strong argument that the eighth amendment creates a right to bail, noted that the eighth amendment and the bail provision of the Judiciary Act are anomalous. Foote, *supra* note 15, at 972. Professor Foote explained the anomaly by noting that the two bail provisions were "the products of two entirely different chains of historical development." *Id.* at 973. The Judiciary Act, according to Professor Foote, sprang from the Massachusetts Body of Liberties, which has no analogue in English law, as does the eighth amendment. *Id.* at 975. The bail clause of the eighth amendment was taken almost verbatim from the English Bill of Rights, which remained unchanged while the more liberal American thoughts on bail were developing. *Id.* at 978-80. This explanation, however, does not explain why, if the two bail provisions were passed by Congress on the same day, the Congress did not specifically intend that the right to bail be granted or denied statutorily by the states, just as Congress passed such a statute. Professor Foote's explanation also does not refute the argument that if Congress had intended to grant an absolute constitutional right to bail (except in capital cases) in the eighth amendment, it would have so stated in the amendment, rather than in the statute.

39. See U.S. Const. amend. V.

40. See U.S. Const. amend. I.

41. See Duker, *supra* note 3, at 43, text accompanying nn. 58-60.

absolute right; there were always certain classes of crimes which legislatures deemed to be non-bailable.⁴² The English statutes, and their descendant, the eighth amendment, were designed to prevent the defendant from incarceration at the whim of the state. As will be shown, the New Mexico bail provision protects the defendant's due process and equal protection rights so that the defendant is not arbitrarily denied bail under the New Mexico bail provision.

III. FOURTEENTH AMENDMENT ANALYSIS

Professor Norwood and Mr. Novins argued that the bail provision allows arbitrary denial of bail because it provides inadequate standards for judges to follow when they consider whether to deny bail and because it does not require a hearing. Additionally, Professor Norwood and Mr. Novins argue that the provision forces judges to allow bail after 60 days when bail has previously been denied. That contention, however, is inaccurate. The bail provision must be read in conjunction with Rule 22 of the New Mexico Rules of Criminal Procedure.

A. *Procedural Due Process and Rule 22*

The New Mexico constitutional amendment allowing bail to be denied to certain persons must be read in *pari materia* with Rule 22 of the New Mexico Rules of Criminal Procedure. There must be procedures for effective administration of the new bail provision. The power to make rules of procedure, however, is uniquely within the province of the supreme court of the state. In *State ex rel. Uzelac v. Lake Criminal Court*,⁴³ the Supreme Court of Indiana was faced with a challenge to a rule of criminal procedure which it had adopted. The court held that:

The Supreme Court . . . not only has the right, but the responsibility under the Constitution, to formulate rules and regulations so that the constitutional rights of litigants may be fully recognized and applied in the administration of justice in the courts.⁴⁴

The New Mexico courts have recognized that they possess the same powers and responsibilities and have provided a framework to protect the constitutional rights of litigants.⁴⁵

42. See Meyer, *supra* note 15, at 1155-56, text accompanying nn. 93-100.

43. 212 N.E.2d 21 (Ind. 1965).

44. *Id.* at 23.

45. The committee which prepared the Rules of Criminal Procedure, including Rule 22, dealt specifically with the question of whether the court had authority to set procedures in bail determinations. In the Committee Commentary, *Rule-making Power of the New Mexico Supreme Court*, in the section entitled *Power to Adopt Rules Governing Release of the Accused*, the Committee concluded that Rule 22 is a valid exercise of the court's power to adopt procedural mechanisms to guarantee the substantive rights granted by the New Mexico Constitution. The Committee Commentary is contained in Judicial Volume 1, N.M. Stat. Ann. (1978).

In *State v. Chavez*,⁴⁶ the New Mexico Court of Appeals found that “[t]he Supreme Court has power to regulate pleading, practice and procedure.”⁴⁷ In *Southwest Underwriters v. Montoya*,⁴⁸ the New Mexico Supreme Court recognized its power to make rules of procedure “which are essential to the performance of the constitutional duties imposed upon the courts. . . .”⁴⁹ Rule 22 of the New Mexico Rules of Criminal Procedure is an example of the court’s exercise of its rulemaking power. Rule 22 clearly is a procedural device for implementing the constitutional provision dealing with bail. The first line of this Rule states: “Pending trial, any person bailable under Article II, Section 13 of the New Mexico Constitution. . . .”⁵⁰ The Rule specifically sets out certain procedures which are used to safeguard the rights of a person subject to a denial of bail under the New Mexico Constitution. The Rule creates procedures where none would otherwise exist. Because the rulemaking function belongs to the Supreme Court, the procedures could not be provided in the bail provision itself or in a statute.⁵¹

Even before the bail provision was amended, Rule 22 was the implementing rule for the bail provision. The Rule specifically requires that “any person bailable . . . , at his first appearance before a court, shall be ordered released . . . , unless the court determines . . . that such release will not reasonably assure the appearance of the person. . . .”⁵² Although this section of the Rule does not specifically order that the court hold a hearing, it is difficult to see how the court could make a “determination” about the defendant’s flight risk unless it does hold a hearing.

If the court does find that the defendant is a flight risk, the Rule requires that the court consider five listed conditions as alternatives to absolute release.⁵³ The Rule expressly provides that the court impose the first of the five conditions which will reasonably assure the defendant’s presence.

46. 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

47. *Id.* at 453, 541 P.2d at 633.

48. 80 N.M. 107, 452 P.2d 176 (1969).

49. *Id.* at 109, 452 P.2d at 178.

50. N.M. R. Crim. P. 22. The New Mexico Supreme Court promulgated Rule 22 in 1972. Introduction, Rules of Criminal Procedure for the District Courts, Jud. Pamp. 6 (Repl. Pamp. 1980), contained in Judicial Volume I, N.M. Stat. Ann. (1978). The Rule was not changed when the bail provision was amended.

51. Common rules of statutory construction compel an interpretation that a statute is constitutional unless it is clearly erroneous. C. Sands, *Sutherland Statutory Construction* § 56.04 (4th ed. 1973). Although the New Mexico bail provision is a constitutional amendment as well as a statute, it follows that a constitutional provision should be interpreted to be constitutional whenever possible. Sutherland specifically states that when a statute, “taken alone, would violate constitutional restrictions . . . it may be construed with other statutes on the same subject in order to discover an interpretation that renders it constitutional.” *Id.* at § 51.01.

52. N.M. R. Crim. P. 22(a).

53. In the order in which the court must consider these conditions, they are: placing the defendant in the custody of another, restrictions on travel, requiring an appearance bond, requiring a bail bond, or any other condition deemed reasonably necessary to assure appearance. N.M. R. Crim. P. 22(a).

The five enumerated conditions range from supervised custody to execution of a bond.⁵⁴ Only when none of the less restrictive conditions will assure the presence of the accused at trial may the court impose "any other condition deemed reasonably necessary"⁵⁵ to assure his appearance. Such a condition then could be denial of bail, if the court finds that no amount of bail will prevent the defendant from fleeing.

The next section of the Rule specifically sets out "factors to be considered in determining conditions of release."⁵⁶ Those factors include the nature and circumstances of the offense, the weight of the evidence, family ties, employment, length of residence, and record of appearance.⁵⁷ Thus, the court not only must hold a hearing, it must allow both sides of the argument to be presented. The prosecutor opposing bail presumably could argue the reasons for which bail should be denied. The defendant would then argue the reasons why bail should not be denied. The court is not limited to consideration of only those factors set out in the Rule, but may take into account any relevant information.

The next section of the Rule specifically states that the court may "impos[e] any other condition necessary to assure the orderly administration of justice."⁵⁸ This section of the Rule, however, explicitly requires that the court hold a hearing⁵⁹ and that there will be a showing that there exists a danger that the defendant will "commit a serious crime, will seek to intimidate witnesses or will otherwise unlawfully interfere with the orderly administration of justice. . . ."⁶⁰ The Rule also provides that when additional conditions are imposed, the court must state in the record the reasons for such conditions.

