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PRETRIAL BAIL: A DEPRIVATION OF LIBERTY OR PROPERTY WITH DUE PROCESS OF LAW

The term "bail" encompasses several interrelated concepts. Bail refers to a monetary or nonmonetary obligation that a criminal defendant undertakes to procure his release pending trial or appeal.[1] Bail also connotes a criminal defendant's status once the defendant is at liberty pending trial or appeal.[2] In addition, bail signifies a procedural scheme by which a court determines the propriety of a defendant's release and decides what accompanying release conditions are appropriate under the circumstances.[3] The federal Bail Reform Act of 1966[4] (the Act) is an example of a pretrial

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[1] *See* Manning v. State *ex rel* Williams, 190 Okla. 65, ____, 120 P.2d 980, 981 (1942) (bail refers to method by which defendant procures release while awaiting trial); BALLENTINE'S LAW DICTIONARY 119 (3d ed. 1969) (one meaning of word "bail" is monetary or nonmonetary security that defendant gives to gain release pending trial).

[2] *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 111 (unabr. ed. 1969) (bail signifies condition of being free from custody pending attendance at judicial proceeding). *See generally* Sawyer v. Barbour, 142 Cal. App.2d 827, ____, 300 P.2d 187, 190-91 (Cal. Dist. Ct. App. 1956) (term "bail" means several things, including security given for release pending trial or appeal and status of defendant that has procured release).

[3] *See* United States v. Stanley, 469 F.2d 576, 579 & n.6 (D.C. Cir. 1972) (bail encompasses procedural scheme by which court determines monetary or nonmonetary release conditions for criminal defendants).

[4] 18 U.S.C. §§ 3141-3152 (1976). The Bail Reform Act of 1966 (the Act) establishes procedures for the pretrial release of federal defendants in capital and noncapital cases and for release pending appeal. *See id.* §§ 3141-3148. Section 3146 of the Act provides a hierarchical list of available release conditions. *See id.* § 3146; *see also infra* notes 146-51 and accompanying text (discussion of hierarchy of release conditions under the Act). In noncapital cases, a court decides the appropriate release condition or conditions by determining the least restrictive measure for reasonably assuring a defendant's attendance at trial. 18 U.S.C. § 3146; S. REP. NO. 750, 89th Cong., 1st Sess., 9-11 (1965) [hereinafter cited as SENATE REPORT]; *see* United States v. Kirkman, 426 F.2d 747, 749-50 (4th Cir. 1970) (judicial officer at bail hearing should impose least onerous release condition necessary to minimize risk of nonappearance); United States v. Leathers, 412 F.2d 169, 173 (D.C. Cir. 1969) (court must establish least restrictive bail condition that reasonably will ensure defendant's attendance). In capital cases, a court determines the additional issue of whether a defendant's release would constitute a danger to the community. *See* 18 U.S.C. § 3148. A decision concerning release pending appeal involves the issue of a good faith motivation for the appeal, along with risk of flight or danger to the community. *See id.*; *see also* Harris v. United States, 404 U.S. 1232, 1232-33 (1971) (bail hearing pending appeal involves issues of flight, danger to community, and motivation for appeal).

Like the federal Act, many state bail statutes provide courts with a variety of release conditions, treat pretrial release differently than release pending appeal, distinguish between pretrial release in capital and noncapital cases, and require courts to consider the circumstances of a particular case when determining the appropriate bail conditions. *See, e.g.*, COLO. REV. STAT. §§ 16-4-101 to -205 (Repl. 1978 & Supp. 1982); CONN. GEN. STAT. ANN. §§ 54-53 to -53a, 54-63a to -63g, 54-64a to -76a (West Supp. 1982); NEB. REV. STAT. §§ 29-901 to -910 (Repl. 1979); N.Y. CRIM. PROC. LAW §§ 510.10-540.30 (McKinney 1971 & Supp. 1982-1983); N.D. R. CRIM. P. 46.

release scheme that favors the pretrial release of criminal defendants facing noncapital charges[5] and that provides courts with a choice of several measures to ensure a defendant's attendance at trial.[6]

Scholars disagree whether a federal pretrial release system is a constitutional or merely a statutory requirement.[7] The prevailing constitutional rationale for bail is that a right to bail, although not absolute, is implicit in the eighth amendment prohibition against the imposition of excessive bail.[8] A supplemental proposition is that a procedural scheme of pretrial release is necessary to preserve the presumption of innocence inherent in American jurisprudence.[9] Controversy exists, however, con-

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[5] *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3152 (1976) (establishing liberal pretrial release system for federal courts); FED. R. CRIM. P. 46(g) (mandating judicial scrutiny of pretrial detention of defendants to avoid unnecessary confinement); *see also* Bloom v. Illinois, 391 U.S. 194, 212 (1968) (Fortas, J., concurring) (federal bail statute indicates expansion of procedural and substantive rights for criminal defendants); H.R. REP. NO. 1541, 89th Cong., 2d Sess. ____ (purpose of federal bail act is to increase availability of pretrial release), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2293, 2295-300 [hereinafter cited as HOUSE REPORT]; SENATE REPORT, *supra* note 4, at 5-8 (new federal bail act revises existing bail practices and provides alternatives to monetary bail practices and provides alternatives to monetary bail conditions to facilitate pretrial release).

[6] *See* 18 U.S.C. § 3146 (1976) (release conditions for criminal defendants); *infra* notes 146-51 and accompanying text (discussion of various release conditions under the Act).

[7] *Compare* H. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 691 (4th ed. 1927) (right to bail implicit in eighth amendment) *and* Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 965-89 (1965) (historical analysis of eighth amendment suggests that right to bail is implicit in Constitution) *with* Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34 (1977) (right to bail only statutory). *See generally* Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) (analysis of controversy concerning source of right to bail) [hereinafter cited as *Historical Perspectives*]. Federal court decisions evince judicial disagreement concerning the source of a right to bail. *Compare* Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955) (eighth amendment protects fundamental right to bail) *with* Kelly v. Springett, 527 F.2d 1090, 1093 (9th Cir. 1975) (right to bail for federal criminal defendants derives from federal statute).

[8] *See, e.g.*, Herzog v. United States, 75 S.Ct. 349, 351 (Douglas, Circuit Justice 1955) (citing eighth amendment for proposition that bail is fundamental right); Hunt v. Roth, 648 F.2d 1148, 1156-57 (8th Cir. 1981) (eighth amendment guarantees right to bail), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam); HOUSE REPORT, *supra* note 5, (right to bail implicit in eighth amendment), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2296; *see also* United States v. Motlow, 10 F.2d 657, 659-62 (Butler, Circuit Justice 1926) (right to pretrial release upon payment of monetary bail is implicit in eighth amendment); H. BLACK, *supra* note 7, at 691 (even absent express statutory or constitutional provision establishing right to bail, right is implicit in excessive bail clause). *But see infra* notes 134-81 and accompanying text (support exists for conclusion that right to bail derives from due process clause of Constitution).

[9] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (bail necessary to preserve presumption of innocence); Hudson v. Parker, 156 U.S. 277, 285 (1895) (presumption of innocence supports a right to bail); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) (bail is necessary to assure consistency with presumption of innocence); *Historical Perspectives*, *supra* note 7, at 356-59 (right to bail is necessary to protect presumption of innocence).

cerning the scope of an eight amendment right to bail.[10] A more logical, but typically overlooked, source for a right to bail is the constitutional guarantee that due process will accompany any deprivation of life, liberty or property.[11] A due process rationale provides a more sound and helpful standard for resolving uncertainties surrounding the nature and scope of the right to bail than an eighth amendment analysis.[12]

American bail practices are rooted in the English common law.[13] Two significant concerns in the development of the English common law were the prevalence of unnecessary incarceration and the possibility of improper release of defendants awaiting trial.[14] Cases involving pretrial imprisonment without bail[15] prompted legislation to ensure the English equivalent of "due process" in criminal cases.[16] Although an absolute common-law

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[10] *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1224 (1969) (disagreement exists concerning scope of eighth amendment right to bail). One view concerning an eighth amendment right to bail is that the only legitimate issue at a bail hearing is the risk of a defendant's flight. *Historical Perspectives*, *supra* note 7, at 335-40; *see* 18 U.S.C. § 3146 (1976) (issue at bail hearing in noncapital case is likelihood of defendant's nonappearance at trial). Another interpretation of an eighth amendment right to bail is that a bail determination should include the risk of flight and the risk of danger to the community. *Historical Perspectives*, *supra* note 7, at 346-49; *see* 18 U.S.C. § 3148 (1976) (two issues at bail hearing in capital case are risk of flight and risk of danger to community).

[11] *See infra* notes 36-53, 158-81 and accompanying text (due process rationale for bail is more logical than eighth amendment analysis). Discussions concerning bail that identify due process as the source of a right to bail are uncommon and merely conclusory. *See* Johnson v. County of Westchester, No. 81 Civ. 1222 (S.D.N.Y. Aug. 3, 1981) (available on LEXIS, Genfed library, Dist file) (due process requires system of pretrial release for criminal defendants); United States *ex rel* Kilheffer v. Plowfield, No. 74-2347 (E.D. Pa. Feb. 24, 1976) (available on LEXIS, Genfed library, Dist file) (due process encompasses right to reasonable bail conditions); I. KLEIN, CONSTITUTIONAL LAW FOR CRIMINAL JUSTICE PROFESSIONALS 101 (1980) (due process implicitly guarantees opportunity for release on bail); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 667 (4th ed. 1873) (defendant's right to give security to effect pretrial release derives from constitutional protection of life, liberty and property); *cf. Ex parte* McDaniel, ___ Fla. ___, ___, 97 So. 317, 318 (1923) (due process clause of state constitution requires bail system).

[12] *See infra* notes 172-81 and accompanying text (judicial interpretation and application of due process clause demonstrate that due process would provide more logical source for right to bail than eighth amendment).

[13] *See* Duker, *supra* note 7, at 34-86 (English common law furnishes background for American bail practices); Foote, *supra* note 7, at 965-89 (examination of development of bail in England necessary to understand American concept of bail). *See generally* E. DE HAAS, THE ANTIQUITIES OF BAIL (1940) (comprehensive historical analysis of bail).

