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"TO DETAIN OR NOT TO DETAIN?"— 
A REVIEW OF THE BACKGROUND, 
CURRENT PROPOSALS, AND DEBATE 
ON PREVENTIVE DETENTION

Sheldon Portman*

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country."

—Sir Winston Churchill

INTRODUCTION

The leading domestic issue of the 1968 presidential campaign was that of "law and order." In response to growing public concern over the geometric rise in the crime rate, and with the District of Columbia reputed to be the nation's "crime capital," President Nixon promised there would be a sharp crackdown on crime if he were elected. In line with that pledge, within a month of his inauguration he submitted a twelve-point program to the Congress for a "war on crime" in the nation's capital.¹

Among the points listed in the President's program was a proposal for legislation authorizing pretrial detention without bail of accused persons considered to be "a clear danger to the community."² That legislation was introduced in July, 1969, in the form of Senate Bill No. S.2600.³

Shortly before President Nixon's announcement, Senator Tydings of Maryland also introduced a preventive detention bill.⁴ At the same time, the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary began hearings concerning amendments to the Federal Bail Reform Act of 1966, particularly with regard to "the outright detention of defendants considered to

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² Id.
represent a high risk of further criminal conduct. . . ." These proposals continue, as of this writing, to be under study in the Congress. They were also the subject of debate before the American Bar Association's Convention at Dallas in August, 1969.6

This legislation brings closer the "constitutional crisis in bail," predicted mid-way through the last decade by the country's leading authority on the subject—Professor Caleb Foote.7

This article will endeavor to describe the background of the preventive detention controversy, review the provisions of the pending legislation, and discuss the constitutional and pragmatic arguments raised by both sides of the issue.8

BACKGROUND OF THE PREVENTIVE DETENTION CONCEPT—
THE MOVEMENT TO ELIMINATE MONEY BAIL

The subject of preventive detention must be discussed in the context of activities leading to the reform of the bail system. In reality, preventive detention is but the opposite side of the coin to elimination of money bail—an objective which modern criminal law reform has been steadily approaching during the past decade.

Opponents of preventive detention have argued that it is unprecedented and foreign to our system of justice. A frequently cited dictum in this regard is Justice Jackson's statement in *Williamson v. United States*,9 wherein he wrote:

Imprisonment to protect society from predicted but unconsummated defenses is so unprecedented in this country and so fraught with danger of excess and injustice that I am loathe to resort to it. . . .

Contrary to this view, however, it has been pointed out that such imprisonment is actually "quite common in this and every other civilized country."10

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5 Hearings on amendments to the Federal Bail Reform Act of 1966 before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969); [hereinafter cited as Senate Hearings].
8 Numerous articles on bail reform have heretofore discussed the problem of preventive detention. Two articles on the specific subject are: Note, *Preventive Detention*, 36 GEO. WASH. L. REV. 178 (1967); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).
9 184 F.2d 280, 282 (2d Cir. 1950).
The fact of the matter is that preventive detention has existed in a sub rosa form in the common practice of setting extremely high money bail for persons thought to constitute a danger regardless of a lack of evidence indicating a likelihood of flight. Frequently, such defendants demonstrated by their lengthy past records that they are not "bail jumpers." This practice is not only vulnerable on eighth amendment grounds as being excessive, it also violates the equal protection clause because it affects only the poor, whereas defendants with money, such as professional gangsters and racketeers, who are often more dangerous to society, have very little difficulty posting high bail.

With the trend toward eliminating money bail manifested by the enactment of the Federal Bail Reform Act of 1966 and the recently approved ABA Standards on Pretrial Release, the controversy over preventive detention is necessarily brought to the surface and must now be met headon. Bail reform and increasing court delays in the District of Columbia have resulted in many more defendants awaiting their trials out of custody for longer periods of time. As one writer has pointed out:

This had led to an increase—or at least the appearance of an increase—in the number of crimes committed by some of these defendants between arrest and trial. And so, in an effort to stem this tide of increasing crime, many political leaders, including senators as diverse in their political views as Roman Hruska and Joseph Tydings, have focused their attention on the defendant awaiting trial. The slogan "crime in the streets" has found its first political victim.

To assess the preventive detention concept, the forces which have motivated bail reform in the United States must first be examined.

Studies Documenting the Inequities of the Bail System

The first modern survey of the operation of the bail system was conducted in Chicago, Illinois, in 1927 by Professor Arthur Court of Burma as being closer to the truth: "... preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed ... is common to all systems of jurisprudence." (Maung Hla Gyaw v. Commissioner, 1948 Burma Law Reps. 764, 766).

11 U.S. DEPT. OF JUSTICE, PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1965) at 29; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating To Pretrial Release, Approved Draft (1968) at 6 [hereinafter cited as ABA STANDARDS].

12 U.S. DEPT. OF JUSTICE, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE; D. J. FREED & P. M. WALD, BAIL IN THE UNITED STATES (1964), at 49-50, 54-60.

13 ABA STANDARDS, supra note 11, at § 5.4.

14 A. DERSHOWITZ, supra note 10.
Lawton Beeley. An examination of court records and case histories of several hundred prisoners awaiting trial showed that 90 percent of the entire unsentenced jail population had lived in Chicago over one year, 70 percent had families there, and one-half had references from reputable persons. It was also discovered that one-half of the prisoners had no record of prior convictions. Bail settings were being made in most instances on the basis of an arbitrary schedule according to the alleged offense without regard to the individual's personal circumstances, and accordingly, many persons were being detained unnecessarily. As a result of this study, Professor Beeley recommended the practice of a fact-finding investigation in each case in order to fix bail according to individual circumstances. He was more than thirty years ahead of his time, however, and nothing was done nor was any other major bail study conducted until 1954 when a group of University of Pennsylvania law students under the direction of Professor Caleb Foote made a study of the bail system in Philadelphia. This study showed that three out of four defendants charged with serious crimes ended up staying in jail between time of arrest and time of trial. A survey of 1,000 jail cases revealed that 528 of these persons were later released after trial and had spent an average of 33 days in jail. Use of high bail for preventive detention purposes and to "make an example" of certain defendants was frankly admitted by some magistrates. The students also found that the county prison in Philadelphia was chronically over-crowded and furthermore, that the cost for pretrial detentions was $300,000 per year.

