PREVENTIVE DETENTION BEFORE TRIAL

Pretrial freedom for persons charged with crime is intended to prevent the infliction of punishment prior to conviction [1] and to permit the unhampered preparation of a defense. Detention before trial deprives a possibly innocent defendant of his liberty, often for substantial periods of time and often in conditions worse than those in which convicted prisoners are kept.[2] In addition, detention may seriously impede the defendant's efforts to prepare his case [3] and may have an effect on the outcome of the trial.[4] If the accused is released, on the other hand, he may fail to appear for trial. The bail system seeks to reconcile the defendant's interest in pretrial liberty with the need for assurance that he will return for trial by making release conditional on his providing financial security for his appearance.

The system has been criticized for not being the most effective method of assuring attendance at trial and for failing to facilitate release of indigents who are unable to post bond. A different criticism of the bail system is that it fails to provide adequate protection for society. In theory, the sole danger at which bail is aimed is the possibility of flight; present law does not authorize detention of offenders on the ground that they may, if released on bail, commit further crimes or interfere with witnesses and evidence. Although these dangerous offenders cannot be denied bail, courts currently accomplish such detention *sub rosa* by setting prohibitively high bail for defendants they consider dangerous. However, if pretrial preventive detention is desirable, this manipulation of the bail system is an unsatisfactory method of achieving it. The method fails whenever the defendant has financial resources sufficient to post the required bail, and, since the practice is not openly recognized and controlled, it offers no procedural protections for the accused. Further, this method of preventing release would be barred by some proposed reforms of the bail system. It has been suggested

[1] *Cf.* CARROLL, THROUGH THE LOOKING GLASS 226–27 (Modern Library ed.):

"For instance, now," [the Queen] . . . went on . . . "there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all." "Suppose he never commits the crime?" said Alice. "That would be all the better, wouldn't it?" the Queen said . . . .

[2] See, *e.g.*, Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 723–25, 727–29 (1958) [hereinafter cited as *New York Bail Study*]; Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1050–51, 1058–59 (1954) [hereinafter cited as *Philadelphia Bail Study*]; Goldfarb, *No Room in the Jail*, The New Republic, March 5, 1966, p. 12.

[3] See U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 70–71 (1st printing 1963) [hereinafter cited as ATT'Y GEN. REP.]; *New York Bail Study* 725; *Philadelphia Bail Study* 1054–58.

[4] Recent studies indicate that there may be a causal relation between pretrial detention and the likelihood of conviction and severity of sentence. See Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 87–88 (1963); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

that an overt system of preventive detention be established that would authorize judges to deny release in cases involving dangerous defendants, but such a proposal raises serious questions: Does preventive detention before trial violate rights guaranteed by federal and state constitutions? Is such a system necessary or wise in view of the nature of the problem and the available alternative methods of dealing with it?

I. THE BAIL SYSTEM AND BAIL REFORM

A. Criticisms of the Bail System

Dissatisfaction with the bail system is not entirely a recent development. Four decades ago one observer concluded that it "neither guarantees security to society nor safeguards the rights of the accused."[5] In the past decade, however, increasing criticism has been focused on the system.[6] One target of this criticism is the bondsman, who, it is suggested, is an unnecessary and undesirable element in the system.[7] Originally, the surety (most often a relative or friend of the accused) exercised a third-party custody and assumed a personal responsibility for producing the accused at trial, on penalty of forfeiture of his own property,[8] but this concept no longer operates as the basis of the bail system. The commercial bondsman often requires collateral from the accused;[9] therefore, the threat of forfeiture frequently does not operate to make the surety fulfill his promise to secure the accused's presence at trial. In general, the bondsman exercises little control over the accused; although he may occasionally recapture a defendant who has jumped bail, the police could do this as effectively.[10] Also, since the bondsman may refuse to write a bond for any defendant, and since he determines the amount of collateral demanded, the system has the effect of delegating to private businessmen the power to decide which defendants shall be released and how much financial security shall be required. It has been suggested that, as an alternative to the bondsman, the accused be allowed to deposit cash or collateral directly with the court in cases where financial security is required.[11]

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[5] BEELEY, THE BAIL SYSTEM IN CHICAGO 160 (1927). See also, *e.g.*, Morse & Beattie, *Survey of the Administration of Criminal Justice in Oregon*, 11 ORE. L. REV. (Supp. 1932) 100, 102–03; 21 COLUM. L. REV. 592 (1921).

[6] See, *e.g.*, FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 9–21 (1964) [hereinafter cited as FREED & WALD]; ATT'Y GEN. REP. 58–82.

[7] See, *e.g.*, Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring); GOLDFARB, RANSOM — A CRITIQUE OF THE AMERICAN BAIL SYSTEM 92–126 (1965) [hereinafter cited as GOLDFARB].

[8] See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 123 (1947); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

[9] See FREED & WALD 26–28.

[10] See Foote, *The Coming Constitutional Crisis in Bail* (pts. 1–2), 113 U. PA. L. REV. 959, 1125 at 1162–63 (1965) [hereinafter cited as Foote, *Crisis in Bail*]; *Philadelphia Bail Study* 1060–67. The bondsman is not subject to certain restrictions that may hamper the police. See Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1873); United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960). However, the desirability of allowing private parties to exercise greater powers of recapture than we are willing to permit to the police is doubtful. See Note, *Bailbondsmen and the Fugitive Accused — The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

[11] ATT'Y GEN. REP. 81–82; *New York Bail Study* 718–20, 730; Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 975 (1961).

With the burden of forfeiture on the accused rather than on the surety, the theory under which the bail system operates is that the prospective financial loss will outweigh the existing incentives toward flight. But it is questionable whether the threat of forfeiture is an effective means of deterring flight.[12] Moreover, individualized determinations of the amount of bail required are seldom attempted. Statutes commonly provide that the nature and circumstances of the offense, the weight of the evidence, and the character and financial ability of the accused should all be considered.[13] But in practice, probably because of inadequate factual information, bail is usually set solely according to the offense charged, with little consideration given to the likelihood of flight in the particular case or to the accused's financial means.[14] As a result, numerous defendants whose presence could probably be assured by release on their own recognizance are unnecessarily detained prior to trial solely because of their poverty.[15]

B. Preventive Detention Through High Bail

In some instances pretrial detention is not an unintended by-product of the bail system but a deliberate attempt to protect society by preventing release. There is a fear that some defendants, such as the "professional criminal who candidly is in 'business' all the time he is free" [16] or the pathological criminal will commit further crimes while on bail. An example of such recidivism, related at the National Bail Conference,[17] concerns an accused who — two years after his release from prison upon completion of a sentence for burglary and armed robbery — was arrested, indicted for burglary, and released on bail. Seven weeks later, and at frequent intervals thereafter, he was again arrested and indicted for burglary or similar crimes and released on bail. When he went to trial, nine and a half months after the first post-sentence arrest, he had been arrested nine times and indicted on ten counts and was free on a total of $48,500 bail.

