NEW MEXICO LAW REVIEW

Volume 12
Issue 2 *Summer 1982*

Spring 1982

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THE CONSTITUTIONALITY OF PRETRIAL DETENTION WITHOUT BAIL IN NEW MEXICO

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In 1979, the New Mexico Legislature passed a joint resolution proposing an amendment to the State's Constitution. The amendment would expand the power of district court judges to deny bail in certain circumstances.[1] New Mexico's voters approved the amendment and it became law upon certification of the ballot results in November, 1980.[2] The amendment reads:

> All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations where bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> 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 7 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 of 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.[3]

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1. The original New Mexico Constitution, adopted January 21, 1916, contained a provision which permitted denial of bail in cases of "capital offenses when the proof is evident or the presumption great." N.M. Const. art. II, § 13. This provision was also contained in Clause 9 of the Kearny Bill of Rights, adopted September 22, 1846. At common law capital offenses were not bailable. *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1225 (1969). Before the amendment under discussion here, cases involving capital offenses were the only instances in which bail could be denied in New Mexico.

2. The result of the November 4, 1980, election was 157,992 for the amendment and 88,033 against.

3. N.M. Const. art. II, § 13. The amendment revised the original Article II, § 13 of the New Mexico Constitution by adding all of the language after the first paragraph.

As a result of this amendment, district court judges may deny bail not only in capital cases, which was permissible before the amendment,[4] but also in two other kinds of cases. Section (A) of the amendment provides for the denial of bail for sixty days to defendants who are accused of felonies and who have been previously convicted in New Mexico of two or more felonies.[5] The previous convictions may not arise from a common transaction with the case at bar.[6] Section (B) permits a judge to deny bail for sixty days to defendants who are accused of a felony involving the use of a deadly weapon and who have one prior felony conviction in New Mexico.[7] In the latter circumstance, the amendment does not require that the prior felony conviction be from a separate transaction than the one at bar.[8] In either instance, the defendant may be held without bail for only sixty days.[9] After sixty days, if the defendant has not yet been tried, bail must be set according to New Mexico's statutory criteria.[10]

The amendment also provides that "an appeal from an order denying bail shall be given preference over all other matters."[11] In effect, this section permits interlocutory appeal from the denial of bail. There could be three theories behind such an appeal. The first would be a claim that the trial court judge abused his discretion in denying bail.[12] The second would be a challenge of the factual determinations made by the judge.[13] The merits of appeals based on these two theories would be decided according to the facts of the specific cases. The last theory, which involves more general theoretical considerations, would be for the accused to challenge the New Mexico bail amendment because it represents an exercise of state power beyond that allowed by the United States Constitution.

The New Mexico constitutional amendment invites serious and important questions about how, if at all, the United States Constitution limits the power of the states to deny bail to persons accused of crimes. These questions include: (1) what, if any, limits on the denial of bail are imposed

4. *See supra* note 1.

5. N.M. Const. art. II, § 13(A).

6. *Id.*

7. N.M. Const. art. II, § 13(B).

8. *Id.*

9. Bail must be set after 60 days unless trial has been delayed longer than 60 days by "a motion for continuance made by or on behalf of the defendant." N.M. Const. art. II, § 13(B).

10. *See* N.M. Stat. Ann. §§ 31-3-1 to -9 (1978) and N.M. R. Crim. P. 22 for statutory provisions relating to bail.

11. N.M. Const. art. II, § 13(B).

12. Because the discretion to deny bail in these circumstances is granted by the New Mexico Constitution, one can assume that the discretionary power is initially absolute. The restrictions, if any, on this discretionary power must be found in the United States Constitution. These restrictions are discussed later in this article.

13. The sufficiency of the evidence which forms the basis of findings of fact is a proper subject of appeal. *See* State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App. 1977).

by the eighth amendment's excessive bail clause; and (2) what, if any, limits on the denial of bail are imposed by the due process and equal protection provisions of the fourteenth amendment. This article will address those questions.

I. EIGHTH AMENDMENT LIMITATIONS ON THE STATE'S POWER TO DENY BAIL

Only the eighth amendment to the United States Constitution suggests that the right to bail is subject to protection from excesses of federal government: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14] The excessive bail clause implies a constitutional concern that a defendant has a right to reasonable bail.[15] Arguably, the New Mexico amendment is unconstitutional in that it deprives defendants of this right under certain circumstances.

There is a threshold inquiry, however, before this analysis applies. The excessive bail clause provides a limitation to New Mexico's bail amendment only if that clause is applicable to the states through the due process clause of the fourteenth amendment.

A. Applicability to States

Precedent does not give a clear answer to the question of whether the excessive bail clause applies to the states.[16] To date, no United States Supreme Court decision has held that it does, although *dicta* so indicates.[17] In 1979, Justice Rehnquist, writing for the majority in *Baker v. McCollan*,[18] stated: "We, of course, agree with the dissent's quotation from the statement from *Schilb v. Kuebel*, that 'the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment.' "[19]

Many federal courts have assumed without question that the bail clause applies to the states.[20] In *Hunt v. Roth*,[21] Judge Lay, of the Eighth Circuit

14. U.S. Const. amend. VIII.

15. The precise nature and extent of this right is debatable. The nature and extent of the right to bail is the subject of discussion later in this article.

16. The Supreme Court held the cruel and unusual punishment clause of the eighth amendment to be applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

17. *See* Schilb v. Keubel, 404 U.S. 357 (1971).

18. 443 U.S. 137 (1979).

19. *Id.* at 144 n. 3 (citation omitted).

20. *See* United States *ex rel.* Walter v. Twomey, 484 F.2d 874, 875 (7th Cir. 1973); United States *ex rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972); Simon v. Woodson, 454 F.2d 161, 165 (5th Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 710–711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963); Wansley v. Wilkerson, 263 F. Supp. 54, 57 (W.D. Va. 1967).

21. 648 F.2d 1148 (8th Cir. 1981), *vacated as moot, sub nom.*, Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982) (No. 80-2165).

Court of Appeals, stated unequivocally, "the excessive bail clause of the eighth amendment is incorporated into the fourteenth amendment."[22] The United States Supreme Court granted certiorari in *Hunt*, and was expected to rule on the applicability of the bail clause of the eighth amendment to the states in that case. The Court, however, vacated the case in March, 1982.[23]

Although there is not yet any direct United States Supreme Court precedent which applies the excessive bail clause to the states, the analysis that the Court has used in considering questions of the application of other constitutional clauses indicates that it should be. The question turns on whether the right which the clause creates is "fundamental to the American scheme of justice."[24] The fourteenth amendment will not permit states to interfere arbitrarily with such fundamental rights. Justice Douglas, writing as Circuit Justice in *Carlisle v. Landon*[25] in 1953, strongly implied that the right created by the excessive bail clause is a fundamental right:

> [t]here is a constitutional question that lurks in every bail case. The eighth amendment provides that "excessive bail" shall not be required. That means . . . that a person may not be capriciously held. Requirement of bail in an amount that staggers the imagination is obviously a denial of bail. It is the unreasoned denial of bail that the Constitution condemns. The discretion to hold without bail is not absolute. If it were, we would have our own model of the police state which looms on the international horizon as mankind's greatest modern threat.[26]

Justice Douglas considered bail to be so indispensable a part of our system of justice that a threat to bail is a threat to that system.