Thus, Rule 22 is the implementing rule for the entire bail provision. The provision and the Rule cannot be read separately. The Rule, explicitly in the case of danger to the community or protection of the court processes, and implicitly in the case of flight risk, requires a hearing. The Rule requires that the judge consider the defendant, his status, his personality, and the crime, before he can do anything other than grant bail. Once the Rule is read in conjunction with the bail provision, the constitutional problems perceived by Professor Norwood and Mr. Novins fall away, and the constitutionality of the bail amendment is apparent.

B. Equal Protection

Since the creation of the criminal justice system, lawmakers have been in the business of classifying people. Lawmakers have always had the

54. N.M. R. Crim. P. 22(a)(1)-(5).

55. N.M. R. Crim. P. 22(a)(5).

56. N.M. R. Crim. P. 22(b).

57. *Id.*

58. N.M. R. Crim. P. 22(c)(2).

59. N.M. R. Crim. P. 22(c).

60. *Id.*

power to set apart certain types of behavior which were punishable, thus separating people into two classes—those who committed the defined offenses and were punished, and those who did not and were not.⁶¹ Early English lawmakers deemed that some crimes were more serious than others, thus separating those who committed the proscribed offenses into two classes—felons and misdemeanants.⁶² Both English and American legislatures have long prescribed different punishments for different crimes, and with that prescription, have, for example, classified those who will go to prison as different from those who may pay fines, usually in lieu of a prison sentence.⁶³

Legislatures also have the power to define certain types of crimes as non-bailable offenses, thus separating those accused of certain crimes, who can be released on bail, from those who are accused of other offenses, who may not be released on bail.⁶⁴ The legislature clearly has the power both to create a class of crimes which are not bailable,⁶⁵ and to create a class of accused felons who may be bailable only under certain circumstances. The only constitutional limitations on this power to classify are that the legislatures draw and administer the classifications fairly.

Whether the classification is administered fairly (i.e., whether the accused is arbitrarily denied bail) depends on the procedural safeguards afforded those subject to denial of bail.⁶⁶ Whether the classification is properly tailored to its purpose is determined under equal protection and substantive due process analyses, which are similar in some respects, but divergent in others. The authors will consider the substantive due process and procedural due process analyses in a subsequent section.⁶⁷ This section will analyze the New Mexico bail provision in the equal protection sense and will indicate the differences between the substantive due process and the equal protection analyses.

The fourteenth amendment of the United States Constitution provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.”⁶⁸ Equal protection does not prohibit the state

61. The laws of King Ethelberht (560–616 A.D.) set a value on a man's life and body, which was compensable to his relatives by one who killed or injured him. Duker, *supra* note 3, at 35 n. 8 (citing 1 Ancient Laws and Institutions of England 3–25 (B. Thorpe ed. 1840)). The Assize of Clarendon (1166) established a class of felonies of royal concern. Duker, *supra* note 3, at 44.

62. See generally Duker, *supra* note 3.

63. Compare N.M. Stat. Ann. § 31-18-15 (Repl. Pamph. 1981), which provides imprisonment only for felonies, with N.M. Stat. Ann. § 31-19-1, which allows the sentencing authority to incarcerate a convicted misdemeanant, or impose a fine, or both.

64. See, e.g., N.M. Const. art II, § 13 (Cum. Supp. 1981): “All persons shall be bailable . . . except for capital offenses. . . .” (emphasis added). Cf. Judiciary Act, *supra* note 33. See also the Statute of Westminster I (1275), which listed, inter alia, arson, treason, and forgery as non-bailable, and eliminated the power of the sheriffs to grant bail to those who were not bailable. Cited in Duker, *supra* note 3, at 46 n. 81 and accompanying text.

65. See N.M. Const. art. II, § 13 (Cum. Supp. 1981). See also *supra* note 64.

66. See *infra* text accompanying notes 162–171.

67. See *infra* text accompanying notes 137–171.

68. U.S. Const. amend. XIV, § 1.

legislatures from making classifications; it requires only that those classifications do not arbitrarily deprive those within the class of benefits which are not bestowed upon those outside the class who are similarly situated. The United States Supreme Court, in its construction of the equal protection clause, has developed three separate analyses which apply in different situations. The first, most often called the "strict scrutiny" test, applies only to classifications based on suspect categories,⁶⁹ or to classifications which deal with what the Court has termed "fundamental rights."⁷⁰ The Court has applied a second type of analysis, often called the "middle tier" analysis, to classifications based on such things as gender,⁷¹ alienage,⁷² and illegitimacy,⁷³ although the Court is by no means settled as to when and how this "heightened scrutiny" is to be applied.⁷⁴ The third test, called the "rational relationship" test, applies to all other classifications.⁷⁵ Each of these tests requires a different equal protection analysis.

1. *The Bail Provision Under Strict Scrutiny*

The Supreme Court of the United States applies a strict scrutiny only when the classification created deals with a suspect category or infringes on one of those rights which the Court has considered a "fundamental right."⁷⁶ Once a challenger to the classification demonstrates that either of those characteristics exists, the burden shifts to the state to show that the classification furthers a "compelling state interest."⁷⁷

69. Classifications based on race and national origin are ordinarily "suspect." See *Loving v. Virginia*, 388 U.S. 1 (1967). But see *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), where the Court, while apparently applying strict scrutiny to the University of California at Davis' special admissions program (benign discrimination), also stated: "[W]hen a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a *substantial* state interest," *Id.* at 320 (emphasis added). It is not clear to the authors whether the *Bakke* Court actually intended a racial classification for benign purposes to be subjected to a lower level of scrutiny.

Any classification which infringes on first amendment rights is also generally subjected to strict scrutiny, requiring a compelling state interest and the least restrictive means. See, e.g., *Sherbert v. Verner*, 375 U.S. 398 (1963).

70. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (access to courts).

71. E.g., *Craig v. Boren*, 429 U.S. 190 (1976).

72. E.g., *Ambach v. Norwich*, 441 U.S. 68 (1979).

73. E.g., *Lalli v. Lalli*, 439 U.S. 259 (1978).

74. For a discussion of the Court's confusion in the sex discrimination area, see Dow, *Sexual Equality, the ERA and the Court—A Tale of Two Failures*, ante at ___ (1983).

75. See *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

76. See *supra* notes 69-70. Fundamental rights, under the equal protection analysis, however, are limited to three things: voting, access to the courts, and travel. See *infra* text accompanying notes 78-90.

77. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The New Mexico bail provision does not classify on the basis of a suspect category, because its classification deals with in-state felons as opposed to all others. Obviously, felons are of all races and religions. The analysis must now pass to the question of whether the bail amendment impermissibly infringes upon a "fundamental" right. The Supreme Court has recognized only the right to vote, the right to access to the courts, and the right to interstate travel as "fundamental" rights to which the equal protection clause applies.⁷⁸

The New Mexico bail provision does not impermissibly burden any of the rights which the Supreme Court has considered to be "fundamental" in the equal protection sense. The bail provision creates a classification which distinguishes those convicted of prior felonies in New Mexico from all other people. The bail provision does not affect voting.⁷⁹ The bail provision does not deny the defendant with a prior New Mexico felony conviction access to the courts because of the classification. Even if the

78. In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Court considered voting to be a fundamental right because it preserves so many other rights. In *Harper*, the Court considered the \$1.50 poll tax in Virginia and decided that the tax violated equal protection because it made the "affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. Voter qualifications, said the Court, have "no relation to wealth. . . ." *Id.* The Court stated: "[E]specially since the right to exercise the franchise [to vote] in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 667. In *Douglas v. Alabama*, 380 U.S. 415 (1965), and in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court held that access to the courts was another fundamental right in the criminal context. Equal access to the courts may not be a fundamental right in the civil sense. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the majority analyzed a filing fee, which effectively prevented the poor in Connecticut from obtaining divorces, under the due process clause. *Id.* at 374. Mr. Justice Douglas, in his concurring opinion, argued forcefully that *Boddie* was not a due process case, but that the state had created a class based on poverty and denied class members equal access to the courts. *Id.* at 386 (Douglas, J., concurring). Mr. Justice Brennan, also concurring, stated: "[T]his case presents a classic problem of equal protection of the laws. . . . [A] state may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee." *Id.* at 388-89 (Brennan, J., concurring). It appeared that *Boddie* would be read broadly and create an equal protection fundamental right to access to the courts in the civil context. In subsequent cases, however, the Court limited the *Boddie* fundamental right to those situations where the access to the courts involved marriage. See *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court recognized a third fundamental right in the equal protection analysis, the right to interstate travel. In *Shapiro*, plaintiffs attacked state residency requirements for welfare benefits. The Court found that the classification between welfare applicants with one year's residence and welfare applicants without a year's residence violated the equal protection clause. The Court noted that the classification between welfare applicants who had resided in the state for one year and those who had not "touches on the fundamental right of interstate movement and must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Id.* at 638 (emphasis by the Court). See also *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (residency requirement for indigents receiving nonemergency hospital care invalidated as a "penalty" for interstate movement).