In some cases there is a possibility that the accused may, if released, intimidate witnesses, tamper with evidence, attempt to influence jurors, or otherwise impede the investigation and prosecution of the crime. This danger is most acute in cases of organized crime: [18]

> Hovering over the prosecution's preparation of most major racketeering cases is the real and serious concern that some person essential to the case is in danger. . . . [O]ne recurring characteristic of the worst racketeers is their ability to evade conviction and avoid trials by seeing to it that the incriminating witness or evidence becomes unavailable.

[12] The threats of recapture and criminal penalties for jumping bail are probably more effective deterrents. See ILL. REV. STAT. ch. 38, § 110-2 (1965); ATT'Y GEN. REP. 78; Foote, *Crisis in Bail* 1163; *Philadelphia Bail Study* 1069, 1072-74.

[13] See, *e.g.*, FED. R. CRIM. P. 46(c).

[14] See, *e.g.*, ATT'Y GEN. REP. 62; *New York Bail Study* 712-15; *Philadelphia Bail Study* 1043.

[15] See, *e.g.*, ATT'Y GEN. REP. 66-68, 135; *New York Bail Study* 707; *Philadelphia Bail Study* 1032-33.

[16] GOLDFARB 143.

[17] NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 152-53 (1965) [hereinafter cited as NATIONAL BAIL CONFERENCE].

[18] GOLDFARB 140-41.

However, danger of harm to witnesses may also be present in cases other than those involving criminal organizations.[19]

The detention of such dangerous persons is clearly unauthorized under the present bail system. Confinement of persons accused of crime is not the purpose of bail: "On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." [20] The requirement of bail is not intended to prevent the commission of crimes between indictment and trial; [21] its sole purpose under present law is to prevent flight, and it may not be set in an amount greater than is necessary to secure attendance at trial.[22]

Despite this legal restriction on the purpose of bail, high bail is sometimes used to prevent the commission of additional crimes or the intimidation of witnesses.[23] For example, a study of bail in New York City reported that one district attorney's office recommended high bail for narcotics offenders in order to "protect society" and for those charged with receiving stolen property in order to "control fences" and reduce the number of burglaries.[24] At the National Bail Conference, a Florida circuit solicitor stated that: "In the multiple burglary ring situation, there is no question about it when the judge sets bail on a dozen burglaries, he is setting it with the idea that he is going to keep that fellow in jail until that trial is concluded." [25] Some judges, while admitting that they consider the likelihood of further crimes in setting bail, maintain that this factor is relevant to the likelihood that the defendant will appear for trial.[26] However, although the two risks are undoubtedly related in some instances, there are probably other cases in which a defendant who is likely to commit further crimes presents little risk of flight.[27]

Setting high bail to prevent commission of crimes before trial [28] is objectionable for several reasons. It attempts to achieve a result that is unauthorized under present law and that may be prohibited by the Constitution.[29] Furthermore, even if preventive detention is acceptable, the bail system is an ineffective means of achieving it. Since the bond itself, which is not forfeited unless the accused fails to appear, provides no deterrent to the commission of crime,[30] high bail is effective only

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[19] See NATIONAL BAIL CONFERENCE 153–54.

[20] Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

[21] United States v. Foster, 79 F. Supp. 422 (S.D.N.Y. 1948).

[22] Stack v. Boyle, 342 U.S. 1 (1951); People *ex rel.* Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930); People *ex rel.* Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947).

[23] See, *e.g.*, FREED & WALD 49–55; *Philadelphia Bail Study* 1038–40.

[24] *New York Bail Study* 705.

[25] NATIONAL BAIL CONFERENCE 206.

[26] See *id.* at 198, 200–02.

[27] See *id.* at 202.

[28] The general recognition that high bail is used for this purpose indicates that the practice is not infrequent. See, *e.g.*, NATIONAL BAIL CONFERENCE 201–03, 212–13; *Hearings on S. 1357, S. 646, S. 647, and S. 648 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 3, 66, 130 (1965) [hereinafter cited as *1965 Hearings*].

[29] See pp. 1498–1505 *infra*.

[30] Indeed, in some cases the need to pay bondsmen's fees may actually increase the likelihood of crime. See GOLDFARB 143; NATIONAL BAIL CONFERENCE 202.

if it operates as a denial of bail. It provides no protection against the dangerous but financially able defendant, such as the organized racketeer or the professional burglar, who can raise the high amount of bail, and it delegates to the bondsman the decision as to which dangerous offenders will be released.

In addition to discriminating between the dangerous rich and the dangerous poor, the present system provides little protection for the accused who is thought to be dangerous. He is subject to "an inevitably hurried, unscientific and unreviewable conjecture by prosecutors and magistrates about his proclivities for crime." [31] Because the preventive basis for high bail is not openly stated and because the great bulk of bail decisions are not brought before the appellate courts, the practice is at present uncontrolled. The defendant who is detained on the basis of an inaccurate estimate of his dangerous tendencies is given little recourse. It has been suggested that "our hostility towards the notion of preventive detention . . . ought not blind us to the fact that the practice is indulged in by criminal courts every day through the often unfair and often ineffective medium of excessive bail, without the candor that is needed to make it visible, controllable and susceptible to appelate [*sic*] review and constitutional testing." [32] An overt acceptance of preventive detention might eliminate these results and provide a more rational, and perhaps even a more liberal, system of pretrial release than presently exists.[33]

C. The Effect of Bail Reform

Current suggestions for reforming the bail system concern mainly the problem of the indigent accused who cannot make bail in the usual amount rather than the special problems of preventive detention. Yet these reforms may also have a substantial effect on the current practice of achieving preventive detention through high bail by making this *sub rosa* use of the bail system impossible. The first influential reform was the Vera Foundation's Manhattan Bail Project, launched in 1961, an experimental program in which indigents who presented a low risk of flight were recommended for release on recognizance.[34] In the wake of the Foundation's success, similar release projects have been inaugurated or planned in a number of other cities,[35] and increasing interest has been focused on the use of release on recognizance as a substitute for traditional bail.[36] The present practice of preventive detention will probably not be greatly affected by such release programs; a judge need not accept the recommendation for release and can continue to set high bail for dangerous offenders.

While objections to the extension of release on recognizance to

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31 FREED & WALD 55.

32 Freed, Preventing Pretrial Release — A Personal Reevaluation, October 14, 1965, at 4 (mimeo).

33 *Cf.* ATT'Y GEN. REP. 60; *1965 Hearings* 67, 70 (statement of Ronald Goldfarb).

34 See Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67 (1963).

35 See GOLDFARB 166; *1965 Hearings* 40.

36 See, *e.g.*, ATT'Y GEN. REP. 74–76; NATIONAL BAIL CONFERENCE 33–148.

"hardened criminals"[37] may succeed under these release programs, such objections may be of less avail under a broadly revised system of pretrial release, in which release without financial security is not regarded as a privileged exception to the requirement of bail. Such an approach is given by the proposed federal Bail Reform Act of 1965,[38] which recently passed the Senate. The act provides a wide range of alternatives to bail, from release on recognizance to daytime release; only if none of these methods is considered sufficient to ensure appearance at trial may financial conditions be imposed.[39] If the defendant's inability to meet any condition, including bail, results in detention, the judge must give a written opinion in which the reasons for imposing the condition are explicitly stated. Provision is made for prompt appellate review of such decisions.

