RESTRICTING THE RIGHT TO BAIL: VERMONT'S NEW CONSTITUTIONAL BAIL AMENDMENT

INTRODUCTION

Traditionally, defendants deemed to pose a risk of flight if released from detention have been denied bail.[1] Similarly, bail could be denied to defendants charged with capital offenses, the historical explanation being that a defendant would forfeit any amount of money rather than appear for his own hanging.[2] Another theory supporting the capital crimes exception suggests that the denial of bail was based on those defendants' dangerous propensities.[3] However, the changing nature of capital offenses has rendered the traditional distinction between capital and non-capital offenses, for purposes of bail, less meaningful.

The list of crimes classified as capital has diminished for reasons in part unrelated to the seriousness of those crimes.[4] More

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1. "A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon." *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (Story, J.); "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court." Reynolds v. United States, 80 S. Ct. 30, 32 (Douglas, Circuit Justice, 1959).

2. Blackstone observed: "For what is there that a man may not be induced to forfeit, to save his own life?" 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 297 (9th Ed. 1783).

3. *See, e.g.*, Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1230 (1969) ("[T]he eighth amendment when adopted clearly permitted pretrial detention for capital crimes because of danger to the community."); Hruska, *Preventive Detention: The Constitution and The Congress*, 3 CREIGHTON L. REV. 36, 47 (1970) (footnote omitted) ("The express right to bail in noncapital cases . . . probably was based on the assumption that only capital offenses involved threats to public safety or strong risk of flight."); Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. REV. 1140, 1162-63 (1972) ("[I]t is evident that the freedom loving colonists were not willing to release on bail any person whom they considered dangerous.").

The dangerous defendant rationale has been criticized because many dangerous crimes during the colonial period did not carry the death penalty while many crimes that could have posed no significant threat to society were made capital. *See* Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV., 328, 348-49 (1982). For example, a 1798 law of Virginia made "performing marriages contrary to law" a capital offense. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 62 & n.45 (1930).

4. As a result of the Furman v. Georgia decision, 408 U.S. 238 (1972) (per curiam), wherein the Supreme Court invalidated state death penalty statutes giving juries unbridled discretion whether to impose the death penalty, a number of states held that the death penalty could no longer be applied under their respective statutes. *See, e.g.*, Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972); People v. Anderson, 3 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

defendants have become eligible for pretrial release and the concern for public safety has increased. In an effort to address this concern, both Congress and the states are attempting to restructure their bail laws to make certain non-capital offenses non-bailable. This trend has rekindled the controversy as to whether the eighth amendment to the United States Constitution guarantees an absolute right to bail. If the capital crimes exception was based on the punishment, and justified by the per se risk of flight theory, there would seem to be little justification for denying bail in non-capital cases.[5] However, if the exception was based on the crime, and therefore justified by the dangerous defendant theory, the denial of bail for certain non-capital offenses may have more validity. Whether new bail laws are upheld based on a finding that there is no constitutionally guaranteed right to bail or that the right does not extend to dangerous defendants, the result is an increased restriction of a criminal defendant's right to bail.

On April 13, 1982, Governor Snelling signed Proposal H, amending section 40 of the Vermont Constitution.[6] The amended provision reads in part, "[p]ersons committed for offenses punishable by death or life imprisonment, when the evidence of guilt is great, shall not be bailable as a matter of right."[7] Prior to this amendment, all prisoners were bailable as a matter of right, except those charged with a "capital offense when the proof is evident or presumption great."[8] In effect, virtually all criminal defendants were entitled to judicially determined bail until this amendment was passed because very few crimes were classified as capital.[9]

The new bail provision raises a number of issues concerning its intended interpretation and effect. To date, there has been no guidance from the Vermont Supreme Court. The discussion below will first focus on the right to bail under the eighth amendment to the United States Constitution by briefly tracing the historical development of that right, followed by a consideration of current federal court interpretations of the eighth amendment. The history of the criminal defendant's right to bail in Vermont will then be ex-

5. This conclusion is premised on the dubious assumption that an accused facing life or long-term imprisonment does not pose the same per se risk of flight as one facing the death penalty.

6. VT. CONST. ch. II, § 40 (Supp. 1975, amended 1982).

7. *Id.*

8. State v. Toomey, 126 Vt. 123, 124, 223 A.2d 473, 475 (1966).

9. *See* VT. STAT. ANN. tit. 13, §§ 2303, 2403, 3401 (1974 & Cum. Supp.).

amined. Finally, the possible interpretations of this new bail provision will be analyzed to determine how the amendment may be applied and how it will affect the criminal defendant's right to bail in Vermont.

I. Right to Bail Under the Eighth Amendment

In *Carlson v. Landon*,[10] the United States Supreme Court discussed the historical background of the eighth amendment's bail provision:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.[11]

Prior to the adoption of the Bill of Rights by the first Congress of the United States, the practice in America had been to grant bail in cases involving crimes which were classified as bailable by the state legislatures.[12] Thus, there was no constitutionally guaranteed right to bail during this period of American history.[13]

The Judiciary Act of 1789, enacted almost simultaneously with the eighth amendment, granted a right to bail to all non-capital defendants.[14] For those accused of capital crimes, it authorized a discretionary denial of bail.[15] The eighth amendment to the United States Constitution states that "[e]xcessive bail shall not be required . . . ."[16] The ambiguity of this clause has sparked a continuing controversy as to whether it implies a guaranteed right to bail in all cases or applies only to situations where bail is otherwise permitted.[17]

One of the earliest cases to address the historical meaning of

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10. 342 U.S. 524 (1952).

11. *Id.* at 545 (footnotes omitted).

12. Duker, *The Right To Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 83 (1977).

13. *Id.*

14. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, (1789) (current version at 18 U.S.C. § 3141 (1976)).

