



1-1-1983

Proposition Four: Preventive Detention v. Pretrial Liberty

David Mark Parker

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

David M. Parker, *Proposition Four: Preventive Detention v. Pretrial Liberty*, 14 PAC. L. J. 303 (1983).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol14/iss2/9>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Proposition Four: Preventive Detention v. Pretrial Liberty

On June 8, 1982 Article I Sec. 12 of the California Constitution which had made pretrial bail mandatory in the case of a felony was amended¹ by Proposition 4². Proposition 4 now provides for pretrial preventive detention³ through the denial of bail. Traditionally, the sole purpose of bail⁴ has been to assure the defendant's appearance and submission to the jurisdiction of the court.⁵ Furthermore when there is no fear of flight the equal protection clause of the fourteenth amendment has been interpreted to require states to release indigents on their own recognizance.⁶ Bail has always been discretionary on both the federal and state levels when the accused is charged with a capital offense⁷ and proof of guilt is evident or the presumption thereof great.⁸ The reason for this discretion is that when loss of life is threatened as

1. CAL. CONST. art. I, §12.

2. Proposition 4 which amends article 1 section 12 of the California Constitution reads as follows:

Sec. 12. A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;
(b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion.

3. Preventive detention is the incarceration, before trial or pending appeal, of a defendant thought likely to pose a danger to the community if released. See Comment, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 328 n.1 (1982); see also, Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36 (1969).

4. Bail is the practice whereby an accused posts a money bond in order to gain pretrial liberty. If the accused fails to appear for a court date, his or her bond is forfeited and an arrest warrant is issued. See D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 1964, at 1-8 (1964) [hereinafter cited as FREED].

5. *Reynolds v. United States*, 80 S. Ct. 30, 32 (Douglas, Circuit Justice 1960); *Bandy v. United States*, 81 S. Ct. 197 (Douglas, Circuit Justice 1960).

6. In *Re Antazo*, 3 Cal. 3d 100, 103-04; 473 P.2d 999, 1000; 89 Cal. Rptr. 255, 256 (1970). See Comment, *Pretrial Release in California: Proposed Reforms of an Unfair System*, 8 PAC. L.J. 841, 848 (1977).

7. BLACKS LAW DICTIONARY 189 (rev. 5th ed. 1979).

8. 4 W. BLACKSTONE, COMMENTARIES 296, 297-98; see Note, *Public Safety Exception to*

punishment for a capital offense, sacrifice of a money bond is not considered sufficient incentive for appearance.⁹ In addition to capital offenses, Proposition 4¹⁰ now allows the state to deny bail when certain felony offenses are charged. First, bail may be denied in all felony cases involving acts of violence against another person when (1) proof of guilt is evident or the presumption thereof great, and (2) based on clear and convincing evidence there is a substantial likelihood that the release of the accused would result in great bodily harm to others. Secondly, bail may be denied in nonviolent felony cases, where there is clear and convincing evidence that the accused has threatened another with great bodily harm, and a substantial likelihood exists that the threat will be carried out if the accused is released. The first provision is designed to protect the public at large from a potentially dangerous individual awaiting trial. The second provision seeks to prevent witness and victim intimidation.

This comment will begin with a discussion of the traditional right to pretrial bail as it existed in this country. An argument will then be made that the existence of the right is inherent in our concept of ordered liberty and may not be deprived by the states or federal government without due process of law. Circuit court decisions expressly incorporating the eighth amendment bail clause into the due process clause of the fourteenth amendment, will be presented to support the argument that the United States Supreme Court acknowledges pretrial bail as a fundamental right. As a result of these developments a proposal will be made that pretrial bail may, and as a matter of necessity should, only be deprived when there is a compelling state interest and no less restrictive alternatives available to further the interest. Preventive detention in the District of Columbia will be analyzed in an effort to show the reader that a scheme of preventive detention can exist that respects the fundamental nature of pretrial liberty. Based upon these observations, Proposition 4 will be analyzed in light of perceived constitutional conflicts, the most prominent of which is the failure to require a written statement of reasons to accompany an order of detention. Finally, a legislative scheme will be proposed balancing a state's interest in preventive detention against an individual's traditional and arguably fundamental right to bail.

Right to Bail, 62 CAL. L. REV. 561, 563 (1974); *see also* 18 U.S.C. §3148 (1970); *United States v. Erwing*, D. C. Cal. 1968, 280 F. Supp. 814 (1968).

9. *See Note, supra* note 8.

10. CAL. CONST. art. I, §12.

TRADITIONAL RIGHT TO BAIL

A. *Eighth Amendment*

In 1791 Congress proposed, and the several states ratified the eighth amendment to the United States Constitution.¹¹ The eighth amendment provides that, "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹² Ambiguity in the wording of the bail clause has left it susceptible to conflicting interpretations.¹³ Read literally, the amendment does not expressly provide for the denial of bail. Therefore, the amendment could have been interpreted to mean that bail was available in all cases with the qualification it never be excessive.¹⁴ Such an absolute right to bail has, however, never been unequivocally accepted.¹⁵ Rather, a majority of the courts have traditionally interpreted the clause to mean bail shall not be excessive in those cases where it is a matter of right by statute or case law, and refusal of bail in those cases when it is not a matter of right is not excessive.¹⁶ Once it is determined by a court that bail is required by either statute or case law, the focus shifts to setting the actual amount of bail.

Determination of whether bail is excessive depends entirely upon the factors the court takes into consideration when setting the amount of bail. The mechanism of bail balances the defendant's interest in pre-trial liberty against the interest the court has in assuring the defendant's attendance at trial.¹⁷ A defendant's presence and submission to the judgment of the court is assured by the threatened forfeiture of the money bond. As a result, bail has traditionally been considered excessive if it is set at an amount higher than that necessary to assure defendant's appearance at trial.¹⁸ It follows that if no money bond would secure defendant's appearance at trial, bail could be completely denied.¹⁹ This denial of bail most frequently occurs when an individual is charged with a capital offense.²⁰ In this instance it is often reasonable to assume that no amount of money will secure the defendant's appearance because the defendant is faced with the possibility of a

11. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

12. *Id.*

13. See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1224 (1969).

14. *Id.*

15. See Comment, *supra* note 3, at 328 n.5. ("Clearly, the right to bail is not universal.")

16. *Id.*

17. See *Reynolds v. United States*, 80 S. Ct. 30, 32 (Douglas, Circuit Justice 1959); Comment, *supra* note 3, at 331.

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

19. See *supra* notes 9-10 and accompanying text.

20. Comment, *supra* note 3, at 331 (citing 4 W. BLACKSTONE COMMENTARIES 297).

death sentence.²¹

The argument has been made that community safety is always an underlying consideration when setting the amount of bail.²² Since case law firmly holds that any amount of bail above the amount designed to assure defendant's appearance at trial is excessive,²³ community safety should only be a factor in the decision whether to grant or deny bail. As noted earlier, this comment will present the argument that the right to be released on bail prior to a showing of guilt is a fundamental right only to be denied when there is a compelling state interest.²⁴ Even so, a fundamental right to bail merely indicates the weight that will be accorded a pretrial liberty interest.²⁵ Therefore, in order to support the theory that a fundamental right to bail has evolved, the next section will present authority for the proposition that there exists a liberty interest in pretrial freedom that may not be deprived without due process of law. Once the argument has been made that one accused of a crime has a due process liberty interest prior to a showing of guilt, this comment will provide authority for the proposition that the pretrial liberty interest has evolved into a fundamental right not to be denied in the absence of a compelling state interest.

B. *Pretrial Liberty and Due Process*

Two United States Supreme Court cases, decided during the October Term of 1951, addressed the issue of the fundamental nature of pretrial bail and the circumstances under which it could be denied. In *Stack v. Boyle*,²⁶ the Supreme Court noted that since the passage of the Judiciary Act of 1789²⁷ federal law had "unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail."²⁸ The Supreme Court then characterized pretrial liberty as a traditional right

21. *Id.*

22. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 FORDHAM L. REV. 423, 428, n.40 (1980); Hruska, *supra* note 3, at 38-39.

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

24. See notes 91-106 and accompanying text *infra*.

25. See J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 376 (1978) [hereinafter cited as NOWAK].

The [Supreme] Court [has] . . . adopted a theory of selective incorporation. Under this concept only those provisions of the Bill of Rights that the Court considers fundamental to the American System of law are applied to the states through the due process clause of the Fourteenth Amendment.

Id.

If a right is determined by the Supreme Court to be fundamental, the right can only be denied when there is a compelling state interest. See NOWAK, *supra*, at 524. "Under the due process guarantee, the Court will employ this level of strict scrutiny only in reviewing legislation which limits fundamental constitutional rights." *Id.*

26. 342 U.S. 1 (1951).

27. 1 STAT. 73, 91.