The act would not inevitably eliminate detention through high bail. It permits the requirement of bail in necessary cases, and if reviewing courts were willing to accept generalized statements of the reasons for high bail or were willing to accept to a broad extent the view that risk of crime is related to risk of nonappearance, the practice of setting high bail to prevent future crimes might possibly be continued. But if the system proposed by the act is applied in accordance with its stated policy of assuring that "all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges" and if "the ends of justice" and "the public interest" to be served continue to be limited to the assurance of appearance at trial, this reform would substantially restrict the use of high bail to detain dangerous defendants except where there was also a substantial risk of flight.

If the states fail to follow legislatively this federal lead in bail reform, some such reform may be accomplished by judicial rulings on the constitutionality of the present operation of the bail system. Although

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[37] NATIONAL BAIL CONFERENCE 162.

[38] S. 1357, 89th Cong., 1st Sess. (1965).

[39] The act provides that any person charged with a noncapital offense shall be released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond unless such release will not reasonably assure the accused's appearance for trial. In that case the judicial officer shall impose the first condition of release from the following list which will reasonably assure the appearance of the accused:

> (1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) place the person under the supervision of a probation officer;
>
> (3) place restrictions on the travel, association or place of abode of the person during the period of release;
>
> (4) require the person to return to custody after daylight hours on designated conditions;
>
> (5) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> (6) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
>
> (7) impose any other condition deemed reasonably necessary to assure appearance as required.

S. REP. NO. 750, 89th Cong., 1st Sess. 2 (1965). Further changes may well be made in the precise provisions of the proposed act before it is finally enacted into law.

"excessive bail" is prohibited by the eighth amendment, courts have said that bail in an amount greater than the defendant can raise is not necessarily excessive; the accused is entitled only to the opportunity to make bail in a reasonable amount, not to such bail as he can provide.[40] It has been argued, however, that the bail system's detention of indigents does violate the eighth amendment, the due process clause, and the equal protection clause: [41] the prohibition of excessive bail must be construed in such a way as not automatically to foreclose for indigents the right to pretrial freedom; bail even in the usual amount should be deemed excessive if the appearance of the accused could be assured by a lower amount which he could afford. An indigent detained in such circumstances, it is suggested, is denied the fundamental fairness guaranteed by due process because he is being punished before trial and is denied the equal protection of the laws since his pretrial freedom is restricted solely on account of his poverty. Application to the bail field of the principle of *Griffin v. Illinois*,[42] in which the Supreme Court held that an indigent could not be deprived of appellate review by a requirement that the appellant purchase and submit a transcript, is urged. Support for this argument is provided by the dictum of Mr. Justice Douglas that "no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on personal recognizance where other relevant factors make it reasonable to believe that he will comply with the orders of the court." [43]

Whether the eighth amendment bail provision is incorporated in the due process clause of the fourteenth amendment has not been authoritatively decided. The Supreme Court's decision in *Robinson v. California* [44] incorporating the cruel and unusual punishment clause partially overruled earlier cases holding that the eighth amendment did not apply to the states.[45] Recent cases, in dicta and without authority, have assumed incorporation of the bail clause.[46] In addition, almost all state constitutions contain prohibitions of excessive bail,[47] and a majority also provide a right to bail in noncapital cases.[48] These provisions might also be interpreted to prohibit the financial discrimination of the present bail system. A ruling prohibiting the unnecessary detention of indigents would not change the constitutional status of preventive detention through high bail, which has already been held to violate the eighth amendment.[49] But it might, to the extent that it generally required release, make preventive detention more difficult to disguise. Whether bail reform comes about by legislative or judicial

[40] See, *e.g.*, White v. United States, 330 F.2d 811 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); *Ex parte* Malley, 50 Nev. 248, 256 Pac. 512 (1927).

[41] See Foote, *Crisis in Bail* 1134–64.

[42] 351 U.S. 12 (1956).

[43] Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961). See also Bandy v. United States, 81 Sup. Ct. 197 (Douglas, Circuit Justice, 1960).

[44] 370 U.S. 660 (1962).

[45] *E.g.*, Collins v. Johnston, 237 U.S. 502 (1915).

[46] See Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963).

[47] See Foote, *Foreword: Comment on The New York Bail Study*, 106 U. PA. L. REV. 685, 689 n.16 (1958).

[48] See FREED & WALD 2–3 n.8.

[49] Stack v. Boyle, 342 U.S. 1 (1951).

action, such reform will probably have a substantial effect in restricting the present method of accomplishing preventive detention. This result will necessitate a reevaluation of the need for preventive detention and the advisability of establishing a system dealing directly with that problem.

D. The Need For Preventive Detention

It may be that the present distortion of the purpose of bail represents a necessary response to a substantial threat to the safety of society. Detention to prevent danger to society is accepted in many other legal systems [50] and was proposed for our own long ago.[51] Although the commission of crimes by defendants free on bail has been called "one of the major problems in the war against crime," [52] there is only fragmentary information concerning the number of such crimes and no information concerning whether they could have been predicted or prevented. An informal study by one district attorney's office was said to have found about thirty arrests for violent crimes by bailed defendants in a period of a few months,[53] but it is not clear what proportion of released defendants this represents or whether these offenders could have been identified in advance.

Statistics provided by release-on-recognizance projects show that few of the defendants are rearrested while on pretrial release. In St. Louis, four defendants out of 170 released were rearrested; [54] in Des Moines, two out of 160, one for attempted burglary and one for forgery.[55] Of the over 3,200 accused persons released on the recommendation of the Vera Foundation, about twenty, or less than one per cent, are known to have been rearrested while awaiting trial.[56] Under the District of Columbia Bail Project, 1,150 defendants have been released, of whom less than two and a half per cent have been rearrested on serious charges; an additional seven per cent have been rearrested on less serious charges, including traffic and domestic relations offenses.[57] Furthermore, these figures include all subsequent arrests, not just convictions; in a significant number of cases such subsequent charges do not result in conviction.[58]

While the standards for release which these programs impose may exclude some of those defendants most likely to commit further

[50] See NATIONAL BAIL CONFERENCE 319–58; *Symposium — Conditional Release Pending Trial*, 108 U. PA. L. REV. 290 (1960).

[51] See ALI CODE OF CRIMINAL PROCEDURE § 70 (1931); BEELY, THE BAIL SYSTEM IN CHICAGO 166 (1927).

[52] 111 CONG. REC. 26,137 (daily ed. Oct. 15, 1965) (remarks of Senator Tydings).

[53] GOLDFARB 133.

[54] NATIONAL BAIL CONFERENCE 183.

[55] *Ibid.*

[56] *Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcommittee on Constitutional Rights of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 117 (1964).

[57] McCarthy, *Practical Results of Bail Reform*, Federal Probation, Sept. 1965, pp. 10, 12. See also McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L.J. 675, 715–18 (1965).