[14] *See* Foote, *supra* note 7, 965-68 (bail developed in England to reduce incarceration of unconvicted defendants and to minimize governmental expense); *Historical Perspectives*, *supra* note 7, at 341-42 (one purpose underlying English bail system was prevention of corrupt practices of local officials that improperly granted bail).

[15] *See* Jenkes' Case, 6 How. St. Tr. 1189 (1676); Darnel's Case, 3 How. St. Tr. 1 (1627); *see also* Foote, *supra* note 7, at 966-68 (discussion of facts and consequences of *Darnel* and *Jenkes*).

[16] *See* Bill of Rights, 1689, 1 W. & M. 2, ch. 2, § 10 (providing that officials should not impose excessive bail); Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, § 9 (proscribing abusive

right to bail did not exist, statutory law provided for bail in certain classes of offenses.[17] In the mid-nineteenth century, Parliament made the decision to grant or deny pretrial release completely within a judge's discretion.[18]

In the American colonies, several precursors to the Constitution expressly guaranteed a right to bail in noncapital cases.[19] Subsequently, however, the drafters of the Bill of Rights to the Constitution did not include a provision expressly granting a right to bail.[20] The only reference to bail that the drafters included was a prohibition against the imposition of excessive bail conditions.[21] Soon after the adoption of the Bill of Rights,

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arrest and pretrial imprisonment practices); Petition of Rights, 1628, 3 Car. 1, ch. 1 (requiring that officials inform accused of specific charges thus enabling accused to seek bail if offense bailable); *see also* Foote, *supra* note 7, at 965-66 (discussion of seventeenth century parliamentary acts that provided protections for defendants' opportunities for pretrial release).

[17] *See* Foote, *supra* note 7, at 968 (prior to nineteenth century right to bail in England depended upon statutory classification of certain offenses as bailable); *see also* Duker, *supra* note 7, at 77 (no absolute right to bail existed in England). At the time of the drafting of the American Constitution, English statutory law did not permit pretrial release for felonies such as murder, treason or arson. *See* Statute of Westminster, 1275, 3 Edw. 1, ch. 12. Defendants were entitled to bail for minor offenses such as a first offense of petit larceny or a trespass that was not punishable by death or loss of limb. *Id.*

[18] *See* Foote, *supra* note 7, at 979 (England made bail discretionary by parliamentary act of 1826).

[19] *See* An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio (Northwest Ordinance), 13 July 1787, art. 2 (granting unconditional right to bail in noncapital cases), *reprinted in* I THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168, 168 (M. Jensen ed. 1976); *see also* Massachusetts Body of Liberties § 18 (1641) (right to release on bail except in capital cases and for contempt of court when express legislative provision exists), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (W. Swindler ed. 1975) [hereinafter cited as SOURCES AND DOCUMENTS]; New York Charter of Liberties and Privileges § 19 (1683), (right to pretrial bail except in treason or felony cases), *reprinted in* 7 SOURCES AND DOCUMENTS, *supra*, at 165. *See generally* Cobb v. Aytch, 643 F.2d 946, 958 n.7 (3d Cir. 1981) (discussion of various colonial constitutions that granted right to bail); *Historical Perspectives*, *supra* note 7, at 334-39 (discussion of early colonial charters that protected right to bail in noncapital cases).

Congress passed the Northwest Ordinance of 1787 pursuant to the Articles of Confederation. *Historical Perspectives*, *supra* note 7, at 338. The drafters of the Constitution omitted a provision expressly granting a right to bail, but Congress subsequently included a right-to-bail provision in the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789); *see also Historical Perspectives*, *supra* note 7, at 338 (Judiciary Act of 1789 did contain express right-to-bail provision but Bill of Rights to Constitution did not). The omission of an express constitutional right-to-bail provision may indicate the Framers' intention to leave the bail issue to Congress. *See* Duker, *supra* note 7, at 86; *Historical Perspectives*, *supra* note 7, at 338. *But see* Foote, *supra* note 7, at 984-89 (omission of express right to bail clause in Constitution was merely accidental). Alternatively, the omission may suggest that a constitutional provision other than the eighth amendment protects a conditional right to bail. *See infra* notes 158-71 and accompanying text (due process clause logically requires a system of pretrial release).

[20] *See* U.S. CONST. amend. VIII (limiting amount of bail that court may impose, but no mention of right to bail).

[21] *See id.* (prohibition against imposition of excessive bail).

the first Congress passed the Judiciary Act of 1789,[22] which provided for pretrial release through bail for defendants in noncapital cases.[23]

United States Supreme Court cases during the century following the adoption of the Constitution and the enactment of the Judiciary Act contain only limited discussions concerning the nature of bail.[24] The Court characterized the function of bail in criminal cases as a means of reasonably ensuring a defendant's appearance at trail and his availability for judgment.[25] The Court emphasized that federal statutory law established bail as a matter of right in noncapital cases.[26] The Supreme Court thus considered bail a procedural scheme for promoting efficient law enforcement while preserving the presumption of innocence that American jurisprudence accords criminal defendants.[27] Similarly, early decisions by other federal courts characterized bail as a practical means for securing a defendant's presence at trial while protecting the defendant's liberty interests.[28]

Federal courts continue to regard bail as a compromise between a government's interest in effective law enforcement and an individual's liberty interest.[29] One of the current theories of bail[30] is that the eighth amendment implies a right to bail.[31] The eighth amendment provides that

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[22] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789).

[23] *See id.* (requiring pretrial release on bail in all noncapital cases).

[24] *See infra* notes 25-27 and accompanying text (discussion of nineteenth century Supreme Court cases that contain references to nature and purpose of bail).

[25] *See Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (purpose of bail in criminal cases is to create significant probability that defendant will appear at trial); *accord* United States v. Ryder, 110 U.S. 729, 736-37 (1884) (bail in criminal cases reasonably assures court of opportunity to have defendant present for trial and judgment).

[26] *See* Hudson v. Parker, 156 U.S. 277, 285-87 (1895) (right to bail in noncapital cases derives from federal statutory law).

[27] *See id.* at 285 (bail is means to protect presumption of innocence while ensuring effective administration of criminal justice system).

[28] *See, e.g., In re* Gannon, 27 F.2d 362, 362-64 (E.D. Pa. 1928) (bail is judicial process for reasonably assuring defendant's presence at trial while protecting defendant's liberty interests); United States v. Motlow, 10 F.2d 657, 659-62 (Butler, Circuit Justice 1926) (bail safeguards defendant's rights yet assures likelihood of appearance at trial); United States v. Feely, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (No. 15,082) (bail balances governmental interest in effective law enforcement against defendant's interest in remaining free prior to conviction).

[29] *See* Bandy v. United States, 81 S.Ct. 197, 197 (Douglas, Circuit Justice 1960) (bail is practice that weighs interests of defendant in avoiding confinement against governmental interest in preventing defendant's flight); *In re* Whitney, 421 F.2d 337, 337-38 (1st Cir. 1970) (bail system reconciles conflict between individual's liberty interest and governmental interest in efficient law enforcement); *see also* Hunt v. Roth, 648 F.2d 1148, 1157-58 (8th Cir. 1981) (bail process balances individual interests against legitimate governmental objectives), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

[30] *See infra* notes 31-35 and accompanying text (view that source of right to bail is eighth amendment); *infra* note 44 and accompanying text (theory that presumption of innocence requires bail); *infra* note 53 and accompanying text (view that right to bail dependent upon statute).

[31] *See supra* note 8 and accompanying text (some courts and legal scholars have concluded that eighth amendment is source of right to bail).

a court shall not impose excessive bail conditions.[32] Courts have interpreted "excessive bail" to mean any condition of pretrial release that is unnecessarily restrictive in a particular case.[33] The uncertainty of a particular defendant's appearance pursuant to a summons is the issue that determines the degree of restrictiveness necessary to minimize the risk of nonappearance.[34] The eighth amendment, therefore, implies a right to pretrial release upon conditions that are reasonable under the particular circumstances.[35]

An eighth amendment rationale for bail is questionable, however, because the nature of the eighth amendment is merely prohibitory with respect to unreasonable sentencing or bail results.[36] The restrictive provisions of the eighth amendment limit governmental authority to prescribe law enforcement measures.[37] The cruel and unusual punishment clause,[38] for example, does not furnish a right to legal procedures that must accompany the imposition of punishment.[39] Neither does the punishment clause provide standards to evaluate the process that results in the sentencing of criminal defendants.[40] The eighth amendment is only a check upon

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[32] *See* U.S. CONST. amend. VIII (prohibiting imposition of excessive bail).

[33] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (bail is excessive if more stringent than reasonably necessary to assure defendant's attendance at trial); United States v. James, 674 F.2d 886, 891 (11th Cir. 1982) (test for excessive bail is whether risk of flight in particular case justifies bail that court has imposed).

[34] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (issue underlying imposition of release conditions is need to increase likelihood of particular defendant's attendance at trial); Koen v. Long, 302 F. Supp. 1383, 1391-92 (E.D. Mo. 1969) (bail conditions are alternatives to summons and are legitimate only when related to risk of nonappearance in particular case), *off'd per curiam*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[35] *See* Hunt v. Roth, 648 F.2d 1148, 1157-62 (8th Cir. 1981) (eighth amendment requires that bail conditions be reasonable under particular circumstances of case), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam); Meechaicum v. Fountain, 537 F. Supp. 1098, 1099 (D. Kan. 1982) (eighth amendment guarantees that court will not impose bail condition more stringent than necessary to ensure defendant's attendance at trial).

[36] *See* U.S. CONST. amend. VIII (proscribing "excessive" bail or fines and "cruel and unusual" punishment), *infra* notes 37-43 and accompanying text (eighth amendment is merely quantitative limitation on imposition of bail or punishment).

[37] *See* Ingraham v. Wright, 430 U.S. 651, 664-67 (1977) (eighth amendment limits legislative and judicial authority to prescribe measures for law enforcement).

[38] U.S. CONST. amend. VIII.