Other considerations also militate in favor of finding a fundamental right to reasonable bail. This right is intimately connected to several fourteenth amendment guarantees. By its very nature bail is related to liberty, which is unquestionably a fundamental right.[27] Further, release on bail is grounded upon the presumption of innocence, which is guaranteed by the fourteenth amendment.[28] Denial of bail results in punishment of an accused by incarcerating him before he is convicted and makes the

22. 648 F.2d at 1156.
23. Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982).
24. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
25. 73 S.Ct. 1179 (Douglas, Circuit Justice, 1953).
26. *Id.* at 1182.
27. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).
28. *See In re* Winship, 397 U.S. 358, 363-64 (1970).

presumption of innocence seem empty.[29] Finally, bail facilitates the right to effective assistance of counsel, which is also guaranteed by the sixth amendment through the fourteenth.[30] Freedom before conviction permits unhampered preparation of defense by allowing the accused unfettered access to counsel, witnesses, experts, family, employers, and places.

Thus, the excessive bail clause creates a fundamental right for two reasons. First, as Justice Douglas argued, to give states discretion to deny bail would threaten the present system of pretrial release. Second, the denial of bail has a substantial deleterious impact on other fundamental rights guaranteed by the fourteenth amendment. Therefore, the eighth amendment's excessive bail clause is an integral part of a set of protections offered to a defendant, and is itself a fundamental right.[31] The states should be bound by it through the fourteenth amendment.

B. Meaning of the Eighth Amendment

To determine whether the power to deny bail violates the fundamental right to bail guaranteed by the eighth amendment, the courts must ascertain the nature and extent of that right. The Supreme Court has not made clear the meaning of the bail clause of the eighth amendment. The language of the clause itself gives little guidance.

There are two principal competing views of its meaning. One view is that the amendment's language, "excessive bail shall not be required,"[32] implies an absolute right to have bail set in all cases, or at least all non-capital cases.[33] The competing view is that the clause gives the state legislatures authority to make allowance for bail, and the language merely restrains the judiciary from demanding an unreasonable amount of bail.[34]

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29. In Stack v. Boyle, 342 U.S. 1 (1951), the Court stated:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . .

Id. at 4.

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.

Id. at 7 (concurring opinion).

30. *See* Holloway v. Arkansas, 435 U.S. 475 (1978). For a discussion of the relationship of bail to the fourteenth amendment, *see* Stack v. Boyle, 342 U.S. at 4.

31. *See* United States v. Abrahams, 604 F.2d 386 (5th Cir. 1979). "The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights." *Id.* at 393.

32. U.S. Const. amend. VIII.

33. *See, e.g.*, Trimble v. Stone, 187 F. Supp. 483, 484 (D. D.C. 1960).

34. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 545–46 (1952) (*dictum*); Mastrian v. Hedman, 326 F.2d 708, 710–11 (8th Cir.) (*dictum*), *cert. denied*, 376 U.S. 965 (1964).

Under the second view, the eighth amendment does not apply to the legislatures, which have the power to provide for bail or not.[35] Both views find some authority in the historical development of bail, in logical analysis, and in judicial interpretation, but neither view clearly prevails.

1) Historical and Logical Analysis of the Eighth Amendment

The language of the bail clause of the eighth amendment is taken from the English statutory Bill of Rights of 1689.[36] The preamble to the English Bill of Rights suggests a possible reason for inclusion of the clause. The preamble states: "excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects. . . ."[37] This language indicates that the purpose of the English excessive bail clause was to shore up enforcement of existing rights to bail, which had been created by Parliament.[38] The English Bill of Rights clause did not create an absolute right to bail.[39]

The English Bill of Rights offered protection against excessive bail amounts only where the Parliament had created the right to bail. This seems to support the second view of the eighth amendment, that the excessive bail clause only prohibits unreasonable denial of bail. The Colonial enactments, by contrast, seemed to grant more expansive bail rights. New York, in its Charter of Libertyes and Priviledges of 1683, provided for an absolute right to bail except in treason and felony cases.[40] At the time, all felony cases, as well as cases of treason, were capital cases, so bail would have been denied for all felonies under the New York Charter.[41] Similar provisions existed in the Massachussets Body of

35. Under this view, although the legislature has the power to provide for bail or not, bail cannot be unreasonably or arbitrarily denied. The nature of this reasonableness requirement is most easily conceptualized and articulated using the existing framework of due process and equal protection analyses. That analysis will be explored in the text of this article. In view of the organic nature and interrelationship of the rights enumerated in the Bill of Rights it may be that these due process concepts are also implicitly contained in the eighth amendment.

36. For a more complete discussion of the historical basis of the excessive bail clause, *see* Foote, *The Coming Constitutional Crisis in Bail (Pt. I)*, 113 U. Pa. L. Rev. 959 (1969) [hereinafter cited as Foote]. *See also* Meyer, *Constitutionality of Pretrial Detention, Part I*, 60 Geo. L. J. 1140 (1972) [hereinafter cited as Meyer]; Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 34–66 (1977).

37. 1 B. Schwartz, The Bill of Rights: A Documentary History 42 (1971) [hereinafter cited as 1 B. Schwartz].

38. Difficulties in England in securing release on bail led to the adoption of the Petition of Right of 1628 and to the passage of the Habeas Corpus Act of 1679. Although these provisions could be used to force the setting of bail in appropriate circumstances, it did not prevent the setting of bail at unreasonably high levels. The excessive bail clause of the Bill of Rights of 1689 was designed to close this loophole. *See*, Foote, *supra* note 36, at 983. For a description of English offenses defined as nonbailable, *see* Hunt v. Roth, 648 F.2d 1148, 1156 n. 12 (8th Cir. 1981), *vacated as moot, sub nom.*, Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982) (No. 80-2165).

39. *See generally* Meyer, *supra* note 36, at 1151–57, 1180–90.

40. 1 B. Schwartz, *supra* note 37, at 163.

41. *Id.*

Liberties in 1641, in the Pennsylvania Laws of 1682, and in several other colonies.[42] In 1787, Congress passed an Ordinance for the Government of the Northwest Territory, providing that "all persons shall be bailable unless for capital offenses, where the proof shall be evident or the presumption great."[43] This line of historical analysis suggests support for the first view.