[58] Thirty per cent of the subsequent charges against defendants released under the District of Columbia project resulted in acquittals or dismissals. McCarthy, *Practical Results of Bail Reform*, Federal Probation, Sept. 1965, pp. 10, 12.

crimes,[59] there are indications that the rearrest of defendants released on bail is also infrequent. A 1962 sampling conducted by the Metropolitan Police Department of Washington, D.C., showed that only sixteen of 2,192 bailed defendants committed offenses while at liberty awaiting trial, and a similar survey by the Vera Foundation is reported to have revealed an almost identical proportion.[60] Several statements made at the National Bail Conference indicate that the number of bailed defendants who are rearrested is not great, and that the vast majority of such further arrests are not for violent crimes. For example, one participant estimated that, out of a substantial number of defendants that he deals with, less than one-tenth of one per cent commit other offenses while on bail and that such offenses usually involve gambling or liquor violations.[61] A district judge and the district attorney for the Eastern District of Michigan agreed that, with the exception of alcohol tax and gambling cases, the subsequent arrest of defendants on bail is extremely rare.[62]

While these figures are too fragmentary to be conclusive, it would seem that if the incidence of violent crimes committed between arrest and trial is actually as low as they suggest, the magnitude of the problem is not great. Although a few cases will present serious problems, it might be feasible to deal with these problems by methods other than preventive detention.[63] However, it may be that such figures are substantially influenced by the prevalent practice of detaining those who would be the most serious risks and that the problem will increase as bail reform reduces the scope of this practice. The gravity of the problem would then depend on the extent to which preventive detention is currently practiced and on whether the officials who indulge in this practice are correct in their estimates of danger. It may well be, however, that the potential harm is actually not as great as anticipated and that, as has happened with other reforms in the criminal law,[64] dire predictions will not be fulfilled.

Greater exploration of the specific need for detention of dangerous offenders is clearly necessary before the scope of the problem can be defined on a firmer basis than conjecture and personal impression.[65] As yet no substantial information is available as to the proportion of persons released, on bond and on recognizance, who are rearrested before trial, how many of these offenders are convicted of one or both crimes, or how many of these crimes are serious felonies or crimes of violence. Also needed is a comparison of the information concerning these of-

[59] For example, the District of Columbia Project excluded most defendants who were free on bail when arrested or who had previously been convicted one or more times of the same felony or of two or more other felonies. See McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L.J. 675, 710–11 (1965).

[60] NATIONAL BAIL CONFERENCE 172.

[61] *Id.* at 180.

[62] *Id.* at 182–83.

[63] See pp. 1508–09 *infra*.

[64] See Foote, *Crisis in Bail* 1164; *Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 104–05 (1964).

[65] See *1965 Hearings* 202, 206.

fenders that might have been available at the original bail hearing with that for other defendants, in order to determine the possible existence of reliable criteria for identifying potential recidivists and to ascertain the number of other defendants who, although they did not commit crimes on bail, would have been detained under these criteria. It would, in addition, be useful to know whether the incidence of repeated crime is higher among those defendants who, although identified as dangerous, evaded detention by their ability to post a high bond than among those defendants released on the usual amount of bail. The suggestion has been made that a test system could be set up to monitor experience with pretrial defendants who, under present law, are entitled to release on bail but who, if constitutional and statutory authority existed, might be detained in the interests of community safety.[66] Several studies are now seeking to assemble empirical data and test the predictability of crimes committed by defendants on pretrial release,[67] but until such information is available it will be difficult to make an enlightened judgment on whether the magnitude of the problem and the probability of identifying those who will commit such crimes are sufficiently great to warrant the proposed remedy of preventive detention.

II. Preventive Detention and the Constitution

Since pretrial confinement of dangerous offenders may not lawfully be accomplished within the present bail system by setting high bail,[68] such detention, if necessary, should be achieved through the enactment of a statutory scheme that expressly authorizes the denial of bail in cases where release would endanger the community. Any such system, however, would be open to obvious constitutional questions. The eighth amendment's bail provision may be interpreted to guarantee the right to bail in noncapital cases. Even if there is no implied constitutional right to bail, or if that right does not extend to all noncapital cases, pretrial detention based on predictions of dangerous acts may be a denial of due process.

A. The Constitutional Right to Bail

The eighth amendment states that "excessive bail shall not be required" but does not explicitly provide a right to bail. The Supreme Court has never ruled on whether this clause implies a right to bail in criminal cases; since federal law has always provided that right by statute,[69] the Court has never reached the constitutional question. Some observers[70] have interpreted the Court's decision in *Carlson v. Landon*[71] to mean that there is no such constitutional right. In that case, the Court upheld the denial of bail to alien Communists pending deportation proceedings. After stating that the eighth amendment does

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[66] *Id.* at 206.
[67] *Id.* at 58, 202.
[68] See p. 1492 *supra.*
[69] See Judiciary Act § 33, 1 Stat. 91 (1789); Fed. R. Crim. P. 46(a).
[70] See, *e.g.*, 111 Cong. Rec. 3993 (daily ed. March 4, 1965) (remarks of Senator Ervin).
[71] 342 U.S. 524 (1952) (5–4 decision).

not apply to such civil proceedings, the court went on to say that the English Bill of Rights Act, from which the eighth amendment provision was adopted, was never thought to provide a right to bail in all cases, but merely to provide "that bail shall not be excessive in those cases where it is proper to grant bail." [72] As "the very language of the Amendment fails to say that all arrests must be bailable," [73] the legislature may define the class of cases in which bail shall be allowed.

But these brief remarks do not resolve conclusively the question of the right to bail in criminal cases. The Court in *Carlson* was dealing with a civil proceeding and thus, although its language may imply that a similar interpretation would be applied in a criminal proceeding, the actual holding does not directly concern criminal cases. The Court did emphasize that Congress has exceptionally broad powers over the deportation of aliens. Also, this opinion seems to conflict with the spirit of *Stack v. Boyle* [74] — decided the same term — which, although basing its requirement that bail be granted on a statutory rather than a constitutional right, recognized the traditional importance of the right to bail in criminal cases. Furthermore, *Carlson* was a case dealing with the rights of Communist aliens during the witch-hunt days of the early 1950's and was a 5-to-4 decision with a vigorous dissent. For these reasons, it is not unlikely that the Court might now decline to follow the *Carlson* interpretation in criminal proceedings. Nevertheless, other courts have said, in ruling on bail in state criminal cases, that a constitutional prohibition of excessive bail does not, in itself, establish a right to bail.[75]

It has been contended that the interpretation expounded in *Carlson v. Landon* would nullify the protection of the eighth amendment bail clause, since the underlying right that the provision was intended to implement would be subject to restriction by the legislature.[76] The rights guaranteed by the American Constitution were to be secure against legislative as well as judicial abridgment. It would be anomalous to assume that the eighth amendment, while prohibiting the *de facto* denial of release through the imposition of excessive bail, leaves the way open for legislative elimination of the right to bail. Thus, in order to give effect to what must have been the framers' intention, it should be concluded that the excessive bail prohibition guarantees by implication some right to bail. Some courts have indicated agreement with this conclusion.[77] In one recent case,[78] the District Court for the District

