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Preventive Detention: Illinois Takes a Tenative Step towards a Safer Community, 21 J. Marshall L. Rev. 389 (1988)

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PREVENTIVE DETENTION: ILLINOIS TAKES A TENTATIVE STEP TOWARDS A SAFER COMMUNITY

The Illinois legislature recently amended article I, section 9 of the Illinois Constitution.[1] This amendment denies bail to those persons who a judge determines will pose a danger to the community if released from custody.[2] This change enables a judge, for the first time in Illinois' history, to justify the pretrial detention of an accused solely on the basis of his potential dangerousness to the community. In allowing judges to consider the dangerousness of the accused, the state legislature has fundamentally altered the theoretical premise underlying bail: assuring the presence of the accused at trial.[3]

The amendment is part of a growing trend of protecting society from the rising number of crimes that arrestees commit while out on bail.[4] This new interest in pretrial detention has led to much debate regarding the constitutionality of preventive detention provisions. The Illinois legislature patterned the amendment after the Federal Bail Reform Act of 1984,[5] which the United States Supreme Court recently upheld as constitutional.[6] This decision lends strong support for the constitutionality of Illinois' amendment. However, because the Supreme Court held only that preventive detention statutes are not "facially unconstitutional," the Illinois amendment is not necessarily free from challenge.

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1. Article I, § 9 of the Illinois Constitution is titled "Bail and Habeas Corpus." The proposed amendment to this section was brought before the Illinois legislature early in 1986. S. J. Res. (Const. amend. 22). The proposal was in response to public pressure arising from the spiraling crime rate. After the amendment won legislative approval, the electorate overwhelmingly approved it. *See* ILL. CONST. art. 14, § 2. The new amendment became effective on November 5, 1986.

2. For a detailed discussion regarding the scope of the new amendment, see *infra* notes 77-83 and accompanying text.

3. *See infra* notes 12-22 and accompanying text for a discussion regarding the historical interpretation of bail.

4. Report of the Illinois Judicial Conference (March 1985).

5. 18 U.S.C. §§ 3141-56 (1985). This Act provides in relevant part:

(e) Detention

If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

18 U.S.C. § 3142(e) (1985).

6. United States v. Salerno, 107 S. Ct. 2095 (1987).

This comment provides an analysis of the challenges the amendment will probably face. First, this comment briefly outlines the historical background of the Illinois bail provision. Second, because the amendment denies bail to arrestees, this comment also briefly discusses the amendment's constitutional implications. Next, this comment compares and contrasts the scope of the new amendment with that of the original bail provision. Finally, this comment focuses on the weaknesses of the amendment and suggests that the Illinois legislature implement procedures that will remedy these shortcomings.

HISTORY OF BAIL IN ILLINOIS

Preventive detention permits a judge to confine an arrestee on the basis of his potential dangerousness to the community.[7] Traditionally, only the conviction of an arrestee triggered the implementation of preventive detention.[8] Recently, however, focus has turned toward the application of preventive detention prior to trial.[9] Now, if an arrestee is deemed too dangerous to be released, a judge can impose pretrial detention.[10] This concept of using "potential dangerousness" as a basis for denying bail, however, is adverse to the well-established purpose of bail.[11]

Historically, courts have denied bail only to persons who posed a risk of flight if released.[12] Those defendants, however, who were

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7. BLACK'S LAW DICTIONARY 1070 (5th ed. 1979).

8. *See, e.g.*, Hermann, *Preventive Detention, A Scientific View of Man and State Power*, 4 U. ILL. L.F. 673 (1973) (preventive detention traditionally occurs after a criminal trial, when dangerousness of convicted individual is considered in sentencing).

9. *Id.* at 675. *See also* Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) [hereinafter *The Right to Bail*] (explaining that recent proposals for preventive detention have again focused attention on issue whether eighth amendment guarantees absolute right to bail).

10. Before pretrial detention is imposed, it is imperative that a judge determine with great accuracy those individuals most likely to commit crimes while out on bail. Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 GEO. L.J. 287 (1969). The problem arises, however, in determining what criteria a judge should use in predicting "dangerousness." Past acts are the simplest indicator of the possibility of future violent acts. *See* Hermann, *supra* note 8, at 689. The use of past acts as an indicator for future actions is controversial because a person may not repeat those actions. *Id.* (relying on Rome, *Identification of the Dangerous Offender*, 42 F.R.D. 185 (1968)). John M. Mitchell, former United States Attorney General, rejects the contention that preventive detention is improper because there is a lack of sufficient indicators to detect dangerousness. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1240 (1969). He states that the same argument may also apply to existing pretrial detention practices of detaining an accused because he poses a potential risk of flight. *Id.*

11. *See infra* note 12 and accompanying text for further discussion of bail.

12. In our criminal justice system, bail was established to deter flight. Hickey, *supra* note 10, at 288. Traditionally, the setting of bail in Illinois was meant solely to ensure the defendant's appearance at his trial. *See generally* Cavise, *The New Bail*

most likely to return for trial were guaranteed an absolute right to bail. The original Illinois bail provision clearly reflects this premise.[13] In addition, the Illinois Supreme Court, as well as the Illinois General Assembly, consistently interpreted the sole purpose of bail as assuring the appearance of the accused at trial.[14]

Illinois' original bail provision denied bail only to those persons accused of crimes for which they faced either a sentence of life imprisonment or the death penalty.[15] Alternatively, all those accused of non-capital offenses were guaranteed bail.[16] The disparate treatment of capital and non-capital offenders was based on the rationale that if an accused who faced the death penalty or life imprisonment was released, he was less likely to appear at his trial.[17] Under these guidelines, a judge could categorically deny bail to all suspected capital offenders.

The Illinois legislature's interpretation of the bail provision has paralleled that of the Supreme Court throughout the debates that resulted in the first three Illinois Constitutions.[18] Although considerable discussion surrounded the original bail provision, it remained

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Statute in Illinois; Preventive Detention By Any Other Name, 4 S. ILL. U.L.J. 631 (1985). This premise was also common throughout the federal system. The Bail Reform Act of 1966, for example, provided for pretrial release only if there was reasonable assurance that the accused would appear at his trial. In setting bail, the Act provided that the court could consider only "the nature and circumstances of the offense charged, the weight of the evidence against the accused . . . his record of conviction 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) (1966).

13. *See infra* note 87 for the language of the original bail provision in Illinois. The original provision denied bail to persons accused of capital offenses and offenses for which they faced life imprisonment.

14. For a discussion on the Illinois Supreme Court and Illinois legislature's interpretation of the purpose of bail, see *infra* notes 18-22 and accompanying text.

15. A court could only impose the sentence, however, for the crime of murder as provided by ILL. REV. STAT. ch. 38, ¶¶ 1005-5-3 and 1005-8-1 (1985).

16. *See* ILL. CONST. art. I, § 9 (1970).