28. 342 U.S. at 4.

which allowed the unhampered preparation of a defense and prevented the infliction of punishment prior to a showing of guilt.²⁹ To underscore this conviction, the Supreme Court emphasized that unless the right to pretrial liberty was preserved by release on bail, "the presumption of innocence, secured only after centuries of struggle would lose its meaning."³⁰ Although largely dicta, the discussion of this traditional right to freedom before conviction stressed the established position of the court that pretrial bail should be denied only in the most extreme cases. This interpretation of the case comports well with the theory that there exists, apart from the eighth amendment, a traditional right to pretrial liberty protected by the due process clauses of the fifth and fourteenth amendments.³¹

Those who favor preventive detention cite *Carlson v. Landon*,³² for the proposition that *Stack* did not provide an absolute right to bail.³³ Decided late in the October 1951 Term, *Carlson* appears to support the position that there is a liberty interest in pretrial freedom not to be denied without due process of law.³⁴ *Carlson* dealt with the detention of resident aliens suspected of subversive activities, pending deportation hearings.³⁵

By act of Congress the Attorney General of the United States had discretion to hold aliens, suspected of being communists, in custody without bail pending a deportation hearing.³⁶ Detention was permitted when there was reasonable cause to believe release on bail would endanger the safety and welfare of the United States.³⁷ The Supreme Court held that detaining alien communists without bail did not constitute a denial of due process if there was reason to believe their release

29. *Id.*

30. *Id.*

31. The fifth and fourteenth amendments to the United States Constitution provide that no person may be deprived of liberty without due process of law. In *Carlson v. Landon*, 342 U.S. 525, 538 (1951), the United States Supreme Court indicated that an arbitrary or capricious denial of bail would constitute a deprivation of liberty without due process of law. *Id.* at 542; see also *Chambers v. Florida*, 309 U.S. 227, 235 (1940). In *Chambers* the court stated that the constitutional draftsmen included the due process clause in the Constitution to protect, at all times, persons charged with or suspected of a crime. *Id.*; see Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 380 (1970).

Since the Petition of Right of 1628, it is clear that the promise of the Magna Carta "that no man shall be . . . taken nor imprisoned . . . without being brought in answer by due process of law" applies to imprisonment before, as well as after, conviction.

Id.

32. 342 U.S. 524 (1951).

33. See Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1140, 1172-73 (1972); Mitchell, *supra* note 13, at 1223-24.

34. See *infra* notes 35-52 and accompanying text.

35. 342 U.S. at 528-29.

36. 342 U.S. at 538-39.

37. 342 U.S. at 528 n.3.

would pose a threat to the security of the nation.³⁸ In order to understand how *Carlson* affected the traditional right to pretrial bail recognized in *Stack*,³⁹ it is important to identify the circumstances of the *Carlson* case. Congress has always exercised broad authority to determine matters of immigration.⁴⁰ Thus, alien residency became a matter of statutory entitlement.⁴¹ The right to remain free on bail pending a deportation hearing, therefore, would depend upon the terms of the statutory entitlement.⁴² Congress could prescribe the conditions of alien residency and actions or activities that would result in revocation of resident status.⁴³ By contrast, the Court in *Stack* was concerned with a criminal proceeding. The *Stack* Court had characterized the right to be free on bail *prior to a criminal proceeding* as traditional in our system of law.⁴⁴ It was emphasized in *Carlson* that deportation was not a criminal proceeding and that it had never been held to be punishment.⁴⁵

In essence, *Carlson* strengthened the argument that an accused could not be deprived of the traditional right to pretrial bail without due process of law.⁴⁶ The Supreme Court noted that refusal of bail prior to deportation did not violate the due process clause of the fifth amendment because the refusal was neither arbitrary nor capricious.⁴⁷ A logical inference to be drawn from this statement is that an arbitrary or capricious decision to deny bail prior to a deportation hearing would violate due process. As noted in *Stack*, the right to pretrial liberty is traditional to our system of criminal jurisprudence, and preservation of the right serves to prevent the infliction of punishment prior to trial.⁴⁸

After *Stack* and *Carlson* it was clear that the Court was willing to afford pretrial liberty greater protection than the right of aliens to re-

38. See generally 342 U.S. at 537-41.

39. See *supra* notes 16-20 and accompanying text.

40. United States Constitution Article I, section 8, clause 4, gives Congress the power to establish a uniform rule of naturalization. See NOWAK, *supra* note 25, at 591 n.14. "Congress does not derive its power to regulate immigration from a specific constitutional grant. It is simply regarded as a power inherent to a sovereignty." Also, "In a long line of cases the Supreme Court has stated that the power of Congress over the admission of aliens to this country is absolute." *Id.* at 895; *Chae Chan Ping v. United States*, 130 U.S. 581, 585 (1889).

41. *Id.*

42. 342 U.S. at 537.

The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, "with such opportunity for review of their action as Congress may see fit to authorize or permit."

Id.

43. *Id.*

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

45. 342 U.S. at 537.

46. See *infra* Note 47 and accompanying text.

47. See generally 342 U.S. at 537-41.

48. *Stack*, 342 U.S. at 4.

main free pending a deportation hearing.⁴⁹ Therefore, if an arbitrary or capricious denial of bail pending deportation would violate due process, the same would surely violate the traditional right to pretrial bail.⁵⁰

Notice was taken in *Stack* that denial of the traditional right to pretrial bail could also undermine the presumption of innocence.⁵¹ Left unresolved was the issue of whether the presumption of innocence provided an independent constitutional safeguard for the right to bail or merely presented a restatement of the rule that an accused could not be denied pretrial liberty without due process of law.⁵² This issue was to be directly addressed in subsequent cases.

C. Presumption of Innocence

In *Bell v. Woolfish*,⁵³ the Supreme Court noted, "In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment."⁵⁴ In order to prevent punishment without due process of law the court observed that the pretrial detainee would have a bail hearing pursuant to 18 United States Code, Section 3146.⁵⁵ 18 U.S.C. 3146 allows pretrial detention only when there is fear that the defendant will flee the jurisdiction if released on bail.⁵⁶ Denial of bail because of the type of offense charged, or the fashion in which it is committed, would result in pretrial confinement. This confinement would constitute punishment prior to a showing of guilt. As a result there would be a violation of the presumed innocence of the defendant and due process of law.

49. This inference can be drawn from the fact that the Supreme Court in *Stack* held bail could only be set prior to a criminal proceeding in an amount designed to assure the defendant's attendance at trial. *Stack*, 342 U.S. at 5. *Carlson* held that aliens could be completely denied bail prior to a deportation hearing as long as the denial was not arbitrary or capricious. *Carlson*, 342 U.S. at 538.

50. See also *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784, 787-88 (1971).

51. *Stack*, 342 U.S. at 4.

52. See Hruska, *supra* note 3, at 48-49 [citing, the President's Commission on Crime in the District of Columbia, Report 520 (1966)].

53. 441 U.S. 520 (1979).

54. *Id.* at 536. In essence the Supreme Court was indicating that the popular notion of an accused's innocence prior to a showing of guilt was in fact a due process right which prevented the state from punishing a defendant prior to conviction. With the foregoing understanding in mind, this due process pretrial protection against punishment will be hereinafter referred to as the "presumed innocence of the defendant." See *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment.

Id.

55. 441 U.S. at 537.

56. 18 U.S.C. §3146 (1976).

In the wake of *Stack*, courts have consistently held that denial of pretrial bail in an arbitrary or capricious fashion will deprive an accused due process of law.⁵⁷ The presumed innocence of the defendant prohibits courts from detaining an accused solely on the grounds of the nature of the crime charged prior to a showing of guilt.⁵⁸ Both of the foregoing protections recognize that there is a liberty interest in pretrial freedom which may not be deprived without due process of law. The question to be resolved is the amount of weight which should be afforded the pretrial liberty interest.⁵⁹

California has enacted a broad statutory scheme providing for preventive detention through Proposition 4. The constitutionality of Proposition 4 is questionable in light of the great protection the Supreme Court has always afforded the right to pretrial bail. The next section will trace those developments which have led certain Federal circuit courts to conclude that the due process liberty interest in pretrial bail has evolved into a fundamental right.⁶⁰

BAIL AS A FUNDAMENTAL RIGHT

The importance of categorizing bail as a fundamental right lies in the fact that courts will apply strict scrutiny to any attempt by the state to deny pretrial liberty.⁶¹ Normally, a state need only show that legislative action bears a rational relationship to a legitimate end not prohibited by the Constitution.⁶² Where government action impinges upon the exercise of a fundamental right, the Supreme Court ". . . will not accept every permissible government purpose as sufficient. . . , but will instead require the government to show that it is pursuing a compelling or overriding end—one whose value is so great that it justifies the limitation of fundamental constitutional values."⁶³ Even if the government can demonstrate a compelling state interest, the Supreme Court will still require proof that the state action is the least restrictive means available to promote that interest.⁶⁴ When alternative, less restrictive