79. Although the bail provision might cause a felon previously convicted in New Mexico to be in jail during an election, convicted felons cannot vote in New Mexico unless and until the Governor restores the right upon completion of the sentence. While N.M. Const. art. II, § 8, provides that

defendant is denied bail under the provision, he is afforded an immediate, expedited appeal on that denial.⁸⁰ Although an accused who is denied bail is certainly denied interstate travel, that right, as any fundamental right, may be denied by the state for a compelling reason.⁸¹ Additionally, under the equal protection analysis of the Court in *Shapiro v. Thompson*,⁸² the Court had held those classifications to violate the equal protection clause because the classifications denied benefits to people when they exercised the right to cross state lines.⁸³ Thus, the bail provision does not create a classification which infringes upon any of the three rights which the Supreme Court has established as "fundamental" in its equal protection analysis.

Professor Norwood and Mr. Novins argued that liberty (and also, under the "penumbra" of liberty, the presumption of innocence and the effective assistance of counsel) is, or should be, a fundamental right under the equal protection analysis.⁸⁴ The authors of this Comment assert, however, that liberty, the presumption of innocence, and effective assistance of counsel are private interests which are protected by the due process clause of the fourteenth amendment and by the sixth amendment, not by the equal protection clause. The fourteenth amendment clearly separates the equal protection and the due process clauses: "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁸⁵ The due process clause provides adequate safeguards for the liberty interest. The state can deprive a person of his liberty, but only after he has been afforded notice and a chance to be heard.⁸⁶ The equal

"[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," N.M. Const. art. VII, § 1, provides that "[e]very citizen . . . except idiots, insane persons and persons convicted of a felonious crime . . . shall be qualified to vote. . . ." This section is buttressed by N.M. Stat. Ann. § 1-4-24(C) (Cum. Supp. 1981), which requires actual determination by the county clerk before the felon can be purged from the rolls. The constitutional bar to a felon's voting is constitutional. See 1973 Op. Att'y Gen. No. 73-44; State *ex rel.* Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968) (conviction in trial court, not affirmation on appeal, was the determinative factor in deciding whether a person was a "convicted felon" for purposes of denying suffrage).

80. N.M. Const. art II, § 13 (Cum. Supp. 1981): "An appeal from an order denying bail shall be given preference over all other matters."

81. A person may even be deprived of the ultimate liberty, his life, if, in the process, he is afforded sufficient due process protections. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

82. 394 U.S. 618 (1969).

83. "[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis by the Court).

84. See Norwood and Novins, *supra* note 6 at text accompanying n. 73.

85. U.S. Const. amend. XIV, § 1 (emphasis added).

86. The Court has also interpreted the due process clause in the "fundamental rights" sense. See *Boddie v. Connecticut*, 401 U.S. 371 (1971). The fundamental right in the due process analysis, however, causes courts to look for not only a compelling state interest, which is the same as with

protection clause, on the other hand, does not deal with notice and the opportunity to be heard. Equal protection is concerned with assuring that if a classification is created, the classification does not deny benefits to those in the class while affording the same benefits to others, who are similarly situated but are not within that class.

Although the Court, for a time, tended to expand the "fundamental rights" protected by the equal protection clause through its equal protection analysis,⁸⁷ that trend is over.⁸⁸ The "fundamentalness" of liberty has been considered often by lower courts⁸⁹ and by the Supreme Court⁹⁰ in the due process sense but not under an equal protection analysis. The Supreme Court has never held that liberty is one of the fundamental rights protected by the equal protection clause.

The New Mexico bail provision distinguishes between those with prior New Mexico felony convictions and all others. That classification is not based upon suspect category. The classification does not infringe upon a fundamental right (voting, travel, or access to the courts) as defined by the Supreme Court. The bail provision's classification, therefore, does

equal protection analysis, but to consider also whether the state has employed the least restrictive means to achieve its purpose. The least restrictive means requirement does not appear in the equal protection analysis.

87. See *supra* notes 69-70.

88. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court refused to expand the list of "fundamental" rights under its equal protection clause to include education. *Rodriguez* involved an attack on the Texas system of financing public education with property taxes. The Court refused to find the poor a suspect class and refused to extend "fundamentalness" to the right to education. The Court upheld the Texas system of school finance under a rational relationship analysis. Justice Stewart, in his concurrence in *Rodriguez*, stated that: "Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the *validity* [emphasis added] of the *classifications* [emphasis by Justice Stewart] created by [the state]." 411 U.S. at 59 (Stewart, J., concurring).

In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court had refused to extend "fundamental" status to "necessities" under an equal protection analysis. In *Dandridge*, plaintiffs challenged Maryland's Aid to Families with Dependent Children program, which imposed a maximum limit of \$250 per month per family, regardless of the size of the family or the amount of need. The Court, although not specifically addressing the issue of the "fundamentalness" of welfare benefits, decided the case on a rational relationship standard of review and found the AFDC scheme constitutional.

Recently in *Powers v. Schwartz*, 448 F. Supp. 54, 56 (S.D. Fla. 1978), *vacated as moot*, 587 F.2d 783 (5th Cir. 1979), the Southern District Court for the District of Florida, in a bail case, specifically refused to consider liberty to be a fundamental right in the equal protection sense. The same court, the year before, considered liberty to be a fundamental right in a due process bail case. *Escandar v. Ferguson*, 441 F. Supp. 53 (S.D. Fla. 1977). Although the *Powers* court did not specifically say that it based its decision on the difference in the two clauses, it probably recognized that the due process analysis holds liberty to be a fundamental right, but the equal protection analysis does not.

89. See, e.g., *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot*, ___ U.S. ___ 102 S. Ct. 1181 (1982); *Pugh v. Rainwater*, 557 F.2d 1189, 1202 (5th Cir. 1977), *vacated in part as moot*, 572 F.2d 1053 (5th Cir. 1978) (en banc); *Escandar v. Ferguson*, 441 F. Supp. 53 (S.D. Fla. 1977).

90. See *Stack v. Boyle*, 342 U.S. 1 (1951).

not fall within the ambit of those classifications which require strict scrutiny under the equal protection clause of the fourteenth amendment. The question then becomes whether some sort of "heightened" scrutiny applies—the "middle tier" analysis.

2. *The Bail Provision Under Heightened Scrutiny*

The Supreme Court of the United States has recognized certain classifications which are so invidious that they require the highest type of scrutiny or "strict scrutiny." Those classifications are ones which are based on race and those involving first amendment rights.⁹¹ The Court has, however, developed an "intermediate tier" of scrutiny for classifications based on such things as gender,⁹² alienage,⁹³ and illegitimacy.⁹⁴ The intermediate, or "middle tier"⁹⁵ of classifications are all based upon involuntary and immutable characteristics that create a definable minority which is deprived, as a class, of equal treatment under the law. The purpose behind requiring heightened scrutiny for those types of classifications is clear: the government should not be allowed to discriminate against those who are not responsible for their physical characteristics, or where they were born, or whether their parents married, especially when their minority status deprives them of the political power to correct the situation.⁹⁶

The classification in the New Mexico bail provision does not cause invidious inequality such as that created by classifications based upon involuntary characteristics. Instead, the classification is based upon the fact that the accused has been convicted of at least one felony in New Mexico. Although a felony conviction is relatively immutable,⁹⁷ the com-

91. See *supra* note 69.

92. See *Craig v. Boren*, 429 U.S. 190 (1976).

93. See *Ambach v. Norwich*, 441 U.S. 68 (1979).

94. See *Lalli v. Lalli*, 439 U.S. 259 (1978).

95. "Intermediate tier," "heightened scrutiny," and "middle tier" are used interchangeably in this section and by most commentators. See *Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945 (1975); *Norwak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 Geo. L.J. 1071 (1974); *Perry, Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023 (1979).

96. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), Justice Powell, in discussing the reason for the Court's refusal to include the poor in the group of classifications which merits heightened scrutiny, stated the following: "The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

97. A felony conviction is immutable unless certain affirmative steps are taken by the felon. In some cases, the governor may pardon the convicted felon. See N.M. Stat. Ann. § 31-13-1(C) (1978), which restores all the felon's civil rights. 1959-60 Op. Att'y. Gen. No. 59-176. The pardon, however, restores only state civil rights and not necessarily federal civil rights. See *United States v. Larranga*, 614 F.2d 239 (10th Cir. 1980).

mission of a felony is not involuntary in the same sense that minorities, women, aliens, and illegitimates have no choice in their physical characteristics, their gender, where they were born, or who their parents are. Thus, the New Mexico bail provision, which classifies on the basis of prior New Mexico felony convictions, does not create a classification which is based on the types of characteristics which give rise to heightened scrutiny. The bail provision therefore must be analyzed under the lowest standard of equal protection review—the “rational relationship” test.

3. *The Bail Provision Under the Rational Relationship Test*

a) *Articulated State Purpose*

The rational relationship test, as set out by the Supreme Court, requires that the state clearly articulate a legitimate purpose, and that the governmental action bear a rational relationship to that purpose.⁹⁸ The State of New Mexico, through its bail provision and the implementation of Rule 22 of the Rules of Criminal Procedure, has clearly articulated that the purposes of the bail provision are to assure the appearance of the defendant at trial⁹⁹ and to secure the orderly administration of justice by preventing intimidation of witnesses and by protecting the community from danger.¹⁰⁰

The courts universally recognize that the state has not only a legitimate, but a “compelling” governmental interest in assuring the presence of the defendant at trial.¹⁰¹ The question of whether protecting the community from a dangerous defendant is a legitimate state interest, however, was in dispute until recently. The Eighth Circuit Court of Appeals in *Hunt v. Roth*, for example, stated that assuring the presence of the accused was not merely a compelling state interest, but was the sole permissible interest of the state.¹⁰² Similarly, in *Pugh v. Rainwater*¹⁰³ the court held that the “sole” permissible interest of the state in a bail provision is assuring the presence of the defendant at trial. Other courts, however, have recognized

98. *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). In *Moreno*, the Court held unconstitutional a provision of the federal food stamp program which limited the “households” which were eligible for food stamps to those which contained “related” persons. The stated purpose of the program was to satisfy nutritional needs and to bolster the agricultural economy. Justice Brennan, writing for the Court, found the classification, which excluded households which contained unrelated persons, to be clearly irrelevant to the purpose and therefore without a rational basis.

99. N.M. R. Crim. P. 22(a).

100. N.M. R. Crim. P. 22(c).

101. See *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *vacated*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

102. 648 F.2d 1148, 1160 (8th Cir. 1981), *vacated as moot*, ___ U.S. ___, 102 S.Ct. 1181 (1982). The Eighth Circuit implied in dicta, however, that danger to the community might be a legitimate state interest: “We recognize that there may be instances where no amount of bail can sufficiently protect the state’s interests. In such a case, a court may consider the relevant factors and deny bail.” 648 F.2d at 1158.

103. 557 F.2d 1189 (5th Cir. 1977), *vacated*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

the protection of the community from dangerous defendants as a legitimate state interest.¹⁰⁴ In *Carbo v. United States*,¹⁰⁵ Justice Douglas, sitting as Circuit Judge for the Ninth Circuit, held that post-conviction bail could be denied. In *Carbo*, Justice Douglas refused to limit the legitimate reasons for denial of bail only to the possibility of flight of the defendant.¹⁰⁶

In 1970, the Congress passed the only pure "preventive detention" bail provision in the land.¹⁰⁷ The District of Columbia Court of Appeals, in *Blunt v. United States*,¹⁰⁸ put to rest the question of whether the state has a legitimate interest in protecting the community from possibly dangerous defendants. The court held that the statute, the purpose of which is to protect the community from possibly dangerous defendants, was constitutional.

Thus, both purposes articulated by New Mexico Rule of Criminal Procedure 22—assurance of the presence of the defendant at trial and assuring the orderly administration of justice by protecting the community and the witnesses—are at least legitimate state purposes,¹⁰⁹ are clearly

104. *E.g.*, *Blunt v. United States*, 322 A.2d 579 (U.S. App. D.C. 1974).

105. 82 S.Ct. 662 (Douglas, Circuit Justice, 1962).

106. *Id.* at 665. For a more thorough discussion of Justice Douglas' position in *Carbo*, see *infra* note 148 and text following. See also *Carlson v. Landon*, 342 U.S. 524 (1952).

107. The statute reads, in pertinent part:

(a) [A] judicial officer may order pretrial detention of—

(1) a person charged with a dangerous crime, as defined in section 23-1331(3), if the Government certifies by motion that based on such person's pattern of behavior consisting of his past and present conduct, and on the other factors set out in section 23-1321(b), there is no condition or combination of conditions which will reasonably assure the safety of the community;

(2) a person charged with a crime of violence, as defined in section 23-1331(4), if (i) the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged; or (ii) the crime of violence was allegedly committed while the person was, with respect to another crime of violence, on bail or other release or on probation, parole, or mandatory release pending completion of a sentence; or

(3) a person charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

D.C. Code Ann. § 23-1322(a) (1981). The statute also requires a hearing and a demonstration by clear and convincing evidence that the defendant is dangerous. D.C. Code Ann. § 23-1322(b) (1981). See also the questions of the Court during oral argument in *Murphy v. Hunt* printed in 50 U.S.L.W. 3613, 3614 (U.S. Feb. 9, 1982). The questions asked by Justices Brennan and Rehnquist clearly implied that danger to the community can be a legitimate reason for denying bail.

108. 322 A.2d 579 (U.S. App. D.C. 1974).

109. For the argument that protection of the community is not merely a legitimate state interest, but is a compelling state interest, see *infra* text accompanying notes 146-149.

articulated in the Rule,¹¹⁰ and need not be set out in the bail provision itself.

b) Rational Relationship

The New Mexico bail provision is rationally related to the legitimate state purposes of assuring the presence of the defendant at his trial and protecting the community from possible danger. The New Mexico bail provision classifies, not between in-state and out-of-state felons, but between those who have prior New Mexico felony convictions and all those who do not have such convictions.¹¹¹

In New Mexico, the Habitual Offenders Act¹¹² states that a felony offender, if convicted of another felony, will be jailed for a period from one to eight years longer than if there were no Habitual Offender Act. His sentence cannot be suspended or deferred.¹¹³ A person who knows he will be imprisoned if he is convicted is more likely to flee than one who has a good chance for a suspended or deferred sentence. The classification of those who have prior New Mexico convictions is therefore rationally related to the articulated state purposes of preventing the flight of the accused.

The purpose of protecting the community from danger is implied in the bail provision itself, which allows for denial of bail when the defendant is accused of committing a felony with a deadly weapon.¹¹⁴ The implementing Rule, which addresses the issue of the court's determination of whether the defendant is or is not likely to commit a serious crime explicitly states this purpose.¹¹⁵ A person who has committed a serious, violent crime is more likely to commit another serious violent crime than

110. The purpose of assuring the presence of the defendant at trial is not expressly articulated in the bail provision. The Rule, however, has contained both purposes since it was promulgated. Because the Rule goes hand-in-hand with the bail provision, and has always been read to articulate the purposes of the bail provision, it must be read to articulate the purposes of the amendment, as well. See *Tijerina v. Baker*, 78 N.M. 770, 438 P.2d 514 (1968), which noted, even before the promulgation of the Rules of Criminal Procedure, that bail may be revoked when the defendant is found to be dangerous. See also N.M. R. Crim. P. 24(a)(3), which specifically allows the courts to revoke bail "upon a showing that the defendant has been indicted . . . on a charge constituting a serious crime allegedly committed while released. . . ." Rule 24 certainly goes to dangerousness of the defendant. If bail can be revoked when the defendant is dangerous, it is logical to allow bail to be denied when the defendant is shown to be dangerous.