15. *Id.*

16. U.S. Const. amend. VIII.

17. *Compare* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969) *with* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Marshall*, 56 Va. L. Rev. 371 (1970).

the eighth amendment was *Ex parte Watkins*,[18] decided in 1833. The Supreme Court stated that "[t]he eighth amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion."[19] It has been suggested that this view implicitly recognized that the amendment, while directed at limiting the discretion of the courts in setting bail, was an ineffective safeguard against Congress' power to prescribe which cases were to be bailable.[20]

Federal courts compounded the ambiguity problems of the eighth amendment by interpreting its provisions inconsistently. In 1924, in *United States v. Curran*,[21] the Second Circuit Court of Appeals stated that "the power to admit to bail is not a power inherent in the court" and the federal courts have such power only when it is conferred by statute.[22] In 1926, relying on *Curran*, the Sixth Circuit Court of Appeals, although addressing the issue of the denial of bail to an alien under immigration law, observed that "[g]enerally speaking, it may be said that the right to bail is dependent upon statute."[23] That same year, the Seventh Circuit Court of Appeals read the eighth amendment as implicitly safeguarding "the right to give bail at least before trial."[24] The court stated that "[t]he purpose [of the eighth amendment] is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail."[25]

Opinion remains divided among the lower courts as to whether or not the eighth amendment guarantees a right to bail.[26] To add to the confusion, the United States Supreme Court has declined to rule explicitly on the issue. The Court had an opportunity to define the scope of the amendment's bail clause in 1951. In *Stack v.*

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18. 32 U.S. (7 Pet.) 568 (1833).
19. *Id.* at 573-74.
20. Duker, *supra* note 12, at 86-87.
21. 297 F. 946 (2d Cir. 1924).
22. *Id.* at 955.
23. Prentis v. Manoogian, 16 F.2d 422, 423 (6th Cir. 1926).
24. United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926).
25. *Id.*
26. *Compare* Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981) (right to bail), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982), *with* United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc) (no right to bail), *cert. denied*, 455 U.S. 1022 (1982).

Boyle,[27] bail had been set at an amount higher than usual for twelve members of the Communist Party indicted under the Smith Act.[28] In reviewing the historical development of bail in the United States, the Court noted:

> From the passage of the Judiciary Act of 1789 . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . . [U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning . . . .[29]

After ordering a hearing to determine the reasonableness of bail for each individual defendant, the Court concluded: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial . . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' . . . ."[30]

Later that term, in *Carlson v. Landon*,[31] the Supreme Court interpreted the eighth amendment bail clause to permit statutory designation of non-bailable offenses, declaring that there was no absolute right to bail. Again, relying on the historical development of bail, the Court stated:

> [T]he English Bill of Rights Act . . . has never been thought to accord a right to bail in all cases . . . . The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus . . . bail is not compulsory where the punishment may be death . . . . Indeed, the very language of the Amendment fails to say all arrests must be bailable.[32]

The Supreme Court also has not specifically held that the bail provision of the eighth amendment is applicable to the states through the due process clause of the fourteenth amendment.[33]

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27. 342 U.S. 1 (1951).

28. Smith Act, ch. 439, § 2, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1976)).

29. *Boyle*, 342 U.S. at 4 (emphasis in original).

30. *Id.* at 4-5.

31. 342 U.S. 524 (1952).

32. *Id.* at 545-46 (footnotes omitted).

33. However, the Court has noted in dictum that the eighth amendment's proscription

Some lower federal courts have assumed, however, that the bail clause does apply to the states.[34] Even if the eighth amendment is held to apply to the states, the right to bail, if any, afforded by the state constitutions may extend beyond the United States Supreme Court's interpretation of the federal amendment. Thus, even if the Supreme Court were to decide that there is no constitutional right to bail, a state, through an interpretation of its own constitution, could find that such a right does exist.[35]

A number of recent opinions directly reject the notion of a federal constitutional right to bail. Rather, the cases hold that the states and Congress possess considerable latitude in defining bailable offenses, so long as that power is exercised reasonably. In *Murphy v. Hunt*,[36] the United States Supreme Court let pass an opportunity to strike down a bail provision which is far more restrictive than that of Vermont. The Nebraska bail provision that was at issue provides that "[a]ll 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 proof is evident or the presumption great."[37] The Eighth Circuit Court of Appeals had found this provision to be unconstitutional because it categorically denied bail to defendants accused of certain offenses with no possibility for the exercise of the court's discretion in determining if bail should be set.[38] That court noted, however, that "Congress and the states may reasonably legislate as to the right to bail for certain offenses, 'provided the power is exercised rationally, reasonably and without discrimination.' "[39] The court also acknowledged that Congress and the states were free, within due process limits, to define the classes of crimes which are bailable as a matter of right and those which are not.[40] However, the Supreme

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of excessive bail has been assumed to apply to the states through the fourteenth amendment. Schilb v. Kuebel, 404 U.S. 357, 365 (1971). It is interesting to note that the third clause of the eighth amendment, prohibiting cruel and unusual punishment, has been explicitly incorporated into the due process clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

34. *See, e.g.*, United States *ex rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972); Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963).

35. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

36. 455 U.S. 478 (1982).

37. NEB. CONST. art. I, § 9 (adopted 1875, amended 1978).

38. Hunt v. Roth, 648 F.2d 1148, 1164 (8th Cir. 1981).

39. *Id.* at 1161 n.20 (quoting United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 206 (S.D.N.Y. 1969)).

40. *Id.*

Court resurrected the provision by vacating as moot the appellate decision.[41]

Recently, the Third Circuit Court of Appeals observed that "[o]f course, the Eighth Amendment does not create an absolute right to be free on bail."[42] In discussing the meaning of the constitutional bail clause, the court stated that "[b]ecause the Eighth Amendment does not delimit the denial of bail to capital offenses, Congress as well as the states could provide that other serious noncapital crimes are similarly not entitled to bail."[43]

Similarly, the United States District Court for the District of Maryland noted that "the Eighth Amendment has never been considered to prevent Congress from classifying criminal cases into those in which an accused is entitled to bail as a matter of right and those in which the allowance of bail is a discretionary matter."[44]

In *Atkins v. People*,[45] the Sixth Circuit Court of Appeals, while reversing a denial of bail on procedural due process grounds, noted that the eighth amendment does not guarantee a right to bail.

