

EIGHTH AMENDMENT EXCESSIVE BAIL CLAUSE APPLIES TO STATES
THROUGH FOURTEENTH AMENDMENT

Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated*, 50 U.S.L.W.
4264 (U.S. Mar. 2, 1982) (No. 80-2165)

In *Hunt v. Roth*¹ the United States Court of Appeals for the Eighth

1. 648 F.2d 1148 (8th Cir. 1981), *vacated*, 50 U.S.L.W. 4264 (U.S. Mar. 2, 1982) (No. 80-2165). The Supreme Court vacated the judgment of the court of appeals and remanded the case with instructions to dismiss, finding the issue moot at the time of the court of appeals decision. *Id.* at 4265. The mootness limitations inherent in bail result in few cases reaching the Supreme Court. See Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1140 (1972); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

In theory, a decision vacating a judgment deprives the opinion of precedential effect, leaving the Supreme Court's opinion and judgment as the sole law of the case. See O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975); United States v. Munsingwear, 340 U.S. 36, 39-40 (1950). In practice, however, the effect is not quite as dramatic. A vacated decision retains limited precedential value because it establishes the position and reasoning of the Court on the issue.

This distinction between theory and practice is found in two analogous situations: the meaning of a denial of certiorari and the significance of summary disposition of appeals to the Supreme Court. In theory, a denial of certiorari is not an indication of the Court's position on the merits. United States v. Carver, 260 U.S. 482, 490 (1923); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1613 (2d ed. 1973); 16 C. WRIGHT, A MILLER, E. CHOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4004, at 510 (1977). In practice, however, a denial of certiorari does indicate the Court's approval of the decision below. Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979). Similarly, in theory, summary disposition of an appeal to the Supreme Court is disposition on the merits. Hicks v. Miranda, 422 U.S. 332, 343 (1975); Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959). In practice, it is questionable whether the merits are reached on disposition. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979); Mandel v. Bradley, 432 U.S. 173, 176 (1977); Linzer, *supra* at 1291-99; Note, *The Precedential Effect of Summary Affirmance and Dismissals for Want of a Substantial Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117 *passim* (1978).

In theory, the court of appeals decision in *Hunt v. Roth* has no precedential value. In practice, the opinion has limited precedential value. A defendant denied bail in the future due to the Nebraska constitutional provision could use the opinion to expedite an appeal to the Supreme Court. He could bring an action under 42 U.S.C. § 1983 (1979), as *Hunt* did, with the reasonable expectation that the district court would adhere to *Hunt v. Roth* and declare the Nebraska provision unconstitutional. On appeal, the same panel or a different panel of the court of appeals would almost certainly arrive at the same conclusion. In this manner, the entire appeal process would be expedited placing the issue before the Supreme Court before it is rendered moot.

A finding of mootness could also be avoided if the defendant brings an action under 42 U.S.C. § 1983 (1979), seeking money damages. The difficulty with this option is finding a party not exempt by sovereign immunity. See generally Allen v. McCurry, 101 S. Ct. 411 (1980); Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Serv., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976).

A defendant denied bail because of the Nebraska provision could also avoid a finding of mootness by bringing a class action under 42 U.S.C. § 1983 (1979) on behalf of all pretrial detainees similarly situated.

Circuit revived the incorporation² doctrine by expressly holding the eighth amendment bail provision³ applicable to the states.

The charges against Hunt included forcible sexual offenses and non-sexual offenses.⁴ The Nebraska Constitution provided that persons charged upon substantial evidence with a forcible sex offense had no right to bail.⁵ The municipal court therefore denied Hunt's application for bail on the forcible sex offenses, and the state district court affirmed.⁶ Hunt filed a federal complaint seeking declaratory and injunctive relief from the denial of bail.⁷ The district court dismissed the complaint and upheld the Nebraska constitutional provision.⁸ The Eighth Circuit, becoming one of the first courts expressly to incorporate the excessive bail clause into the due process clause of the fourteenth amendment,⁹ reversed¹⁰ and *held*: Denial of bail by the Nebraska

2. "Incorporation" as used in this Comment refers to the process of making specific provisions in the Bill of Rights applicable to the states through the due process clause of the fourteenth amendment. Some scholars have criticized this use of the term "incorporation." See, e.g., Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74, 77 (1963).

3. "Excessive bail shall not be required . . ." U.S. CONST. amend. VIII.

4. The state had charged Hunt with: (1) first degree sexual assault on a child, (2) three counts of first degree forcible sexual assault, (3) several counts of non-sexual felonies, and (4) one count of nonforcible sexual assault. 648 F.2d at 1151. The Omaha Municipal Court allowed Hunt bail on the non-sexual offenses but denied him bail on the sexual offenses.

5. "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great." NEB. CONST. art. I, § 9.

Before 1978, only treason and murder were nonbailable when the proof was evident or the presumption great. In 1978, the Nebraska legislature amended the state's Constitution to its present form.

6. On May 23, 1980 Hunt appeared in Douglas County District Court for a review of the denial of bail. For the purposes of those proceedings, Hunt stipulated that the proof was evident or the presumption great. 648 F.2d at 1151.

7. Hunt's action was filed under the Civil Rights Act, 42 U.S.C. § 1983 (1979).

8. See *Hunt v. Roth*, 648 F.2d 1148, 1151 (8th Cir. 1981), *vacated*, 50 U.S.L.W. 4264 (U.S. Mar. 2, 1982) (No. 80-2165). Hunt also filed an unsuccessful petition for a writ of habeas corpus. *Id.*

The district court relied on the Nebraska Supreme Court's decision in *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106, *cert. denied*, 444 U.S. 920 (1979), in dismissing Hunt's § 1983 action. See 648 F.2d at 1151. The facts in *Parker* were similar to those in *Hunt*. The Nebraska Supreme Court rejected Parker's argument, that Article I, § 9 of the Nebraska Constitution violated the excessive bail prohibition of the eighth amendment, *id.* at 860, 278 N.W.2d at 113, despite its earlier holding in *State v. Pilgrim*, 182 Neb. 594, 597-98, 156 N.W.2d 171, 173-74 (1968), that the federal prohibition against excessive bail was applicable to the states. After dismissing all of Parker's other constitutional arguments, 202 Neb. at 868-69, 278 N.W.2d at 116-17, the *Parker* court upheld the constitutionality of Article I, § 9 of the Nebraska Constitution. *Id.* at 871, 278 N.W.2d at 117-18.

