Forcible Rape and the Right to Bail

Kathy M. Pisula

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FORCIBLE RAPE AND THE RIGHT TO BAIL

California courts are powerless to deny bail in forcible rape cases. Article I, section 12 of the California Constitution mandates that those charged with a non-capital offense must be granted bail as a matter of right. Moreover, in In re Underwood the California Supreme Court held that bail may not be denied to protect the public. Despite the validity of the court’s position, the interests of society are underprotected with regard to the crime of forcible rape. A constitutional amendment denying the right to bail to those accused of forcible rape when “the proof is evident or the presumption great” is needed. Although such an amendment may be susceptible to constitutional attack, an analysis of the United States Constitution reveals that there is no constitutional roadblock to such an amendment.

INTRODUCTION

In Washington, D.C., a defendant was arrested for forcible rape. While free on $1,000 bail, he committed a burglary and was released on $1,500 bail. While on bail for both offenses, he again committed forcible rape—this time on a 15-year-old girl.1

Both rape2 and bail3 are of ancient origin. Traditional views of rape reflect a society concerned with the protection of a man’s right to the exclusive sexual possession of a woman, rather than with the protection of a woman from sexual assault. A re-examination of sexual roles has resulted in shifting the focus of these views to accommodate a changing view of women in society.4

2. Rape is mentioned in the first book of the Bible, which recounts the rape of Jacob’s virgin daughter Dinah. Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 2 n.2 (1977).
4. Ireland, Reform Rape Legislation: A New Standard of Sexual Responsibility, 49 U. Colo. L. Rev. 185, 185 nn.2 & 3 (1977). See also K. Millett, Sexual Politics 70 (1971) (“Traditionally rape has been viewed as an offense one man commits against another—a matter of abusing his woman.”).
Forcible rape is beginning to be recognized as a heinous crime committed not by one whose primary motive is sexual gratification, but rather by one disposed to violence and seeking to inflict violence and harm upon the victim. Recently, the Nebraska Supreme Court rejected the notion that rape is not a serious crime: "Next to murder there is [no crime] which ranks higher." Recently, the Nebraska Supreme Court upheld the amendment in Parker v. Roth and the United States Supreme Court declined to review the case. By leaving the Nebraska law in operation, the United States Supreme Court left other states free to follow Nebraska's lead.

On November 7, 1978, the citizens of Nebraska approved a constitutional amendment denying bail to those accused of forcible rape. The Nebraska Supreme Court rejected the notion that rape is not a serious crime: "Next to murder there is [no crime] which ranks higher." On November 7, 1978, the citizens of Nebraska approved a constitutional amendment denying bail to those accused of forcible rape. The Nebraska Supreme Court upheld the amendment in Parker v. Roth and the United States Supreme Court declined to review the case. By leaving the Nebraska law in operation, the United States Supreme Court left other states free to follow Nebraska's lead.

Under current California law, a defendant in a criminal action is entitled to be released on bail as a matter of right, unless he is charged with a capital crime. This right is guaranteed by article I, section 12 of the California constitution. Because rape is not punishable by death in California, it is not included in the capita.
tal crime exception to the right to bail. Therefore, California courts are powerless to deny bail in forcible rape cases.

Nonetheless, there is a legitimate concern for the safety of the community when a defendant who has been charged with forcible rape is free on bail. Because the courts are not constitutionally free to deny bail in forcible rape cases, the only viable alternative is a constitutional amendment. This amendment would not deny bail in every case where an individual is charged with forcible rape. Bail could only be denied after showing either that the proof of the charge was evident or that the presumption was great that the crime was committed. An unsubstantiated charge would not result in incarceration. Such an amendment is susceptible to attack on three major constitutional grounds: the eighth amendment prohibition against excessive bail, the equal protection clause of the fourteenth amendment, and the presumption of innocence guaranteed by the due process clause of the fourteenth amendment. This Comment will illustrate that such an amendment does not violate any constitutional provision. The people of California have the power to deny bail to those accused of forcible rape.14

THE CRIME OF FORCIBLE RAPE

The increasing number of rapes in this country15 and the inher-

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Offenses</th>
<th>Rate per 100,000 Inhabitants</th>
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<tbody>
<tr>
<td>1960</td>
<td>17,190</td>
<td>9.6</td>
</tr>
<tr>
<td>1961</td>
<td>17,220</td>
<td>9.4</td>
</tr>
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</table>

14. This Comment is concerned with the right to bail pending trial and conviction. For a discussion of the right to bail pending appeal, see Scott & Wedner, Stated Discretion and Bail Pending Appeal: Judicial Silence May No Longer Be Golden, 8 SW. U.L. REV. 810 (1976); Comment, Post-Conviction Criminal Rights: Parole and Probation Revocation and Bail, 8 CREIGHTON L. REV. 682 (1974-75).

ent gravity of the crime demand that its elimination be given increased attention.

The problem of rape is rapidly approaching epidemic proportions. Legislators have a unique opportunity and a pressing responsibility; immediate legal reform [is needed] to prevent the rape epidemic before it happens. Legislators have the power that no single concerned citizen, and no women's organization has the power to say to an entire class of potential criminal offenders that violence in the form of sexual assault is not only anti-social but also will result in certain punishment. Without prompt action on this crisis hundreds of people will be assaulted while the assaulters continue. This certainly far outweighs the uncertain benefits of more years of deliberation.16

Statements like this represent the growing recognition that rape is a critical problem in our society. Recently there has been an extensive review of the law concerning the crime of rape.17 Virtually every state has considered revising its rape statutes. The changes include formulating a new definition of rape,18 revising

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
<th>Rate</th>
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</thead>
<tbody>
<tr>
<td>1962</td>
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<tr>
<td>1963</td>
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<td>21,420</td>
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<td>1971</td>
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<tr>
<td>1978</td>
<td>67,131</td>
<td>30.8</td>
</tr>
<tr>
<td>1979</td>
<td>75,989</td>
<td>34.5</td>
</tr>
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The number of forcible rapes reported in 1979 represented an increase of 100% from 1970. Id. at 13. In addition, victimization studies indicate that rape is one of the most underreported of all major crimes. The ratio of reported to unreported rapes is estimated anywhere from one in three to one in five. 2 National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Dep't of Justice, Forceible Rape 3 (1978) [hereinafter cited as Forceible Rape]. If the actual number of rapes is conservatively estimated to be four times the reported number, almost one third of a million rapes were committed in 1979. This means that in 1979 one in every 330 women in the United States was sexually assaulted. See id. at 3.


evidentiary requirements,\textsuperscript{19} and making the provision of services to victims mandatory.\textsuperscript{20}

The crime of rape is traumatic and dehumanizing. At the very least, the victim of a rape is subjected to an extremely personal intrusion upon her body. Frequently the victim is treated brutally by the attacker and suffers substantial physical injuries.\textsuperscript{21} In \textit{Coker v. Georgia}\textsuperscript{22} the United States Supreme Court commented on the crime of rape:

It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.\textsuperscript{23}

Some victims are so badly injured physically and/or psychologically that their lives are beyond repair. The long-range effect upon the life and health of a rape victim is impossible to measure. Rape is not a mere physical attack; it is extremely destructive of the human personality.\textsuperscript{24} As Chief Justice Burger stated in \textit{Coker}, "Victims may recover from the physical damage of knife or bullet wounds or beatings with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery."\textsuperscript{25}

Justifiably, the focus of societal concern has been the rape victim. As a result, however, information on rape offenders is far


\textsuperscript{20} For a discussion of this issue, see Abarbanel, \textit{Helping Victims of Rape}, 21 SOC. WORK 478 (1976); McCombie, Bossuk, Savitz & Pell, \textit{Development of a Medical Center Rape Crisis Intervention Program}, 133 AM. J. PSYCH. 418 (1976).


