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Preventive Detention In California: Can Some Criminal Defendants Be Detained Prior To Trial?

In recent years there has been a growing concern with the need to reform the procedures for releasing criminal defendants prior to trial. Many states have changed their laws to emphasize release of the defendant on his own recognizance rather than release when the defendant posts bail. However, there is also a growing concern over the release of "dangerous" defendants, i.e. those defendants who might commit another crime if released prior to trial. Assembly Bill 2834 was introduced in the 1971 Session of the California Legislature, but the bill failed to pass. A.B. 2834 would have made substantial changes in California law. The bill would have changed the law on pre-trial release of criminal defendants to emphasize release on O.R. (own recognizance). In addition A.B. 2834 would have allowed the arraigning magistrate to detain certain classes of defendants prior to trial. This comment briefly discusses the changes in pre-trial release as proposed by the bill and then analyzes the preventive detention provisions of the bill. The author attempts to determine which defendants, if any, can rationally be detained as a means of preventing crime committed during pre-trial release.

Criminal law dealing with pre-trial release and detention is in a state of flux. Conflicting forces such as lengthy criminal court calendar backlogs, overcrowded prisons, the general increase in crime (especially drug related crimes and civil disturbance), pressures to make criminal justice applicable without regard to the wealth of the defendant, and attempts to rehabilitate offenders rather than punish them, are forcing re-evaluation and reform in pre-trial procedures. These reforms have generally been beneficial and are being implemented in many jurisdictions.[1] Several states,[2] and the Federal System,[3] have changed their pre-trial release laws to a system emphasizing release

1. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 18, 19, 25-28 (1965) [hereinafter cited as NATIONAL CONFERENCE ON BAIL].
2. *Id.* at 359-362.
3. The Federal Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3150 (1966).

on own recognizance (O.R.) and now require bail and other requirements for release only where the court feels such additional requirements are necessitated by good cause.[4]

California is not in the forefront of reform in bail. California law currently establishes bail as the primary mode of release for most serious offenses[5] with release on O.R. available only where good cause can be shown.[6] In the 1971 session of the legislature two bills were introduced both of which would have reformed the entire system of pre-trial release in California.[7] Neither bill passed. This comment considers only A.B. 2834 introduced by Assemblyman Townsend which includes bail reforms similar to those in A.B. 2752 introduced by Assemblyman Bagley, but goes a step beyond and proposes pre-trial preventive detention.

A.B. 2834 would have changed the Penal Code relating to bail by adding, amending, and deleting several sections.[8] The bill was comprehensive in effect as it included provisions establishing release policy and requirements for all criminal defendants. It provided for special criminal penalties for crime committed during release, and set up the procedures and substantive standards for pre-trial preventive detention with special standards for a state of emergency (riot).

Current Pre-Trial Release Law

Under California law now, all defendants are entitled to pre-trial release on money bail as a matter of right except those defendants potentially punishable by death.[9] The judge is required by statute to consider the crime charged, the likelihood of the defendant reappearing for trial and the criminal record of the defendant in setting the amount of bail.[10] This portion of the law remains unchanged since its codification in 1872[11] (except for the considerations to be made in establishing the amount of bail which were added in 1927).[12] An alternative method of release (O.R., where good cause can be shown) was added to the code in 1959.[13] If defendant is not granted release on

4. The Federal act provides that the indigent are to be released on their own recognizance unless good cause is otherwise shown for the denial of release. The stated purpose of the act is "to assure that all persons regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."
5. CAL. PEN. CODE § 1276.
6. CAL. PEN. CODE § 1318.
7. A.B. 2834, 1971 Regular Session. A.B. 2752, 1971 Regular Session.
8. A.B. 2834, 1971 Regular Session.
9. CAL. PEN. CODE § 1270.
10. CAL. PEN. CODE § 1275.
11. CAL. PEN. CODE § 1276.
12. CAL. PEN. CODE § 1275.
13. CAL. PEN. CODE § 1318.

O.R. and is unable to post the bail set by the arraigning authority his case must be reviewed within five days by the court, unless he waives this right.[14] But attorneys frequently use the writ of habeas corpus as a faster method for review of bail.[15]

Once defendant is released and fails to appear when charged with a felony,[16] he is subject to possible penalties of a $5000 fine and/or 5 years imprisonment.[17] If charged with a misdemeanor, he is guilty of a misdemeanor.[18]

Pre-Trial Release Law as Proposed by A.B. 2834

If A.B. 2834 had been enacted, release on O.R. rather than bail would have been the primary mode of release.[19] At arraignment a defendant would have been eligible for release on O.R. unless the arraigning authority decides he should not be released on O.R.[20] In that instance the defendant would still have been eligible for release under any one or combination of the following:[21] (1) release under supervision of a probation officer;[22] (2) release with restrictions on travel, associations or abode;[23] (3) release with bail or deposit under now existing law;[24] or (4) release under any other conditions deemed necessary.[25]

To have been released on O.R. a defendant must have promised (1) to appear when and where specified, (2) to waive extradition if he fails to appear and is apprehended outside the state, and (3) to commit no crime while on release.[26] At this time the judge would have had to inform the defendant of harsh penalties established for any violation of conditions and terms of release.[27] Any defendant on any

14. CAL. PEN. CODE § 1320.
15. CAL. PEN. CODE § 1473.
16. CAL. PEN. CODE § 1319.4.
17. *Id.*
18. CAL. PEN. CODE § 1319.6.
19. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267, to the Penal Code.
20. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.1, to the Penal Code.
21. *Id.*
22. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.1(a), to the Penal Code.
23. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.1(b), to the Penal Code.
24. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.1(c), to the Penal Code.
25. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.1(d), to the Penal Code.
26. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267(a)-(c), to the Penal Code.
27. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.3, to the Penal Code.

form of release who commits a crime while on release or violates a condition of release would have been guilty of a felony or misdemeanor depending on whether the original crime charged was, respectively, a felony or misdemeanor.[28] The felony carried up to a five year sentence, to run consecutively with any sentence for the original charge.[29] The misdemeanor carried a mandatory 30 day to six month consecutive sentence.[30] In addition conviction of a felony committed while on release must have resulted in a consecutive sentence with no possibility of probation or a suspended sentence for that crime.[31]

The bill set out a list of factors which should have been considered in arriving at a decision on the form of release for each defendant.[32] If the defendant could not meet the requirements set for his release within 24 hours, he could have requested his case be reviewed.[33] If the authority at this review (within 24 hours of the request) did not change the release requirements to allow defendant's release, a written opinion must have been prepared giving the reasons for the release requirements imposed.[34] Presumably any such opinion would be based on the factors specified in the bill as those which the court should consider.