17. *See* State v. Konigsberg, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960) (underlying motive for denying bail in capital cases is to assure accused's presence at trial). *See also* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 377 (1970) (most sensible explanation for denying bail to accused capital offenders is that few men facing death penalty will appear for trial). *But see* Mitchell, *supra* note 10, at 1230. Mitchell rejects the above contention. He believes bail is denied for capital offenders to protect the community from danger. *Id.* Support for this assertion is found in the fact that capital offenses include such dangerous crimes as murder, treason, espionage and, in some instances, rape. *Id.* Therefore, the only logical inference is that persons charged with capital offenses were denied bail to protect the community from the danger these detainees may pose. *Id.*

18. During the debates that resulted in all three Illinois Constitutions, much discussion surrounded the question: "What is the purpose of bail?" *See* PROCEEDINGS OF THE ILLINOIS CONSTITUTIONAL CONVENTION, 1920-1922, vol. IV, at 3619. After considerable debate, the answer was to make certain that the accused party returns to stand trial. *Id.* at 3621. Consequently, the bail section of the state constitution was always left intact. For an in-depth discussion regarding the legislative history of the bail provision, see Cavise, *supra* note 12, at 644.

virtually intact.[19]

Debate regarding the bail provision was also heard during Illinois' most recent Constitutional Convention in 1970.[20] The delegates to that convention, however, were presented with a new concept: the adoption of a preventive detention amendment.[21] The delegates again focused on the purpose of bail in their debate.[22] The delegates reviewed the legislative committee debate transcripts, and, in reaffirming the traditional purpose of the bail provision, rejected the proposed preventive detention amendment.[23]

Finally, in 1985, the Illinois state legislature responded to public pressure[24] and enacted a law providing judges with a new consideration when setting bail.[25] In effect, the new law was a preventive detention statute. For the first time, a judge could consider community safety when determining an appropriate bail.[26]

Arguably, this new statute was not a "pure" preventive detention statute because a judge could not deny bail based solely on a detainee's potential dangerousness.[27] Dangerousness was only one factor to consider when setting bail. The effect, however, was the

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19. Cavise, *supra* note 12, at 644.

20. *See* RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, Vol. III Transcript of June 10, 1970, at 1654 [hereinafter CONSTITUTIONAL CONVENTION OF 1970].

21. *Id.* This proposal for preventive detention differed from the recent amendment because it was only applicable to persons who had been convicted of previous crimes of violence. *Id.* The new amendment is applicable to all persons, regardless of whether they have ever been convicted of any prior, violent crimes.

22. The issue of preventive detention, however, did not monopolize the discussion surrounding the Illinois bail provision. Most debate concerned the inequities inherent in the whole bail system. CONSTITUTIONAL CONVENTION OF 1970, *supra* note 20, at 1659. The delegates noted that the basic inequity in the bail system is the way the practice discriminates against persons solely because of their poverty. *Id.* Those persons who are poor are unable to make bail, and therefore are held in jail awaiting their trial. *Id.* at 1658.

In addressing the inherent inequities, the delegates considered the purpose of bail. *Id.* at 1655, 1659. After lengthy debate, the delegates affirmed once again that "bail, of course, is to assure the presence of the defendant at the trial." *Id.* at 1655. At the conclusion of this debate, the only change that was made to the bail provision was to remove a comma from the text. *Id.* at 1654.

23. *Id.*

24. Chicago Tribune, June 3, 1985, at 1, col. 1.

25. ILL. REV. STAT. ch. 38, ¶ 110-5 (1985).

26. *Id.* Paragraph 110-5 reads in relevant part: "Determining the amount of bail and conditions of release. (a) In determining the amount of monetary bail or conditions of release, if any, which will reasonably assure the appearance of a defendant as required or the safety of any other person or the community, . . ." ILL. REV. STAT. ch. 38, ¶ 110-5 (1985).

27. One can make this argument because the judge is still required to set bail and, upon posting bail, the judge must release the defendant. Although the consideration of dangerousness may raise the amount of bail, the judge nonetheless must consider a bail amount. ILL. REV. STAT. ch. 38, ¶ 110-5 (1985). *See also* Cavise, *supra* note 12, at 639 (new Illinois bail statute not similar to typical preventive detention statute).

same. A judge could set a high bail that a defendant could not pay, thus detaining him until trial.[28]

In enacting this new statute, the Illinois legislature created a conflict with the state constitution, which limited a judge's consideration to risk of flight.[29] The legislature was forced to choose between revising the new statute or amending the constitution.[30] The legislature chose to amend the constitution.[31]

Constitutionality of Preventive Detention

Illinois' new amendment will deprive certain defendants of their right to bail.[32] This deprivation raises eighth amendment and due process issues.[33] Accordingly, the constitutionality of preventive detention must be addressed.

Because preventive detention statutes deny a defendant the op-

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28. Although a judge cannot deny bail to dangerous offenders, courts can indirectly accomplish detention. The judge can set bail at an amount high enough to assure that the defendant will not obtain pretrial release. Cavise, *supra* note 12, at 638. *See* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966) [hereinafter *Preventive Detention Before Trial*] (courts accomplish preventive detention *sub rosa*). Critics of the bail system regard this manipulation of the system as unsatisfactory. *Id.* This practice leads to disparate treatment of the poor, because others will have the financial resources to post the required bond. Therefore, the poor are detained rather than the dangerous. *Id.* at 1495. *See also* CONSTITUTIONAL CONVENTION OF 1970, *supra* note 20, at 1659 (bail system discriminates against persons solely because of poverty).

29. The interpretations of the original bail provision in the state constitution have consistently regarded the purpose of bail as assuring the presence of the accused at his trial. *See supra* notes 18-22. This interpretation precluded the consideration of community safety as a purpose for setting bail. This interpretation creates the inconsistency. *See* Cavise, *supra* note 12, at 649 (statutory language allowing consideration of community safety contradicts mandate of Supreme Court of Illinois).

30. *See* Cavise, *supra* note 12, at 653. The Illinois legislature also recognized the need to correct this inconsistency. *See Constitutional Amendment: Hearings on S. J. Res. (Const. amend. 22) Before the House Judiciary 11 Committee*, 84th General Assembly (April 17, 1986) (statement of Representative Hawkinson) [hereinafter *Committee Hearings on S. J. Res. 22*]. During debate, the legislature decided that the new amendment would correct the inconsistency, which is demonstrated by this dialogue:

> Hawkinson: " . . . do you think that this constitutional authority will justify what the existing law is with regard to considering this factor of dangerousness in setting the amount of bail as in denying it in these offenses?"
>
> Repel: "Yes, I do."
>
> Hawkinson: "Alright, thank you."
>
> Chairman Cullerton: "Good. We cleaned up another statute."

31. ILL. CONST. art. I, § 9 (amend. 1986).

32. *See infra* notes 77-83 and accompanying text regarding the application and scope of the new amendment.