57. See *Keating*, 322 F. Supp. at 786-87; *Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir. 1964).

58. See *supra* notes 44-46 and accompanying text.

59. See, *NOWAK, supra* note 25, at 524.

60. See *infra* notes 67-110 and accompanying text.

61. See *NOWAK, supra* note 25, at 524.

62. *Id.*

63. *Id.*

64. *Id.*

Even if the government can demonstrate such [compelling] an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee. Under the due process guar-

means are available, the Supreme Court will not allow fundamental rights to be denied.⁶⁵

A. Historical Development

After the decisions in *Stack* and *Carlson* the theory that the right to pretrial bail was fundamental in nature manifested itself as a basic constitutional protection.⁶⁶ Justice Douglas supplemented the position of the Supreme Court that bail was basic to the American system of criminal jurisprudence with language such as: "The shadow of a doubt across one's own conclusions is itself sufficient to grant application for bail. . ."⁶⁷ and; "Doubt whether bail should be granted or denied should always be resolved in favor of the defendant."⁶⁸

While addressing the basic nature of bail in *Cohen v. United States*,⁶⁹ Justice Douglas affirmed that the nature of the crime should not affect the right to bail.⁷⁰ Nevertheless, the right to bail has generally been couched in conditional language. In recognition of the importance of pretrial bail Justice Douglas stated, "The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a showing of guilt."⁷¹ Extraordinary circumstances which warrant denial of pretrial bail, must still be balanced against the constitutional directive that the right to bail is a fundamental tradition and basic to our system of law. Proponents of preventive detention also use the language of Justice Douglas in *Carbo v. United States*⁷² as support for their position.⁷³ *Carbo* dealt with an application for bail pending appeal following convictions for racketeering, extortion, and conspiracy.⁷⁴ Federal Rule of Criminal Procedure 46(a)(2)⁷⁵ provides that bail is discretionary after a showing of guilt. Justice Douglas was cautious to point out that even in the exercise of

antee the Court will employ this level of strict scrutiny only in reviewing legislation which limits fundamental constitutional rights.

Id.

65. *Id.*

66. See *infra* notes 67-110 and accompanying text.

67. *Herzog v. United States*, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955) *cert. denied*, 352 U.S. 844 (1956).

68. *Id.*

69. 82 S. Ct. 8 (Douglas, Circuit Justice 1955) *cert. denied*, 369 U.S. 865 (1962).

70. *Id.* at 9. "Equal Justice under the law requires that bail not be denied even a notorious law-violator if he has a substantial question to be resolved on appeal." *Id.* The same logic would apply when someone was merely charged with committing a notorious crime taking into consideration the additional safeguard afforded by the presumption of innocence.

71. *Bandy v. United States*, 81 S. Ct. 197 (Douglas, Circuit Justice 1960).

72. 82 S. Ct. 662 (Douglas, Circuit Justice 1962). Application for review of the Circuit Judge denying bail pending appeal is denied 369 U.S. 868 (1962).

73. See generally *Hruska, supra* note 3; *Mitchell, supra* note 13.

74. *Carbo*, 82 S. Ct. at 663.

75. Federal Rules of Criminal Procedure 46(a)(2) provides that "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay."

discretion, the likelihood of repetition of acts charged as unlawful was too restrictive a standard upon which to deny bail.⁷⁶ Community sentiment or evil reputation could never play a role in the determination of whether to grant or deny bail, especially when the crimes were of a political nature.⁷⁷ As for the impact on the basic right to pretrial bail, *Carbo* should have only limited value. Federal Rule of Criminal Procedure 46(a)(1)⁷⁸ was recognized by the court as providing mandatory pretrial bail.⁷⁹ In particular the court held that, "Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one."⁸⁰ If the defendant were merely charged with an atrocious offense, Federal Rule of Criminal Procedure 46(a)(1) would have required pretrial release on bail.

As for the effect *Carbo* had on pretrial preventive detention, two principles can be derived. First, if the Court was willing to afford bail pending appeal from a conviction such careful scrutiny, when it was a matter of discretion by statute, pretrial denial of bail would obviously only be allowed in the most extreme situations.⁸¹ Further, it was clear that preventive detention was not going to be allowed merely on the basis of the nature of the crime charged.⁸² Fear that an atrocious act would be repeated was found to be too restrictive a standard on which to deny bail pending appeal after a showing of guilt. Therefore, denial of pretrial bail purely on the basis of the atrocious offense alleged would not only be too restrictive a standard but would also constitute punishment before a showing of guilt. The presumed innocence of the defendant is designed to protect against exactly this type of pretrial punishment.⁸³ In *Carbo* the Court also indicated that the right to bail could not be denied because of community sentiment, especially when the crime charged was of a political nature.⁸⁴ Any scheme of pretrial preventive detention designed to deny bail purely on the basis of the crime charged was obviously going to meet strong opposition.

76. *Carbo*, 82 S. Ct. at 667.

77. *Id.* at 665.

78. Rule 46(a)(1) provides:

A person arrested for an offense not 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.

FED. R. CRIM. P. 46(a)(1).

79. *Carbo*, 82 S. Ct. at 666.

80. *Id.* at 666.

81. *Id.* at 668. ("Keeping a defendant in custody during the trial 'to render fruitless' any attempt to interfere with witnesses or jurors . . . may, in the extreme or unusual case, justify denial of bail.").

82. See *infra* note 105 and accompanying text.

83. See *supra* note 44 and accompanying text.

84. *Carbo*, 82 S. Ct. at 667.

In the wake of *Carbo* it became apparent that the Supreme Court was willing to deal with preventive detention only after a showing of guilt and when it was a matter of discretion by statute.⁸⁵ A showing of guilt could be considered probative of the danger an individual posed to the community.⁸⁶ Even with this indication of dangerous propensity, statutes still provided that a defendant was entitled to freedom if there was a substantial question to be resolved on appeal after conviction.⁸⁷ The Supreme Court was consistent in its refusal to grant certiorari to decisions which held the right to bail was fundamental in nature and basic to our system of law.⁸⁸ The right was indicated to be traditional⁸⁹ or inherent in our concept of ordered liberty.⁹⁰ No mention had yet been made that the eighth amendment itself secured pretrial bail as a fundamental right.

B. Modern Trend

Traditionally, the United States Supreme Court has in theory identified a right as fundamental by determining whether it is inherent in our concept of ordered liberty.⁹¹ The Court has done this in practice by

85. This inference can be drawn from the fact that after the decisions in *Stack v. Carbo* the Supreme Court consistently denied certiorari to the opinions of Justice Douglas sitting as a Circuit Justice. See *supra* notes 57-71 and accompanying text. See Comment, *supra* note 3, at 331 n.17. "The Supreme Court has applied the Eighth Amendment bail clause only in cases arising out of federal statutes." *Id.*

86. *Carbo*, 82 S. Ct. at 666.

Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character.

Id.

87. *Carbo*, 82 S. Ct. at 666; *Leigh v. United States*, 82 S. Ct. 994, *id.* at 996 (Warren, Circuit Justice 1962). Chief Justice Warren held that even the right to bail pending appeal was basic to our system of law. *Id.* FED. R. CRIM. P. 46(a)2.

88. See *supra* notes 67-69 and accompanying text.

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

90. *Mastrian v. Hedman*, 326 F.2d 708, 710, *cert. denied*, 376 U.S. 965 (1964).

91. See generally, *infra* notes 92-105 and accompanying text. Traditionally the United States Supreme Court would in theory identify a right as fundamental by determining whether it was inherent to our concept of ordered liberty. *Palco v. Connecticut*, 302 U.S. 319 (1959). The court has done this in practice by selectively incorporating specific rights embodied in the Bill of Rights. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968). In both *Duncan v. Louisiana* and *Crist v. Bety*, 437 U.S. 28 (1978), the court looked to the historical development of fundamental principles to determine whether or not certain procedural guarantees constituted fundamental rights. Using this analysis, one author has argued *Duncan* compels the incorporation of an eighth amendment right to bail. See Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 354-56 (1982). In *Griswold v. Connecticut*, 381 U.S. 479, *id.* at 486 (1965), the court indicated that the fundamental rights inherent in the concept of ordered liberty are broader than the specified rights appearing in the Bill of Rights. *Id.* One author has argued that the right to bail is within the penumbra of rights emanating from the eighth amendment's preoccupation against excessiveness. See Miller, *Preventive Detention—A Guide to the Eradication of Individual Rights*, 16 How. L.J. 1, 10-12 (1970). *Griswold v. Connecticut* also recognized that there existed fundamental rights that existed simply in the concept of ordered liberty. See 381 U.S. at 486. This language has been used to describe the right to bail. See *Mastrian v. Hedman*, 326 F.2d 708, 710 (1964).