[39] *See* Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976) (cruel and unusual punishment clause not applicable prior to conviction); *see also* Lock v. Jenkins, 641 F.2d 488, 491 n.7, 492 n.9 (7th Cir. 1981) (eighth amendment punishment clause creates only post-conviction rights for criminal defendants concerning type and amount of punishment). *See generally* U.S. CONST. amend. IV (right to procedures governing arrests and searches or seizures of evidence during criminal investigations); *id.* amend. V (right to grand jury indictment for certain offenses, protection against double jeopardy and prohibition against involuntary self-incrimination in criminal cases); *id.* amend. VI (right to procedures governing criminal trials, such as speedy and public trial by jury, notice to defendant of specific charges against him, confrontation of hostile witnesses and representation by counsel).

[40] *See* United States v. Parish, 468 F.2d 1129, 1133 & n.18 (D.C. Cir. 1972) (due process

the type and amount of punishment that the legislature may authorize and a court may impose.[41] Similarly, the eighth amendment proscription of excessive bail is merely a quantitative limit on the imposition of bail conditions.[42] Both the punishment and the bail provisions of the eighth amendment, therefore, presume the existence of, but do not create, an underlying right.[43]

Courts and legal scholars have considered an eighth amendment right to bail a necessary corollary to the presumption of innocence because, absent bail, defendants regularly would remain in jail pending an adjudication of guilt or innocence.[44] The presumption of innocence, however, is not a sound basis for a right to bail.[45] While the Constitution does not expressly recognize that an accused is presumptively innocent until an adjudication of guilt, the presumption is a fundamental evidentiary prin-

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clause furnishes general standard for evaluating proceedings that result in imposition of punishment), *cert. denied*, 410 U.S. 957 (1973); Greene v. Briggs, 10 F. Cas. 1135, 1139-41 (D.R.I. 1852) (No. 5,764) (due process clause is general constitutional check on procedures that government follows to effect punishment of criminal defendant); U.S. CONST. amends. IV-VI (specific constitutional provisions governing arrest and prosecution of criminal defendants).

[41] *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977) (eighth amendment is restriction upon types of conduct that legislature can define as criminal and form or amount of punishment that legislature can authorize and that court can impose); Weems v. United State, 217 U.S. 349, 371, 378-82 (1910) (eighth amendment is check on legislative definition of crimes and on duration or conditions of imprisonment); Lock v. Jenkins, 641 F.2d 488, 491-92 (7th Cir. 1981) (eighth amendment provides post-conviction right concerning amount of punishment).

[42] *See* Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963) (eighth amendment prohibits imposition of excessive bail but does not create any substantive pretrial rights); Koen v. Long, 302 F. Supp. 1383, 1391-92 (E.D. Mo. 1969) (eighth amendment only limits amount of monetary bail), *aff'd per curiam*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *accord* People *ex rel* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 398, 49 N.E.2d 498, 500 (1943) (history of bail in America demonstrates that excessive bail clause only limits amount of bail and does not imply right to bail).

[43] *See* Meechaicum v. Fountain, 537 F. Supp. 1098, 1099 (D. Kan. 1982) (eighth amendment not applicable to state defendant unless express statutory or state constitutional right to bail exists); *supra* notes 39-41 (eighth amendment is not the source of procedural rights of defendants concerning arrest, prosecution, and conviction resulting in imposition of punishment); *see also* Duker, *supra* note 7, at 77-89 (eighth amendment depends upon independent source for right to bail).

[44] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (presumption of innocence supports conclusion that eighth amendment protects fundamental right to bail); Hunt v. Roth, 648 F.2d 1148, 1156 (8th Cir. 1981) (eighth amendment and presumption of innocence provide sound bases for right to reasonable bail), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) (importance of bail derives from presumption of innocence inherent in American jurisprudence); *Historical Perspectives*, *supra* note 7, at 358-59 (right to bail is consistent with presumption of innocence); *see also* SENATE REPORT, *supra* note 4, at 6 (liberal pretrial release opportunities assure viability of presumption of innocence).

[45] *See infra* notes 46-51 (presumption of innocence is not logical support for pretrial release opportunities).

ciple that governs criminal trials.[46] The presumption of innocence requires that the prosecution prove a defendant's guilt beyond a reasonable doubt before a court may impose a fine or imprisonment.[47] If the presumption of innocence were a substantive right in criminal cases, any pretrial restrictions on a defendant's liberty would be impermissible.[48] Instead, both pretrial detention and release conditions depend upon a prior showing of probable cause before a judicial officer.[49] The presumption of innocence does not bar such restrictions on a defendant's liberty, because probable cause means that reasonable grounds exist to believe that a particular defendant has committed a particular crime.[50] Neither does the presumption preclude detention or conditional release of admittedly innocent persons, such as material witnesses or jurors.[51] The presumption of innocence concept, therefore, is neither relevant nor helpful to a system of pretrial release of criminal defendants.[52]

The lack of logical and historical support for an eighth amendment right to bail has led some courts and scholars to conclude that a right to bail is totally dependent upon statutory provisions.[53] A logical alter-

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[46] *See* Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976) (presumption of innocence is evidentiary principle, not substantive right); Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) (presumption of innocence does not create any substantive pretrial rights); Mitchell, *supra* note 10, at 1231-32 (presumption of innocence is not substantive right, but rather rule of evidence).

[47] *See* Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) (presumption of innocence is principle that requires prosecution to carry burden of proof in criminal trials).

[48] *See* Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976) (if presumption of innocence were fundamental right any pretrial restrictions on defendant would be unconstitutional in capital and noncapital cases); Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) (if presumption of innocence were substantive principle any pretrial detention would be per se unconstitutional); Mitchell, *supra* note 10, at 1231-32 (any restrictions upon defendant's liberty pending final adjudication of guilt would be inconsistent with an absolute presumption of innocence); *cf.* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (due process clause, rather than eighth amendment or presumption of innocence, is what furnishes criminal defendants a right concerning conditions of pretrial confinement).

[49] *See* Gerstein v. Pugh, 420 U.S. 103, 113-19 (1975) (fourth amendment requires judicial determination of probable cause to legitimize pretrial restriction on defendant's liberty)

[50] *Id.* at 111-12.

[51] *See* 18 U.S.C. § 3149 (1976) (authorizing custody or conditional release of material witnesses); *see also* United States v. Holovachka, 314 F.2d 345, 351-53 (7th Cir.) (trial court has authority in criminal case to place jury in custody of federal marshall to prevent prejudicial influences), *cert. denied*, 374 U.S. 809 (1963).

[52] *See supra* notes 46-51 and accompanying text (presumption of innocence is not related logically to right to bail).

[53] *See* Duker, *supra* note 7, at 67-86 (historical background of eighth amendment demonstrated intention of drafters to make right to bail dependent on statute); Mitchell, *supra* note 10, at 1224-35 (background of eighth amendment does not support constitutional right to bail and suggests that bail is dependent on statutory provision); *see also* Carlson v. Landon, 342 U.S. 524, 545 (1952) (eighth amendment does not limit authority of Congress to define scope of right to bail) (dicta); United States *ex rel* Covington v. Coparo, 297 F. Supp. 203, 206 (S.D.N.Y. 1969) (congressional power to restrict scope of right to bail is subject only to constitutional proscriptions of arbitrary, unreasonable and discriminatory

native conclusion, however, is that the constitutional source for a right to bail is the due process clause of the fifth amendment.[54] The due process clause expressly guarantees that established procedures will accompany all deprivations of life, liberty or property.[55] The procedural due process concept has developed as a protection for personal rights and interests not specifically enumerated in the Constitution but encompassed generally within the term "liberty."[56] The goal of due process is fundamental fairness,[57] which means the minimization of the risk of erroneous or arbitrary deprivations of life, liberty or property.[58] The specific requirements

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legislative conduct). *See generally Historical Perspectives, supra* note 7, at 340-46 (discussion of view that right to bail only statutory).

[54] *See infra* notes 55-59 and accompanying text (interpretation of due process clause); *infra* notes 60-133 and accompanying text (due process is basis for procedural rights in situations analogous to pretrial bail); *infra* notes 172-81 and accompanying text (judicial precedent demonstrates applicability of due process to bail issues).

[55] U.S. CONST. amend. V. The due process clause of the fifth amendment provides protection against federal governmental deprivations of life, liberty or property by requiring that procedural safeguards accompany the deprivation. *Id.* Similarly, the due process clause of the fourteenth amendment requires procedural protections to accompany state governmental deprivations of life, liberty or property. *Id.* amend. XIV.

[56] *See* Rochin v. California, 342 U.S. 165, 169 (1952) (due process requires protection of interests generally recognized as fundamental even though not specifically enumerated in constitution or statute). Procedural due process applies to specific constitutional rights, as well as general liberty and property interests. For example, no express constitutional right to welfare benefits exists. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (person does not have constitutional right to welfare benefits). The Supreme Court, however, requires an adversarial hearing pursuant to the due process clause before discontinuation of welfare benefits because a welfare recipient acquires a property interest in the continuation of the benefits. *See* Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970). *See generally* Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS 186-202 (1977) (courts have abandoned distinction between judicially protected rights and nonenforceable privileges to provide protection for commonly recognized interests); Resnick, *Due Process and Procedural Justice*, in DUE PROCESS 206-27 (1977) (applicability of procedural due process depends on current social values); Comment, People v. Ramirez: *A New Liberty Interest Expands Due Process Protections*, CALIF. L. REV. 1073, 1075-78 (1981) (due process protections attach to federal or state constitutional rights, statutory rights and interests recognized at common law).

In construing the scope of the due process clause, the United States Supreme Court has interpreted the term "liberty" broadly. *See* Kent v. Dulles, 357 U.S. 116, 125-27 (1958) (right to travel is form of liberty that government cannot restrict without satisfying due process); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("liberty" does not mean only physical freedom but also includes right to contract freely, to choose occupation, to marry and other privileges fundamental at common law); Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897) (liberty is broad term which includes right to be free from physical restraint and to choose place of residence or livelihood).

[57] *See* Bursey v. United States, 466 F.2d 1059, 1080 (9th Cir. 1972) (essence of due process right is fundamental fairness); Cox v. Burke, 361 F.2d 183, 186 (7th Cir.) (goal of due process protections is fundamental fairness), *cert. denied*, 385 U.S. 939 (1966).

