

FOOTNOTE TO *FURMAN*:  
FAILING JUSTIFICATION FOR THE CAPITAL CASE  
EXCEPTION TO THE RIGHT TO BAIL AFTER  
ABOLITION OF THE DEATH PENALTY

I. INTRODUCTION

Regardless of the source for the right to bail, either a statutory or a constitutionally derived source, the constitutionality of exclusion from that right of those accused of capital offenses had long been settled.<sup>1</sup> This was true at common law where, for felonies, bail was allowed strictly at the discretion of the higher courts, although a justice of the peace was required to set bail for the less serious charges brought within his jurisdiction.<sup>2</sup> The capital crimes exception to the right to bail was, therefore, standard court practice at common law.

These procedures were adopted by colonial legislatures when they drafted statutes concerning bail.<sup>3</sup> Five states have retained this common law practice and leave bail in capital cases to judicial discretion.<sup>4</sup>

The Federal Bail Act of 1789<sup>5</sup> excluded capital offenses from its statutory exposition ofailable offenses. This historic federal exclusion was unaffected by the Bail Reform Act of 1966<sup>6</sup> and is extant as embodied in Rule 46(a) of the Federal Rules of Criminal Procedure, where the exception depends on the penalty and not on the crime itself.<sup>7</sup>

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1. *Carlson v. Landon*, 342 U.S. 524 (1952); *Mastrian v. Hedman*, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 465 (1964); *Corbett v. Patterson*, 272 F. Supp. 602 (D. Colo. 1967).

2. 4 W. BLACKSTONE, COMMENTARIES 298-99 (W. Lewis, Ed. 1900) [hereinafter cited as BLACKSTONE].

3. J. GOEBEL & T. NAUGHTEN, LAW ENFORCEMENT IN COLONIAL NEW YORK, 497-98 (1944).

4. See Appendix III.

5. Judiciary Act of 1789, ch. 20, § 33(b), 1 Stat. 91: "[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death. . . ."

6. 18 U.S.C. §§ 3146, 3147 (1970).

7. FED. R. CRIM. P. 46(a).

(1) Before Conviction. A person arrested for *an offense not*

Presently, thirty-one states follow this federal practice by excepting those accused of capital crimes from a constitutional or statutory right to bail.<sup>8</sup> There are, however, eleven additional states which have phrased exception provisions differently by excluding only those accused of specific crimes, or those accused of crimes subject to specific non-capital punishment from the right to bail.<sup>9</sup> The remaining three jurisdictions grant a right to bail without exception.<sup>10</sup> As is readily apparent then, decisions which hold the imposition of a death penalty unconstitutional will not have uniform effect on the right to bail in all states. But, as is also apparent, decisions which affect the constitutionality of death penalty imposition will necessarily affect an exclusion from right to bail for those accused of capital crimes.

In particular, the United States Supreme Court's decision in *Furman v. Georgia*,<sup>11</sup> raises the question of the continuing constitutionality for both state and federal exclusions. Given the differing bases for the majority opinions in *Furman*, (i.e., the seeming bases for the majority of opinions was that the death penalty as imposed was a violation of the eighth and fourteenth amendments<sup>12</sup>), the question of the capital case exclusion from the right to bail appears to be one which would allow jurisdictional divergence in resolution.

The state appellate court decisions resolving the right to bail for those accused of what were capital offenses under state constitutional provisions which grant a right to bail "except for capital offenses" give an example of this divergence. The anticipated variability is illustrated in recent opinions on this issue stemming from

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*punishable by death* shall be admitted to bail. A person arrested for an offense *punishable by death* may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(Emphasis added).

8. See Appendix I.

9. See Appendix II.

10. See Appendix IV. It should be noted, however, that these states may still have the traditionally worded capital crimes exclusion in their constitutions, even though there is a statutory grant of right to bail without exception.

11. *Furman v. Georgia*, 408 U.S. 238 (1972).

12. The holding in *Furman* was expressed, "Per Curiam: The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. 238 (1972). For the suggestion that the death penalty is not per se unconstitutional, but is so only as it is now authorized and imposed, see the concurring opinions of Justices Stewart and White, as well as the dissenting opinions of Chief Justice Burger and Justice Blackmun. Justices Brennan and Marshall expressed the only opinions to the contrary.

the *Furman* decision. Pennsylvania, Connecticut and Texas found a right to bail in formerly capital cases while Mississippi and Colorado did not. In the exemplary decisions of *Commonwealth v. Truesdale*,<sup>13</sup> and *Hudson v. McAdory*,<sup>14</sup> the courts arrive at two conflicting interpretations of the indirect effect of the *Furman* decision.

In *Truesdale* the Pennsylvania court dismissed the state's contention that since murder in the first degree was the only capital offense in that state, that the term "capital offense" referred to in art. I, § 14 of the Pennsylvania Constitution could be read interchangeably with "murder in the first degree". Rather, the court held that the term "capital offense" used in the Pennsylvania Constitution was restricted to its plain meaning, *i.e.* an offense which may be punished by imposition of the death penalty.<sup>15</sup>

The court analyzed the express purpose of bail and the constitutional rationale for the capital offenses exception in arriving at a conclusion that after *Furman* those accused of what were formerly capital crimes were possessed of the same right to bail as all other criminal defendants.<sup>16</sup> Further, the court found such a result to be justified by three basic tenets of our criminal justice system: the presumption of innocence, the reluctance to punish prior to conviction, and the desire to give the accused maximum opportunity to prepare his defense.<sup>17</sup>

Finally, the court rejected the state's request that the exception be reinstated as a form of preventive detention. The request was given short shrift by the court which stated that "[t]his would be an unprecedented step on our part, and one that is fraught with constitutional problems in terms of due process. It would also be contrary to the whole foundation of our penal system, since our laws punish for past offense, rather than incarcerate a person to prevent future offenses."<sup>18</sup>

Arriving at the same conclusion, but without such an extended analysis, the Texas Court of Criminal Appeals in *Ex parte Contella*<sup>19</sup>

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13. — Pa. —, 296 A.2d 829 (1972).

14. — Miss. —, 268 So. 2d 916 (1972).

15. — Pa. at —, 296 A.2d at 832.

16. *Id.* at —, 296 A.2d at 835.

17. *Id.* at —, 296 A.2d at 834.

18. *Id.* at —, 296 A.2d at 836.

19. 485 S.W.2d 910 (Tex. Crim. App., 1972), *holding aff'd on rehearing*,

held that since the language of the state constitution allowed denial of bail only in cases where the death penalty could be imposed, and since the *Furman* decision required Texas to refrain from imposing the death penalty, there was no longer any case in which bail could be denied on the basis of the capital offenses exception to the right to bail.

The Supreme Court of Connecticut likewise found it error for a trial judge to refuse bail in a case that prior to *Furman* had been characterized as capital. In the concise opinion of *State v. Aillon*,<sup>20</sup> this court found an unequivocal right to bail as the necessary sequel to the *Furman* decision when coupled with article I, section 8 of the Connecticut Constitution. Although the per curiam opinion expressed an uneasiness with *Furman's* lack of unanimity, there seemed to be no doubt as to its effect on bail in formerly capital cases.

But a contrary holding was expressed by the Mississippi Supreme Court in *Hudson v. McAdory*.<sup>21</sup> In order to conform its decision to the strictures of the Mississippi Constitution,<sup>22</sup> and at the same time avoid finding a right to bail for those accused of what, prior to *Furman*, were offenses punishable by death, the court in *Hudson*, with strained logic, held, ". . . that a capital case is any case where the permissible punishment prescribed by the Legislature is death, even though such penalty may not be inflicted since the decision of *Furman*."<sup>23</sup> The court arrived at its decision by determining that the definition of "capital offenses" within the meaning of the Mississippi Constitution was a legislative, not a judicial, responsibility.<sup>24</sup> To further illustrate the wisdom of the holding, the court finds, through a discussion of other statutes incorporating reference to "capital offenses", that "[i]t therefore becomes apparent that it is necessary to retain the classification 'capital offenses,' 'capital crimes' and similar references so that utter chaos and confusion in the administration of criminal justice would not be the result of the abolition of the death penalty in certain classes and categories of crimes."<sup>25</sup>

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485 S.W.2d at 912, n.1 (Tex. Crim. App., 1972). Note that the Texas Court of Criminal Appeals is the highest criminal appellate court in that jurisdiction.

20. — Conn. —, 295 A.2d 666 (1972).

21. — Miss. —, 268 So. 2d 916 (1972).

22. Miss. Const. art. III, § 29 provides in part, "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

23. — Miss. at —, 268 So. 2d at 923.

24. *Id.* at —, 268 So. 2d at 922-23.

25. *Id.* at —, 268 So. 2d at 921.