33. U.S. CONST. amend. VIII, XIV. Preventive detention affects a liberty interest. Liberty is one of the most important rights protected by the due process clause. *See* Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979).

portunity of release on bail prior to trial,[34] most challenges to these statutes raise the issue of whether the eighth amendment to the United States Constitution guarantees an absolute right to bail.[35] The scope of the eighth amendment is unclear because it does not explicitly grant a right to bail.[36] Furthermore, the United States Supreme Court has never directly addressed this issue.[37]

In *Stack v. Boyle*,[38] however, the Court indirectly advanced an interpretation of the relevant clause of the eighth amendment. Although *Stack* concerned the excessiveness of bail orders, the Court recognized in *dicta* a "traditional right to freedom before conviction . . . ."[39] The Court interpreted bail as protecting a defendant's liberty interests prior to conviction.[40]

The same year it decided *Stack*, the Court elaborated upon the *Stack* rationale in *Carlson v. Landon*.[41] The *Carlson* Court briefly analyzed the history of the eighth amendment and its application.[42]

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34. Traditionally, criminal defendants have used bail to obtain release from prison prior to trial. Preventive detention, however, denies defendants the opportunity to post a money bond as security for their return for trial. Preventive detention thus incarcerates the defendant while he awaits trial. *See generally The Right to Bail, supra* note 9, at 329-30.

35. *See, e.g.*, United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). In *Edwards*, the court set out the constitutional challenges to preventive detention. Two major sources of challenge are the eighth amendment excessive bail clause and the due process clauses of the fifth and fourteenth amendments. *Id.* at 1325, 1331.

36. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Because the amendment does not explicitly provide a right to bail, court interpretations have been inconsistent. *Compare Edwards*, 430 A.2d at 1330 ("excessive bail" clause of eighth amendment does not grant right to bail in criminal case) *with* Hunt v. Roth, 648 F.2d 1148, 1157 (8th Cir. 1981), *vacated*, 455 U.S. 478 (1982) ("excessive bail" clause implies denial of bail is prohibited) *and* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 969 ("excessive bail" clause an oversight, which masked framers' true intention to include right to bail).

37. The Supreme Court has had few opportunities to rule on the meaning of the clause because federal and state laws have always provided the right to bail. *See Prevention Detention Before Trial, supra* note 28, at 1498.

38. 342 U.S. 1 (1951). In *Stack*, 12 defendants were charged with violating the Smith Act. *Id.* at 3. Bail for each defendant was set between $2,500-$100,000. *Id.* The Supreme Court held that any bail set higher than the amount necessary to assure the defendants' appearance at trial is excessive. *Id.* at 5.

39. *Id.* at 4. The *Stack* Court added "[u]nless the right to bail before trial is preserved, the presumption of innocence, . . . would lose its meaning." *Id. But cf.* Bell v. Wolfish, 441 U.S. 520 (1979). The *Bell* Court stated that the presumption of innocence has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533.

40. *Stack*, 342 U.S. at 4.

41. 342 U.S. 524, *reh'g denied*, 343 U.S. 988 (1952). *Carlson* involved the denial of bail to aliens, prior to deportation hearings. *Id.* at 526-27.

42. *Id.* at 545-46. For a comprehensive discussion of the history of bail, see United States v. Edwards, 430 A.2d 1321, 1326-28 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) ("excessive bail" clause derived from English Bill of Rights); Duker, *The Right to Bail; A Historical Inquiry*, 42 A.B.L. REV. 33, 77 (fundamental right to bail

The Court concluded that the right to bail, implicit in the eighth amendment, permits the denial of bail prior to trial in certain situations.[43] The Court stated "the Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country."[44] Implicit in this statement is that the eighth amendment does not guarantee an absolute right to bail.

The eighth amendment issue was finally addressed by the Supreme Court in *United States v Salerno*.[45] The *Salerno* Court addressed the issue of whether preventive detention violated the eighth amendment's excessive bail clause.[46] The Court held that it did not.[47] In reaching this decision, the Court noted that "the very language of the Amendment fails to say all arrests must be bailable."[48] The *Salerno* Court stated that the only eighth amendment limitation is that the conditions of "release or detention" not be excessive.[49] Excessiveness, the Court noted, would be determined by the interest sought to be protected.[50] The Court held that when there is a compelling state interest,[51] the eighth amendment does not prohibit detention.

Preventive Detention and Substantive Due Process

Preventive detention statutes also implicate a substantive due process concern.[52] The validity of a substantive due process claim

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not universal among early states); Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L.J. 1139, 1191 (1972) (early state constitutions granting both right to bail and protection from excessive bail); *The Right to Bail*, *supra* note 9, at 334 (right to bail evidenced since colonial periods).

43. The *Carlson* Court noted that *Carlson* was not a criminal case. 342 U.S. at 537. This gave Congress the authority to deny bail in order to regulate the immigration and expulsion of aliens. *Id.*

44. *Id.* at 545. The Court explained that in criminal cases bail is not compulsory when the punishment may be death. *Id.*

45. 107 S. Ct. 2095 (1987).

46. *Id.* at 2100-01. The *Salerno* case involved the pretrial detention of two reputed mobsters. *Id.* at 2099. Both defendants challenged the constitutionality of their detention, which was imposed pursuant to the Bail Reform Act, 18 U.S.C.A. § 3142 (e, f). *Id.* at 2100. *See supra* note 5 for the text of the statute.

47. *Salerno*, 107 S. Ct. at 2105.

48. *Id.* (quoting Carlson v. Landon, 342 U.S. 524, 545-46, *reh'g denied*, 343 U.S. 988 (1952)).

49. *Id.*

50. *Id.* The Court further noted that a judge should determine bail at a sum sufficient to protect the interest at issue, but no greater. *Id.* (citing Stack v. Boyle, 342 U.S. 1, 5 (1951)). If, however, only detention could ensure protection of the interest, then the eighth amendment does not prohibit such detention. *Id.*

51. *Id.*

52. Preventive detention restricts a person's liberty interest. *See* United States v. Edwards, 430 A.2d 1321, 1354 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (Ferren, A.J., concurring in part, dissenting in part). "Liberty . . . has been recognized as the core of liberty protected by the Due Process Clause . . . ." *Id.* (quoting Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979)

hinges upon a determination of whether the preventive detention statute is penal or regulatory.[53] In order to pass constitutional muster, a statute cannot impose punishment prior to a conviction for the crime charged.[54] Courts have suggested many factors to distinguish a penal sanction from a regulatory sanction.[55] The most significant factor in making this distinction, however, emphasizes the governmental purpose behind the statute.[56] For example, "if a particular condition of pretrial detention is reasonably related to a legitimate governmental objective it does not, without more, amount to punishment."[57]

Courts have used this analysis in deciding whether preventive detention violates substantive due process. The Supreme Court also used this analysis in *United States v. Salerno*.[58] In addition to the eighth amendment challenge in *Salerno*, the defendant claimed that preventive detention amounted to punishment before trial and thus violated substantive due process.[59] In a strongly worded opinion, the Court rejected this argument and noted that Congress never intended preventive detention as punishment.[60] Rather, the Court stated that the purpose of the detention was to solve a societal problem: protecting a community from danger.[61] The Court concluded that this was a legitimate regulatory goal.[62]

(Powell, J., concurring in part, dissenting in part)).