\textsuperscript{22} 433 U.S. 584 (1977).

\textsuperscript{23} Id. at 597-98.


from extensive. Only recently has it been recognized that the primary motive for forcible rape is a desire to inflict humiliation, violence, and harm upon the victim. It is not a desire for sexual gratification. Rape is not the result of an uncontrollable sexual urge that is spontaneously released. A person who has committed such a violent, psychologically motivated crime is capable of committing a similar crime while free on bail.

Those charged with forcible rape pose a significant threat to society and to their victims. They should not be released on bail pending trial. Members of the community, as well as a criminal defendant, have a constitutional right to life and liberty and should not have to sacrifice their lives or safety as a price of granting bail to a dangerous rapist prior to trial.

**FUNDAMENTAL APPROACHES TO BAIL IN THE UNITED STATES**

The decision to deny bail to one accused of forcible rape is determined by the state’s view of the purpose of bail. Although bail is mentioned in the constitutions of all fifty states, each state’s conception of the purpose of bail is not the same. An examination

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26. The only extensive study on the profile of sex offenders is M. Amir, Patterns in Forcible Rape (1971).


28. In 1976 the Battelle Law & Justice Study Center conducted interviews with a group of convicted rapists. The 50 rapists who were interviewed were patients at Atascadero State Hospital. An examination of the arrest histories of these 50 individuals was also undertaken. These 50 rapists demonstrated a wide range of previous criminal activity. The official records listed a total of 142 rape convictions or arrests among the group. The 50 rapists also admitted to 69 additional rapes for which they had not been caught. Three-quarters of the men had at least one previous arrest for robbery or assault; five had been arrested for homicide and three convicted of rape/homicide. Although the group is not representative of the entire rapist population, their history of violent crimes is striking. Even more striking, however, is the repetitiveness of the criminal acts. National Institute of Law Enforcement and Criminal Justice, U.S. Dep’t of Justice, Forcible Rape—Final Project Report 11 (1978). See also text accompanying notes 145-50 infra.

In addition, increased bail reforms and court delays have apparently caused an increase in the number of crimes committed by defendants between the time they are arrested and the time they come to trial. This is because of the fact that more defendants are free for a longer time pending disposition of their cases. Portman, “To Detain or Not to Detain?—A Review of the Background, Current Proposals, and Debate on Preventive Detention, 10 Santa Clara Law. 224, 226 (1970).

of each state's bail system reveals that bail has two basic purposes—to compel a defendant's presence at trial and to protect the safety of the community. The traditional and most prevalent purpose for bail is to compel a defendant's appearance at trial by the use of economic pressure. This use of bail reconciles the societal interest in assuring that the accused will appear for trial and submit to the judgment of the court, with the defendant's interest in avoiding any premature and perhaps unjustifiable punishment. Bail assures the orderly progression of the criminal proceeding while it minimizes interference with individual freedom.

California's constitutional provision is typical of those states


Two state constitutions grant a right to bail unless the defendant is accused of murder or treason: Del. CONST. art. I, § 17; Ore. CONST. art. I, § 14.

The Nebraska constitution grants a right to bail unless the defendant is accused of murder, treason, or forcible rape: Neb. CONST. art. I, § 9.

Three state constitutions grant a right to bail unless the defendant is charged with a capital offense or an offense punishable by life imprisonment: Fla. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15.

The Texas constitution grants a right to bail except in capital cases in certain instances, or where the defendant has twice been previously convicted of a non-capital felony, is accused of committing a non-capital felony while free on bail for a prior felony, or is accused of a non-capital felony involving the use of a deadly weapon after being convicted of a prior felony: Tex. CONST. art. I, §§ 11, 11(a).

The Utah constitution grants a right to bail except in capital cases in certain instances or where the defendant is accused of the commission of a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge: Utah CONST. art. I, § 8.

The Michigan constitution grants a right to bail unless the defendant has certain specified previous convictions, or has committed a felony while on bail, pending the disposition of a prior violent felony charge, or while on probation or parole as a result of a prior conviction for a violent felony: Mich. CONST. art. I, § 15.

The Maine constitution is unique: Me. CONST. art. I, § 10:

No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.

The nine remaining states have no right to bail provision but do have a counterpart of the eighth amendment to the United States Constitution prohibiting excessive bail.


that adhere to this purpose: "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great." Although this provision does not provide an absolute right to bail in all cases, "[t]he underlying motive for denying bail in . . . capital cases is to assure the accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his . . . property, the framers of the Constitution obviously reacted to man's undoubted urge to prefer the latter." Therefore, the denial of bail in capital cases is in accord with the assurance-type statutes.

The Bail Reform Act of 1966, which governs federal bail law, is also an assurance-type statute. A person charged with a non-capital offense should be admitted to bail, while in capital cases the judge has discretion to deny bail. The legislative declaration of purpose expressly disclaims any intent to adopt a system whereby bail could be denied on the basis of danger to the community.

A far less accepted purpose of bail is that of protecting society from further criminal activity by the defendant while he awaits trial. The practice of denying bail to the dangerous is termed

33. CAL. CONST. art. I, § 12.

This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pretrial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence.

For the argument that an inherent extra-statutory judicial power still exists to deny bail under the Bail Reform Act of 1966, see Note, United States v. Bigelow: Inherent Extra-Statutory Judicial Power to Deny Bail, 1977 DET. C.L. REV. 875. The author concludes that bail can be denied in a non-capital case where the denial is not a form of punishment for unproved crimes and where it would be irresponsible to release the defendant. Id. at 884.


It is interesting to note that even in those jurisdictions that maintain that the sole purpose of bail is to deter the flight of the defendant, there is a discrepancy between theoretical application and actual practice. Preventive detention exists in a sub rosa form in the common practice of setting extremely high bail for persons thought to be a danger to the community, regardless of a lack of evidence indicating a likelihood of flight. U.S. DEP'T OF JUSTICE, PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 149-219 (1965).

See also AMERICAN BAR ASSOCIATION, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO PRETRIAL RELEASE 6 (1968):

[I]t is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release. . . . So-called preventive detention should be dealt
preventive detention. The practice of preventive detention has given rise to a great deal of controversy. Some people have attacked it as unconstitutional, as representing a sharp break with our legal tradition, and as historically wrong. Others see no constitutional violation because the right to bail is a statutory right. A decision to amend California's constitution so as to allow denial of bail if the defendant is accused of forcible rape necessarily involves this controversy over preventive detention. Arguably, an accused should be detained when it appears likely he will flee or commit other crimes while out on bail. Those states whose only concern is for the rights of the accused can be criticized as ignoring society's interest in protecting itself against dangerous criminals.

**California's Approach to Bail**

California's bail scheme does not provide for a system of preventive detention. Imposing a preference for the rights of the accused, California has an assurance-type system which is mandated by article I, section 12 of the California constitution. The Penal Code implements this constitutional mandate. Under

with openly and on its own merits, not masked behind manipulations of bail amounts.

See also Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255 (1969) (testimony of James F. Hewitt, Legal Aid Society of San Francisco): "As a practical matter, Senator, we have preventive detention. We know that district judges are setting high bail for people they believe to be dangerous, and we know that appellate courts are affirming those bail settings."


42. CAL. CONST. art. I, § 12: "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great...

43. CAL. PENAL CODE § 1268a (West Supp. 1970-1979). "[A] defendant shall be released from custody prior to conviction upon the posting of bail as a matter of right, or the defendant may be released from custody upon his or her own recogni-
current California law, a defendant is entitled to be released on bail “as a matter of right” unless he is charged with an offense punishable with death and “the proof [of his guilt] is evident or the presumption thereof great.” The only discretion vested in the trial judge is in setting the amount of bail, which may not be excessive. The statutes and judicial decisions have evolved the principle that the possibility that an innocent party might be unjustifiably punished outweighs the risk that the guilty might escape. This principle assumes that the risk of escape is the only factor which can be balanced against the possibility of unnecessarily punishing the innocent.