111. For example, the bail provision excludes from the classification those who have a prior New Mexico misdemeanor conviction, and those who have no convictions at all, as well as those who have out-of-state felony convictions.

112. N.M. Stat. Ann. § 31-18-17(B), (C) & (D) (Repl. Pamp. 1981).

113. *Id.*

114. N.M. Const. art. II, § 13(B) (Cum. Supp. 1981).

115. N.M. R. Crim. P. 24(c). See also N.M. R. Crim. P. 24(a).

is a person who has never committed such a crime.¹¹⁶ Keeping such potentially dangerous people off the streets is a logical way to protect the community from violent crime. Thus, the bail provision is rationally related to the purpose stated in the Rule: the protection of the community.

c) *Over- and Underinclusiveness*

Professor Norwood and Mr. Novins also attacked the New Mexico bail provision on the ground that it was both over- and underinclusive.¹¹⁷ The argument states that the bail provision does not include all those who are not convicted of felonies in New Mexico, but are, nonetheless, flight risks,¹¹⁸ and that it does not include all those who are dangerous to the community.¹¹⁹ This argument, however, fails to take into account the discretionary nature of the bail provision and the requirements of Rule 22.

The provision does not require that the judge deny bail.¹²⁰ The provision does not require that the judge deny bail only to those convicted of felonies in New Mexico. Nor does it require that the judge automatically close his eyes to all crimes committed outside New Mexico. The judge is able to consider all past felony convictions from any jurisdiction, and to make his decision accordingly.

The fact that the bail provision may not identify every single flight risk or every single dangerous defendant does not make the provision unconstitutional. The state is allowed to correct what it perceives to be a problem.¹²¹ In *Williamson v. Lee Optical Co.*,¹²² the United States Supreme Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."¹²³ More recently, the Court, in *Dandridge v. Williams*,¹²⁴ stated that "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."¹²⁵ It is enough that the people of New Mexico

116. See Meyer, *supra* note 15, at 1452 n. 400.

117. See Norwood and Novins, *supra* note 6, at text following n. 106.

118. An example is the transient defendant, who has no family or community ties, unlike the New Mexico felon who has lived here all his life.

119. For example, those who are convicted of violent felonies outside New Mexico.

120. "Bail *may* be denied by the district court . . ." N.M. Const. art. II, § 13 (Cum. Supp. 1981) (emphasis added).

121. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See also *Schilb v. Keubel*, 404 U.S. 357 (1971).

122. 348 U.S. 483 (1955).

123. *Id.* at 487-88.

124. 397 U.S. 471 (1970).

125. *Id.* at 485.

set out, through the bail provision, to correct what is perceived as a problem, and that the classification is rationally related to the problem.

It would be impossible to draft the New Mexico bail provision any more broadly without rendering it unconstitutional. For example, to include misdemeanants in the bail provision would be to allow judges to deny bail to those who, as often as not, are not subjected to a jail sentence upon conviction, and would literally be punishing the misdemeanants in a way in which they would not ordinarily be punished.¹²⁶ To include out-of-state felons within the scope of the bail provision would allow the courts to deny bail to some over whom the judges would not even be allowed discretion, had the felon been convicted of the same offense in New Mexico, because that offense is not a felony here.¹²⁷

The New Mexico bail provision, while it may not assure that every flight risk or dangerous defendant is denied bail, does allow the judge, at his discretion, to consider the risk of flight and the potential dangerousness of those felons who have prior New Mexico convictions. Application of the bail provision will detain some of those who are potential flight risks or dangers to the community. Even if the provision is under-inclusive, it is not unconstitutional because it is rationally related to the articulated purpose.

Professor Norwood and Mr. Novins also argued that the New Mexico bail provision is unconstitutional because it will "swallow" within its requirement those New Mexico felons who are not flight risks and who are not dangerous.¹²⁸ Again, Professor Norwood and Mr. Novins' argument fails to take into account the discretionary nature of the bail provision and fails to account for the fact that the judge, even if he chooses to exercise his discretion, is bound by Rule 22 to consider the individual circumstances of each case.

Certainly all those with prior New Mexico felony convictions are not flight risks; nor are they all dangerous to the community. The bail provision, however, does not require that the judge deny bail to every de-

126. See *Stack v. Boyle*, 342 U.S. 1 (1951), in which the Court refused to allow bail to be set at an amount greater than the fine would have been upon conviction.

127. For example, under N.M. Stat. Ann. § 66-7-202 (1978), a hit-and-run is a misdemeanor. In Alaska, however, hit-and-run is a felony, punishable by up to ten years in prison. Alaska Stat. § 28.35.060 (1978). It would surely be irrational to include the Alaskan within the scope of the New Mexico bail provision when his New Mexico counterpart would not be subject to the same sanctions.

The New Mexico courts have had trouble trying to decide whether a federal felony should be considered a felony in New Mexico for purposes of the Habitual Criminal Act, N.M. Stat. Ann. § 31-18-17 (B-D) (1978). In three separate cases, the court used three separate definitions of what should be included. See *State v. James*, 94 N.M. 604, 614 P.2d 16 (1980); *State v. Montoya*, 94 N.M. 704, 616 P.2d 417 (1980); *State v. Garduno*, 93 N.M. 335, 600 P.2d 281 (1979). See also Stelzner, *Criminal Procedure Survey of New Mexico Law: 1980-81*, 12 N.M.L. Rev. 271 (1982), text accompanying notes 254-261.

128. See Norwood and Novins, *supra* note 6, at text following n. 106.

fendant who has one or more prior New Mexico felony convictions when the judge has determined that the New Mexico felons are neither dangerous nor flight risks. Rule 22 specifically requires that, before denying bail to anyone, the judge must determine that the defendant is a flight risk or a threat to the orderly administration of justice.¹²⁹ The fact that the bail provision itself does not require an individual determination of risk of flight or dangerousness is immaterial, as long as the judges are held within the limits of discretion which are required by New Mexico Rule of Criminal Procedure 22.¹³⁰

Some may question why the New Mexico Legislature proposed, and the people of New Mexico passed, the amendment to the bail provision, when it does not necessarily correct all the evil it tries to correct, and when Rule 22 already provides for an individual determination of bail. Others may question why Rule 22 was not amended to include absolute denial of bail when the constitutional provision was amended. The wisdom of a constitutional provision, however, is not subject to constitutional attack. The Supreme Court declared in *Dandridge v. Williams*,¹³¹ that courts can no longer strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought."¹³²

4. Conclusion

The New Mexico bail provision passes all degrees of constitutional attack under the equal protection clause. The governmental interest in assuring the orderly administration of justice is a legitimate state interest.¹³³ The strict scrutiny test does not apply to the bail provision because the provision does not create a suspect classification or infringe on a fundamental right in the equal protection sense.¹³⁴ Heightened scrutiny does not apply because the classification was not created on the basis of the immutable, involuntary characteristics which require application of the middle tier analysis.¹³⁵ The bail provision is rationally related to its articulated purposes of assuring defendants' presence at trial and protecting society.¹³⁶ The discretionary nature of the provision and the requirements of Rule 22 prevent the bail provision from being over- or underinclusive.¹³⁷ Therefore, the amendment to the New Mexico bail

129. See *supra* notes 52, 58, and accompanying text.

130. N.M. R. Crim. P. 22(a).

131. 397 U.S. 471 (1970).

132. *Id.* at 484 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

133. See *supra* text accompanying notes 98-109.

134. See *supra* text accompanying notes 76-90.

135. See *supra* text accompanying notes 91-97.

136. See *supra* text accompanying notes 98-116.

137. See *supra* text accompanying notes 117-131.

provision does not violate the fourteenth amendment to the United States Constitution under an equal protection analysis.