9. The Eighth Circuit dismissed the appeal from the denial of the petition for a writ of

Constitution in forcible rape cases violates the eighth amendment.¹¹

In 1833, the United States Supreme Court established that the Bill of Rights¹² was adopted to limit only the power of the federal government and was not applicable to the states.¹³ After the Civil War, Congress sought to limit the power of the states in a similar fashion and proposed the thirteenth, fourteenth, and fifteenth amendments.¹⁴ Soon after those amendments were ratified,¹⁵ scholars and courts began to debate the meaning and scope of the fourteenth amendment privileges and

habeas corpus and Hunt's prayer for immediate relief as moot because he subsequently had been convicted on several counts. 648 F.2d at 1151. The court, however, found that the district court erred in dismissing Hunt's complaint for declaratory judgment under § 1983, because Hunt's appeal raised a question "capable of repetition, yet evading review." *Id.* at 1152. Because appeals from three convictions were pending at the time of the decision, *id.* at 1151, the court determined that under *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the possibility of a new trial after direct appeal was sufficient to maintain a live controversy and prevent the issue from being rendered moot. 648 F.2d at 1151-52.

The court recognized that if even one of Hunt's convictions was affirmed, the case would become moot because pretrial release on bail would no longer be possible. *Id.* at 1152 n.5. Judge Arnold, in dissent, argued that the case should be dismissed because the likelihood of the decision to be of any use to Hunt was too attenuated and speculative. *Id.* at 1167 (Arnold, J., dissenting).

The Supreme Court disagreed with the Court of Appeals majority opinion and found that the issue in the case was not "capable of repetition, yet evading review," because no court has held that "a mere physical or theoretical possibility [is] sufficient." 50 U.S.L.W. 4264, 4265 (U.S. Mar. 2, 1982) (No. 80-2165). Rather, there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party." *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The Court agreed with Judge Arnold that there was no reasonable expectation that all three of Hunt's convictions would be overturned on appeal. 50 U.S.L.W. 4264, 4265 (U.S. Mar. 2, 1982) (No. 80-2165).

Justice White dissented, arguing that the issue was not moot because of the possibility of Hunt being denied bail pending appeal. *Id.* at 4265-66. The majority dismissed this argument, because the question of pretrial bail is distinct from bail pending appeal. *Id.* at 4265 n.5.

10. *Id.* at 1156. While the primary issue in *Hunt* concerned the interpretation of the excessive bail clause in relation to the Nebraska Constitution, the significance of the preliminary holding should not be overlooked. Without incorporating the bail clause of the eighth amendment into the liberties protected by the fourteenth, the Eighth Circuit could not have arrived at its decision. Because principles of federalism require federal courts to defer to state supreme court interpretations of state constitutional provisions, *id.* at 1155, it was important that the Eighth Circuit's opinion not rest on an "assumption" that the excessive bail prohibition is applied to the states. See notes 78-79 *infra*. The focus of this Comment is the appropriateness of the incorporation decision and its implications. The court's application of the excessive bail clause to the Nebraska Constitutional provision, see note 5 *supra*, is beyond the scope of this Comment.

11. 648 F.2d at 1165.

12. U.S. CONST. amends. I-X.

13. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

14. U.S. CONST. amends. XIII-XV.

15. The amendments were ratified in 1868.

immunities and due process clauses.¹⁶

Forty years later, in the *Slaughter-House Cases*,¹⁷ the Supreme Court rejected the argument that the privileges and immunities clause was a short-hand designation for the Bill of Rights. Thereafter, focus shifted to the due process clause as constitutional authority for applying the Bill of Rights to the states.¹⁸ Since then the Court has determined the scope of the fourteenth amendment due process clause by a "gradual process of judicial inclusion and exclusion"¹⁹ of certain rights.²⁰

The Court has had difficulty, however, in deciding which of the first ten amendments should be incorporated. Three distinct approaches were suggested by various Justices: fundamental rights-natural law,²¹

16. The relevant portions of the first section state:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

17. *Butcher's Benevolent Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co.* (The *Slaughter-House Cases*), 83 U.S. (16 Wall.) 36 (1872).

18. See Henkin, *supra* note 2, at 78. See generally J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); J. TENBROEK, *EQUAL UNDER LAW* (1965).

19. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878).

20. Specific Bill of Rights guarantees have been incorporated into the fourteenth amendment and made binding on the states on a case-by-case basis. The current scope of incorporation is outlined below:

First Amendment: *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment of religion); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (freedom of speech).

Fourth Amendment: *Ker v. California*, 374 U.S. 23 (1963) (fourth amendment standards identical for federal and state governments); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

Fifth Amendment: *Ashe v. Swenson*, 397 U.S. 436 (1970) (collateral estoppel); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Griffin v. California*, 380 U.S. 609 (1965) (self-incrimination); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination). *But see* *Hurtado v. California*, 110 U.S. 516 (1884) (applicability of grand jury clause rejected).

Sixth Amendment: *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Irvin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *In re Oliver*, 333 U.S. 257 (1948) (notice of charge).

Seventh Amendment: *Walker v. Sauvinet*, 92 U.S. 90 (1876) (right to jury in civil cases not applicable).

Eighth Amendment: *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (cruel and unusual punishment). See *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (assumed application of excessive bail provision).

21. Justices Cardozo, Frankfurter, and Harlan are most closely identified with this approach. See *Palko v. Connecticut*, 302 U.S. 319, 320 (1937) (majority opinion by Cardozo, J.), *overruled*, *Benton v. Maryland*, 395 U.S. 784 (1969); *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frank-

total incorporation,²² and selective incorporation.²³

The "fundamental²⁴ rights-natural law" approach would allow the Court flexibility²⁵ in defining fourteenth amendment due process. This approach would neither limit the possible scope of due process to the provisions of the Bill of Rights nor require that any or all of the rights enumerated in the first eight amendments be applied to the states. Instead, the Court would incorporate those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁶

furter, J., concurring), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Duncan v. Louisiana*, 391 U.S. 145, 215 (1968) (Harlan, J., dissenting).

