

1974

Furman v. Georgia: Will the Death of Capital Punishment Mean a New Life for Bail?

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Recommended Citation

(1974) "Furman v. Georgia: Will the Death of Capital Punishment Mean a New Life for Bail?" *Hofstra Law Review*: Vol. 2: Iss. 1, Article 15.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/15>

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One possible function of the vicinage requirement is to permit community standards to be injected into the legal system as a check against harsh and arbitrary administration of justice.¹⁰⁴ While the community may not be able to determine what is criminal, the jury system gives it some ability to say what is not criminal.¹⁰⁵ The assumption here, of course, is that there are identifiable mini-communities which differ significantly from the larger communities of which they are a part. Without going into the general merits of the assumption, it may at least be said to be questionable in the context of the decision in *People v. Jones*. The Los Angeles Superior Court District was broken into smaller divisions for purposes of judicial convenience. There is nothing in *Jones* to indicate that the sub-district lines in Los Angeles County were drawn to reflect identifiable communities. If they were not, then, the mere fact that a geographic area was excluded will not void the jury for failing to reflect a cross section of the community.¹⁰⁶

Furthermore, even if the sub-districts in Los Angeles County were drawn to reflect contained, distinguishable communities, whatever protection the vicinage requirement as defined by the *Jones* court might offer those communities is substantially weakened by the court's admissions that it would have been proper to select the jury from all over Los Angeles County.

As one author has said,¹⁰⁷

[E]ssentially we remain faced with the fact that vicinage is an anachronism unsuited to modern conditions and productive of neither better justice nor greater liberty.

The court in *People v. Jones*, by interpreting the vicinage requirement of the Sixth Amendment more strictly than it was ever intended to be, has taken a decisive step in the wrong direction.

FURMAN V. GEORGIA: WILL THE DEATH OF CAPITAL PUNISHMENT MEAN A NEW LIFE FOR BAIL?

*Furman v. Georgia*¹ has effectively abolished capital punish-

104. Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

105. Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 425 (1969).

106. See pp. 420-21, 428 *supra*.

107. HELLER, *supra* note 44 at 95.

1. 408 U.S. 238 (1972).

ment in the United States for the time being. Five justices concluded, on varying grounds, that capital punishment, per se, or as applied, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Justices Brennan and Marshall based their decisions on the abhorrent nature of the punishment. Justices Stewart and White grounded their opinions on the discriminatory nature of the discretionary application of capital punishment. Justice Douglas, while relying on that same discriminatory aspect, raised the possibility that even a mandatory death penalty might violate the Eighth Amendment if it were applied in an uneven fashion through, possibly, the misuse of prosecutorial discretion.

Since many states have constitutional provisions which guarantee a right to bail except in certain capital offenses, a universal right to bail should logically result in those states as a result of the abolition of capital punishment² by *Furman*. "Hence, where the legislature abolishes capital punishment for any or for all offenses, the offenses so affected areailable as of right under the constitutional guarantee."³

Traditionally, the only purpose of bail is to assure the presence of the accused at trial. The sole test would seem to be whether the defendant will appear.⁴ "The basic principle underlying the right to reasonable bail is the presumption of innocence and any denial of personal liberty must meet the test of due process."⁵ The goal is "[T]o combine the administration of criminal justice with the convenience of a person accused but not proved to be guilty."⁶

2. The phrase "abolition" is used in this paper to refer to the abolition of capital punishment.

3. 8 C.J.S. *Bail* §35 (1962).

4. *State v. Johnson*, 61 N.J. 351, 294 A.2d 245 (1972).

5. *Gaertner v. State*, 35 Wis. 2d 159, 150 N.W.2d 370, 373 (1967).

6. 6 AM. JUR. *Bail and Recognizance* §6 (rev. ed. 1950). See 8 C.J.S. *Bail* §30 (1962).

"The setting of bail may not be used as a device for keeping persons in jail upon an indictment pending their trial. Rather, it is to enable a defendant to stay out of jail until he has been found guilty, while guaranteeing his presence at trial." *Workman v. Cardwell*, 338 F. Supp. 893, 898 (N.D. Ohio 1972); See *State v. Kauffman*, 20 S.D. 620, 108 N.W. 246 (1906).

"Its true purpose is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the presumption under law that an accused is innocent until proven guilty." *State ex rel. Wallen v. Noe*, 78 Wash. 2d 484, 475 P.2d 787, 789 (1970).