selectively incorporating specific rights embodied in the Bill of Rights into the due process clause of the fourteenth amendment.⁹² As a result, if states were to deny a fundamental right, they would be depriving a person of due process of law guaranteed by the fourteenth amendment.⁹³ This practice of identifying rights as fundamental and protecting those rights against state action through the due process clause of the fourteenth amendment has come to be known as the incorporation doctrine.⁹⁴ As noted earlier, the right to pretrial bail is a liberty interest which may not be deprived by the state without due process of law.⁹⁵ A conclusion that the eighth amendment has been "incorporated" through the fourteenth amendment would mean that the Supreme Court would apply strict scrutiny to any attempt to deny pretrial bail.⁹⁶ Professors Nowak, Rotunda, and Young (hereinafter cited as Nowak) note, "The Supreme Court has applied most of the provisions of the Bill of Rights to the states because it found them to be fundamental to the American system of government and inherent in the concept of ordered liberty under the due process clause."⁹⁷ By way of example, Nowak presupposes that the right to bail is a fundamental right which has been "incorporated" into the due process clause of the fourteenth amendment. Nowak states, ". . . if the State or Federal government were [sic] to deny to a specific class of persons the right to bail upon certain criminal charges, the classification should be analyzed to determine the compatibility of the law with the substantive guarantees of the eighth amendment prohibition of excessive bail."⁹⁸ In essence, Nowak suggests that the denial of bail by the state should be treated as the denial of a fundamental right.

The special treatment afforded pretrial liberty by the Supreme Court has prompted the Second, Third, Fifth and Eighth Circuits to conclude that the eighth amendment bail clause has been incorporated into the fourteenth amendment due process clause.⁹⁹ As a result of this incor-

92. See NOWAK, *supra* note 25, at 376-78, 411-16; TRIBE, AMERICAN CONSTITUTIONAL LAW 567-569 (1978).

93. *Id.*

94. *Id.*

95. See *supra* note 31 and accompanying text.

96. See *supra* notes 25 and 64 and accompanying text.

97. See NOWAK, *supra* note 25, at 524.

98. *Id.* at 674-75.

99. *Sistrunk v. Lyons*, 646 F.2d 64, 66 (3d. Cir. 1981) ("The excessive bail provision of the Eighth Amendment is applicable to states pursuant to the due process clause of the 14th amendment"); *Hunt v. Roth*, 648 F.2d 1148, 1164-65 (8th Cir. 1981), *vacated as moot sub. nom. Murphy v. Hunt*, 50 U.S.L.W. 4264 (U.S. March 2, 1982) (the portion of Article I, section 9 of the Nebraska Constitution denying bail to persons charged with certain sexual offenses violates the eighth amendment of the United States Constitution, as incorporated in the fourteenth amendment."); See *United States ex rel. Goodman v. Kehle*, 456 F.2d 863, 868 (2nd Cir. 1972).

No constitutional distinction exists between requiring excessive bail and denying bail altogether, in absence of legitimate reasons, and thus, under the Eighth Amendment

poration the four circuits maintain that denial of pretrial bail by the states violates a fundamental right protected by the eighth amendment.¹⁰⁰ The Third Circuit held that the eighth amendment had been incorporated in *Sistrunk v. Lyons*.¹⁰¹ In *Sistrunk, Duncan v. Louisiana*¹⁰² was cited for the proposition that when determining whether a right is fundamental, the true inquiry is, "whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . whether it is basic in our system of jurisprudence . . . and whether it is a fundamental right essential to a fair trial."¹⁰³ Application of this test, and a comparison to other fundamental rights led the *Sistrunk* court to the conclusion that the eighth amendment had been incorporated through the due process clause of the fourteenth amendment.¹⁰⁴ Furthermore, denial of bail purely because of the nature of the offense charged has been held to impinge upon this fundamental right to bail.¹⁰⁵

In *Sistrunk* two Supreme Court cases were noted for their recognition of the incorporation of the eighth amendment. The *Sistrunk* court stated, "The Supreme Court has to a considerable extent foreshadowed its position on this important subject by stating in *Schilb v. Kuebel*, (citation omitted), that

'[b]ail, of course is basic to our system of law, (citing cases), and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment.'

. . . [t]he Supreme Court has recently noted that it continues to adhere to this assumption as a fundamental means for protection against deprivations of liberty without due process of law. See *Baker v. McCollum*, (citation omitted)."¹⁰⁶ Incorporation of the eighth amendment was clearly considered a closed question on the part of the *Sistrunk* court. In light of these developments it must be remembered that even courts holding that the right to bail is inherent in our concept of ordered lib-

where bail is fixed, it must not be excessive, and even where bail is not a matter of right, a state court may not deny it arbitrarily or capriciously.

Id.; see also *Henderson v. Dutton*, 397 F.2d 375, 377 (5th Cir. 1968).

100. See generally discussion of incorporation, NOWAK, *supra* note 25, at 376.

101. 646 F.2d 64 (3rd. Cir. 1981).

102. 391 U.S. 145 (1968).

103. *Id.* at 148-149.

104. 646 F.2d at 67-69.

105. See *Hunt v. Roth*, 648 F.2d at 1164-1165 ("Article I, section 9 of the Nebraska Constitution denying bail to persons charged with certain sexual offenses violates the Eighth Amendment as incorporated through the Fourteenth"); NOWAK, *supra* note 25, at 674-675.

106. *Sistrunk v. Lyons*, 646 F.2d at 67; see, NOWAK, *supra* note 25, at 415. "The cruel and unusual punishment clause of the Eighth Amendment has been specifically made applicable to the states by the Supreme Court and the excessive bail provision has been made applicable by implication." *Id.*

erty and protected by the eighth and fourteenth amendments, have acknowledged that pretrial bail could be denied in some instances.¹⁰⁷

Arguably, it is self evident that under certain circumstances protection of society from dangerous individuals does constitute a compelling state interest. Any statutory scheme of incarcerating people prior to a showing of guilt must be subjected to strict scrutiny. To permit otherwise, would make a mockery of both the preferential treatment the Supreme Court has afforded the right to pretrial bail and the presumed innocence of the defendant.¹⁰⁸ If bail were not recognized as a fundamental right, arbitrariness could be introduced into the detention of individuals accused of a crime where the state has yet to carry the burden of proving guilt.¹⁰⁹ Not only is this contrary to our collective understanding of the criminal justice system, it creates a situation where persons who expound unpopular political beliefs could be unfairly singled out for denial of bail.¹¹⁰ Finally, infringement upon the right to pretrial bail in the absence of a compelling state interest would foster distrust and disillusionment with the fairness of the criminal justice system. The obvious solution to these problems would be an express holding by the Supreme Court that pretrial liberty is a fundamental right which is protected against state action by the due process clause of the fourteenth amendment.

C. Fundamental Right to Bail and Legislation

Doubt as to the constitutionality of pretrial preventive detention was reflected in the Bail Reform Act of 1966.¹¹¹ Pretrial release was made mandatory with minimal safeguards to assure attendance at trial, in all noncapital cases.¹¹² Again, detention on the theory that an individual posed a threat to community safety was permitted only after a conviction and where there was no substantial question on appeal.¹¹³ Legislative intent behind the Bail Reform Act indicated congressional uncertainty as to the exact parameters of our traditional right to pretrial bail.¹¹⁴ Reference was made to the Judiciary Act of 1789 which made

107. See *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (1963); *Hunt v. Roth*, 648 F.2d at 1160.

108. See *supra* note 54 and accompanying text.

109. In the absence of review by strict judicial scrutiny the state would only have to show a rational basis for pretrial detention. The amount of discretion given magistrates under the rational basis test could lead to denial of bail for arbitrary reasons, such as, to give the defendant a taste of jail. See Foote, *The Coming Constitutional Crisis in Bail II*, 113 U. PA. L. REV. 1125, 1167-68 (1965).

110. This concern was first voiced in *Carbo v. U.S.*, 82 S. Ct. 662 (Douglas, Circuit Justice 1962).

111. Pub. L. No. 89-465, 80 STAT. 214-16 (codified at 18 U.S.C. §§3146-3151 (1976)).

112. 18 U.S.C. 3146 (1976).

113. *Id.* §3148 (1976).