Substantive due process requires the government to show a "compelling state interest" in order to restrain fundamental rights. Roe v. Wade, 410 U.S. 113, 155 (1973). Generally, challenges to substantive due process are not successful because courts recognize a compelling state interest in protecting society from crime. *See* Palmore v. United States, 411 U.S. 389 (1973).

53. *See Edwards*, 430 A.2d at 1331. *See also Salerno*, 107 S. Ct. at 2101 (preventive detention not designed as penal measure, but rather regulatory).

54. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

55. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Factors suggested by the *Mendoza-Martinez* Court to distinguish penal sanctions from regulatory sanctions include: whether the sanction involves an affirmative disability or restraint, whether the sanction has historically been regarded as a punishment, whether the sanction comes into play only on a finding of scienter, and whether application of the sanction will promote the traditional aims of punishment. *Id.* at 168. For an application of these factors to preventive detention, see *Edwards*, 430 A.2d at 1332.

56. The Court's opinion in *Bell v. Wolfish* emphasizes this factor: "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate purpose . . . ." 441 U.S. 520, 538 (1979.)

57. *Edwards*, 430 A.2d at 1332 (quoting *Bell*, 441 U.S. at 538). The *Edwards* court, in applying this factor, held that pretrial detention serves the legitimate interest of protecting the safety of the community until it can determine whether society may properly punish the defendant. *Id.*

58. 107 S. Ct. 2095 (1987).

59. *Id.* at 2101.

60. *Id.*

61. *Id.*

62. *Id.* at 2102. The *Salerno* Court noted that it had repeatedly held that a government's regulatory interest in community safety can outweigh a person's liberty interest. *Id.* (citing Schall v. Martin, 467 U.S. 253 (1984) (court upholds detaining

The Supreme Court decision in *Salerno* reversed a controversial lower court opinion which held that incarceration as a regulatory measure was repugnant to the notion of substantive due process.[63] In so holding, the Court sent a clear message that preventive detention is constitutional.

Preventive Detention and Procedural Due Process

An additional challenge to preventive detention is that the statutes do not provide the requisite minimal procedural framework necessary for a fair hearing.[64] Because a liberty interest is involved, courts must provide procedural safeguards in order to adequately protect this interest.[65] The threshold issue, then, is what procedural formalities are constitutionally guaranteed.

In *United States v. Edwards*,[66] the Court of Appeals for the District of Columbia Circuit determined that the procedural safeguards that are necessary at trial need not be provided during the pretrial detention hearing.[67] The *Edwards* court concluded that the interests involved in a pretrial detention hearing mirrored the interests involved in a preliminary hearing.[68] Relying on the Supreme Court's decision in *Gerstein v. Pugh*,[69] which held that an arrestee is entitled to a timely hearing before a magistrate, the *Edwards* court held the requisite safeguards of a pretrial detention hearing include

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potentially dangerous juveniles); Addington v. Texas, 441 U.S. 418 (1979) (detention of potentially dangerous mentally unstable persons); Carlson v. Landon, 342 U.S. 524 (1952) (detention of potentially dangerous aliens pending deportation); Ludecke v. Watkins, 335 U.S. 160 (1948) (detention of enemy aliens at time of war)).

63. United States v. Salerno, 794 F.2d 64 (2d Cir. 1986), *cert. granted*, 107 S. Ct. 397 (1986).

64. *See* United States v. Edwards, 430 A.2d 1321, 1333 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

65. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

66. 430 A.2d 1321 (D.C. 1981).

67. *Id.* at 1335 (relying on Gerstein v. Pugh, 420 U.S. 103 (1975)).

68. *Id.* at 1336. The *Edwards* court considered the following factors when determining the scope of the procedural protections required: the individual's interest affected by the official action; the nature of the governmental function; and the value of additional procedural safeguards. *Id.* (relying on Mathews v. Eldridge, 424 U.S. 319 (1976)). The court concluded that the individual's interest in a detention hearing and a preliminary hearing were the same: freedom from detention. *Id.* at 1337. Furthermore, the governmental interest is also the same in both proceedings. *Id.* The governmental interest is in not conducting a full criminal proceeding twice. *Id.* Both proceedings require few additional procedural safeguards due to their limited function. *Id.* Finally, the *Edwards* court concluded that the effect of the findings in a detention hearing and a preliminary hearing is the same: Each hearing determines whether a judge may detain an accused before trial. *Id.* These similarities led the court to the conclusion that the procedural requirements of a preliminary hearing were also applicable to a pretrial detention hearing. *Id.*

69. 420 U.S. 103, 114 (1975). The magistrate must make a determination of probable cause before any extended restraint of the accused's liberty. *Id.*

close proximity of the hearing to the arrest,[70] notice of specific charges made,[71] and recognition of the right to counsel.[72]

The *Edwards* court set out these minimum procedural guidelines in order to protect due process rights. Other advocates of preventive detention, however, have gone much further.[73] In addition to the *Edwards* factors, they require detailed procedures that limit a judge's discretion and further safeguard the accused's due process rights.[74] The guidelines set forth in the Federal Bail Reform Act, which was upheld in *Salerno*, are an example of the extensive safeguards taken to ensure the protection of a detainee's procedural due process rights.[75] The *Salerno* Court, noting that these guidelines

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70. *Edwards*, 430 A.2d at 1335 (relying on *Gerstein*, 420 U.S. at 114).

71. *Id.* at 1340 (relying on Wolff v. McDonnell, 418 U.S. 539 (1974)).

72. *Id.* (noting D.C. CODE ANN. §§ 23-1322 (1973)).

73. *See, e.g.*, THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 ("the Act"). The Act requires a judge to hold a hearing immediately upon the defendant's first appearance in court. 18 U.S.C. § 3142(f) (1984). At that hearing, the defendant has a right to representation by counsel. *Id.* Further, the defendant has a right to testify, to present witnesses, to cross examine, and to present evidence by proffer. *Id.*

74. *See, e.g.*, FLA. STAT. ANN. § 907.041 (West 1985), which states in relevant part:

> (d) When a person charged with a crime for which pretrial detention could be ordered is arrested, the arresting agency may detain such defendant, prior to the filing by the state attorney of a motion seeking pretrial detention, for a period not to exceed 24 hours.
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> (e) The court shall order detention only after a pretrial detention hearing. The hearing shall be held within 5 days of the filing by the state attorney of a complaint to seek pretrial detention. The defendant may request a continuance. No continuance shall be longer than 5 days unless there are extenuating circumstances . . . .
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> (f) The state attorney has the burden of showing the need for pretrial detention.
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> (g) The defendant is entitled to be represented by counsel, to present witnesses and evidence, and to cross-examine witnesses. The court may admit relevant evidence without complying with the rules of evidence . . . . No testimony by the defendant shall be admissible to prove guilt at any other judicial proceeding . . . .
>
> (h) The pretrial detention order of the court shall be based solely upon evidence produced at the hearing and shall contain findings of fact and conclusions of law to support it . . . . The court shall render its findings within 24 hours of the pretrial detention hearing.
>
> (i) If ordered detained pending trial . . . the defendant may not be held more than 90 days . . . .