In 1789, Congress considered two bail proposals: one for what is now the eighth amendment; the other, the Judiciary Act,[44] which extended an absolute right to bail in all but capital cases.[45] Both were approved. No record of debate on the bail provisions of the Judiciary Act exists. Only in the House did the debates mention the bail amendment:

> Each bail provision was enacted as originally proposed. . . . There is no evidence in Madison's speech . . . in which he for the first time revealed the proposed content of the Bill of Rights, that he had any knowledge of what the Senate committee was about to recommend on the subject of bail. It is equally unlikely that the Senate committee, which had already been working for two months on the Judiciary Act and which reported its draft bill only four days after Madison's speech, was influenced in drafting its bail proposal by either that speech or by any knowledge that a constitutional amendment on the subject might be enacted at some indefinite time in the future. Whereas in June [1789] even the desirability of any bill of rights was uncertain, passage of a judiciary act was recognized as an immediate necessity. There is, therefore, no evidence in the concurrent consideration of the Bill of Rights and Judiciary Act of any deliberate congressional intention to exclude a right to bail under what became the eighth amendment.[46]

The two bail measures were independently conceived.[47] The presence of these two bail measures, as well as the history of the English and Colonial bail provisions, leaves room for both views on the meaning of the eighth amendment. In sum, an analysis of the historical development of the bail clause of the eighth amendment yields no clear interpretation of its meaning.[48] The only explanation consistent with the history of the Colonies

42. Foote, *supra* note 36, at 975.

43. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, July 13, 1787, 1 B. Schwartz, *supra* note 37, at 400.

44. 1 Stat. 91, § 33 (1789).

45. Foote, *supra* note 36, at 971.

46. *Id.* at 972.

47. *Id.*

48. The Congressional record of debates of the Eighth Amendment fairly illustrates the problem of defining what the bail clause means. The only mention of the clause was by Mr. Livermore, who remarked that "[t]he clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?" Foote, *supra* note 36, at 986 (citing 1 Annals of Cong. 754 (1789–91)).

and English Law is "that the clause was intended to afford protection against pretrial imprisonment in a broad category of cases."[49] This explanation provides little guidance for how the clause should be read today.

Pure logic cannot solve the dilemma, either. Two arguments support the first view, that the excessive bail clause creates a right to bail in all but capital cases. The first argument employs the same kind of analysis which leads to the conclusion that the right to bail is fundamental. Pretrial release on bail is basic to the fair administration of justice.[50] The second argument concerns the clear implications of the language of the "excessive bail" clause.

The language of the eighth amendment prohibits the requirement of excessive bail. The argument is that the denial of bail is, *per se*, excessive. Justice Burton, interpreting the meaning of the eighth amendment in his dissent in *Carlson v. Landon*,[51] stated, "The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing."[52] Judge Lay, writing the opinion in *Hunt v. Roth*,[53] observed: "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."[54] Thus the clear language of the amendment indicates an absolute right to bail. This raises a question of how to justify the capital case exception.

The capital case exception under this analysis is primarily justifiable as historical accident, but may provide further logical argument for the first view. Only in capital cases does the possibility exist that bail could not be set high enough that a person would be willing to forfeit it by

49. Foote, *supra* note 36, at 989.

50. *See supra* text accompanying notes 19–33. In United States v. Smith, 444 F.2d 61 (8th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972), the court stated that "[t]he primary purpose of bail is to allow an accused person not yet tried to be free of restraint while at the same time insuring that person's presence at the pending court proceedings." 444 F.2d at 62. *See* United States v. Beaman, 631 F.2d 85, 86 (6th Cir. 1980); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc); United States v. Wright, 483 F.2d 1068, 1069 (4th Cir. 1973); United States v. Bobrow, 468 F.2d 124, 127 n. 16 (D.C. Cir. 1972); Forest v. United States, 203 F.2d 83, 84 (8th Cir. 1953); *See also* White v. United States, 330 F.2d 811, 814 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926).

51. 342 U.S. 524 (1952).

52. *Id.* at 569.

53. 648 F.2d 1148 (8th Cir. 1981), *vacated as moot, sub nom.*, Murphy v. Hunt, 50 U.S.L.W. 4254 (U.S. March 2, 1982) (No. 80-2165).

54. 648 F.2d at 1157. This again relies on the notion that absolute denial of bail is *per se* unreasonable.

fleeing before trial.[55] Legislatures enacted statutes denying bail to defendants in capital cases "because it had been thought that most defendants facing a possible death penalty would likely flee regardless of what bail was set, but that those facing only a possible prison sentence would not if bail were sufficiently high."[56] In capital cases, therefore, the right to bail bowed before the requirement of ensuring the defendant's presence at trial.

In addition to the policy justification outlined above, the capital case exception to the absolute right to bail is justifiable as an historical accident. The eighth amendment affords protection against excessive bail in those categories of crime which were bailable at the time of its enactment. Capital crimes were not bailable at the time of the enactment of the eighth amendment. Thus, the exception for capital cases is consistent with the view that denial of bail is *per se* excessive bail.

The historical analysis also suggests an absolute right to bail in non-capital cases. Capital cases were the *only* crimes which were non-bailable at the enactment of the eighth amendment. It is possible to infer, therefore, that only capital crimes remain non-bailable. The logical extension of this argument is that the eighth amendment creates an absolute right to bail in all other categories of crime.

The competing view on the meaning of the eighth amendment is that the excessive bail clause does not create a right to bail, but only prohibits excessive bail in cases made bailable by provisions of law. This view uses historical analysis to argue that the language of the bail provision does not necessarily imply a right to bail.[57] The argument is that the source of the eighth amendment is the English Bill of Rights. Because the excessive bail prohibition of the English Bill of Rights did not preclude Parliament from defining certain offenses as non-bailable, likewise Congress and state legislatures are not so limited. The argument continues, stating that there is nothing in the language of the eighth amendment

55. Blackstone's *Commentaries* observed in 1770:

> [the accused] must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity?

4 W. Blackstone, Commentaries on the Laws of England 293–94 (4th ed. 1770).

56. United States v. Kennedy, 618 F.2d 557, 559 (9th Cir. 1980).

57. For a discussion of the argument supporting this view, *see* Mitchell, *Bail Reform and the Constitutionality of PreTrial Detention*, 55 Va. L. Rev. 1223 (1969).

which *expressly* creates an absolute right to bail and such language should not be read into it.

The underpinnings of the argument supporting a limited application of the excessive bail clause may be further bolstered by anti-federalism notions. The eighth amendment is in no way intended to interfere with the states' rights to determine cases where they deem bail to be appropriate.

As a logical matter, the two competing historical and logical views of the eighth amendment are well balanced. Judicial pronouncements concerning which of these views should prevail are equally inconclusive.

2) Judicial Interpretation of the Eighth Amendment

The United States Supreme Court has provided little guidance on the question of whether the bail clause of the eighth amendment guarantees an absolute right to bail. The Court, while discussing the federal statutory right to bail in *Stack v. Boyle*,[58] relied on the first of the two views and seemed to suggest the existence of an absolute constitutional right to bail.

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[59]

Insofar as *Stack v. Boyle* can be seen as an endorsement of the existence of a constitutional right to bail, the opinion was severely undercut one year later. In *Carlson v. Landon*,[60] the Court emphasized the other strand of historical development and stated:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does

58. 342 U.S. 1 (1951).
59. *Id.* at 4 (citation omitted).
60. 342 U.S. 524 (1952).