114. 1966 U.S. CODE AND CONG. & AD. NEWS, Vol. 2 2293, 2295-96.

pretrial bail a matter of right in noncapital cases.¹¹⁵ As a result of the failure of the Supreme Court to place a clear line of demarcation between an individual's right to freedom before trial and the interest of society in preventive detention, Congress limited the act to bail reform.¹¹⁶

In 1969 Senate Bill 2600¹¹⁷ was introduced to Congress in an attempt to institute a statutory scheme for pretrial preventive detention. The proposal was opposed by such notable figures as Senator Sam Ervin, former Attorney General Ramsey Clark, and organizations such as the Bar Association of New York City and the National Bar Association.¹¹⁸ Opposition centered around the belief that fear for community safety was not a legitimate basis for denial of pretrial freedom.¹¹⁹ As a result of this opposition the bill was sent to the Judiciary Committee and no action was taken.¹²⁰

Thus, legislators were mired in a state of uncertainty. Elected representatives became hesitant to enact schemes of pretrial preventive detention because of the confusion surrounding the fundamental nature of the right to bail.¹²¹ As a result of this confusion Congress enacted a statutory scheme for preventive detention in the District of Columbia that by its structure recognized bail as a fundamental right.¹²²

D. Preventive Detention in the District of Columbia

Congress predicted that a pretrial preventive detention scheme would have to pass strict judicial scrutiny when it passed the District of Columbia Court Reform and Criminal Procedure Act of 1970.¹²³ This conclusion is drawn from an analysis of the internal safeguards imposed against complete discretion in the denial of pretrial bail. All criminal violations in the District of Columbia are federal crimes.¹²⁴ In other federal districts most crimes are prosecuted in state courts.¹²⁵ As a result of this distinction Congress chose the District of Columbia as a

115. *Id.*

116. *Id.*

117. S.B. 2600, 91st Cong., 1st Sess. (1969), reprinted in 115 CONG. REC. S 7908-09 (daily ed. July 11, 1969). See generally Comment, *Preventive Detention and the Proposed Amendments to the Bail Reform Act of 1966*, 11 WM. & MARY L. REV. 525 (1970).

118. *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 1187 (1970). See Ervin, *Foreward: Preventive Detention—A Step Backward For Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291 (March 1971).

119. *Id.*

120. See, Kennedy, *supra* note 22, at 429.

121. See *supra* notes 111-120 and accompanying text.

122. See *infra* notes 123-137 and accompanying text.

123. Pub. L. No. 91-358, §210(a), 84 Stat. 644 (codified at D.C. CODE ENCLY. §23-1322 (West Supp. 1970)).

124. See Kennedy, *supra* note 22, at 429.

125. *Id.*

testing ground for the first pretrial preventive detention program in the country.¹²⁶

The District of Columbia statutory scheme permits the federal district court to incarcerate an accused prior to trial if the accused is (1) charged with a dangerous crime and the government certifies that the suspect's *past* and *present* behavior indicates there are no release conditions which will insure the safety of the community;¹²⁷ or (2) if the suspect is charged with a violent crime within the past ten years or has allegedly committed the present crime while on bail or probation;¹²⁸ or (3) if the suspect is charged with any offense and for the purpose of obstructing or attempting to obstruct justice, [he] threatens, injures, intimidates or attempts any of the foregoing with any prospective witness or juror.¹²⁹ This statute further provides there must be a hearing and the magistrate must find there is no combination of release conditions that will ensure the safety of the community.¹³⁰ Finally, if the court orders pretrial detention, the defendant's case must be tried within sixty days.¹³¹ In *Blunt v. United States*,¹³² it was held that this statutory scheme satisfied the requirements of fundamental fairness and did not deprive the defendant of due process. *Blunt*, however, must be contrasted with *Campbell v. McGruder*¹³³ which held that absent a specific constitutional violation, the constitutionality of the District of Columbia scheme for pretrial detention can be measured only by balancing the liberty interests of the pretrial detainee against the need of the state to protect the safety of the community.¹³⁴ The question left to be answered was how much weight should be placed on the liberty interest of an accused awaiting trial. A close analysis of the D.C. scheme supports the logical inference that Congress believed pretrial detention would have to pass strict judicial scrutiny. Sections (1)-(3) place the burden on the state to prove very specific circumstances exist, before bail can be denied. A judge is not given absolute discretion to deny pretrial bail.

Arguably, all three of the instances in which pretrial bail may be denied pose a compelling state interest. These limitations on the ability to deny pretrial bail recognize the special treatment pretrial bail has received from the Supreme Court. Further, detention will not be al-

126. *Id.*

127. D.C. CODE ENCYCL. §23-1322(a)(1) (West Supp. 1970).

128. *Id.* §23-1322(a)(2).

129. *Id.* §23-1322(a)(3).

130. *Id.* §23-1322(b).

131. *Id.* §23-1322(d).

132. *Blunt v. United States*, 322 A.2d 579 (App. D. C. 1974).

133. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

134. *Id.* at 529.

lowed where a combination of bail conditions will serve to protect the community.¹³⁵ The D.C. scheme, thus, requires there be a showing that no less restrictive means are available to protect the community. Where state action does not impinge upon a fundamental right only a rational basis between the means and goal need be shown.¹³⁶ The additional safeguards afforded the right to pretrial bail in the D.C. scheme renders the conclusion that Congress anticipated more than a rational basis would be necessary to deny the right. Before bail may be denied a hearing is required and any order of detention must be accompanied by written findings of fact and the reasons for its entry.¹³⁷ This avoids any arbitrary or capricious decisions, insuring due process protection for the right to bail.¹³⁸

Preventive detention in the District of Columbia provides California with an example of enabling legislation which could be adopted to implement Proposition 4. In the absence of such legislation, however, it is prudent to anticipate the conflicts Proposition 4 will pose to existing case law.

E. Statutory Considerations

Whether or not the circuit courts are correct in concluding that the eighth amendment has been incorporated into the due process clause of the fourteenth amendment, it appears that the Supreme Court will only allow pretrial preventive detention in the most extreme circumstances.¹³⁹ Apart from the eighth amendment, it has been shown that the due process clauses provide protection against deprivation of pretrial liberty.¹⁴⁰ Bail may never be denied solely because of the nature of the crime charged.¹⁴¹ Such a denial would inflict punishment before trial.¹⁴² Protection against pretrial punishment is secured through due process.¹⁴³ Any deprivation of pretrial liberty through the denial of bail is always without due process except to the extent it is necessary to serve an important state interest.¹⁴⁴ Even if an important state interest exists, a court still cannot deny bail in an arbitrary or capricious

135. See *supra* note 130 and accompanying text.

136. See NOWAK, *supra* note 25, at 524.

137. D. C. CODE ENCYCL. §23-1322(b)(3).

138. If there is no requirement that the court identify the reasons for pretrial detention, there will be no sure way of determining the basis for the denial of bail.

139. See *Carbo v. United States*, 82 S. Ct. 662, 668 (Douglas, Circuit Justice 1962), *cert. denied* 369 U.S. 865 (1962); see also *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

140. See *supra* note 31 and accompanying text.

141. See *supra* note 70 and 105 and accompanying text.

142. See *supra* note 54 and accompanying text.

143. See *supra* note 54 and accompanying text.

144. *Duran v. Elrod*, 542 F.2d 998, 1001 (1976).

fashion.¹⁴⁵

A precarious balance has existed since *Stack* between an individual's right to freedom before trial and the interest society has in preventive detention. In the past California has treated pretrial bail as a fundamental right by making it mandatory in all noncapital cases.¹⁴⁶ With the passage of Proposition 4, far greater discretion is placed in the hands of the trial court to deprive an individual of his or her liberty prior to a showing of guilt. If the argument is accepted that pretrial bail exists as a fundamental right, it will be necessary to pass enabling legislation to insure that Proposition 4 passes strict judicial scrutiny. It is strongly recommended that the California Legislature enact a preventive detention scheme based on the one presently operating in the District of Columbia. As the next section will illustrate, adoption of a statutory scheme which recognizes bail as a fundamental right could save preventive detention in California.

PROPOSITION 4

A. Due Process Considerations

Proposition 4¹⁴⁷ provides that bail may be denied in a felony offense involving an act of violence on another person.¹⁴⁸ The court must find that (1) facts are evident or presumption great the accused committed the crime and (2) there is a substantial likelihood the person's release would result in great bodily harm to others.¹⁴⁹ Ordinarily, when persons are charged with a crime they are brought before a magistrate within a reasonable time period and arraigned.¹⁵⁰ In the case of an indigent, counsel is not appointed until the arraignment.¹⁵¹ At the time of the arraignment the court makes a preliminary decision as to bail.¹⁵² Prior to the arraignment no hearing has been held to determine if the facts are evident or presumption great that the accused has committed the offense.¹⁵³ Due to time constraints it is unlikely in the usual case that the District Attorney will have been able to develop evidence of the dangerous propensity of the accused. Therefore, the only fact pro-

145. *See* United States *ex rel* Keating v. Bensinger, 322 F. Supp. 784 (D.D.C. 1971); Goodman v. Kehle, 456 F.2d 863, 868 (2nd Cir. 1972) ("even where bail is not a matter of right a state court may not deny it arbitrarily or capriciously").

146. Cal. Const. Article I Sec. 12.

147. CAL. CONST. art. I, §12.

148. *Id.* §12(b).

149. *Id.*

150. *See* Note, *supra* note 3, at 330-31.

151. B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE 351-55 (1963).

152. *See supra* note 150.