[72] *Id.* at 545.
[73] *Id.* at 546.
[74] 342 U.S. 1 (1951).
[75] See, *e.g.*, Mastrian v. Hedman, 326 F.2d 708, 710–11 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964) (dictum) (eighth amendment applies to states, but does not prohibit states from making certain offenses nonbailable); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498, 39 N.Y.S.2d 526 (1943) (excessive bail clause of New York constitution); Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906) (dictum) (excessive bail clause of Georgia constitution).
[76] See Carlson v. Landon, 342 U.S. 524, 556–57 (1952) (Black, J., dissenting); Foote, *Crisis in Bail* 965–89.
[77] See, *e.g.*, United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum) (Butler, Circuit Justice); United States v. Fiala, 102 F. Supp. 899 (W.D. Wash. 1951) (dictum). A constitutional right to bail might also be found in the due process clause. *Cf.* Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954) (dictum).
[78] Trimble v. Stone, 187 F. Supp 483 (D.D.C. 1960).

of Columbia ruled, despite the absence of a statutory provision, that bail must be set in juvenile cases; the court held, seemingly on the basis of the Supreme Court decision in *Stack v. Boyle*,[79] that the eighth amendment secures a right to bail in noncapital cases. But this conclusion, whether correct or not, is not supported by the holding in *Stack v. Boyle*. That case held that, where a right to bail exists, bail in an amount greater than necessary to assure appearance is excessive under the eighth amendment, but the right to bail protected in *Stack* was a statutory, not a constitutional, right.

Those who find an implicit right to bail in the eighth amendment usually assume, without discussing its extent, that it is an unconditional right to bail before trial in noncapital cases,[80] as was expressly provided by the original Judiciary Act [81] and by most early state provisions.[82] However, the scope of that right need not be so inflexibly defined. Even the explicit guarantee of the right to free speech contained in the first amendment is subject to restriction when required by public necessity; [83] the undefined right to bail implicit in the eighth amendment might also be subject to such restriction. Unlike the jury trial provision, the excessive bail clause contains no language indicating that the right should be strictly defined according to the extent of that right at the time the Constitution was adopted. The express limitations of the bail right to noncapital cases, as found in many of the statutory and state constitutional provisions, were apparently based on the assumption that there was a greater risk of flight when the defendant faced a possible death penalty.[84] However, there may be other cases, as where a substantial prison sentence may be imposed, in which the likelihood of flight is sufficient to justify a denial of bail. Furthermore, public interests other than flight may warrant detention. Originally there may have been little need to consider the danger of repeated criminal conduct by persons on bail, since at that time most dangerous felonies were capital crimes and thus not bailable by right. But as states limit or abolish the death penalty, for reasons unrelated to the bail right, it may become necessary to reconsider the range of cases in which release may be denied. Whether the offense is a capital crime should not be the only factor considered in determining the public interest involved. However, this reasoning is precluded where the right to bail in noncapital cases is expressly provided by the state constitution. In those states, denial of bail in a noncapital case for preventive purposes, no matter how great the dangers posed by release, would be permissible only by constitutional amendment.[85]

B. Preventive Detention and Due Process

Even if release on bail is not required in all noncapital cases, pretrial

[79] 342 U.S. 1 (1951).

[80] See, *e.g.*, United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) (dictum) (Butler, Circuit Justice); Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960).

[81] Judiciary Act § 33, 1 Stat. 91 (1789).

[82] See Foote, *Crisis in Bail* 975–78.

[83] See, *e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

[84] See State v. Konigsberg, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960).

[85] *Cf. Ex parte* Ball, 106 Kan. 536, 188 Pac. 424 (1920).

detention must still satisfy the requirements of due process. Some courts have indicated that the presumption of innocence is the basis for pretrial liberty.[86] Preventive detention, which is often defended on the grounds that the accused may "repeat" his crime or commit "other crimes" while on bail, appears to be based on an assumption that he has committed the crime charged, and thus it might be said to violate that presumption. But the strict presumption of innocence is merely a rule of evidence that comes into operation at the time of trial; [87] it does not require that all defendants be treated as though in fact innocent during the period prior to trial.[88] The "presumption of innocence" on which pretrial freedom is based — a notion distinct from that which relates to the burden of proof at trial — is not a factual presumption but an expression of the belief that there should be no deprivation of liberty without due process of law.

Due process does not require that there be a trial and conviction before any interference with liberty is permitted. The existence of probable cause justifies such interference as is necessary for arrest and indictment, and denial of pretrial liberty is accepted in some cases in which there are strong reasons for requiring pretrial detention, as in capital cases or when the accused is found incompetent to stand trial. The question remains whether the danger of future crimes or of interference with witnesses may be the basis of pretrial detention, even if the prediction is based on a full hearing with adequate procedural safeguards. Although these dangers cannot be considered in setting the amount of bail, they might constitute a proper basis for the denial of bail.[89] There have been suggestions, however, that the prediction of future criminal conduct is an improper ground for denying release, even in areas in which the grant of bail is discretionary. There is, for example, no right to bail pending appeal after conviction, yet Mr. Justice Jackson, in reversing a discretionary denial of bail pending appeal based on a fear that the defendants would commit future harmful acts, refused to consider that danger, stating that: "Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it . . . ." [90] But the more general view is that, although bail should normally be granted pending appeal, it may be denied if release would jeopardize the safety of the community.[91] In capital cases, the other area of the criminal law in which bail may

[86] See Stack v. Boyle, 342 U.S. 1, 4 (1951); State v. Konigsberg, 33 N.J. 367, 372–73, 164 A.2d 740, 743 (1960).

[87] See NATIONAL BAIL CONFERENCE 177.

[88] See Smith, *Bail Before Trial: Reflections of a Scottish Lawyer*, 108 U. PA. L. REV. 305, 309 (1960).

[89] *Cf.* Hairston v. United States, 343 F.2d 313, 316 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 86 Sup. Ct. 110 (1965).

[90] Williamson v. United States, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950). In *Williamson*, however, it was questionable whether the future acts desired to be prevented, involving the publication of the *Daily Worker*, could constitutionally be proscribed.

[91] See, *e.g.*, Rehman v. California, 85 Sup. Ct. 8 (Douglas, Circuit Justice, 1964); Leigh v. United States, 82 Sup. Ct. 994, 996 (Warren, Circuit Justice, 1962) (dictum); Note, *Considerations Involved in the Granting of Bail Pending Appeal in the Federal Courts*, 25 GEO. WASH. L. REV. 693 (1957).

presently be denied at the judge's discretion, it also seems to be accepted that danger to the community is a permissible ground for denying bail.[92] Also, in deportation and other civil proceedings, where no right to bail exists, fear of future dangerous conduct may be the basis for a denial of release.[93]

Thus, the view that prior restraint for an anticipated crime necessarily violates due process [94] is generally rejected in those areas where the grant of bail is presently a matter of discretion rather than of right; in such cases detention may be predicated on the need to prevent future crimes. However, those areas are distinguishable from the pretrial period in noncapital cases. The defendant pursuing an appeal, unlike the accused who has not yet been tried, stands convicted of the crime, even though the conviction may later be reversed. In capital cases, the judge, because he traditionally has been allowed almost complete discretion whether to grant bail, has the power to consider whatever factors he deems relevant. And civil proceedings lack many of the protections required by the criminal law. It may be that the "preventive" basis for detention should not be extended to noncapital crimes before trial, as to which there has customarily been a right to bail with risk of flight the only traditional ground for detention.