Pre-trial Preventive Detention Under A.B. 2834

The judge or magistrate would have had another alternative available where pre-trial release of a defendant appeared inadvisable. He may have ordered the defendant held without bail under the pre-trial preventive detention portion of this bill.[35] A.B. 2834 would have allowed pre-trial preventive detention only when it is determined at a summary hearing, held at arraignment, that no form of release will assure the reappearance of the defendant, the safety of the community,

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28. A.B. 2834, 1971 Regular Session. Proposed amendment, §§ 1319.4 and 1319.6, to the Penal Code.
29. A.B. 2834, 1971 Regular Session. Proposed amendment, § 1319.4, to the Penal Code.
30. A.B. 2834, 1971 Regular Session. Proposed amendment, § 1319.6, to the Penal Code.
31. A.B. 2834, 1971 Regular Session. Proposed amendment, § 1319.7, to the Penal Code.
32. A.B. 2834, 1971 Regular Session. Proposed addition to the Penal Code § 1267.2

> . . . [T]he nature and circumstances of the offense charged, the safety of any other person or the community, the weight of the evidence against the defendant, his family ties, employment, financial resources, character and mental condition, past conduct, length of residence in the community, and record of attendance at prior court proceedings.

33. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.4, to the Penal Code.
34. *Id.*
35. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.6, to the Penal Code.

or the unobstructed administration of justice.[36] To have allowed pre-trial detention it must have been shown by clear and convincing evidence there was (1) a substantial probability defendant is guilty of the offense charged[37] *and* (2) there must be reasonable cause to believe one of the following: (1) (the catch-all) that no form of release will reasonably assure the appearance of the defendant, the safety of the community or the unobstructed administration of justice;[38] or (2) that defendant is a drug addict;[39] or (3) that defendant is making his living by illegally selling drugs.[40] If these elements were found, defendant could have been detained.

If the prosecution decided to press for detention of a defendant, it would have made an oral motion at the arraignment.[41] At that time, unless defendant requested a continuance (two days at most), a summary hearing must have been held.[42] Defendant had a right to counsel, to be present, to testify, and cross-examine witnesses.[43] The burden of proof would have been on the prosecution to show by clear and convincing evidence the need for detention.[44] The rules of evidence would have applied but all testimony would have been inadmissable in any later trial, except at a trial for perjury.[45] The detention must have ended within 30 days or at the time trial began unless defendant made a motion for delay of the trial.[46]

Summary of Changes Which A.B. 2834 Would Have Made

Obviously the law would have been changed in several aspects by A.B. 2834. O.R. rather than bail would be the first considered mode of release.[47] Restricted releases or supervised release without bail would be permissible in addition to the present release on bail;[48] the

36. *Id.*
37. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(d), to the Penal Code.
38. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(a), to the Penal Code.
39. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(b), to the Penal Code.
40. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(c), to the Penal Code.
41. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(b), to the Penal Code.
42. *Id.*
43. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(d), to the Penal Code.
44. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(e), to the Penal Code.
45. *Id.*
46. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.9, to the Penal Code.
47. *See* note 19 *supra.*
48. *See* note 21 *supra.*

law would be harsh for violation of conditions and the defendant would be aware of that.[49] Review on a speedy basis would be available without the need to resort to the writ of habeas corpus.[50] Failure of the court to set standards allowing release would require the court to give a written explanation for such failure.[51] This requirement of a written decision stating the reasons for not releasing defendant would have simplified appellate review of bail. Presently, the appellate court bases its review of bail on a memorandum written by the arraigning magistrate upon the request of the appellate court.[52] It also might have pressured the court to allow pre-trial release more often.

A.B. 2834 would not have allowed pre-trial release where it is currently prohibited but it would have been a meaningful, though subtle, change to emphasize pre-trial release in some way and form. The emphasis on release based upon the character and background of the defendant rather than his ability to raise bail would result in the poor man having a better chance to receive the type of pre-trial treatment once available to only the rich.[53]

Allowing pre-trial release is important. Defendants released prior to trial are able to maintain jobs and important family relationships.[54] These defendants are also in a much better position to prepare their defense. On release they are able to locate vital witnesses and have unimpeded preparation with their counsel.[55] These advantages are significant. Several studies have shown there is significantly less likelihood that a defendant released prior to trial will be convicted, and if convicted, the sentence will be lighter, or he will be much more likely to get probation in lieu of jail than the defendant who is detained prior to trial.[56] Another important consideration is the possibility of holding an innocent man prior to trial; pre-trial release also avoids the very real problem of intermingling innocent defendants with hardened convicts in overcrowded jails.[57] A defendant detained prior to trial would lose these advantages of pre-trial release.

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49. *See* note 27 *supra.*
50. *See* note 34 *supra.*
51. *Id.*
52. Fernandez v. United States 81 S. Ct. 642, 644 (1961); CAL. RULES OF COURT, Rule 60.
53. U.S. ATT'Y GEN. COMM. REP., POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 66, 67 (1963); McCarthy, Jr. *The District of Columbia Bail Project,* 53 GEO. L.J. 675, 684 (1965); NATIONAL CONFERENCE ON BAIL, at 48; BAIL AND SUMMONS: 1965, 22 (1966).
54. LaFave, *Alternatives to the Present Bail System,* 1965 U. ILL. L. FORUM, 8, 11 (1965); ABA Project PRETRIAL RELEASE, 23-25 (Tent. Draft 1968).
55. *Id.*
56. Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031, 1054 (1954); R. GOLDFARB, RANSOM 221 (1964); McCarthy, Jr., *supra* note 53, at 688-702.
57. NATIONAL CONFERENCE ON BAIL, at 193.

Preventive Detention: Pro and Con

A plan for pre-trial preventive detention has been enacted in only one jurisdiction to this date—Washington D.C.[58] Because the concept is relatively untested, the practical and legal merits of the concept are strongly debated by proponents and opponents.