> not require that bail be allowed under the circumstances of these cases.[61]

The *Carlson* opinion is unlikely to be the last word on the subject. Professor Lawrence Tribe points out that *Carlson* was decided by a "bare majority" and that the opinion concerned denying bail to alien Communists pending deportation.[62] The majority indicated that it did not regard the eighth amendment as clearly applicable to civil proceedings of the sort involved in *Carlson*. Further, the case is ambiguous. *Carlson* referred to the cases where bail is "proper," yet Professor Tribe noted that this word is "sufficiently ambiguous to beg the question of whether or not there is a right to bail."[63] It is not clear from the opinion whether the Court considered the propriety of bail in certain cases to be a matter for the legislature to decide, or whether bail is always proper, except in capital cases. *Carlson* involved a civil deportation proceeding and is not sufficiently factually apposite to apply to the question for cases involving a usual criminal code violation. As Professor Tribe stated, "Given the majority's emphasis . . . on Congress' special power over resident aliens in cases touching the national security, the opinion's brief remarks cannot be said to determine the reach of the excessive bail clause in criminal cases."[64] Since *Carlson*, the Supreme Court has not dealt directly with the existence of a constitutional right to bail.

Most lower federal courts which have considered the issue whether the eighth amendment applies to the states through the fourteenth amendment reject the idea of an absolute constitutional right to bail.[65] For example,

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61. *Id.* at 545–46.

62. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 403 (1970) [hereinafter cited as Tribe].

63. *Id.* at 403.

64. *Id.*

65. *See* Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964) (per curiam). Some federal courts have espoused the competing view. The "absolute right to bail" view of the eighth amendment was adopted by Justice Butler, writing as Circuit Justice in the Seventh Circuit Court of Appeals in United States v. Motlow, 10 F.2d 657 (7th Cir. 1926). Justice Butler found that the language of the bail clause

> implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.

Id. at 659.

The court also found an absolute right to bail in Trimble v. Stone, 187 F. Supp. 483 (D. D.C. 1960). In Trimble, Judge Holtzoff said the right to bail was constitutionally protected:

> This clause has invariably been construed as guaranteeing the right to bail by necessary implication. . . . The right to bail is absolute except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant may be. This fundamental privilege is one of the outstanding features of the personal rights accorded in Anglo-American jurisprudence to those charged with infractions of the law.

Id. at 484, 485.

the Eighth Circuit Court of Appeals in *Mastrian v. Hedman*[66] noted that "[t]raditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail."[67]

Since the Supreme Court did not address the bail question head-on in *Hunt v. Roth*,[68] the courts and commentators will continue to disagree as to whether the eighth amendment confers any right to bail. If there is a constitutionally created absolute right to bail in all but capital crimes, the New Mexico bail provision clearly violates the eighth amendment. If the other view prevails, and the Court holds that the eighth amendment merely prevents existing statutory rights to bail from being abused, the New Mexico bail provision may pass constitutional muster under the eighth amendment analysis. Under this view, the New Mexico legislature has the power to create classes of offenses for which bail need not be granted. Even if the second view ultimately prevails, the New Mexico amendment may still fall under the fourteenth amendment analysis below.

The second view leaves the eighth amendment with a very restricted meaning. Under this view, the eighth amendment would apply mostly to judges who actually set bail and would be concerned with specific bail amounts. As a way of influencing how states and legislatures provide for bail for their citizens, the eighth amendment would be meaningless.[69] The authors believe that the eighth amendment should not be given such a narrow interpretation. Its protections cannot be so superficial as to allow Congress and the states to render it empty by legislative enactment.

II. FOURTEENTH AMENDMENT ANALYSIS

Even assuming that the eighth amendment permits states to create classes of offenses for which bail need not be available, it does not necessarily follow that a state has absolute power to limit bail. The fourteenth amendment protects other rights as well and in protecting these, may restrict the denial of bail. The limits of this power are expressed in the analysis made by Judge Weinfeld writing in *United States ex rel. Covington v. Coparo*.[70] Judge Weinfeld observed:

> However, Congress could, without running afoul of the Eighth Amendment, also provide, for example, that persons accused of

66. 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964).

67. 326 F.2d at 710.

68. 648 F.2d 1148 (8th Cir. 1981), *vacated as moot, sub nom.*, Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982) (No. 80-2165). In *Hunt* the Eighth Circuit Court of Appeals considered, *inter alia*, the question of the constitutionality of a Nebraska constitutional amendment, which provides: "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great." Neb. Const. art. 1, §9.

69. *See* Foote, *supra* note 36, at 969.

70. 297 F. Supp. 203 (S.D.N.Y. 1969).

> kidnapping, bank robbery with force and violence, or other serious non-capital crimes are not entitled to bail as a matter of right. This Congressional power, of course, is confined by the due process clause of the Fifth Amendment. Thus, I am of the view that Mr. Justice Burton, in his dissent in Carlson v. Landon, correctly defined the scope of the Eighth Amendment to "prohibit . . . federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail."
>
> And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so, too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably; but, under the Eighth Amendment, where bail is fixed in either instance, it must not be excessive, and further, where bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail.[71]

A state's power to grant or deny bail is limited by the parameters of the fourteenth amendment.

A. Substantive Due Process and Equal Protection

Neither due process nor equal protection required of the states by the fourteenth amendment can be satisfied unless a state's laws are at the minimum rationally related to a legitimate state interest.[72] Under the fourteenth amendment, a state may deprive an individual of life, liberty or property, provided it does so with due process. For rights and interests classified as "fundamental" by the United States Supreme Court, the deprivation may be justified only by the state's showing a compelling state interest. For other, *i.e.*, non-fundamental rights, the state need show only that the deprivation is "rationally related" to a legitimate state interest. Under the rational basis analysis, a challenge to a state deprivation will almost always fail.

Equal protection analysis is substantially the same. The state may make classifications for different treatment when those classifications are ra-

71. *Id.* at 206.

72. For due process requirements of rational relationship, *see* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). The same requirement is demanded for equal protection analysis. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

tionally related to a legitimate state interest. For special groups, called "suspect classifications" by the Supreme Court, a state can justify unequal treatment only by showing a compelling state interest. The same test is applied when fundamental rights are denied to certain groups while granted to others. In order to pass constitutional muster, the actions of the State of New Mexico relating to the grant or denial of bail must then be at least rationally related to a legitimate state interest. A powerful argument can be made that "liberty" under the fourteenth amendment is a fundamental right which can be abridged only by a state showing of a compelling state interest.[73] Cases discussing the right to bail and the right to parole, both of which involve questions of freedom from physical restraint versus incarceration, have almost invariably analyzed state and federal acts under the so-called rational basis test.[74] Thus, it appears more likely that the New Mexico bail provisions will stand or fall on the rational basis analysis under the fourteenth amendment. Equal protection will be satisfied if the classifications made are " 'reasonable, not arbitrary, and [if they] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all people similarly circumstanced shall be treated alike.' "[75]

Two questions then arise. The first is what are the legitimate state interests which justify the grant or denial of bail to certain individuals, or individuals charged with certain offenses. The second is how the new bail provisions relate to those state interests.

