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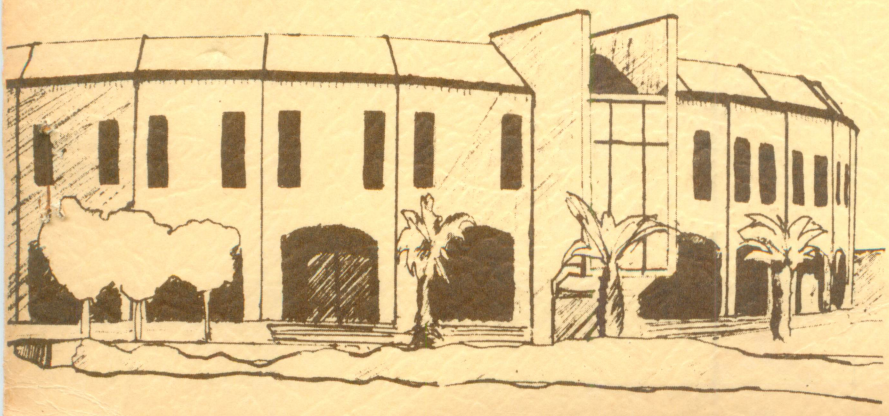

ST. MARY'S UNIVERSITY 1927 SCHOOL OF LAW

PREVENTIVE DETENTION AND EQUAL PROTECTION OF THE LAW IN TEXAS

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In every criminal proceeding there is an interval between the initial arrest of the accused and the final determination of his guilt or innocence. During this pretrial interval the accused, who has yet to be found guilty, is interested in gaining a speedy release.[1] This release enables him to better prepare his defense and to avoid any premature, and perhaps, unnecessary punishment.[2] At the same time, society is entitled to reasonable assurance that the accused will appear for trial and submit to the judgment of the court.[3] Bail is the method used in the United States to reconcile these conflicting interests of society and the accused.[4] The court determines what sum of money will be sufficient to assure the accused's later appearance at trial.[5] With this sum of money deposited with the court as security, the accused is released.[6]

Although assurance of trial appearance is the most prevalent use to which bail is put,[7] it is not the only one. Some jurisdictions classify the accused not only on the basis of risk of nonappearance, but also on the basis of the danger the person would pose to the community if released.[8] Preventive detention is the descriptive term assigned to this practice of

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1. The United States Supreme Court has called the period between arraignment and trial "perhaps the most critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation [are] vitally important . . . ." Powell v. Alabama, 287 U.S. 45, 57 (1932).

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

3. United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 207 (S.D.N.Y. 1969); *see* United States *ex rel.* Siegal v. Follette, 290 F. Supp. 632, 635 (S.D.N.Y. 1968); Painten v. Massachusetts, 254 F. Supp. 246, 249 (D. Mass. 1966); State v. Foy, 369 A.2d 995, 1001 (N.J. 1976).

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

5. For example, TEX. CODE CRIM. PRO. ANN. art. 17.15 (Vernon 1977) states that "bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with."

6. There has been much concern over the potential for abuse in a money bail system. A modern tendency is to favor personal recognizance release instead of money bail. *See* 18 U.S.C. § 3146(a) (1970). The Fifth Circuit has held that the equal protection clause is violated if the judge does not consider the less financially burdensome alternatives for pretrial release before he imposes money bail. Pugh v. Rainwater, 557 F.2d 1189, 1190-91 (5th Cir. 1977).

7. *E.g., In re* Underwood, 508 P.2d 721, 723, 107 Cal. Rptr. 401, 403 (1973) (en banc); Lucero v. District Court, 532 P.2d 955, 957 (Colo. 1975) (en banc); State v. Menillo, 268 A.2d 667, 670 (Conn. 1970); State v. Johnson, 294 A.2d 245, 250 (N.J. 1972); Commonwealth v. Truesdale, 296 A.2d 829, 834 (Pa. 1972); Mello v. Superior Court, 370 A.2d 1262, 1264 (R.I. 1977); State v. Pray, 346 A.2d 227, 229 (Vt. 1975).

8. *See, e.g.*, D.C. Code Encycl. § 23-1321(a) (West Supp. 1970); MD. ANN. CODE art. 27, § 616 ½(c) (Supp. 1977); VA. CODE § 19.2-120 (1975).

absolutely denying bail to the dangerous.[9] On November 8, 1977, Texas voters amended article I, section 11a of the state constitution to provide what appears to be a comprehensive preventive detention system.[10]

Insofar as any preventive detention system involves classification, it is subject to attack as violative of the equal protection clause of the fourteenth amendment to the United States Constitution.[11] Interestingly, the Texas courts may eventually be faced with such an equal protection attack upon the new Texas provision.[12]

BAIL IN THE UNITED STATES

American bail systems can be conveniently assigned to one of three categories according to the functions they are designed to perform. In the first category are those systems whose only lawful function is to assure the presence of the accused at trial.[13] In the second category are those systems which perform primarily an assurance function, but which also clearly

9. *See* People *ex rel.* Hemingway v. Elrod, 322 N.E.2d 837, 841 (Ill. 1975); State v. Johnson, 294 A.2d 245, 250-51 (N.J. 1972); People *ex rel.* LaForce v. Skinner, 319 N.Y.S.2d 10, 14 (Sup. Ct. 1971); Commonwealth v. Truesdale, 296 A.2d 829, 836 (Pa. 1972); Mello v. Superior Court, 370 A.2d 1262, 1265 (R.I. 1977); Ervin, *The Legislative Role in Bail Reform,* 35 GEO. WASH. L. REV. 429, 443 (1967). The term "pretrial detention" is sometimes used. *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 U. VA. L. REV. 1223, 1223 (1969); *cf. In re* Underwood, 508 P.2d 721, 723, 107 Cal. Rptr. 401, 403 (1973) ("public safety exception").