[58] *See* Addington v. Texas, 441 U.S. 418, 423-27 (1979) (goal of due process protections in civil commitment cases is to minimize risk of erroneous or arbitrary commitment); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-15 (1950) (due process protections such as notice and hearing ensure fairness and propriety of deprivation of life, liberty or

of due process, therefore, vary according to the nature of the issue and the importance of the interests at stake.[59]

The due process clause, for example, requires procedural safeguards in both punitive and nonpunitive deprivation of liberty situations.[60] Both pretrial incarceration and conditional release of criminal defendants constitute nonpunitive deprivations of liberty.[61] Federal courts use a due process analysis, under either the fifth or the fourteenth amendment,[62] to determine the issue, standard of proof and type of hearing necessary to legitimize nonpunitive deprivations of liberty that are analogous to pretrial restrictions for criminal defendants.[63] In *Addington v. Texas*,[64] the Supreme Court addressed the standard of proof necessary to satisfy due process in civil commitment proceedings.[65] Under the Texas commitment scheme,

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property in particular case); *see also* Grey, *supra* note 56, at 183-84 (purpose of due process protections is fair and accurate results in adjudication). *See generally* Roper & Melone, *Does Procedural Due Process Make a Difference?*, 65 JUDICATURE 136, 136-41 (1981) (study of second trials following reversal for procedural error indicates different outcomes in majority of cases).

[59] *See* Addington v. Texas, 441 U.S. 418, 423 (1979) (due process operates as continuum of procedural protection according to importance of correct result in particular type of case); Hannah v. Larche, 363 U.S. 420, 440-43 (1960) (extent of due process that is constitutionally required depends upon nature of issue and type of proceeding). Due process protections attach to matters outside traditional civil or criminal litigation. For example, due process requires that administrative agency determinations concerning the discontinuation of welfare benefits include an adversarial hearing to protect a recipient's property interest in the continuation of the benefits. Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970). Due process also protects the right of public school students to be free from arbitrary or excessive corporal punishment by school officials. Ingraham v. Wright, 430 U.S. 651, 672-75 (1977).

[60] *See* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (due process provides protection for wide range of liberty interests beyond actual imprisonment); Fuentes v. Shevin, 407 U.S. 67, 81 (1972) (due process protections attach to all deprivations of liberty or property); Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897) (due process protects against unreasonable restrictions on liberty generally, not just punishment).

[61] *See* Hunt v. Roth, 648 F.2d 1148, 1157-63 (8th Cir. 1981) (punishment is impermissible justification for pretrial restrictions on criminal defendant's liberty or property), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam), HOUSE REPORT, *supra* note 5 (purpose of pretrial restrictions for criminal defendants is administrative efficiency not punishment), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2295; SENATE REPORT, *supra* note 4, at 1-10 (bail is nonpunitive deprivation of liberty).

[62] *Compare* U.S. CONST. amend. V (federal government shall not deprive person of life, liberty or property without due process of law) *with id.* amend. XIV (state cannot deprive person of life, liberty or property without due process of law). *See generally supra* notes 55-59, *infra* notes 135-38 and accompanying text (explanation of due process analysis).

[63] *See infra* notes 65-110 and accompanying text (due process analysis determines procedural protections necessary in civil commitment cases); *infra* notes 121-33 and accompanying text (due process is source of procedural safeguards that accompany detention or conditional release of material witnesses).

[64] 441 U.S. 418 (1979).

[65] *See id.* at 421-33. The appellant in *Addington* challenged the constitutionality of his involuntary commitment to a mental hospital on the ground that the commitment hearing did not comport with due process. *Id.* at 421-22. Addington argued that due process required the state to prove a need for commitment beyond a reasonable doubt. *Id.* at 427-31. In *Addington*, the trial court had instructed the jury on a "clear, unequivocal, and convinc-

the state's power to confine a person involuntarily depended upon a showing that the person was mentally ill and was dangerous to himself or to others.[66] The only fact at issue at Addington's commitment hearing had been whether Addington was a danger to himself or others.[67] The *Addington* court rejected the state's argument that the state only needed to establish Addington's danger potential by a preponderance of the evidence.[68] Because civil commitment constitutes a significant deprivation of liberty, the Court required a higher standard of proof than the preponderance standard applicable in civil adjudication of monetary or other property interests.[69]

The *Addington* Court reasoned that fixing a standard of proof in commitment cases is an important step in achieving fundamental fairness.[70]

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ing" standard of proof. *Id.* at 421. The Texas Court of Civil Appeals had reversed and held that the appropriate standard of proof was the beyond a reasonable doubt standard. *Id.* at 422. The Texas Supreme Court, however, had reinstated the trial court decision and held that the applicable standard of proof in civil commitment cases was the preponderance of the evidence standard. *Id.* On appeal, the United States Supreme Court determined that a preponderance standard was too lenient and that a reasonable doubt standard was too strict. *Id.* at 425-31. The Court held that a clear and convincing evidence standard was sufficiently protective to satisfy due process. *Id.* at 431-33.

The preponderance standard applicable in most civil litigation means that the total credible evidence must convince a fact-finder that the alleged fact is more likely true than untrue. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 339 at 793-96 (E. Cleary ed. 1972) [hereinafter cited as MCCORMICK]; McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF L. REV. 242, 247-51 (1944). The standard of proof applicable in criminal proceedings requires that the trier of fact must have no reasonable doubt that an allegation of the prosecution is true. Speiser v. Randall, 357 U.S. 513, 525-26 (1958); MCCORMICK, *supra*, § 341 at 798-802; McBaine, *supra*, at 255-58. The clear and convincing level falls somewhere between the preponderance and reasonable doubt standards and means that a high probability must exist that the allegation is true. MCCORMICK, *supra*, § 340 at 796-98; McBaine, *supra*, at 251-54. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.6 at 243-45 (1977) (discussion of preponderance, clear and convincing, and reasonable doubt standards of proof).

[66] 441 U.S. at 420-21; *see* TEX. REV. CIV. STAT. ANN arts. 5547-40 to -57 (Vernon 1958 & Supp. 1982) (civil commitment provisions).

[67] 441 U.S. at 421. In *Addington*, the appellant had undergone temporary commitment to mental institutions seven times and indefinite commitment three times during the ten year period prior to the case. *Id.* at 420. The *Addington* case arose when Addington's mother petitioned for his indefinite commitment following Addington's arrest for threatened assault against his mother. *Id.* At the commitment hearing, Addington conceded that he was mentally ill but argued that sufficient evidence did not exist concerning danger to himself or others. *Id.* at 421.

[68] *See id.* at 425-27.

[69] *Id.* The *Addington* Court determined that due process requires a higher standard of proof in civil commitment cases than in civil litigation involving strictly monetary or other property interests because liberty is more important than property. *See id.* at 425-27. The Court analogized civil commitment to certain types of civil adjudication, such as deportation and fraud cases, in which the more stringent standard of clear and convincing evidence applies. *Id.* at 424. The clear and convincing standard applies in civil cases in which a special potential for deception exists or in which special individual interests, such as liberty or reputation, are at stake. *See* MCCORMICK, *supra* note 65, § 340 at 797-98.

[70] *See* 441 U.S. at 424.

The applicable standard of proof, therefore, should reflect the importance of accuracy in a particular type of proceeding.[71] The Court determined the need for accuracy in civil commitment cases by weighing the interests of the parties.[72] An individual has a strong interest in avoiding physical restraint and the attendant social and psychological stigma of commitment.[73] The state government has a valid interest in caring for mentally impaired citizens[74] and in protecting the public against potentially dangerous individuals.[75] The state, however, also has a pecuniary interest in avoiding unnecessary confinement and treatment.[76] The *Addington* Court, therefore, found that the importance of avoiding improper confinement outweighed the state's interest in the treatment and custody of mentally ill persons.[77] The Court held that a "clear and convincing" standard of proof[78] was necessary under the due process clause to reduce the possibility of erroneous commitment.[79]

Due process also requires judicial determination of the proper issue before civil commitment of a person.[80] In *Jackson v. Indiana*,[81] the Supreme

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[71] *Id.* at 423-27.

[72] *See id.* at 425-26; *see also infra* text accompanying notes 73-75 (discussion of particular interests of parties in *Addington*).

[73] 441 U.S. at 425-26.

[74] *Id.* In civil commitment cases, the state's *parens patriae* power to care for citizens provides the ground for authority to confine persons that are unable to care for themselves. *Id.* at 426.

[75] *Id.* A state has authority under the police power to confine involuntarily a mentally ill person when the person poses a danger to the community. *Id.*; *see* Lawton v. Steele, 152 U.S. 133, 136-38 (1894) (police power of state extends generally to protection of public health, safety, and morals). The constitutional basis for the police power is the tenth amendment of the Constitution. Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 291 (1981); Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967 (W.D. Mo. 1982); *see* U.S. CONST. amend X (absent constitutional delegation of power to federal government or limit on state power, state retains authority).

[76] *See* 441 U.S. at 426 (state has no interest in erroneous confinement of person in mental institution); *cf.* SENATE REPORT, *supra* note 4, at 1-2 (unnecessary pretrial incarceration of criminal defendants imposes financial burden on government).

[77] 441 U.S. at 427.

[78] *See supra* note 65 (discussion of clear and convincing standard of proof).

[79] 441 U.S. at 424-25, 432-33. In *Addington*, the appellant argued that due process required the use of the reasonable doubt standard in civil commitment cases because commitment is analogous to incarceration in a penal institution. *Id.* at 427-28. Addington argued that the Court previously had applied the reasonable doubt standard to adjudications outside the criminal context, namely juvenile delinquency proceedings. *Id.* The *Addington* Court determined that delinquency proceedings were analogous to criminal proceedings because the issue in both types of cases is the commission of a crime. *Id.* The *Addington* Court distinguished civil commitment from both criminal and juvenile adjudications because the resulting confinement is not punitive. *Id.* The Court also stated that failure to commit a mentally ill person is more harmful to the person than acquittal of a guilty defendant is to the defendant. *Id.* at 428-29.