C. *Substantive Due Process*

Professor Norwood and Mr. Novins concluded that the analysis of the bail provision will be governed by the rational relationship test.¹³⁸ While the conclusion is true as to the equal protection analysis,¹³⁹ it appears that under the due process clause, New Mexico bail must be analyzed under a stricter test. Denial of bail restricts certain rights secured by the Constitution, including the fourteenth amendment right to liberty and the eighth amendment right to be free from the imposition of unreasonably high bail. The eighth amendment necessarily implies a ban against the unreasonable denial of bail. In *Hunt v. Roth*¹⁴⁰ the eighth circuit recognized this:

If the Eighth Amendment has any meaning beyond sheer rhetoric, the constitutional prohibition against excessive bail necessarily implies that unreasonable denial of bail is likewise prohibited. Logic defies any other resolution of the question.¹⁴¹

Given the fundamental nature of bail, a state may deny bail to a person only if the state denies the bail to serve a "compelling interest" and only if no less restrictive action will adequately serve the state's interest.

1. *Compelling Interest*

States have a compelling interest in ensuring that persons accused of a crime appear at trial. In *Stack v. Boyle*,¹⁴² the United States Supreme Court faced the question of whether the bail set by the lower court was excessive. The Supreme Court noted that bail set at an amount higher than that reasonably calculated to ensure that the defendant stand trial and submit to sentencing was excessive.¹⁴³ The decision in *Stack* clearly shows that the flight risk of a defendant is a consideration which can, and must, be weighed in determining the amount of bail.

Just as a court may set bail at an amount high enough to ensure the presence of a defendant at trial, a court may deny bail if it is satisfied

138. Norwood & Novins, *supra* note 6, at text accompanying nn. 74-75.

139. See *supra* text accompanying notes 111-128.

140. 648 F.2d 1148 (8th Cir. 1981), *vacated as moot*, ___ U.S. ___, 102 S.Ct. 1181 (1982).

141. 648 F.2d at 1157. For purposes of brevity, this Comment will not discuss in detail whether a less restrictive test should be applied. Should lower scrutiny be applied, it is all the more clear that the bail provision will pass constitutional muster.

142. 342 U.S. 1 (1951).

143. *Id.* at 4-5.

that no bail, however high, could assure the presence of the accused. This principle is obvious from the acceptance of provisions denying bail in capital cases where the proof is evident or the presumption great.¹⁴⁴ The reason for allowing bail to be denied in those instances is that if an accused is given a choice between facing a possible sentence of death or imprisonment, or fleeing with the attendant penalty of forfeiting his bail, he will undoubtedly choose the latter.¹⁴⁵ The exception in capital cases makes it clear that a state does have the power to deny bail if the denial is to protect a compelling interest of the state.

Bail may be denied to protect a second compelling interest: the preservation of the orderly administration of justice. The state not only may, but must, protect its court processes from abuse. As a corollary to its right to have a defendant stand trial, the court must ensure that the judicial system is not abused, that the defendant does not tamper with jurors, witnesses, and other participants in the trial. If the accused will interfere with those processes, and the only way to protect those processes is to keep the defendant in jail pending trial, then the court may deny bail.¹⁴⁶

In appropriate cases, a state may deny bail to protect a third interest: ensuring the safety of the community. If it appears that an accused constitutes a danger to the community and a denial of bail is the only means of protecting the community, a court may balance the interest in protecting the community against the defendant's interest in being free on bail. If the balance weighs in favor of the state, the court may deny bail.

Insofar as the New Mexico bail provision seeks to use the denial of bail to protect the community, New Mexico has created nothing new. In *Carlson v. Landon*,¹⁴⁷ the Supreme Court upheld a statute which allowed the denial of bail to certain aliens. The Court expressly noted that bail could be denied to persons who presented a danger to the welfare of the country: "Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of the deportation proceedings."¹⁴⁸

144. See *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot*, ___ U.S. ___, 102 S.Ct. 1181 (1982); *United States v. Kennedy*, 618 F.2d 557 (9th Cir. 1981); *State v. Koingsberg*, 33 N.J. 367, 164 A.2d 740 (1960); 4 W. Blackstone, *Commentaries on the Laws of England*, 293-94 (4th ed. 1979).

145. See *United States v. Kennedy*, 618 F.2d 557, 559 (9th Cir. 1980). See also 4 W. Blackstone, *Commentaries on the Laws of England* 293-94 (4th ed. 1979).

146. See *Carbo v. United States*, 82 S.Ct. 662 (Douglas, Circuit Justice, 1962); *United States v. Smith*, 444 F.2d 61 (8th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972).

147. 342 U.S. 524 (1952).

148. *Id.* at 538. Although *Carlson* involved civil deportation charges, as opposed to criminal charges, the underlying issue was the same—whether a state can deny bail in order to protect its citizens.

Justice Douglas applied the same rationale in *Carbo v. United States*.¹⁴⁹ In *Carbo* the defendant was denied bail pending appeal. Justice Douglas recognized that the denial of bail went against presumptions of law. Douglas upheld the denial, noting that petitioner represented a flight risk. He went on to say:

Yet the risk of the applicant using release on bail as the occasion to escape does not, in my view, exhaust the conditions that may warrant the denial of bail.

One convicted of rape or murder is not necessarily turned loose on bail pending review, even though substantial questions were presented on appeal. If, for example the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail.¹⁵⁰

Carbo involved bail pending appeal. The individual's interest in freedom is less for one seeking bail after conviction, but he still has an interest in his freedom until his conviction has been affirmed by the court of last resort. Justice Douglas noted that this interest must be balanced against the interests of society. It is thus apparent that judges must be responsive to the needs of society, as well as to the liberties of the individual. If a court finds that, on balance, the societal interests outweigh those of a particular citizen, the court must take whatever steps are necessary to protect the greater interest.

It is clear that the states have a compelling interest in ensuring that the accused appear at trial, in protecting the legal process from abuse, and in protecting the community from danger. Bail may therefore be denied to assure those interests, if the denial is the least restrictive means of ensuring that the states interests are protected.

2. *Least Restrictive Means*

The New Mexico bail provision protects the legitimate interests of the state. It is also designed to ensure that the courts will deny bail to a criminal only when no less restrictive alternative is available to the state. The provision can be separated for the purposes of analysis: the first category is denial of bail for reason of flight risk; the second category is denial of bail for preservation of the orderly administration of justice, which includes both the protection of the legal process and prevention of harm to society.

149. 82 S.Ct. 662 (Douglas, Circuit Justice, 1962).

150. *Id.* at 666.

a) Flight Risk

The New Mexico bail provision is implemented through Rule 22 of the New Mexico Rules of Criminal Procedure.¹⁵¹ As discussed in preceding text, Rule 22 requires that the court impose the least restrictive condition on the defendant which will assure his presence at trial. The Rule does not mention denial of bail for flight risk. It might be argued that this failure deprives courts of the power to deny bail for flight risk. The Rule, however, by its own terms, applies only to persons bailable under Article II, Section B of the New Mexico Constitution. Although Section B describes all persons, except persons charged with certain capital offenses, as "bailable," it gives express authority to district courts to deny bail to certain other persons. Even if a court were to adopt a reading that the people described in the New Mexico Constitution are bailable and hence governed by Rule 22, bail may be denied under the fifth condition described as "any other condition."

b) Orderly Administration of Justice

Rule 22 also ensures that denial of bail to protect the orderly administration of justice will be had only when it is the least restrictive means available to protect the state's interests. The terms of the Rule make it clear that a denial of bail is permissible only as a last resort.

The Rule provides that if the court determines that there is a danger that the defendant will commit a serious crime or will interfere with court processes, the court may impose any condition "necessary" to assure the orderly administration of justice. The scope of the judge's discretion to deny bail is constrained by the word "necessary." A condition on release is necessary only if it is needed to effect a goal: if a less drastic measure than denial of bail will serve the state's interests, the denial is not necessary.¹⁵²

Rule 22 ensures that bail will be denied only in those instances where it is the only means of protecting the state's interests. It is therefore the least restrictive means of protecting the state's compelling interests and is thus constitutional under any standard of review.