But see 8 C.J.S. *Bail* §36(1) (1962), which states that fear for the safety of a government witness may justify a denial of bail. And, Justice Douglas, sitting as a circuit justice, claimed bail could be denied "if, for example, the safety of the community would be

Therefore, the basis for the capital crimes qualification in state right-to-bail provisions would seem to be the overwhelming likelihood of flight by an accused capital offender faced with the prospect of the death penalty. That likelihood of flight being the sole basis of bail denial under traditional theories of bail, the removal of that likelihood, through *Furman's* abolition, should require a universal right to bail in those states with constitutional right-to-bail provisions. Bail, however, might be thought to serve another purpose besides simply assuring the defendant's presence at trial. Some courts, without explicitly offering any such additional rationale for bail, have simply held that abolition does not lead to a universal right to bail. That is the issue raised by the cases discussed here.

Thirty-four states have constitutional provisions granting a right to bail in criminal offenses except in capital cases in certain instances.⁷ Typical of these is California's: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great."⁸ Seven more states have the same guarantee, but the qualification is broader: in these instances, the state constitution grants the right to bail unless the defendant is accused of "murder or treason"⁹ or "unless charged with a capital offense or an offense punishable by life imprisonment"¹⁰ instead of defining the qualification solely in

jeopardized," *Carbo v. U.S.*, 82 S.Ct. 662, 666, *appeal denied*, 369 U.S. 868 (1962), and he added, "In my view the safety of witnesses . . . has relevancy to the bail issue." *Id.* at 668.

Protection of the defendant himself, under traditional bail theory, should not be a relevant consideration unless the danger to him would prevent his appearance at trial. "Obviously, the court had no power to require a bond from the defendant to protect him from violence. The only ground for increase of bail was that it seemed to the court necessary in order to secure the defendant's attendance for trial." *State ex rel. Ryan v. Kjelstad*, 230 Wis. 579, 284 N.W. 554, 556 (1939).

7. ALA. CONST. art. I, §16; ALASKA CONST. art. I, §11; ARIZ. CONST. art. 2, §22; ARK. CONST. art. II, §8; CAL. CONST. art. I, §6; COLO. CONST. art. II, §19; CONN. CONST. art. I, §8; DEL. CONST. art. I, §12; IDAHO CONST. art. I, §6; ILL. CONST. art. I, §9; IOWA CONST. art. I, §12; KANSAS CONST. B. of R., §9; KY. CONST. art. I, §16; LA. CONST. art. 1, §12; MINN. CONST. art. I, §7; MISS. CONST. art. 3, §29; MO. CONST. art. I, §20; MONT. CONST. art. III, §19; NEV. CONST. art. I, §7; N.J. CONST. art. I, §11; N.M. CONST. art. II, §13; N.D. CONST. art. I, §6; OHIO CONST. art. I, §9; OKLA. CONST. art. II, §8; PA. CONST. art. I, §14; S.C. CONST. art. I, §20; S.D. CONST. art. VI, §8; TENN. CONST. art. I, §15; TEXAS CONST. art. I, §11; UTAH CONST. art. I, §8; VT. CONST. ch. 2, §32; WASH. CONST. art. I, §20; WIS. CONST. art. I, §8; WYO. CONST. art. I, §14.

8. See note 7, *supra*.

9. IND. CONST. art. I, §17; MICH. CONST. art. I, §15; NEB. CONST. art. I, §9; ORE. CONST. art. I, §14.

10. FLA. CONST. art. I, §14; R.I. CONST. art. I, §9.

terms of a capital offense. They thus avoid the problem which abolition might create. The extreme form of this kind of broad qualification is Maine's:¹¹

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

The nine remaining states have no right-to-bail provision, but have, as do all the states, a state counterpart to the Eighth Amendment to the U.S. Constitution.

Long before *Furman*, capital punishment had been abolished by a number of states, including those which have right-to-bail provisions in their constitutions. Beginning with Wisconsin, in 1865, these states held uniformly that the right to bail must extend to all cases after abolition since capital cases didn't exist anymore.¹² *People v. Anderson*, a recent California decision, represents the first time in which a court considered this issue and reached the opposite conclusion.¹³

California, adopting what can be called the "classification" doctrine,¹⁴ held that the legislature, by classifying certain crimes as capital offenses, intended that they be non-bailable under the constitutional provision. This begs the initial question as to whether the legislature *can* make a crime non-bailable after abolition, consistent with the constitutional right-to-bail provision. Although *Anderson* abolished capital punishment in California just prior to *Furman* and spoke only peripherally of the right to bail, it has been followed by a number of courts which have had to deal with the right-to-bail aspects of the *Furman* decision.¹⁵

11. ME. CONST. art. I, §10.

12. *In re Perry*, 19 Wis. 711 (1865), 8 A.L.R. 1352; *In re Welisch*, 18 Ariz. 517, 163 P. 264 (1917); *Ex parte Ball*, 106 Kan. 536, 188 P. 424 (1920); *Ex parte Contella*, 485 S.W.2d 910, (Tex. Crim. App. 1972).