22. Justice Black was the staunchest supporter of this approach. See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

Akin to Justice Black's total incorporation view is the notion of "incorporation plus," suggested by Justices Murphy and Rutledge in their separate *Adamson* dissent. Although they indicated their "substantial agreement" with Justice Black, they stated that they were "not prepared to say that the [fourteenth amendment] is entirely and necessarily limited by the Bill of Rights." *Id.* at 123-24. This approach found at least tacit acceptance in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold* the Court found that the Bill of Rights encompasses the right of privacy, a right not specifically mentioned in the Bill of Rights. Justice Douglas wrote that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

23. Justices Brennan and White championed this approach. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In addition to the three mentioned theories, a fourth theory has emerged in the civil due process area. It purports to balance the importance of the right to the individual against the administrative costs that recognition of the right would impose on the government. The theory considers alternative procedures to ensure the right. *Mathews v. Eldridge*, 424 U.S. 319 (1976); Nowak, *Forward—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 401-02 (1979) (determine "whether this society's historic and philosophic commitment to those values requires it to bear the costs"). See generally Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). See also Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

Professor Nowak predicted that the Court will assume an arbitrary quality in criminal procedure decisions if the *Mapp v. Ohio*, 367 U.S. 643 (1961), approach (see notes 40-45 *infra* and accompanying text) of applying "ancillary" as well as "core" rights continues. Nowak, *supra*, at 400-04.

24. The use of "fundamental rights" in defining due process has its origins in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) in which Justice Bushrod Washington enumerated certain "fundamental rights" protected by the interstate privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1.

25. See Kadish, *supra* note 23, at 319; Nowak, *supra* note 23, at 397; Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2-4 (1956).

26. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964). In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court, after recognizing that some

Such rights would be "implicit in the concept of ordered liberty,"²⁷ forbidding to the states that which is "repugnant to the conscience of mankind."²⁸

Justice Black criticized the fundamental rights-natural law approach²⁹ and advocated³⁰ total incorporation of the Bill of Rights.³¹

protections enumerated in the Bill of Rights were a part of "fundamental fairness," stated: "If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Id.* at 99. *Accord*, *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959); *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926); *Frank v. Mangum*, 237 U.S. 309, 326 (1915); *Rogers v. Peck*, 199 U.S. 425, 434 (1905); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Hurtado v. California*, 110 U.S. 516, 535 (1884).

27. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled*, *Benton v. Maryland*, 395 U.S. 784 (1969). *See generally* Henkin, *supra* note 2, at 84.

28. *Palko v. Connecticut*, 302 U.S. 319, 323 (1937), *overruled*, *Benton v. Maryland*, 395 U.S. 784 (1969). *Compare* *Rochin v. California*, 342 U.S. 165 (1952) (pumping petitioner's stomach to retrieve two contraband morphine capsules, which were used to convict petitioner, was conduct shocking to the conscience) *with* *Breithaupt v. Abram*, 352 U.S. 432 (1957) (blood test taken from unconscious petitioner to determine blood alcohol content not personally offensive).

29. *See, e.g.*, *Adamson v. California*, 332 U.S. 46 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964): "I think . . . the 'natural law' theory of the Constitution . . . degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise." *Id.* at 70 (Black, J., dissenting). In the same opinion, Justice Black continued: "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." *Id.* at 89. *Accord*, *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting); *Bartkus v. Illinois*, 359 U.S. 121, 155-56 (1959) (Black, J., dissenting); *Rochin v. California*, 342 U.S. 165, 175-76 (1952) (Black, J., concurring).

Courts and commentators have attacked Justice Black's approach, contending that total incorporation is subject to the same criticism Black leveled at the fundamental rights approach. *Adamson v. California*, 332 U.S. 46 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 140 (1949). Indeed, Justice Harlan argued that the same degree of broad power that Black said the Court had appropriated was inherent in the role of the judiciary. *See* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Harlan, J., dissenting). *See generally* Henkin, *supra* note 2, at 82-84; Nowak, *supra* note 23, at 400.

30. Justice Douglas joined Justice Black in many of his opinions. *See, e.g.*, *Adamson v. California*, 332 U.S. 46, 92 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968). Chief Justice Warren and Justice Brennan indicated that they "neither accepted nor rejected that view." *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960).

31. "My view has been and is that the Fourteenth Amendment, *as a whole*, makes the Bill of Rights applicable to the States." *Duncan v. Louisiana*, 391 U.S. 145, 166 n.1 (1968) (Black, J., concurring) (emphasis in original). *See* H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), which Justice Black cited in *Adamson v. California*, 332 U.S. 46, 72 n.5 (1947) (Black, J., dissenting), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964). *Contra*, Fairman, *supra* note 29, at 140; Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The*

Although the Court³² rejected total incorporation, most of the Bill of Rights was subsequently incorporated³³.

In *Duncan v. Louisiana*,³⁴ the Supreme Court announced a compromise approach³⁵—selective incorporation³⁶—to determine if the questioned right should be incorporated.³⁷ This approach basically uses the fundamental rights-natural law approach,³⁸ yet looks to the Bill of Rights for guidance in ascertaining the meaning of due process.³⁹

Judicial Interpretation, 2 STAN. L. REV. 140 (1949). See also 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1158 (1953).

32. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Adamson v. California*, 332 U.S. 46 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

33. *Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., dissenting). See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 475-76 (10th ed. 1980); note 20 *supra*.

34. 391 U.S. 145 (1968).

35. "The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted." *Id.* at 172 (Harlan, J., dissenting).

36. Although Justice White never referred to this theory as selective incorporation, jurists have used the term to identify it as such. See Nowak, *supra* note 23, at 397; Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977). Justice Brennan has been the major spokesman of the selective incorporation approach. See *Cohen v. Hurley*, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274-75 (1960) (equally divided court); Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

37. The test is "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' . . . ; whether it is a 'fundamental right, essential to a fair trial.'" *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

38. See note 27 *supra* and accompanying text.

39. "In resolving conflicting claims concerning the meaning of this spacious language [of Due Process], the Court has looked increasingly to the Bill of Rights for guidance . . ." 391 U.S. at 147-48.