Proponents of preventive detention argue that increased appellate scrutiny of bail orders hinders the current ability of judges to detain dangerous defendants by imposing high bail.[59] It is also pointed out that preventive detention will not significantly increase the number of defendants detained prior to trial because of the current procedure of setting high bail. In one study it was shown that only about 1 out of 5 defendants was able to post bail and be released when bail is set at $5000 or more.[60] The increase in crime generally, and specifically crime committed by those released prior to trial, is pointed to as proof of the need for preventive detention of dangerous defendants.[61]

Opponents of preventive detention argue that preventive detention creates more problems than it solves. It will detain many who would not have committed a crime while on pre-trial release.[62] It will increase jail administrative costs by holding more persons and necessitating more hearings and judicial proceedings.[63] They also argue that, in fact, very little crime is committed by persons on bail that could not be prevented by having trials within sixty days of the arrest.[64] They argue that the human cost of detaining defendants by disrupting home life or work is too great for the dubious benefits gained.[65] Lastly, it is argued preventive detention is not permissible under the constitution.[66]

THE CONSTITUTION AND PREVENTIVE DETENTION UNDER A.B. 2834

Pre-trial preventive detention in general is susceptible to attack

58. District of Columbia Court Reform and Ciriminal Procedure Act of 1970, Pub. L. No. 91-358, § 23-1322 et seq., 84 Stat. 473 [hereinafter cited as REFORM ACT OF 1970].
59. NATIONAL COMFERENCE ON BAIL, at 203-206.
60. McCarthy, Jr., *supra* note 53 at 684.
61. PRESIDENT'S COMM'N, TASK FORCE REPORT: THE COURTS, 39 (1967); NATIONAL CONFERENCE ON BAIL, at 180.
62. *Preventive Detention; An Empirical Analysis,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 303, 325 (1971).
63. *See* Comment, *supra* note 62 at 355; PRESIDENT'S COMM'N, *supra* note 61, at 41.
64. Ervin, Jr., *Foreword: Preventive Detention—A Step Backward for Criminal Justice,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 289, 298 (1971).
65. U.S. ATT'Y GEN. COMM. REP., *supra* note 53, at 71.
66. Foote, *The Coming Constitutional Crisis in Bail: I & II,* 113 U. PA. L. REV. 959 & 1180 (1965).

based on two constitutional provisions. First, it can be argued that it violates the eighth amendment prohibition of excessive bail. Second, it can be argued it violates the fourteenth amendment by taking liberty without due process of law or denying the guarantee of equal protection.

Certain defendants who had not committed capital crimes would have been held with no right to bail under the preventive detention section of A.B. 2834. If the eighth amendment of the United States Constitution confers an absolute right to bail in all non-capital offenses the preventive detention portion of A.B. 2834 would obviously be unconstitutional. But there is a dispute as to whether or not the eighth amendment to the United States Constitution guarantees a right to bail or only a right to reasonable bail when bail is provided for by law.

In *Carlson v. Landon*[67] and *Stack v. Boyle*[68] the United States Supreme Court considered the eighth amendment's prohibition of excessive bail. In *Carlson v. Landon*[69] the U.S. Supreme Court in a 5-4 decision found that the right to bail did not attach to all arrests, at least not to an arrest of aliens being deported under the Internal Security Act of 1950 which did not provide for bail.[70] The distinction was made by the Court between criminal arrests that were bailable and non-criminal arrests, such as these pre-deportation hearing arrests that were non-bailable by statute.[71]

Stack v. Boyle[72] involved defendants who were arrested for conspiring to violate the Smith Act. Bail was set at $50,000 because four persons convicted for the same offense in another jurisdiction had forfeited bail.[73] The U.S. Supreme Court found there was a right to bail and further there was a right to reasonable bail, reasonable bail being only the amount necessary to assure the re-appearance of the individual defendant to stand trial.[74] The ruling was not based upon the eighth amendment but upon a federal statute.[75] There was dicta describing the right to bail as a traditional right, a right necessary to allow a defendant to prepare his case and to avoid punishment prior to trial, and that without these rights the presumption of innocence has no meaning.[76]

Because these cases do not really settle the issue, scholars have con-

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67. 342 U.S. 524 (1952).
68. 342 U.S. 1 (1951).
69. 342 U.S. 524 (1952).
70. 342 U.S. 524, 526 (1952).
71. *Id.* at 537.
72. 342 U.S. 1 (1951).
73. 342 U.S. 1, 2 (1951).
74. *Id.* at 4.
75. *Id.*
76. *Id.*

tinued to debate the meaning of the eighth amendment. Professor Caleb Foote has presented a strong argument for the eighth amendment implicity guaranteeing a right to bail in all non-capital cases.[77] He traced the history of bail in the English system since the Magna Carta and showed how, by the time of the adoption of the constitution in 1791, English courts had no discretion, but had to set bail in non-capital offenses.[78] He argues that this was a common law right which the drafters of the Constitution intended to protect by the inclusion of the right to a writ of habeas corpus in the Constitution which was, and is, the means to enforce the right to bail.[79] Also the right was further defined and strengthened by the eighth amendment requirement that bail not be excessive.[80] He then dismissed *Carlson v. Landon*[81] as being based on the faulty assumption that bail was discretionary with English Courts.[82]

Professor Foote then applied an equal protection and due process rationale, as exemplified by *Griffin v. Illinois*,[83] to interpret and expand the meaning of the word "excessive" in the eighth amendment.[84] He concluded that any bail set in money is excessive for an indigent person.[85] That is, pre-trial release must be based on some rationale or criteria other than financial ability.