Arguably, there are three legitimate purposes in denying pre-trial bail: (1) protection of court processes, (2) protection of society from dangerous defendants, and (3) assurance of the defendant's presence at trial. The rational relationship of the New Mexico Constitution bail provision to these purposes must be carefully analyzed to determine its constitutionality.

1) Protection of Court Processes

The first of the possible purposes behind the amendment, protection of court processes, is not strong enough to support the provision; nor is

73. Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978), employed the compelling state interest analysis in its examination of the bail statutes of the State of Florida. People v. Olivas, 17 Cal.3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), *cert. denied*, 434 U.S. 866 (1977), concurring with United States *ex rel* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) held that "liberty" under the Fourteenth Amendment is a fundamental right "[a]mong the rights protected by the Constitution, next to life itself, none is more basic than liberty." 17 Cal.3d at 247, 551 P.2d at 382, 131 Cal. Rptr. at 62 (quoting United States *ex rel* Robinson v. York, 281 F. Supp. 8, 16 (D. Conn. 1968)).

74. *See* Schilb v. Kuebel, 404 U.S. 357 (1971) where Justice Blackmun wrote, "But we are not at all concerned here with any fundamental right to bail. . . . This [Illinois bail scheme where the state retains 10% of the amount actually posted by the defendant, *i.e.*, 1% of the bail amount] smacks of administrative detail and procedure and is hardly to be classified as a 'fundamental right'. . . ." *Id.* at 365.

75. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

the amendment directed to that purpose. There is no doubt that a court may revoke bail, once granted, as part of its inherent powers to protect the integrity of its proceedings from threats by the defendant to witnesses or jurors.[76] The New Mexico Constitutional bail scheme does not add any new restrictions or expansions to that traditional power. Further, although the protection of court processes may be a legitimate purpose, the amendment is not particularly related to that interest. The new bail scheme deals with the denial of bail before there can have been any threats. Therefore, with respect to that purpose, the statute is overinclusive.

2) Protection of Society from Dangerous Defendants

The second possible legitimate state interest is the subject of controversy. There is presently debate on the proposition that the "danger to the community" presented by a defendant may be a legitimate justification for denial of bail.[77] Federal law seems to recognize the principle, at least as a statutory matter. The federal bail scheme imposed by the Bail Reform Act of 1966,[78] grants an absolute right to bail pending trial to all but those charged with capital offenses. This is similar to the common law exception for capital crimes. In the Bail Reform Act, however, the exception is based on the fear that a person accused of murder might be dangerous to the community. Capital offense defendants are otherwise bailable under the same criteria as those already convicted of crimes.[79] This statutory scheme recognizes elimination of danger to the community as a legitimate end which justifies pre-trial detention without bail.

The constitutionality of denying pre-trial bail to certain individuals or classes of individuals based on their "danger to the community" has never been addressed by the United States Supreme Court. The Court of Appeals of the District of Columbia held that interest to be a legitimate one in *Blunt v. United States*.[80] *Blunt* arose when the federal legislation under the Nixon administration proposed preventive detention.[81] That proposal was defeated except for a portion applicable only to the District

76. *See* Hemingway v. Elrod, *supra* note 66. *See also* Fernandez v. United States, 81 S.Ct. 642, 683 (1961), (Harlan, Associate Justice); Carbo v. United States, 82 S.Ct. 662 (Douglas, Circuit Justice, 1962).

77. *See*, Tribe, *supra* note 62; Foote, *supra* note 36; Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 38 (1964); Comment, *Bail: The Need for Reconsideration*, 59 N.W. U. L. Rev. 678, 691 (1964).

78. 18 U.S.C. §§ 3146–3156 (1976).

79. It must be noted that there is no constitutional right to bail after the defendant has been convicted. *See* United States v. Carbo, 82 S.Ct. 662 (Douglas, Circuit Justice, 1962). In that situation, bail pending appeal may often, as in federal prosecutions, be denied if the trial court finds that "no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." 18 U.S.C. § 3148 (1976).

80. 322 A.2d 579 (U.S. App. D.C. 1974).

81. *See* D.C. Code Encycl. § 23-1322 (West).

of Columbia.[82] It is the only "pure preventive detention" law in the nation.[83] The District of Columbia Code provision allows detention prior to trial of two kinds of defendants: (1) persons charged with a "dangerous crime" whose pattern of behavior based on several criteria indicates that no conditions other than detention will reasonably assure the safety of the community; and (2) persons charged with violent crimes who are either released on bail at the time of the most recent crime or were convicted of violent crimes within ten years immediately preceding the crime charged.[84] The District of Columbia Court upheld that law against constitutional challenge in *Blunt*.[85] The court specifically held that § 23-1322(a), the section which concerned community safety, was constitutional.[86] The court noted that this section embodied the principles enunciated in earlier cases of *Carbo v. United States*[87] and *United States v. Gilbert*,[88] by allowing the trial court to deny bail in order to protect witnesses from harm by the defendant.

Thus the *Blunt* case gives support to the proposition that keeping an accused felon in jail in order to prevent danger to the community may serve as a legitimate state purpose. The district court in *Blunt* went on to say that the preventive detention statute did not contravene the presumption of innocence.[89] The presumption, the court said, applies only to the trial itself. To make the presumption apply to the pre-trial bond situation, the court argued, would "make any detention for inability to meet conditions of release unconstitutional."[90]

That argument completely ignores the basic underlying rationale of *Stack v. Boyle*, which clearly indicates that the presumption of innocence should apply throughout the trial process.[91] Our legal system has sanctions calculated to deter outlawed behavior. The system cannot function if the sanctions are not imposed. Various restraints of liberty, such as pre-trial detention, may be necessary to insure that a reliable trial will be held and that sanctions cannot be avoided by flight. Other than this one justification for pre-trial deprivation of liberty, Professor Tribe noted that a "person awaiting trial has as great a right to liberty as any other citizen."[92]

82. D.C. Code Encycl. § 23-1322 (1981).
83. *See* Mitchell, *Bail Reform and the Constitutionality of PreTrial Detention*, 55 Va. L. Rev. 1223 (1969).
84. Taylor, *Issue and Debate—Pre-Trial Jailing of Dangerous Suspects*, N.Y. Times, Feb. 24, 1981, at 104.
85. Blunt v. United States, 322 A.2d 579 (U.S. App. D.C. 1974).
86. *Id.* at 586.
87. 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).
88. 425 F.2d 490 (D.C. Cir. 1969).
89. 322 A.2d at 584.
90. *Id.*
91. *See* Stack v. Boyle, 342 U.S. 1 (1951).
92. Tribe, *supra* note 62, at 404.