Id. See also 18 U.S.C. § 3142 (1985) (Federal Bail Reform Act provisions for pretrial detention); D.C. CODE ANN. § 23-1322 (1982) (Washington D.C.'s provision for pretrial detention).

75. United States v. Salerno, 107 S. Ct. 2095, 2101 (1987). The Court noted that the Bail Reform Act required extensive guidelines to safeguard the detainee's due process rights. *Id.* For example, the Act requires a prompt detention hearing, a stringent length of detention, and a separate facility to house the detainees away from convicts. *Id.* at 2101-02. The Court further noted that the Act provides the detainee with the right to counsel, to testify on his own behalf, and to present and cross examine witnesses. *Id.* at 2102. Furthermore, the Act provides that the prosecutor must prove by clear and convincing evidence that detention is necessary. *Id.* This decision is entitled to immediate appellate review. *Id.*

"far exceed" those found necessary in *Gerstein*, insinuated that such extensive guidelines were not necessary to protect due process rights.[76]

THE AMENDMENT TO THE ILLINOIS STATE CONSTITUTION ARTICLE I, SECTION 9

Illinois has recently tried to expand the use of preventive detention. The Illinois legislature has amended the state constitution to effectuate this purpose.[77] The new amendment expands the number of situations in which a judge can deny bail prior to trial.[78] In addition to capital punishment offenses and offenses for which life imprisonment could be imposed, the amendment adds "felony offenses for which a mandatory jail sentence is imposed if convicted."[79] Thus, the new amendment has broadened the scope of the original bail provision.

The language of this amendment is patterned after the 1984 Bail Reform Act.[80] The Illinois amendment requires a hearing in which a judge is to engage in a two-tiered analysis before he can

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76. *Id.* at 2104. The Court noted that the Bail Reform Act provided safeguards that were more extensive than those it held necessary in *Schall* and *Gerstein*. *Id.* (citing Schall v. Martin, 467 U.S. 253 (1984), and Gerstein v. Pugh, 420 U.S. 103 (1975)).

In *Schall*, the Court upheld a New York Statute that authorized the preventive detention of juveniles if there was a serious risk that the juvenile might commit a criminal act if released. NEW YORK JUD. LAW § 320.5(3)(b) (McKinney 1983) (Family Court Act). The Court's rationale recognized that juveniles, unlike adults, are always in some form of custody. *Schall*, 467 U.S. at 265. It is assumed that parents control their children, and if "control falters," the state must take over. *Id.* (noting State v. Gleason, 404 A.2d 573 (Me. 1979)). Therefore, the Court concluded that in "appropriate circumstances a juvenile's interest may be subordinate to the state's interest in preserving and promoting the welfare of the child." *Id.* (quoting Santosky v. Ramer, 455 U.S. 745, 766 (1982)).

77. The new amendment reads as follows:

SECTION 9. BAIL AND HABEAS CORPUS

All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.

ILL. CONST. art. I, § 9 (amend. 1986).

78. *See supra* notes 12-22 and accompanying text for a discussion of the scope of the new amendment.

79. For a discussion of felony offenses included under the new amendment, see *infra* notes 88-94 and accompanying text.

80. *Committee Hearings on S. J. Res. 22*, *supra* note 30 (statement of Mr. McKracken).

deny bail. First, a judge must conclude that either the proof is evident or the presumption is great that the defendant committed the offense.[81] Second, the judge must find that release pending further proceedings would pose a real and present threat to the physical safety of any person.[82]

The final paragraph of the amendment deals with the costs involved in implementing the new procedure. Pursuant to the amendment, the state will reimburse any local unit of government for additional costs incurred when enforcing this provision.[83] For example, if bail is denied to the accused, and the cost of housing the defendant is added to the county's cost, the state will reimburse the county for the additional cost.

Although the Supreme Court has upheld the constitutionality of preventive detention in general, Illinois' version of preventive detention will nonetheless face many challenges. As the amendment stands, it has several practical problems. The language of the amendment is ambiguous and confusing.[84] Furthermore, the amendment lacks procedural guidelines.[85] Consequently, the legislature will need to take action in order to implement the amendment and to provide the procedural safeguards of due process.[86]

A. *Statutory Construction Challenges*

The new provision is loosely constructed with respect to the crimes included in the amendment. The new amendment expands the scope of preventive detention to include those persons who are accused of felonies for which a mandatory prison sentence is imposed if convicted.[87] Under the Illinois felony schedule scheme, this includes all murder,[88] attempted murder,[89] aggravated criminal as-

81. ILL. CONST. art. I, § 9 (Amend. 1986).
82. *Id.*
83. *Id.*
84. For a discussion of the amendment's construction problems, see *infra* notes 87-115 and accompanying text.
85. *See infra* note 129 and accompanying text for a discussion of necessary procedural guidelines.
86. *See Constitutional Amendment: Senate Floor Debate on S. J. Res. (Const. Amend. 22)*, 84th General Assembly (April 30, 1986) (Statement of Senator Davidson) [hereinafter *Senate Debate on S. J. Res. 22*].
87. The original bail provision only allowed denial of bail to those persons accused of capital offenses, or offenses for which they faced life imprisonment. The provision read as follows: "All persons shall be bailable by sufficient sureties, except for capital offenses and offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction where the proof is evident or the presumption great . . . ." ILL. CONST. art. I, § 9 (1970).
88. ILL. REV. STAT. ch. 38, ¶ 9-1 (1985).
89. *Id.* ¶ 8-4(c)(1).

sault,[90] criminal trespass,[91] certain criminal sexual assault,[92] residential burglary,[93] and specific controlled substance violations.[94] On the other hand, lower grade crimes, such as voluntary manslaughter,[95] aggravated battery,[96] kidnapping,[97] and child abduction,[98] are not covered under the amendment.[99] These crimes are potentially more violent and dangerous than many of the crimes provided for in the amendment. Thus, the scope of the provision, although broader, may not serve the function it was designed to perform: protecting society from dangerous persons. In order to remedy this inadequacy, the legislature must revise the felony schedule to include these lower grade crimes under the amendment.

Possibly the most problematic clause in the amendment refers to those persons who may be denied bail. As it stands, the amendment is applicable to "felony offenses for which a sentence of imprisonment, without conditional and revocable release shall be imposed by law . . . ."[100] Within this provision, the phrase "without conditional and revocable release," promises much litigation. The drafters' intentions in including this language was to implicate non-probational offenses.[101] The traditional interpretation of this particular language, however, has led to a contrary reading of that concept.