3. Conclusion

The recent addition to the constitutional provision dealing with bail will be subjected to "strict scrutiny" analysis. Under this analysis, the

151. N.M. R. Crim. P. 22.

152. Although it is clear that the word "necessary" is subject to different interpretations, *see* Kay County Excise Bd. v. Atchison, T. & S.F.R. Co., 185 Okla. 327, 91 P.2d 1087 (1939), a definition of necessary as "something indispensable" makes clear the constitutionality of the bail provision.

courts will look to whether the provision serves a compelling interest and whether it is the least restrictive means of accomplishing the goals of the state. The state's interests at issue here, securing the attendance of defendants at trial and the preservation of the orderly administration of justice are compelling interests. The means adopted by the state clearly are the least restrictive. The addition to the constitution therefore survives the strict scrutiny analysis of a due process challenge.

D. Procedural Due Process

Professor Norwood and Mr. Novins argued that the bail provision fails to accord procedural due process by failing to require any type of individualized determination of the defendant's dangerousness or degree of flight risk. They also argue that the provision violates constitutional precepts because it creates an irrebuttable presumption as to the defendant's dangerousness or likelihood of jumping bail and because it fails to survive the Supreme Court's test for sufficiency of due process.

1. Irrebuttable Presumptions

The Supreme Court has held that an irrebuttable presumption cannot be used to deny a person his rights unless the presumption is universally or necessarily true.¹⁵³ From this position, Professor Norwood and Mr. Novins argued that the New Mexico bail provision violates due process by creating an irrebuttable presumption that the defendant is dangerous or is a flight risk.¹⁵⁴ The New Mexico bail provision accords due process of law because it does not create an irrebuttable presumption. The bail provision reads that a person who has committed at least one felony in New Mexico may pose a flight risk or a danger to the orderly administration of justice. The bail provision creates only a permissive presumption, i.e., a presumption that the court is permitted, but is not required, to make.

An irrebuttable presumption requires the court to accept as true the conclusion which is authorized by the presumption, without affording the opponent of the presumption the opportunity to challenge the conclusion.¹⁵⁵ The bail provision does not create an irrebuttable presumption

153. See *Vlandis v. Kline*, 412 U.S. 441 (1973).

154. Norwood & Novins, *supra* note 6, at text accompanying nn. 108-120.

155. Professor Norwood and Mr. Novins argue that once the court finds that the accused falls within the framework of the bail provision, it must automatically deny bail. A conclusive or irrebuttable presumption is a direction to the factfinder to hold a given way once the factfinder is convinced of the facts triggering the presumption. *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979). The New Mexico bail provision does not create an irrebuttable presumption because the district court must grant bail unless the state demonstrates that a denial of bail is necessary to protect legitimate state interests.

because it can be implemented only after a hearing in which evidence has been adduced to support the conclusion that the defendant should not be released on bail. The accused is afforded an opportunity to be heard at the hearing.¹⁵⁶ Not only does the defendant have the opportunity to be heard, the court may deny bail only if there is no less restrictive means available to protect the state's interest.¹⁵⁷

As Professor Norwood and Mr. Novins noted, the Nebraska bail provision which was declared unconstitutional in *Hunt v. Roth*¹⁵⁸ is similar to the New Mexico provision. The only distinguishing feature of the Nebraska law was that it *required* bail to be denied to defendants charged with sex offenses involving force or coercion and therefore created an irrebuttable presumption that a defendant was a flight risk or dangerous to the community. The Eighth Circuit found the provision to be violative of constitutional mandates because "bail *must* be denied to every person charged with 'sexual offenses. . . .'"¹⁵⁹ The court continued:

Once the charge is made and it is determined that the proof is evident, no other relevant factor is weighed and no standards relevant to the purpose of assuring the presence of the defendant are considered. No discretion is vested in any judicial officer to grant or deny bail.¹⁶⁰

The three defects the Eighth Circuit found in *Hunt* are not present in the New Mexico bail provision. Rule 22 provides the district judge (1) relevant factors to consider in determining whether to grant or deny bail, (2) standards for ensuring that the state's interests will be protected, and (3) discretion to either grant or deny bail in all cases.

As mentioned in text above,¹⁶¹ Rule 22 provides relevant factors to consider in determining whether to grant or deny bail (i.e., the flight risk and the threat to the orderly administration of justice). This was the first concern of the *Hunt* court. In addition to the criteria of the Rule, the constitutional provision allowing the denial of bail implies that the court should consider only certain persons as potentially dangerous: those who have two or more prior felony convictions, or those with one prior felony conviction and who are charged with the commission of a felony involving the use of a deadly weapon.

Rule 22 does not expressly provide that bail could be denied on the basis of danger to the orderly administration of justice. It does provide, however, that the court may impose restrictions on the conditions of release if the defendant is likely to interfere with the court processes or

156. See *supra* text accompanying notes 52-60. See also N.M. R. Crim. P. 22.

157. See *supra* text accompanying notes 150-151.

158. 648 F.2d 1148 (8th Cir. 1981), *vacated as moot*, ___ U.S. ___, 102 S.Ct. 1181 (1982).

159. 648 F.2d at 1162.

160. *Id.*

161. See *supra* text accompanying notes 50-60.

commit a serious crime. The most severe condition of release is the absolute denial of bail. The procedural requirements of Rule 22 dealing with conditions of release imposed to assure the orderly administration of justice therefore apply to the decision to deny bail on that ground. Section (c) of Rule 22 provides that conditions may be imposed “[a]fter a hearing and upon a showing that there exists a danger that the defendant will commit a serious crime, will seek to intimidate witnesses or will otherwise interfere with the orderly administration of justice. . . .” Not only is the defendant protected by the hearing, but the Rule places on the state the burden of demonstrating that the accused represents a threat to the orderly administration of justice.

Common sense will guide the court in determining what weight to give the factors supplied by the Rule and by the Constitution. The factors described in Section (b) of Rule 22 relating to flight risk may also weigh in determining whether the accused represents a danger to the legal process or to society. For example, the nature and circumstances of the crime and the criminal record of the accused may provide the judge with an insight into the character of the accused and information about the likelihood that he represents a danger to society or the court processes. Most important, however, is the attitude and demeanor of the accused—which is something the trial court is uniquely able to perceive. No record, however complete, can apprise an appellate court of what actually happens in a trial court. It is for this reason that appellate courts must be chary of reversing the decisions of lower courts, and it is for this reason that trial courts are vested with discretion.

The New Mexico bail provision addresses the *Hunt* court’s second concern by providing standards to ensure that the state’s interest will be protected without unnecessarily infringing on the accused’s interests. As noted in the discussion on substantive due process, the procedural mechanisms of the New Mexico bail provision ensure that bail will be denied only when the denial is the least restrictive means of protecting legitimate state interests.

The third concern which the *Hunt* court expressed was that the Nebraska bail provision failed to give discretion to the judicial officer to grant or deny bail.¹⁶² The New Mexico bail provision addresses this concern by authorizing a district court to grant or deny bail if, after a hearing and after considering relevant data, the court finds it best to deny bail.

162. Professor Norwood and Mr. Novins appear to abandon their otherwise wholesale adoption of *Hunt* by arguing that the New Mexico bail provisions are unconstitutional because they grant too much discretion to the court. Norwood & Novins, *supra* note 6, at text accompanying nn. 124–129. Vesting discretion in a district court judge is not only permissible but is mandated where the judge has the authority to deprive a person of a substantial right. Power to punish an offender may be vested in a court as a discretionary power as long as there are safeguards which ensure that the court will not abuse its power and impose punishment “wantonly and freakishly.” *Gregg v. Georgia*,

2. *The Mathews Test*

Relying on *Mathews v. Eldridge*,¹⁶³ Professor Norwood and Mr. Novins concluded that the New Mexico bail provision does not satisfy procedural due process. *Mathews* involved the question of whether an evidentiary hearing is required by the constitution before Social Security disability payments can be terminated.¹⁶⁴ In analyzing the scheme in *Mathews*, the Court was forced to consider what process was required to satisfy procedural due process guarantees. The Court first considered the private interest which would be affected by the state action. Second, the Court considered the risk of erroneous deprivation of the right at issue and the probable value of additional or substitute procedural safeguards. Finally, the Court looked to the government's interest, which included both the goals of the state and the burden that additional or substitute procedural requirements would entail.¹⁶⁵

428 U.S. 153, 188 (1976). In *Gregg* the Supreme Court of the United States upheld a statute which granted discretion to jurors to order that a person convicted of a capital offense be executed. The Court recognized that granting discretion over such a power would not be constitutional unless there were adequate safeguards to insure that the jury did not abuse its power. The Court went on to say that the vesting of discretion was legitimate where it was clear that the power would not be invoked arbitrarily or capriciously. Citing *Furman v. Georgia*, 408 U.S. 238 (1972), wherein the Supreme Court struck a statute as unconstitutional because it gave untrammelled discretion to a jury to invoke the death penalty without necessarily considering the particular facts of the case, the Court noted that: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 189. While noting that discretion must be jealously guarded and protected from abuse, the Court nonetheless noted that discretion alone does not make a statute unconstitutional.