> [T]hat "[e]xcessive bail shall not be required" has never been interpreted to require that all persons awaiting trial be released on bail. The states have the authority to determine that certain arrestees are so dangerous to the community—because of either the nature of the crime with which they are charged or their propensity to flee before trial—that they may be denied bail and incarcerated.[46]

The District of Columbia Court of Appeals, in *United States v. Edwards*,[47] also concluded that there is no "fundamental right" to bail.[48] The court noted that "the excessive bail clause was developed as a specific remedy for judicial abuse of the bail procedure

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41. The Court held that since the defendant had already been convicted, his constitutional claim to the right to pretrial bail was moot. *Hunt*, 455 U.S. at 481.

42. Sistrunk v. Lyons, 646 F.2d 64, 68 (3rd Cir. 1981).

43. *Id.* at 70.

44. Turco v. State, 324 F. Supp. 61, 63 (D. Md. 1971), *aff'd* 444 F.2d 56 (4th Cir. 1971); *see also* United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 206 (S.D.N.Y. 1969).

45. 644 F.2d 543 (6th Cir. 1981), *cert. denied*, 452 U.S. 964 (1981).

46. *Atkins*, 644 F.2d at 549.

47. 430 A.2d 1321 (D.C. App. 1981) (en banc); *see infra* notes 150-52 and accompanying text.

48. *Id.* at 1327.

as otherwise established by law, and did not in and of itself, imply any right to bail.[49] Thus, in the absence of Supreme Court guidance, the current trend among the federal courts supports the position that there is no constitutionally guaranteed right to bail.

II. Pre-Amendment Bail Law in Vermont

Until 1975, Vermont courts imposed money bail and release conditions for two reasons: to assure the appearance of the defendant at trial and to protect the public.[50] In 1974, the Vermont Supreme Court held, in *State v. Webb*,[51] that nonmonetary conditions of release could be imposed to protect the public:

> These conditions that can be imposed upon the release of the defendant to negate danger to the public include: placing him in custody of a designated person or organization agreeing to supervise him; placing restrictions on travel, association or his place of abode during the period of release; or imposing any other condition deemed necessary, including a condition requiring that the defendant return to custody after specified hours.[52]

In *State v. McInnis*,[53] decided the same year, the court indicated that a defendant could be denied release on bail after a finding of danger to the public:

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49. *Id.*

50. In so doing, the courts relied on Vermont's bail statute which, by its language, appeared specifically to sanction this practice. The statute provides in part:

> (a) Any person charged with an offense other than an offense punishable by death, shall at his appearance before a judicial officer be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines in the exercise of his discretion that such a release will not reasonably assure the appearance of the person as required, or that the release of the person will constitute a danger to the public. When such a determination is made the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions . . . .
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> (b) In determining which conditions of release will reasonably assure appearance and will not constitute a danger to the public, the judicial officer shall [consider the relevant circumstances of the case].

Vt. Stat. Ann. tit. 13, § 7554 (1974).

51. 132 Vt. 418, 320 A.2d 626 (1974).

52. *Id.* at 420-21, 320 A.2d at 628 (citing Vt. Stat. Ann. tit. 13, §§ 7554(a)(1), (2), (5) (1974)).

53. 133 Vt. 20, 328 A.2d 400 (1974).

> It should be noted that in cases other than those punishable by death, the Legislature has required that the accused be released, unless there are facts established sufficient to support a finding that release will not reasonably assure the appearance of the person as required, or that the release of the person will constitute a danger to the public, or both.[54]

The court was careful to point out, however, that such a finding would require a strong factual foundation since the "deprivation of liberty before trial is a drastic device . . . ."[55]

In the 1975 threshold case of *State v. Pray*,[56] the Vermont Supreme Court directly addressed the issue of the constitutionality of pretrial preventive detention.[57] The defendant in *Pray*, charged with first-degree murder, was denied bail on the grounds that his release would constitute a danger to the public.[58] At that time, the bail provision of the Vermont Constitution provided that "all prisoners, unless in execution or committed for capital offenses, when the proof is evident or presumption great, shall be bailable by sufficient sureties; nor shall excessive bail be exacted for bailable offenses."[59] The court interpreted the words "shall be bailable by sufficient sureties" as authorizing the imposition of bail for assurance purposes only.[60] Since the defendant was not charged with a capital offense, the court found that he was entitled to bail as a matter of right if his appearance at trial could be sufficiently assured.[61]

This interpretation led the court to a constitutional analysis of Vermont's bail statute. The statute provides for pretrial release in non-capital cases on personal recognizance or upon the posting of an unsecured bond "unless the [judicial] officer determines . . . that such a release will not reasonably assure the appearance of the person as required, or that the release of the person will constitute

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54. *Id.* at 21, 328 A.2d at 402.

55. *Id.* at 22, 328 A.2d at 402.

56. 133 Vt. 537, 346 A.2d 227 (1975).

57. The purpose of preventive detention is to protect the public by allowing courts to deny bail based on a defendant's presumed dangerous propensities. Hruska, *supra* note 3, at 39.

58. *Pray*, 133 Vt. at 539, 346 A.2d at 228.

59. VT. CONST. ch. II, § 40 (Supp. 1975).

60. *Pray*, 133 Vt. at 541-42, 346 A.2d at 229. Implicit in this interpretation is that the authority to deny bail exists only if there is no way reasonably to assure the defendant's appearance at trial.