153. Proposition 4 does not expressly provide for a hearing to determine if facts are evident or the presumption great.

bative of the threat the accused passes to the community will be the nature of the offense charged. Proposition 4 does not expressly provide for a bail hearing separate from the arraignment. As a result, a defendant could be denied bail at the arraignment solely because of the nature and circumstances of the offense charged. Failure to set bail because of the nature of the offense charged violates the presumed innocence of the defendant.¹⁵⁴ This would occur because the defendant would be punished for a crime the state has yet to prove he committed. In *Hunt v. Roth*¹⁵⁵ the Eighth Circuit Court operated on the assumption that the eighth amendment had been incorporated, and held that denial of bail based on the nature of the crime charged would impinge upon a fundamental right and deny equal protection.

Even if it is not accepted that pretrial bail is a fundamental right, due process will require a Proposition 4 bail hearing, designed to develop evidence of a dangerous propensity, be held prior to or concurrently with the arraignment.¹⁵⁶ Otherwise, the court may only have evidence of the nature of the crime charged at the time of the arraignment, and the magistrate would be required to grant bail and set it in an amount that was not excessive.¹⁵⁷ Since fear of flight is the only factor to be considered in setting bail, the magistrate would be unable to consider community safety when determining the amount of the bond.¹⁵⁸ Thus, failure to hold a bail hearing prior to or concurrent with the arraignment at which time evidence of dangerous propensity could be developed, would defeat the purpose of preventive detention. For these reasons it is strongly suggested that the Proposition 4 bail hearing be held at the time of arraignment for those defendants who have secured counsel, and within a short period of time after arraignment for defendants who are appointed counsel. In either case defendants should be granted bail if the only evidence available at the time of the hearing is the nature of the crime charged.

It will be incumbent upon the courts and Legislature to define procedural requirements for a hearing. Proposition 4 requires the state to prove by "clear and convincing evidence there is a substantial likelihood that the accused's release would result in great bodily harm to

154. See *supra* note 54 and accompanying text.

155. 648 F.2d 1148 (8th Cir. 1981), vacated as moot sub nom. *Murphy v. Hunt*, 50 U.S.L.W.4264 (U.S. March 2, 1982).

156. See *infra* note 157 and accompanying text.

157. Both Proposition 4 and the eighth amendment provide that once a decision to grant bail has been made, the amount shall not be excessive. *Stack v. Boyle*, 342 U.S. 1 (1951) held that any amount of bail in excess of that required to assure the defendant's appearance at trial is excessive. *Id.* at 5.

158. *Id.*

others.”¹⁵⁹ Clear and convincing evidence has been defined as, “clear, explicit, and unequivocal, so clear as to leave no substantial doubt and sufficiently strong to demand the unhesitating assent of every reasonable mind.”¹⁶⁰ This definite and exact standard of clear and convincing evidence, is only required to show that, there is a substantial likelihood release of that defendant poses a threat to the community. Arguably, it is an anomaly that the court is required to make an unequivocal finding that there is only a probability of danger.

Recognition of the fundamental nature of pretrial bail requires the state to show by clear and convincing evidence that release of the defendant will in fact pose a threat to the community. A lesser standard undermines the great deference the Supreme Court has always afforded the right to pretrial liberty and gives the magistrate the ability to deny bail in the absence of a compelling state interest. Under Proposition 4 the burden to produce clear and convincing evidence of dangerous propensity is placed on the state.¹⁶¹ The issue thus revolves around what standards will be employed to sustain a prediction or finding of dangerous propensity. There exists a clear constitutional standard that once a decision to grant bail is made, any amount higher than that required to secure the appearance of the defendant is excessive.¹⁶² Proposition 4 only requires that the court consider the seriousness of the offense charged, previous criminal record, and probability of appearance, in setting the amount of bail. Practically speaking since fear of flight is the only factor to be considered in setting bail, the court is not required to look at seriousness of the offense charged, previous criminal record or probability of appearance, until after it has determined the accused does not pose a threat to the community. This raises the issue of what standards the courts will use in determining dangerous propensity.

Predicting future human behavior is an insurmountable task even for those who are experts in the field. Therefore, judges who have little expertise in this area are faced with obvious problems. As one leading scholar has stated:

We know almost nothing in criminology about the factors that distinguish those few accused robbers or rapists who will commit a crime on pretrial liberty from the majority of the accused robbers and rapists who will not commit such a crime on pretrial liberty. To imagine that, at a preliminary hearing soon after arrest a judge could make a reliable determination about an accused's future dangerousness when very little data about the accused will then be available to him,

159. CAL. CONST. art I, §12.

160. *People v. Carruso*, 68 Cal. 2d 183, 190, 436 P.2d 336, 341, 65 Cal. Rptr. 336, 341 (1967).

161. *See supra* note 2.

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

and we do not know what that little data means anyway, it seems to me is to indulge in pure fantasy.¹⁶³

Another scholar has stated:

Unless something more precise than bad reputation and bad prospects¹⁶⁴ is required probably a majority of all defendants would be detainable and the decision from among this group of whom to detain and whom to free would turn not on legal standards relevant to the state's legitimate objective but rather on the vagaries of judicial temperament or the masking of illicit objectives, for example to give the defendant a taste of jail.¹⁶⁵

At the present time, the ability to predict human behavior has not been reduced to an exact science. At the very least previous criminal record and evidence of prior offenses committed on bail should be considered in determining dangerous propensity. Failure to require these factors be considered before denying bail evidences the shallow underpinnings of Proposition 4, and increases the likelihood bail will be denied when there is no real threat posed to the safety of the community in general or victims and witnesses in particular.

B. Witness and Victim Intimidation

Witness and victim intimidation by one accused of a crime is another situation contemplated by Proposition 4. Subsection (c) permits preventive detention in violent or non-violent felonies where there is clear and convincing evidence the accused has threatened another and a substantial likelihood the threat will be carried out. Again, Proposition 4 will allow denial of pretrial bail where there is only a substantial likelihood that danger exists. In light of *Carbo v. United States*¹⁶⁶ the ability of a court to deny bail in this situation must be questioned. *Carbo* cautioned that, "keeping a defendant in custody during the trial to 'render fruitless' any attempt to interfere with witnesses or jurors may, in the extreme or unusual case, justify denial of bail."¹⁶⁷ A showing of

163. See Comment, *supra* note 51, at 844.

164. The court in *Carbo v. U.S.*, 82 S. Ct. 662, 665 (Douglas, Circuit Justice 1962) cautioned that bail is not to be denied merely because of the community's sentiment against the accused nor because of an evil reputation.

165. See FOOTE, *supra* note 109, at 1167-68; Comment, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1493 (1966) ("Present system provides little protection for the accused who is thought to be dangerous. He is subject to an inevitably hurried, unscientific and unreviewable conjecture by prosecutors and magistrates about his proclivities for crime."). *Sellers v. U.S.*, 89 S. Ct. 36, 38 (Black, Circuit Justice 1968).

Idea that it would be "dangerous" in general to allow applicant to be at large must—if it is ever a justifiable ground for denying bail as distinguished from separate proceeding for bond to keep the peace—relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep applicant in jail.

166. 82 S. Ct. 662 (Douglas, Circuit Justice 1962).

167. 82 S. Ct. at 668.

substantial likelihood falls short of constituting an extreme or unusual case because bail can be denied when there is only a probability a witness or victim will be intimidated. Pursuant to the *Carbo* standard, bail should not be denied under Proposition 4 unless there is clear and convincing evidence the defendant will in fact pose a threat to a victim or witness if released prior to trial. A mere showing of substantial likelihood would emasculate the standard that bail only be denied in an extreme or unusual case. Further, absent a requirement that reasons for denial of bail be stated in writing, it is highly unlikely an appellate court reviewing the denial will be able to determine if even a substantial likelihood did in fact exist.

C. Written Statement of Reasons

Another serious deficiency of Proposition 4 obviously is the failure to require a written statement of reasons for denial of pretrial bail. Due process requires that pretrial bail never be denied in an arbitrary or capricious fashion.¹⁶⁸ This due process consideration has led one federal court which recognizes the binding nature of the eighth amendment on the states to hold, "[t]hat the state court's failure to provide any basis for its decision to deny pretrial bail creates a presumption of arbitrariness."¹⁶⁹ For example, the District of Columbia scheme requires that an order of pretrial detention be accompanied by written findings of fact and the reason for its entry.¹⁷⁰ Even with the safeguard of a written statement, certain scholars who adhere to the notion that bail is a fundamental right, believe the District of Columbia scheme still violates due process.¹⁷¹ At the very least failure to provide a written statement of reasons for denial of pretrial bail hinders an appellate court in the task of determining whether the denial was arbitrary or capricious. If strict scrutiny is applied by an appellate court reviewing a denial of bail, a written statement of reasons will be vital to the determination of whether denial was based on a compelling state interest. In contrast, even where there is a presumption of regularity in the denial of bail after conviction pending appeal, courts have held, "it is undoubtedly advisable that the court state the reasons for denial in a separate document or in a clearly identifiable place in the record."¹⁷² This suggestion is made in order to insure that bail after conviction pending appeal not be denied arbitrarily or unreasonably.