In an address to the National Conference on Bail and Criminal Justice, then Chief Justice Warren, in discussing the Judiciary Act of 1789 and the eighth amendment, apparently agreed with Professor Foote by saying that eighth amendment rights have "generally been construed as guaranteeing the right to bail by logical implication."[86]

But there is a logical argument which contradicts the Foote and Warren viewpoint. Attorney General Mitchell has presented a logical analysis in support of the argument that the eight amendment only guarantees that bail, when provided by law, not be excessive.[87] The law of 1789 made a great many more crimes punishable by death than does the law today.[88] It is argued that the guarantee of reasonable bail is applicable only to such crimes as were bailable—that were not punishable by death —in 1789.[89] Most modern felonies would therefore *not* be bailable. A

77. Foote, *supra* note 66, at 965.
78. *Id.* at 973.
79. *Id.* at 968.
80. *Id.* at 968.
81. 342 U.S. 524 (1952).
82. Foote, *supra* note 66, at 978.
83. 351 U.S. 12 (1956).
84. Foote, *supra* note 66, at 1164.
85. *Id.* at 1153.
86. NATIONAL COMFERENCE ON BAIL, at 7.
87. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969).
88. *Id.* at 1227.
89. *Id.* at 1230.

torney General Mitchell argues further that as capital punishment can be either enlarged or restricted by Congress and by the various state legislatures, so also should the *right* to bail be susceptible either to enlargement or restriction by legislation.[90]

Until the Supreme Court settles these arguments, we cannot be sure what the eighth amendment guarantees or precludes. Pre-trial preventive detention would clearly be unconstitutional if the Court construes the eighth amendment to implicitly guarantee a right to bail in *all* non-capital cases.

Preventive Detention and the Fourteenth Amendment

If the court does *not* construe the eighth amendment to guarantee this right to bail, detention under A.B. 2834 would have to meet the due process and equal protection provisions of the fourteenth amendment.[91] A decision on the constitutionality of pre-trial detention which is based on the fourteenth amendment would allow the Court to avoid the enunciation of a new constitutionally guaranteed right to bail in all non-capital offenses. Therefore it seems that the eighth amendment becomes less important in considering the drafting, implementation and interpretation of A.B. 2834 while problems involving the fourteenth amendment become more important.

Procedural Due Process and A.B. 2834

A statute providing for pre-trial detention must meet the requisites of substantive and procedural due process. A body of case law sets out these requisites. Under these cases, the procedural due process requirements of the fourteenth amendment would have probably been satisfied by the provisions of A.B. 2834. But there were some questionable aspects of the bill. There are no decisions to date which establish the procedural requirements for a detention proceeding, but there are decisions with which detention proceedings can be compared.

A proceeding that is analogous to detention hearings is civil commitment.[92] In California there are strict statutory procedural requirements for civil commitment.[93] Commitment for those with mental disorders and for those addicted to drugs is by summary hearing.[94] Any appeal is

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90. *Id.*
91. The pertinent portion of the fourteenth amendment is "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
92. *See* George, *Due Process in Protective Activities*, 8 SANTA CLARA L. REV. 133 (1968).
93. CAL. WELF. & INST. CODE § 3100 et seq. 5303.
94. *Id.*

made by writ of habeas corpus.[95] At the appeal hearing there is a right to retain counsel, a right to counsel for indigents, a right to present and cross-examine witnesses, a right to adequate and timely notice and even a right to a jury to consider limited questions of fact.[96] The United States Supreme Court found all these procedural rights, with the exception of a jury, to be necessary to commit a defendant as a sexual psychopath.[97] The court characterized the process as criminal in nature and on that basis concluded that all these rights are essential to satisfy the constitutional right to due process of law.[98]

The right to a jury is absent from A.B. 2834 because of the summary nature of the remedy.[99] Another right which, arguably, is missing is the right to adequate and timely notice. The United States Supreme Court has been strict in requiring timely notice to defendants of the charges against them. Lack of adequate notice was the basis for reversal in *Goldberg v. Kelly*[100] which involved the arbitrary denial of welfare aid. The Court held that *timely* and *adequate* notice of the hearing which specified the reasons for termination of the aid was essential to due process.[101]

Specifying the exact reasons for detention under A.B. 2834 would have been difficult because of the very general grounds for detention,[102] but with a well drafted statute it would be possible to give *adequate* notice by clearly specifying the grounds for detention.

The requirement of *timely* notice poses additional problems. A detention hearing at arraignment,[103] within 72 hours of arrest, is short notice for the purpose of developing any defense. The obvious solution would be to allow the postponement of the hearing on a motion by defendant. But during this period defendant must remain in jail, otherwise there would be no purpose for a "detention" hearing. In the Washington D.C. preventive detention measure a continuance up to five days is allowed on motion from the defense.[104] The prosecution, on a showing of good cause, can request a three day continuance.[105] The defendant is held without bail during a continuance requested by either side.[106] A.B. 2834 did not specify whether defendant could be held without bail dur-

95. CAL. WELF. & INST. CODE § 5275.
96. CAL. WELF. & INST. CODE §§ 3104, 3108, 5302, 5303.
97. Specht v. Patterson, 386 U.S. 605 (1967).
98. *Id.* at 610.
99. Duncan v. Louisianna, 391 U.S. 145, 161 (1968). The holding indicates a potential jeopardy of at least six months imprisonment must be involved before the right to a jury trial attaches.
100. 397 U.S. 254 (1970).
101. *Id.* at 267.
102. *See* text accompanying notes 129-131 *infra.*
103. CAL. PEN. CODE § 859.
104. REFORM ACT OF 1970, at §§ 23-1322(c)(3), 23-1322(4).
105. *Id.*
106. *Id.*

ing any continuance.[107] It did limit the continuance to a maximum of two days on request by defendant, and no continuance was allowed the prosecution in any case.[108] But the time interval provided for in A.B. 2834 is arguably inadequate for preparing a defense. There is clearly a conflict between the need for a prompt hearing and the need for adequate time to prepare for the hearing. However, since the defendant is being detained until there is a hearing, the need for a prompt hearing probably outweighs the need for time to prepare a defense.

Another procedural problem arises when one considers whether the rules of evidence should be applicable and whether any of the hearing records should be admissible at trial. There are no United States Supreme Court cases deeming the rules of evidence to be essential to a hearing, administrative proceeding, or juvenile proceeding, but there is dicta indicating that application of the rules of evidence is essential for due process in juvenile hearings.[109]

In the Washington D.C. preventive detention law, the rules of evidence are not applicable at a detention hearing. The proceedings are not admissible at a subsequent trial, except for impeachment purposes.[110] Even with this limitation it seems questionable to allow hearsay and other forms of usually unacceptable evidence to be the basis for detention; especially as this evidence is (1) admissible, by statute, under the guise of impeachment and is (2) used for the determination of probable guilt at the hearing. Under A.B. 2834 the rules of evidence would have been applicable and the proceedings inadmissible at any later trial except at a trial for perjury.[111] But the flat restriction of all or any portion of the detention proceedings from consideration at trial hinders as well as protects the defendant. The defendant could be given the option of presenting portions of the detention hearing record at trial upon a showing of good cause as presently allowed in other proceedings by statute.[112] Good cause might be found where an important defense witness was heard and cross-examined at the detention hearing but is not available for the trial.