Justice White charged that the fundamental rights-natural law approach incorrectly focused on an "imagined system" to determine which rights are fundamental. *Id.* at 149-50 n.14. Instead, the Court should look to those rights fundamental to an "Anglo-American regime of ordered liberty." *Id.* Justice Harlan criticized the selective incorporation approach as illogical. *Id.* at 181 (Harlan, J., dissenting). Justice Black expressed willingness to support this doctrine as an acceptable alternative to total incorporation. *Id.* at 211 (Black, J., concurring).

Scholars also criticized the selective incorporation approach. See Henkin, *supra* note 2, at 77-78; Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 939 (1965).

In *In re Winship*, 397 U.S. 358 (1970), the Court did not restrict itself to those rights listed in the Bill of Rights in defining the scope of due process under the fourteenth amendment. The Court, using the *Duncan* approach, *id.* at 361-64, held that the state was required in a criminal proceeding to demonstrate proof beyond a reasonable doubt of every element of the crime. The Court stated: "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

The Warren Court extended selective incorporation to encompass not only specific provisions of the Bill of Rights but also the judicially-defined details of the federal provisions.⁴⁰ Thus, in *Mapp v. Ohio*⁴¹ the Court held that the fourteenth amendment incorporated not only the search and seizure provision of the fourth amendment⁴² but also the exclusionary rule enforcement mechanism⁴³ that had been applied by the federal courts since 1949.⁴⁴ Critics on the Court argued in response that this development violated the spirit of federalism and diluted constitutional rights.⁴⁵

This theory of incorporation is characterized by Gunther as the "having your cake and eating it too" position. G. GUNTHER, *supra* note 33, at 483 n.3.

40. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the same constitutional standards apply against both the State and Federal governments"); *Cohen v. Hurley*, 366 U.S. 117, 158 (1961) (Brennan, J., dissenting) ("only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific right being absorbed"). See also 391 U.S. at 161; *Miranda v. Arizona*, 384 U.S. 436, 464 (1966); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964).

Under the fundamental rights-natural law approach, a finding that one of the provisions in the Bill of Rights was applicable to the states did not necessarily mean that all of the ancillary rules were also applicable. For example, in holding the fourth amendment search and seizure provision applicable to the states, but not the exclusionary rule (adopted for federal jurisdictions in *Weeks v. United States*, 232 U.S. 383 (1914)), Justice Frankfurter explained that only the "core" was applicable to the states. The states were then free to apply various solutions. *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961). *Accord*, *Adamson v. California*, 332 U.S. 46 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

41. 367 U.S. 643 (1961). Although this approach was first used by the court in *Mapp*, Justice Brennan, joined by Chief Justice Warren and Justice Douglas, earlier expounded the theory in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274-76 (1960) (opinion of Brennan, J.), and again in *Cohen v. Hurley*, 366 U.S. 117, 157 (1961) (Brennan, J., dissenting), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964). See generally *Henkin, supra* note 2, at 74.

42. After the decision in *Weeks v. United States*, 232 U.S. 383, 398 (1914), the fourth amendment search and seizure provision became applicable to the states.

43. The exclusionary rule forbids the use of illegally seized evidence because it is "a denial of the constitutional rights of the accused." *Id.* at 398.

"To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. . . . [I]t also makes very good sense. . . . Moreover, as was said in *Elkins*, '[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.'" *Mapp v. Ohio*, 367 U.S. 643, 656-58 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)).

44. *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

45. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a factual guarantee in order to reconcile the logic of "incorporation" the "jot-for-jot and case-for-case" application of the federal right to the States, with the reality of federalism.

Williams v. Florida, 399 U.S. 78, 129 (1970) (Harlan, J., dissenting). *Accord*, *Crist v. Bretz*, 437

The Supreme Court has also used historical analysis to define “due process”⁴⁶ by looking to old English law, colonial law, and law at and immediately following the American Revolution in deciding whether a right is fundamental.⁴⁷

Bail had its origins in early England, when “wergeld”⁴⁸ and “bohr”⁴⁹ were initiated to restrain private vengeance until a public trial could be commenced.⁵⁰ The Petition of Rights of 1628,⁵¹ the Habeas Corpus Act of 1679,⁵² and the Bill of Rights of 1679⁵³ all sought to facilitate

U.S. 28, 40 (1978) (Powell, J., dissenting); *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (Powell, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting); *id.* at 213-14 (Fortas, J., concurring); *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967) (Harlan, J., concurring); *Griffin v. California*, 380 U.S. 609, 615 (1965) (Harlan, J., concurring); *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring); *Malloy v. Hogan*, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting); *Ker v. California*, 374 U.S. 23, 44 (1963) (Harlan, J., concurring); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting). *Contra*, *Duncan v. Louisiana*, 391 U.S. at 170 (Black, J., concurring). *See also* Friendly, *supra* note 39, at 953-55, 938; Nowak, *supra* note 23, at 400-01.

The sharp division on the Court was particularly evident on the issue of whether unanimous verdicts are a part of the sixth and fourteenth amendment jury right. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (Powell, J., concurring); *Johnson v. Louisiana*, 406 U.S. 356 (1972). *See also* Earnest v. Willingham, 406 F.2d 681, 684 (10th Cir. 1969); Nowak, *supra* note 23, at 399 n.16.

46. In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (8 How.) 272 (1856), Justice Curtis stated:

[W]e must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Id. at 277. *See generally* *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898); Duker, *supra* note 36, at 33; Kadish, *supra* note 23, at 322. *See also* Fairman, *supra* note 29; Friendly, *supra* note 39; Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, (1965); Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1140 (1972); Morrison, *supra* note 31.

Historical analysis has been conclusive in some cases. *See, e.g.*, *Ownbey v. Morgan*, 256 U.S. 94 (1921). Other cases have completely ignored such analysis. *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45 (1932); *Hurtado v. California*, 110 U.S. 516 (1884).

47. *See Duncan v. Louisiana*, 391 U.S. 145, 151-61 (1968).

48. “[T]he value set upon a man’s life and bodily faculties in accordance with his rank in society, and paid as compensation for injury or death.” Duker, *supra* note 36, at 35.