Similarly, in *People ex rel. Dunbar v. District Court*,<sup>26</sup> a terse opinion by the Colorado Supreme Court, a Colorado constitutional right to bail excepting only "capital offenses" was held to be unaffected by the *Furman* decision. The court there found "capital offenses" to be a category of crime, dependent not on the death penalty for definition but on other unnamed factors.

Other decisions in jurisdictions where the capital offenses exception is operative have rejected the arguments which seemingly convinced the Mississippi and Colorado courts. Although the cases dealt with the right to bail after abolition of the death penalty, they were not the result of *Furman*, but, rather, they resulted from other previous abolitions, both legislative and judicial.

The Minnesota Supreme Court in 1958, in *State v. Pett*,<sup>27</sup> followed a line of precedent extending back into the nineteenth century by granting bail despite a capital crimes exception.<sup>28</sup> *Pett* and these earlier cases hold that where there is a capital offenses exception to the right to bail, and the legislature abolishes the death penalty for a crime, there is no remaining basis for denying bail simply because it was once punishable by death. Any other decision would lead to absurd results, as can be seen by envisioning a denial of bail to all those accused of crimes our puritanical forefather's deemed worthy of the utmost sanction.<sup>29</sup>

More recently, the New Jersey Supreme Court arrived at the same conclusion as *Truesdale* in *State v. Johnson*.<sup>30</sup> The holdings were identical even though *Johnson* stemmed from a pre-*Furman* United States Supreme Court determination that the New Jersey death penalty provisions were unconstitutional.<sup>31</sup>

The California Supreme Court finessed the right to bail issue in a

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26. — Colo. —, 500 P.2d 358 (1972).

27. 253 Minn. 429, 92 N.W.2d 205 (1958).

28. *In re Welisch*, 18 Ariz. 517, 163 P. 264 (1917); *Ex parte Ball*, 106 Kan. 536, 188 P. 424 (1920); *City of Sioux Falls v. Marshall*, 48 S.D. 378, 204 N.W. 999 (1925); *In re Perry*, 19 Wis. 676 (1865); cf. *State v. Johnson*, 83 Wash. 1, 144 P. 944 (1914).

29. See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1228, n.24 (1969), which lists various forms of sodomy, mayhem, and manslaughter as capital crimes in various jurisdictions between 1787 and 1809 [hereinafter cited as Mitchell].

30. 61 N.J. 351, 294 A.2d 245 (1972).

31. *New Jersey v. Funicello*, 403 U.S. 948 (1971).

modification of its now defunct decision in *People v. Anderson*.<sup>32</sup> The court there reserved the issue to a more appropriate proceeding, but indicated its disposition by studiously observing that the underlying gravity of capital offenses endures, even though the death penalty has been abolished.<sup>33</sup> This gravity of the offense argument was cited in both *Hudson* and *Dunbar* to support the post-*Furman* denial of a right to bail for those accused of what were capital crimes.<sup>34</sup>

The language of the California Constitution is no less explicit than that of its Pennsylvania, Connecticut, Texas, or New Jersey counterparts,<sup>35</sup> but the California court, like Mississippi in *Hudson*, seems to be reluctant to part with the historic capital offenses exception to the right to bail, no matter how eager they were to judicially abolish the death penalty. Nevertheless, despite the rea-

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32. The court in *Anderson* held that the "imposition of the death penalty constitutes 'cruel or unusual' punishment in violation of the California Constitution." 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880, modified 6 Cal. 3d 804(a), 100 Cal. Rptr. at 172, n.45, 493 P.2d at 899-900, n.45. On November 7, 1972, however, the voters of California passed an initiative constitutional amendment, Proposition 17 on the ballot, which amended art. I of the CAL. CONST. to read:

"Sec. 27 All statutes of this state in effect on February 17, 1972, [i.e., those in effect prior to the *Anderson* decision], requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. "The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment within the meaning of Article I, Section 6, nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

33. 6 Cal. 3d 804(a), 100 Cal. Rptr. at 172, n.45, 493 P.2d at 899-900, n.45. Note that the underlying gravity argument ignores the fact that where crimes have been removed from capital status in the past, there has been an automatic inclusion in the right to bail despite the unchanged gravity of the offense. See cases at note 28 *supra*.

34. *Hudson v. McAdory*, — Miss. at —, 268 So. 2d 921, and *People ex rel. Dunbar v. District Court*, — Colo. at —, 500 P.2d at 359.

35. CAL. CONST., art. I, § 6 provides in part: "All persons shall be bailable by sufficient sureties unless for capital offenses when proof is evident or the presumption great." Compare, PA. CONST., art. I, § 14 which provides, "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great; \* \* \*"; CONN. CONST., art. I, § 8 which provides in part, "In all criminal prosecutions, the accused shall have a right \* \* \* to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great."; TEXAS CONST., art. I, § 11 provides, in part: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when proof is evident. . ."; N.J. CONST. art. I, § 11 provides, "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

soning in *Hudson*, it is difficult to conceive of a method by which the California court, in an appropriate proceeding, could justify the status quo for bail exclusion in light of the *Furman* decision's opinion that the current manner of imposing the death penalty is unconstitutional, and the express words of the California Constitution excepting only capital offenses from the right to bail.<sup>36</sup> A similar determination, compelled by the *Furman* decision, would seem likewise imminent for those other jurisdictions where the exclusion is tied to the death penalty.<sup>37</sup>

However, as *Truesdale* and *Hudson* illustrate, the lack of an ascertainable basis for the *Furman* decision<sup>38</sup> will undoubtedly result in divergent judicial interpretations of the holding by state courts, which could lead to variations regarding the continued constitutionality of exclusion provisions. While this may come to pass, a result continuing the exclusion without provision for the death penalty seems to ignore the constitutional rationale for the exclusion which has prevailed these many years.<sup>39</sup> It would seem that without the factor of the death penalty, and absent restorative legislation, the request for bail in offenses which were once classified as capital should be resolved only in accordance with established standards utilized in other bail matters.<sup>40</sup>

36. See CAL. CONST. art. I, § 6 at note 35, *supra*.

37. See Appendix I for those jurisdictions affected.

38. Each member of the five man majority wrote only for himself, while each dissent, except Mr. Justice Blackmun's, was supported by all the other dissenters. As the court in *Dunbar* stated, "It is impossible for us to reconcile the various opinions which are included in the 243 pages of divergent views that support the Supreme Court's per curiam result." *People ex rel. Dunbar*, — Colo. at —, 500 P.2d at 359.

39. The classic expression of that rationale has been that bail is denied in capital cases because it is assumed that the prisoner will forfeit the bail rather than forfeit his life. *In re Corbo*, 54 N.J. Super. 575, 149 A.2d 828, *certif. denied*, 29 N.J. 465, 149 A.2d 859 (1959).

40. The traditional articulation of these standards is found in 18 U.S.C. § 3146(b) (1970).

In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

To fully support this conclusion, it is necessary to consider the theoretical purpose and constitutional nature of the right to bail, and the relation of the exclusion to that right. Such considerations must be made with deference to the evolving concepts of individual rights present in our constitutional theory.<sup>41</sup>

## II. THE NATURE, PURPOSE, AND USE OF BAIL

### A. *The Controversy: A Constitutional Right to Bail?*

Whether or not there is a constitutional right to bail is a question representative of the most difficult of constitutional determinations. Since the United States Constitution says nothing expressly about a right to bail, determination of that issue is left to judicial construction. The only constitutional provision mentioning bail is the eighth amendment which says that "[e]xcessive bail shall not be required . . ."<sup>42</sup> From this statement some have found an implicit guarantee of a right to reasonable bail in all noncapital cases.<sup>43</sup> Another possible constitutional source for this right is the guarantee of due process, which is said to include the presumption of innocence.<sup>44</sup> A third, less frequently mentioned constitutional source for the right to bail is the sixth amendment's guarantees of trial by an impartial jury and assistance of counsel.<sup>45</sup>

Criticism common to all three theories of a constitutional right to bail is the lack of an express guarantee of this right.<sup>46</sup> Of particular weight to argument against an eighth amendment basis is the difficulty of inferring a capital offense exclusion from an implied right to bail.<sup>47</sup> An eighth amendment source also leaves the lack of a right to bail pending appeal unexplained. A theory

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41. Due Process is an evolving concept, . . . it therefore entails a gradual process of judicial inclusion and exclusion to ascertain these immutable principles . . . of free government which no member of the Union may disregard.

Duncan v. Louisiana, 391 U.S. 145 (1968).

42. U.S. CONST. amend. VIII.

43. Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960); United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954); United States v. Fah Chung, 132 F. 109, 110 (S.D. Ga. 1904) (dictum); Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. Rev. 959 (1965), [hereinafter cited as Foote].