Despite the reasoning of the *Blunt* court, it is difficult to see how pretrial detention imposed because of an assumption that an accused may be dangerous, does not violate the presumption of innocence. Society has already given the defendant his freedom after his first conviction, so the assumption of his dangerousness cannot spring from that. It can only arise from a notion that the accusation of a second felony indicates that the accused is a repeat offender, and a continuing danger. This rationale, however, assumes that the accused is guilty of the second offense, and thus contravenes the presumption of innocence.[93] All courts have agreed that sentence cannot be imposed upon one who has not yet been convicted of a crime. Indeed, "it would hardly be appropriate for the State to undertake in the pre-trial detention period programs to rehabilitate a man still clothed with the presumption of innocence."[94]

The fact that the rationale of preventing danger to the community violates the presumption of innocence argues forcibly against its recognition as a legitimate state purpose. Because the theory is supported by some precedent, however, it is gaining support. In a speech given to the American Bar Association Mid-year Meeting, Chief Justice Burger stated that "[t]he crucial element of future dangerousness" should be restored to bail consideration.[95] This speech may indicate that the Supreme Court will eventually recognize the protection of society from a "dangerous" defendant as a legitimate interest justifying pre-trial denial of the right to bail.

If the protection of society from dangerous defendants is held to be a legitimate state purpose, the second question must be asked: whether the amendment or law is rationally related to that end. For the New Mexico amendment, the answer is no, both as a matter of substantive due process and as a matter of equal protection.

The amendment fails because it does not accomplish the purported purpose of restraining dangerous defendants, at least not for more than the arbitrary period of sixty days. The amendment has no provision guaranteeing that a defendant held without bail shall receive an expedited trial within the prescribed sixty-day period.[96] There will be defendants

93. This argument not only refutes the possibility that the protection of society is a legitimate state purpose of a denial of bail statute, but also demonstrates that such a law is overbroad and cannot be rationally related to such a purpose. The United States District Court for the District of Columbia upheld the District of Columbia preventive detention law in United States v. Edwards, 80-401. Nat'l Law J., May 25, 1981, p. 3, col. 1, *aff'd*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 50 U.S.L.W. 3765 (U.S. March 23, 1982) (No. 81-5017).

94. McGiniss v. Rowyster, 410 U.S. 263, 273 (1973).

95. *See* 49 U.S.L.W. 2522 (U.S. Feb. 17, 1981) for a synopsis of the Chief Justice's speech to the American Bar Association Mid-Year Meeting.

96. N.M. Const. art. II, § 13. The statute which was upheld in Blunt v. United States, 322 A.2d 579 (U.S. App. D.C. 1974), also did not contain the arbitrary 60-day period. *See* District of Columbia Preventive Detention Act, § 23-1322(d)(1) (Supp. 1970).

who have not been tried by the time the state constitution mandates that they be granted bail. Thus, defendants may be denied bail for sixty days, then must be granted bail for the time remaining before their trials. Release after the sixty-day limitation on pre-trial detention makes the bail amendment ineffective as a means of protecting society. The "dangerous" defendant is no less dangerous after sixty days of incarceration. Yet he is now eligible for bail. The preventive detention aspect of the bail amendment is thus thwarted. It "protects" the community for sixty days from "dangerous" people with prior New Mexico felony convictions, then it treats those "dangerous" people exactly the same as all other defendants are treated. The amendment does not protect society from the dangerous defendants after sixty days. The bail amendment fails the rational relationship test as a matter of substantive due process.

The amendment also denies equal protection to those who have prior New Mexico felony convictions. The amendment makes an arbitrary, and therefore impermissible, distinction between types of criminal defendants.[97] The classification is based on the location of prior convictions. Under the bail amendment, a person who has committed two non-violent felonies, gambling offenses for example, may in New Mexico be denied bail under the amendment. This person cannot rationally be deemed to be more dangerous to society than a person with five prior armed robbery convictions from another state. Yet the armed robber, who has exhibited a history of violent behavior and who would rationally be considered to be more dangerous than the gambler, is entitled to release on bail. There is no connection between the situs of conviction and the danger the accused presents to the community. The bail provision thus fails the equal protection aspect of the rational relationship test.

Section 1(B), which allows denial of bail to those with one prior New Mexico felony who are now charged with a felony involving the use of a deadly weapon, is unconstitutional for other reasons. Presumably, Section (B) was intended to allow detention of dangerous persons, ones who allegedly showed their dangerousness by carrying deadly weapons, as reflected in their new charges.[98] Because the deadly weapon provision expressly concerns the new charges, that approach does violence to the presumption of innocence. For example, a person previously convicted

97. N.M. Const. art. II, § 13

98. The use of the new charge as part of the rationale of dangerousness raises procedural due process problems. If danger to the community is a legitimate purpose for pre-trial detention, then the procedures used for such criteria should be similar to those for civil commitments where the purpose is the same. The pending charge cannot be the sole basis for a finding that the defendnt poses a serious enough threat to the community to justify detention. As the Supreme Court held in Baxtrom v. Herold, 383 U.S. 107 (1966), a person completing a penal sentence is entitled to a full hearing before he can be institutionalized as dangerous. Surely a person presumed innocent of his newly charged offense is entitled to the same procedures.

of a forgery is now charged with an armed robbery. Nothing in the defendant's past indicates he is dangerous. Under the new bail scheme, a judge is allowed to deny the accused his liberty for sixty days merely on the basis of a new charge. Such an approach can only be explained by admitting that the charges against the defendant are true. If the defendant is truly presumed to be innocent, the justification for his detention vanishes.[99]

3) Assuring the Presence of Defendant at Trial

Courts have recognized that the states may enact bail laws to further their legitimate state interests in assuring that defendants appear for their court proceedings.[100] The criteria by which bail is fixed must be "based upon standards relevant to the purpose of assuring the presence of that defendant."[101] Courts have held that assuring the presence of the accused at trial is the sole governmental interest served by the granting of bail.[102] The courts agree that states may deny bail completely when it is established that no amount of bail will assure the defendant's presence at trial.[103] Thus, there can be no question that assuring presence at trial is a legitimate state purpose.

This purpose cannot support the New Mexico bail amendment, however. The amendment is not rationally related to the purpose of assuring the presence of the defendant at trial. The amendment fails this purpose in many of the same ways it failed in the analysis of the "danger to the community" purpose. For example, the substantive due process analysis is the same. The arbitrary sixty-day limitation on the denial of bail means that the amendment will not ensure the presence of a defendant unless his trial happens to come up within the sixty days.

The people whom the state apparently believes are high flight risks will, after sixty days of institutional confinement, be free to flee while on bail. If the state believes that bail is sufficient to prevent flight after sixty days, then there is no need for the sixty-day incarceration. The effect of the amendment is antithetical to the purpose of assuring the

99. This argument also cuts against the use of "dangerousness to the community" as a legitimate state purpose.

100. *See* Stack v. Boyle, 342 U.S. 1 (1951). In fact, courts have said this is a *compelling* state interest. *See* Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot, sub nom.*, Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982), Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978), Escandar v. Ferguson, 441 F. Supp. 53 (S.D. Fla. 1977).

101. Stack v. Boyle, 342 U.S. 1, 5 (1951).

102. *Id.*; Escandar v. Ferguson, 441 F. Supp. 53, 58 (S.D. Fla. 1977).

103. United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203 (S.D. N.Y. 1969); Hemingway v. Elrod, 60 Ill. 2d 74, 322 N.E.2d 837 (1975). *See also*, State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972).

defendant's presence at trial. The amendment thus is not rationally related to the purpose of assuring the defendant's presence at trial.