49. Bohr, initiated in the Laws of Kings Hlothære (673-685 A.D.) and Eadric (685-687 A.D.), is a form of surety. “[W]hen one person initiated a complaint against the other, the accused had to give ‘surety’ to the judicial officer to guarantee the appearance at trial.” *Id.*

50. *Id.* at 43. All crimes were bailable until the Statute of Westminster in the year 1175, which was intended to curb the discretionary power of the sheriffs. *Id.* at 45-46.

51. 3 Charles 1, C. 1 (1628). *See* Foote, *supra* note 46, at 966.

52. 31 Charles 2, C. 2 (1679).

[A]fter the Party shall be brought before them the said Lord Chancellor . . . shall discharge the said Prisoner from his Imprisonment, taking his or their Recognizances, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the offense, for his or their Appearance in

pretrial freedom for the accused.⁵⁴ None, however, endeavored to offer an unlimited right to bail for all offenses.⁵⁵

The American colonies continued the tradition of pretrial release for all legislatively defined bailable offenses.⁵⁶ Congress adopted the "excessive bail" clause⁵⁷ as part of the Bill of Rights with little comment.⁵⁸ The bail clause was supplemented immediately by the first Judiciary Act, which provided a federal statutory right to bail in all noncapital cases.⁵⁹ Since then, each of the fifty states has provided for some form of bail.⁶⁰

In *Stack v. Boyle*⁶¹ the Supreme Court interpreted the excessive bail clause of the eighth amendment.⁶² The Court held that bail set in an

the Court of the King's Bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is not bailable.

Id., reprinted in Duker, *supra* note 36, at 66. See Foote, *supra* note 46, at 967. See generally E. DEHAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENTS IN CRIMINAL CASES TO THE YEAR 1275, at 4 (1940).

53. 1 Wm. & Mary 2, C. 2 (1689). See Foote, *supra* note 46, at 966.

54. See Duker, *supra* note 36, at 33; Foote, *supra* note 46, at 1120; Meyer, *supra* note 46, at 1140.

55. See E. DUMBAULD, THE BILL OF RIGHTS 46 (1957); Duker, *supra* note 36, at 33; Foote, *supra* note 46, at 968; Meyer, *supra* note 46, at 1140.

56. For a thorough discussion of early colonial statutes, see Duker, *supra* note 36, at 77-83.

57. See note 3 *supra*.

58. 1 CONG. DEB. 754 (1834). See Duker, *supra* note 36, at 85-86; Foote, *supra* note 46, at 969-71.

59. Judiciary Act of 1789, 1 Stat. 73, 91.

60. In 42 states, constitutional or statutory provisions make all persons accused of a noncapital crime bailable by sufficient sureties. Persons accused of a capital crime are bailable when the proof is evident or the presumption is great. In Texas, "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be construed to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law." TEX. CONST. art. I, § 11. Georgia and New York provide an absolute right to bail only in misdemeanor cases. GA. CODE ANN. § 29-901 (1977); N.Y. CRIM. PROC. LAW § 530.20(1) (McKinney 1971). In three states, the judge has almost complete discretion to allow bail or not, in accord with common law. MASS. ANN. LAWS, ch. 276, § 42 (Michie/Law. Co-op 1980); VA. CODE § 19.2-120 (1950); W. VA. CODE § 62-1C-1(a) (1977). North Carolina requires the trial judge to determine pretrial release in noncapital cases in one of four categories. N.C. GEN. STAT. §§ 15A-533, -534 (1978 & Cum. Supp. 1981). In capital cases the judge has complete discretion. *Id.* § 15A-533(c) (Cum. Supp. 1981). In Hawaii, the judge "may dispense with bail if reasonably satisfied that the defendant . . . will appear when directed, except for a defendant charged with an offense punishable by life imprisonment." HAWAII CONST. art. I, § 12. See also Duker, *supra* note 36, at 93 n.373; Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detentions*, 55 VA. L. REV. 1223, 1226 n.17, 1227 n.22, 1228 n.24 (1969).

61. 342 U.S. 1 (1951).

62. See note 3 *supra*.

amount higher than that reasonably calculated to assure the accused's presence at trial was "excessive" and therefore unconstitutional.⁶³ The federal Bail Reform Act of 1966⁶⁴ continued this historical tradition⁶⁵ of affording a person accused of a noncapital offense the right to pre-trial release on bail.⁶⁶

Persons charged with a crime punishable by death, however, do not enjoy the same statutory right.⁶⁷ Bail is denied in the federal courts if the judge believes that release will pose a danger to the community or that no set of conditions will reasonably assure that a person charged with a capital offense will not flee.⁶⁸ Courts have traditionally used this latter rationale for explaining the denial of bail in capital cases.⁶⁹ In the wake of the Supreme Court's decision in *Furman v. Georgia*,⁷⁰ however, the underlying gravity of the offense became the justification for denying bail in some of these cases.⁷¹

Although there is a federal statutory right to bail in noncapital cases,⁷² scholars dispute the existence of a similar constitutional right.⁷³

63. 342 U.S. at 4-5. "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5.

64. 18 U.S.C. § 3146 (1976). Rule 46 of the Federal Rules of Criminal Procedure is analogous to the Bail Reform Act. FED. R. CRIM. P. 46.

65. See notes 48-60 *supra* and accompanying text.

66. The judge presiding over the bail hearing is obligated to use the *Stack* test in setting the amount of bail. He may, however, condition the release by requiring one or more of the conditions set forth in 18 U.S.C. § 3146(a)(1)-(5) (1976). Congress' power to define the class of offenses not entitled to bail is subject to fifth amendment due process constraints. *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969).

67. Bail Reform Act, 18 U.S.C. § 3148 (1976) (as amended 1970) (release in capital cases or after conviction).

68. *Id.*

69. 4 W. BLACKSTONE, COMMENTARIES *296-97. See notes 55-56 & 59 *supra* and accompanying text.

70. 408 U.S. 238 (1972).