It has been suggested that the public interest in protecting persons and property is as great as the interest in protecting the administration of justice and that it is unreasonable to say that only the latter may be protected through pretrial detention.[95] The distinction between denial of bail to prevent flight and denial to prevent other criminal conduct, it is argued, is misleading: both involve detention before conviction based on predictions as to future unlawful conduct; both equally merit the description "preventive detention," and both are in the same position with respect to due process.[96] There is, however, a significant difference between these two purposes. The public interest in the prevention of dangerous acts is great, but there is an established method of protection against such acts: the threat of sanctions imposed through the criminal law. We have made the basic decision that crimes should normally be deterred by the threat of subsequent punishment, not by prior confinement. Since this system cannot operate if the threatened sanctions are not effectively imposed, pretrial detention may sometimes be necessary to prevent flight and so preserve the integrity of the system. Also, detention to prevent intimidation of witnesses or hampering investigation can be justified as an extension of the traditional concept of detention to ensure that a trial will be held.[97] This view receives some support from the principle that a court has inherent power to revoke bail during trial if the defendant's threatening of witnesses jeopardizes

[92] See proposed amendment of 18 U.S.C. § 3148, in S. 1357, 89th Cong., 1st Sess. § 3(a) (1965); *1965 Hearings* 26.

[93] See Carlson v. Landon, 342 U.S. 524 (1952).

[94] See NATIONAL BAIL CONFERENCE 176.

[95] See Freed, Preventing Pretrial Release — A Personal Reevaluation, October 14, 1965 (mimeo).

[96] *Ibid.*

[97] See Mastrian v. Hedman, 326 F.2d 708, 712 (8th Cir.) (dictum), *cert. denied*, 376 U.S. 965 (1964); NATIONAL BAIL CONFERENCE 178.

the fair administration of justice.[98] But the fact that detention may be required to ensure the orderly functioning of the usual criminal process does not justify the use of detention as a substitute for that process. Pretrial detention to prevent future crimes serves to displace rather than to preserve the established system of justice.

Furthermore, the risk of repeated crime, unlike the risk of flight or of interference with witnesses, is not inherently limited to the pretrial period. If detention to prevent the commission of crimes is desirable, there seems little logical reason for confining it to persons charged but not yet convicted.[99] The existence of probable cause may be a sufficient basis for subjecting the accused to detention which is not imposed on those not charged with crimes. However, it would not appear to justify a distinction between an accused and other dangerous offenders with histories of past criminal activity (such as a convicted prisoner who has completed his sentence) who may present an equal threat of future crimes. Denial of bail merely presents a convenient method for accomplishing such confinement. But if detention of dangerous criminals is to be considered, the merits of such a system might be evaluated more clearly if they were considered apart from the bail context.

Historical support for the concept of preventive detention is claimed to be provided by the peace bond.[100] Under this procedure a justice of the peace could require those who threatened to commit a crime, or those "not of good fame," to post a bond for good behavior. If the defendant committed the threatened crime or misbehaved, the bond was forfeited; if he was unable to post the bond, he was incarcerated for the term of the bond. The peace bond was adopted in the United States as part of the common law heritage but, in general, it has not been frequently used.[101] Whether the detention of a defendant unable to post the bond is constitutional is open to serious doubt;[102] in addition to the possible violations of due process that relate to preventive detention in general, the peace bond also raises the same questions of financial discrimination and equal protection that are raised by the present bail system. Also, in theory, detention is not the purpose of the peace bond; its aim is to prevent crimes through the threat of forfeiture, with deten-

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[98] Carbo v. United States, 288 F.2d 868 (9th Cir. 1961); United States v. Rice, 192 Fed. 720 (C.C.S.D.N.Y. 1911).

[99] Detention to prevent flight is not restricted to persons charged with crime. Although usually imposed only on the accused, it may equally be imposed through the use of the material witness bond on others whose presence at trial is necessary.

[100] See GOLDFARB 128–30. See generally Note, *"Preventive Justice" — Bonds to Keep the Peace and for Good Behavior*, 88 U. PA. L. REV. 331 (1940).

[101] See GOLDFARB 130. *But see* Commonwealth v. Franklin, 172 Pa. Super. 152, 153, 92 A.2d 272, 274 (1952). Occasionally this device is resurrected for some particular purpose, as in the South to deter civil rights demonstrators. GOLDFARB 81–82.

[102] The requirement that a defendant, after being acquitted by a jury, post a bond for good behavior has been held to be a deprivation of due process. Commonwealth v. Franklin, 172 Pa. Super. 152, 155–56, 92 A.2d 272, 274–75 (1952). Decisions upholding the requirement of a peace bond against constitutional attack have rested on the determination that these proceedings are not criminal and do not require such criminal procedures as trial by jury. *E.g.*, *Ex parte* Way, 56 Cal. App. 2d 814, 133 P.2d 637 (Dist. Ct. App. 1943); *Ex parte* Johnson, 391 S.W.2d 407 (Tex. Crim. App. 1965). However, these cases did not discuss the due process and equal protection questions.

tion serving only as the means to enforce the bond. For these reasons, the peace bond appears to be most appropriate when it can be used to provide deterrence without confinement, as in dealing with minor domestic or neighborhood complaints.[103] Although the bond does provide some historical basis for the notion of preventive detention, it seems a weak support for a general system of detaining dangerous offenders before trial.

There are other areas of the law in which detention for preventive purposes is sanctioned. A prediction of future dangerous conduct forms the basis for confinement in a number of civil proceedings, such as commitment of the mentally ill,[104] of sexual psychopaths, [105] and of defective delinquents.[106] Commitment statutes for sexual psychopaths and defective delinquents are designed to protect society by confining for an indeterminate period certain offenders who have shown a course of habitual misconduct, and to provide these offenders with medical treatment for their cure. Although most such statutes require that the defendant be convicted of a crime before he may be committed, some states provide that anyone charged with a criminal offense may be committed.[107] The constitutionality of these statutes has been upheld against attack on equal protection grounds, the courts holding that the legislature could define a class presenting a special danger if the classification were based on reasonable and substantial distinctions and were in accord with the aims sought to be achieved; that the legislature does not extend the detention to cover all the classes which it might include does not destroy the validity of the statute, since "the legislature is free to recognize degrees of harm, and . . . [to] confine its restrictions to those classes of cases where the need is deemed to be clearest." [108]

If the legislature determines that the danger of repeated criminal acts is greater in the case of defendants awaiting trial than in the case of other potential offenders, an analogous civil proceeding to provide preventive detention before trial [109] might be acceptable. But the theory of detention in the other proceedings is that, because of some mental or emotional abnormality, these people are not responsive to the deterrence provided by the threat of criminal sanctions and cannot be dealt with through the usual process of the criminal law. It is not claimed that persons who would be detained before trial are outside of, and should not be treated through, the normal criminal system; except for the pretrial period they are to be dealt with by the standard criminal process. Also, most of these civil proceedings have a secondary purpose of treatment and cure;[110] a person may be confined on the basis of

[103] See NATIONAL BAIL CONFERENCE 216.

[104] See Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

[105] See LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 298–329 (1961).

[106] See MD. ANN. CODE art. 31B (1957).