[80] *See infra* notes 82-99 and accompanying text (civil commitment for indefinite period of time must rest upon judicial determination of person's lack of capacity to function in community or of potential danger to community).

[81] 406 U.S. 715 (1972).

Court reviewed Indiana's scheme for confinement of a criminal defendant on the ground of incompentency to stand trial.[82] The Indiana commitment statute permitted a court with reasonable grounds to suspect a competency problem to appoint examining physicians, to order a competency hearing upon the physicians' recommendation and, after a finding of incompetency, to commit the defendant to a psychiatric facility until the defendant regained competency.[83] Indiana also had two separate statutory provisions authorizing the indefinite commitment of "feeble-minded" or "mentally ill" persons.[84] A finding of feeble-mindedness required a showing that the person was unable to care for himself.[85] A finding of mental illness required a showing that the person was a danger to himself or to others.[86] Commitment procedures for a feeble-minded or a mentally ill person included notice, a full judicial hearing, representation by counsel and right of appeal.[87] The duration of confinement for feeble-minded and mentally ill persons depended upon a continuing need for treatment or custody.[88] The release of an incompetent defendant, however, required a finding of restored competency.[89] Jackson, a deaf-mute, had the mental capacity of a preschooler.[90] Pending Jackson's trial on two counts of robbery, the state trial court appointed two psychiatrists to examine Jackson.[91] At the resulting competency hearing, the trial court found that Jackson was incompetent to stand trial due to his physical and mental disability and minimal communication skills.[92] The Indiana Supreme Court upheld the trial court's decision and rejected Jackson's argument that the poor prog-

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[82] *Id.* at 728.

[83] *Id.* at 721-24; *see* IND. CODE § 35-5-3-2 (1971) (procedure for determining competency to stand trial), *amended by* IND. CODE ANN. § 35-5-3.1-1 (Burns Repl. 1979) Competency to stand trial requires sufficient mental capacity to understand the nature of the trial and to assist in the preparation of a defense. 406 U.S. at 721.

[84] 406 U.S. at 722-24; *see* IND. CODE § 16-15-1-3 (1971) (commitment of feeble-minded persons) (repealed 1978); *id.* §§ 16-14-9-1 to -31 (commitment of mentally ill persons generally), *amended by* IND. CODE ANN. §§ 16-14-9.1-1 to -18 (Burns Repl. 1979).

[85] 406 U.S. at 721-22.

[86] *Id.* at 723.

[87] *Id.* at 728.

[88] *Id.* at 728-31.

[89] *Id.* In *Jackson*, the Supreme Court determined that Indiana had violated Jackson's constitutional rights by confining him indefinitely on the basis of incompetency to stand trial. *Id.* at 720-21. Jackson's confinement was unconstitutional under the equal protection clause because the difference in standards for commitment and release of criminal defendants and civilly committed persons was unreasonable. *Id.* at 723-31. The durational nature of Jackson's commitment was also a deprivation of liberty without due process of law because incompetency to stand trial was not an appropriate issue on which to base an indefinite commitment. *Id.* at 732-39; *see* McNeil v. Director, Patuxent Inst., 407 U.S. 245, 249-50 (1972) (short-term commitment for psychiatric evaluation requires less stringent procedural protections than indefinite confinement); *infra* notes 102-10 and accompanying text (discussion of *McNeil*).

[90] 406 U.S. at 718.

[91] *Id.* at 719.

[92] *Id.* at 719-20.

nosis for restoration of competency made his chances for release virtually nonexistent and rendered the indefinite commitment violative of due process.[93] Jackson argued that indefinite commitment on the ground of incompetency involved only a minimal burden on the state and placed a heavy burden on a person who wished to challenge or terminate the commitment.[94]

In *Jackson*, the United States Supreme Court reasoned that due process requires extended confinement to rest upon a judicial determination of one of the issues under the feeble-minded or mentally ill commitment provisions.[95] The Court found that a finding of incompetency justified only temporary confinement for evaluation purposes and was not an appropriate basis for indefinite commitment.[96] The *Jackson* Court held that confinement for incompetency beyond a reasonable evaluation period,[97] in order to comport with due process, required an additional judicial determination of Jackson's incapacity to function in the community or a poor prognosis for a restoration of competency.[98] The additional determination would be comparable to the issues under Indiana's regular civil commitment provisions.[99]

In commitment cases, due process also requires that the nature of the judicial hearing relate reasonably to the nature and duration of the confinement.[100] In *McNeil v. Director, Patuxent Institution*,[101] the Supreme Court addressed the constitutionality of an *ex parte* hearing that resulted in extended confinement for psychiatric examination.[102] Under Maryland law, a judge could order temporary commitment for evaluation when reasonable cause existed to suspect "defective delinquency."[103] Defective delinquency involved repeated and extreme antisocial or criminal conduct, an intellectual or emotional defect, and a clear danger to the community.[104]

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[93] *Id.* at 720.

[94] *Id.* at 719, 731-38.

[95] *Id.* at 738-39.

[96] *Id.* at 726.

[97] *See id.* at 739. The *Jackson* Court held that incompetency was a legitimate basis only for a temporary commitment to determine the likelihood of restoration of competency. *Id.* The Court, however, declined to decide what a reasonable time period would be. *See id.*

[98] *Id.* at 738-39. *See generally*, Comment, *Substantive Due Process Limits on the Duration of Civil Commitment for the Treatment of Mental Illness*, 16 HARV. C.R.-C.L. L. REV. 205, 212-26 (1981) (discussion of facts, holding and implications of *Jackson* decision).

[99] *See* 406 U.S. at 738-39.

[100] *See infra* notes 102-10 and accompanying text (*ex parte* hearing does not provide legitimate procedural basis for extended commitment).

[101] 407 U.S. 245 (1972).

[102] *Id.* at 249-50. The trial court in *McNeil* had ordered McNeil's commitment for evaluation sua sponte based on a psychiatric examination prior to sentencing. *Id.* at 248 n.3.

[103] *Id.* at 247-48 & n.3; *see* MD. ANN. CODE art. 31B, § 6(b) (Repl. 1976) (procedure for temporary commitment order), *amended by* MD. ANN. CODE art. 31B, § 8(a) (Supp. 1982).

[104] 407 U.S. at 246-47; *see* MD. ANN. CODE art. 31B, § 5 (Repl. 1976) (definition of defective delinquency), *amended by* MD. ANN. CODE art. 31B, § 1(g) (Supp. 1982).

In addition, a defective delinquent must have committed a felony or one of certain enumerated misdemeanors.[105] Following conviction, psychiatric examination and a medical recommendation of indefinite commitment for treatment of defective delinquency, the procedural elements of commitment included an adversarial hearing, the right to a jury and a right of appeal.[106] McNeil, a convicted felon sentenced to five years imprisonment, spent the duration of his sentence at Patuxent Institution on the basis of an *ex parte* judicial determination of reasonable cause to suspect defective delinquency.[107] McNeil never had received a full hearing on the question of defective delinquency because the institution had been unable to determine whether McNeil's condition met the statutory definition.[108] The *McNeil* Court determined that the *ex parte* nature of the hearing imposed a temporal limitation on the state's power to confine McNeil,[109] because due process required an adversarial hearing to legitimize an extended deprivation of liberty in a psychiatric institution.[110]

Another example of a nonpunitive deprivation of liberty that is analogous to pretrial bail for defendants is the detention or conditional release of material witnesses. A witness is material when the witness has personal knowledge of facts that render the witness' testimony indispensable, either before a grand jury to secure an indictment or at trial to establish the prosecution's case.[111] Federal law concerning material witnesses follows a due process approach by identifying an issue, requir-

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[105] 407 U.S. at 246-47; *see* MD. ANN. CODE art. 31B, § 6(a) (Repl. 1976) (requisite of conviction for felony or certain misdemeanors, such as offense involving violence or second offense for misdeameanor punishable by imprisonment), *amended by* MD. ANN. CODE art. 31B, § 1(g) (Supp. 1982).

[106] 407 U.S. at 247; *see* MD. ANN. CODE art. 31B, § 8 (Repl. 1976) (commitment procedures for defective delinquency following initial evaluation), *amended by* MD. ANN. CODE art. 31B, §§ 8-9 (Supp. 1982).

[107] 407 U.S. at 246-48.

[108] *Id.* at 246, 250-51. In *McNeil*, examining physicians were unable to reach a conclusion about McNeil's status as a defective delinquent, because McNeil would not cooperate with the examiners. *Id.* at 250. As an alternative to its civil commitment power, therefore, the state asserted authority to confine McNeil on the ground of civil contempt. *Id.* The *McNeil* Court, however, rejected the state's assertion and held that due process would require that McNeil have an opportunity to show cause for his uncooperative conduct at an adversarial hearing and that the state prove willful disobedience. *Id.* at 251.

[109] *See id.* at 249-50. The *McNeil* Court held that the observation of procedural protections applicable to short-term commitment for evaluation limits the duration of the resulting confinement. *Id.* The Court did not establish a fixed time limitation but noted that the revised Maryland statute sets a maximum evaluation period of six months. *Id.* at 250; *see* MD. ANN. CODE art. 31B, § 7(a) (Supp. 1982). At the time of McNeil's appeal to the Supreme Court, McNeil had spent six years in confinement for evaluation. 407 U.S. at 250.

[110] 407 U.S. at 250.