13. 6 Cal.3d 628, 100 Cal. Rptr. 152 n.45, 493 P.2d 880, 899 n.45 (1972) (dictum).

14. "Our constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." *People ex rel. Dunbar v. District Court*, 500 P.2d 358, 359 (Colo. 1972).

"[T]hat class of crimes as classified by the legislature still retains the same characteristics they obtained prior to *Furman*, . . ." *In re Kennedy*, 512 P.2d 201, 203 (Okla. Crim. App. 1973).

15. Those cases which "followed" *Anderson*, in that they utilize the same rationale in viewing the right to bail in formerly capital offenses as unaffected by abolition, are *People ex rel. Dunbar v. District Court*, 502 P.2d 420 (Colo. 1972); *State v. Flood*, 263 La. 700, 269 S. 2d 212 (1972); *Hudson v. McAdory*, 268 S.2d 916 (Miss. 1972); *Jones v. Sheriff*, 509 P.2d 824 (Nev. 1973); *In re Kennedy*, 512 P.2d 201 (Okla. Crim. App. 1973).

It was only by way of a footnote that *Anderson* addressed the problem, saying:¹⁶

The issue of the right to bail in cases in which the law has heretofore provided for the death penalty has been raised for the first time by the People and amici curiae on petition for rehearing. Although this question was never an issue in this case, we deem it appropriate to note that article I, section 6, of the California Constitution and section 1270 of the Penal Code, dealing with the subject of bail, refer to a category of offenses for which the punishment of death could be imposed and bail should be denied under certain circumstances. The law thus determined the gravity of such offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction. Those offenses, of course, remain the same but under the decision in this case punishment by death cannot constitutionally be exacted. The underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision. Accordingly, to subserve such purpose and subject to our future consideration of this issue in an appropriate proceeding, we hold they remain as offenses for which bail should be denied in conformity with article I, section 6, of the Constitution and Penal Code section 1270 when the proof of guilt is evident or the presumption thereof great.

A decision which deems it "appropriate" to reach a conclusion at one point, but feels compelled to make a holding "subject to our future consideration of this issue in an appropriate proceeding" would seem to lack considerable force, yet five, and possibly six, states have relied heavily on *Anderson* or its largely unexplored rationale, in reaching the same result.¹⁷ In addition, Louisiana, while acknowledging "[t]he word 'capital' in criminal law has to do with the death penalty,"¹⁸ has also followed the rationale of *Anderson* in holding that certain incidents which attach to capital crimes (12 man jury, unanimity, sequestration) would continue despite *Furman*.

It may be that underlying social considerations have modi-

In addition, Washington has indicated in *State v. Haga*, 81 Wash. 2d 704, 504 P.2d 787 (1972) that it will probably follow *Anderson*, although *Haga* concerned bail on appeal.

Four states have disagreed with *Anderson*. *In re Tarr*, 109 Ariz. 264, 508 P.2d 728 (Ariz. 1973); *State v. Johnson*, 61 N.J. 351, 294 A.2d 245 (1972); *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972); *Ex parte Contella*, 485 S.W.2d 910 (Texas 1972).
16. 6 Cal.3d 628, 100 Cal. Rptr. 152, 172 n.45, 493 P.2d 880, 900 n.45 (1972).

17. See note 15 *supra*.

18. *State v. Holmes*, 263 La. 685, 269 S.2d 207, 208 (1972).

fied the century-old view that abolition creates a universal right to bail in states with constitutional right-to-bail provisions.¹⁹ The efforts to revive the death penalty after *Furman* reflect a belief that "capital offenders" should not remain among the living. This sentiment probably also would reject the idea that accused capital offenders should walk the streets freely prior to trial. The *Anderson* decision may accurately reflect this possibly changing social attitude.