[107] See Comment, *The Validity of the Segregation of the Sexual Psychopath Under the Law*, 26 OHIO ST. L.J. 640, 646 (1965).

[108] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940). See also Eggleston v. State, 209 Md. 504, 121 A.2d 698 (1956).

[109] See GOLDFARB 245–47.

[110] See, *e.g.*, *In re* Moulton, 96 N.H. 370, 77 A.2d 26 (1950).

danger even though he is not treatable,[111] but the general scheme of these statutes is to provide treatment as well as confinement. The detention is for an indefinite period, to last until the danger or mental defect that warranted the confinement no longer exists. The lack of these basic features of a civil commitment might well result in the classification of pretrial detention as an adjunct to the criminal proceeding, even if it is denominated a civil proceeding. However, any system of pretrial preventive detention must depend first on a policy judgment by the legislature, and it is clear that the constitutional question cannot be finally determined in the abstract on a legislative policy judgment that has never been made.

III. Preventive Detention and Its Alternatives

A. Standards for Detention

If the Constitution does permit pretrial detention of those likely to obstruct justice or commit crimes while on bail, the legislature must determine which particular classes of defendants present a sufficient danger to warrant confinement and must provide standards to ensure that detention is limited to those classes. One great danger of a preventive detention system is that, once established, it might not be restricted to the cases presenting the clear and substantial danger which required its establishment. If the system is originally justified by the need to detain "those who have a history of habitual or compulsive law breaking while on bail or parole," [112] the standard for detention should not be so broad as "good cause shown to the justice or the court" [113] or an undefined likelihood of dangerous acts, but should require that such a history be shown.[114]

The legislature should determine and explicitly state narrow limits within which the judge may exercise his discretion to imprison defendants on the basis of predicted danger. For cases involving a fear of future criminal acts, the legislature should specify the offenses considered sufficiently serious to warrant detention. These offenses should probably be limited to serious felonies and crimes of violence; certainly for many minor crimes the potential harm is not sufficiently significant to justify the use of preventive detention, even where the probability of repetition appears to be great. Also, the legislature should determine, on the basis of some empirical evidence, the class of cases in which there is a great likelihood of future criminal acts. For example, detention might be restricted to defendants who have made specific threats of harm, who have a certain number of prior convictions for serious crimes,

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[111] See, *e.g.*, Barnes v. Director, Patuxent Institution, 240 Md. 32, 212 A.2d 465 (1965).

[112] National Bail Conference 166.

[113] *Ibid.*

[114] In upholding the Minnesota sexual psychopath law, the Supreme Court noted that the act, as construed by the state court, required proof of a "habitual course of misconduct in sexual matters" and called for "evidence of past conduct pointing to probable consequences . . . as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 274 (1940).

who have been convicted of crimes committed while on bail or parole, or who are rearrested while on bail on another charge; in the last case, some previous conviction might be required so that no accused would be detained as a dangerous criminal merely on the basis of two unproved accusations. The precise requirements would depend, of course, on the results of factual studies. But some minimum objective requirements should be established so that detention will be allowed only where some past act of the accused places him in a class for which an unusual degree of danger has been shown to exist and so that no defendant will be confined merely upon a judge's supposition as to dangerous tendencies.

The offense charged and the defendant's past criminal activity are not relevant where the harm feared is interference with witnesses or evidence. For these cases, the legislature should specify the type of interference which is to be prevented and should set standards for a finding of likelihood that the accused will attempt to obstruct justice. Confinement on this basis might be limited to defendants who have committed such acts in the past or who have made specific threats or attempts.

Defendants meeting the minimum requirements should not, of course, be detained automatically; the judge should be required to find that, in the particular case, there is a substantial probability that the defendant will, if released, commit some specified type of dangerous act. Also, it might be wise to limit detention to cases "where the proof is evident or the presumption great," a restriction provided by numerous state constitutions on the denial of bail in capital cases.[115]

It would be impossible to prescribe definite criteria that would cover all dangerous offenders; limitations on judicial discretion to deny bail will result in the release of some defendants who will commit crimes while on bail. However, in the absence of explicit criteria, the judge is given too much leeway in deciding which offenders are so dangerous as to require confinement and too little guidance as to what the legislature considers a sufficient danger. Where the legislature authorizes a deprivation of liberty on the basis of its determination that certain defendants are too dangerous to be released, it ought to spell out clearly the circumstances in which detention may be ordered.

It is doubtful whether judges, given a wide discretion, would be able to identify potential repeaters accurately; our ability to predict future behavior is simply too limited. Although some studies have shown fairly accurate predictions of juvenile delinquency and of criminal behavior on parole, they indicate that reasonable success can be expected only through the use of elaborate statistical methods or extensive examination.[116] The necessary information will usually not be available at the bail hearing, nor can it be speedily obtained; for example, the presentence report, which contains the kind of information that would be required for a preventive detention hearing, ordinarily takes at least two weeks to prepare.[117] Moreover, while it may be possible to predict ac-

[115] See Note, *Bail: The Need for Reconsideration*, 59 Nw. U.L. Rev. 678, 694 (1964).

[116] See, *e.g.*, Glueck & Glueck, Unravelling Juvenile Delinquency 75–76 (1950); Monachesi, *American Studies in the Prediction of Recidivism*, 41 J. Crim. L. & C. 268 (1950); *New York Bail Study* 706.

[117] Foote, *Crisis in Bail* 1175. Also, as such reports often rely on confidential

curately whether a person will commit a crime at some time in the future, it would appear much more difficult to predict whether he will commit a crime within the next month or two. The difficulty of predicting an event which occurs so infrequently, and the tendency to overpredict dangerousness, have led some observers to the conclusion that the fewest mistakes will be made by releasing all defendants.[118] Since the difficulties of accurate prediction are so great, it seems that detention of most offenders who actually would commit new crimes can be achieved only if the judge also detains an even greater number of defendants who in fact would not. That broad discretion to detain dangerous offenders would lead to confinement in a great number of cases in which no subsequent crime would have been committed is suggested to some extent by experience in countries which do allow discretionary detention for preventive purposes.[119] In England, for example, forty per cent of all persons who are indicted are detained prior to trial,[120] although the number of them who would have committed serious crimes, if we assume that the fragmentary American statistics give a reasonable indication, is probably no more than five or ten per cent. Thus, given the current state of behavioral prediction, it would seem preferable not to attempt to detain all dangerous offenders by allowing the trial judge to exercise broad discretion, but to restrict that discretion to identified classes in which the likelihood of dangerous acts has been shown to be particularly great.

A broad standard would also provide a shield for some of the abuses which exist under the present system, such as detention to give the accused a "taste of jail," to punish or make an example of him,[121] to induce cooperation with the prosecution,[122] or to discourage civil rights demonstrators.[123] For example, if bail may be denied in "cases where recidivism . . . is reasonably anticipated,"[124] a judge could easily disguise any prohibited purposes of detention. Admittedly, some abuses can be prevented if the reasons for detention must be given and are subject to appellate review. However, as such decisions are not easily susceptible to review, appellate courts are likely to give a great deal of weight to the judge's decision in determining the degree of danger and are likely to uphold that decision if there is no clear abuse of discretion.[125] The difficulty of ensuring that decisions are supported by evidence and made on an individual basis is suggested by the experience in Norway, where the originally strict rules requiring a statement of reasons for detention have been relaxed to the point where a general

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information from anonymous sources, they might not be admissible at the hearing on pretrial detention.