California has not always adhered to this bail policy. For many years the California courts took a more restrictive approach to granting bail by interpreting article I, section 12 of the California constitution to provide a public safety exception to the right to bail. Bail could be denied to one accused of a non-capital crimin-
nal offense in order to ensure the safety of the individual or for the protection of society.

P.2d at 1011. See Note, Bail As A Matter of Right—In re Underwood, 26 Hastings L.J. 559 (1974).

The first case which appears to depart from this traditional interpretation is In re Henley, 18 Cal. App. 1, 121 P. 933 (1912). See Note, Bail as a Matter of Right—In re Underwood, 26 Hastings L.J. 559, 569 (1974). Henley was arrested on a warrant which had been issued under a statute providing for the arrest and commitment of inebriates. Bail was denied by the magistrate without grounds being stated. The court of appeal found that the scope of the right-to-bail provision in article I, section 6 of the California constitution included a person charged with being an inebriate.

His right as to bail should certainly not be more restricted than that of a person accused of a grave crime. In the latter contingency no question would be raised except in the case of a capital offense as provided in the constitution. [But] [t]here might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail.

18 Cal. App. at 4-5, 121 P. at 935 (emphasis added).

Despite the court's recognition of the public safety exception, it found the denial of bail improper, even though the defendant's behavior arguably justified detention for the protection of the public. Moreover, the court's statement regarding "instances... where... it would be proper to deny bail" expressly relates to instances under the civil commitment inebriates statute. The court expressly stated that where a person was accused of a grave crime, "no question would be raised" regarding the accused's right to bail except in the case of a capital offense. Moreover, said "instances under the statute" justifying denial of bail were not enumerated. The statement is merely dictum relating to a particular statute. Nonetheless, failing to take proper account of the language "under this statute," numerous court opinions in California have cited Henley for a proposition for which it does not stand—the proposition that bail may be denied for a criminal non-capital offense for the safety of the individual or of society.

In re Westcott, 93 Cal. App. 575, 270 P. 247 (1928), was the first case to make this erroneous interpretation. The defendant in Westcott was charged with murder and his sanity was in doubt. He had previously been convicted of this same murder, but both convictions were overturned on appeal. The court in citing Henley said that although there might be some instances where it would be proper to deny bail for the safety of the individual or protection of society, there was no showing in this particular case that to fix bail would endanger the public. It is interesting to note that although Westcott relies on the public safety language in Henley, it provides less support for that proposition than its language might indicate. The court refused to deprive Westcott of his pretrial liberty by denying bail despite the fact that he was an allegedly dangerous individual. Comment, Public Safety Exception to Right to Bail, 65 Calif. L. Rev. 561, 564 (1974).

In Evans v. Municipal Court, 207 Cal. App. 2d 633, 24 Cal. Rptr. 633 (1962), the defendant was arrested for driving under the influence of intoxicating liquor and was detained for approximately four hours to allow him to sober up. Relying on Henley, Westcott, In re Gentry, 206 Cal. App. 2d 723, 234 Cal. Rptr. 208 (1962) and In re Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951), the court held that the defendant did not have the right to immediate release on bail. A police officer has the discretion to deny immediate release on bail if "to do so would endanger appellant or society." Id. at 636, 24 Cal. Rptr. at 635. Although Evans perpetuates the erroneous interpretation of Henley, it can obviously be limited to its facts. There
In 1973 the California Supreme Court resolved the conflict be-

is no suggestion that denial of bail for a longer period, or where an intoxicating
condition was not present, would be proper.

The court's flirtation with a public safety exception to the right to bail in non-
capital cases culminated in Bean v. County of Los Angeles, 252 Cal. App. 2d 754, 60 
Cal. Rptr. 804 (1967). There, the issue before the court concerned a bail forfeiture 
in a criminal misdemeanor case. In discussing the matter the court stated that:

A defendant in a criminal action is entitled to be released on bail as a 
matter of right except for a capital offense when the proof is evident or the 

presumption great . . . or where for the safety of the individual or for the 

protection of society it would be proper to deny bail.

Id. at 757, 60 Cal. Rptr. at 807 (citing Evans v. Municipal Court, 207 Cal. App. 2d 
633, 24 Cal. Rptr. 633 (1962); In re Gentry, 206 Cal. App. 2d 723, 234 Cal. Rptr. 208 
(1962); In re Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951); In re Westcott, 93 Cal.
App. 575, 270 P. 247 (1928); In re Henley, 18 Cal. App. 1, 121 P. 933 (1912)). This 

statement regarding the propriety of denying bail was dictum and was not in any 

way necessary for the result in that case. Even as dictum the Bean statement is 

not persuasive authority because it does not reflect an accurate interpretation of 

the cited cases.

In the case of In re Medina, 2d Crim. 17732 (Cal. Ct. App. Feb. 20, 1970), the court 
of appeal, relying on Bean, denied Medina's petition for habeas corpus to set bail 
pending trial without opinion. Thereafter the California Supreme Court denied 


pending trial was granted by the United States District Court upon grounds that 

Medina's bail pending trial had been unconstitutionally revoked. Medina v. Pitch-

ness, Civil No. 70-583-WPG (C.D. Cal. Apr. 20, 1970). Because Medina's petition for 

writ of habeas corpus was denied without opinion by the court of appeal and the 

California Supreme Court, and because that denial was overturned by a federal 

court, that denial should not be considered as affirming Bean and the judicially 

created public safety exception to article I, section 12 and Penal Code section 

1268a.

From Westcott to Medina only one court correctly interpreted Henley. In re 

Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951), written by Justice McComb while 

he was sitting on the court of appeal, stands for strict adherence to a broad princi-

ple of a constitutional right to bail in non-capital cases.

Only by strict adherence to this principle are we assured of the guaran-

tees of the Constitution in the equal administration of the laws where 

there are many judges of differing degrees of education, age, experience & 

background.

. . . .

History has demonstrated beyond a doubt that such a guaranty as is set 

forth in article I, section 6 of the [California] Constitution is necessary for 

the protection of the citizen, and that it should be preserved at all 

hazards. Any judicial officer who refuses to give his loyalty to this ideal 

because of his feelings of revulsion at the nature of the offense charged 

against the accused either does not conceive the doctrine in its full mean-

ing or he profanes the hallowed words of the patriots who convened in 

Philadelphia in 1787.

Id. at 219-20, 233 P.2d at 162-63. Although the case concerned the right to bail after 

conviction and pending appeal, Justice McComb's comments are equally applicable 

to the right to bail before trial:

Irrespective of the villainy of the accused or the heinousness of his of-

fense, without regard for public opinion, or for the personal views of an 

individual officer as to the wisdom of the constitutional provision [art. I, 

§ 6], such provision is binding without qualification upon the courts until 

the people have . . . legally erased the constitutional mandate.