10. *See* TEX. CONST. art. I, § 11a.

11. Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice,* 6 HARV. C.R.-C.L.L. REV. 291, 337-340 (1971) (preventive detention and legislative classification). *See also* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 342 (1949) (legislative classification in general); 82 HARV. L. REV. 1065, 1076 (1969).

12. Although this comment focuses on equal protection, the constitutionality of preventive detention has been discussed in other contexts. The eighth amendment states, "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII. It has been argued that implicit in this prohibition of excessive bail is the absolute guarantee of bail in noncapital cases, prior to conviction. *See* United States v. Motlow, 10 F.2d 657, 659 (Butler, Circuit Justice, 1926); Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960). The principal commentary in this area is Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 989-99, 1164, 1180-82 (1965). On the other hand, there is extensive authority to the contrary. *See, e.g.,* Carlson v. Landon, 342 U.S. 524, 546 (1952); United States v. Gilbert, 425 F.2d 490, 491 (D.C. Cir. 1969); Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir.), *cert. denied,* 376 U.S. 965 (1964); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 206 (S.D.N.Y. 1969). *See generally* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 U. VA. L. REV. 1223, 1224-31 (1969). It has also been urged that preventive detention violates the due process clause. *See* Portman, *"To Detain or not to Detain?"—A Review of the Background, Current Proposals, and Debate on Preventive Detention,* 10 SANTA CLARA L. REV. 224, 244-49 (1970); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 U. VA. L. REV. 371, 380-81 (1970). *But see* Note, *Preventive Detention,* 36 GEO. WASH. L. REV. 178, 185 (1967).

13. *See, e.g.,* ARK. CONST. art. II, § 8; HAWAII CONST. art. I, § 9; IDAHO CONST. art. I, § 6; N.J. CONST. art. I, § 11; WIS. CONST. art. I, § 8.

provide for some type of preventive detention.[14] The third category is comprised of those systems which allow revocation and denial of bail to certain individuals, but do so, at least ostensibly, in the name of assurance and not prevention.[15]

A bail system whose only purpose is assurance, of the type mentioned in the first category, reads typically as follows: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."[16] The Bail Reform Act of 1966,[17] which governs federal bail law, is an assurance-type statute.[18] The Act favors nonmonetary, personal recognizance bail, but in the event the court determines more is required to assure appearance, certain conditions may be imposed on the accused during his pretrial freedom.[19] The sponsors of the Act expressly disclaimed any intent to adopt a system of preventive detention.[20]

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14. *See, e.g.*, D.C. Code Encycl. § 23-1321(a) (West Supp. 1970); GA. CODE ANN. § 27-901 (Supp. 1977); MD. ANN. CODE art. 27, § 616 ½(c) (Supp. 1977); N.Y. CRIM. PROC. LAW § 530 (McKinney 1971 & Supp. 1977-1978); VA. CODE § 19.2-120 (1975).

15. *See, e.g.*, ARIZ. CONST. art. II, § 22; NEV. REV. STAT. ch. 178.487 (1977); UTAH CONST. art. I, § 8.

16. ARK. CONST. art. II, § 8; *accord*, MINN. CONST. art. I, § 7; N.J. CONST. art. I, § 11; WIS. CONST. art. I, § 8; *see* ALASKA CONST. art. I, § 11; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; HAW. REV. STAT. § 804-3 (1976); IDAHO CONST. art. I, § 6; MONT. CONST. art. III, § 19; OKLA. CONST. art. II, § 8.

17. 18 U.S.C. § 3146-3152 (1970 & Supp. V 1975); *see* FED. R. CRIM. P. 46(a) (Supp. V 1975).

18. *See* 18 U.S.C. § 3146(a) (1970). The statute provides in pertinent part: "Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer . . . ." *Id.*

19. *See id.* The statute provides:

> In the event personal recognizance or a nonsecured appearance bond is determined inadequate to assure the appearance of the accused, the judicial officer may:
>
> (1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percentum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
>
> (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Id.

20. *See* H.R. REP. No. 1541, 89th Cong., 2d Sess. 6, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2296.

The second category combines prevention and assurance functions, and has thus far been adopted by a minority of jurisdictions.[21] In these jurisdictions, the primary function of bail is still assurance, and to this extent, the first and second categories are similar. In the second category, however, language has been added to the provisions which allows a court to deny bail to those it determines are dangerous to the public. Because this added function is the distinguishing, if not the primary, purpose of systems of the second category, these systems will be referred to as prevention-type systems. There are a variety of such systems in existence. The New York Criminal Procedure Code makes bail discretionary in all felonies.[22] New York courts have limited this exercise of discretion to "rare and extraordinary" cases, where the evidence is "clear and convincing" and the "peril apparent."[23] In Virginia bail may be denied when there is probable cause to believe that the accused will "constitute an unreasonable danger to himself or the public" if released.[24] Georgia lists several serious crimes, less than capital in nature, for which bail may be denied.[25] In the District of Columbia the judge may deny bail to those accused of certain dangerous or violent crimes, and to those accused of tampering with witnesses, or otherwise obstructing orderly trial processes.[26]

The third type of system appears preventive on its face in that it allows revocation and subsequent denial of bail to those charged with commission of a crime while on bail.[27] Appearances notwithstanding, some courts,

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A solution [to the problem of preventive detention] goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis. The present problem of reform of existing bail procedures demands an immediate solution. It should not be delayed by consideration of the question of preventive detention.