44. Turner v. United States, 396 U.S. 398, 425 (1970) (Black, J., dissenting).

45. *Hearings on Preventive Detention before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess (1970). (Senator Ervin's opening remarks, 5-7), [hereinafter cited as 1970 *Hearings*].

46. Meyer, *Constitutionality of Pretrial Detention: I*, 60 GEO. L.J. 1139, 1179 (1972), [hereinafter cited as Meyer].

47. *Id.*, at 1180. See also, Mitchell, *supra* note 29 at 1230.



such as this, requiring double inferences, hardly seems to be the most promising foundation for building constitutional structure.

On sounder ground is the implication of a right to bail found in the presumption of innocence, and included in constitutional guarantees by the due process clause. One presumed innocent should not have his liberty curtailed solely on the strength of an accusation. The due process clause has been said to contain this presumption along with other fundamental expressions of our system's concept of fairness and justice.<sup>48</sup> Here, significantly, the evolutionary nature of the due process clause<sup>49</sup> accounts for the historic exclusion of capital offenses from a right to bail. Moreover, it is consistent with the presumption of innocence to allow bail denial pending appeal. These criticisms, persuasive against an eighth amendment source are unconvincing here. However, the lack of indication that the framers intended the due process clause to do more than guarantee uniform application of statutory rights poses the strongest criticism of a due process source for an absolute right to bail.<sup>50</sup> If a due process basis is accepted for a right to bail, it follows that the continued validity of the exclusion would have to be measured against evolving due process standards in light of the decision abolishing the death penalty.

A sixth amendment basis for the right to bail is similar, holding that the right to trial by an impartial jury includes the right to bail because empirical evidence indicates discrimination against defendants in custody at the time of trial.<sup>51</sup> Further, the guarantee of assistance of counsel is said to imply the necessity of pretrial liberty for the defendant in order to assist in preparation of the case.<sup>52</sup> But this theory too lacks an explicit articulation, and op-

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48. *In re Winship*, 397 U.S. 358, 363 (1970), *citing Coffin v. United States*, 156 U.S. 432, 453 (1895); *Turner v. United States*, 396 U.S. 398, 425 (1970) (Black, J., dissenting).

"Bail is a method of protecting the defendant in his 'presumption of innocence' until his trial." PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, *Report* 520 (1966). The Supreme Court has ruled that the presumption of innocence is a requirement during criminal proceedings, as opposed to prior to those proceedings. *Deutch v. United States*, 367 U.S. 456, 471 (1961).

49. See note 41, *supra*.

50. See Meyer, *supra* note 46, at 1382.

51. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964), [hereinafter cited as Rankin].

52. See 1970 *Hearings*, *supra* note 45.

erates on the challenged assumption that a fair trial is possible only where pretrial liberty is provided.

Perhaps these problems of provenance exist because the search is for a right to bail rather than for a guarantee of the objective that bail is designed to secure, pretrial liberty. It is apparent from a perusal of a substantial majority of opinions of courts which have considered the issue that "the right to bail is not absolute".<sup>53</sup> But such a statement fails to truly reflect the scope of the right to pretrial liberty, for the law is not that the Constitution permits legislatures to make all arrests non-bailable; nor does it permit the judiciary to refuse to set bail in an otherwise appropriate case.<sup>54</sup> However, it seems clear that while the courts are not overwhelmingly concerned with the preservation of the bail system, they are protective of the right of one arrested on a criminal charge to be free pending trial.

This distinction between the guarantee and the mode of its accomplishment was succinctly expressed by the court in *United States v. Fah Chung*, where it was stated, "If, then, it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori would it seem also unlawful to deprive him of his liberty by refusing bail altogether."<sup>55</sup> Bail, as seen in this light, is only the conduit through which liberty can be obtained prior to trial. Too often bail is equated with pretrial release. Such an equation is erroneous because the bail process is most generally used as a flexible control on pretrial liberty rather than as a simple method of effectuating it.<sup>56</sup> What guarantee there is protects a defendant's right to pretrial liberty, and not a bondsman's to his premium.<sup>57</sup> However, rather than subordi-

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53. It is definitely beyond cavil that the right to bail is not absolute.

Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial . . .

*Corbett v. Patterson*, 272 F. Supp. 602, 607 (D. Colo. 1967), citing *Mastrian v. Hedman*, 326 F.2d 708 (8th Cir.), cert. denied, 376 U.S. 965 (1964).

54. See authority cited at note 43, *supra*.

55. *United States v. Fah Chung*, 132 F. 109, 110 (S.D. Ga. 1904).

56. See generally, Paulsen, *Pretrial Release in the United States*, 66 COLUM. L. REV. 109, 114 (1966); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1502-03 (1966).

57. As Judge J. Skelly Wright of the District of Columbia said, . . . bail has become a barnacle on the back of the criminal law. Theoretically a defendant out on bond is in the custody of his bondsman. Thus the bondsman is allowed to charge a modest fee, ten per cent of the bond, for the service he renders and the risk he runs. Actually a defendant on bond is in the custody of no one and the police and FBI are much more familiar with his whereabouts than his bondsman. Moreover, if the defendant fails

nating the legal issues to philology by attempting to change the synonymous usage of "bail" and pretrial liberty, the distinction between the concept and the procedure will be merely noted. Accordingly, the "right to bail" as used herein is intended to convey a meaning of a right to pretrial liberty consistent with a presumption of innocence.

When considered as a limitation on individual liberty, the requirement of bail as a condition to pretrial liberty conflicts with the concept of an absolute presumption of innocence. This has been justified by deeming such a limitation necessary to protect society's overriding interest in the efficient functioning of its criminal process. Further, the capital offenses exclusion has been justified as being necessary, since only in that manner could the legitimate purpose of bail be served in capital cases. Regardless of one's view of the nature and existence of a constitutional right to bail, it is apparent that the purpose of bail, being fundamental to the evaluation of continuing justification for the capital offenses exception, must be fully considered before an informed judgment can be made.

#### B. *Express Purpose of Bail*

In the Anglo-American system of jurisprudence, it is thought that the right of an individual to do as he pleases is limited only where there is some overriding social need. The establishment of a category of conduct denoted criminal is an expression of an overriding social need. Yet, to maintain the rights of the individual to the fullest extent possible, one accused of a crime is presumed innocent until proven guilty.<sup>58</sup> The postulate of a presumption of innocence is the embodiment of the proposition that a man who stands accused of crime is fully entitled to freedom and respect as an innocent member of the community until regular criminal process

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to appear for trial, it is the FBI or the police who pick him up—yet the bondsman gets the fee. In short, the bondsman gets paid for rendering no real service. . . .

Wright, *Criminal Law and the Bill of Rights*, THE REPORTER, June 3, 1965, p. 23. See also, Judge Wright's concurring opinion in *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963).

For further comment on the bondsman's role, see NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 233 (1964) (Address of Richard H. Kuh), [hereinafter cited as 1964 BAIL CONFERENCE].

58. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

has proved his guilt. His liberty may be limited only as necessary to assure the progress of the proceedings pending against him. Those limitations do not rely on any assumption of guilt and are, therefore, in harmony with this basic axiom of dignity and equality. Bail is a method used to assure the timely progression of the criminal process while minimizing the interference with individual freedom and dignity.

The use of bail in the United States, like so much else in our criminal procedure, is a result of colonial imitation of historic English practice. At the time of the American Revolution, English bail law consisted of so many particular rules that a systematic treatment is almost impossible. Further clouding the subject was the wide range of judicial discretion creating exceptions to practically any rule.<sup>59</sup> Early colonial bail statutes, however, seemed to be more spiritually akin to the Statute of Westminster of 1275<sup>60</sup> which was the first English statutory regulation of bail.<sup>61</sup> The statute was designed to give definite guidelines to those charged with the responsibility of handling release on bail, and it is this feature that the rather individualistic colonialists chose to incorporate in their early laws.<sup>62</sup> However, the state and federal constitutional prohibitions against excessive bail are traceable to the English Bill of Rights in 1689.<sup>63</sup>

A historic and comprehensive review of the statutory and case law on the English bail system suggests that at common-law, and at least until the late eighteenth century, the only legitimate function of pretrial detention in England was to provide assurance that the accused could be prosecuted and, if guilty, sentenced. And, likewise, the accepted purpose of bail was to provide those assurances by surety rather than incarceration.<sup>64</sup> Furthermore, the lack of early American case reports indicates how little controversy there was over this limited purpose.

Until *Stack v. Boyle*<sup>65</sup> the United States Supreme Court had not

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59. 4 BLACKSTONE, *supra* note 2, at 298-99.

60. 3 Edw. 1, c.15 (1275).