61. *Id.* at 540-41, 346 A.2d at 228-29.

a danger to the public."[62] If it is determined that a release will not reasonably assure the appearance of the person at trial, the judicial officer is compelled by section 7554(a) to impose statutorily enumerated conditions of release, either singly or in combination.[63] With regard to the potentially dangerous defendant, the court found that section 7554(a) was silent as to whether conditions "may be imposed, must be imposed, or bail denied altogether" in order to protect the public.[64]

However, the court went on to note that the prefatory language of section 7554(b)[65] does suggest that a judicial officer has a positive duty to impose conditions of release on the potentially dangerous defendant.[66] Therefore, section 7554(a), read in conjunction with section 7554(b), would not allow a judicial officer to deny bail with conditions to a potentially dangerous defendant.[67] In other words, the court could find no express statutory authority for a judicial officer to deny a defendant bail solely on a finding that he was a danger to the public.[68] Consequently, since there was no conflict between the statute and the constitution, the statute was upheld.[69] Had the court construed section 7554 to authorize the denial of bail to protect the public, as suggested in *McInnis*,[70] the court would have been forced to declare the statute unconstitutional.[71]

In concluding, the court stated that "[t]here is nothing in the Vermont Constitution, chapter II, section 40, that provides for de-

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62. VT. STAT. ANN. tit. 13, § 7554(a) (1974).

63. *Id.*

64. *Pray*, 133 Vt. at 540, 346 A.2d at 229.

65. VT. STAT. ANN. tit. 13, § 7554(b) (1974).

66. *Pray*, 133 Vt. at 540-41, 346 A.2d at 229.

67. *Id.* at 541, 346 A.2d at 229.

68. *Id.* However, the legislative history of the bail statute supports a different conclusion:

> This provision ordering the release of the person who will constitute a danger to the public is an addition to the Federal Bail Act . . . . In other words, the judge advocate could say the fellow may show up; in the meantime he may rob a few more banks so we had better not let him go.

Hearings on S. 1083 Before the Senate Judiciary Committee, Adj. Sess., Jan. 4, 1968, at 1 (testimony of Senator Jeffords).

69. *Pray*, 133 Vt. at 541, 346 A.2d at 230.

70. 133 Vt. 20, 328 A.2d 400 (1974). The *Pray* court explicitly overruled *McInnis* to the extent that it suggested that a defendant might be denied release on bail after a finding of danger to the public. *Pray*, 133 Vt. at 542, 346 A.2d at 230.

71. *Pray*, 133 Vt. at 541, 346 A.2d at 229.

nial of bail because of a defendant's dangerous propensities."[72] After declaring its holding that bail may not be denied a defendant solely on the grounds that his release would constitute a danger to society, the court went on to note that "[i]f the constitutional guarantees of bail . . . are in error, then it is up to the people to effect change, since the right to amend the constitution rests solely with the electorate."[73]

The *Pray* rule was affirmed in *State v. Cyr*[74] which held that "bail cannot be used solely as a device for protecting the public."[75] The rule received further support in *State v. Mecier*[76] where *Pray* was read as holding that "a defendant cannot be entirely denied bail on the ground that his release would constitute a danger to the public."[77]

At issue in yet another case, *State v. Brown*,[78] was whether a judicial officer could impose a condition of release solely to protect the public.[79] The court refused to extend *Pray*, noting that "[o]ur cases hold only that bail may not be *denied* on the sole ground that the defendant's release would endanger the public."[80] The court reasoned that if bail could not be based on the imposition of a condition designed to protect the public, then section 7554 would be virtually meaningless.[81]

III. The New Amendment

On March 2, 1982, the bail provision of the Vermont Constitution was amended by the voters[82] to read as follows:

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72. *Id.*

73. *Id.* at 542, 346 A.2d at 230 (citing Vt. Const. ch. II, § 72; Buttolph v. Osburn, 119 Vt. 116, 122, 119 A.2d 686, 690 (1955)). For a similar analysis under practically identical statutory and constitutional provisions, see Martin v. State, 517 P.2d 1389 (Alaska 1974). *See also* Note, *Preventive Detention*, 79 Harv. L. Rev. 1489 (1966): "In those states [which guarantee the right to bail in non-capital cases], denial of bail in a noncapital case for preventive purposes, no matter how great the dangers posed by release, would be permissible only by constitutional amendment." *Id.* at 1500 (footnote omitted).

74. 134 Vt. 460, 365 A.2d 969 (1976).

75. *Id.* at 462, 365 A.2d at 971.

76. 136 Vt. 336, 388 A.2d 435 (1978).

77. *Id.* at 338, 388 A.2d at 437.

78. 136 Vt. 561, 396 A.2d 134 (1978).

79. Bail was conditioned on the defendant not being "the subject of a new charge of a felony . . . ." *Id.* at 563, 396 A.2d at 135.

80. *Id.* at 565, 396 A.2d at 136-37 (emphasis added).

81. *Id.*

82. The amendment procedure is set out in Vt. Const., ch. II, § 72.

> Excessive bail shall not be exacted for bailable offenses. All persons, unless sentenced, or unless committed for offenses punishable by death or life imprisonment when the evidence of guilt is great, shall be bailable by sufficient sureties. Persons committed for offenses punishable by death or life imprisonment, when the evidence of guilt is great, shall not be bailable as a matter of right.[83]

The purpose for the new amendment was explained in the following manner during the House Judiciary Committee Hearings:

> The reason for the proposed amendment is to give judges discretion to withhold bail where a person has committed a crime punishable by life imprisonment such as murder or some others that exist in the criminal code. The present constitutional provision had that authority but it talked about capital offenses, meaning ones where the person could be executed . . . . So this merely reflects the changes in the statutes that took place to eliminate the death penalty to provide that in those cases where life imprisonment is a possible penalty, the judges could in their discretion deny bail.[84]

However, further testimony indicated that the public expected a much more restrictive access to bail than the new provision actually contained:

> [I]f this is passed or with hullaballou the public is going to be thinking this is something which it isn't. And if it is passed, the first time a rape case comes up which is not covered under it, the public is going to say, why aren't the courts doing their job, and the courts are doing their job but they are going to get blamed for the fellow getting out on bail . . . .[85]

A. *Constitutionality of the Amendment*

The Vermont Supreme Court had its first opportunity to address the constitutionality of the new bail amendment in *State v. Hunt*.[86] The defendant was charged with first degree murder and cash bail was set. While the defendant was trying to raise the money, the State requested that the new amendment be invoked

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83. VT. CONST. ch. II, § 40 (Supp. 1975, amended 1982). This section was enacted by a vote of 66,898 to 21,900 and was signed by Governor Snelling on April 13, 1982. Brief for Appellee at 7, State v. Hunt, No. 82-316 (Vt. S. Ct. June 26, 1982).