Id. at 2296. *See generally* S. REP. No. 750, 89th Cong., 1st Sess. 5 (1965) (similar disclaimer in Senate).

21. A survey reveals that the District of Columbia, Georgia, New York, and Virginia have adopted some form of prevention-type legislation. *See* note 14 *supra.*

22. N.Y. CRIM. PROC. LAW § 530.20 (McKinney Supp. 1977-1978).

23. *See* People *ex rel.* Shapiro v. Keeper of City Prison, 49 N.E.2d 498, 501 (N.Y. 1943); People v. Melville, 308 N.Y.S.2d 671, 680 (Crim. Ct. 1970). *But see* People *ex rel.* LaForce v. Skinner, 319 N.Y.S.2d 10, 13 (Sup. Ct. 1971) (cautioning that New York law on preventive detention is unsettled).

24. VA. CODE § 19.2-120(2) (1975).

25. GA. CODE ANN. § 27-901 (Supp. 1977) (rape, armed robbery, aircraft hijacking, treason, murder and perjury, and offenses of giving and selling, offering for sale, bartering or exchanging of any narcotic drug).

26. D.C. Code Encycl. § 23-1322(a) (West Supp. 1970).

27. *See* ARIZ. CONST. art. II, § 22.

All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses when the proof is evident or the presumption great.
2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where proof is evident or the presumption great as to the present charge.

Id.; *cf.* NEV. REV. STAT. ch. 178.487 (1977).

mindful of the constitutional controversy surrounding preventive detention, have been careful to interpret their statutes as having only an assurance function.[28] Their position is that commission of a crime while on bail exposes the accused to an increased chance of ultimate conviction, since he now must stand trial for an additional offense.[29] Attendant with this increased risk of conviction is a greater incentive to flee before trial.[30] Thus, it is this added risk of flight, and not the risk of danger to the public, as indicated by the recidivism, that justifies revocation and denial of bail.[31]

BAIL IN TEXAS

Until 1956 Texas had an assurance-type system as provided by article I, section 11, of the constitution.[32] In 1956 voters amended the constitution by adding section 11a, which provides, at least superficially, for a preventive-type of detention.[33] Section 11a allowed a judge to deny bail to one seeking release on a felony charge when this person had been convicted of a felony on two previous occasions.[34] The Texas Court of Criminal Appeals has considered old section 11a twice, holding it constitutional in *Ex*

> Every release on bail with or without security is conditioned upon the defendant's good behavior while so released, and upon a showing that the proof is evident or the presumption great that the defendant has committed a felony during the period of release, the defendant's bail may be revoked, after a hearing . . . . Pending such revocation, the defendant may be held without bail by order of the magistrate before whom he is brought after an arrest upon the second charge.

Id.; *cf.* UTAH CONST. art. I, § 8.

> All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong or where a person is accused of the commission of a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, and where the proof is evident or the presumption strong.

Id.

28. *See, e.g.*, Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion) (interpreting FED. R. CRIM. P. 46(a)(2) prior to enactment of Bail Reform Act of 1966); United States v. Wilson, 257 F.2d 796, 797 (2d Cir. 1958) (interpreting FED. R. CRIM. P. 46(a)(2) prior to enactment of Bail Reform Act of 1966); Rendel v. Mummert, 474 P.2d 824, 828-29 (Ariz. 1970) (en banc) (explaining intent of statute to be assurance); Mello v. Superior Court, 370 A.2d 1262, 1264 (R.I. 1977) (right to revoke for criminal behavior while on bail related to increased risk of flight).

29. *See* United States v. Wilson, 257 F.2d 796, 797 (2d Cir. 1958); Rendel v. Mummert, 474 P.2d 824, 828-29 (Ariz. 1970); Mello v. Superior Court, 370 A.2d 1262, 1264 (R.I. 1977).

30. *See* note 29 *supra*.

31. *See* note 29 *supra*.

32. *See* TEX. CONST. art. I, § 11; *accord*, TEX. CONST. art. I, § 9 (1869); TEX. CONST. art. I, § 9 (1866); TEX. CONST. art. I, § 9 (1861); TEX. CONST. art. I, § 9 (1845).

33. *See* TEX. CONST. art. I, § 11a (1956, amended 1977). There is no applicable publication of legislative history in Texas. As a result, it cannot be said with certainty whether section 11a was intended to be preventive or assurative. It could conceivably be argued that the provision was for assurance and that the classification reflected the legislature's belief that those twice previously convicted of a felony represented a greater risk of flight.

34. TEX. CONST. art. I, § 11a (1956).

parte Miles.[35]

On November 8, 1977, section 11a was amended.[36] By its provisions a district judge may still deny bail to an accused defendant convicted of a felony on two previous occasions.[37] Additionally, bail may now be denied to one accused of committing a felony while on bail pursuant to an existing felony indictment, and to one once previously convicted of a felony, seeking bail for a crime involving the use of a deadly weapon.[38] There must be a hearing "substantially showing the guilt of the accused of the offense," and the order denying bail must issue within seven days after the arrest, and trial must be had within sixty days of the arrest.[39] Further, the accused has a preferential right of appeal to the court of criminal appeals.[40]

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35. 474 S.W.2d 224 (Tex. Crim. App. 1971). The defendant argued that section 11a was unconstitutional in that it discriminated against that class of people "theretofore twice convicted of a felony." The court held that the unequal treatment was based on a "reasonable and substantial classification" and therefore was not unconstitutional. *Id.* at 225. In *Ex parte* Smith, 548 S.W.2d 410 (Tex. Crim. App. 1977) the court was not faced with a direct attack on the constitutionality of section 11a. The court did cite *Miles,* however, in stating that section 11a was constitutional. *Id.* at 414.