61. J. GOEBEL & T. NAUGHTEN, *supra* note 3, at 497,98.

62. Foote, *supra* note 43, at 974.

63. 1 W. & M., c.36, § 10 (1689), "Excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." as cited by Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 398 (1970), [hereinafter cited as Tribe].

64. Tribe, *supra* note 63, at 401-402, citing A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL IN CIVIL AND CRIMINAL CASES (1783).

65. 342 U.S. 1 (1951).

considered the purpose of bail a topic worthy of its attention.<sup>66</sup> In *Stack*, the Court began its analysis in that case noting that the

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.<sup>67</sup>

The Court further stated that the

right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty . . . like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.<sup>68</sup>

In a contemporary context, with current concern for the indigent unable to raise the required sum or to afford the bail bond premium,<sup>69</sup> a preferable phrasing is that employed by the Minnesota court in *State v. Mastrian*,<sup>70</sup> "The purpose of bail is to permit a prisoner's release if appearance at trial can otherwise be guaranteed." This rephrased statement of purpose would include other techniques, including release on recognizance,<sup>71</sup> which will reasonably assure that the accused attends his trial.

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66. For an alternative explanation, consideration should be given to the extreme difficulty in framing a timely constitutional bail question, and having it heard by the Supreme Court before it is mooted by subsequent events. The sixth amendment speedy trial guarantee would, if afforded, secure near invisibility for this issue from Supreme Court scrutiny. As an example, the Texas Court of Criminal Appeals reversed its order upon rehearing in *Ex parte Contella*, 485 S.W.2d 910 (Tex. Crim. App., 1972), holding *aff'd on rehearing*, 485 S.W.2d 912, n.1 (Tex. Crim. App., 1972), because ensuing developments had mooted the question.

67. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

68. *Id.*, at 4-5. See also, *United States v. Foster*, 79 F. Supp. 422, 423 (S.D. N.Y., 1948).

69. Foote, *supra* note 43.

70. 266 Minn. 58, 122 N.W.2d 621, *cert. denied* 375 U.S. 942 (1963).

71. See 1966 BAIL REFORM ACT, 18 U.S.C. §§ 3146, 3147 (1970) which provides in part,

§ 3146(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.

Despite criticism dismissing the *Stack v. Boyle* analysis of the presumption of innocence as necessarily including a right to pretrial release,<sup>72</sup> the concept of presumption of innocence will continue to demand pretrial liberty for the accused, at least until the Supreme Court reverses *Stack*.<sup>73</sup> As the Fifth Circuit said in *Dudley v. United States*,

[Admission to bail gives] full fealty to the basic principle of freedom inherent in our system, that an accused is presumed to be innocent until his guilt is established by evidence beyond a reasonable doubt, it reconciles sound administration of justice with the rights of the accused to be free from harassment and confinement, unhampered in the preparation of his defense and not subjected to punishment prior to conviction.<sup>74</sup>

Consistent with the federal scheme, the states at the time of the founding provided for this express purpose of bail by statute, provision of the state constitution, or by reference to common law practices.<sup>75</sup> In keeping with the historic English practice,<sup>76</sup> most laws enacted provided for denial of bail in capital cases.<sup>77</sup> The federal bail statute of 1789,<sup>78</sup> which authorized discretionary denial of bail in all capital cases, was similar in this respect to state bail enactments.<sup>79</sup> Authority to deny bail in capital cases remains the general pattern throughout the United States today.<sup>80</sup>

The purpose of the exception has been defined in accordance with the express purpose of bail. It has been held that,

The underlying motive for denying bail in the prescribed type of capital offenses is to assure the accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the *Constitution* obviously reacted to man's undoubted urge to prefer the latter.<sup>81</sup>

In those jurisdictions that allow discretionary bail in capital cases, the decision is guided by almost universal phrase, that bail is to

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72. See Mitchell, *supra* note 29, at 1231. Also see Meyer, *supra* note 46, at 1175.

73. See Tribe, *supra* note 63, at 404.

74. 242 F.2d 656, 659 (5 Cir. 1957).

75. "Eleven of the original thirteen states enacted bail statutes between 1780 and 1801." Mitchell, *supra* note 29, at 1225-26.

76. A statute of 1554, 1 and 2 Phil. & M., c.13 (1554), established a prohibition against statutorily unauthorized bail granted by justices of the peace. This statute was designed to prevent collusion between the justices and prisoners brought before them; it reserved the question of bail for cases beyond the justices' authority—particularly capital cases—to the discretion of the higher court justices. See Meyer, *supra* note 46, at 1156.

77. See Mitchell, *supra* note 29, at 1126.

78. Judiciary Act of 1789, ch. 20, § 33(b), 1 Stat. 91.

79. See Mitchell, *supra* note 29, at 1126.

80. *Id.*, at 1127. Also see Appendices I-IV.

81. *State v. Konigsberg*, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960).

be denied "when the proof is evident or the presumption great".<sup>82</sup>

Regardless of the validity of the assumption made in the rationale for the exception, the exception has been regarded as constitutional<sup>83</sup> and, furthermore, has historic acceptance in Anglo-American jurisprudence.<sup>84</sup> The rationale has been questioned, however, with a suggestion that "anticipated danger to other persons in the community was a substantial factor in legislative decisions to make bail available to certain classes of dangerous offenders."<sup>85</sup> It is interesting that although the justification for the exception lies within the framework of the express purpose of bail, the criteria in many jurisdictions where bail in capital cases is discretionary is a quantum of guilt, and not consideration of likelihood of flight.<sup>86</sup> Denying bail when the proof is evident or the presumption great indicates that there is less interest in assuring the accused's attendance at trial than in keeping him in custody until that trial. It is evident that the exception, despite its rationale to the contrary, cannot be easily reconciled with the limited purpose of bail.<sup>87</sup>

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82. Generally, where a constitution requires a showing that the "proof is evident or the presumption great" the weight given to an indictment or information will be dispositive of the question of bail in capital cases. The three following balances have been struck: (1) the indictment or information is conclusive against the defendant on the issue. *McCarroll v. Faust*, 278 F. Supp. 448 (E.D. La. 1968); (2) the indictment or information raises a prima facie presumption that the defendant comes within the exception although the presumption is rebuttable. *In re Steigler*, 250 A.2d 379 (Del. 1969). (This view has been expressed by a majority of courts considering the issue.); or, (3) the state has the burden, apart from the information or indictment, of showing that the proof is evident or the presumption great. *State v. Konigsberg*, 33 N.J. 367, 164 A.2d 740 (1960).

Note that those courts placing the burden on the state to show that the defendant comes under the capital crimes exception speak as though the presumption of innocence alone required the state to assume the burden. *State v. Konigsberg*, 33 N.J. at 373-75, 164 A.2d at 743-44; *accord*, *Taglianetti v. Fontaine*, 105 R.I. at 598, 253 A.2d at 611 (1969).

83. 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.

*Carlson v. Landon*, 342 U.S. 524, 545-46 (1952).

84. See note 76, *supra*.

85. See *Mitchell*, *supra* note 29, at 1225.

86. See note 82, *supra*.

87. That it is the accepted rationale cannot be questioned, for as former Attorney General Mitchell stated,

The almost universal experience of law enforcement officials, however, has been that most persons who are charged with this offense [premeditated murder] murder family members or paramours and therefore are the least likely of all offenders to be recidivists. Nevertheless, they have been and still are routinely detained pending trial.

See *Mitchell*, *supra* note 29, at 1236. And as Professor Tribe observed,

The suggestion above, that the exception is prompted by motives other than those within the limited purpose of bail, is not out of keeping with the general judicial practice of using bail as a means of denying pretrial liberty when considered appropriate.<sup>88</sup> If the exception, as affected by the abolition of the death penalty, is to be justified, it must comport with accepted use of bail. Distressingly, it is apparent that the judicial use of bail itself does not always correspond to the articulated limited purpose of bail.

### C. *Uses and Abuses of Bail*

The foregoing has been a theoretical analysis of bail. It is significant to note that there is a wide disparity between the theoretical application and modern bail practice. The cases and discussion below illustrate that bail has been used to deny pretrial liberty where a court: 1) desires to protect society's interest in an efficient judicial process; 2) desires to protect society from the anticipated dangerous acts of the accused; or 3) where the court desires to protect a favored cultural or political interest.

Since the court acts in the name of society to protect legitimate social interests, and since our system of government allows diverse political and cultural beliefs, the last of these uses is clearly an evident abuse of judicial discretion. An aspect of the second use, that comprising the concept of preventive detention, is currently a source of great controversy. The first use is universally recognized as being within the legitimate scope of concern by the courts. However, society's interest in a functional judicial process can often be more assuredly protected by means other than bail.