84. *Hearings on Proposal H Before the House Judiciary Committee*, Bien. Sess., April 1, 1981, at 46-47 (testimony of Senator Gibson) [hereinafter cited as *Hearings*].

85. *Id.* at 10 (testimony of Vermont District Court Judge Edward Costello).

86. Entry Order, No. 82-316 (Vt. S. Ct. June 26, 1983).

and that bail be denied. At a second bail hearing, the trial judge revoked the bail. An appeal was taken to the Vermont Supreme Court in which the defendant argued that the new bail amendment violated the eighth amendment guarantee of a right to bail. The court declined to comment on the constitutional issue and reversed the decision on other grounds.[87] At this date, no other case has addressed the issue of the constitutionality of the new Vermont amendment.

As previously discussed, the United States Supreme Court has not held that there is an absolute right to bail under the eighth amendment to the United States Constitution.[88] Nor has the amendment been held to apply to the states through the fourteenth amendment.[89] Therefore, states must decide whether such a right exists under their own constitutions or whether they may define which classes of crime are bailable as a matter of right and which are not.

One line of authority suggests that, despite the abolition of the death penalty in many states, due in large part to the landmark Supreme Court decision of *Furman v. Georgia*,[90] the power to deny bail for offenses that were traditionally capital offenses has remained unchanged. These cases hold that the classification of capital offenses remains valid for the purpose of bail determination despite the inability to inflict the death penalty as punishment. For example, in *State v. Sparks*,[91] the North Carolina Supreme Court held that the crime of first-degree murder is a "capital offense" within the meaning of the bail statute, whether or not the defendant faces the death penalty.[92]

Therefore, the release of such a defendant on bail is a matter within the discretion of the trial judge.[93] And in *Ex parte Bynum*,[94] the Supreme Court of Alabama agreed with the view that offenses which were classified as capital before *Furman* are

87. The court held that because the State failed to request that bail be denied at the first hearing, it could not do so at a second hearing since there was no changed condition in the defendant's status which would warrant a change of the bail set at the first hearing. *Id.*

88. *See supra* notes 27-32 and accompanying text.

89. *See supra* note 33 and accompanying text.

90. 408 U.S. 238 (1972); *see supra* note 4.

91. 297 N.C. 314, 255 S.E.2d 373 (1979).

92. *Id.* at 321, 255 S.E.2d at 378.

93. *Id.*

94. 294 Ala. 78, 312 So. 2d 52 (1975).

still capital, thereby allowing bail to be denied for those offenses.[95] "The only effect of *Furman* was to eliminate the imposition of the death penalty as it was then enforced, and not to eliminate the classification whereby crimes are categorized as capital for purposes other than punishment."[96]

Arizona,[97] Texas,[98] Michigan,[99] Wisconsin,[100] Nebraska,[101] and Utah[102] are among the states which have amended their constitutions with the apparent intention of permitting preventive detention.[103] The classifications found in these amendments differ from the "traditionally capital crimes" classification in that the right to bail is denied to all defendants accused of certain crimes thought to be associated with dangerous propensities.[104]

As states continue to place restrictions on the right to bail in non-capital cases, appeals are certain to increase. In view of this trend, the United States Supreme Court will inevitably be asked to resolve whether there is a constitutional guarantee of a right to bail. Until that time, however, it is almost certain that the Vermont Supreme Court will be called upon again to address the issue. In view of the recent decisions of various state[105] and circuit courts,[106] which have consistently upheld the right of states to classify crimes as bailable or non-bailable, it is highly unlikely that the new Vermont bail provision will be struck down under the state constitution.

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95. *Id.* at 83, 312 So. 2d at 55.

96. *Id.*; *see also* State v. Flood, 263 La. 700, 269 So. 2d 212 (1972); Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972); Roll v. Larson, 30 Utah 2d 271, 516 P.2d 1392 (1973).

97. ARIZ. CONST. art. II, § 22 (adopted 1910, amended 1970).

98. TEX. CONST. art. I, § 11(a) (adopted 1956, amended 1977).

99. MICH. CONST. art. I, § 15 (adopted 1963, amended 1978).

100. WIS. CONST. art. I, § 8(2) (adopted 1848, amended 1981).

101. NEB. CONST. art. I, § 9 (adopted 1875, amended 1978).

102. UTAH CONST. art. I, § 8 (adopted 1895, amended 1972).

103. The denial of bail for certain crimes is an accepted practice in Sweden, Norway, Denmark, and West Germany. These countries deny bail to criminal defendants based on the risk of danger to society and the risk of flight. Foote, *The Coming Constitutional Crisis in Bail* (Part I), 113 U. PA. L. REV. 959, 963 (1965).

104. The validity of inferring dangerous propensities from a defendant's arrest based on probable cause for a particular crime was called into question in Hunt v. Roth, 648 F.2d 1148, 1162-65 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982).

105. *See supra* notes 91-96 and accompanying text.

106. *See supra* notes 42-49 and accompanying text.

B. *Standard and Burden of Proof*

The new amendment raises the question of what is required to show that a defendant has no right to bail. Under the amendment, the crime committed must be punishable by death or life imprisonment and the evidence of guilt must be great. The latter phrase, "when the evidence of guilt is great," has no established meaning in Vermont jurisprudence, there being no legislative guidance or prior case law upon which to rely.