36. TEX. CONST. art. I, § 11a now reads:

> Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, or (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above or of the offense committed while on bail in (2) above, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above or the accusation and indictment used under (2) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals.

TEX. CONST. art. I, § 11a.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* Ordinarily, the Texas Court of Criminal Appeals hears appeals following convictions. *See* TEX. CODE CRIM. PRO. ANN. art. 44.08 (Vernon 1966). Of course, the issue of bail becomes moot after conviction. Bail questions are raised in habeas corpus proceedings before the court, and the court hears all habeas corpus applications "at the earliest practicable time." TEX. CODE CRIM. PRO. ANN. art. 44.36 (Vernon 1966). Section 11a has apparently gone one step further in stating that the appeal from a denial of bail "shall be given preference by the Court of Criminal Appeals." TEX. CONST. art. I, § 11a.

PREVENTIVE DETENTION AND EQUAL PROTECTION

Equal Protection in General

Generally in preventive detention jurisdictions the classification of an accused as dangerous may result in his being denied bail.[41] It is widely accepted that denial of bail has a detrimental effect on the accused, and that those denied bail suffer a disadvantage compared to those granted bail.[42] A disadvantageous classification, however, clearly is not enough standing alone to render the classifying statute void as violative of the equal protection clause of the fourteenth amendment.[43] Federal and state authorities traditionally have been allowed wide discretion, pursuant to their police power, in making laws whose purpose it is to promote public safety; and to this end, nothing prevents the state from classifying dissimilar groups differently.[44]

Valid legislation, however, requires more than a mere recital by the state that the action has been taken pursuant to its police power.[45] Legislative discretion in this area is limited by the requirement that the classification created be, to some extent, relevant to a legitimate state purpose.[46] The degree of relevance necessary to justify a classification will vary with the nature of the rights affected.[47] When the classification affects social and economic rights, the state need only show that the legislation has *some* relevance to a legitimate purpose.[48] This is known as the traditional test

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41. *See* note 14 *supra.*

42. *See, e.g.,* Barker v. Wingo, 407 U.S. 514, 532-33 (1972) (disadvantages resulting from pretrial detention discussed in connection with right to speedy trial); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (deprivation of liberty following bail revocation condemns one to suffer "grievous loss"); Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice, 1960) (harm goes beyond denial of freedom); *cf.* Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970) (in special cases, denial of pretrial bail may interfere with due process rights to fair trial).

43. *See* Labine v. Vincent, 401 U.S. 532, 536 (1971) (equal protection does not mean illegitimate child can never be treated differently than legitimate child); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (different standards may be appropriate for municipal advertising restrictions).

44. *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 380 (1968) (Congress has legitimate interest in preventing destruction of draft cards); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (state has legitimate interest in forbidding optician from performing certain tasks relating to eye care); Prince v. Massachusetts, 321 U.S. 158, 169-71 (1944) (state has legitimate interest in child-labor legislation); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (state has legitimate interest in keeping natural mineral waters pure).

45. *See* McLaughlin v. Florida, 379 U.S. 184, 190 (1964) ("arbitrary selection can never be justified by calling it classification") (quoting Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 159 (1897)).

46. *See* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Baxstrom v. Herold, 383 U.S. 107, 111 (1966); Carrington v. Rash, 380 U.S. 89, 93 (1965).

47. *See* Oregon v. Mitchell, 400 U.S. 112, 247 n.30 (1970).

48. *See, e.g.,* City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 285 (1976) (union dues withheld from paychecks); Richardson v. Belcher, 404 U.S. 78, 81 (1971)

of equal protection,[49] and of the two tests generally recognized, it is certainly the less burdensome from the viewpoint of the party attempting to support a statute's validity.[50]

The burden on the state is increased in two ways when fundamental rights, as distinguished from social and economic rights, are involved. First, under a strict standard of judicial review, the state must show that it has a *compelling* interest in the legislation.[51] Second, the state must show that the statute by which it seeks to accomplish this compelling interest is drawn no more broadly than is necessary for this purpose.[52]

Equal Protection and Preventive Detention

Any examination of preventive detention in terms of equal protection must first inquire whether bail is a fundamental right.[53] If it is not, the traditional, or relaxed, standard of judicial review applies, and the state need only show it has *some* legitimate interest in the legislation.[54] If bail is a fundamental right, the state's burden is much greater, in that the legislation must survive strict judicial scrutiny. As a consequence of this stricter standard of judicial review, the state must show both a compelling interest in the legislation, and that it has constructed the classifying statute with sufficient narrowness.[55]

The great majority of cases in which rights have been declared funda-

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(workmen's compensation benefits); Labine v. Vincent, 401 U.S. 532, 539 (1971) (intestate distribution of property); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (welfare benefits); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (Sunday closing laws); Walters v. City of St. Louis, 347 U.S. 231, 237 (1954) (taxation power of state).

49. *See, e.g.*, Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 484 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

50. *See, e.g.*, City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 286 (1976) ("relatively relaxed standards of reasonableness"); Richardson v. Belcher, 404 U.S. 78, 81 (1971) ("rationally based and free from invidious discrimination"); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("some reasonable basis").

51. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (heavy burden of justification on state); Oregon v. Mitchell, 400 U.S. 112, 247 n.30 (1970) (state must show interest of substantial importance); Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969) (rational basis test not applicable); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (compelling state interest test); Levy v. Louisiana, 391 U.S. 68, 71 (1968) (review extremely sensitive when basic human rights involved); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (classification invading fundamental rights "must be closely scrutinized and carefully confined").

52. *See* Police Dept. v. Mosley, 408 U.S. 92, 101 (1972). Statutes affecting fundamental interests must "be narrowly tailored to their legitimate objectives." *Id.* at 101; *accord,* Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (statutes affecting constitutional rights must be drawn precisely); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (highly selective regulation required); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (strict scrutiny).

53. *See* notes 51 & 52 *supra.*

54. *See* notes 49 & 50 *supra.*

55. *See* notes 51 & 52 *supra.*

mental with relation to equal protection have involved the various rights guaranteed by the first amendment.[56] Other examples of fundamental rights are voting rights,[57] the right to travel,[58] the right to racial equality,[59] and the right to procreate.[60] Although the United States Supreme Court has never declared bail to be a fundamental right within the context of the equal protection clause, the Court has declared that bail is a "fundamental right" and "basic to our system" in other contexts.[61] In addition, there is ample support from lower court decisions for the position that bail is a fundamental right in the context of the equal protection clause.[62] Moreover, besides its application to fundamental rights, the strict standard of review has also been applied to "constitutionally protected activity."[63] Bail, by virtue of its mention in the eighth amendment, could reasonably be regarded as a constitutionally protected activity.[64] Thus, regardless of

56. *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) (picketing rights); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507 (1969) (right to wear arm band in protest of Vietnam war); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (freedom of association); Niemotko v. Maryland, 340 U.S. 268, 271-72 (1951) (freedom of religion); Schneider v. State, 308 U.S. 147, 160-61 (1939) (freedom of the press).

57. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (durational requirements); Kramer v. Union Free School Dist., 395 U.S. 621, 624-26 (1969) (voter eligibility in school elections); Williams v. Rhodes, 393 U.S. 23, 28-29 (1968) (third party's right to position on ballot); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (poll tax); Carrington v. Rash, 380 U.S. 89, 93-94 (1965) (exclusion of military); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (apportionment on nonpopulation basis).

58. *See* Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (statute inhibited migration of indigents).

59. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (doctrine of "separate but equal" in public education).

60. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (sterilization of criminals).

61. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971). "Bail, of course, is basic to our system of law . . . ." *Id.* at 365. *Compare* Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962) *with* Cohen v. United States, 82 S. Ct. 8, 9 (Douglas, Circuit Justice, 1961) *and* Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice, 1955).

62. *See, e.g.*, Pugh v. Rainwater, 557 F.2d 1189, 1195-96 (5th Cir. 1977) (challenged bail practices require strict judicial scrutiny); United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972) ("right to bail is 'fundamental' in that it involves issues of personal freedom in the most immediate and literal sense of those words"); Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970) (right to pretrial release is fundamental right); *In re* Podesto, 544 P.2d 1297, 1303, 127 Cal. Rptr. 97, 103 (1976) (en banc) (assumes that strict standard appropriate); People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906, 908, 385 N.Y.S.2d 518, 520 (1976) (pretrial detention violates fundamental right of liberty); *In re* Wilson, 393 N.Y.S.2d 275, 277 (Fam. Ct. 1977) (freedom from detention is fundamental right).

63. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

64. The eighth amendment to the United States Constitution states in pertinent part: "Excessive bail shall not be required. . . ." U.S. CONST. amend. VIII. Senator Sam Ervin has argued that the mere fact that bail is mentioned in the Bill of Rights qualifies it as sufficiently fundamental to merit strict scrutiny. Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L.L. REV. 289, 336-37 (1971).

whether bail is deemed a fundamental right, it would seem that the Court, if squarely faced with the question, would find the strict standard applicable to preventive detention legislation. Attendant with this strict standard of review is the requirement that the particular scheme be "narrowly tailored to . . . legitimate objectives."[65] The bail procedures provided in Texas' recently amended section 11a should be examined in light of these strict requirements.

EQUAL PROTECTION AND SECTION 11a

Section 11a lists three types of alleged offenders who may be denied bail after a hearing substantially showing their guilt.[66] Consequently, bail may be denied to those twice previously convicted of a felony,[67] to those presently indicted for a prior felony,[68] and to those once previously convicted of a felony.[69] This is a legislative classification, and if challenged, is susceptible to attack on equal protection grounds.[70] To survive this attack, the state must show, at a minimum, that the provision was designed with sufficient precision with respect to its intended purpose.[71] The first task, then, is to ascertain the legislature's purpose behind the provision. Since there is no applicable publication of legislative history, it is impossible to state with certainty what the purpose of section 11a is; however, it appears to provide for a preventive-type system of bail.[72]

Assuming that section 11a constitutes a preventive-type system, the next task is to determine whether the provision was drawn with sufficient precision, or "tailored to serve [its] objective."[73] Denial of bail under

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65. Police Dept. v. Mosely, 408 U.S. 92, 101 (1972).