[111] *See* Bacon v. United States, 449 F.2d 933, 938 n.5 (9th Cir. 1971) (witness with personal knowledge of matters necessary to grand jury proceeding is material); *In re* Cochran, 434 F. Supp. 1207, 1214 (D. Neb. 1977) (witness whose testimony was essential to state's case against accused was material); *see also* SENATE REPORT, *supra* note 4, at 19-20 (material witnesses are persons with knowledge about crime that someone else has committed).

ing a hearing and placing the burden of proof on the prosecution.[112] The Bail Reform Act encourages the release of material witnesses to avoid unnecessary restrictions on an individual's liberty.[113] Under the Act, the same hierarchical list of conditions that applies to criminal defendants[114] applies to the release of material witnesses.[115] The specific issue that the Act identifies for determining appropriate release conditions is the likelihood of compliance with a subpoena.[116] If a witness cannot satisfy a condition of release after the prosecution has demonstrated a significant risk of noncompliance with a subpoena, the government must resort to a deposition pursuant to Federal Rule of Criminal Procedure (Federal Rule) 15(a), if the deposition will suffice to preserve the witness' testimony.[117] The Act does not indicate clearly whether additional grounds, such as witness safety, would justify detention or restrictive conditions of release.[118] The Act may contemplate witness safety as a legitimate basis

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[112] *See* 18 U.S.C. § 3149 (1976) (first step in custody or conditional release of material witnesses is showing by prosecution before judicial officer that witness' appearance pursuant to subpoena is unlikely). At common law, a court could order a person with knowledge of facts pertinent to the prosecution's case to attend and testify at trial. 1 T. WATERMAN, WATERMAN'S ARCHBOLD ON THE PRACTICE, PLEADING, AND EVIDENCE IN CRIMINAL CASES 38-39 (6th ed. 1853). A court could issue a warrant for the custody of a material witness pending trial if the court found probable cause to believe that the witness would disobey a court order to testify. *Id.* If the witness refused to give recognizance for his attendance at trial, the court could commit the witness to the local jail until trial or until the witness gave recognizance. *Id.* at 47-1 to 50.

[113] *See* HOUSE REPORT, *supra* note 5 (presumption in favor of release of all persons within scope of Act), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2295; SENATE REPORT, *supra* note 4, at 19-20 (material witness' opportunity for release should be at least as great as that for criminal defendants); *cf. infra* note 154 and accompanying text (presumption exists in favor of defendant's release).

[114] *See* 18 U.S.C. § 3146 (1976) (hierarchy of release conditions for criminal defendants pending trial); *see also infra* notes 140-51 and accompanying text (discussion of release conditions under § 3146).

[115] *See* 18 U.S.C. § 3149 (1976) (applicability of release conditions listed in § 3146 to conditional release of material witnesses).

[116] *Id.*; *see* Hurtado v. United States, 410 U.S. 578, 600 (1973) (Brennan, J., concurring in part and dissenting in part) (purpose of detention of material witnesses is to ensure attendance at trial); United States v. Verduzco-Macias, 463 F.2d 105, 107 (9th Cir.) (court may impose conditional release or confinement of material witness only after finding that witness' appearance at trial is otherwise doubtful), *cert. denied*, 409 U.S. 883 (1972); Bacon v. United States, 449 F.2d 933, 940-43 (9th Cir. 1971) (material witness provisions of federal law require government to show probable cause to expect witness' unavailability or flight before permitting custody of witness); *In re* Cochran, 434 F. Supp. 1207, 1214 (D. Neb. 1977) (critical issue underlying detention of material witness is effectiveness of subpoena in securing attendance at trial

[117] *See* 18 U.S.C. § 3149 (1976) (government must choose deposition instead of custody of material witness whenever deposition adequately will preserve testimony and custody not necessary to prevent failure of justice); *accord* FED. R. CRIM. P. 15 (a) (court has authority to order deposition of material witness and then order witness' release from custody).

[118] *See* 18 U.S.C. § 3149 (1976) (detention permissible only to prevent a failure of justice).

for detention, however, by providing that detention is permissible in lieu of a deposition to "prevent a failure of justice."[119] The Act, therefore, strongly favors the release of material witnesses and permits confinement only in exceptional circumstances.[120]

Federal courts have recognized that procedural protections surrounding custody of material witnesses derive from due process.[121] Due process requires an adversarial hearing before a judicial officer on the question of the likelihood that a witness will disregard a subpoena.[122] In *In re Cochran*,[123] for example, the United States District Court for the District of Nebraska applied the fourteenth amendment due process standard to a state material witness statute.[124] The Nebraska material witness statute permitted authorities to hold witnesses in jail until payment of monetary security once a magistrate had determined that probable cause existed

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Federal courts have construed § 3149 of the Act to permit detention of material witnesses only when necessary to ensure that a witness will testify at trial. *See* United States v. Verduzco-Macias, 463 F.2d 105, 107 (9th Cir.) (conditional release or detention of material witness under § 3149 inappropriate unless risk of nonattendance exists), *cert. denied*, 409 U.S. 883 (1972); *In re* Cochran, 434 F. Supp. 1207, 1214 (D. Neb. 1977) (prosecution must show ineffectiveness of subpoena in securing witness' attendance at trial before custody of witness permissible under Act); *see also* cases cited *supra* note 116 (issue in material witness cases is risk of noncompliance with subpoena). The Act provides, however, that the prosecution should preserve a witness' testimony in a deposition rather than confine the witness. *See* 18 U.S.C. § 3149 (1976). Once the prosecution has resorted to a deposition, therefore, the need to secure the witness' testimony no longer is an issue, yet the Act still would permit detention to prevent a failure of justice. *See id.*

[119] *See* 18 U.S.C. § 3149 (1976) (detention of material witness permissible if deposition inadequate or if detention necessary to prevent injustice).

[120] *See supra* notes 112-19 and accompanying text (Act establishes presumption in favor of material witness' release).

[121] *See* Hurtado v. United States, 410 U.S. 578, 594-98 (1973) (Brennan, J., concurring in part and dissenting in part) (holding material witness in custody is deprivation of liberty and must satisfy due process); *In re* Cochran, 434 F. Supp. 1207, 1212-14 (D. Neb. 1977) (due process controls detention of material witnesses because detention is deprivation of liberty). Due to loss of income, detention of a material witness may constitute a deprivation of property in addition to a deprivation of liberty. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 10 (1969). *But see Hurtado*, 410 U.S. at 588-89 (majority opinion) (because all persons have public duty to provide evidence, incarceration of material witnesses is not "taking" of property under fifth amendment).

[122] *See In re* Cochran, 434 F. Supp. 1207, 1212-14 (D. Neb. 1977) (due process requires that adversarial hearing precede deprivation of material witness' liberty); *cf.* Vitek v. Jones, 445 U.S. 480, 495-97 (1980) (procedural requirement of civil commitment process is adversarial hearing because commitment is deprivation of liberty). In *Vitek*, Nebraska officials had transferred a prison inmate to a mental institution for psychiatric treatment. *Id.* at 482. The state argued that due process protections did not attach to the transfer because the prisoner already was in custody and no longer had any liberty interest. *Id.* at 491-94. The *Vitek* Court, however, held that a person imprisoned for punishment purposes retains a liberty interest that requires due process to accompany a change in the nature of confinement. *See id.* at 488-95.

[123] 434 F. Supp. 1207 (D. Neb. 1977).

[124] *See id.* at 1212-14.

to expect nonappearance at trial.[125] Authorities had taken James and Norman Cochran into custody as material witnesses without notice or a hearing.[126] Following the "arrest," the court appointed counsel and set monetary bail conditions.[127] At a preliminary hearing, the court reduced the amount of bail but summarily dismissed the Cochrans' motion for further reduction of bail and release.[128]

The *Cochran* court upheld the Nebraska statute as a valid general authorization of bail procedures for material witnesses.[129] The court held, however, that the specific procedures that the state had followed in *Cochran* violated the Cochrans' due process rights.[130] The *Cochran* court reasoned that due process requires at least notice and an opportunity to be heard prior to the confinement of a material witness.[131] The court determined that the state had failed to provide both notice of the state's allegations and a meaningful hearing at which a judicial officer would identify the evidentiary bases for a decision to detain or set monetary release conditions for the witnesses.[132] The *Cochran* court, therefore, found that the state wrongfully shifted both the burden of production and the burden of persuasion to the parties whose liberty was at stake.[133]

The due process analysis that has developed in the context of civil commitment and material witness cases is well-suited to the bail issue.[134] The first step in a due process analysis is whether pretrial restrictions on a criminal defendant's liberty involve a constitutionally protected

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[125] *Id.* at 1209; *see* NEB. REV. STAT. §§ 29-507 to -508 (1975) (procedures for detention of material witnesses), *amended by* NEB. REV. STAT. §§ 29-507 to -508.02 (Supp. 1982).

[126] 434 F. Supp. at 1209. In *Cochran*, police took a criminal defendant's two brothers into custody as material witnesses, and the witnesses remained in jail over a weekend. *Id.* The following Monday, a county judge set bail at $25,000 for each witness and appointed counsel. *Id.* The judge made the bail determination, however, solely on the basis of the county attorney's unsubstantiated allegations of materiality and impracticability of a subpoena. *Id.* The two witnesses then moved for a reduction in bail, challenged the constitutionality of Nebraska's material witness statute and alleged a lack of evidence on the issue of intention not to attend and testify. *Id.* The judge reduced bond to $15,000 each and summarily dismissed the Cochrans' other claims. *Id.* at 1209-10. The Cochrans sought habeas corpus relief in the federal district court. *Id.* at 1209.

[127] *Id.*

[128] *Id.* at 1210.

[129] *Id.* at 1216.

[130] *Id.* at 1212-16.

[131] *Id.* at 1212-13. In *Cochran*, the United States District Court for the District of Nebraska held that due process requires notice, a full evidentiary hearing and appointment of counsel before a state can hold a person pursuant to a material witness statute. *See id.* at 1213-14. The court determined, however, that a right to other procedural protections, such as a right to a direct appeal and the right to monetary compensation, did not fall within the due process clause and depended upon state law. *Id.* at 1215.

[132] *Id.* at 1216.

[133] *Id.*

[134] *See infra* notes 135-38, 158-71 and accompanying text (application of due process analysis to pretrial custody of criminal defendants results in balance between governmental and individual interests).

interest.[135] Like civil commitment and detention of material witnesses, pretrial incarceration or conditional release of defendants constitutes a deprivation of liberty or property.[136] The second part of a due process inquiry is a determination of the rights that attach to a defendant's liberty pending trial.[137] The second step considers the nature of the interest, the risk of an erroneous deprivation of the interest absent procedural safeguards and the state or federal government's interest in the deprivation and the avoidance of formal procedures.[138]

Current federal bail procedures[139] illustrate a due process interest balancing approach by providing a hierarchy of pretrial release measures in noncapital cases to ensure a defendant's presence at trial.[140] Under the Act, one of the least preferred conditions of release is payment of a sum of money from personal assets or through a bondsman.[141] In addition, the Federal Rules require a reasonably prompt hearing before a judicial officer to determine the appropriate conditions of a defendant's release pursuant to the Act.[142] The judicial officer who will determine the appropriate release conditions is preferably a federal judge or magistrate.[143] A state judge or magistrate with authority to try and sentence an accused for a federal offense[144] may set bail conditions only when a federal judicial officer is

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[135] *See* Ingraham v. Wright, 430 U.S. 651, 672 (1977) (first step in determining due process rights of students was whether corporal punishment by school officials implicated constitutionally recognized interest).