#### *Use of Bail to Protect the Functioning of the Judicial Process*

The interest in protecting the judicial process is tripartite. First, in order to maintain an effective criminal process within our theoretical framework, society has a legitimate interest in assuring the attendance of the accused at his trial. Secondly, society's interest in imposing sanctions on transgressors extends only to those who are mentally competent; therefore, in our constitutional system, a determination of mental competency can be required. Lastly, society has an interest in maintaining its criminal process free from interference, whether from the accused or another. The in-

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"There could be no better proof that fear of flight, not assumed dangerousness, accounts for the exceptional treatment of persons awaiting trial on capital charges." See Tribe, *supra* note 63, at 378.

88. See Mitchell, *supra* note 29, at 1237.



terference contemplated might be the intimidation of witnesses, tampering with evidence, or other disruption of the trial process.

The accused's right to attend his trial is guaranteed and compelled by provision of the sixth amendment. As indicated by the discussion of the purpose served by the concept of bail, the criminal process must, in order to be effective, assure the attendance of the accused at his trial for verdict and sentence.<sup>89</sup> The process is implemented by measuring the risk of the accused's flight by means of traditional bail criteria<sup>90</sup>—those "standards relevant to the purpose of assuring the presence of that defendant".<sup>91</sup> The court hearing the request must then tailor the form of pretrial release to the facts and circumstances of the case before it.<sup>92</sup>

The Court in *Stack* found this assurance to be the underlying rationale for their decision. As Professor Tribe has so ably argued,

To secure the public interest in preventing certain forms of conduct, we have established a system of sanctions calculated to deter outlawed behavior. That system cannot function at all if the threatened sanctions are not effectively imposed, and various restraints on liberty, from arrest to detention, may at times be needed to provide assurance that a reliable trial can be held. Moreover, society may justly demand this assurance even if the defendant is innocent. . . . But if the presumption of innocence of which the Court in *Stack* spoke is to mean anything, it must point to a fundamental distinction between restraints without which there could be no meaningful prosecution at all—restraints to which even the innocent may justly be subjected—and restraints that merely further the aims of convicting persons found to be guilty.<sup>93</sup>

Apart from these restraints needed to provide basic assurances, however, a person awaiting trial is to be secure in his liberties and dignity.

Another basic assurance that is required by society's interest in maintaining an effective criminal process is the competency of the accused to stand trial on the charges against him. This is generally accomplished by court commitment for psychiatric observation. For example, a statute in the District of Columbia author-

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89. Assurance is afforded by an appearance bond, release on recognizance (see note 71, *supra*), or through the use of summons in lieu of arrest for specified crimes. See Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 639, n.30 (1964).

90. See note 40, *supra*.

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

92. *Id.*

93. Tribe, *supra* note 63, text and n.152 at 404.

izes persons charged with a crime to be committed for a reasonable period prior to trial in a hospital for a mental examination.<sup>94</sup> This may be based solely on the court's observations of the accused or prima facie evidence submitted and has never been considered to contravene due process.<sup>95</sup>

The third part of society's judicial process interest is the assurance that the trial procedures can be accomplished without interference from the accused or others. Here, however, society has deemed the criminal process of sufficient importance to make interference therewith a crime in itself.<sup>96</sup> Along with other criminal laws prohibiting the general use of force to accomplish objectives, these laws can protect society's interest in maintaining its criminal process free of interference. Moreover, where it is the accused who is attempting interference with the criminal process, the court can revoke his bail in order to maintain an independent criminal process.<sup>97</sup> This is in addition to any other criminal liability the accused might engender as a result of his conduct. As Mr. Justice Harlan has stated with regard to the federal courts:

District courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice.<sup>98</sup>

The right of society to maintain its judicial processes is as accepted as it is necessary. The granting and revocation of bail is the pre-eminent method of protecting that interest.

#### *Use of Bail to Detain Those Thought to be Dangerous*

The use of bail as a means of protecting society from the anticipated dangerous acts of an accused is far less accepted, and in one aspect, it is in irreconcilable discord with the express purpose

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94. 24 D.C. CODE ANN. § 301(a) (1967).

95. Mitchell, *supra* note 29, at 1233. But note that this is only a limited departure from a right to pretrial liberty. The limit was demarcated by the court in Marcey v. Harris, 130 App. D.C. 301, 400 F.2d 772 (D.C. Cir. 1968), where a pretrial commitment under the District of Columbia statute, solely for purposes of pretrial mental examination, was held to be an insufficient ground for denial of bail otherwise appropriate under the Bail Reform Act. Therefore, where the defendant was released on bail on a murder charge but later committed for pretrial mental examination, he was entitled to have commitment limited to examination on an out-patient basis unless the court was advised by hospital report that in-patient commitment was necessary to assure effective examination.

96. For example, CAL. PENAL CODE § 92 making it a felony to bribe a juror.

97. Reaves v. State, 229 Ark. 453, 316 S.W.2d 824, *cert. denied*, 359 U.S. 944 (1958).

98. Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan, Circuit Justice, 1961); *see also*, Bitter v. United States, 389 U.S. 15, 16 (1967); FED. R. CRIM. P. 46(a) (2).

consigned to bail.<sup>99</sup> The anticipation of the dangerous act may be based on either an objective determination of a physical or mental condition of the accused which in and of itself is inherently dangerous to the remainder of society; or, that anticipation may be based on a subjective determination of the inclination of the accused to commit other dangerous acts if granted pretrial liberty. This latter procedure has become colloquially characterized as "preventive detention". It is significant that a determination of need for preventive detention of an accused is generally predicated on the existence of a past criminal record rather than on an objective determination of need or a legal determination of guilt.<sup>100</sup>

While the concrete evaluation of physical or mental condition, and the weight to be attributed to that evaluation may, in isolated areas, be open to dispute,<sup>101</sup> that evaluation fundamentally differs from a conclusion resulting in confinement based on anticipation of an intent not susceptible of proof. To the extent that medical science possesses objective techniques which reveal the presence of dangerously incapacitating disorders, cases involving determination of physical or mental condition are inapposite to, and clearly not precedent for cases concerned with the constitutionality of government attempts to deny pretrial liberty in anticipation of dangerous intentional acts by an accused. This conclusion is compelled because there is no analogous body of knowledge, nor any comparable technology of prediction available for dealing with criminal behavior generally.<sup>102</sup>

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99. Well before the present controversy surrounding preventive detention, Mr. Justice Jackson commented on this concept:

Imprisonment to protect society from predicted but unsummed offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it. . . .

Williamson v. United States, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950).

100. See note 94, *supra*. See also, Mitchell, *supra* note 29, at 1235.

101. Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV. L. REV. 793 (1970).

102. See P. BRIGGS & R. WIRT, PREDICTION, JUVENILE DELINQUENCY, RESEARCH AND THEORY 170 (1965); S. GLUECK & E. GLUECK, PREDICTING DELINQUENCY AND CRIME (1959); Wirt & Briggs, *The Efficacy of Ten of the Gluecks' Predictors*, 50 J. CRIM. L.C. & P.S. 478 (1960). There is serious skepticism, however, about the ability to predict dangerousness, and sizable empirical data suggest the inadequacy of present techniques. See Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 77 (1968); Sawyer, *Measurement and Prediction, Clinical and Statistical*, 66 PSYCH. BULL. 178 (1966).

The Supreme Court recognized this distinction in *Minnesota ex rel. Pearson v. Probate Court*,<sup>103</sup> by sustaining a sexual psychopath statute authorizing the commitment of persons "likely to attack or otherwise inflict injury" on others. In upholding the statute, the court carefully observed that the statute required the existence of a condition that rendered the individual wholly unable to control his impulses. There is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of law but is suspected of being unwilling to do so. Further, the position has been taken that as a matter of due process, only an incapacitating illness can justify a deprivation of liberty based on potential dangerousness.<sup>104</sup>

With this distinction in mind, the denial of bail consistent with a legitimate social interest can be distinguished from its denial to accomplish preventive detention. The fact that both denials hope to prevent dangerous acts does not bridge their difference.

The controversy surrounding preventive detention statutes<sup>105</sup> discloses the extent to which judicial discretion has concealed the courts' motives in denying bail by conforming justification to accepted expressions.<sup>106</sup> There is a certain irony in the widespread concern over a legislature codifying a hoary but unannounced judicial practice.

Where candor is present, it is often acknowledged that the setting of bail is frequently influenced, however illegitimately, by the desire to imprison particular defendants in order to prevent the anticipated commission of crime prior to trial.<sup>107</sup> Where practiced, this *sub rosa* approach has generated much dissatisfaction because it has encountered no conspicuous success in distinguishing defendants with recidivious tendencies,<sup>108</sup> and because it nec-

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103. 309 U.S. 270, 273 (1940).