What makes *Anderson* more surprising is the previous virtual unanimity on the definition of "capital crimes."²⁰ "The jurisprudence is replete with the definition of 'capital offense' and it is undeviating."²¹ It has always been held that capital crimes are those for which the death penalty is possible.²² "It is universally held that a 'capital offense' is an offense for which a sentence of death may be imposed."²³

In holding that an offense can be a capital crime for purposes of bail, but is not capital for purposes of punishment, the California court appears willing to violate the rule of constitutional construction which requires courts to give effect to the ordinary meaning of a term which appears unambiguously in the text.²⁴ The refusal to grant bail in formerly capital cases after abolition would require a court to read the constitutional provision guaranteeing bail "except for capital offenses" as saying, in effect, "except for murder in the first degree," (or whatever the previously capital offense happens to be) and to do so would seem "untenable from a constitutional standpoint."²⁵

However, Mississippi held that denial of bail was still necessary after *Furman*, "so that utter chaos and confusion in the administration of criminal justice would not be the result of the

19. *State v. Flood*, 263 La. 700, 269 S.2d 212, 215 (1972) (dissenting opinion).

20. WORDS AND PHRASES, "Capital Crime," "Capital Felony," "Capital Offense."

For support for the proposition that the death penalty must be possible for there to be a capital crime, see *Fitzpatrick v. United States*, 178 U.S. 304 (1900); *Rakes v. United States*, 212 U.S. 55 (1909).

21. *State v. Flood*, 263 La. 700, 269 S.2d 212, 215 (1972) (dissenting opinion).

22. *State v. Christensen*, 165 Kansas 585, 195 P.2d 592 (1948); *Ex parte Welsh*, 236 Mo. App. 1129, 162 S.W.2d 358 (1942); *Ex parte Dusenberry*, 97 Mo. 504, 11 S.W. 217 (1889); *Commonwealth v. Boyle*, 412 Pa. 398, 195 A.2d 97 (1963); *Ex parte Ball*, 106 Kan 536, 188 P. 424 (1920).

23. *In re Tarr*, 109 Ariz. 264, 508 P.2d 728, 728 (1973).

24. Where the state constitution frames its right-to-bail provision in terms of capital offenses or life imprisonment, the court need not strain the constitutional fabric in order to maintain those offenses non-bailable.

25. *State v. Pett*, 253 Minn. 439, 92 N.W.2d 205, 206 (1958).

abolition of the death penalty."²⁶ The court, however, went on to state that, "[i]n order to retain the constitutional plan for the designation of capital offenses, we hold that a capital case is any case where the permissible punishment prescribed by the Legislature is death, even though such penalty may not be inflicted since the decision of *Furman*. . . ."²⁷ The problem that arises from this approach is that the legislature might also circumvent the constitutional right-to-bail provision by so designating a particular crime as capital by affixing an unenforceable death penalty upon it.

The dissent in the Mississippi case claimed the court was yielding to constitutional amendment by judicial fiat. That state court had long refused to abolish capital punishment by this method (a method which the dissent felt had been used in *Furman*) and such an approach was no more acceptable to soften *Furman's* impact, according to the dissent, than to reach *Furman's* conclusion.²⁸

New Jersey expressly rejected the footnote in *Anderson* as unacceptable dictum, adding:²⁹

The underlying motive for denying bail in capital cases was to assure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the many state Constitutions felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present.

It would seem that the split between those states adhering to *Anderson's* rationale, and those adhering to the rationale of the New Jersey and earlier abolition cases, is a result of differences in their view of the function of bail. New Jersey pointed to the punishment as the determinative element, being relevant to the likelihood of flight. The severity of the possible punishment is therefore related to the traditional purpose of bail. *Anderson* and its followers, on the other hand, concentrate on the underlying "gravity of the offense" without telling us how this relates at all to the function of bail or its denial.

26. *Hudson v. McAdory*, 268 S.2d 916, 921 (Miss. 1972).

27. *Id.* at 923.

28. *Id.* at 927.

29. *State v. Johnson*, 61 N.J. 351, 360, 294 A.2d 245, 250 (1972).