The sixty-day provision also works another evil. It exerts a chilling effect on the exercise of Constitutional rights.[104] A defendant who is denied bail under the provisions of the bail amendment can be detained longer if there is a motion for a "continuance made by or on behalf of the defendant."[105] A defendant after sixty days of incarceration could very easily be faced with a decision to ask for a continuance to pursue further discovery and further prepare for a trial, or get out of jail. His understandable thirst for freedom could dictate his foregoing the motion. No person should be forced to choose between liberty and his other constitutional rights.

The equal protection analysis of the "presence at trial" purpose is also similar to that employed under the "danger to the community" purpose, and focuses on the arbitrary distinction between in-state and out-of-state felons. Section (A) draws a distinction between those charged with a felony who have two prior felony convictions "within the state" and those who do not.[106] Assuming the felony charged is not a capital offense, a judge, under Section (A), could deny bail to a lifetime New Mexico defendant with two prior New Mexico felony convictions. He would have no discretion to deny bail to a defendant from another state who has several prior felonies, but had the good fortune to have been convicted elsewhere. The New Mexican, who has never left the state, is without a doubt less of a flight risk than the transient out-of-state defendant. Yet, it is the New Mexican who can be absolutely denied the chance to make bail. The same result obtains under Section (B) of the amendment. There, a defendant with an out-of-state felony conviction is eligible for bail in a non-capital case, but the person with a prior New Mexico felony conviction who is charged with a dangerous weapon felony may be denied bail.

The state constitutional provisions relating to denial of bail violate the guarantees of the fourteenth amendment no matter what purpose is assigned to them. As a matter of substantive due process, the defendant's fundamental right to liberty far outweighs the purposes of bail amendment, and the amendment does not provide for the least restrictive means of depriving the defendant of that right. The arbitrary sixty-day limitation on the denial of bail cannot be rationally related to the state interests.

104. Although the chilling effect may not reach the level of a constitutionally cognizable harm, Dombrowski v. Pfister, 380 U.S. 479 (1965), a defendant's right to effective assistance of counsel guaranteed by the sixth amendment can be affected.

105. N.M. Const. art. II, § 13(B).

106. N.M. Const. art. II, § 13(A).

Without such a limitation, however, the deprivation of liberty would be open-ended and thus intolerable.

As a matter of equal protection, the amendment falls because of the in-state, out-of-state distinction. The category of in-state felons, allegedly created to remedy substantive evils, is both underinclusive and overinclusive. It is underinclusive in that defendants who pose a flight risk or are dangerous to the community, but, who do not have prior New Mexico felony convictions, are not included within the classification. The category is overinclusive in that it will inevitably swallow those in-state felons who are not dangerous to the community, and who are not flight risks. Thus, the New Mexico bail amendment violates the fourteenth amendment guarantees of substantive due process and equal protection.

4) Least Restrictive Means

Bail, as discussed earlier, is a fundamental right guaranteed by our constitution. As such, the right to bail can be abridged only by the Government's showing a compelling need to do so. The state interests which could compel a denial or abridgment of the right to bail are, as noted earlier, assurance of the defendant's presence at trial, protection of court processes and arguably protection of the community. To insure that the right to bail is not unnecessarily curtailed, the state must use the least restrictive means to protect its interests.

The New Mexico bail scheme, which allows arbitrary deprivations of pre-trial liberty, violates the principle that such actions are unjustified where less restrictive means are available.[107] In *Covington v. Harris,*[108] the United States Court of Appeals for the District of Columbia, speaking of civil commitments, recognized the applicability of this principle in cases of deprivation of bail to those "extraordinary deprivations" of liberty. A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.[109]

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[110]

107. *See* Wood v. United States, 391 F.2d 981, 984 (D.C. Cir. 1968).
108. 419 F.2d 617 (1969).
109. *Id.* at 623.
110. *Id.* at 623 n. 16.

The New Mexico bail scheme could, by requiring individual merit determinations, accomplish its interests in a less restrictive manner. Its failure to provide processes yielding the less restrictive means to accomplish its purposes violates the procedural aspect of the due process clause of the fourteenth amendment.

B. Procedural Due Process

An equally serious flaw in the bail provision is its failure to require any type of individualized determination of the defendant's dangerousness or flight risk. This failure means that the defendant with prior New Mexico felony convictions does not receive the procedural due process guaranteed him by the fourteenth amendment. The New Mexico amendment violates procedural due process in two ways. First, the amendment creates irrebuttable presumptions as to a defendant's dangerousness or likelihood of jumping bail. Second, the amendment cannot pass muster under the Supreme Court test for sufficiency of due process.

1) Irrebuttable Presumptions

Under a recent, although seldom-used, analysis of the mid-seventies, the New Mexico bail scheme must fail because it permits irrebuttable presumptions. Under the New Mexico bail provision, the defendant is never given an opportunity to rebut the presumption that he is dangerous to the community or that he may not remain for his trial. In *Vlandis v. Kline*,[111] the United States Supreme Court said that "the due process clause in certain circumstances cannot deny individuals certain rights based on an irrebuttable presumption which is not necessarily or universally true in fact."[112] The courts have applied the doctrine in invalidating irrebuttable presumptions of nonresidence,[113] mandatory pregnancy leaves for school teachers,[114] and a provision of the food stamp program.[115]

Reasoning from cases wherein the court has used the irrebuttable presumption analysis, however, also applies to denial of bail cases. In one irrebuttable presumption case, *Stanley v. Illinois*,[116] the Supreme Court held that the state could not create an irrebuttable presumption that unmarried fathers were unsuitable and neglectful. The Court in *Stanley* gave considerable attention to the importance of the family, saying that peti-

111. 412 U.S. 441 (1973).
112. *Id.* at 452.
113. Vlandis v. Kline, 412 U.S. 441 (1973).
114. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974).
115. United States Dep't of Agriculture v. Murray, 413 U.S. 508 (1973).
116. 405 U.S. 645 (1972).

tioner's interest in retaining custody of his children is cognizable and substantial.[117] In *Stanley,* the aim of the Juvenile Act in question was to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community. . . ."[118] It is clear that the policy reasons behind the striking of the statute in *Stanley* are at least as powerful in cases involving denial of bail. In determining whether an individual can be permitted to retain his liberty before trial, his interest in liberty is surely as cognizable and substantial as a father's interest in keeping custody of his child. As custody questions require individualized determinations, so too should the decision on whether one's liberty is to be curtailed before he is tried of a charge of which he is presumed innocent.

The legal tests applied in *Stanley,* as well as the policy considerations, are as important in a denial of bail case. Assuming the goals of the New Mexico bail scheme are valid, the question is "to determine whether the means used to achieve these ends are constitutionally defensible."[119] In *Stanley* the Court asked, "[w]hat is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case. . . ."[120] Here, the court must ask, what the state interest is in depriving a defendant of his pre-trial liberty without a hearing to determine if he is a flight risk, or a danger to the community, or a threat to the integrity of the prosecution against him. The answer is clear. There is no such state interest.