Prior to the deprivation of liberty, a court must provide, consistent with the requirements of due process, a hearing which is meaningful and findings sufficient to make any appeal meaningful.[107] Without standards to guide lower courts in determining whether the evidence of guilt is great, any decision by a trial court might be capricious or arbitrary.[108]

"When the evidence of guilt is great" is a phrase which has been given a variety of interpretations by different state courts ranging from requiring a simple finding of probable cause[109] to proof beyond a reasonable doubt.[110] The court in *State v. Konigsberg*[111] struck a compromise between the two extremes. In that case, the New Jersey Supreme Court provided the following test: "Guilt or innocence is not the issue . . . . [T]he just rule for utilization is that bail should be denied when the circumstances disclosed indicate a fair likelihood that the defendant is in danger of a jury verdict of [guilty]."[112]

The Vermont Legislature was aware of this evidentiary problem and the need for guidelines before the new bail provision was passed. In reply to Representative Spencer's question regarding who would set the standard for weighing the evidence of guilt, District Court Judge Costello stated:

> The judge must make a ruling whether or not there is proba-

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107. Specht v. Patterson, 386 U.S. 605, 610 (1967).

108. The right to an individual evaluation in considering bail is provided for in Vermont's bail statute wherein specific provisions are set forth to guide the trial court in setting bail. VT. STAT. ANN. tit. 13, § 7554 (1974). In light of the new constitutional amendment, which now allows for the denial of bail for crimes punishable by life imprisonment, these statutory provisions no longer apply to such offenses. *See supra* note 50. There is no pending legislation to amend the bail statute to reflect the constitutional change.

109. *Ex parte* Andrews, 39 Okla. Crim. 359, 361, 265 P. 144, 145 (1928).

110. Fountaine v. Mullen, 117 R.I. 262, 264-69, 366 A.2d 1138, 1140-42 (1967).

111. 33 N.J. 367, 164 A.2d 740 (1960).

112. *Id.* at 377, 164 A.2d at 745.

> bly [sic] cause. If that is contested, then there would have to be an evidentiary hearing of some kind and if the judge ruled that whatever standard he chose to take . . . is when the evidence of guilt is great, I suspect I would go to the Vermont Supreme Court very quickly who would hopefully lay down some guidelines as to how you decide whether or not you are finding this supported by the evidence. As far as guidelines initially, I think probably there would be quite a little discussion among the judges as to just what they are looking for.[113]

A related issue is whether the state or the accused, bears the burden of proof to show, or to refute, that the evidence of guilt is great. A discussion of the different approaches of various jurisdictions will provide an indication of the possible choices facing Vermont courts when addressing the new amendment.

In the jurisdictions holding that the burden of proof is on the state, the courts have stated that the indictment has no evidentiary value and cannot raise a presumption of guilt.[114] This line of reasoning is based on two grounds. First, the accused is protected by the presumption of innocence from any inference of having committed the crime as charged.[115] Second, since an accused is entitled to bail in all cases outside the capital crimes exception, the party relying on this exception bears the burden of proof.[116]

The Connecticut Supreme Court has taken an alternative position holding that an indictment has some evidentiary value but that it should not be given conclusive effect which would lead to the denial of bail.[117] In its decision, the court adopted the *Konigsberg* test[118] as the proper rule for determining when "the proof is evident or the presumption great."[119]

Where courts have held that the accused has the burden of proof, the indictment is said to raise a prima facie or strong presumption which the accused must overcome by sufficient rebuttal

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113. *Hearings, supra* note 84, at 15 (testimony of Vermont District Court Judge Edward Costello).

114. *E.g.*, State v. Konigsberg, 33 N.J. 367, 164 A.2d 740 (1960). Since the decision to grant or deny bail is a judiciary determination, not to be considered or decided by a grand jury, the indictment is not sufficient to show that the proof is evident or presumption great. *Id.* at 373, 164 A.2d at 743.

115. Commonwealth v. Stahl, 237 Ky. 388, 35 S.W.2d 563 (1931).

116. *Konigsberg*, 33 N.J. at 374-75, 164 A.2d at 744.

117. State v. Menillo, 159 Conn. 264, 277, 268 A.2d 667, 673 (1970).

118. *See supra* note 112 and accompanying text.

119. *Menillo*, 159 Conn. at 270, 268 A.2d at 670.

evidence.[120] The same rule has been applied in jurisdictions which prosecute by information on the theory that an information, like an indictment, raises a prima facie presumption of guilt which the defendant must rebut.[121] In at least one jurisdiction, however, it has been held that while the burden of proof is on the defendant, the information does not have the effect of a presumption, either conclusive or prima facie.[122]

In Vermont, any offense may be prosecuted by indictment or information at the option of the prosecuting officer.[123] Thus, before determining whether the evidence against a defendant is great, Vermont courts must decide which party will bear the burden of proof with respect to that issue. In *State v. Churchill*,[124] the Supreme Court of Vermont noted that the constitutional phrase "when the proof is evident or presumption great" refers to a standard for refusing bail in capital cases and does not place the burden of proof on the person seeking bail.[125]

If Vermont continues to follow this precedent, the question remains as to how much evidentiary weight will be given to the information which merely requires a showing of probable cause.[126] The language in *State v. McInnis*[127] may provide some useful guidelines: "In this case, the respondent is being confined without bail. Since the deprivation of liberty before trial is a drastic device, and one obviously sought to be avoided by the Legislature, this Court has and does require strong factual foundation for such findings . . . ."[128] The court went on to note that the "ingredient of violence in the crime charged" was an insufficient basis, by itself, to justify the denial of bail.[129] Therefore, Vermont trial judges may give some evidentiary weight to the information, but they will need to establish concrete guidelines as to what degree of evidence will be required from the prosecution to show that the evidence of guilt

120. *See, e.g.*, Fischer v. Ball, 212 Md. 517, 129 A.2d 822 (1957).