Courts have consistently emphasized that it is the possibility of capital punishment, rather than the gravity of the offense itself, which is the essential factor in the decision to deny the right to bail. For instance, where the defendant has committed a capital crime under conditions which might render him non-bailable, but he is a minor and thus immune to the death penalty, it has been held that he is therefore bailable.³⁰ Where mitigating circumstances indicate that the offense will not be punishable by death, the offender has been held bailable.³¹ Although the right-to-bail provisions have not been held to guarantee bail on appeal,³² it has nevertheless been held that, when granted, bail on appeal extends to a defendant who had been accused of a capital crime but who had been convicted of second-degree murder, since he was no longer subject to the threat of the death penalty.³³

All forty-one right-to-bail states further modify the capital crimes qualification with the phrase, "where the proof is evident or the presumption great," or essentially identical words. It has been held that this applies not merely to proof of the offense, but in addition requires proof to indicate the death penalty would probably be inflicted.³⁴ "The term, 'proof is evident' means . . . that upon a hearing of the facts before the court a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty."³⁵ This supports the New Jersey view that the real threat of capital punishment is the relevant factor in the consideration of bail in these states. This view is also especially pertinent since it is an interpretation of the phrase which modifies the capital crimes qualification, and thus sheds some light on what some courts, at least, view the intent of that qualification to be. By adding the phrase, "where the proof is evident or the presumption great," if this view is right, the framers clearly meant that not only must the defendant be accused of a capital crime, but he must be in great danger of receiving the death penalty. The gravity of the offense, then, divorced from the pun-

30. *Ex parte Walker*, 28 Tex. App. 246, 13 S.W. 861 (1889).

31. *State v. Klingman*, 14 Iowa 404 (1862).

32. Universal right to bail on appeal would be intolerable, because "the result would be that all convicted persons of all crimes could be admitted to bail, even after judgments were affirmed in the highest courts of the state." *Ex parte Halsey*, 124 Ohio St. 318, 178 N.E. 271, 272 (1931).

33. *Commonwealth v. Caye*, 447 Pa. 213, 290 A.2d 244 (1972).

34. *Ex parte Contella*, 485 S.W.2d 910 (Texas 1972), and cases cited therein. *See also Ex parte Tindall*, 111 Tex. Crim. 2d 444, 15 S.W. 2d 24 (Texas 1929).

35. *Ex parte Contella*, 485 S.W.2d 910, 911 (Texas 1972).

ishment, acquires very little relevance.

To be consistent with the accepted theory of bail and the intent of the framers, the unstated assumption of *Anderson* must be that the "gravity of the offense," apart from the punishment, is related to the likelihood of flight. Persons accused of formerly capital crimes should have a higher propensity for flight, even after abolition. Further, implicit in the *Anderson* view is the assumption that the framers of the right-to-bail provisions must also have been acting under this belief.³⁶ Having nowhere stated this assumption, however, *Anderson* leaves us to question its basis without the aid of supporting materials or precedent. It would seem at least arguable that the type of person who commits a capital crime, absent the threat of capital punishment, would be no more likely to flee than the person accused of a crime punishable by life imprisonment, or, in fact, the person accused of a crime characterized by deception and dishonesty. Embezzlement, larceny, fraud, would all seem to be committed by persons who are at least as likely to flee as those accused of capital crimes, who, for the most part, are murderers and rapists.

Although murderers and rapists are no paradigms of honesty, to say nothing of virtue, there is no reason to believe that the framers seriously desired to foreclose the possibility of bail to such accused criminals because they were less trustworthy than defendants accused of countless other crimes. Absent any support for such a belief, which the "classification" courts have not offered, the traditional theory offered by New Jersey seems much more appealing.

"Classification" courts have probably adopted a different theory of bail entirely—one that considers the danger to the public as well as the likelihood of flight. Although it is not consistent with the traditional view of bail, it is certainly consistent with the realities of crime. The likelihood of danger to the public by a thief

36. An interesting modern-day counterpart to the postulated intent occurred in somewhat inverse fashion in the attempt to abolish capital punishment through constitutional amendment in Montana. "A separately submitted proposition against the death penalty which would have deleted from this section: 'except for capital offenses, when the proof is evident or the presumption great' was not adopted by the electorate." Compilers Note, MONT. CONST. art. II, §21 (Supp. 1973). The assumption of those who authored that proposition of course was that the original framers of the state constitution meant the qualification on the right to bail to apply only so long as there was capital punishment. Therefore, were the proposition to pass, and thus abolish capital punishment, the authors must have concluded that the qualification relating to capital punishment and bail must also be abolished.

on bail committing more thefts is far less than that of a multiple murderer continuing to ply his trade while awaiting trial. "The fact is," said Justice Marshall in *Furman*, ". . . that murderers are extremely unlikely to commit other crimes either in prison or upon their release."³⁷ Despite the low recidivism rate of murderers, the danger posed by the random few who do repeat might conceivably be greater than that of less violent criminals characterized by higher recidivism. And, since rape comprises a significant proportion of capital crimes (two of the three defendants in *Furman* were convicted of rape), the low recidivism of murderers is not wholly relevant to a consideration of capital crimes in general.