71. *Furman* forbade the imposition of the death penalty if left solely to the unfettered discretion of the jury. *Id.* at 239-40. Consequently, many state statutes that had authorized capital punishment were rendered unconstitutional. States that had used the death penalty to distinguish between bailable and nonbailable offenses were then left to decide whether to grant bail to a prisoner who stood accused of a previously nonbailable crime. Some state courts used the traditional justification, see note 69 *supra* and accompanying text, and held all crimes bailable. See *In re Tarr*, 109 Ariz. 264, 508 P.2d 728 (1973); *Baumgarner v. State*, 253 Ark. 723, 506 S.W.2d 834 (1972); *State v. Johnson*, 61 N.J. 351, 294 A.2d 245 (1972); *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972). Other courts reasoned that the offenses are not classified on the basis of penalty, but rather on the gravity or nature of the crime itself. See *People v. Obie*, 41 Cal. App. 3d 744, 116 Cal. Rptr. 283 (1974); *Jones v. Sheriff, Washoe County*, 89 Nev. 175, 509 P.2d 824 (1973).

72. See notes 64-66 *supra*.

73. Duker, *supra* note 36, at 86, argued that "[h]istory clearly indicates that the [eighth

The bail clause⁷⁴ is unclear, and the Supreme Court's decisions are inconclusive. Contradictory dicta in *Stack v. Boyle*⁷⁵ and *Carlson v. Landon*⁷⁶ have produced conflicting lower court decisions on this issue.⁷⁷

While a constitutional right to bail in noncapital cases is disputed, there is general agreement that the prohibition against excessive bail applies to the states.⁷⁸ The Supreme Court has not conclusively ruled on the issue. In *Schilb v. Kuebel*,⁷⁹ however, the Court assumed the provision to be applicable to the states through the fourteenth amendment.⁸⁰

amendment bail provision] does no more than prohibit the setting of excessive bail in cases prescribed bailable. The clause is, therefore, not self-executing. It requires the legislation of Congress creating the right to bail to lend it sustenance." *Id.* (footnotes omitted). Foote, *supra* note 46, at 969, contended, however, that "[s]uch an interpretation reaches the extraordinary result of a constitutional provision being merely auxiliary to some other law, which in the federal system must be statutory. . . . The . . . interpretation . . . leaves the amendment meaningless"

74. See note 3 *supra*.

75. 342 U.S. 1, 4 (1951) ("person[s] arrested for a non-capital offense *shall* be admitted to bail").

76. 342 U.S. 524, 545 (1952) (right to bail not absolute, but when granted bail shall not be excessive).

77. Compare *United States v. Edwards*, 29 CRIM. L. REP. (BNA) 2193 (D.C. Cir. 1981) with *United States v. Cramer*, 451 F.2d 1198 (5th Cir. 1971); *United States v. Cook*, 428 F.2d 460 (5th Cir. 1970); *Brown v. United States*, 392 F.2d 189 (5th Cir. 1968) and *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960).

78. See *United States ex rel. Walker v. Twomey*, 484 F.2d 874, 875 (7th Cir. 1973); *United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 868 (2d Cir. 1972); *Simon v. Woodson*, 454 F.2d 161, 165 (5th Cir. 1972); *Bloss v. Michigan*, 421 F.2d 903, 905 (6th Cir. 1970); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968); *Sellers v. Georgia*, 374 F.2d 84, 85 (5th Cir. 1967); *Mastrian v. Hedman*, 326 F.2d 708, 710-11 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963); *United States ex rel. Rainwater v. Morris*, 411 F. Supp. 1252, 1255 (N.D. Ill. 1976); *Grady v. Iowa State Penitentiary*, 346 F. Supp. 681, 682 (N.D. Iowa, 1972); *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784, 786 (N.D. Ill. 1971); *Arsad v. Henry*, 317 F. Supp. 129, 130 (E.D.N.C. 1970); *Goodine v. Griffin*, 309 F. Supp. 590, 591 (S.D. Ga. 1970); *Hernandez v. Heyd*, 307 F. Supp. 826, 828 (E.D. La. 1970); *United States ex rel. Fink v. Heyd*, 287 F. Supp. 716, 717-18 (E.D. La. 1968), *aff'd*, 408 F.2d 7 (5th Cir.), *cert. denied*, 396 U.S. 895 (1969); Foote, *supra* note 46, at 1181.

79. 404 U.S. 357 (1971).

80. *Id.* at 365. "Bail, of course, is basic to our system of law, . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Id.* Justice Stevens recently noted adherence to this position. *Baker v. McCollan*, 443 U.S. 137, 149 n.1 (1979) (Stevens, J., dissenting).

Shortly after the Supreme Court's decision in *Schilb*, Judge Friendly, speaking for the Second Circuit, stated:

Although this provision of the Bill of Rights has not yet been held by the Supreme Court to be one of those made applicable to the states through the Fourteenth Amendment, we entertain little doubt that it will be. . . . Likewise we perceive no constitutional distinc-

In *Hunt v. Roth*,⁸¹ the Eighth Circuit became one of the first federal courts to hold explicitly that which the Supreme Court in *Schilb* only assumed.⁸² The court first noted that *Duncan v. Louisiana*⁸³ requires a right to be fundamental to the American scheme of justice before it is incorporated as part of the fourteenth amendment.⁸⁴ The Eighth Circuit next looked to *Stack* for an indication that the right to bail was fundamental.⁸⁵ The court then recognized the relationship between the bail clause and other rights protected by the fourteenth amendment, such as the presumption of innocence and the sixth amendment right to counsel.⁸⁶ The court cited with approval both a Fifth Circuit decision suggesting that bail underlies the entire structure of the Bill of Rights⁸⁷ and an exposition on the importance of bail from Justice Story's Commentaries on the Constitution.⁸⁸ In concluding that the fourteenth amendment incorporates the excessive bail clause, the court noted that the Supreme Court had already held another part of the eighth amend-

tion between requiring excessive bail and denying bail altogether in the absence of legitimate reasons.

United States *ex rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972).

81. 648 F.2d 1148 (8th Cir. 1981), *vacated*, 50 U.S.L.W. 4264 (U.S. Mar. 2, 1982) (No. 80-2165).

82. *Id.* at 1155. The Third Circuit, just two months before *Hunt* was handed down, expressly incorporated the bail clause with a more extensive analysis. *Sistrunk v. Lyons*, 646 F.2d 64, 66-70 (3d Cir. 1981).