66. TEX. CONST. art. I, § 11a.

67. *Id.* Members of this group may be denied bail upon a substantial showing of their guilt of any felony. *Id*

68. *Id.* Members of this group may be denied bail by a showing that they committed a felony, while already on bail for a felony. *Id.*

69. *Id.* Members of this group may be denied bail upon a showing that they committed a felony involving the use of a deadly weapon. *Id.*

70. *See* note 11 *supra.*

71. *See* note 52 *supra.*

72. Governor Dolph Briscoe stated:

> Texans are weary of conditions which allow multiple crimes to be committed by an accused felon who is free on bail. . . .
>
> . . . .
>
> I recommend a Constitutional amendment allowing a judge discretionary authority to deny bail for anyone who commits a felony while free on bond. The right to bail is a precious right. But the person who abuses this right and preys upon society by following criminal activity while free on bail should forfeit the opportunity for continued freedom.

Message to the 65th Legislature, Regular Session, by Governor Briscoe, TEX. H.R.J. 113-14 (1977).

73. Shapiro v. Thompson, 394 U.S. 618, 631 (1969); *accord,* Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (drawn with precision); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288,

section 11a appears to be completely within the judge's discretion, subject to two limitations.[74] First, the accused is entitled to a preliminary hearing.[75] At this hearing the state must "substantially" establish the guilt of the felony for which the accused seeks bail.[76] Second, depending on the applicant, some degree of prior felony involvement must be shown.[77] It can be seen that felony status, in the first instance present felony status, and in the second instance prior felony status, is determinative of the bail decision. The essential question in an equal protection challenge is whether a provision which gives such emphasis to felony status is narrowly enough drawn.

The Texas Penal Code states that one of its objectives is to insure the public safety through "the deterrent influence of the penalties" provided, and by authorizing "such punishment as may be necessary."[78] It is undisputed that the legislature has broad powers when it comes to determining that certain crimes are to be punished more severely than others.[79] In a penal context felony classification is entirely reasonable, and well founded historically.[80] In section 11a, however, the Texas legislature has extended the use of the felony classification to the bail system, a context in which it arguably has no place. The function of the Penal Code is punitive, and felony status has real significance only in this area.[81] In contrast, whatever the function of the bail system, it can never be punitive.[82] If it is argued that the proper function is assurance, the only relevant criteria are those which reflect on the accused's likelihood of appearing for trial.[83] Felony

307 (1964) (not unnecessarily broad); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (when narrower means available).

74. TEX. CONST. art. I, § 11a.

75. *Id.*

76. *Id.*

77. *Id.* The degree of prior felony involvement will vary depending on the degree of present felony involvement. See notes 67-69 *supra* and accompanying test.

78. TEX. PENAL CODE ANN. § 1.02 (Vernon 1974).

79. This power is broad, but not unlimited. In addition to the bail clause, the eighth amendment prohibits cruel and unusual punishment. U.S. CONST. amend. VIII.

80. *See generally* W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 26-29 (1972).

81. *See* TEX. PENAL CODE ANN. § 1.07(14) (Vernon 1974). This section defines felony in terms of the punishment applicable: " 'Felony' means an offense so designated by law or punishable by death or confinement in a penitentiary." *Id.*

82. *See* Bitter v. United States, 389 U.S. 15 (1967) (per curiam). Denial of bail "had the appearance and effect of punishment . . . . Punishment may not be so inflicted." *Id.* at 17; *accord* Reynolds v. United States, 80 S. Ct. 30 (Douglas, Circuit Justice, 1959). Bail "is never denied for the purpose of punishment . . . ." *Id.* at 32.

83. The Federal Bail Reform Act of 1966, a typical assurance statute, provides in pertinent part:

> In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convic-

status, if it has any place at all in such a consideration, should be only one of several conditions studied.[84] If a function of bail is to prevent crime, the only relevant consideration is the likelihood that the accused will commit a crime in the interval before his trial.[85] Again, the fact that he has a history of criminal activity should be only one of several factors considered.[86] An apparent weakness of section 11a lies in its permitting the judge to deny bail solely on the basis of the felony status, without regard to other, and often more relevant factors.

Furthermore, section 11a may be criticized for being overnarrow. The provision apparently is overnarrow in its express dependence on prior felony involvement, leaving the judge powerless to deal with certain individuals who, despite their lack of a criminal record, might pose a serious threat to society if released on bail.[87] For example, a person charged with any noncapital crime, including murder, who lacked the requisite prior felony involvement, could not be detained legally despite the existence of other factors indicating a likelihood that he might commit more crimes pending his trial. And although the narrowness objection might not be of a constitutional dimension,[88] it certainly points to a serious flaw in section 11a.

On the other hand, section 11a is arguably overbroad in that its dependence on prior felony involvement permits the detention of certain people without sufficient justification. For instance, a person charged with aggravated perjury, a felony in Texas,[89] who had been convicted twice before of a felony, could be detained prior to his trial on the perjury charge. Since the perjurer commits his crime only in the courtroom, it is difficult to find a compelling state interest served by his pretrial detention. Thus, an objection to the overbreadth of section 11a unrebutted by sufficient proof of a

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tions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

18 U.S.C. § 3146(b) (1970).

84. *See id.* § 3146.

85. *See* D.C. Code Encycl. § 23-1322(b)(2)(B) (West Supp. 1970) (requiring that there be no condition or combination of conditions other than denial of bail to reasonably assure pubic safety); VA. CODE § 19.2-120(2) (1975) (requiring that accused be unreasonably dangerous either to himself or to public). See note 23 *supra*.

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

87. For instance, in a New York case, the defendant was charged with committing several terroristic bombings. The district attorney presented the testimony of an accomplice witness who stated that he and defendant had stolen a certain quantity of dynamite. The district attorney also showed that a large part of this dynamite was still unaccounted for. The trial court denied bail because of the "dangerous potential" of the defendant. People v. Melville, 308 N.Y.S.2d 671, 680 (Crim. Ct. 1970).