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90. *Id.* ¶ 12-14.

91. *Id.* ¶ 21-3.

92. *Id.* ¶¶ 12-13, 12-16. In cases where criminal sexual assault results in conviction of a defendant who is a family member of the victim, the court shall consider the safety and welfare of the victim and may impose a sentence of probation. *Id.* ¶ 1005-5-3(8)(e).

93. *Id.* ¶ 12-11.

94. ILL. REV. STAT. ch. 56 ½, ¶ 709 (1985).

95. ILL. REV. STAT. ch. 38, ¶ 9-2 (1985).

96. *Id.* ¶ 10-4.

97. *Id.* ¶ 10-1.

98. *Id.* ¶ 10-5.

99. The legislature anticipated this effect. *See Constitutional Amendment: House of Representatives Floor Debate on S.J. Res. (Const. Amend. 22)*, 84th General Assembly (April 22, 1986) (statement of Representative Cullerton) [hereinafter *House of Representative Debate on S. J. Res. 22*]. Representative Cullerton noted that in an attempt to risk the vote on the amendment, the Committee realized they were not adding all the serious offenses to the list where bail could be denied. *Id.* at 38. The example he used was residential burglary. *Id.* (referring to ILL. REV. STAT. ch. 38, ¶ 12-11 (1985)). A judge could order preventive detention for a first time residential burglary offender, for example, a 17-year-old teenager whose only charge is taking a bike out of a garage. *Id.* However, "the amendment wouldn't have applied to the Alton Coleman case," because he did not commit the offenses covered by the amendment, when he was released on bail prior to his killing spree. *Id.*

100. ILL. CONST. art. I, § 9 (Amend. 1986).

101. *See Senate Debate on S. J. Res. 22, supra* note 86, at 6 (statement of Senator Davidson). "The phrase 'without conditional and irrevocable release' means without probation . . . ." *Id. But see House of Representatives Debate on S. J. Res. 22, supra* note 99, at 32 (statement of Representative McCracken). "That terminology bears no relation to . . . parole. This language is for the purpose of making it clear that the Amendment relates only to those offenses for which a mandatory imprisonment is required as a result of conviction." *Id.*

The only section of the Illinois Criminal Code that refers to "conditional and revocable release" is § 1005-6-1, which concerns parole.[102] This implies that the phrase includes probational, as well as non-probational offenses. Associating this phrase with probation will inevitably lead to misinterpretation of the preventive detention statute, which will drastically affect the scope and applicability of the amendment.[103]

Literally interpretated, the language used in the amendment means that preventive detention applies only to felony offenses carrying a sentence of imprisonment, with no parole.[104] The intent of the legislature was to broaden the scope of the preventive detention amendment's applicability. Qualifying when a judge can impose preventive detention has dramatically narrowed the scope of the amendment in two respects. First, non-parolable offenses are few in number.[105] Second, Illinois has abolished the use of the term parole.[106] Thus, if literally interpreted, there is no situation under the amendment where a judge would deny bail to someone accused of a felony offense.

The construction of the new amendment is further complicated by the phrase, "the offender would pose a real and present threat to the safety of *any* person."[107] The drafters of the amendment included the defendant in the class of people it was intended to protect when it chose the word "any."[108] Thus, when a judge determines

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102. ILL. REV. STAT. ch. 38, ¶ 1005-6-1 (1985). Although the actual language used in the statute differs slightly, its meaning is quite clear. The provision refers to "conditional discharge." *Id.* This section specifically differentiates between probation and conditional discharge. "[T]he court shall impose a sentence of probation *or* conditional discharge." *Id.* (emphasis added).

103. The committee that conducted hearings on the amendment also realized the possibility of litigation. *See Committee Hearings on S. J. Res. 22, supra* note 30 (statement of Mr. Suffredin, Chicago Bar Association representative). Mr. Suffredin informed the members of the committee that the phrase would "beg some litigation." *Id.* The committee, however, passed the amendment with the phrase intact.

104. *Id.*

105. Only sentences of natural life imprisonment are not eligible for parole. The only offense which would fall under this category is murder. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(a)(1)(b) (1985).

106. ILL. REV. STAT. ch. 38, ¶ 1003-3-2 (1985). The word "parole" has been replaced with the phrase "mandatory supervised release". *Id.* ¶¶ 1003-3-3, 1003-14-1.

107. ILL. CONST. art. I, § 9 (Amend. 1986).

108. The Committee was specifically aware of the problematic language. *See Committee Hearings on S. J. Res. 22, supra* note 30 (statements of Chairman Cullerton and Representative McCracken). As Chairman Cullerton pointed out:

> The issue is the language says, "after a hearing to determine whether or not the release of the offender would pose a real and present threat to the physical safety on any person." It seems clear to me that that could include the defendant himself . . . . without having any proof that there's a danger to the community.

Id. Debate surrounding this language was quite hostile. Chairman Cullerton, in speaking on the House of Representatives floor, declared that the use of the word "any" would ultimately be the downfall of the amendment. *See House of Representa-*

that the accused may pose a danger to himself, he can lock up that person without bail while he is awaiting trial. This situation might arise, for example, if the defendant is suicidal. The judge may declare the defendant a danger to himself and deny him bail.

Denying bail to someone who poses a danger himself obscures the basic premise of the amendment that preventive detention is necessary to protect the community from the accused.[109] Preventive detention can only survive a due process challenge if there is a legitimate state interest in protecting the community from crime.[110] It will not survive a due process challenge if the amendment's purpose is to protect the defendant from himself. In constructing the amendment, then, the drafters should have used the words "other persons" as opposed to "any person."[111] The phrase "other persons" is more consistent with the purpose of preventive detention: protecting the community from the danger that the defendant may pose to its members.

The final paragraph of the new amendment, which deals with the costs incurred in applying the amendment, will inevitably impose a significant financial burden on the state.[112] The section requires the state to reimburse "[a]ny costs accruing to a unit of local

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tives Debate on S. J. Res. 22, supra note 99, at 37 (statement of Representative Cullerton). "[W]hat ultimately will declare this Constitutional Amendment unconstitutional" is the language providing that the offender may pose a danger to "any" person. *Id.* Representative Cullerton pointed out to the House members that he felt the drafters had no constitutional right to deny bail to a person because he may harm himself. *Id.*

109. Preventive detention statutes in general were enacted in response to the rising crime rate. *See* Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 178 (1985). It is reasonable to conclude that anticipated danger to other persons or to the community was a substantial motivating factor in the Illinois legislature's decision to deny bail to certain classes of dangerous offenders. If a person is denied bail when he poses a danger only to himself, the legislature is not protecting other persons in the community from the danger the accused poses. They are only protecting the accused from the danger to himself. This is not the intent of preventive detention provisions. *See* Hickey, *supra* note 10, at 301. Because preventive detention deprives a citizen of his liberty based on an unconvicted act, it must only be used to prevent danger to other persons. *Id.*

110. *See* Schlesinger, *supra* note 109, at 195 (preventive detention serving a legitimate state objective necessary to meet due process requirements). *See also* Schall v. Martin, 467 U.S. 253 (1984) (New York statute meeting due process requirements because it served legitimate state interest in preventing child from committing criminal act).