104. Goldstein & Katz, *Dangerousness and Mental Illness*, 70 YALE L.J. 225, 237-38 (1960), *relying on In re Williams*, 157 F. Supp. 871, 876 (D.D.C.), *aff'd per curiam*, 252 F.2d 629 (D.C. Cir. 1958).

105. *See generally*, 1970 *Hearings*, *supra* note 45; Meyer, *supra* note 46; Mitchell, *supra* note 29; Tribe, *supra* note 63; Foote, *supra* note 43 to cite but a few of the works treating this controversial subject.

106. 1964 BAIL CONFERENCE, *supra* note 57. *See* discussion beginning at 184.

107. *Standards Relating to Pretrial Release*, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, (6 Tent. Draft, Mar., 1968); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1038-43 (1954).

108. *Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*,

essarily withdraws pretrial liberty of defendants based on one man's subjective judgment of another's intentions. Given the current state of the predictive art, mere codification of the prevailing practice would probably not measurably enhance the safety of the community.<sup>109</sup>

Since the judicial process is the means that society has selected to protect itself, we should rely on it to solve the problem of the criminal who seemingly cannot be deterred from his selected occupation.<sup>110</sup> Alterations of the criminal justice system taken to minimize delays between arrest and trial,<sup>111</sup> to impose additional penalties for crimes committed during the pretrial interregnum,<sup>112</sup> and efforts at closer supervision of the behavior of those released<sup>113</sup> could afford adequate protection from the evils thought to be avoided by the expediency of preventive detention. Instead of advocating a policy of constitutional irredentism, instead of infringing on civil liberties, instead of encroaching on the civil rights of defendants, the obvious response is to solve the problem of the determined criminal by implementing his sixth amendment right to a speedy trial with all possible diligence. Moreover, the call for conditional bail designed to produce the defendant at trial is already in-

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91st Cong., 1st Sess. 69-71 (1969). (Testimony of Bruce D. Beaudin, Director, District of Columbia Bail Agency), [hereinafter cited as *1969 Hearings*].

109. This is supported by the experience with denial of bail on appeal and in juvenile cases where the possibility of dangerous acts can be considered controlling.

See *1969 Hearings*, *supra* note 108, at 81, and at 131, which indicate that despite the fact that the real reasons for detention pending appeal or juvenile hearing have been candidly exposed, the judicial predictions of dangerousness are not any more accurate than pretrial predictions.

110. See *United States v. Melville*, 306 F. Supp. 124 (S.D.N.Y. 1969) for an example of such a criminal.

111. JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, Report 23 (May 1969); *1969 Hearings*, *supra* note 108, at 22-23 (testimony of Judge George L. Hart, Jr.); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1508 (1966).

112. See 1964 BAIL CONFERENCE, *supra* note 57, at 173.

113. Suggestions for such conditional bail can be found in *Standards Relating to Pretrial Release*, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, § 5.2, at 18, and § 5.5, at 20 (Approved Draft 1968). See *United States v. Melville*, 309 F. Supp. 824 (S.D.N.Y. 1970) for an example of how a District Judge can sufficiently condition bail to supervise even the most determined of criminals.

cluded within the requirements of the law on bail.<sup>114</sup>

There would seem to be little doubt that it would be a more efficient method of crime control to prevent the crime rather than to merely apprehend the criminal. The historic English experience convinced this nation's founders that a degree of efficiency would have to be sacrificed to preclude a far greater crime, the arbitrary exercise of power by those entrusted with its keeping. Too often those wielding power in the name of society have confused desired social goals with their own personal advantage.

Our nation, therefore, refrained from granting the government unlimited power to prevent crime by detention of potential miscreants. Instead, we have relied on the moral and deterrent effects of laws which define prohibited modes of conduct. We have primarily relied on the threat of incarceration to provide the required deterrence. For the dangerously ill who are incapable of responding normally to a system of deterrents, we have devised alternative methods of protecting society, such as civil commitment. However, in recognition of human nature, we are resigned to the fact that threatened sanctions will not deter all who are capable of controlling their behavior. Therefore, we have accepted the risk of crime as the inevitable consequence of a social system that prefers protection of individual liberty to a crime-free existence.

This preference is tempered, however, by the realization that a deterrent system cannot function at all unless there is successful prosecution of those proven to have violated the law. Hence, we have traditionally detained individuals likely to flee or otherwise avoid prosecution. Pretrial detention to assure presence is essential to the preservation of a system that seeks to control crime by sanction rather than preventing it by prior imprisonment. This limited form of preventive detention does not, however, provide precedent for preventive detention statutes since "detention to insure prosecution for a past crime is the antithesis of detention to prevent the commission of a future crime."<sup>115</sup>

The area of least controversy in the discussion of limitation on pretrial liberty is that which denies bail as a result of an inherently dangerous physical or mental condition objectively determined. However, a source of confusion between the protection of society from intentional acts and essentially intentionless acts seems to be the fact that unintended acts resulting from a physical or mental condition often transgress the bounds of criminal law.

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

115. See Tribe, *supra* note 63, at 377.

Simply because the danger is the same does not furnish a theoretical basis for preventive detention for both the intended and unintentional act.

The protection of society from the anticipated dangerous acts of one who is incapable of conforming his behavior is an obvious necessity, since our criminal process is based on the concept of deterrence. Since the criminal process is not designed to treat such offenders, there is generally an alternative provision for treating an offending condition. Civil commitment procedures have been widely adopted for sexual psychopaths, narcotics addicts, chronic alcoholics, and persons who are severely disturbed, either emotionally or mentally. Such detention is partially intended to prevent future behavior dangerous to the community.<sup>116</sup>

So, too, there is no right to pretrial liberty in the case of one quarantined because of a communicable disease.<sup>117</sup> Here, the condition, being purely physical, is susceptible to a straight-forward objective determination, and defensible precautions establish the limit to allowable individual freedom. It is almost universally held that constitutional guarantees must acquiesce in the enforcement of statutes and ordinances designed to protect public health.<sup>118</sup>

In California there are several cases which uphold society's right to protect itself from the acts of those incapable of conforming their behavior to the requirements of the law. It is with the distinction between the types of social protection in mind then, that a summary of cases providing a judicial exception to the express constitutional right to bail in California should be read. The court in *Bean v. Los Angeles County* made such a summary.

A defendant in a criminal action is entitled to be released on bail as a matter of right except for a capital offense when the proof is evident or the presumption great (Cal. Const. Art. 1, § 6) or where for the safety of the individual or for the protection of society it would be proper to deny bail. (See *In re Wescott*, 93 Cal. App. 575 (1928) [charged with murder, sanity in doubt, but no petition filed or adjudication of insanity had]; *In re Keddy*, 105 Cal. App. 2d 215 (1951) [convicted of a misdemeanor, certified to superior court for hearing on question of sexual psychopathy]; *In re Gentry*, 206 Cal. App. 2d 723 (1962) [charged with first degree burglary, pleas of

116. See generally, Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160 (1967).

117. *State v. Hutchinson*, 246 Ala. 48, 18 So. 2d 723 (1944).

118. *People ex rel. Baker v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944).

not guilty and not guilty by reason of insanity entered]; *Evans v. Municipal Court*, 207 Cal. App. 2d 633 (1962) [arrested upon charge of driving while under the influence of intoxicating liquor, held without bail until sober, then released on bail]; *In re Henly*, 18 Cal. App. 1 (1912) [arrested and detained upon warrant issued upon petition to ascertain addiction to intemperate use of stimulants]<sup>119</sup>.

It is apparent that these cases reflect an exception created for the protection of society, but they are limited to occasions where the need for protection can be objectively determined.

In referring to such an exception the court in *In re Henley* said:

There might be instances under [Article 1, Section 6 of the California Constitution] where, for the safety of the individual or of society, it would be proper to deny bail, but unless such a showing is made, the said provision of the constitution would be held, we think, to apply.<sup>120</sup>

As can be seen, then, even where the state by necessity limits pre-trial liberty, it retains a burden of showing an objective condition justifying such limitation. Further, habeas corpus relief reaches those who show that they have been inappropriately included as members of a class that can legitimately be detained prior to trial.

#### *Use of Bail to Protect Favored Political or Cultural Interests*

More abusive than the common practice of preventive detention is the coercive use to which bail has been put in furtherance of favored cultural or political interests.

Bail, on occasion, has been oppressively denied to those who would foment political changes. The history of the civil rights struggle is replete with examples of exorbitant bail for minor offenses, such as trespass or disturbing the peace.<sup>121</sup> In fact, it has been postulated that excessive bail was required of civil rights leaders, not only to detain and punish them, but also to deplete the treasuries of their organizations, thereby preventing further demonstrations.<sup>122</sup>

A far less visible use of deliberately excessive bail was triggered by the Detroit and Newark riots of 1967. There, most of those ar-

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119. 252 Cal. App. 2d 754, 757-58, 60 Cal. Rptr. 804, 807 (1967).