118 See *id.* at 1169–74.

119 *Cf. 1965 Hearings* 202; Paulsen, *Pre-trial Release in the United States*, 66 COLUM. L. REV. 109, 125 (1966).

120 NATIONAL BAIL CONFERENCE 338.

121 See *id.* at 192; *New York Bail Study* 705; *Philadelphia Bail Study* 1039.

122 See People *ex rel.* Rubenstein v. Warden of City Prison, 279 App. Div. 47, 107 N.Y.S.2d 948 (1951) (per curiam); ATT'Y GEN. REP. 83 n.17.

123 GOLDFARB 59–81.

124 *Id.* at 246.

125 *Cf., e.g.*, Ward v. United States, 76 Sup. Ct. 1063 (Frankfurter, Circuit Justice, 1956).

statement or a reference to the relevant provisions of the act will suffice.[126]

Two types of safeguards should accompany any system of pretrial preventive detention: procedures to ensure that its application is limited to those cases in which it is required and arrangements to provide that any detention imposed is no more restrictive than is necessary.[127] Procedural safeguards should be similar to those proposed in the Bail Reform Act,[128] including a hearing (with right to counsel) and provisions for speedy review. The second objective would be accomplished first by ensuring a speedy trial; by giving the case priority on the court calendar it should be possible to have the trial shortly after the time necessary to allow for preparation of the prosecution and defense. There might also be a specific limit on the length of time for which such detention could be imposed.[129] Time spent in custody prior to trial should be credited against any sentence imposed, and consideration should be given to providing compensation for time spent in custody prior to trial if the accused is not subsequently convicted. Also, the conditions of detention should not unnecessarily interfere with the preparation of a defense; restrictions on correspondence and consultation with counsel should be eliminated, with only reasonable limitations on phone calls and visitors.

B. Alternatives to Detention

Even if adequate procedures are provided, the basic difficulties of prediction and of providing definite standards remain. Recognition of these difficulties should cause consideration to be given to alternative solutions; currently available procedures suggest some methods which might be effective in dealing with the problem. When the fear is of further criminal conduct or violent acts, one obvious alternative would be to provide a speedy trial. Frequently, the cases in which the accused commits crimes while on bail are those cases in which there is a long period between indictment and trial.[130] Shortening the period before trial could reduce substantially the dangers involved in releasing the professional or habitual criminal. For those defendants regarded as pathological criminals, civil commitment may be available. When there is fear of danger to a particular person, police protection could be provided. In addition, the types of conditional and supervised release provided by the Bail Reform Act for cases where there is a fear of flight may also be appropriate where there is a fear of crime: supervision by a parole officer, release into the custody of some responsible third person, restrictions on travel and association, and perhaps daytime release might reduce the risk of crime. While there may be some constitutional limitations

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[126] See Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336, 340 (1960).

[127] See suggested procedures in NATIONAL BAIL CONFERENCE xxx (Interim Report); *1965 Hearings* 177.

[128] S. 1357, 89th Cong., 1st Sess. (1965).

[129] See *1965 Hearings* 177; Vouin, *Provisional Release in French Penal Law*, 108 U. PA. L. REV. 355, 360 (1960).

[130] Almost three-fourths of the subsequent offenses alleged to have been committed by defendants released under the District of Columbia project occurred more than thirty days after the release. *1965 Hearings* 177.

on the conditions which may be imposed, it is unlikely, if the alternative of preventive detention were deemed permissible, that any such limitations would severely restrict reasonable conditions on release.

In cases involving possible intimidation of witnesses or destruction of evidence, it might be even more effective to protect the witness or evidence than to jail the accused; although some protection might be provided by detention, if the case involves organized crime the other members of the organization could obstruct justice even if the accused were confined. Depositions of witnesses could perhaps be taken immediately, thus eliminating the benefits of intimidation.[131] Evidence might be subpoenaed at the time of arrest, and any attempts to interfere might be dealt with by existing obstruction-of-justice statutes. The accused could be subject to supervision [132] or police surveillance if necessary, and police protection could be provided for any witness believed to be in danger. Furthermore, appropriate conditions on release, such as a requirement that the accused refrain from contacting the witness,[133] might be imposed; violation of these might be grounds for revocation of bail or summary contempt proceedings. If there is a fear that the witness may be killed, such a condition by itself would probably not provide sufficient protection, but it might be used in combination with other methods, such as police surveillance. Where less drastic methods of dissuading the witness are foreseen, this measure might be of some effect; bail could be revoked after the first threat or attempt, and at that stage the witness would probably not have been irrevocably persuaded not to testify, especially if he is aware that the accused will no longer be free on bail.

Such alternative methods might well provide adequate protection against most of the dangers posed by the release of defendants prior to trial. While the majority of these alternatives would probably not involve great expense, a few of them, such as surveillance and police protection for endangered persons, may be costly. However, since the number of cases in which the need for these controls will arise is likely to be exceedingly small, the price does not seem too high to pay for the maintenance of freedom before conviction.

IV. Conclusion

Pretrial preventive detention is in conflict with two notions basic to our criminal law system: that illegal acts are to be deterred by the threat of subsequent punishment rather than by prior confinement and that imprisonment should not be imposed without conviction of a crime.

[131] See National Bail Conference 207. If the accused had counsel to cross-examine the witness at the deposition hearing, the deposition would probably be admissible at the trial if the witness were unavailable or refused to testify. In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court held that a transcript of testimony at the preliminary hearing was inadmissible if the defendant was denied the right to counsel at cross-examination, but the Court indicated that the result would probably be different if the witness's statements were taken at a hearing at which the accused was represented by counsel and was given adequate opportunity to cross-examine the witness.

[132] See Sica v. United States, 82 Sup. Ct. 669 (Douglas, Circuit Justice, 1962); United States v. Davis, 345 F.2d 441 (D.C. Cir. 1965) (per curiam).

[133] See National Bail Conference 217.

In some cases these principles may be outweighed by the public interest in safety or the administration of justice. If the release of dangerous defendants prior to trial does present an alarming threat of harm to society, detention of those defendants would probably be justified. However, the magnitude of that danger has yet to be shown. That some defendants will commit crimes or intimidate witnesses while free on bail must be admitted, but currently available alternatives, less restrictive of individual freedom, might be sufficient to meet that danger. The Deputy Attorney General of the United States has stated the conclusion that:[134]

> Under all the circumstances, legislative authorization of preventive detention at this time seems unwarranted. Too much progress has been made and can be made within the framework of the techniques available under present law and the proposed conventional approach to risk the great uncertainties, legal and practical, which follow preventive detention. As these courses are pursued a more accurate measure of the need for, the desirability of and the permissibility of preventive detention can and should be assessed.

If alternative measures prove to be inadequate, it may be proper to establish a system of preventive detention, but it should first be demonstrated that the more drastic remedy is required. Otherwise, basic rights may be abridged on the basis of unfounded assumptions and fearful speculation.

[134] *1965 Hearings* 26.