111. *See, e.g.*, ARIZ. CONST. art. II, § 22 ("substantial danger to any other person or the community"); CALIF. CONST. art. I., § 12 ("felony offenses involving acts of violence on another person"); 18 U.S.C. §§ 3142-3151 (1985) (if no conditions of release will assure the safety of any other person and the community); D.C. CODE ANN. § 23-1322(e)(1981) ("no conditions of release will assure that the person will not flee or pose a danger to any other person or to the community"); FLA. STAT. ANN. § 907.041 (West 1985) ("the defendant poses a threat of harm to the community").

112. *See infra* notes 113-116 and accompanying text for a further discussion of the financial burdens that the state may incur as a result of this new amendment.

government as a result of the denial of bail pursuant to the 1986 Amendment to this Section."[113] The phrase "any costs" is open to broad construction.

The provision is intended to reimburse the local government only for those costs incurred in denying bail to persons accused of felonies.[114] As the provision reads, the state is required to reimburse a county for "any" costs that result from implementing the new amendment.[115] The use of the word "any" does not, however, infer minimal costs. The literal interpretation of this provision may require the state to reimburse the county for the use of temporary quarters or possibly the construction of new prisons, if the influx of prisoners necessitates these measures.[116]

In order to remedy these inadequacies, the legislature must redefine "any costs." It must define which costs are reimbursable and which costs are not. In addition, the legislature must delineate procedures that a county must follow in order to gain their reimbursement.

DUE PROCESS REQUIREMENT

As previously stated, preventive detention has serious due process implications because it restricts a detainee's liberty interest.[117] This restraint on a detainee's liberty interest must be reasonable when balanced against society's interest in preventing the commis-

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113. ILL. CONST. art. I, § 9 (Amend. 1986).

114. *See Committee Hearings on S. J. Res. 22, supra* note 30 (statement of Mr. Homer). The intent of the legislature was to reimburse the county only for the cost of detaining persons accused of felonies. As Mr. Homer clarifies:

> [I]t's contemplated that pursuant to this Amendment, the only costs that the state would pick up would be for any prisoner who was held without bail as a result of the expanded language that is in Constitutional Amendment 22, and the state would not be required to reimburse counties where a Judge has refused bail for capital offenses or ones involving life imprisonment.

Id.

115. *See* ILL. CONST. art. I, § 9 (Amend. 1986).

116. *See House of Representatives Debate on S. J. Res. 22, supra* note 99, at 35 (statement of Representative Cullerton). Representative Cullerton specifically states that the provision referring to costs was intentionally drafted very broadly. He also points out that the state must reimburse the county for additional costs even when the defendant is acquitted. *Id.* The reimbursable costs also include the salaries of prosecutors, judges, public defenders and court reporters. *Id.* at 36.

A corollary problem associated with preventive detention is the effect that it may have upon prison populations. Because the new amendment may, in fact, imprison more defendants, this will increase the problem of already overcrowded prisons. This may result in the construction of new prisons, whose cost could be passed on to the state under the literal reading of the amendment. For a discussion of the problem of prison overcrowding, see generally NAT'L INST. OF JUST., THE DEVELOPMENT AND IMPLEMENTATION OF BAIL GUIDELINES: HIGHLIGHTS AND ISSUES (1984).

117. *See supra* notes 52-72 and accompanying text for a discussion on due process.

sion of further crimes while the defendant is awaiting trial.[118] To ensure that the restraint on liberty resulting from preventive detention comports with due process requirements, the statute must provide appropriate procedural safeguards.[119] The legislature must enact a statute implementing these procedural safeguards.

The Supreme Court has held that the same due process protections required at trial are not necessary at a pretrial detention hearing.[120] To prevent abuse in imposing pretrial detention, Illinois should impose stricter guidelines and implement procedures used in other jurisdictions.[121] These procedures provide detailed guidelines pertaining to when a judge must hold a hearing, what rules of evidence apply, who has the burden of proof, and how long the detention period can last without violating due process.

An excellent example of these procedures is set out in the American Bar Association's Project on Minimum Standards for Criminal Justice (ABA).[122] Although the ABA rejected a draft proposal for preventive detention,[123] it nonetheless drew up "Model Provision" to implement the concept.[124] This provision recommends comprehensive procedures to protect a defendant's due process rights. These recommendations include a hearing within two days of filing an application for a detention order,[125] that the government bear the burden of proof,[126] and that the length of detention be limited to thirty days.[127]

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118. *Cf.* Terry v. Ohio, 392 U.S. 1 (1968) (reasonableness test for restraints on liberty caused by stop and frisk procedure).

119. *See generally* Hrusk, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36 (1969) (in order to protect rights of defendant, procedural guidelines must be provided); Schlesinger, *supra* note 109, at 192 (procedural safeguards have important effect of balancing defendant's interests); *Preventive Detention Before Trial, supra* note 28, at 1498 (in absence of explicit criteria, judge given too much discretion).

120. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

121. *See supra* note 73 for an example of detailed guidelines other advocates of preventive detention have employed. For a list of other jurisdictions that provide for preventive detention, see Cavise, *supra* note 12, at 643 n.71.

122. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE (1968) [hereinafter ABA MINIMUM STANDARDS].

123. In rejecting the concept of preventive detention, the ABA committee recognized the lack of information concerning the extent of crime on bail. It also recognized the difficulties in predicting criminal behavior. *Id.* (*Appendix C, introductory note*).

124. ABA MINIMUM STANDARDS, *supra* note 122, *Appendix C:* PREVENTIVE DETENTION: A MODEL PROVISION [hereinafter A MODEL PROVISION]. This provision pertains only to defendants who are charged with felonies involving bodily harm, or defendants who have been convicted of a violent felony within the last five years. *Id.* Only these defendants are subject to pretrial detention. *Id.*

125. A MODEL PROVISION, *supra* note 124, § 1.5(b)(i).

126. *Id.* § 1.5(b)(ii).

127. *Id.* § 1.8.

The Illinois statute must provide these safeguards. Due process requires a fair hearing. In order to comport with due process, a judge must hold this hearing immediately after the state has filed an application for detention.[128] A judge must hold this hearing quickly to ensure that the detention is no more restrictive than necessary.[129]

The statute must also clarify that the defendant does not have the burden of proving that pretrial detention is unwarranted. Under current Illinois law regarding bailable offenses, the person seeking release has the burden of proving that his guilt is not evident and that the judge should release him pending bail.[130] Because pretrial detention implicates a severe restraint of liberty, the state, rather than the detainee, should carry the burden of proving that pretrial detention is necessary.[131] This follows from the presumption of innocence until proven guilty.[132] The requirement that the prosecution carry the burden of proving one's guilt protects this presumption.[133] Because this presumption is such an integral part of our criminal justice system, the Illinois statute must incorporate this protection.