Id. at 219, 233 P.2d at 162.
between the seemingly clear words of the California constitution and the developing case law which created a public safety exception to the right to bail in non-capital cases. Albert B. Underwood III was arrested for possession of a sawed-off shotgun and shells. While on bail for that offense Underwood was charged with possession of a sawed-off shotgun, attempted murder, attempting to explode a destructive device with intent to commit murder, attempting to explode a destructive device with intent to injure people or property, and possession of a destructive device. The trial court denied bail on the grounds that the safety of the community would be jeopardized if Underwood was granted bail. In the case of In re Underwood the California Supreme Court, with Justice Burke dissenting, found that the

50. CAL. CONST. art. I, § 12: "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great . . . ."
53. Id. at 347, 508 P.2d at 722, 107 Cal. Rptr. at 402.
   [I]n this day and age there is so much violence and murder that we have to stop it . . . . The time has come where we must restrain violence and deaths as much as possible. If it is necessary to resolve it by denying bail to those who can or are able to perpetrate murders and violence and crimes of that nature then the Court at this time will not be reluctant to deny bail, and bail is denied. Let the District Court of Appeal make their ruling.
55. 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).
56. Justice Burke registered a vehement dissent. He asserted that the language of art. I, § 6 would permit the judiciary to "retain the inherent power to achieve a suitable balance between society's right of defense, protection and safety, and defendant's own right to bail." Id. at 353, 508 P.2d at 727, 107 Cal. Rptr. at 407. He based this proposition on the fact that the framers of the California constitution also included art. I, § 1 which recognizes the "inalienable right of all men to enjoy and defend their life and liberty, to protect their property and to pursue and obtain safety and happiness." Id. at 353, 508 P.2d 727, 107 Cal. Rptr. at 407. According to Justice Burke, in order to guarantee the right to "obtain safety," the judiciary must have the authority to deny bail to dangerous defendants.

On the surface, there is a conflict between the right of an individual in society to "obtain safety" and the right of a defendant to be released on bail. This conflict, however, can be resolved by the application of a rule of construction. The language of art. I, § 6 is specific, it is not vague or ambiguous. Art. I, § 1, on the other hand, is open to a much broader interpretation. When constitutional provisions conflict, the provision that is more specific prevails. Serrano v. Priest, 5 Cal. 3d 584, 596, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 619 (1971). In addition, an argument could be made that the two provisions do not conflict. Art. I, § 6 merely fulfills art. I, § 1 in that if bail were a matter of discretion, then everyone would be subject to un-
trial court erred in denying bail to Underwood on the basis of his dangerous propensities. The court held that a defendant in a criminal action has the right to be released on bail except where charged with a capital offense when the proof is evident or the presumption of guilt great. The court explicitly stated that the only legal purpose of bail is “to assure the defendant's attendance in court.”

Bail cannot be used to punish the defendant or to protect the public. Article I, section 12 cannot be interpreted to allow a denial of bail based on the dangerous propensities of the defendant.

reasonable or arbitrary detention. Note, Bail as a Matter of Right—In re Underwood, 26 HASTINGS L.J. 559, 568 n.44 (1974).

57. In re Underwood, 9 Cal. 3d 345, 348, 508 P.2d 721, 723, 107 Cal. Rptr. 401, 403 (1973) (citing In re Newbern, 55 Cal. 2d 500, 380 P.2d 43, 11 Cal. Rptr. 547 (1961); In re Brumback, 46 Cal. 2d 810, 299 P.2d 217 (1956)).


59. The court indicated that protection of the public must be secured through the process of civil commitment. In re Underwood, 9 Cal. 3d 345, 350 n.8, 508 P.2d 721, 724 n.8, 107 Cal. Rptr. 401, 404 n.8 (1973). As pointed out by Justice Burke in his dissent, the effectiveness of civil commitment in keeping society safe from truly dangerous persons is questionable. Id. at 352 n.1, 508 P.2d at 726 n.1, 107 Cal. Rptr. at 408 n.1. See generally Note, Control and Treatment of Narcotics Addicts: Civil Commitment in California, 6 SAN DIEGO L. REV. 35 (1969).

60. The majority said, “[T]here is no validity in the argument that there is an implied public safety exception in statutory or other provisions guaranteeing the right to bail and we hold that such an exception does not exist in view of the clear direction of article I, section 6.” In re Underwood, 9 Cal. 3d 345, 350, 508 P.2d 721, 724, 107 Cal. Rptr. 401, 404 (1973).

It is interesting to note that this is the same California court that decided People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), one year earlier. By abolishing the death penalty, the court was faced with the question of whether those charged with previously capital crimes would now be entitled to bail. The usual reason for denying bail in capital cases, and no doubt the rationale behind California’s provision, is “fear of flight”—the recognition that the danger of flight is at its greatest when a defendant’s life is at stake and that no amount of economic motivation can assure his attendance in court. In re Corbo, 54 N.J. Super. 575, 149 A.2d 828, 834 (1959). When the possibility of execution is removed, the fear of flight rationale breaks down. Thus, if the sole reason for the denial of bail in capital crimes is the high risk of flight, it should follow that if the death penalty is abolished the right to bail must be extended to cover the previously capital crimes. Yet that was not the result reached by the Anderson court:

[A]rticle I, section 6 of the California constitution and section 1270 of the Penal Code, dealing with the subject of bail, refer to a category of offenses for which the punishment of death could be imposed and bail should be denied under certain circumstances. The law thus determined the gravity of such offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction. Those offenses, of course, remain the same but under the decision in this case punishment by death cannot constitutionally be exacted. The underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision. Accordingly, to subserve such purpose . . . we hold they remain as offenses for which bail should be denied in conformity with article I, section 6 of the California constitution and Penal Code section 1270 when the proof of guilt is evident or the presumption thereof great.
The majority’s position is supported by several aspects of the history of bail in California. Because there was minimal debate regarding article I, section 12 of the California constitution, there is very little legislative history on which to rely. A provision concerning excessive bail was accepted as part of the California Bill of Rights with no reported discussion. The language that provided that all persons shall be bailable except those charged with a capital offense, was added on September 28, 1849, with only one relevant comment:

It has been thought by some that the section which we have just adopted [the excessive bail clause] covers this entire ground; but in my opinion it does not. This section is a part of the common law, and as we have not adopted the common law, and perhaps may not, I think it very necessary that such a section should be introduced so that in all cases, except capital offenses, where the proof is evident or the presumption great, the party accused shall be entitled to bail. An innocent man may be kept in prison and refused bail, without such a provision as this.

As the court in Underwood pointed out, this section was consciously added to the excessive bail provision in order to expressly indicate that all except the one class of defendants were to be bailable. Penal Code section 1268a, which implements

6 Cal. 3d 628, 657 n.45, 493 P.2d 880, 900 n.45, 100 Cal. Rptr. 152, 171 n.45 (1972).

The Anderson court appears to have adopted a different theory of bail entirely—one that considers the danger to the public as well as the possibility of flight. Bail was portrayed as a function of the gravity of the offense, not of the punishment. This implies that denial of bail has a relation to dangerousness as well as to the likelihood of flight. It is unclear what happened between Anderson, decided in 1972, and Underwood to cause a change in the court’s mind. Obviously the denial of bail for those crimes that were previously capital was upheld for the protection of the public safety, just as bail was denied to Underwood by the lower court for the same reason.

For a more complete discussion of the relationship between the abolition of the death penalty and the capital case exception to the right to bail, see Comment, The Right to Bail in Capital Cases: The Effect of the Legislative Response to Furman v. Georgia, 8 CUM. L. REV. 229 (1977); 2 HOFSTRA L. REV. 432 (1974).


63. J. Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution 41 (1850) [hereinafter cited as Debates]. It is significant that this right is included in the Bill of Rights for this section is the repository of those rights most cherished and guarded by the framers. People v. Tinder, 19 Cal. 539 (1862).

64. Debates, supra note 63, at 293, cited in Note, Bail as a Matter of Right—In re Underwood, 26 HASTINGS L.J. 559, 564 (1974).

65. 9 Cal. 3d at 349-50, 508 P.2d at 724, 107 Cal. Rptr. at 404.