121. *See, e.g.*, Fikes v. State, 221 Ark. 81, 251 S.W.2d 1014 (1952).

122. State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948).

123. VT. R. CRIM. P. 7(a). The Vermont Supreme Court has held that the state constitution imposes no requirement of prosecution by indictment and that the requirement in Vermont law is entirely statutory. State v. Stimpson, 78 Vt. 124, 139, 62 A. 14, 19 (1905); State v. Barr, 126 Vt. 112, 116, 223 A.2d 462, 446 (1966).

124. 133 Vt. 338, 341 A.2d 22 (1975).

125. *Id.* at 341, 341 A.2d at 24.

126. VT. R. CRIM. P. 4(b).

127. 133 Vt. 20, 328 A.2d 400 (1974).

128. *Id.* at 22, 328 A.2d at 402.

129. *Id.*

is great against a defendant.

C. *Mandatory or Discretionary Denial*

Once it has been determined that the evidence against a defendant accused of a crime carrying a potential life sentence "is great," the question becomes whether the new bail provision either requires or permits the denial of bail. Although raised in *State v. Hunt*,[130] this issue was not addressed by the Vermont Supreme Court which found it unnecessary to consider the issue since the case was remanded on other grounds.[131]

The Supreme Court of Vermont, however, has always recognized the discretionary power of the trial judge to admit to bail those charged with capital offenses.[132] The old provision of the Vermont Constitution provided that all prisoners, except those charged with "capital offences, when the proof is evident or presumption great, shall be bailable by sufficient sureties . . . ."[133] Some state courts with similar constitutional or statutory provisions have interpreted this language to require mandatory exclusion from bail where the proof is evident.[134] But others, including Vermont,[135] have maintained that the trial courts are vested with discretionary power when determining whether to admit to bail a person charged with a capital offense.

In *State v. Toomey*,[136] the Vermont Supreme Court held:

> Even where the offense charged is a capital one, and the proof of guilt is evident or presumption great, the prisoner may be admitted to bail in the discretion of the court having jurisdiction of the question; but in this connection it should be stated that the discretion to be exercised by a court of justice is not an arbitrary, but a sound, judicial discretion, controlled by certain and well defined and established rules.[137]

The *Toomey* court went on to enumerate the factors to be consid-

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130. Brief for Appellant at 15, State v. Hunt, No. 82-316 (Vt. S. Ct. June 26, 1982).

131. *See supra* note 87.

132. State v. Toomey, 126 Vt. 123, 124, 223 A.2d 473, 475 (1966).

133. VT. CONST. ch II, § 40 (Supp. 1975).

134. *See, e.g.*, People v. District Court, 187 Colo. 164, 166-67, 529 P.2d 1335, 1336 (1974) (noting that a statute mandating denial of bail to persons charged with capital offenses where proof is evident or presumption great is constitutional and leaves no discretion to grant bail in a given situation).

135. *In re* Dexter, 93 Vt. 304, 315, 107 A. 134, 138 (1919).

136. 126 Vt. 123, 223 A.2d 475 (1966).

137. *Id.* at 124-25, 223 A.2d at 475 (1969) (citing *In re* Dexter, 93 Vt. at 315).

ered in exercising this discretion:

> (1) Ability of the accused to give bail, (2) nature of the offense, (3) penalty for the offense charged, (4) character and reputation of the accused, (5) health of the accused, (6) character and strength of the evidence, (7) probability of the accused appearing at trial, (8) forfeiture of other bonds, and (9) whether the accused was a fugitive from justice when arrested.[138]

This reasoning was adopted by the Rhode Island Supreme Court which held that trial courts have discretion to admit to bail persons accused of capital crimes even where the evidence of guilt is substantial.[139] The Maine Supreme Judicial Court also adopted this reasoning in finding that there is a discretionary right to bail in capital cases.[140]

The legislative history of Vermont's new amendment indicates that this provision was intended to provide judges with the discretion to deny bail to defendants charged with certain criminal offenses. "It doesn't say they have to deny bail, but it gives them discretion where evidence of guilt is great . . . ."[141]

The new constitutional amendment states that a certain class of defendants "shall not be bailable as a matter of right"[142] but neither case law nor legislative history indicate that they are not bailable at all. Therefore, while the new bail provision allows a discretionary denial of the right to bail, that denial may not be arbitrary but rather must be the result of "sound, judicial discretion, controlled by certain and well defined and established rules."[143] A court's failure to exercise discretion when properly called upon to do so would constitute an abuse of discretion, thereby requiring reversal.[144] Thus, the *Toomey* factors should continue as useful guidelines for the exercise of the trial court's discretion when applying the new bail provision.

D. *Preventive Detention*

After a trial court has found that the evidence of guilt is great

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138. *Toomey*, 126 Vt. at 125, 223 A.2d at 475.
139. Fountaine v. Mullen, 117 R.I. 262, 270, 366 A.2d 1138, 1143 (1976).
140. Fredette v. State, 428 A.2d 395, 402 (Me. 1981).
141. *Hearings, supra* note 84, at 47 (testimony of Senator Gibson).
142. VT. CONST. ch. II, § 40 (Supp. 1975, amended 1982).
143. *Toomey*, 126 Vt. at 125, 223 A.2d at 475.
144. State v. Gardner, 139 Vt. 456, 461, 433 A.2d 249, 252 (1981).

against a defendant charged with a life sentence crime, an issue is raised as to whether the judge, in his discretion, can deny bail solely on the grounds that release would constitute a danger to society.[145]

The practice of preventive detention[146] has arisen in an effort to provide a compromise to the extreme positions inherent in the bail clause of the eighth amendment. On the one hand, a finding of a constitutionally guaranteed right to bail would preclude the practice of preventive detention. On the other hand, a finding that no such right exists would allow legislatures a relatively free reign to decide which societal interests outweigh a defendant's pretrial liberty interest. Preventive detention allows a limited right to legislatures to deny bail to presumptively dangerous defendants while preserving the right to bail for all other classes of defendants. This middle position can provide a balance between protecting society yet, at the same time, minimizing the risk of legislative abuse of the bail procedure.