An issue related to the burden of proof is what standard of proof should attach to a preventive detention determination. The state may not have to prove the need for detention beyond a reasonable doubt because of the state's legitimate interest in not conducting a full blown criminal trial.[134] Even the United States Supreme Court has held that due process does not require a trial and conviction before any restraint of liberty is permitted.[135] The exis-

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128. *Cf.* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process protections attaching to probation revocation). *See also* United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (due process mandating a fair hearing).

129. Two types of safeguards should accompany any system of pretrial detention. First, procedural safeguards are necessary to ensure that its application is limited to those cases in which it is required. *Preventive Detention Before Trial*, *supra* note 28, at 1502. Second, procedural safeguards are necessary to provide that any detention is no more restrictive than necessary. *Id.*

130. ILL. REV. STAT. ch. 38, ¶ 110-4(b) (1985). This section provides: (b) "A person seeking release on bail who is charged with a capital offense or an offense for which a sentence of life imprisonment may be imposed has the burden of demonstrating that the proof of his guilt is not evident and the presumption is not great." *Id.*

131. *See* Hrusk, *supra* note 119, at 56. All basic criminal law protections should apply to any preventive detention system. *Id.* Included in these protections are the right to counsel, to testify, and to cross-examine witnesses. *Id.*

132. The presumption of innocence is not explicitly set forth in the federal Constitution, however, it has been recognized as a "basic component of a fair trial" under our system of criminal justice. Estelle v. Williams, 425 U.S. 510, 513 (1976). *But see* Mitchell, *supra* note 10, at 1231. The presumption of innocence is simply a rule of evidence, which places the burden on the government to prove guilt. *Id.* at 1232.

133. Mitchell, *supra* note 10, at 1231. *See also The Right to Bail*, *supra* note 9, at 358 n.197.

134. *See* United States v. Edwards, 430 A.2d 1321, 1337 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

135. Terry v. Ohio, 392 U.S. 1 (1968) (showing of probable cause justifying a

tence of probable cause justifies such a restraint when the restraint is limited to a short duration.[136] The standard of proof for preventive detention, however, must be more than probable cause, because it involves restraint for an extended detention.[137] The restraint of liberty involved in a pretrial detention is clearly more restrictive. Consequently, the government should have a greater burden for demonstrating the need for detention prior to trial.[138]

Requiring the government to meet the clear and convincing evidence standard before implementing preventive detention will better serve all interests involved.[139] Not only will this standard prevent a full blown criminal trial to determine dangerousness, it will also require a showing of substantial evidence that this defendant poses a real risk to the safety of the community.

It is imperative that the Illinois legislature outline procedures to ensure that any pretrial detention is no more restrictive than is necessary.[140] One way to accomplish this objective is to require a specific limit on the length of detention, thereby ensuring a speedy trial.[141] Under current Illinois law, any defendant who is incarcerated without bail must be brought to trial within 120 days of the arrest.[142] This is much too long to keep a presumptively innocent person incarcerated. Other jurisdictions have recognized this fact. The District of Columbia's preventive detention statute, for example, requires the state to bring the detainee to trial within sixty days or release him.[143] Florida's statute limits the detention of the defendant to ninety days or less.[144] The ABA's "model provision" only allows a detention period of thirty days.[145] All of these statutes indicate the need to give preventive detention cases priority on the court calendar.

The Illinois legislature must also define the defendant's rights during the detention hearing. First, the defendant must receive the

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temporary restraint of liberty).

136. *Id.*

137. In *Terry*, the detention allowed was short in duration, possibly only minutes. *Id.* Pretrial detention, however, may last from 60-120 days, depending upon the jurisidiction. *See* D.C. CODE ANN. § 23-1322(e) (1981) (duration of detention is 60 days); FLA. STAT. ANN. § 907.041 (West 1985) (duration of detention 90 days); ILL. REV. STAT. ch. 38, ¶ 103-5 (1985) (trial must be held within 120 days of arrest).

138. *See* Hrusk, *supra* note 119, at 65 (advocating clear and convincing evidence requirement that the accused has committed a dangerous act).

139. *Id.*

140. *See Preventive Detention Before Trial, supra* note 28, at 1502 (should enact procedures to ensure that detention is no more restrictive than necessary).

141. *Id. See also* Hrusk, *supra* note 119, at 64 (advocating maximum limit on actual period of detention).

142. ILL. REV. STAT. ch. 38, ¶ 103-5 (1985).

143. D.C. CODE ANN. § 23-1322 (1981).

144. FLA. STAT. ANN. § 907.041 (West 1985).

145. A MODEL PROVISION, *supra* note 124, § 1.8.

right to counsel because the proceeding is adversarial in nature.[146] Second, the defendant must receive advance notice of the specific allegations pending against him so that he can adequately prepare a defense.[147] Third, the defendant should have the right to an immediate appeal of the detention order.[148] Definition of a detainee's rights is necessary not only to protect due process, but also to ensure uniform proceedings.

In drafting the statute to implement the new amendment, it is imperative that the legislature set out procedural guidelines to ensure the protection of the defendant's due process rights. The legislature should base its procedures along the guidelines set forth in the ABA's model provision for preventive detention.[149] Implementation of such a procedure will ensure strict compliance with due process requirements and will limit a judge's discretion.

CONCLUSION

The recent amendment to the Illinois Constitution is part of a growing trend to address society's legitimate interest in protecting the safety of the community from a defendant who may pose a danger if released prior to trial. The Supreme Court has clearly established the validity of preventive detention. This validation greatly impacts all preventive detention provisions. Despite the Court's approval, however, the new Illinois amendment will inevitably be challenged on other grounds. The broad construction will invite much litigation. To clarify its intent, the Illinois legislature must implement a statute. This statute must be carefully drafted to incorporate due process safeguards and to prevent abuse of application. Strict adherence to the ABA "model provision" for preventive detention will assure the success of this goal.

Carolyn Nickels Offenbach

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146. Escobedo v. Illinois, 378 U.S. 478 (1964) (the right to counsel attaches at interrogation).

147. *See* Wolff v. McDonnell, 418 U.S. 539, 564 (1974) (notice is necessary for the accused to "marshall the facts in his defense"); *see also* United States v. Edwards, 430 A.2d 1321, 1339 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (advance notice of the specific allegations against the accused is a fundamental component of due process).

148. A MODEL PROVISION, *supra* note 124, § 1.10. The "model provision" provides for immediate appellate review of a detention order. *Id.* This requires immediate preparation of the court record. The Provision also allocates the costs of the appellate procedure to the state. *Id.*

149. *Id.* The legislature may also use the Federal Bail Reform Act as a model for the statute. 18 U.S.C. §§ 3141-3151 (1985).