66. CAL. PENAL CODE § 1268a (West Supp. 1970-1979): "[A] defendant shall be released from custody prior to conviction upon the posting of bail as a matter of
article I, section 12, supports the contention that pretrial liberty was intended to be a matter of right in non-capital cases.\textsuperscript{67}

Several decisions of the California Court of Appeals and the California Supreme Court interpreting article I, section 12 shortly after it was adopted\textsuperscript{68} came to the conclusion that admission to bail in non-capital cases is a constitutional right which no court can properly refuse. Subsequent cases that proclaimed a public safety exception to this right to bail were based on an erroneous interpretation of the case of \textit{In re Henley}.\textsuperscript{69}

Furthermore the language used in article I, section 12 plainly and unequivocally indicates a definite and certain purpose to be accomplished, and courts must construe it so as to carry out that purpose. Clearly, article I, section 12 provides that all persons shall be bailable for non-capital offenses by sufficient sureties. The terms and conditions are neither vague nor ambiguous.

The result reached by the majority in \textit{Underwood} gives preferred status to the rights of the individual defendant over the rights of the community. It stresses the defendant's right to be released on bail pending trial regardless of any potential danger he may present.\textsuperscript{70} A defendant who repeatedly commits the same non-capital offense, for example rape, but who faithfully appears in court could be released. On the other hand, a forgetful defendant who fails to appear on time may be denied bail.\textsuperscript{71} In electing to favor the interests of the defendant in obtaining pretrial freedom, California courts are neglecting the protection of society.\textsuperscript{72}

The California Supreme Court entrusted this concern for the public safety to the area of civil commitment.\textsuperscript{73} But, as Justice Burke noted in his dissent, the provisions of the Welfare and Institutions Code would be ineffective in most instances.\textsuperscript{74} Sections right, or the defendant may be released from custody upon his or her own recognizance, except that a defendant charged with an offense punishable with death where the proof is evident or the presumption thereof great shall not be released from custody."


\textsuperscript{68.} See note 49 \textit{supra}. When a judicial interpretation of the meaning and effect of a provision of the constitution is made near the time of its adoption, it is strong evidence that that interpretation reflects the true meaning and intent of the framers. Knowles v. Yates, 31 Cal. 82, 89 (1866).

\textsuperscript{69.} 18 Cal. App. 1, 121 P. 933 (1912). See note 49 \textit{supra}.

\textsuperscript{70.} Comment, \textit{Bail: Right or Privilege}, 3 U. SAN FERN. V.L. REV. 159, 167 (1974).


\textsuperscript{72.} Comment, \textit{Bail: Right or Privilege}, 3 U. SAN FERN. V.L. REV. 159, 167 (1974).

\textsuperscript{73.} \textit{In re Underwood}, 9 Cal. 3d 345, 350 n.8, 508 P.2d 721, 724 n.8, 107 Cal. Rptr. 401, 404 n.8 (1973).

\textsuperscript{74.} Id. at 352 n.1, 508 P.2d at 726 n.1, 107 Cal. Rptr. at 406 n.1.

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6300-6330 regarding mentally disordered sex offenders would solve the problem of the mentally ill rapist, but would not be effective in cases where the rapist is not shown to be mentally disturbed. 75

The only viable solution is a constitutional amendment to the California bail provision. The California Supreme Court implied this solution when it said, “If the constitutional guarantees are wrong, let the people change them—not judges or legislators." 76 The right to bail must be modified by the inclusion into the California Constitution of an exception for those accused of forcible rape where the proof is evident or the presumption great.

LEGAL IMPLICATIONS OF ALTERING CALIFORNIA’S APPROACH TO BAIL

On April 21, 1978, LB 553 was enacted by the Nebraska legislature proposing that article I, section 9 of the Nebraska constitution be amended to deny the right to bail to all persons accused of “sexual offenses involving penetration by force or against the will of the victim.” 77 On November 7, 1978, the Nebraska voters approved the proposed amendment by a margin of more than 4-1.78 Although a state constitution is the fundamental law of a state, it is subject to the limitations found in the United States Constitution which supercedes all state constitutions.79 If a state constitutional provision directly conflicts with any federal constitutional guarantees it is invalid.80

An amendment such as the one passed by the people of Nebraska is susceptible to attack on several constitutional grounds. First, it can be argued that the amendment violates the eighth amendment’s prohibition of excessive bail.81 Second, it can be argued that the amendment violates the equal protection clause of

75. Although it is not unreasonable to conclude that any person who would commit a rape must be insane, this belief has no basis in fact. See M. Amr, supra note 26, at 315.
77. Neb. Const. art. I, § 9 now provides: “All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great . . . .”
80. Id.
81. U.S. Const. amend. VIII.
the fourteenth amendment. Third, the amendment arguably violates a defendant's presumption of innocence protected by the due process clause of the fourteenth amendment. Lastly, it may violate a defendant's right to the effective assistance of counsel and to freedom to prepare his defense under the sixth and fourteenth amendments.

On April 3, 1979, the Nebraska Supreme Court ruled in *Parker v. Roth* that the new bail provision does not violate the sixth, eighth, or fourteenth amendments of the United States Constitution. On October 16, 1979, the United States Supreme Court decided to leave the Nebraska law in effect by declining to review the case. The Court's action does not set a precedent. It does, however, allow the Nebraska law to remain in operation and leaves other states free to follow Nebraska's example.

An analysis of the constitutional arguments presented in *Parker* indicates that there is no constitutional roadblock to a state denying bail in cases where the defendant is charged with forcible rape and the proof is evident or the presumption great that he committed the crime.

**Eighth Amendment**

The eighth amendment provides that "excessive bail shall not be required." This cryptic language has given rise to two schools of thought concerning the scope of the amendment. One interpretation is that the eighth amendment creates a right to bail. The other asserts that the eighth amendment prohibits ex-

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82. U.S. Const. amend. XIV.
83. Id.
84. U.S. Const. amends. VI, XIV.
86. 444 U.S. 920 (1979). Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun would have granted certiorari.
87. Review on certiorari is not a matter of right, but of judicial discretion. Because it is discretionary, a denial ordinarily "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950), L. Tribe, American Constitutional Law 35 n.8 (1978).
88. The eighth amendment is not specifically addressed to the states. The United States Supreme Court has never expressly held that it would be applicable to the states through the due process clause of the fourteenth amendment. A number of lower courts, however, have made such a finding. Simon v. Woodson, 454 F.2d 161, 164 n.3, 165 nn. 4 & 5 (5th Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), cert. denied, 378 U.S. 965 (1964); Pilkinton v. Circuit Court of Howell County, 324 F.2d 45, 46 (8th Cir. 1963). Subsequent discussion of the eighth amendment will thus be considered applicable to the state and federal government.
89. See, e.g., Ervin, supra note 39, at 298, 336; Foote, supra note 39, at 970.
cessive bail where a right to bail otherwise exists. The plain language of the amendment, its historical background, and the weight of judicial authority support the latter interpretation.

The eighth amendment contains the only reference to bail in the United States Constitution. The plain meaning of the language of the eighth amendment does not require that every defendant be admitted to bail. Rather, it merely prohibits excessive bail in cases where bail is allowed. Nevertheless, one noted authority argues that this language must be interpreted broadly to mean that a right to bail exists in almost all cases. Otherwise, the states could define away the right to bail by enacting legislation denying bail in all cases, leaving the eighth amendment devoid of any right to bail. Although Professor Foote’s argument is logically sound, it fails to consider one important objection. If the framers of the United States Constitution intended to create an absolute right to bail, they would have expressly provided for one. The total absence of language in the United States Constitution establishing a right to bail is strong evidence that the framers did not intend to create such a right.