THE SUBSTANTIVE PROVISIONS OF A.B. 2834

In contrast to the high procedural standards, A.B. 2834 did not have

107. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(a), to the Penal Code.
108. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(b), to the Penal Code.
109. *In re* Winship 397 U.S. 358, 362 (1970).
110. Reform Act of 1970 at § 23-1322(c)(6).
111. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.8(e), to the Penal Code.
112. Cal. Evid. Code § 1291.

clear and objective substantive provisions to guide the arraigning authority in ordering detention. In analyzing the specific elements required for detention it must be remembered the courts have applied very strict standards to laws infringing or likely to infringe on fundamental rights.[113] Under the equal protection clause the state has the burden of demonstrating a compelling state interest when statutory classification infringes on a person's fundamental rights.[114]

Because the incarceration of a person, before an adjudication of guilt, infringes on his fundamental right to liberty the courts will require the state to demonstrate a compelling interest when detaining a specified class of individuals prior to trial.[115]

The elements which must have been established under A.B. 2834 to detain a defendant were (1) a substantial probability that he was guilty of the crime charged[116] and (2) he fell into one of the following categories: (a) he was a person for whom no conditions of release would guarantee his appearance, the safety of the community, or the unobstructed administration of justice[117] or, (b) he was a drug addict[118] or, (c) he made his living from the illegal sale of drugs.[119] If detention is sought during an official state of extreme emergency, the prosecution would have had to show only that release of the defendant would have been likely to contribute to the circumstances which led to the state of emergency.[120]

Probable Guilt as an Essential Element for Detention

Even though a defendant is a member of one of the classes listed in the proposed statute, there must still be a showing, to a substantial probability, that defendant is guilty.[121] Although this is a lesser degree of proof than that which is necessary to convict the defendant (beyond a reasonable doubt)[122] there may still be a due process issue raised when a likelihood of guilt is an essential element for detention.

The United States Supreme Court recently held that under the due process clause, where determination of guilt at a civil juvenile hearing resulted in detention, the required degree of proof must be proof beyond a

113. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Korematsu v. United States, 323 U.S. 214, 216 (1944); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Dandridge v. Williams, 397 U.S. 471 (1970).
114. *Id.*
115. *Id.*
116. *See* note 37 *supra.*
117. *See* note 38 *supra.*
118. *See* note 39 *supra.*
119. *See* note 40 *supra.*
120. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.11(b), to the Penal Code.
121. *See* note 37 *supra.*
122. CAL. PEN. CODE § 1096.

reasonable doubt, and not the civil standard of proof—a preponderance of the evidence.[123] The court reasoned that any incarceration is the same deprivation of liberty of the defendant no matter what it is called or why it is imposed.[124] Confinement and the public stigma resulting from juvenile detention were held similar enough to a criminal conviction to require criminal standards of proof.[125] If the Supreme Court characterizes a juvenile detention hearing as one requiring a criminal standard of proof, it should follow that a preventive detention hearing requires a criminal standard of proof. If this is so, requiring proof of "guilt" as an essential element for detention would force the court to conduct a pre-trial trial.

The need to preserve the presumption of innocence is another reason for not utilizing "guilt" as an element in determining whether a defendant should be detained. The Supreme Court, in *Stack v. Boyle*,[126] was concerned about this loss of the presumption of innocence and the court felt release on reasonable bail was necessary to preserve the practical effect of this presumption.[127] Therefore, if the jury learned or even suspected that defendant was detained and also knew probable guilt was essential to that detention, it could be argued defendant was denied due process since he was thereby deprived of a presumption of innocence.

Finally, it is possible to argue that guilt is not necessarily relevant in determining which defendants should be detained prior to trial. Pre-trial detention is supposedly based on a compelling need to protect the community from further criminal behavior.[128] The rationale is prevention of crime not punishment for crime. Whether or not defendant is guilty is only relevant if "guilt" makes it more likely he will commit crime while released pending trial. If defendant's probability of guilt is used in deciding this issue, the determination of guilt is only useful in two fact situations; (1) where a record of recidivism is the basis for belief defendant will commit a crime if released, or (2) as a defense for the innocent defendant.

Consider how guilt or lack thereof would be applied to a defendant who has a history of crime. An example might be a defendant charged with burglary and theft. This defendant would have a right to some form of pre-trial release unless it could be shown that he would be likely to commit more crimes while on pre-trial release. A pattern of such behavior in the past, (a record showing repeated crimes) plus a strong showing

123. *In re* Winship 397 U.S. 358 (1970).
124. *Id.* at 366.
125. *Id.* at 367.
126. 342 U.S. 1 (1951).
127. *Id.* at 4.
128. *Hearings on Pre-Trial Detention, Before the California Senate Subcommittee on Judiciary*, Sept. 15, 1970, p. 118 [hereinafter cited as *Hearings*].

that he had just commited one or more such crimes would make it more plausible to believe he might well commit another crime if released. In this perspective, the showing of guilt would be used not as an element for detention but rather as evidence establishing a pattern of criminal behavior.

Another example of a time when guilt may be relevant is when the defendant is innocent of the crime charged, but he has a criminal record. He may have little or no community ties and the prosecution is relying on past record in seeking pre-trial detention. This defendant may very well welcome the early opportunity to assert his defenses and require the prosecution to establish a substantial probability of his guilt. These innocent defendants could be protected by requiring the proof of guilt only be made by the prosecution where the defendant chooses to assert his innocence as a defense to detention. Proof of guilt therefore, except as evidence of recidivism, would only be necessary where innocence was asserted as a defense to detention. Guilt would not be a necessary element for detention in any other case. Without formal adjudication of guilt there would be less likelihood of prejudice to the detained defendant and the detention would more clearly be preventive detention, rather than incarceration for a crime of which the defendant is still presumably innocent.