[136] *See* Hunt v. Roth, 648 F.2d 1148, 1157 (8th Cir. 1981) (individual has interest in remaining at liberty prior to trial), *vacated as moot sub nom.* Murphy v. Hunt, 445 U.S. 478 (1982); SENATE REPORT, *supra* note 4, at 1 (pretrial detention of defendants is deprivation of liberty); *supra* note 56 (due process provides protection for wide range of liberty interests).

[137] *See* Ingraham v. Wright, 430 U.S. 651, 675 (1977) (second step in due process analysis is determination of extent of procedural protection necessary).

[138] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (three factors necessary to determine scope of due process rights); *cf. In re* Cochran, 434 F. Supp. 1207, 1213-14 (D. Neb. 1977) (applying *Mathews* criteria to determine due process rights of material witnesses).

[139] *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3152 (1976).

[140] *See id.* § 3146; *see also* United States v. Kirkman, 426 F.2d 747, 749-50 (4th Cir. 1970) (federal bail statute provides hierarchy of pretrial bail conditions for defendants in noncapital cases).

[141] *See* 18 U.S.C. § 3146 (1976) (monetary release conditions appear at bottom of hierarchical list of release conditions for criminal defendants); *see also* United States v. Abrahams, 575 F.2d 3, 6 (1st Cir. 1978) (Act establishes preference for nonmonetary bail conditions); United States v. Kirkman, 426 F.2d 747, 749-50 (4th Cir. 1970) (under Act courts should give preference to nonmonetary release conditions over monetary release conditions); Wood v. United States, 391 F.2d 981, 983 (D.C. Cir. 1968) (Act evinces strong policy favoring use of nonmonetary release conditions); SENATE REPORT, *supra* note 4, at 9-10 (goal of Act is to establish preference for nonmonetary release conditions).

[142] *See* FED. R. CRIM. P. 5(a), 5(c) (one purpose of requirement for judicial hearing without undue delay following arrest is to determine release conditions pursuant to federal bail statute).

[143] *See id.* 5(a) (federal judge or magistrate presides at hearing whenever federal judicial officer available).

[144] *See* 18 U.S.C. § 3041 (1976) (designation of state judges or magistrates authorized to try and sentence accused for federal offense).

unavailable.[145] Under the Act, the preferred bail measures[146] are release on personal recognizance (ROR)[147] or release upon execution of an unsecured appearance bond.[148] A judicial officer has authority to impose conditions of release other than ROR or an unsecured appearance bond only if the court finds additional or alternative release conditions necessary to ensure the defendant's appearance at trial.[149] A conditional release other than ROR or an appearance bond involves measures such as third-party custody or supervision, temporal or geographic restrictions on a defendant's activities, or restrictions on a defendant's social contacts.[150] The least preferred forms of conditional release are monetary security and discretionary measures such as specified daily periods of official custody.[151] Whenever a defendant remains in custody because he is unable to meet a release condition, the defendant has the right to judicial review of the condition.[152] If review does not result in modification of the condition and release, the reviewing judge or magistrate must prepare a written explanation of the refusal to amend the release condition.[153]

By providing a hierarchy of release measures, therefore, the Act establishes a presumption in favor of a defendant's pretrial release.[154] The

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[145] FED. R. CRIM. P. 5(a).

[146] *See* 18 U.S.C. § 3146 (1976) (listing release conditions available to judicial officer in order of preference); SENATE REPORT, *supra* note 4, at 8-11 (release on personal recognizance, unsecured appearance bond or other nonmonetary release conditions have priority consideration over monetary or custodial bail conditions).

[147] *See* United States v. Stanley, 469 F.2d 576, 579 n.4 (D.C. Cir. 1972) (personal recognizance is promise by defendant to appear at trial). A violation of bail conditions is punishable as contempt or as the specific crime of "bail jumping." *See* 18 U.S.C. § 401(3) (1976) (violation of bail conditions punishable as contempt); *id.* § 3150 (separate federal offense for violation of bail conditions is merely alternative to prosecution for contempt under § 401); *see also* United States v. Guerrero, 517 F.2d 528, 530-31 (10th Cir. 1975) (elements of § 3150 violation are existence of bail conditions for federal criminal defendant and defendant's willful failure to comply with conditions).

[148] *See* United States v. Stanley, 469 F.2d 576, 579 n.4 (D.C. Cir. 1972) (unsecured appearance bond is promise by defendant to pay fixed sum of money upon failure to appear at trial); Note, *The Bail Reform Act of 1966*, 53 IOWA L. REV. 170, 181 n.75 (1967) (same).

[149] 18 U.S.C. § 3146(a) (1976). The Act allows a judicial officer to establish restrictive conditions of release only as necessary reasonably to ensure a defendant's attendance at trial. *Id.* In imposing release conditions, a court considers equally factors such as the type of offense, the nature of the evidence against the defendant and the defendant's employment history, conviction record and financial resources. *Id.* § 3146(b); *see* United States v. Alston, 420 F.2d 176, 178-79 (D.C. Cir. 1969) (court should consider list of factors in Act only as factors bear upon likelihood of defendant's nonappearance at trial). A court may consider the type of offense and nature of the evidence presumably because the court already will have made a probable cause determination prior to the imposition of any release condition other than ROR or appearance bond. *See* Gerstein v. Pugh, 420 U.S. 103, 125 n.26 (1975).

[150] 18 U.S.C. § 3146(a)(1)-(2) (1976).

[151] *Id.* § 3146(a)(3)-(5).

[152] *Id.* § 3146(d).

[153] *Id.*

[154] *See* United States v. Abrahams, 575 F.2d 3, 6 (1st Cir. 1978) (Act creates presump-

standard for determining appropriate release conditions, moreover, is reasonable assurance, rather than absolute certainty, that a defendant will appear at trial.[155] The purpose of the Act was not to confer a right to bail, but to modify existing bail practices to maximize a defendant's opportunities for release on nonmonetary conditions.[156] The hierarchy of release conditions assures that a court will release a defendant under the least restrictive conditions necessary to minimize the risk of nonappearance at trial.[157]

Bail procedures under the Act, therefore, closely parallel the scope of a right to bail under a due process analysis. Prior to an adjudication of guilt, a defendant has a substantial interest in retaining his liberty.[158] Apart from the physical restraint and attendant psychological effects, pretrial incarceration may hamper the preparation of a defense, affect the defendant's family and deprive the defendant of income.[159] Even a conditional pretrial release constitutes a deprivation of liberty[160] or a deprivation of property in exchange for liberty.[161] Absent procedural protections, no effective method of tempering unreasonable deprivations of liberty or property exists.[162] A subsequent civil action against state or federal officials, for example, does not prevent the arbitrary infringement of a defendant's rights and cannot compensate the defendant adequately for

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tion in favor of releasing defendants under minimally restrictive conditions); United States v. Meinster, 481 F. Supp. 1117, 1121-22 (S.D. Fla. 1979) (Act creates presumption in favor of defendant's release and effect of presumption is to assign burden of proof to prosecution to establish significant risk of defendant's nonattendance).

[155] *See* 18 U.S.C. § 3146(a) (court may impose conditions upon defendant's release only as necessary for reasonable assurance of appearance at trial); *see also* United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969) (standard for determining release conditions under Act is reasonable assurance of appearance at trial, not absolute certainty).

[156] *See* HOUSE REPORT, *supra* note 5 (purpose of Act is to increase availability of pretrial release), *reprinted in* 1966 U.S.CODE CONG. & AD. NEWS at 2295-300; SENATE REPORT, *supra* note 4, at 5-8 (purpose of Act is to revise existing bail practices by encouraging use of alternatives to monetary bail to facilitate pretrial release for indigent defendants).

[157] *See* United States v. Cramer, 451 F.2d 1198, 1200 (5th Cir. 1971) (court legitimately can impose only conditions of release that are necessary to minimize risk of nonappearance); United States v. Leathers, 412 F.2d 169, 173 (D.C. Cir. 1969) (court must impose least restrictive release conditions that reasonably will assure defendant's attendance).

[158] *See supra* note 136 and accompanying text (criminal defendant has liberty interest prior to trial).

[159] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (pretrial release affords defendant opportunity to assist in preparation of defense); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) (pretrial release of defendant is essential for preparation of defense); SENATE REPORT, *supra* note 4, at 2 (pretrial imprisonment of defendant stigmatizes defendant, affects defendant's family and may result in loss of income).

[160] *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (conditional pretrial release is often substantial deprivation of liberty); *see also* supra note 56 (broad definition of "liberty").

[161] *See* J. STORY, *supra* note 11, at 667 (monetary bail condition is exchange of property for liberty).

[162] *See infra* note 163 and accompanying text (civil action for unreasonable deprivation of liberty is inadequate remedy).

such a substantial harm.[163] Moreover, under a due process analysis, legitimate governmental interests would include the assurance of a defendant's appearance at trial,[164] protection of the public against a dangerous individual[165] and prevention of improper conduct toward witnesses or jurors.[166] Procedural protections, such as a judicial hearing, would protect the government's interests by providing a means for determining the risk of flight, danger or witness tampering.[167] Any resulting financial or administrative burden to the government is minimal, since bail procedures should result in corresponding reductions in the housing, feeding and supervision of defendants.[168] For example, when a defendant's appearance is likely, a summons, ROR or appearance bond should provide the government with sufficient security that the defendant will attend trial.[169] Conversely, when no set of monetary or nonmonetary release conditions will be effective to minimize the risk of flight or danger to the community, pretrial detention should be constitutionally permissible.[170] A due process

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[163] *See* Ingraham v. Wright, 430 U.S. 651, 690-91 (1977) (White, J., dissenting) (tort action against teacher for infliction of corporal punishment is unlikely to be either preventive or compensatory); Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (civil suits are ineffective remedies for unreasonable searches and seizures). *But see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-97 (1971) (civil action for damages is appropriate remedy when federal officials violate person's fourth amendment rights); 42 U.S.C. § 1983 (1976) (authorizing suit against state officials to redress violation of federal constitutional or statutory right).