A complete historical review of the legal development of bail is unclear, complex, and beyond the scope of this Comment. However, a cursory examination of the historical origins of bail reveals that the framers of the United States Constitution did not intend to grant an absolute right to bail. The concept of bail came to

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91. Professor Foote, supra note 39, at 984-89, suggests that the lack of an express guarantee of an absolute right to bail resulted in part from the fact that George Mason, its drafter, was not technically skilled in the law.

92. Id. at 969-71. See also U.S. DEP’T OF JUSTICE, PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL & CRIMINAL JUSTICE 7 (1965) where then Chief Justice Warren apparently agreed with Foote by saying that eighth amendment rights have “generally been construed as guaranteeing the right to bail by logical implication.”

93. For a discussion of the history of bail, see D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964 at 1-8 (1964); R. GOLDFARB, RANSOM 6-10, 21-31, 93-95 (1965); Duker, supra note 90; Foote, supra note 39; Meyer, supra note 39; Mitchell, supra note 39; Note, Preventive Detention, 36 GEO. WASH. L. REV. 178 (1967); Note, Bail: An Ancient Practice Reexamined, 70 YALE L.J. 966 (1961).

94. A detailed analysis of the development of bail in England is unnecessary. The prohibition against excessive bail evolved from three documents: the Petition of Right of 1628; the Habeas Corpus Act of 1679; and the Bill of Rights of 1689. There was no absolute right to bail in England and the excessive bail provision was enacted to prevent judges from setting excessive bail in those cases where the
the United States with the early English settlers. In 1641, Massa-
chusetts recognized a right to bail in the Massachusetts body of
Liberty. Before the adoption of the Bill of Rights other states cop-
ied the Massachusetts statute and enacted either statutory or
constitutional provisions which established both a right to bail
and a prohibition against excessive bail. If a provision regarding
excessive bail implied a right to pretrial bail, it is difficult to un-
derstand why the states mention both. Not only is there no men-
tion of a right to bail in the eighth amendment, but a discussion of
the issue in the congressional debate over the Bill of Rights is al-
most non-existent. As the Nebraska Supreme Court observed in
Parker, the framers of the Constitution were obviously familiar
with the presence of a right to bail provision in various colonial
statutes. However, the framers did not include such a provision
in the United States Constitution. The logical conclusion is that
they did not intend to create a federal constitutional right to bail.

Shortly before Congress passed the eighth amendment it en-
acted the Judiciary Act of 1789. The act was similar to the colonial
statutes in that it guaranteed a right to bail in all non-capital
criminal cases and provided that bail was discretionary in capital
cases. The bail provisions of that act are currently codified at 18
U.S.C. §§ 3141-52 (1976). If Congress had intended to establish a
right to bail in the eighth amendment, it would have expressly in-
cluded it, just as it did in the Judiciary Act. Moreover, it would be
inconsistent for Congress to adopt an amendment granting a right
to bail just days after passing a statute disallowing that right in
certain cases. The constitutionality of that statute (and every fed-
eral bail statute since 1789) would immediately be called into

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defendant was bailable by law. Duker, supra note 90, at 66; Meyer, supra note 39,
at 1180.


96. Foote, supra note 39, at 986. Professor Foote could only discover one refer-
ence to the bail clause in the congressional debates and that was a question as to
what the language meant. The question was not answered.

97. Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 111, cert. denied, 444 U.S. 920
(1979).

98. Meyer, supra note 39, at 1194, 1455. It is interesting to note that in 1789 all
felonies were capital and therefore not bailable. As an example, the capital crimes
of Massachusetts included:

[I] dolary, witchcraft, blasphemy, willful murder, slaying in anger or cru-
elty of passion, poisoning, bestiality, sodomy, adultery, man stealing, false
witness, conspiring or attempting invasion, insurrection, or public rebel-
lion against the Commonwealth, or treacherously attempting the altera-
tion or subversion of the frame of government, a child over 16 years old
cursing or smiting his parents, a son over 16 rebelling against his parents,
or rape.


99. See also Fed. R. Crim. P. 46(a) (1), (a) (2).
question. It is more likely that the eighth amendment was not intended to create a federal constitutional right to bail, but rather was intended to protect against the arbitrary use of excessive bail to deny release. The question of whether a particular offense is bailable was to be left to the legislature. This allows greater flexibility when changed circumstances or attitudes require a revision.101

There are several situations in which an individual does not have a right to bail. If the eighth amendment did grant a right to bail, that right would apply in all instances. Yet both the Federal Rules of Criminal Procedure102 and the Bail Reform Act of 1966103 provide that in capital cases the judge has discretion to deny bail.104 Denial of bail is also allowed in the area of deportation of aliens. Under section 23 of the Internal Security Act of 1950, the Attorney General has the discretion to retain the defendant in custody or release him on bail.105 Finally, federal courts have statutory authorization to deny bail to the mentally incompetent.106

An examination of the judicial interpretation of the eighth amendment provides another clue to its meaning. The United States Supreme Court has never definitively ruled whether the eighth amendment means that all defendants must be given a chance to post bail.107 Carlson v. Landon108 and Stack v. Boyle109 are the two most significant cases considering the excessive bail provision of the eighth amendment.

Although Stack involved the question of excessive bail and not the denial of bail, it is frequently relied on for the principle that bail is a constitutionally guaranteed right.110 In Stack the defendants were charged with violating the Smith Act and held on $50,000 bond each. The United States Supreme Court held that

100. Younger, supra note 1, at 278.
107. Younger, supra note 1, at 271.
where bail is allowed, there is a right to reasonable bail.111 In
dicta the Court described the right to bail as a "traditional
right."112 The Court's holding, however, was not based upon the
eighth amendment. As the court in Parker pointed out, the Court in Stack was not talking of the United States Constitution but
was referring solely to the Judiciary Act of 1789 and the Federal
Rules of Criminal Procedure.113

The only United States Supreme Court case involving the consti-
tutionality of a statute authorizing the denial of bail is Carlson
v. Landon.114 Carlson was argued just a few weeks after Stack
was decided. In a five to four decision (with a vigorous dissent by
Mr. Justice Black)115 the Court upheld the denial of bail to alien
Communists pending deportation proceedings.116 Like Stack,
Carlson is not directly relevant to the issue of pretrial bail in a
criminal proceeding. The deportation of aliens is a civil proce-
ding. Unlike the Court in Stack, however, the Carlson Court did
address the issue of whether the eighth amendment grants a right
to bail:

The bail clause [eighth amendment] was lifted with slight changes from
the English Bill of Rights Act. In England that clause has never been
thought to accord a right to bail in all cases, but merely to provide that
bail shall not be excessive in those cases where it is proper to grant bail.
When this clause was carried over into our Bill of Rights, nothing was said
that indicated any different concept. The eighth amendment has not pre-
vented Congress from defining the classes of cases in which bail shall be
allowed in this country.117

Thus, according to Carlson there is no constitutional right to
bail.118 Chief Justice Vinson, author of the opinion in Stack,

112. From the passage of the Judiciary Act of 1789... to the present Fed-
eral Rules of Criminal Procedure... federal law has unequivocally pro-
vided that a person arrested for a non-capital offense
shall be admitted to
bail. This traditional right to freedom before conviction permits the un-
hampered preparation of a defense, and serves to prevent the infliction of
punishment prior to conviction. ... Unless this right to bail before trial is
preserved, the presumption of innocence, secured only after centuries of
struggle, would lose its meaning.