168. See *supra* note 145 and accompanying text.

169. *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784, 787 (1971).

170. D. C. CODE ENCYCL. §23-1322(b)(3).

171. See *supra* note 118 and accompanying text.

172. See *Finetti v. Harris*, 609 F.2d 599-600 (1979).

In an attempt to protect against an arbitrary denial of pretrial bail, especially where no specific standards for a finding of dangerous propensity are proposed by Proposition 4, it is strongly recommended that a written statement of reasons be prepared to accompany an order of detention. The written statement would serve both the purpose of rebutting any presumption of arbitrariness and provide a basis for an appellate court to determine whether a compelling state interest exists. As a result of this written statement, a state would better insure that a truly dangerous individual could be denied pretrial liberty in a constitutional manner. In the absence of a written statement the same truly dangerous individual could be released because of the failure of a detention order to survive strict scrutiny.

The foregoing section has illustrated situations in which the operation of Proposition 4 could deny an accused the exercise of a fundamental right and due process of law. Another consideration is whether or not the denial of pretrial bail will deprive an accused equal protection of the law.

D. Equal Protection

As previously noted certain courts and commentators have adopted the theory that an eighth amendment right to bail has been incorporated into the due process clause of the fourteenth amendment.¹⁷³ This has resulted in the presumed existence of a fundamental right to pretrial bail.¹⁷⁴ Nowak notes in the treatise on constitutional law, that if the fundamental right to bail, protected against state action by the substantive guarantees of the eighth amendment, were to be denied to a class of persons, this would deprive the class equal protection of the law.¹⁷⁵ Thus, if all persons accused of a sex crime were to be denied the fundamental right to pretrial bail, by a state, they would be denied equal protection of the law.¹⁷⁶ Denial of equal protection by the states is subjected to strict judicial scrutiny when fundamental rights are impinged or a suspect class discriminated against.¹⁷⁷ Strict scrutiny requires the state to carry the burden of showing there is a compelling interest for denying pretrial liberty and no less restrictive means available to accomplish this end.¹⁷⁸ Since Proposition 4 attempts to deny bail to a class of persons charged with a felony involving a violent act,

173. See *supra* note 99 and accompanying text; *infra* note 176 and accompanying text.

174. See *supra* note 106 and accompanying text.

175. See NOWAK, *supra* note 25, at 675.

176. *Id.*

177. See *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also Nowak, *supra* note 25 at 524-25.

178. *Id.*

while admitting to bail individuals accused of nonviolent felonies, there is a possibility it may deny equal protection of the law. Further, once subjected to an equal protection analysis, Proposition 4 poses a critical problem. A literal reading of the proposition gives the committing magistrate complete discretion to release any defendant on his or her own recognizance while detaining others. Thus, persons in a similar situation can be treated in a dissimilar fashion.

There is no conditional language surrounding the court's ability to grant an own recognizance release. The only mandatory wording in Proposition 4 is that "[a] person shall be released on bail by sufficient sureties." Denial of bail is subjugated to the preceding clause. Therefore, a plain reading of Proposition 4 indicates that the ability to deny bail for dangerous propensity is permissive, not mandatory. In effect Proposition 4 would allow the judge to release a defendant on his or her own recognizance even after presentation of clear and convincing evidence that there is a substantial likelihood he or she will pose a threat to the community. As a result, an individual accused of rape in Los Angeles with two prior convictions for rape while released on bail could be deprived of pretrial liberty, while one accused of rape with the same prior convictions in Sacramento could be released on his or her own recognizance. Although this is an extreme example, Proposition 4 provides no internal safeguard against this type of discriminatory treatment. Despite the fact that Proposition 4 can, as the foregoing example illustrates, be exercised in a discriminatory fashion, the Proposition on its face appears to be neutral. This was also the case in *Yick Wo v. Hopkins*.¹⁷⁹ In *Yick Wo* the Supreme Court held that state action which is nondiscriminatory by its terms may constitute a de jure violation of equal protection if it is intentionally or purposefully applied in a discriminatory manner. Even though *Yick Wo* dealt with discrimination on the basis of a suspect classification, the same analysis would apply where the state impinges on a fundamental right.¹⁸⁰ Pursuant to *Yick Wo*, if a court were to deny the fundamental right to bail for one accused of rape with two priors in one county, and grant own recognizance release to an accused in an identical situation in another county, an equal protection challenge could be reasonably anticipated. In order to protect against this type of challenge a written statement of reasons should be required even if an accused is released on his or her own recognizance after a bail hearing. Under no circumstances should an own recognizance release be granted where there is a substantial likelihood of a threat to the community. Not only would own recognizance

179. 118 U.S. 356 (1886).

180. See NOWAK, *supra* note 25, at 524-525.

release, when there is a showing of dangerous propensity, defeat the legitimate purpose of preventive detention, such release could also result in a possible ruling by the United States Supreme Court that Proposition 4 on its face and in its application denies equal protection of the law. Failure to consider alternatives to preventive detention, further increases the likelihood that Proposition 4 will be found unconstitutional.

E. Less Restrictive Means

As noted earlier, when state action impinges on the exercise of a fundamental right, or denies equal protection of the law to a suspect class courts will apply strict judicial scrutiny.¹⁸¹ Strict scrutiny requires the state to prove the action is in furtherance of a compelling state interest and there are no less restrictive alternatives available to achieve the purpose.¹⁸² The theory has been proposed that protecting society from violent individuals is a compelling state interest.¹⁸³ Preventive detention presupposes that the way to protect society is to detain those accused of a violent crime prior to trial.¹⁸⁴ Presuming there is a fundamental right to pretrial bail, the burden is still on the state to prove there are no means less restrictive than denial of an accused's pretrial liberty, available to protect the community from a dangerous individual. Recognition of the need to consider alternatives is included in the District of Columbia scheme of preventive detention. The District of Columbia scheme requires the written statement to include a showing that no condition or combination of conditions of release could protect jurors, witnesses, or the community at large.¹⁸⁵ Proposition 4 does not provide for the same considerations. Subsection (b) of Proposition 4 only requires a finding of a substantial likelihood of danger. No further showing is necessary to justify a denial of pretrial liberty. The failure of Proposition 4 to require consideration of less restrictive alternatives than preventive detention ignores the fundamental nature of pretrial liberty. Consideration of alternatives to detention may allow courts to protect the community without breaching the trust our forefathers reposed in them to protect our basic liberties. For example, the District of Columbia scheme proposes certain conditions of bail that could be imposed. Section 23-1321 of the District of Columbia statute requires a court to consider the following alternatives:

181. See *supra* note 64.

182. *Id.*

183. See *supra* notes 107 & 108 and accompanying text.

184. See *generally supra* note 2.

185. D. C. CODE ENCYCL. 23-1322(b)(3).

"(1) Place the accused in the custody of a designated person or organization agreeing to supervise him. (2) Place restrictions on the travel, association or place of abode during the period of release. . . . (5) Impose any other condition, including a condition requiring that the person return to custody after specified hours of release for employment or other limited purposes." At the very least it is strongly recommended California courts consider the foregoing conditions of release before denying bail. By requiring conditions of release, courts could adequately protect the safety of the community, while still giving deference to the fundamental nature of pretrial liberty.

Assembly Bill 2685,¹⁸⁶ recently introduced in the California assembly, would grant counties money to construct facilities which will provide protection for witnesses and jurors during a trial. Proposition 4 allows the court to deny bail where there is only a substantial likelihood an accused will pose a threat to victims or witnesses. Whatever amount of proof substantial likelihood does in fact constitute, the fundamental nature of pretrial liberty requires that denial of bail be balanced against the ability of the police and state agencies to provide protection.¹⁸⁷ An opportunity to prepare an adequate defense through release on pretrial bail may outweigh the slight inconvenience police protection would pose for victims and witnesses.¹⁸⁸ In observance of the recognition by the Supreme Court that there is a presumed right to pretrial bail,¹⁸⁹ and the consistent holding that bail is basic to our system of law,¹⁹⁰ absent clear and convincing evidence an accused will pose a threat to witnesses or victims while on bail, courts should consider the conditions of release proposed by the District of Columbia scheme and the protection provided by Assembly Bill 2685. Consideration of the foregoing alternatives would support a denial of pretrial bail subjected to strict scrutiny by demonstrating that no terms of release would protect the community. Accordingly, in order to protect a denial

186. Cal. Stats. 1982, c. 1097, §2, at — (amending CAL. PEN. CODE §14101).

187. See *Campbell v. McGruder*, 580 F.2d 521, 528-29 (D.C. Cir. 1978). The constitutionality of pretrial preventive detention can be measured only by balancing the liberty interests of the pretrial detainee against the need of the state to protect the safety of the community.