Growing public concern about the increasing crime rate has spurred both state and federal action. Some states have amended their constitutional right-to-bail provisions to permit preventive detention.[147] And the Senate Judiciary Committee has approved a bill to amend the federal bail statute[148] to allow the detention of certain defendants if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[149]

The District of Columbia Reform and Criminal Procedure Act

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145. Since the enactment of the new amendment, the *Pray* decision is arguably no longer applicable to crimes carrying life sentences. In that case, life sentence crimes were bailable as a matter of right. A very different situation is at issue now that life sentence crimes are not bailable as a matter of right.

146. *See supra* note 57.

147. *See, e.g.*, TEX. CONST. art. I, § 11(a) (adopted 1956, amended 1977) which provides that:

> any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for the prior felony for which he has been indicted, or (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony . . . may be denied bail pending trial.

148. 18 U.S.C. §§ 3141-3152 (1976).

149. S. 1554, 97th Cong., 1st Sess., § 3142(e)(1) (1981).

of 1970 officially recognizes the practice of preventive detention.[150] The Act allows courts to withhold bail from a defendant for up to sixty days prior to trial if the court finds that the defendant's release would constitute a danger to the community.[151] The constitutionality of the Act was upheld by the District of Columbia Court of Appeals in *United States v. Edwards*.[152]

In *Wansley v. Wilkerson*,[153] the United States District Court for the Western District of Virginia denied the defendant's application for bail pending retrial on rape and murder charges. Although stating that a general right to bail exists, the court ordered bail withheld in order to protect the community.[154] A few years later, in 1972, the same court held that a judge may deny bail if he finds that release of the defendant would pose a danger to the community.[155] In 1975, the Virginia Legislature enacted a statute specifically authorizing preventive detention.[156]

The legislative history of Vermont's new amendment indicates that its opponents were concerned that it did not go far enough to cover the major public concern: consideration of an accused's danger to the public. "I oppose Proposal H simply because in my mind it does not go far enough. It does not provide for consideration of an accused or an accused offender's danger to the community."[157] In response to a suggestion that the list of offenses carrying life sentences[158] might be statutorily increased, State Attorney General

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150. D.C. CODE ANN. §§ 23-1321-1322 (1973).

151. *Id.*

152. 430 A.2d 1321 (D.C. App. 1981) (en banc).

153. 263 F. Supp. 54 (W.D. Va. 1967).

154. *Id.* at 57.

155. Nail v. Slayton, 353 F. Supp. 1013, 1019 (W.D. Va. 1972).

156. VA. CODE § 19.2-120 (1983). This section provides that:

> An accused, or juvenile . . . who is held in custody pending trial or hearing . . . shall be admitted to bail . . . unless there is probable cause to believe that:
>
> (1) He will not appear for trial or hearing or at such other time and place as may be directed, or
>
> (2) His liberty will constitute an unreasonable danger to himself or the public.

157. *Hearings, supra* note 84, at 19 (testimony of Vermont Attorney General John Easton). "Ideally bail statutes or bail constitutional provision [sic] should provide that persons are entitled to bail but may be held without bail if dangerousness to the public is shown by evidence . . . ." *Id.* at 4 (testimony of Vermont District Court Judge Edward Costello).

158. The following offenses listed in Title 13 of the Vermont Statutes Annotated (1974 & Supp. 1983) carry potential sentences of either life imprisonment or death:

(1) Habitual criminals—§ 11 (life)

John Easton replied:

> I would not favor changing all our statutes simply to deal with the constitution. If the constitution is an impediment to accomplishing what your constituents and the citizens of this state feel should be accomplished, I don't think we should deal with it by amending the various offenses having two or three dozen life offense statutes on the books. I think we ought to deal with the problem and the problem is, what about the person who has demonstrated by past behavior that he represents such a danger to the community that no conditions of release will assure the safety of the public.[159]

This testimony suggests that the offenses covered by the new amendment would not allow for the denial of bail based on a finding that the release of a defendant would constitute a danger to society.

Conclusion

The new bail amendment to the Vermont Constitution provides trial judges with the discretion to deny bail when two narrowly-drawn conditions exist: (1) when the offense charged is punishable by death or life imprisonment; and (2) when the evidence of guilt is great. Presumably, the discretionary decision to deny bail may not be based on a finding that the release of the defendant would pose a danger to society.

The *Pray* court invited the voters of Vermont to effect a change if they disagreed with the constitutional guarantees of bail set forth at that time.[160] That is precisely what they did when Proposal H was adopted. However, legislative history indicates that the people of Vermont had hoped that the new bail amendment

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(2) Attempts—§ 1402 (life)
(3) First degree murder—§ 2303(a) (life)
(4) First degree murder in an unrelated second offense—§ 2303(b) (life)
(5) First degree murder of a correctional facility official or law inforcement officer—§ 2303(c) (life or death)
(6) Second degree murder—§ 2303(d) (life)
(7) Kidnapping with intent to extort money—§ 2403 (life or death)
(8) Treason—§ 3401 (death)

159. *Hearings, supra* note 84, at 25 (testimony of Vermont Attorney General John Easton). The Office of the Vermont Attorney General has proposed a new constitutional amendment which specifically provides that danger to the public may be considered when making bail determinations. Telephone interview with John Easton, Vermont Attorney General (Sept. 27, 1983).

160. *Pray*, 133 Vt. at 42, 346 A.2d at 230.

would be far more restrictive than it actually is. As the crime rate mounts and public concern increases, Vermont courts and legislators certainly will be faced with the difficult task of weighing the societal concern for the public safety against the criminal defendant's right to bail. Thus, while Vermont has taken the first step in joining the trend to restrict the criminal defendant's right to bail, it may not be the last.

Alice E. DeTora