[164] *See* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (assurance of defendant's attendance at trial is constitutionally permissible issue at bail hearing); United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971) (governmental authority to secure defendant's appearance at trial is indisputable).

[165] *See* People v. Melville, 62 Misc.2d 366, 374, 308 N.Y.S.2d 671, ____ (N.Y. Crim. Ct. 1970) (protection of community against dangerous person is valid governmental objective). In capital cases, the Act permits a court to consider the issue of whether a defendant's release would pose a danger to the community. *See* 18 U.S.C. § 3148 (1976). A court also can consider the danger issue when a defendant seeks release pending appeal in both capital and noncapital cases. *Id.* In the course of a decision on an application for bail pending appeal, Justice Douglas asserted, in dicta, that community safety was a legitimate concern in bail proceedings generally. *See* Carbo v. United States, 82 S.Ct. 662, 666 (Douglas, Circuit Justice 1962) (dictum); *accord* Williamson v. United States, 184 F.2d 280, 282-83 (Jackson, Circuit Justice 1950) (government may exercise authority to deny bail on basis of danger to community in exceptional circumstances).

[166] *See* Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) (government has valid interest in protecting witnesses against improper conduct by defendant).

[167] *See* United States v. Abrahams, 575 F.2d 3, 6-8 (1st Cir. 1978) (bail hearing should determine likelihood of flight or noncompliance with summons in particular case).

[168] *See* SENATE REPORT, *supra* note 4, at 1-2 (one policy underlying liberal release provisions of Act is to reduce financial burden on government resulting from unnecessary detention of defendants pending trial).

[169] *See id.* at 10 (ROR or appearance bond is often sufficient assurance that defendant will attend trial); *cf.* Bacon v. United States, 449 F.2d 933, 945 (9th Cir. 1971) (subpoena carries threat of contempt for noncompliance and usually furnishes sufficient impetus for witness to appear at trial).

[170] *See* United States v. Abrahams, 575 F.2d 3, 8 (1st Cir. 1978) (pretrial detention rather

theory of bail, therefore, would not create an unconditional right to pretrial release but would provide a right to a procedural framework within which a court would weigh conflicting interests in a particular case.[171]

In addition, judicial precedent supports the feasibility of a due process rationale for bail.[172] Even when the enunciated source of a right to bail is the eighth amendment, federal or state statutory law, or state constitutional provisions, courts have used due process as an additional check upon specific bail practices.[173] For example, when state statutory or constitutional law provides a right to bail, due process protects against unreasonable or arbitrary bail procedures.[174] A state bail scheme also violates due process when the overall scheme does not provide for a judicial hearing to determine appropriate release conditions in a particular case.[175] In *Ackies v. Purdy*,[176] the United States District Court for the Southern District of Florida addressed a challenge to a Florida county bail system, which used a master bail schedule of offenses and corresponding fixed

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than conditional release is appropriate when no set of release conditions would provide reasonable assurance of defendant's attendance at trial).

[171] *See supra* notes 137-70 and accompanying text (due process analysis of bail suggests conditional right to pretrial release depending upon particular circumstances of case).

[172] *See* Kelly v. Springett, 527 F.2d 1090, 1093 (9th Cir. 1975) (due process protections apply to administration of state bail system); Meechaicum v. Fountain, 537 F. Supp. 1098, 1099 (D. Kan. 1982) (applying due process clause as additional protection of state statutory or constitutional right to bail). A few federal courts have concluded without discussion that a right to reasonable bail conditions derives from the due process clause. *See* Pugh v. Rainwater, 572 F.2d 1053, 1070 (5th Cir. 1978) (Gee, J., concurring) (both due process and equal protection clauses contemplate right to pretrial release on reasonable conditions that will ensure defendant's presence at trial); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963) (denial of right to bail violates due process); Johnson v. County of Westchester, Civ. No. 81-1222 (S.D.N.Y. Aug. 3, 1981) (available on LEXIS, Genfed library, Dist file) (due process requires system of pretrial release); United States *ex rel* Kilheffer v. Plowfield, Civ. No. 74-2347 (E.D. Pa. Feb. 24, 1976) (available on LEXIS, Genfed library, Dist file) (due process encompasses right to bail as device for protection of defendant's liberty interests); *see also* United States v. Carignan, 342 U.S. 36, 45-47 (1951) (Douglas, J., concurring) (bail is procedural protection that reflects choice between efficient law enforcement and individual liberty interests); *Ex parte* McDaniel, ____ Fla. ____, ____, 97 So. 317, 318 (1923) (even absent express provision granting right to bail in noncapital cases, due process clause of state constitution would require bail system); J. STORY, *supra* note 11, at 667 (due process clause supports right to bail).

[173] *See* Kelly v. Springett, 527 F.2d 1090, 1093 (9th Cir. 1975) (once state has established bail system, defendant has due process right to fair administration of system); Meechaicum v. Fountain, 537 F. Supp. 1098, 1099 (D. Kan. 1982) (when state defendant has statutory or constitutional right to bail under state law, due process is additional check).

[174] *See supra* note 173 and accompanying text (when state law confers right to bail due process protects against arbitrary administration of system).

[175] *See* Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970) (due process requires judicial hearing to accompany imposition of pretrial release conditions); *accord Ex parte* Jackson, 602 S.W.2d 535, 537 (Tex. 1980) (en banc) (due process requires hearing on decision to grant or deny bail).

[176] 322 F. Supp. 38 (S.D. Fla. 1970)

amounts of monetary security.[177] The *Ackies* court noted that due process requires an adversarial hearing in certain administrative and civil proceedings involving property interests.[178] The court reasoned that, at the least, due process requires a comparable opportunity to be heard when a defendant's liberty is at stake.[179] The *Ackies* court found that a master bail schedule eliminated the necessary case-by-case determination of release conditions.[180] The court held that the Florida scheme was unconstitutional, not because the fixed bail amount might be excessive in particular cases, but because the system violated due process by failing to establish procedural safeguards.[181]

The value balancing that occurs at bail hearings is illustrative of due process, which weighs an individual's life, liberty or property interests against the public interest.[182] The due process clause, therefore, requires a scheme of procedural protections before the government can deprive a defendant of liberty or property to secure the defendant's attendance at trial.[183] The eighth amendment is merely a quantitative limit on bail

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[177] *See id.* at 40-41. In *Ackies*, Ackies brought a class action on behalf of Florida defendants challenging the bail system in Dade County, Florida. *Id.* at 40. Following an arrest, Dade County court officials would consult a master bail schedule to determine monetary release conditions for an accused on the basis of the charges against him. *Id.* Records indicated that defendants that were unable to meet the monetary conditions spent from several days to several months in jail before any judicial hearing occurred. *Id.*

[178] *Id.* at 41.

[179] *Id.*

[180] *Id.* In *Ackies*, county officials used a master bail schedule and gave no consideration to a particular defendant's background, employment record, or other community ties in determining monetary release conditions for defendants. *Id.* at 40. The *Ackies* court found that both federal and state precedent considered pretrial release an issue that requires a judicial determination on the basis of the particular circumstances of a case. *Id.* at 41.

[181] *Id.* The *Ackies* court held that a master schedule for monetary release conditions violated the equal protection clause in addition to the due process clause because the schedule resulted in discrimination, without a reasonable basis, against poor defendants. *Id.* at 41-42. The court reasoned that an indigent defendant with strong community ties would be more likely to attend trial pursuant to lenient release conditions than a wealthier person without community ties. *Id.* at 42. The court noted, therefore, that a master bail schedule was not in the state's interest because the lack of judicial determinations in particular cases might result in release on overly lenient conditions. *Id.* at 41.

[182] *See* United States v. Carignan, 342 U.S. 36, 45-47 (1951) (Douglas, J., concurring) (bail system is procedural protection that reflects choice between individual and governmental interests); Hunt v. Roth, 648 F.2d 1148, 1157-58 (8th Cir. 1981) (pretrial release system weighs individual interests against legitimate governmental objectives), *vacated as moot sub nom.* Murphy v. Hunt, 445 U.S. 478 (1982).

[183] *See* Pugh v. Rainwater, 572 F.2d 1053, 1070 (5th Cir. 1978) (Gee, J., concurring) (due process clause contemplates right to pretrial release on reasonable conditions that will secure defendant's presence at trial); Johnson v. County of Westchester, Civ. No. 81-1222 (S.D.N.Y. Aug. 3, 1981) (available on LEXIS, Genfed library, Dist file) (due process clause requires system of pretrial release for criminal defendants); *Ex parte* McDaniel, ___ Fla. ___, ___, 97 So. 317, 318 (1923) (even absent provision granting right to bail in noncapital cases, state constitution would require bail system pursuant to due process clause); *see also supra* notes 135-81 and accompanying text (applicability of due process clause to pretrial release question).

results.[184] The absence of an excessive bail clause would neither diminish nor eliminate a due process right to bail.[185]

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[184] *See supra* notes 37-42 and accompanying text (eighth amendment limits amount of bail that court may impose, but does not confer underlying right to pretrial release measures).

[185] *See* Ingraham v. Wright, 430 U.S. 651, 664-66 (1977) (eighth amendment is only a limitiation on legislative and judicial power to prescribe law enforcement measures); *accord* People *ex rel* Shapiro v. Keeper of City Prisons, 290 N.Y. 393, 398, 49 N.E.2d 498, 500 (1943) (history of bail in America demonstrates that excessive bail provision only limits amount of bail and does not imply right to reasonable bail procedures). *See generally*, Duker, *supra* note 7, at 77-89 (eighth amendment does not confer right to bail but depends necessarily upon independent source for right to bail).