120. 18 Cal. App. 1, 5, 121 P. 933, 935 (1912).

121. Wizner, *Bail and Civil Rights*, 2 LAW TRANS. Q. 111 (1965); Examples of exceptionally high bail in civil rights cases are also found in 1964 BAIL CONFERENCE, *supra* note 57, at 180, 187, 191; *Stack v. Boyle*, 342 U.S. 1 (1951) illustrates excessive bail set for communists accused of violating the Smith Act.

122. Claiborne, *Bail and Civil Rights*, unpublished report to the National Conference on Bail and Criminal Justice, Washington, D.C., May 27-29, 1964, *cited in* Wizner, *supra* note 121, at 116.



rested were kept in custody because bail was deliberately set at a figure beyond their means. The amount of bail was determined without regard to the offense charged, the individual's background, family ties, employment history, or other factors generally considered relevant.<sup>123</sup> The most shocking abuse noted was the order from some of the judges of the Detroit Recorder's Court, requiring the sheriff to refuse enlargement of defendants who were able to post bail. These defendants were subsequently held in custody pending rehearing to determine if bail had initially been set too low.<sup>124</sup> The effects of this procedure were compounded, since many of those arrested never came to trial, were acquitted, or were convicted of a less serious charge, for which incarceration was never a possibility.<sup>125</sup>

There can be no doubt that such uses of the judicial power violates the spirit as well as the letter of the *Constitution*. The eighth amendment prohibition against excessive bail specifically deals with such abuses of discretion.<sup>126</sup> Here the issue is clear, and few would argue that such conduct is within the constitutional scheme. But in those cases where society can demonstrate an overwhelming need for limitation of individual liberty, the approach tends to be one of a balancing of interests rather than one of absolutes.

### III. THE EXCEPTION AS IT AFFECTS INDIVIDUAL LIBERTIES

That imprisonment prior to conviction is an evil to be tolerated, if at all, only because of compelling social necessity needs no elaboration. It has been suggested that at least one-quarter of the total pretrial jail population is never convicted of any crime.<sup>127</sup> In view of this, there could hardly seem to be any question that a preju-

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123. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, at 341 (Bantam ed. 1968), [hereinafter cited as RIOT COMM'N REPORT]; Colista and Domonkas, *Bail and Civil Disorders*, 45 U. DET. J. URBAN L. 815, 815-19 (1968); Crockett, *Recorder's Court and the 1967 Civil Disturbances*, 45 U. DET. J. URBAN L. 841, 842-46 (1968).

124. RIOT COMM'N REPORT, *supra* note 123, at 341, n.7; Crockett, *supra* note 123, at 846.

125. RIOT COMM'N REPORT, *supra* note 123, at 338-40.

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

127. Foote, *supra* note 43, at 1137; Rankin, *supra* note 51, at 642 (27% of sample of 358 jailed defendants were not convicted); GRAY, 1971 UNIFORM CRIME REPORT 110 (16.8% of total and 29.6% of those charged with violent crimes were acquitted or dismissed).

ditional invasion of human values occurs when an accused is imprisoned prior to trial. The problem is in deciding the weight to be attributed individual interests when balancing them with the supposed necessity that produced the invasion.

This balancing of risks is typical of due process adjudications, so that we are required to weigh the detriment to an individual resulting from detention against the risk to the community that if released he might abscond, commit further crimes, or interfere with the prosecution of his case.<sup>128</sup> The balance our system has selected has been labeled the “presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’.”<sup>129</sup>

Despite arguments to the contrary,<sup>130</sup> it would not seem rash to contend that the right to pretrial liberty is a manifestation of the presumption of innocence. This has been recognized from at least the time of Blackstone, who saw the period between confinement and trial as a “dubious interval” during which “a prisoner ought to be treated with the utmost humanity”.<sup>131</sup>

That the presumption adheres to those accused of capital crimes cannot be questioned.<sup>132</sup> The balance, however, is struck on a slightly different scale.<sup>133</sup> This is a result of the assumptive basis for the rationale of the capital crimes exception.<sup>134</sup> However, since the rate of acquittal or dismissal for capital crimes is greater than that for other crimes,<sup>135</sup> it is apparent that the need of the presump-

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128. See generally, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 400-05 (1964).

129. *In re Winship*, 397 U.S. 358, 363 (1970), citing *Coffin v. United States*, 156 U.S. 432, 453 (1895).

130. Foote, *supra* note 43, at 1145. “Existing conditions of pretrial detention are an example of the limited efficacy of an ideal such as the presumption of innocence, particularly where such detention advantages the prosecution and then reduces the judge’s burdens by contributing to a high rate of guilty pleas.”

131. 4 BLACKSTONE, *supra* note 2, at 297.

132. Many state courts rely on the presumption of innocence in interpreting their constitutional provisions dealing with denial of pretrial release in capital cases. Typically the state constitutional provisions provide that: “All prisoners shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great. . . .” See discussion in note 82, *supra*. Also see Appendix I.

133. See note 81 *supra*.

134. See text following note 80, *supra*.

135. GRAY, 1971 UNIFORM CRIME REPORTS 35, “In 1971, 33% of the murder defendants were either acquitted or their cases dismissed at some prosecutive stage.” This compares with an average of 16.8% acquitted or dismissed for all crimes covered by the 1971 UNIFORM CRIME REPORTS. *Id.*, at 110.

tion is far greater in capital cases to prevent punishment prior to conviction. And when the rate of conviction for premeditated murder, the typical capital offense, is found to be only 38.5 per cent,<sup>136</sup> it is obvious that there is some contradiction in espousing a presumption of innocence while singling out these accused for pretrial deprivation of liberty by standards reflecting guilt, (*i.e.*, "when proof is evident or the presumption great"), rather than the likelihood of appearance at trial.

#### IV. THE EXCEPTION AFTER THE ABOLITION OF THE DEATH PENALTY

It would be expected that but for the historic exception of capital crimes from the right to bail, such a denial would be a violation of due process, as punishment of status as an accused rather than as response to proven criminal conduct.<sup>137</sup> After noting the evolutionary nature of our concept of due process,<sup>138</sup> and the United States Supreme Court's decision abolishing the death penalty<sup>139</sup> the conclusion is inescapable that there is no continued justification for the exclusion, given its accepted rationale. This is particularly true in light of the above discussion concerning legitimate uses of bail.

If capital crimes as a class are excluded from a right to bail because there is an overwhelming likelihood that the accused will abscond rather than defer to the process of justice, and the possibility of imposition of a death sentence is removed, then the rationale fails. It fails because the accused no longer has the overwhelming urge to avoid trial since his life is no longer in jeopardy. There is a significant conceptual difference between the fear of a death sentence and the fear of imprisonment. As discussed above, the express purpose of bail in non-capital cases is to provide pretrial lib-

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136. *Id.*, at 110.

137. *See generally*, Tribe, *supra* note 63 at 394 for the proposition that discretionary pretrial detention punishes status in violation of the due process clause. Professor Tribe cites *Robinson v. California*, 370 U.S. 660 (1962), and *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) in support of his argument, noting that the principle underlying the result is that a man should be condemned only for specific actions the criminal consequences of which he could have anticipated, *i.e.* where the law condemns a man who could not have reasonably avoided its consequences, were he so inclined, there is a violation of due process.

138. *See* note 41, *supra*.

139. *Furman v. Georgia*, 408 U.S. 238 (1972).

erty where the presence of the accused at trial can otherwise reasonably be guaranteed. If the fear of imprisonment is not a sufficient basis for uniformly denying bail in non-capital cases, how can it be a sufficient basis in those cases that were formerly punishable by death? The continued detention of those accused of crimes formerly punishable with death on the basis of evident proof or great presumption would be a violation of due process since their incarceration is based on considerations other than the likelihood of trial attendance.

Legitimate societal interests can still be protected by application of bail criteria to those cases which were capital. The "underlying gravity of those offenses" which concerned the California court in *Anderson*<sup>140</sup> is taken into account by traditional bail criteria.<sup>141</sup> To continue pretrial incarceration in the face of death penalty abolition is an exercise of judicial discretion outside the rationale for legitimate bail purposes. In most cases conditions of pretrial liberty can be tailored to assure the accused's presence at trial, regardless of the crime. Since society's procedure in dealing with antisocial conduct is embodied in the criminal process, it is inconsistent with our concept of ordered liberty to subject an accused to imprisonment absent the most compelling of circumstances.