83. 391 U.S. 145 (1968). See text accompanying note 38 *supra*.

84. 648 F.2d at 1155.

85. *Id.* In *Stack* the Supreme Court stressed the importance of bail in allowing the defendant unhampered preparation of his defense and in preventing the infliction of cruel and unusual punishment. *Id.* See notes 61-63 *supra* and accompanying text.

86. *Id.* at 1156. An important distinction exists between an evidentiary and a general presumption of innocence when considering a bail issue.

"Presumption of innocence" is capable of being used in two different ways. First, it may be used as an evidentiary rule governing the burden of proof at trial. Second, it may be used to describe the general presumption that one should not be deprived of liberty without due process of law. Bail functions to preserve the second use.

Coffin v. United States, 156 U.S. 432, 453 (1895). See 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940). See also *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976).

The Third Circuit, in its analysis of whether bail should be applied to the states, also looked at other Bill of Rights provisions that have been incorporated. The court noted that the right to a speedy trial and the requirement of proof beyond a reasonable doubt prevented unwarranted confinement of persons not yet proven guilty. It suggested that because freedom from excessive bail serves a similar purpose, logic dictates that bail also be incorporated. *Sistrunk v. Lyons*, 646 F.2d 64, 67 (3d Cir. 1981).

87. 648 F.2d at 1156. The court quoted with approval *United States v. Abrahams*, 604 F.2d 386 (5th Cir. 1979). "The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights." *Id.* at 393.

88. 648 F.2d at 1156 n.10.

ment—the cruel and unusual punishment clause—applicable to the states.⁸⁹

The *Hunt* decision properly incorporated the eighth amendment's bail provision into the fourteenth amendment due process clause. The holding is consistent with the Supreme Court's previous assumption⁹⁰ and with the assumption of almost all jurists on the applicability of the provision to the states.⁹¹ In addition, this outcome is further supported by a similar Third Circuit holding only two months before the *Hunt* decision.⁹²

The Eighth Circuit correctly used the test set forth in *Duncan* to determine whether the bail clause is applicable to the states.⁹³ Although the court's analysis was short, it relied upon the proper sources: history⁹⁴ and similarity to other incorporated rights.⁹⁵ This brevity reflected the strength of the assumption that the bail clause does apply to the states.⁹⁶

Although there is agreement that bail cannot constitutionally be excessive,⁹⁷ there is no such agreement on other aspects of bail. Because of *Mapp*,⁹⁸ rights ancillary to the bail clause are incorporated.⁹⁹ These ancillary rights may have tremendous impact on the amount of flexibility permitted the states in developing and administering their bail systems. This flexibility is advantageous to bail administration because the various local laws can reflect community need and sentiment.¹⁰⁰ The Supreme Court, however, has not yet determined which ancillary rights should be incorporated within the terms of the fourteenth amendment.

Increasing dissatisfaction with the present approach to bail has re-

89. *Id.* at 1156 n.11.

90. See notes 79-80 *supra* and accompanying text.

91. See Friendly, *supra* note 39, *passim*; Nowak, *supra* note 23, at 398 n.15; cases cited in note 78 *supra*.

92. *Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981). See notes 82 & 86 *supra*.

93. See notes 34-39 *supra*.

94. For a review of the history of bail, see notes 46-60 *supra* and accompanying text.

95. See note 86 *supra* and accompanying text.

96. See notes 79-80 *supra* and accompanying text.

97. See notes 62-63 *supra* and accompanying text.

98. See notes 41-44 *supra* and accompanying text.

99. The Supreme Court has used the terms "core" and "ancillary" to describe, respectively, the specific right mentioned in the constitutional provision and the rights giving meaning and breadth to the "core" right. See notes 40-44 *supra* and accompanying text.

100. See note 60 *supra* and accompanying text.

sulted in many proposals for change.¹⁰¹ Preventive detention statutes are becoming more attractive to persons concerned with the "dangerousness" of criminal defendants.¹⁰² Persons concerned that the traditional form of "cash bail" violates the equal protection doctrine have suggested alternatives to bail.¹⁰³ Finally, as reflected in *Hunt v.*

101. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME—FINAL REPORT, PHASE II § 38, reprinted in 29 CRIM. L. REP. (BNA) 3131 (1981).

The Attorney General should support or propose legislation to amend the Bail Reform Act that would accomplish the following:

- a. Permit courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community.
- b. Deny bail to an individual accused of a serious crime who had previously, while in a pretrial release status, committed a serious crime for which he was convicted.
- c. Codify existing case law defining the authority of the courts to detain defendants as to whom no conditions of release are adequate to assure appearance at trial.
- d. Abandon, in the case of serious crimes, the current standard presumptively favoring release of convicted persons awaiting imposition or execution of sentence or appealing their convictions.
- e. Provide the government with the right to appeal release decisions analogous to the appellate rights now afforded defendants.
- f. Require defendants to refrain from criminal activity as a mandatory condition of release.
- g. Make the penalties for bail jumping more closely proportionate to the penalties for the offense with which the defendant was originally charged.

Id. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE §§ 1.1, .4, .5 (Proposed Official Draft 1971).

102. Nine states presently allow the trial judge to consider the "dangerousness" of the defendant at the pre-trial hearing. ALASKA STAT. § 12.30.020(a) (1979); DEL. CODE ANN. tit. 11, § 2105(a) (1979); HAWAII REV. STAT. §§ 804-1, -7.1 (1976 & Supp. 1978); MINN. R. CRIM. P. 6.02; N.H. REV. STAT. ANN. § 597:5, :6-a (1979); N.Y. CRIM. PRO. LAW § 510.30 (1971 & Supp. 1981); S.C. CODE § 17-15-10 (1976); VT. STAT. ANN. tit. 13, § 7554(a) (1974); VA. CODE § 19.2-120 (Supp. 1979). The District of Columbia enacted a preventive detention statute in 1973. D.C. CODE ANN. § 23-1322(a)(3) (1973). See *Blunt v. United States*, 322 A.2d 579 (D.C. 1974). See generally *Duke, Bail Reform for the Eighties: A Reply to Sen. Kennedy*, 49 FORDHAM L. REV. 40 (1980); *Kennedy, A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 FORDHAM L. REV. 423 (1980).