Defendants for Whom no Form of Release is Satisfactory—a Basis for Detention

After a finding of probable guilt, A.B. 2834 provided that defendant must fit into one of the three categories discussed above[129] before he could be detained. The first alternative category is the one that provides for detention of defendants for whom no form of release would be satisfactory. The language of this subdivision may have been sufficiently clear and specific so that the test of a "compelling state interest" for detaining this class of defendants would be satisfied. The subdivision provided that these defendants could have been detained only when no conditions of release would "assure the appearance of the defendant, the safety of any person or the community, or the unobstructed administration of justice."[130] The section provided that a defendant could be detained only if the magistrate finds "reasonable cause to believe" defendant fits this category of defendants (or one of the other categories).

This section may have been subject to abuse because there were no standards to guide the magistrate in finding "reasonable cause" to believe

129. *See* text accompanying note 38 *supra*.
130. A.B. 2834, 1971 Regular Session. Proposed Addition, § 1267.7(a).

defendant would fail to appear, or threaten the safety of the community or obstruct justice. There was nothing in the bill to prevent an individual magistrate from finding reasonable cause to believe the defendant is a threat to the safety of the community just because he is charged with a crime.[131]

Drug Addiction As A Basis for Detention

The second category of defendants liable for detention under A.B. 2834—those defendants who were drug addicts—[132] is detention for the wrong reason. Drug addiction is a basis for committing an addict to treatment for his personal well-being, but is an addict (not a seller of drugs) such a danger to the community his release cannot be permitted? The drafters of A.B. 2834 seem to have overlooked the fact that the law already provides for detention or commitment of drug addicts and particular procedures are specified for addicts accused of a crime.[133] Apparently the drafters of A.B. 2834 presumed that drug addicts are a danger to the community.

In an empirical study of crime committed on bail there was no evidence that narcotics addicts are significantly more likely to commit crime during release than other defendants.[134] Given this fact there appears to be no reason for "singling out" addicts for pre-trial detention unless the detention is for treatment. In the Washington, D.C. preventive detention law a separate provision applies to those who are found to be drug addicts after a medical examination. The court may order the defendant detained prior to trial, or order detention with medical care prior to trial, or civilly commit the defendant/addict for treatment.[135]

In addition, detention without treatment arguably imposes cruel and unusual punishment upon these defendants. In *Robinson v. California*[136] the United States Supreme Court struck down a California statute which made narcotics addiction a misdemeanor with a mandatory 90 day jail sentence. The court held that the statute in effect made the "status" of narcotics addiction a criminal offense and that jailing a defendant for this "status" rather than for a criminal act constituted cruel and unusual punishment and therefore the statute was void.[137] The detention provided

131. This could be considered a violation of substantive due process. *See* Justice Black's dissent in *In re* Winship 397 U.S. 358, 377 (1970).
132. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(b), to the Penal Code. That the defendant is addicted to narcotics, or because of repeated use of narcotics, is in imminent danger of becoming addicted to the use of narcotics; . . . .
133. CAL. WELF. & INST. CODE § 3100.
134. *See* Comment, *supra* note 62, at 311.
135. REFORM ACT OF 1970, at § 23-1323.
136. 370 U.S. 660 (1962).
137. *Id.* at 667.

for addicts in A.B. 2834 differs in that the defendant would have been charged with a crime besides addiction, but it can be argued that the defendant-addict is being denied the fundamental right to bail and liberty solely for his status as an addict; the non-addict defendants charged with the same crime would have a right to pre-trial release, while the addict would not.

Illegal Drug Selling—As A Basis for Detention

The third alternative—that defendant is an illegal drug seller[138]—may be sufficient for a showing of compelling state interest in detention. Illegal drug marketing is a serious problem which often continues during pre-trial release. Preventive detention would stop this abuse of pre-trial release. At the street retail level drug peddlers are often selling to support their own habit. If they are arrested for narcotics posssion and sale, and then released on bail they then have, with an upcoming trial and bond expenses, an even greater incentive to sell drugs. But it is argued if the defendant is a dealer *and* an addict there is no need for preventive pre-trial detention as he may be detained or committed under existing law for treatment for drug addiction.[139]

Non-addict criminals in organized illegal drug distribution with large amounts of capital at their disposal are the major abusers of bail.[140] These defendants often threaten witnesses and continue sales and distribution when released prior to trial; many also forfeit bail. Large amounts of bail are ineffective in holding these defendants or guaranteeing their appearance for trial because of the substantial profits involved and the large amounts of capital available, as a consequence, for bail and bail forfeiture expense.[141] In the South District of New York, from 1960 through 1969, $530,000 of an approximate total of $632,000 of bail forfeitures were forfeited by defendants in major narcotics cases.[142]

Secondly, law enforcement officials believe detention would aid in the control of illegal drug trafficking because of the problems of investigating and controlling defendants who are free on bail.[143] These officials argue that because of the exclusionary rules relating to evidence wrongfully obtained by police it is more difficult to investigate and prosecute for criminal activity carried on during pre-trial release than it is prior to the

138. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.7(c), to the Penal Code . . . [T]hat sale of narcotics provides him with a substantial part of his livelihood; . . . .

139. *See* text accompanying note 133 *supra.*

140. H.R. REP. No. 91-1808, 91st Cong., 2d Sess. 64 (1971).

141. *Hearings on Crime In America Before a Select Comm. of the House on Crime,* 91st Cong., 2d Sess. 53-55 (1970).

142. *See* note 140 *supra,* at 64.

143. *Id.* at 69.

initial arrest.[144] The case of *Massiah v. United States*[145] is an example. Massiah was arrested for narcotics trafficking and released on bail. While Massiah was on bail, police "bugged" the car of one of Massiah's confederates with the confederate's permission. Massiah made damaging admissions while in the car talking with the confederate.[146] This evidence would have been admissible if obtained prior to arrest, but was inadmissible in this situation because it violated Massiah's sixth amendment rights to have counsel before any questioning after arrest.[147]

But the only police function restricted by *Massiah* was the gathering of evidence after arrest and during pre-trial release. If need be, surveillance and control can be better maintained by release with conditions which is less drastic than preventive detention.[148]

Because of the serious personal and societal injury resulting from illegal drugs and because pre-trial release may increase the distribution of illegal drugs, pre-trial preventive detention is considered by some law enforcement authorities to be necessary to effectively control organized illegal drug trafficking. Based on these policy considerations, there may be a compelling state interest in detaining these defendants and measures drafted clearly and narrowly to be applicable only to non-addict defendants charged with crimes involving drug trafficking may be constitutionally acceptable. But these particular defendants are few in number and enacting preventive detention to combat these criminals, when there are other steps available, would seem unwise.