Not only is the vesting of discretion to grant or deny bail proper, it is mandated by the federal Constitution. In *Roberts v. Louisiana*, 428 U.S. 325 (1976), the United States Supreme Court struck a statute which provided that all persons convicted of murder should be sentenced to death. The Court held that a sanction should not be imposed across the board on a class of people when a lesser sanction might serve the purposes of the state. The Court held that discretion should be vested in the court or jury to determine whether the death penalty was appropriate, or whether a lesser sanction could still fulfill the purposes of the state. See *Jurek v. Texas*, 428 U.S. 262 (1976).

Similarly, the denial of bail is an extreme sanction. There are many less restrictive means of safeguarding the state's interests which might be appropriate. To ensure that bail is not denied to a person when a less restrictive alternative is available, the court must have the discretion to grant or deny bail depending upon the unique circumstances of each case.

The power of the court to exercise this discretion is limited; the law contains safeguards to ensure that the power is not abused. The constitutional grant of power itself contains limits by narrowly defining the class of persons over which the district court might exercise its discretion. The Rule which implements the provision, N.M. R. Crim. P. 22, sets forth specific standards to guide the court in determining whether to grant or deny bail. The New Mexico Constitution properly bestows a discretionary power on the district court and provides that court with the criteria necessary to guide it (through Rule 22). Thus, the provision ensures that the power to grant or deny bail is not wielded improperly.

163. 424 U.S. 319 (1976).

164. *Id.* at 323.

165. *Id.* at 335.

The authors of this Comment readily agree that the threshold inquiry of *Mathews* (a determination of the nature of the private interest affected) leads to the conclusion that due process must be afforded the defendant before the court may deny bail. An analysis of the two other considerations delved into by the *Mathews* Court, however, compels the conclusion that the New Mexico bail amendment does afford adequate procedural safeguards.

The inquiry into whether there is a potential for erroneous deprivations is not directly applicable to a denial of bail based on a finding of flight risk or on a finding that the defendant represents a danger to the community. The bottom line of the issue in *Mathews* was whether the petitioner should have had his Social Security benefits terminated.¹⁶⁶ There was a "right" and a "wrong" answer to this question. The determination that an accused poses a flight risk or a danger to the orderly administration of justice is not capable of such an accurate determination. The fact that a Higher Consciousness might be able to tell that an accused will not, in fact, jump bail, does not negate the fact that he is a flight risk. He is a flight risk, if, according to the criteria adopted by the New Mexico Supreme Court and incorporated into Rule 22, he is likely, in the court's opinion, to jump bail. Of course courts will recognize that some of those accused of a crime will be more likely to jump bail than others. To determine at what point the likelihood of an accused's jumping bail warrants denial of bail, the court will have to balance the risks in that particular case against the defendant's interest in freedom, always aware of the potential for error. Therefore, as long as the court's determination is based on the criteria of Rule 22, an erroneous deprivation of the right to bail will be unlikely. When an error does occur, it will be because our society has decided that the protection of the community cannot be jeopardized by individual freedoms, or because the court has overestimated the risk of flight and denied bail where the risk was, in reality, very small.

A corollary of the inquiry into the likelihood of erroneous deprivation is the availability of additional or alternative safeguards for the person subject to the deprivation. The New Mexico bail provision already provides a person subject to denial of bail with the safeguards sought in *Mathews*. There must be a hearing to consider the factors relevant to a fair determination of the interests of the state and the accused.¹⁶⁷ Additionally, the state has the burden of demonstrating that the defendant

166. *Id.* at 343.

167. The sole relief sought in *Mathews* was an evidentiary hearing. 424 U.S. at 323. Those subject to a denial of bail under the New Mexico Constitution are accorded a hearing. *See supra* text accompanying notes 52-60.

should be denied bail.¹⁶⁸ The court may deny bail only if it is the least restrictive means of protecting the state's interest.¹⁶⁹ The amendment provides for an expedited appeal which "shall be given preference over all other matters."¹⁷⁰ There are no alternative or additional procedures which can be implemented to safeguard the defendant.

The final prong of the *Mathews* test has two parts. First, the court must consider the strength of the government's interest. The state's interest in denying bail in a particular case will be either ensuring the defendant's presence at trial or the protection of the orderly administration of justice. Both interests rise to the level of "compelling state interests."¹⁷¹ They clearly outweigh the interests of a defendant who has been shown to pose a threat to those interests.

Second, the court must analyze the burden that would be suffered by the state if additional or alternative safeguards were imposed. As noted above, there are no alternative or additional safeguards. The accused who is subject to a denial of bail is afforded every conceivable due process privilege. The only alternative would be the elimination of the ability to deny bail to the person who poses a danger to the state or who is a flight risk. The burden this denial would put on the state is obvious: it would prevent the state not only from protecting its compelling interests, but it would prevent the state from fulfilling its duty to its citizens.

The *Mathews* test provides an analysis which balances the defendant's right against the state's interest. It requires that the state provide the person subject to a deprivation of a liberty with sufficient safeguards to ensure that, on balance, he is treated fairly. The New Mexico bail provision thus comports with the *Mathews* test by requiring that a person who is subject to a denial of bail be afforded a wide panoply of procedural safeguards. On balance, the scheme is justified because it is the only way that important state interests can be protected.

3. Conclusion

The new bail provision does accord procedural due process. It provides for an individualized determination of a particular defendant's dangerousness, or the likelihood of his jumping bail. It does not create an irrebuttable presumption. The hearing required by *Mathews* is met; the hearing afforded by Rule 22 is a valid balance between the needs of society and the need to ensure that those subject to a denial of bail are

168. Because the court must impose the least restrictive burden on the accused, the burden must necessarily be on the state to justify the imposition of any condition of release. See N.M. R. Crim. P. 22(c).

169. See *supra* text accompanying note 151.

170. N.M. Const. art. II, § 13(B) (Cum. Supp. 1981) (emphasis added).

171. See *supra* analysis at text accompanying notes 150-151.

treated fairly. The procedural safeguards of Rule 22 guarantee due process of law.

IV. CONCLUSION

The New Mexico bail provision passes all degrees of constitutional scrutiny. The eighth amendment of the United States Constitution does not create an absolute right to bail any more than the other amendments in the Bill of Rights create absolute rights. The eighth amendment simply guarantees that the government may not deny bail arbitrarily and unreasonably.

The bail provision in New Mexico must be read with its implementing rule, Rule 22 of the New Mexico Rules of Criminal Procedure. The bail provision is designed to assure the orderly administration of justice. The provision protects the court processes and society as a whole. The bail provision is rationally related to the compelling state purposes of protecting society and assuring the presence of the accused at trial. Those purposes are clearly articulated in Rule 22.

The bail provision is discretionary. It does not require that judges deny bail to New Mexico felons and does not force judges to grant bail to out-of-state felons in all cases. Rule 22 mandates that bail cannot be denied without a hearing and provides the judge with sufficient guidelines so that he may not deny bail arbitrarily. The judge can deny bail to an accused only if there are no less restrictive means available which will serve the state purposes.

Denial of bail to an accused whom the court has determined to be a flight risk or a danger to society is no more punishment before a determination of guilt than is denial of bail to a person charged with a capital crime. For these reasons, the authors respectfully disagree with the analysis and conclusion of Professor Norwood and Mr. Novins, and assert that the bail provision of the New Mexico Constitution *is* constitutional.

SARAH CURRY SMITH and MATTHEW HOLT