103. "Cash bail," a sum of money deposited with the court to assure the accused's presence at trial, is the traditional form of bail. See *Bail Reform Act*, 18 U.S.C. § 3146(a)(4) (1976); *Cohen, Wealth, Bail and the Equal Protection of the Laws*, 23 VILL. L. REV. 977 (1978). Critics have questioned cash bail as a denial of equal protection to indigent defendants. *Bandy v. United States*, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960); *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977). See *D. FREED & P. WALD, BAIL IN THE UNITED STATES* 32-33 (1964); *Cohen, supra*, at 977.

Because the accused may not have the sum of money required by the court, he may have to turn to the professional bail bondsman to post the requisite amount in return for a fee. Critics have also challenged this practice, which is ancillary to cash bail, because it is subject to abuse. It allows bail bondsman, and not the court, to hold the key to an individual's freedom. See *D. FREED & P. WALD, supra*, at 32-33; *Cohen, supra*, at 977; *Goldkamp, Philadelphia Revisited: An Examination of Bail and Detention Two Decades after Foote*, 26 CRIME & DELINQUENCY 179 (1980); *Duker, supra* note 36, at 101; *Foote, supra* note 46, at 1151; *Meyer, supra* note 46, at 1449.

Roth,¹⁰⁴ some state constitutions or statutes may exclude persons accused of certain crimes from consideration for release on bail.¹⁰⁵

These state-initiated variations in the bail system may be curtailed by incorporation of the bail clause. As *Hunt v. Roth* demonstrates, incorporation gives the federal courts an additional weapon to strike down state constitutional or legislative bail provisions. The present flexibility of our nation's bail laws may thus be eroded.¹⁰⁶

Courts may, however, structure incorporation of the bail clause in such a way as to make possible continued state control over their own bail laws.¹⁰⁷ For example, a court could distinguish between bailable and nonbailable offenses on other criteria, such as the gravity of the offense, rather than the possibility of a death sentence.¹⁰⁸ A similar classification occurred to a limited extent in the wake of the Supreme Court's death penalty decision in *Furman*.¹⁰⁹ Such a redefinition of bailable and nonbailable offenses would not halt the movement toward

See generally Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 119-22 (1966).

Jurisdictions dissatisfied with the cash bail method have developed alternative release procedures. An "appearance bond," for instance, allows the accused, at the court's discretion, to post a sum of money not to exceed 10% of the full amount set by the court, with the entire sum to be returned upon the performance of the conditions of release, including appearance at trial. *See, e.g.,* *Van Atta v. Scott*, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980); Bail Reform Act, 18 U.S.C. § 3146(a)(3) (1976). Jurisdictions have also experimented with release on citation of personal recognizance. *See, e.g.,* *Van Atta v. Scott*, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980); MO. REV. STAT. §§ 544-545 (1978); D. FREED & P. WALD, *supra* at 61-63.

104. 648 F.2d 1148 (8th Cir. 1981), *vacated*, 50 U.S.L.W. 4264 (U.S. Mar. 2, 1982) (No. 80-2165).

105. *See* note 6 *supra*. This raises the issue of whether there is a constitutional right to bail in noncapital offenses—an issue that faced the Eighth Circuit in *Hunt*. Further discussion of this aspect of *Hunt* is, however, beyond the scope of this Comment.

106. The Supreme Court has expressed an unwillingness to involve itself in the detail of a state's bail administration. In *Schilb v. Kuebel*, 404 U.S. 357 (1971), in which the bail provision was assumed applicable to the states, the Court noted that the sole concern presented in that case was one provision of Illinois' bail laws providing for a one percent cost retention of the bail amount by the state. That, the Court said, "smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion." *Id.* at 365. *But see* Friendly, *supra* note 39, at 929-56.

107. *See* *Furman v. Georgia*, 408 U.S. 238 (1972); notes 70-71 *supra* and accompanying text.

108. In *Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981), the Third Circuit reached the same conclusion. The court speculated that if the rethinking of the purposes of bail continued, courts might categorize offenses other than capital crimes as nonbailable. The court implicitly acknowledged that before this rethinking could occur, the United States Supreme Court would have to allow as a permissible goal the protection of the community rather than reasonable assurance of the accused's presence at trial, the sole justification presently allowed by *Stack*. *Id.* at 70.

109. *See generally* notes 70-71 *supra* and accompanying text.

preventive detention¹¹⁰ as would a holding that due process requires a right to bail in noncapital offenses.¹¹¹

If the Supreme Court determines, however, that there is a constitutional right to bail in noncapital cases, any state wishing a particular crime to be nonbailable will have to make it a capital offense. The flexibility in determining which crimes are capital is severely curtailed, though, because the states are limited in prescribing the death penalty by the eighth amendment cruel and unusual punishment clause.¹¹²

Because of the short-term nature of bail,¹¹³ issues involving bail are usually rendered moot before reaching the Supreme Court. As a result, the Court has not yet provided a definitive statement on whether the bail clause applies to states. With its decision in *Hunt*, the Eighth Circuit Court of Appeals became one of the first courts to expressly incorporate the bail clause.¹¹⁴ Questions concerning the full impact of that decision, however, remain unanswered.¹¹⁵

Despite the Supreme Court's decision to vacate the judgment as moot,¹¹⁶ *Hunt* retains its vitality on the merits by establishing the Eighth Circuit's position on the issue.¹¹⁷ After *Hunt*, defendants who bring an action in the Eighth Circuit for denial of bail under the Nebraska provision can expect the court to rule the provision unconstitutional.¹¹⁸ If the question of whether states are subject to the bail clause arises again, absent the problem of mootness, the Supreme Court may expressly incorporate the clause. Perhaps such a determination would resolve some issues ancillary to incorporation.

K.A.M.

110. See notes 101-02 *supra* and accompanying text.

111. See notes 66 & 107 *supra* and accompanying text.

112. In *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972), the Fourth Circuit determined that the death sentence was "so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment." *Id.* at 793.

113. See note 1 *supra*.

114. See note 82 *supra* and accompanying text.

115. See note 99-112 *supra* and accompanying text.

116. See note 9 *supra*.

117. See note 1 *supra*.

118. *Id.*