Detention During a Riot

A.B. 2834 also included separate provisions and different criteria for riots.[149] If a state of emergency had been proclaimed by the governor, as provided for by law,[150] a defendant might have been detained if it was found he was "likely to contribute to the circumstances which led to the proclamation."[151] Again, this is a broad, general, category that could be applied to many people without regard for the type of crime they are charged with or the type or degree of danger to the community if the defendants were released. Besides the possible lack of compelling state

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144. *Id.* at 69.
145. 377 U.S. 201 (1964).
146. *Id.* at 203.
147. *Id.* at 206; PRESIDENT'S COMM'N, TASK FORCE REPORT: ORGANIZED CRIME, 98 (1967).
148. *Hearings*, at 102.
149. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.11, to the Penal Code.
150. CAL. MIL. & VET. CODE § 1580.
151. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.11, to the Penal Code.

interest, there is the danger of infringing on first amendment freedoms when detention is applied to mass disturbances.

A riot should be clearly differentiated from a mass demonstration where the exercise of first amendment freedoms are primary and property damage is only incidental. First amendment rights can, in general, be limited only where their exercise poses a clear and present danger.[152] Therefore, when providing for preventive detention in riot situations the law must not restrict first amendment freedoms; it must be phrased so that it clearly applies to riots only.

Under A.B. 2834 preventive detention of a defendant because he is likely to return to the foray if released would have been possible only after the Governor declared a state of extreme emergency as prescribed by law.[153] Threfore, unless this power was abused by the Governor, defendants would not have been detained under the provision unless there was some clear and present danger. Hence, it could be argued first amendment rights may not have been violated under the provisions of A.B. 2834.

Pre-trial preventive detention is felt to be necessary by some authorities to deal with riots because riots can become extremely dangerous almost instantly and are only stopped by time and/or the strongest of police measures. The situation often becomes a serious threat to property, life, and government which may justify strong measures. One of the ways, it is argued, that riots may be quelled is by detaining those arrested during the rioting until the disturbance is over.[154] Law enforcement officials feel it is extremely important to keep participants from rejoining the human conflagration when released. They believe mass disturbances such as experienced in Watts, Detroit, Newark, Washington, D.C., Chicago and other major cities, are more difficult to subdue with the return of "bailed out" rioters who may be more vehement than when originally arrested.[155] The situation has been described as a "rotating door" which must be stopped by preventive detention.[156]

Currently this rotating door is stopped by *sub rosa* detention in the form of high bails and belated arraignments.[157] During the Watts riot, which lasted several days, over 2,200 persons were arrested in connection

152. Feiner v. New York, 340 U.S. 315, 321 (1951); Cox v. Louisiana No. 49, 379 U.S. 559, 563 (1965).
153. A.B. 2834, 1971 Regular Session. Proposed addition, § 1267.11, to the Penal Code.
154. *Hearings*, at 87.
155. *Id.*; Comment, *Criminal Justice in Extremis*, 36 U. CHI. L. REV. 455, 503 (1969).
156. *Hearings*, at 86.
157. *See* note 155 *supra*; *see also*, Calif. State Bar Spec. Comm. Rep., *The Administration of Justice During Civil Disorders*, 45 J.S.B.C. 191, 196 (1970).

with the riots.[158] The judges set higher than usual bails and only "about two or three" were released and re-arrested for further involvement in the riots.[159] Pre-trial preventive detention is arguably superior in these situations because it requires a showing of the need for detention by the authorities and because, if properly drawn, the detention would be limited in duration to the period of rioting or the prescribed statutory period. Detention under high bail, with court backlogs from mass arrests, could result in detention until the defendant pleads guilty or the long delayed trial is held.

In contrast to the views of police officials a select committee of the California State Bar suggested that most persons arrested in a riot be released on their own recognizance during a civil disturbance.[160] They reasoned that (1) past experience shows nearly all defendants who are arrested on minor offenses (the majority) will appear for trial without the need for money security; (2) that jailing large numbers of persons is expensive and hard or impossible to achieve, and results in intolerable conditions for those detained; (3) that the good public relations resulting from reasonable police behavior in releasing arrestees will quell the disturbances; (4) and that any release can be made conditional upon non-participation in the disturbance and thereby protect community interests.[161]

Even the committee does not recommend release on O.R. of those who commit major offenses.[162] There would then seem to be some agreement on detaining those who are charged with the commission of serious crimes as part of a serious civil disturbance.

A.B. 2834, if reintroduced, should be narrowed to reflect this agreement by requiring for detention when (1) the charge is one of a felony committed in furtherance of the disturbance, (2) no form of release is satisfactory, (3) defendant is likely to contribute to the disturbance if released, and (4) any detention will be terminated at or before the end of the disturbances. It would then be applicable only to those high risk defendants and only during the emergency. The classification of arrestees by this proposal would probably be rational and necessary and therefore satisfy the requirements of the fourteenth amendment.

Comparison of A.B. 2834 with Other Preventive Detention Measures

Congress, in implementing pre-trial preventive detention in Washington D.C., did not mention riots but attempted to limit judicial discretion

158. *Hearings*, at 87.
159. *Id.*
160. Calif. State Bar Spec. Comm. Rep., *supra* note 157, at 196.
161. *Id.*
162. *Id.*

to certain high risk categories and thereby lessen the possibilities for abuse of judicial discretion. The Washington, D.C. act established two general categories of defendants plus two special categories, (the special categories are for narcotic addicts and for defendants charged with threatening a witness or juror or otherwise obstructing the administration of justice).[163] The first general category is applicable to those defendants charged with a "dangerous crime"—a robbery or attempted robbery, common law burglary, common law arson, forcible rape or attempted rape, or the illegal sale of drugs.[164] The other category is aimed at (1) all recidivist defendants, (2) those charged with a "serious crime" (non-white-collar felonies) who have also had a prior felony conviction within ten years, and (3) those who are charged with committing a felony on release.[165] As in A.B. 2834, a substantial probability of guilt must also be established for detaining defendants who fall within either of these two general categories.[166]