88. Senator Sam Ervin has referred to this phenomenon as underinclusion, and has stated that the courts are particularly attuned to such an objection when it is coupled with the problem of overbreadth or overinclusion. Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L.L. REV. 289, 339 (1971).

89. *See* TEX. PENAL CODE ANN. § 37.03(b) (Vernon 1974).

compelling state interest would raise a substantial constitutional question, which the court must carefully examine.[90]

THE FUTURE OF PREVENTIVE DETENTION IN TEXAS

At least one constitutional authority has argued that any form of preventive detention is necessarily unconstitutional.[91] Should the Texas Court of Criminal Appeals so hold, section 11a, to the extent it is preventive, would fall. Case law on the per se constitutionality of preventive detention is largely undeveloped.[92] What authority there is seems to support those who argue that not every preventive bail system is necessarily unconstitutional.[93] It seems unlikely that the court of criminal appeals will totally invalidate section 11a.[94]

It is more probable that the court will attempt in some way to limit the scope of section 11a. Assuming that preventive provisions are subject to strict scrutiny,[95] equal protection requires that these provisions not be overbroad, and that they accomplish their intended purposes in ways that least drastically impinge on constitutionally protected rights.[96] One possible objection to section 11a is that, as currently written, its dependence on felony status renders it overbroad and that there are less drastic means available which would both serve the purpose of the provision and meet constitutional requirements.

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90. *See generally* notes 51 & 52 *supra* and accompanying text.

91. *See* Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice,* 6 HARV. C.R.-C.L.L. REV. 291, 297-98 (1971).

92. The United States Supreme Court has been squarely confronted with the constitutionality of preventive detention only once. In Carlson v. Landon, 342 U.S. 524 (1952) the Court upheld the pretrial detention of an alien facing deportation on charges of being a Communist. *Id.* at 546. The precedential value of this case, however, is limited. Deportation proceedings are civil, not criminal in nature. In addition, the applicant in *Carlson* was accused of being a Communist, during the height of the McCarthy era. Since the Bail Reform Act of 1966, preventive detention has been prohibited at the federal level. *See* 18 U.S.C. § 3146 (1970). This has precluded any constitutional attacks. Finally, similar state statutes have precluded such attacks at the state level. *See In re* Underwood, 508 P.2d 721, 724-25, 107 Cal. Rptr. 401, 404-05 (1973).

93. *See, e.g.,* Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan, Circuit Justice, 1961); Carlson v. Landon, 342 U.S. 524, 541-42 (1952); United States v. Gilbert, 425 F.2d 490, 491 (D.C. Cir. 1969); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), *cert. denied,* 376 U.S. 965 (1964); United States *ex rel.* Covington v. Coparo, 297 F. Supp. 203, 206 (S.D.N.Y. 1969); Blunt v. United States, 322 A.2d 579, 583 (D.C. 1974). *See generally* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 U. VA. L. REV. 1223, 1224-31 (1969).

94. The Texas Court of Criminal Appeals twice upheld the constitutionality of old section 11a, which contained a provision identical to new section 11a on denial of bail to those twice convicted of felonies. *See Ex parte* Smith, 548 S.W.2d 410, 414 (Tex. Crim. App. 1977); *Ex parte* Miles, 474 S.W.2d 224, 225 (Tex. Crim. App. 1971).

95. *See* note 65 *supra* and accompanying text.

96. See notes 51 & 52 *supra* and accompanying text.

Section 11a was proposed by the legislature and approved by the voters of Texas. Consequently, the court might be reluctant to overturn such a provision in favor of a more precisely drafted replacement. One possible alternative would be for the legislature to draft a statute whose purpose it is to supplement section 11a by narrowing its scope.[97] A legislative body, however, is particularly unsuited as a means of correcting constitutional infirmities in bail law, where time is of the essence.[98] A more effective, and possibly more reasonable, solution would be for the court, when faced with a challenge to section 11a, to introduce a set of guidelines whose purpose it is to narrow the applicability of section 11a.[99]

It is important to consider, therefore, what guidelines are appropriate. One new provision of section 11a, and the provision likely to have the most widespread application, is the power given to the district court to deny bail to one accused of a felony while already on bail.[100] While this classification also relies on felony status, and as such is susceptible to attack for overbreadth in violation of the equal protection clause, it largely has been accepted as a legitimate classification in other jurisdictions.[101] On the other hand, Texas is virtually alone in making prior felony involvement the determining factor in a bail decision. Common to the other systems is the requirement that the bail applicant be determined *presently dangerous* before he is denied bail.[102] The idea seems well founded that denial of bail is too severe a sanction to be invoked in any but the most extreme cases of danger to the public.[103] Since section 11a is not mandatory,[104] it is sug-

97. In addition to the bail guarantees in sections 11, 11a, and 13 of the Texas Constitution, bail is dealt with in article 17 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PRO. ANN. art. 17.01-17.38 (Vernon 1977).

98. Section 11a makes it clear that time is of the essence, by requiring that the order denying bail be handed down within seven days of incarceration, that trial be had within sixty days of incarceration, and that the accused has a preferential right of appeal. *See* TEX. CONST. art. I, § 11a. Time is essential in a bail challenge since the challenge becomes moot upon the disposition of the accused's case at trial. The Texas legislature is not scheduled to meet again until 1979. In the meantime the rights of many defendants could be jeopardized.

99. In New York, bail is discretionary in all felonies. The courts have narrowed the trial judge's exercise of discretion, however, to emergency situations. See notes 22 & 23 *supra* and accompanying text.