It may be time to reexamine our concept of bail if a substantial number of courts feel the need to base it on factors other than the likelihood of flight. In fact, it might take an ostrich to believe the traditional theory of bail goes unmodified in its application. The fact that bail is set at the discretion of the judge not only permits him to "set" bail but also to effectively deny it by setting it too high, thereby preventing the release of allegedly dangerous defendants.³⁸

Further, the guidelines for setting bail along traditional lines seem to encompass some un-traditional elements. For instance, most courts consider the "seriousness of the offense" in setting bail, rather than the *character* of the offense (which they could do by examining, for example, the elements of deception, fraud, and general trustworthiness). The conclusion is almost inescapable that the courts thereby consider the danger to the community. Despite the fact that Pennsylvania followed New Jersey in holding bail was available to all defendants after *Furman*, its court ruled that "anticipated criminal activity alone cannot stand as grounds for denial of bail. This, however, is not to say it cannot be considered. . . ."³⁹

Both the Minnesota and Pennsylvania courts suggested con-

37. *Furman v. Georgia*, 408 U.S. 238, 355 (1972).

38. "Nothing we say in this opinion should in any way limit the trial court in setting an appropriate bond commensurate with the crime and the propensity, if any, of the defendant to leave the jurisdiction pending trial." *In re Tarr*, 109 Ariz. 264, 508 P.2d 728, 729 (Ariz. 1973). The implication that there may be no propensity to leave, but that bail should still be set commensurate with the crime, is obviously inconsistent with the traditional theory of bail. *Tarr*, incidentally, followed the New Jersey view that the right to bail cannot be foreclosed from formerly capital offenders. See *State v. Johnson*, 61 N.J. 351, 294 A.2d 245 (1972).

39. *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829, 236 (1972).

stitutional amendments as one remedy for the problem caused by the abolition of capital punishment. The Maine amendment, discussed previously, seems to do the job nicely. On the other hand, at least one court has noted that the problem is more basic, extending beyond the right-to-bail provision itself and lying at the very heart of the bail concept. "Bail is not a means for punishing defendants . . . nor for protecting the public safety."⁴⁰ This court (the same California court which decided *Anderson* one year earlier) went on to say:⁴¹

We are compelled to the conclusion that the detention of persons dangerous to themselves or others is not contemplated within our criminal bail system, and if it becomes necessary to detain such persons, authorization therefor must be found elsewhere, either in existing or future provisions of the law.

In a footnote,⁴² the court pointed out that civil commitment is one method that has been used for confinement of persons absent criminal conviction.

But the problem is more than one of legalistic niceties. The dilemma which results when bail is used, implicitly or otherwise, for purposes of preventive detention, is unavoidable regardless of which label is attached to it. Substantive aspects of pre-conviction confinement must be considered. Merely calling bail-denial "civil commitment" will not resolve the conflict between basic principles of criminal justice (such as the presumption of innocence) and the desire to protect the community from possibly dangerous suspects which arises from the very act of confinement without conviction. It will not be resolved unless civil commitment is treated substantively differently than bail-denial itself. Unless the courts view such civil commitment differently than bail-denial, unless the prisoner is treated differently, and unless society thinks of it (and therefore the confinee) differently, such confinement will conflict not only with the right-to-bail provisions of the many state constitutions, but also with the concepts of bail which underly them.

CONCLUSION

The departure which the *Anderson* rationale represents, from the traditional concept of bail, is an important one. Wrapped in

40. *In re Underwood*, 107 Cal. Rptr. 401, 403, 508 P.2d 721, 723 (1973).

41. *Id.* at 724.

42. *Id.* n.8.

the guise of a simple difference in constitutional interpretation is a much more far-reaching purpose of bail beyond the traditional one of assuring the presence of the defendant at his trial. Because the *Anderson*-type decisions do not state their view of bail explicitly, we are left to guess at their impact. But it is obvious that these decisions are based on a function of bail that is related to the protection of the public in addition to that of assuring the defendant's presence at trial.

If the courts which use such a view would be more candid, justice would be better served. Such candor would serve two crucial ends. First, an explicit admission that bail has the protection of the public from dangerous individuals as one of its purposes would allow discussion of the limits of such a concept. Second, such a frank discussion of the use of bail-denial for purposes different from traditional concepts would allow exploration of how it should differ in its application.