In a preventive detention statute proposed by the ABA, guilt is not an element and the categories of defendants include those whose major threat to the community is one to human life rather than property.[167] Six categories are set out beginning with defendants who are charged with a capital crime.[168] The second is defendants believed to have committed a felony while on bail at an earlier date.[169] The third includes defendants charged with a felony involving serious injury or attempted harm to another person (similar to the D.C. category of "dangerous crimes"), and it is found there is "a high degree of probability" that if released this defendant will commit another such crime.[170] The fourth group is similar except the offense charged need not be one involving human injury if defendant has committed a prior dangerous offense within five years.[171] The fifth category includes those defendants who threaten a material witness, those whose release would impede the administration of justice.[172] The sixth category allows detention of those defendants it is believed would flee the United States if released.[173] In categories three, four and five a "high probability" of danger to some person must be shown.[174] What is and what is not a "high probability" should at least be outlined in

163. REFORM ACT OF 1970, at §§ 23-1322(a)(3), 23-1323.
164. *Id.* at §§ 23-1331(3), 23-1322(a)(1).
165. *Id.* at §§ 23-1331(4), 23-1322(a)(2).
166. Id. at §§ 23-1322(a)(1), 23-1322(a)(2).
167. ABA Project, *supra* note 54, at 83, 85.
168. *Id.* at 85.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

the statute. Case law and developing empirical data could eventually make this line relatively clear cut and predictable.

Who Should be Detained

The D.C. act attempts to detain both those who are a threat to personal safety (dangerous crimes) and those felony recidivists who threaten property interests (serious crimes);[175] the Model Act focuses mainly on those defendants whose release appears to threaten human safety;[176] A.B. 2834 appeared to focus on those "probably guilty' defendants a judge wanted to detain.[177]

Crimes against property constitute the major portion of all crime and defendants who commit property crimes are most likely to commit another crime.[178] Criminals who commit crimes involving serious harm to persons, such as murder, rape and aggravated assault, are known to have a very low rate of recidivism.[179] In contrast, robbers with a high rate of recidivism and often injure their victims.[180] With the exception of robbers then, the choice would appear to be to detain the defendant likely to commit a property crime or to detain the defendant who is less likely to commit another crime but who appears to be a threat to human safety, if released, because of the nature of his alleged crime.

A recent empirical study conducted in Boston, using the standards provided in the Washington, D.C. measure, showed 1 out of 7 of those defendants with a history of "violent crimes"[181] were convicted of a second crime committed while released on bail.[182] One out of four of those arrested with a record of "dangerous crimes"[183] were convicted of a second crime committed while released on bail.[184] These odds were reduced to about 1 out of 3 by correlating them with other factors which could be considered under the Washington, D.C. preventive detention law.[185] It could well be argued there is not sufficient compelling state interest to justify the detention of three defendants to prevent one from further criminal acts. A fortiori, 1 out of 7 or 1 out of 4 would be less satisfactory "odds" for detention. More accurate categories should be discovered or detention should be made applicable only to those defendants for whom

175. *See* text accompanying note 163 *supra.*
176. *See* text accompanying note 174 *supra.*
177. *See* text accompanying note 130 *supra.*
178. PRESIDENT'S COMM'N, TASK FORCE REPORT: CRIME AND ITS IMPACT, 79 (1967).
179. *Id.*
180. *Id.* at 14-16.
181. *See* text accompanying note 164 *supra.*
182. *See* Comment, *supra* note 62, at 392.
183. *See* text accompanying note 169 *supra.*
184. *See* Comment, *supra* note 62, at 392.
185. *Id.*

there is currently some authority for denying pre-trial release, those who commit a crime punishable by death,[186] those who appear likely to flee the jurisdiction,[187] or those who in fact attempt to or do impede the administration of justice.[188] The categories of defendants liable for pretrial detention might be expanded to include defendants arrested for a serious offense committed while on release;[189] certain rioters;[190] and those involved in illegal organized drug sales.[191] Detaining defendants in other categories, as defendants who commit "dangerous crimes," may result in detention of many persons who would not commit crime while on release.

CONCLUSION

A.B. 2834, if enacted, would have given a great amount of discretion to the arraigning authorities. The discretion given to release defendants on O.R., on conditions, on bail, or on some combination of these, would have been a benefit to criminal defendants. With the emphasis on character rather than on money, and with review available within twenty-four hours of request, poor defendants would receive the same treatment prior to trial as rich defendants, those who can raise bail. These reforms appear to be needed and beneficial. The discretion given the same arraigning authority to detain defendants as a means of preventing crime is too broad. The required element that defendants be probably guilty is poor justification for detention. The presumption of innocence must be respected until defendants are found to be guilty "beyond a reasonable doubt."

Even without these problems of overbreadth, and detention based on probable guilt, it is questionable whether any form of detention would be valid under the due process and equal protection clauses of the fourteenth amendment. Assuming the eighth amendment is not found to bar pretrial detention, the ideal detention statute would be clearly applicable only where there is a compelling need for detention and administered so as to prejudice the detained defendants' trial as little as possible. These two requirements of (1) a compelling state need and (2) the preservation of the presumption of innocence, mandate a detention statute drafted to be applicable only to those classes of defendants known to present a threat of serious harm if released. The model ABA statute appears to be

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186. CAL. PEN. CODE § 1270.
187. Mastrian v. Hedman 326 F.2d 708 (8th Cir.) *cert. denied,* 376 U.S. 695 (1964).
188. Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan Cir. Justice, 1961); Bitter v. United States, 389 U.S. 15, 16 (1967); Carbo v. United States 82 S. Ct. 662 (1962).
189. ABA Project, *supra* note 54, at 83.
190. *See* text accompanying note 154 *supra.*
191. *See* text accompanying note 138 *supra.*

the best way of satisfying these requirements. It does not base detention on proof of guilt but on proof to "a high degree of probability" the defendant will injure another person if released, or on the likelihood defendant will flee the United States, if released, or on a record of a felony previously committed while on pre-trial release.

Although it is possible that a state can demonstrate a compelling need to detain defendants who will be likely to injure other people if released, the problem remains as to whether these defendants can be identified. Our present inability to predict human behavior, may defeat the efforts to detain "dangerous" defendants.

Barry D. Parkinson