100. *See* TEX. CONST. art. I, § 11a.

101. *See* ARIZ. CONST. art. II, § 22; NEV. REV. STAT. ch. 178.487 (1977); UTAH CONST. art. I, § 8.

102. *See, e.g.*, D.C. Code Encycl. § 23-1322(a) (West Supp. 1970) (no condition available to reasonably assure public safety); MD. ANN. CODE art. 27, § 616½(c) (Supp. 1977) (requiring a finding that defendant would pose danger to public); VA. CODE § 19.2-120 (1975) (unreasonable danger). See notes 22 & 23 *supra*.

103. The eighth amendment *"at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." Harris v. United States, 404 U.S. 1232 (Douglas, Circuit Justice, 1971) (quoting Sellers v. United States, 89 S. Ct. 36, 38 (1968)). If danger is used as a ground for denying bail it must be danger of the sort "that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail." *Id.* at 38. Since bail is basic to our system, "[d]oubts whether it should be granted

gested that the court of criminal appeals strictly limit the power of the trial court to deny bail to only those felons whose present behavior indicates they are a public menace.[105] Past behavior, in the way of felony convictions, should be only one of several factors considered.[106]

CONCLUSION

The legislature, by focusing on the felony status as a foundation for denial of bail under section 11a, has erred twice. On the constitutional level, section 11a violates equal protection in that it sweeps too broadly, failing to recognize that even a legitimate state purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[107] At the same time, section 11a is overly restrictive and thus too narrow, in that it is confined to consideration of felony offenders. Just as there may be felons who do not pose a threat to society sufficiently great to justify their pretrial detention, so there may also be nonfelons, or persons not otherwise within the ambit of section 11a who ought properly to be detained. Thus section 11a is not only infirm constitutionally, it is also defective from a social standpoint. The goals of preventive detention can be better served by another, more precisely constructed scheme.

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or denied should always be resolved in favor of the defendant." Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice, 1955).

104. Bail "may" be denied pending trial. TEX. CONST. art. I, § 11a.

105. The simplest system would be the New York scheme, discussed in notes 22 & 23 *supra*. Perhaps the best reasoned proposal comes from the dissenting opinion in the Pennsylvania case, Commonwealth *ex rel.* Ford v. Hendrick, 257 A.2d 657, 657-71 (Pa. Super. Ct. 1969) (Hoffman, J., dissenting). Judge Hoffman, recognizing the severe consequences preventive detention may have on the accused, pointed out that some cases nevertheless require such a severe sanction in the interest of public safety. He proposed a three-part system. First, the burden is on the state to prove by clear and convincing evidence that the accused committed the crime for which he is charged, and that he is "likely" to commit criminal acts if released. *Id.* at 663. Second, the predicted crimes must be of the sort that will "physically" endanger the community. *Id.* at 663. Finally, conditions similar to those applicable under the Bail Reform Act should be imposed in lieu of detention, whenever feasible. *Id.* at 665.

106. In the District of Columbia the court is required to consider both the crime for which the accused is presently charged and prior convictions for the same sort of crime. D.C. Code Encycl. § 23-1322(a)(2) (West Supp. 1970).

107. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

THE COMPENSABILITY OF MENTALLY INDUCED OCCUPATIONAL DISEASES UNDER TEXAS WORKERS' COMPENSATION LAW

RICHARD E. SAMES

The concept of compensation for work related accidents and diseases has undergone a major change in recent years. In many jurisdictions, workers' compensation awards are now granted for psychiatric disorders attributable to employment related pressures and emotional stresses.[1] Frequently, the causal relationship between the hazards of employment and the disability is obscure.[2] The issue is not merely one of legal line drawing, but a larger and more difficult problem of reconciling the work related injury theory of workers' compensation with the social and moral issue of a disabled member of society.[3] A 1971 amendment to the Texas Workers' Compensation Act[4] has raised a number of questions concerning recovery for mentally induced occupational diseases under Texas law. The following discussion will attempt to analyze that amendment in light of the efforts toward more liberal compensation in other jurisdictions and the Texas decisions before and after the amendment.

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1. *See, e.g.*, Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285 (Ct. App. 1971); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 487 P.2d 278, 282 (Hawaii 1971); Carter v. General Motors Corp., 106 N.W.2d 105, 110 (Mich. 1960). The term "workmen's" has been changed to "workers'" in the Texas statute. TEX. REV. CIV. STAT. ANN. art. 8306b, § 1 (Vernon Supp. 1978).

2. *Compare* Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 151-52 (Mich. 1975) (employee's subjective perception of work environment determines causation) *with* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 345-46 (1965) (only objective stress should be considered since no job is stress free and compensating for subjective stresses will lead to compensating all psychological maladies). "[T]he complex etiology of psychoneuroses . . . are such that . . . a psychiatrist will be unable to estimate with any degree of accuracy the probabilities of the injury occurring in the absence of employment. . . . In such cases, the causation requirement . . . is of little assistance in deciding whether to award compensation." Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1142-43 (1961).

3. *See* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 347 (1965).

> [E]xtension of the benefits of the compensation system to all sick or injured employees . . . . would make workmen's compensation into something never contemplated and would violate completely the basic principle that the expense of *work* injuries are to be a part of the cost of production. However, if we are to approach that result inevitably . . . perhaps the time has come when we must answer certain questions frankly—notably, the question whether we actually intend to make industry pay for all disabilities of employees regardless of fault, and if so, under what rules, and subject to what limitations.

Id. at 347.

4. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).