188. See *Cobb v. Ayitch*, 643 F.2d 946, 958 (1981). The court stated that the "Sixth Amendment's speedy trial clause, which was derived from most ancient guarantees of fundamental rights, prevents lengthy periods of detention that unnecessarily interfere with those liberty interests enjoyed by the accused." *Id.* This case would support the theory that the eighth amendment bail clause evidences a constitutional intent to assure a fair trial. See Note, *supra* note 3, at 357. "Pretrial liberty permits defendant to prepare an adequate defense." See Hruska, *supra* note 3, at 184. Preparation of an adequate defense can be inhibited purely as a result of the incarceration. It has been argued that the pretrial liberty improves the accused's chances of receiving a fair trial by removing the psychological pressure of incarceration which manifests itself in uncooperative courtroom behavior. See FREED, *supra* note 4, at 46.

189. See *supra* note 106 and accompanying text.

190. See *supra* notes 62-71 and accompanying text.

of bail against reversal under strict scrutiny, the court denying bail should include a written statement recognizing that conditions of release were considered and a brief statement why the conditions were deemed unsatisfactory. This consideration of alternatives to preventive detention could insure that denial of bail in the face of a real threat to the community could survive strict judicial scrutiny.

Serious questions concerning the constitutionality of Proposition 4 have been raised in this comment. As a result, consideration must be given to the possibility that Proposition 4 could be ruled unconstitutional, and preventive detention placed in jeopardy.

PREVENTIVE DETENTION AND PROPOSITION 8

A. Possible Developments

Proposition 4 stands on precarious constitutional ground. The possibility that it may be declared unconstitutional by the United States Supreme Court must be considered. In the event of such a decision, the Public Safety Bill provision of Proposition 8,¹⁹¹ which also received an affirmative vote in the June 1982 election, would become law.¹⁹² The bail provision of Proposition 8 makes public safety the primary consideration when setting, reducing, or denying bail. Consideration of public safety when determining the amount of bail would violate the Supreme Court's holding that bail set in an amount higher than that required to insure attendance at trial would be excessive.¹⁹³ Therefore, if the public's safety was considered when setting bail for an individual determined to pose a danger to the community, bail set at an amount

191. The Public Safety Bail Clause of Proposition 8 reads,

(e) *Public Safety Bail.*

A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing, or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

192. See CAL. CONST. art. II, §10(b). Due to the fact Prop. 4 received a larger affirmative vote it is law. If Prop. 4 is declared unconstitutional, the bail section of Prop. 8 goes into effect.

193. Bail may only be set in an amount designed to assure defendant's appearance at trial. Bail may not be set in an amount designed to prevent release and protect the community. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

designed to prevent release would be considered excessive.¹⁹⁴ Both Proposition 4 and the eighth amendment, held by certain courts to be applicable to the states, prohibit excessive bail. In order to overcome this problem, legislation is needed to expressly limit consideration of public safety to the decision whether to grant or deny bail. Otherwise, bail set in an amount designed to protect the public by making it impossible for the accused to secure a money bond would violate established case law and the excessive bail clause.

In addition to the problem of excessiveness, consideration of public safety when setting the amount of bail also presents an equal protection problem. In the case of *In Re Antazo*¹⁹⁵ the California Supreme Court held that denial of bail on the basis of indigency constituted invidious discrimination on the basis of wealth in violation of the equal protection clause of the fourteenth amendment. The problem resulted from the fact that wealthy individuals could attain pretrial liberty by securing a money bond. Indigents accused of the same crime would be denied pretrial liberty purely on the basis of poverty. *Antazo* made poverty a suspect classification so that the state had to show a compelling interest for depriving the pretrial liberty of indigents while allowing wealthy defendants to make bail.¹⁹⁶ To remedy this problem legislation was passed allowing indigents who could not afford a money bond release on their own recognizance.¹⁹⁷ This resolved the equal protection problem. Consideration of public safety when setting the amount of bail recreates the problem which existed before *Antazo*. Proposition 8 precludes own recognizance release when there is a finding of dangerous propensity. Therefore, if a defendant were considered to pose a threat to the community, and bail was set in a high amount to prevent release, a wealthy defendant may still be able to secure a money bond while an indigent would be denied pretrial freedom. Since Proposition 8 prevents own recognizance release when there is a showing of dangerous propensity, the amount of money one had would again determine the likelihood of pretrial release. In light of *Antazo* a strong argument exists that consideration of public safety in setting the amount of bail, when no right to own recognizance release exists, would violate equal protection. By way of contrast, it should be noted that the District of Columbia scheme avoids these problems by expressly providing, "no financial conditions may be imposed to assure the safety of any other person or the community."¹⁹⁸ It is strongly rec-

194. *Id.*

195. 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

196. *Id.*; see Comment, *supra* note 6, at 848-49.

197. CAL. PENAL CODE §§1318, 1318.1.

198. D. C. CODE ENCYCL. 23-1321(a)(5).

commended that in the event the bail provision of Proposition 8 becomes law, legislation should be passed limiting consideration of public safety to the decision whether to grant or deny bail.

Another easily identifiable problem with Proposition 8 is the use of language referring to detention for a serious felony. The theory has been proposed that there is a compelling interest in protecting society from dangerous individuals. Where a serious nonviolent felony has been charged, a different situation is presented.

In *Sellers v. United States*,¹⁹⁹ the Supreme Court drew a distinction between crimes of a serious nature and those involving physical violence. Pending appeal after conviction, the Supreme Court held that bail could never be denied in the case of a nonviolent serious felony when there was a substantial question to be resolved. In light of *Sellers* the charges of a serious felony not involving physical violence should never be a factor in the decision to deny bail or own recognizance release. The use of this language in Proposition 8 requires legislation limiting preventive detention to situations where an accused poses a threat of violence to the community. Otherwise, Justice Douglas' fear expressed in *Carbo* that preventive detention could be used to discriminate against those accused of serious political crimes or merely held in contempt by society could be realized.

CONCLUSION

The theory has been proposed that there exists in our concept of ordered liberty a fundamental right to pretrial freedom.²⁰⁰ More importantly though, pretrial liberty results from the popular belief of the American people that an accused is presumed innocent until proven guilty. In large part the legitimacy of our criminal justice system rests on this assumption. Now that the political climate is changing and pretrial liberty is being threatened by the states, it is time for the Supreme Court to give substance to its implication that the eighth amendment has been incorporated into the due process clause of the fourteenth amendment.²⁰¹ An express holding that pretrial bail is a fundamental right would not totally forbid preventive detention. States would merely be required to enact statutory schemes similar to the one presently operating in the District of Columbia. For this reason, it is strongly recommended that the California Legislature pass a preventive detention scheme patterned after the District of Columbia scheme

199. *Sellers v. United States*, 89 S. Ct. 36, 38 (Black, Circuit Justice 1968).

200. See *supra* notes 91-107 and accompanying text.

201. For concurring opinions see generally Tribe, *supra* note 31, and Note, *supra* note 3.

to serve as an enabling statute for Proposition 4. Legislative action in this area could save Proposition 4 from being declared unconstitutional.

Proposition 4 reflects a consensus that the community has a right to be protected from dangerous individuals awaiting trial. Conservatorship proceedings also support this position.²⁰² Absent adequate standards for predicting dangerous propensity, judges will be forced to make a determination based on the nature of the crime charged. This type of detention would constitute punishment for an offense alleged before a showing of guilt.²⁰³ An accused would be forced to shoulder a sentence purely on the basis of an accusation.²⁰⁴ Not only is this constitutionally suspect, but in a practical sense it impedes the ability of the accused to prepare an adequate defense or receive a fair trial.²⁰⁵

The theory has not been proposed that an absolute right to pretrial liberty exists; merely that the right should not be deprived without a compelling state interest and proof that there are no less restrictive alternatives available. It is strongly recommended that the legislature to adopt a statutory scheme for preventive detention modeled after the one which exists in the District of Columbia. As shown by the foregoing analysis the District of Columbia scheme is effective in safeguarding basic liberties. In the absence of legislative action it will be incumbent upon the trial judge to afford greater due process protection than that which is provided for in Proposition 4. A written statement which includes reasons for rejecting proposed conditions of release would protect against reversal on appeal.

The United States Constitution was designed to protect our basic liberties against the popular will of the people. Safety in the community is an important concern which must be balanced against the right to pretrial liberty. If Proposition 4 achieves this balance through the enactment of legislation, a scheme of preventive detention can exist which respects the fundamental nature of pretrial liberty.

David Mark Parker

202. See CAL. PROB. CODE §2350.

203. See *supra* notes 91-106 and accompanying text.

204. *Id.*

205. See *supra* note 188 and accompanying text.