Id.
(1979).
115. Justice Black argued that the interpretation of the majority would nullify
the protection of the eighth amendment since the right to be protected [bail]
could be implemented out of existence. It was a contradiction to say that the
eighth amendment prohibits use of excessive bail to deny release but allow the
legislature to totally destroy the right. Id. at 556-58. Portman, supra note 39, at
242. See also Foote, supra note 39, at 959-71.
118. See Foote, supra note 39, at 979, for an attack on the Court's historical
analysis. It has also been said that since the case dealt with "the rights of Com-
munists during the witch-hunt days of the early 1950's" it may not be strong au-
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joined in the Court's opinion in Carlson. His agreement with the majority in Carlson indicates that reliance on Stack as support for a constitutional right to bail is misplaced.119

The case of Mastrian v. Hedman120 also supports the proposition that the eighth amendment does not grant a right to bail. In Mastrian the court said that it is within the discretion of the states to determine which offenses will be bailable, and therefore subject to the eighth amendment, and which will not be bailable.121 An examination of the more recent decisions interpreting the eighth amendment indicates that the weight of authority follows the reasoning in Carlson and Mastrian.122

Based on the language of the eighth amendment and its historical development and judicial interpretation, it is clear that there is no constitutional right to bail. The states are free to define the offenses that are bailable and those that are not.

Equal Protection

An amendment to the California constitution must also meet the requirements of the equal protection clause of the fourteenth amendment of the United States Constitution. Opponents of the proposed amendment may argue that the amendment denies rapists the equal protection of the laws by subjecting them to a system of pretrial detention not applicable to persons charged with other crimes. The equal protection clause provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws."123 The United States Supreme Court has formulated three tests for determining whether or not a state legislative classification violates the equal protection clause: the rational basis test, the strict scrutiny test, and a new intermediate

120. 326 F.2d 708 (8th Cir.), cert. denied, 376 U.S. 965 (1964).
121. "Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail." Id. at 710-11.
123. U.S. Const. amend. XIV. See also Cal. Const. art. I, § 7: "A person may not be . . . denied equal protection of the laws. . . ."
Using the traditional rational basis test, a state-created classification is valid if the classification bears a rational relation to a permissible state objective. The strict scrutiny test is far more rigorous and requires that the state demonstrate that the classification is necessary to promote a compelling governmental interest. The strict scrutiny test is applied whenever the classification infringes on a "fundamental right" or involves a "suspect class." Several recent decisions indicate the emergence of an intermediate test which is more deferential than strict scrutiny but more exacting than the rational relation test.

Under the intermediate test the classification must be substantially related to an important state interest. In applying this test the court balances the interest of the state against the interest of those disadvantaged by the classification. This intermediate test has only been specifically applied to classifications based on gender and illegitimacy. Nonetheless, a growing range of cases, involving classifications other than gender and illegitimacy, and involving a number of important but not "Constitutionally

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125. See United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) ("A legislative classification must be sustained if it is rationally related to a legitimate governmental objective"); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 (1973); McGowan v. Maryland, 366 U.S. 420, 425 (1966) ("[Equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").


128. The Supreme Court has held that classifications are suspect if they are based on alienage, Graham v. Richardson, 403 U.S. 355, 372 (1971); race, Loving v. Virginia, 388 U.S. 1, 11 (1967); or national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944).

129. See generally The Supreme Court, 1976 Term, 91 Harv. L. Rev. 72, 177-88 (1977).

130. Id.

131. See, e.g., Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976) (such classifications must bear a "close and substantial relationship to important governmental objectives").

132. See, e.g., Lalli v. Lalli, 439 U.S. 259 (1978) (although not subject to strict scrutiny, classifications based on illegitimacy are invalid under the fourteenth amendment "if they are not substantially related to permissible state interests").
fundamental" interests, have also triggered approaches somewhere between the rational relation test and the strict scrutiny test.133

In examining the proposed California amendment, the initial question is whether it would infringe on a fundamental interest or discriminate on the basis of a suspect class. In San Antonio Independent School District v. Rodriguez134 the United States Supreme Court stated that the judiciary may not create fundamental rights; rights must have their basis in the Constitution.135 The social importance of the right or interest involved is not the critical determinant. “[T]he answer lies in assessing whether . . . [the] right . . . is explicitly or implicitly guaranteed by the Constitution.”136 In accordance with this view, the Court refused to expand the existing list of fundamental rights and suspect classifications.137 In view of the language of the eighth amendment, its historical development, and its judicial interpretations, bail is not a fundamental right guaranteed by the United States Constitution.138 Although one commentator has argued that because bail is mentioned in the United States Constitution it is sufficiently fundamental to merit strict scrutiny,139 the United States Supreme Court has not been disposed to make such a finding.140 In addition, there is a dearth of scholarly articles that espouse the contrary.141

Since there is no fundamental right to bail with a basis in the United States Constitution, the strict scrutiny test is not applicable. However, the decision still remains as to which of the less demanding tests should be applied—the rational basis test or the intermediate test. The denial of bail does involve a loss of per-

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135. “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.” Id. at 33.
136. Id.
137. See notes 127-28 supra.
138. See text accompanying notes 88-123 supra.
139. Ervin, supra note 38, at 335-37.
140. See text accompanying notes 107-123 supra.
141. See, e.g., Duker, supra note 90; Meyer, supra note 39; Mitchell, supra note 39.
sonal liberty, an interest the Court has described as traditional.\textsuperscript{142} Thus, although bail may not fall within the Court's restricted view of "fundamental rights," it could arguably be subject to an active judicial review more demanding than the basic requirement of minimum rationality.

The purpose of the proposed forcible rape amendment is twofold: (1) to ensure the defendant's presence at trial and (2) to protect the safety of the public. These purposes are clearly within the police power of the state. Consequently, the only question to be answered is whether the amendment is substantially related to these important state interests.

The Court has indicated that statistical evidence is usually relevant in determining whether a particular law bears a substantial relationship to the achievement of important state interests.\textsuperscript{143} Literature analyzing the recidivism\textsuperscript{144} among forcible rapists is meager.\textsuperscript{145} The data that are available indicate that a person who has committed a violent, psychologically motivated crime like forcible rape is capable of committing other crimes while free on bail. One noted author has reported the results from a study of 646 cases of forcible rape that occurred in Philadelphia from January 1, 1958, to December 31, 1958, and from January 1, 1960, to December 31, 1960.\textsuperscript{146} Information was obtained from the Morals Squad of the Philadelphia Police Department where all complaints about rape are recorded and filed. The data showed a high proportion of offenders with previous criminal records (49.3%). In addition, the study showed a significant association between a record of arrest for forcible rape alone or rape combined with other sex offenses and the onset of a criminal career. A similar

\textsuperscript{142} Stack v. Boyle, 342 U.S. 1, 4 (1951).
\textsuperscript{143} See, e.g., Craig v. Boren, 429 U.S. 190, 200 (1976).
\textsuperscript{144} Recidivism is herein defined as the number of arrests, convictions, or commitments for past offenses of a given offender. M. Amir, \textit{supra} note 26, at 109.
\textsuperscript{145} One explanation for this lack of statistical evidence is the fact that rape is generally conceded to be among the most under-reported crimes of violence against the person. The only statistical count of the numbers of forcible rapes in the United States is compiled by the Federal Bureau of Investigation from reports of police departments. These figures, however, are only the tip of the iceberg. According to the National Institute of Law Enforcement and Criminal Justice, the ratio of unreported rapes to reported rapes is conservatively estimated at 88%. \textit{National Institute of Law Enforcement and Criminal Justice, U.S. Dep't of Justice, Forcible Rape—Final Project Report} 11 (1978).
\textsuperscript{146} Besides the failure of women to report rapes, there are other reasons that the actual number of rapes can't be established. The various police departments report rape in a variety of ways, charges are often dropped or reduced to a lesser offense, and it is difficult to gather evidence to support a charge of rape. J. LaPlount & L. Schaefer, Rape: A Focus on the Victim (May 1973) (unpublished thesis in California State University at San Diego Library).
\textsuperscript{146} M. Amir, \textit{supra} note 26, at 109-25.
study shows that among seventy-seven rapists in the Colorado State Penitentiary, eighty-five percent had a previous arrest record. Twelve percent had been convicted of forcible rape, and thirty-eight percent had either committed previous rapes, been arrested for investigation of rape, or been convicted of other sexual offenses.\textsuperscript{147} A Canadian study found that ninety-five percent of thirty rapists in a penitentiary had previous convictions, nineteen percent had been convicted for sexual offenses, and twenty-seven percent had been convicted for aggressive offenses.\textsuperscript{148} And in a study of forcible rape in San Diego County, California, from 1968 to 1972, 65.5\% of offenders had previous criminal records. Twenty-two percent of the offenders had previous records for sex offenses.\textsuperscript{149} This statistical evidence supports the conclusion that sex offenders are usually recidivists.\textsuperscript{150}