Lower courts have discussed the irrebuttable presumption analysis in the context of the denial of bail.[121] The Eighth Circuit Court of Appeals in *Hunt v. Roth*[122] used the irrebuttable presumption analysis to find that the Nebraska bail provision was unconstitutional. The Nebraska bail amendment denied bail to all charged with "sexual offenses involving penetration by force or against the will of the victim, . . . where the proof is evident or the presumption great."[123] The only way in which the Nebraska scheme differs from the New Mexico scheme is that in New Mexico, bail is not *automatically* denied to those charged as the Nebraska bail provision required. A New Mexico judge has discretion about whether to deny bail. This discretion does not cure the procedural due process problem, however. Nothing in the amendment suggests that the court

117. *Id.* at 652.

118. *Id.*

119. *Id.*

120. *Id.* at 652 (citing Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961), and Goldberg v. Kelly, 397 U.S. 254 (1970)).

121. *See* Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot, sub nom.,* Murphy v. Hunt, 50 U.S.L.W. 4264 (U.S. March 2, 1982).

122. *Id.*

123. 648 F.2d at 1155. Forcible rape defendants were not allowed to speak once the state demonstrated that this proof was evident or the presumption great. *Id.*

must consider evidence about whether the defendant should be granted bail.

The presence of judicial discretion merely means that the denial of bail will differ from judge to judge. In New Mexico the judge may arbitrarily invoke an irrebuttable presumption against the granting of bail at his own whim, without regard for the dangerousness or risk of flight presented by the individual. The reasoning of the Eighth Circuit should apply with equal or greater force in New Mexico. The irrebuttable presumption created by the New Mexico bail amendment is inconsistent with procedural due process notions. There is no requirement of an individualized determination of flight risk, danger to the community or danger to the process of a defendant's impending prosecution.

2) The Mathews *Test*

The flip side of the conclusion that an irrebuttable presumption violates due process is the question of what process is due in a given case. In *Mathews v. Eldridge,*[124] Justice Powell proposed a three-pronged test to be employed to determine the sufficiency of due process afforded by a statute:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[125]

Applying the *Mathews v. Eldridge* test to the New Mexico bail scheme shows that it does not satisfy procedural due process.

The first prong of the test requires an examination of the private interest affected. The private interest involved in the denial of bail is personal liberty. An interest in liberty from incarceration is very significant by any measurement and, in fact, is fundamental.[126] The Court has long held that all deprivations of liberty require individualized justification.[127]

The second factor of the analysis requires an examination of the possibility of erroneous deprivation under the procedures used, and a balancing of possible alternatives. New Mexico judges or magistrates have, under the bail scheme, absolute unfettered discretion to deny bail to those accused of felonies who have prior New Mexico felony convictions. The risk of erroneous deprivation, *i.e.*, denial of bail to those for whom bail

124. 424 U.S. 319 (1976).
125. *Id.* at 335.
126. *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966).
127. Goss v. Lopez, 419 U.S. 565, 579 (1975).

should be granted, is not only very likely, but is unavoidable. The judge is not given any guidelines to determine who, among those with prior New Mexico felonies, will be granted bail and who will be denied bail. Because the judge has absolute discretion, he can, consistent with the New Mexico Constitution, deny bail at his whim, or even for invidious reasons.

The third prong of the *Mathews v. Eldridge* test concerns governmental interest, *i.e.*, the burden of implementing required procedures balanced against the desire to retain those procedures. Satisfaction of this factor would be furthered by allowing a determination of eligibility for bail based on the characteristics of the individual defendant. Presently, each defendant is brought before a judge or magistrate who determines conditions of release. The new bail provisions do not change that. By continuing this process at that time, the judge could consider the individual defendant's merits, rather than the mere fact that he may have prior felony convictions. This consideration would not involve a substantially greater burden to the administrative process than existed before the new bail scheme went into effect. The additional time would not pose a significant administrative burden in view of the fundamental rights being considered.

Due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[128] In the case of bail, due process requires that the hearing contain evidence related to the probability that the accused will flee or is a danger to the community. A decision based on the number of the defendant's prior convictions alone does not provide the accused with the due process right to be heard.

> Past crimes would be material [to the risk of flight] if proceedings incident thereto showed an accused had violated conditions of a bail or release order. . . . A District Court cannot fairly take past convictions into account, as showing tendency to flight, unless he at least makes inquiry whether in the prior proceedings the accused had failed to comply with bail, release, or other orders.[129]

The New Mexico bail provision does not require a full hearing before bail can be denied. Procedural due process is thus violated.

III. CONCLUSION

When the New Mexico bail amendment is analyzed in light of the eighth and fourteenth amendments of the United States Constitution,

128. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

129. United States v. Alston, 420 F.2d 176, 179 (D.C. Cir. 1969). The court in *Alston* mentioned the prior convictions in the context of the Bail Reform Act, 18 U.S.C. §§ 3146 to 52 (Supp. IV, 1965–1968). The Act allows consideration of past crimes when setting bail only to the extent the record may show "he poses little risk of flight."

serious questions concerning its constitutional validity emerge. If, as the authors urge, the eighth amendment creates an absolute right to bail in all but capital offense cases, the New Mexico amendment must fall. Even if the eighth amendment does not create a complete ban to legislative power to deny bail, the New Mexico amendment restricts access to bail unreasonably and arbitrarily.

The New Mexico bail scheme is not rationally related to any permissible state goal. It does not necessarily apply to those who are most likely to flee from or disrupt their criminal prosecutions. It does not distinguish between those who may truly be dangerous and those who are not. It does not provide a means to prevent flight to avoid prosecution. It does not provide adequate procedural safeguards to satisfy the requirements of due process.

What the amendment does is permit judges in New Mexico arbitrarily to deny people who were previously convicted of felonies of their liberty merely because they have been convicted before. A fundamental constitutional principle is that no person may be punished until convicted of a crime.[130] The New Mexico bail provision has nothing to do with the nature of the prior felonies, only the convictions. The amendment allows punishment merely because the defendants have been charged with a crime. The only difference between a person with two felony convictions who is allowed to enjoy his freedom and one who may be locked up for sixty days without bail is the fact of a new charge. The one is not necessarily any more dangerous than the other. Under the New Mexico bail amendment, the filing of an information or indictment against a previously convicted New Mexico felon allows the state to label the individual as dangerous or a flight risk, and automatically deny him his freedom. The imposition of burdens unconnected with a defendant's individual tendencies towards flight or danger can only be seen as punishment. The New Mexico bail amendment, which allows punishment before a conviction, violates the interests spoken for so forcefully in *Stack v. Boyle*.[131] The New Mexico bail provision has dealt the presumption of innocence a severe blow. The "centuries of struggle" to preserve the presumption of innocence will have been in vain as long as the bail amendment of the New Mexico Constitution stands.

130. Aptheker v. Secretary of State, 378 U.S. 500 (1964) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). The principle has been recognized generally. N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Louisiana *ex rel.* Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bell v. Wolfish, 449 U.S. 520 (1979).

131. 342 U.S. 1, 4 (1951).