The legitimate bail procedures and provisions for detention of those objectively determined to be incapable of conforming their behavior to the law give assurances that Jack the Ripper, the Boston Strangler, or others who manifest such psychological aberrations which pose immediate danger to the community will be restrained. To argue the need for preventive detention of all those accused of crimes formerly punishable by death from these atypical examples of capital criminals ignores the grave injustice perpetrated thereby on the nearly two thirds of all murder defendants who are never convicted of the crime charged.<sup>142</sup>

In those states where the exception is tied to the death penalty,<sup>143</sup> an opinion continuing the exclusion will necessarily entail a distorted construction of the controlling law, contrary to the plain meaning of the words used therein.<sup>144</sup> Where the law, statutory

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140. *People v. Anderson*, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880, modified 6 Cal. 3d 804(a), 100 Cal. Rptr. at 172, n.45, 493 P.2d at 899-900, n.45.

141. See note 40, *supra*, for these bail criteria which take into account the "underlying gravity" of the crime by considering the "nature and circumstances of the offense charged".

142. See GRAY, *supra* note 127, at 35.

143. See Appendix I for those states.

144. As an example, see *Hudson v. McAdory* discussed in text at note 21, *supra*.

or constitutional, provides for a right to bail except for crimes punishable by death, and the death penalty is abolished, the natural consequence is for the right to attach in all cases, even those crimes formerly punished by death. This has been the decision where the legislature has abolished the death penalty<sup>145</sup> and it is difficult to justify a different treatment for judicial abrogation.

If the state leaves bail in capital cases to the discretion of its judiciary,<sup>146</sup> or if the state happens to be one of the growing number that makes exception to the right to bail by reference to specific crimes or specific non-capital punishments,<sup>147</sup> then the issue becomes more complex. The due process argument of unconstitutional discrimination based on status, and violation of the presumption of innocence would have to succeed in order to guarantee a right to bail for those accused of what were capital crimes. It is unlikely that the ramifications of the *Furman* decision noted in other jurisdictions will naturally transpire in these. In fact, it seems apparent that *Furman* will prompt no more than superficial consideration with respect to a right to bail in these jurisdictions unless constitutional arguments are fully developed and convincing.

As an example of the treatment given this issue in a state without the typical capital offenses exception, consider the decision of the Supreme Court of Florida in *Donaldson v. Sack*.<sup>148</sup> Contrary to its Mississippi counterpart in *Hudson*,<sup>149</sup> the Florida court held that to be consistent with the *Furman* decision there was no longer what had been termed a "capital case".<sup>150</sup> The bail provisions of Florida law, however, contained an addendum to the typical capital offenses exception which also excepted offenses punishable by life imprisonment.<sup>151</sup> Therefore, the court found that the Florida

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145. See cases cited at note 28, *supra*.

146. See Appendix III.

147. See Appendix II. Seven states have joined this category since 1962. Note, 7 VILL. L. REV. 438, 450 (1962). Five of these seven additions are states which have abolished capital punishment. See Mitchell, *supra* note 29 at 1229, n.26.

148. 265 So. 2d 499 (Fla. 1972).

149. *Hudson v. McAdory*, — Miss. —, 268 So. 2d 916 (1972).

150. *Donaldson v. Sack*, 265 So. 2d at 505.

151. FLA. CONST. art. I, § 14 provides in part that the right to bail is limited for those "charged with a capital offense or an offense punishable by life imprisonment."

constitutional and statutory provisions for exception to the right to bail will not change as a result of the abolition of the death penalty.<sup>152</sup> In accord is *Taglianetti v. Fontaine*,<sup>153</sup> a 1969 Rhode Island case stemming from legislative abolition of the death penalty.

Successful attacks against the denial of bail in states with the traditional capital offenses exception would provide some basis for mounting due process attacks in the remaining jurisdictions.<sup>154</sup> The issue is clearest where the capital offenses exception, stripped of its constitutional apology by the *Furman* decision, can be seen as it truly is, a historic form of preventive detention. The redrafting of applicable statutes necessitated by *Furman* seems to be an ideal opportunity for the evolving due process values to remedy this historic inequity.

The conclusion is compelled then, as a result of the Supreme Court's decision in *Furman*, that those states having an exception to the right of bail for capital crimes will now have to grant pre-trial liberty to all criminal defendants by an equal set of standards. And, furthermore, the evolutionary nature of the due process clause would prevent a legislature from reinstating the exception by merely changing the wording of appropriate statutes.<sup>155</sup>

The *Constitution* dictates that there be no unreasonable discrimination among defendants in the granting of bail, particularly since the *Furman*-shattered rationale for the exclusion and the evidence of its effects indicates that denial based solely on the crime charged is contrary to the presumption of innocence.<sup>156</sup> Any new rationale for the exclusion would have a hard time succeeding in the due process marketplace of competing interests.

The previous discussion concluded that preventive detention is not a legitimate governmental interest that can be accomplished through the denial of pretrial liberty.<sup>157</sup> The exception, without a saving constitutional rationale, is no more than preventive detention based solely on the nature of the crime charged. The exception is, therefore, no longer a legitimate exercise of social prerogative. Furthermore, evolution of the due process clause prevents rein-

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152. *Donaldson v. Sack*, 265 So. 2d at 504.

153. 105 R.I. 596, 253 A.2d 609 (1969).

154. See those jurisdictions listed in Appendix II and III.

155. Such efforts were attempted in California in response to the *Ander-son* decision. See 1972 Regular Session of the California legislature, Senate Bill No. 350 introduced by Senator Richardson and Assembly Bill No. 537 introduced by Assemblyman Barnes.

156. See text following note 128, *supra*.

157. See generally, Tribe, *supra* note 63; Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1969).

statement of the exclusion since the exclusion allows denial of pre-trial liberty as a result of an accusation—punishment of a status rather than punishment as a result of a due process proceeding adjudging guilt.

#### V. SUMMARY

The decision abolishing the death penalty has by the same token eliminated the exclusion from a right to bail for those accused of what, prior to *Furman*, were capital crimes. Pretrial liberty in cases that were formerly capital should be determined by the same standards as bail in non-capital cases, *i.e.* by those factors which give the judge some indication of the accused's likelihood of attendance at trial. The terms of pretrial liberty can be designed to maximize the likelihood of the accused's presence.

Of prime concern in preserving the presumption of innocence prior to trial is the limitation of the discretion necessarily exercised by the judge solely to legitimate purposes. Further, there are indications that pretrial detention has effects on the sentence imposed, and possibly on the verdict itself. Such indications open the entire process of determining the appropriateness of pretrial release to attack on due process grounds. Those accused of capital crimes, perhaps more than others, are in need of the presumption of innocence if justice is to be achieved.

The opinion of the Pennsylvania Supreme Court in *Commonwealth v. Truesdale*<sup>158</sup> through full consideration of the issue illustrates the logical consequence of the *Furman* decision—the elimination of the exclusion where there is otherwise a right to bail. The evolving nature of the due process clause would prevent the reinstatement of the exclusion because it offends the presumption of innocence and unnecessarily discriminates against those charged with what were capital crimes.

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158. — Pa. —, 296 A.2d 829 (1972).

## APPENDICES OF LAWS GOVERNING THE RIGHT TO BAIL IN CAPITAL CASES

### I

In the following thirty-one states the controlling bail provision incorporates the typical capital offenses exclusion from the right to bail:

ALA. CONST. art. I, § 16; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 6; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; KAN. CONST. BILL OF RIGHTS, § 9; KY. CONST. § 16; LA. CONST. art. I, § 12; MD. ANN. CODE, MD. RULES, RULE 777 (a) (1971); MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. III, § 19; NEV. CONST. art. I, § 7; N.H. REV. STAT. ANN. ch. 597:1 (Supp. 1971); N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 6; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; PA. CONST. art. I, § 14; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; VT. CONST. ch. II, § 32; WASH. CONST. art. I, § 20; WYO. CONST. art. I, § 14.

### II

In the following eleven states the controlling right to bail provision excepts those accused of specific crimes, or those accused of crimes carrying specific non-capital punishment:

FLA. CONST. art. I, § 14; HAWAII REV. STAT. § 709-9 (1968); IND. CONST. art. I, § 17; IOWA STAT. § 763.1 (1965); ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; ORE. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; W. VA. CODE ANN. § 62-1C-1 (1966).

### III

In the following five states bail in capital cases, in accordance with the practice at common law, is left solely to judicial discretion:

GA. CODE ANN. § 27-901 (1972); MASS. GEN. LAWS ANN. ch. 276, § 42 (1972); N.Y. CRIM. P. LAW § 510.30 (1971); N.C. GEN. STAT. § 15-102 (1971); VA. CODE ANN. § 19.1-112 (Supp. 1972).

### IV

Three states grant a right to bail without exception:

ALAS. STAT. § 12.30.010 (1970); MINN. STAT. ANN. § 629.52 (Supp. 1972); WIS. STAT. ANN. § 969.01(1) (1971).