Forcible rape is a particularly repugnant crime, charged with danger and the possibility of death to a victim. It constitutes a serious and increasing danger to the public. To require that a person accused of forcible rape be denied bail pending trial is not unreasonable \textit{where the proof is evident or the presumption great} that the crime was committed. This response to the problem of

\textsuperscript{147} J. MacDonALD, \textsc{Rape Offenders and Their Victims} 24, 55 (1971).
\textsuperscript{148} McCaldon, \textsc{Rape}, \textsc{Can. J. Corrections} 37 (1967). \textit{See also} Svalostoga, \textsc{Rape and Social Structure}, \textsc{Pac. Soc. Rev.} 48 (1962) (among 141 rapists studied in Denmark, 77\% had previous criminal records); \textit{supra} note 28.
\textsuperscript{150} \textit{But see} B. Karpm\textsc{A}, \textsc{The Sexual Offender and His Offenses} (1954); P. Tapan\textsc{A}, \textsc{The Habitual Sex Offender} (1950). The discrepancies between the various studies on recidivism may be accounted for by the fact that measurements of recidivism have been made on the basis of different types of records. Those studies evidencing a high recidivism rate were based on arrest records while those reporting a low recidivism rate utilized conviction or commitment records. The use of arrest records instead of conviction or commitment records is better suited to the analysis of recidivism among those involved in the crime of forcible rape for a number of reasons. First, since arrest is the step of the penal administration nearest to the crime, the law of “case mortality” operates less here. “Case mortality” is the decrease in the proportion of offenders with criminal records as one moves from arrest records to conviction records. Second, a previous arrest record is more likely to be in the file of an offender who has committed a crime in the past. Third, the absence of a conviction record is not evidence that the crime was not committed. Arrest records show that such behavior did occur but that for some reason the offender did not face a trial. Fourth, the occurrence of the crime, its reporting, and the arrest record are likely to coincide, making arrest records a better basis for measuring characteristics of offenders. Finally, the “vicissitudes of arrest from one period of time to another, and from one community to another, are probably less than those connected with court and sentencing procedures.” M. Am\textsc{I}, \textit{supra} note 26, at 109-11.
rape does not violate the equal protection clause of the fourteenth amendment merely because all offenses with similar or greater penalties are not treated the same. The United States Supreme Court has held that the United States Constitution allows a state to recognize degrees of harm and to attack those areas it considers most in need of reform. A state need not choose between attacking every aspect of a problem or not attacking the problem at all. As the court in Parker stated, "[t]he minimum penalty is not the issue in a determination that violent rape . . . should not be bailable. The real possibility of repeated acts and further victims pending trial is the issue." The suggested California amendment would not be an arbitrary decision but would bear a substantial relationship to important state interests.

Presumption of Innocence

A constitutional amendment that empowers the courts to deny bail where the defendant has been charged with forcible rape cannot violate the presumption of innocence protected by the due process clause of the fourteenth amendment. As the court in Parker pointed out, the presumption of innocence is merely a rule of evidence that attaches to a defendant at the beginning of a trial and remains with the defendant throughout the trial. The presumption has nothing to do with confinement or release prior to trial. It primarily serves the purpose of impressing on the judge or jury that any doubts as to a defendant’s guilt must be resolved in his favor and that the burden of proving guilt is on the prosecution.

If the presumption of innocence was a bar to the proposed California amendment, it would also bar pretrial detention of those charged with a capital crime and those who could not raise bail. Theoretically, it could even be extended to prevent police from ar-

153. Id.
155. In criminal cases, the ‘presumption of innocence’ has been adopted by judges as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt. MCCORMICK ON EVIDENCE 806 (2d ed. E. Cleary ed. 1972).
resting persons and taking them into custody.\textsuperscript{156} The fact that the presumption of innocence has not been so applied supports the theory that pretrial detention has no relationship to the presumption of innocence.

The purpose of the proposed amendment is to allow bail to be denied to those persons charged with forcible rape where the court finds that the proof is evident or the presumption is great that the person committed the crime. This legitimate purpose in no way conflicts with or violates the purpose of the presumption of innocence, which is to instill in the minds of the court and jury that the burden is on the prosecution at trial to prove, beyond a reasonable doubt, that the accused is guilty.\textsuperscript{157}

CONCLUSION

Article I, section 12 of the California constitution mandates that those charged with a non-capital offense be granted bail as a matter of right. In \textit{In re Underwood} the California Supreme Court held that bail may not be denied to protect the public. The position the court took in \textit{Underwood} is supported by the history of bail in California, the early decisions of the California Supreme Court interpreting article I, section 12, and the unequivocal language of article I, section 12. Despite the validity of the court’s position, society’s interests are underprotected with regard to the crime of forcible rape.

Forcible rape is traumatic and dehumanizing. Frequently the victim is treated brutally by the attacker and suffers substantial physical and psychological injuries. The primary motive for forci-


ble rape is not sexual gratification. Rather, it is a desire to inflict violence upon the victim. A person who has committed such a violent, psychologically motivated crime is capable of committing a similar crime while free on bail. Those charged with forcible rape pose a significant threat to society and should not be released on bail pending trial if the proof is evident or the presumption great that they did commit the crime.

Because the California constitution prevents the courts from withholding bail in forcible rape cases, a constitutional amendment denying the right to bail to those accused of forcible rape when "the proof is evident or the presumption great" is needed. An analysis of the United States Constitution reveals that there is no constitutional roadblock to such an amendment. Based on the language, historical development, and judicial interpretation of the eighth amendment, there is no constitutional right to bail. The states are free to define the offenses that are bailable and those that are not. Furthermore, the proposed California amendment would not violate the equal protection clause of the fourteenth amendment. Rape poses a threat to the victim and to society. There is nothing unreasonable about the conclusion that it is in society's best interests to deny bail to persons charged with forcible rape. This response to the problem of rape does not violate the equal protection clause of the fourteenth amendment merely because all offenses with similar or greater penalties are not treated the same. The United States Supreme Court has held, in *Williamson v. Lee Optical of Oklahoma, Inc.*,\(^{158}\) that the United States Constitution allows a state to recognize degrees of harm and to attack those areas it considers most in need of reform. A state need not choose between attacking every aspect of a problem or not attacking the problem at all.

Finally, the two-fold purpose of the amendment, insuring the defendant's presence at trial and protecting the safety of the public, does not conflict with the presumption of innocence guaranteed by the due process clause of the fourteenth amendment. The purpose of the presumption of innocence is to instill in the minds of the court and jury that the burden is on the prosecutor at trial to prove, beyond a reasonable doubt, that the accused is guilty.

Forcible rapists constitute a distinct class of criminals and members of that class should not be entitled to pretrial release. In the words of Chief Justice Krivosha of the Nebraska Supreme

Court, "[s]ociety deserves more."\textsuperscript{159}

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