A similar study was conducted in New York City in 1957 by another group of researchers under Professor Foote's direction. In this study it was found that the nature of the charged offense was generally the factor most relied upon to set bail with only an occasional reference to defendant's background or the likelihood of his non-appearance. Eighty-eight percent of the prisoners interviewed had local relatives and 55 percent had resided in the city for more than 10 years. Pretrial detention facilities cost the City of New York $5 million in 1955 with prisoners awaiting trial confined for 18 hours a day under restraints which were comparable to maximum security penal institutions. No work and few recreational opportunities were provided for them.

A study of the operation of the bail system in another large metropolitan area was conducted in 1962 by the District of Columbia Bar Association's Junior Bar Section. Sixty-six percent of the defendants studied were unable to post bail. Seventeen percent of those who had bail set at $500 remained in custody, while 40 percent failed at $1,000, and 78 percent failed at $2,500.

A comparison of final dispositions by the District of Columbia study revealed that 25 percent of those able to obtain their release by posting bail received probationary or suspended sentences whereas only 6 percent of those who could not afford bail received probationary sentences. Bail setting procedures were also analyzed. This comparison showed that magistrates invariably based their decisions on the prosecutor's recommendations, which were based on defendant's prior record and the nature of the offense, with little or no regard to family ties or length of residence, property ownership, or record on probation. Bondsmen, on the other hand, gave great weight to the latter items.

Defense attorneys who were interviewed during the course of the survey gave the opinion that pretrial detention made trial preparation very difficult and had a further detrimental effect on the outcome of their cases due to the accused's inability to locate witnesses, the pressure of incarceration on jury waivers to secure an early trial, and the adverse effect on the jury of observing a defendant enter the courtroom from the cell block.

The District of Columbia study also showed that pretrial detainees constituted 30 to 40 percent of the total jail population with an average custody period of 51 days at a cost of $200 per defendant. The total cost of such incarcerations in 1962 was $500,000.

In 1963, Attorney General Robert Kennedy appointed a special committee to study and report on bail practices in the Federal Courts. This study confirmed what the others had shown—that bail for indigents was being set without regard to individual circumstances and was generally based upon the charge and the circumstances of the offense. A survey of four districts showed a wide variance in the proportion of persons remaining in pretrial detention. In the District of Connecticut, 23 percent of the defendants were unable to make bail; 33 percent in the North District of Illinois; 58 percent in the Northern District of California (San

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Francisco), and 83 percent in the Eastern District of California (Sacramento). It was also learned that those free on bail were more often acquitted or had their charges dismissed whereas those in custody pleaded guilty more frequently. The Attorney General's report concluded that the bail procedure in the Federal system results in "serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrents of non-appearance by accused persons."21

The Attorney General's committee recommended that there be increased reliance upon summons, institution of a bail investiga-
tive function as part of the Federal Probation Service, a policy by the Justice Department favoring pretrial release, greater reliance on release on personal recognizance, use of non-monetary conditions, and authorization for posting of cash less than the bail amount, refundable upon the defendant's appearance.

As a result of these studies and recommendations, several important innovations in the bail system occurred during the sixties.

Innovations and Efforts to Improve the Bail System

1. The Manhattan Bail Project and the Vera Foundation. Although the above studies were conducted by lawyers, law pro-
fessors and law students, the first modern change in the system was brought about by a non-lawyer. In 1960, a chemical engineer and industrialist named Louis Schweitzer was taken on a tour of a Brooklyn detention prison. He was so shocked and indignant at what he saw that he immediately took steps to determine what he could do to change the system.

Schweitzer was particularly struck by the fact that some people were held in pretrial detention for as long as a year because they could not afford bail. Young male defendants, aged 16 to 20, were being thrown into prison with hardened criminals. Facilities were worse than those for prisoners who had been convicted and were serving their sentences in state prisons. He was also distressed over the economic discrimination of the system which in 1960 resulted in nearly 115,000 people being held in custody before trial in New York City. Over 80,000 of these defendants were acquitted or had their charges dismissed but were required to remain in prison for no other reason than that they were poor and could not afford bail.22

21 Id.
22 R. Goldfarb, Ransom 150-51 (1965). See Ares, Rankin & Sturz, The
This experience caused Mr. Schweitzer to establish the Vera Foundation (named after his mother) to promote equal protection of the laws, aid the indigent accused, and develop programs to further "law, justice, and civil liberties in the United States." The first Vera program was the Manhattan Bail Project which began in October, 1961, in cooperation with the New York University Law School and its Institute of Judicial Administration.

Herbert J. Sturz was appointed Executive Director of the Vera Foundation and also served as Director of the Manhattan Bail Project. The start of the program was difficult and uncertain, as described by Mr. Sturz:

Months of study preceded our first day in court. Our early thought was to provide a revolving bail fund which would be available to indigent defendants. But helping the poor to buy their freedom is no solution; it merely perpetuates reliance upon money as the criterion for release. We wanted to break the pattern and stimulate a more basic change in bail thinking. The release of greater numbers on their own recognizance appeared the broadest and most potentially valuable approach. We decided to test the hypothesis that a greater number of defendants could be successfully released in this way if verified information about their stability and community roots could be presented to the court. This was the goal of Vera Foundation's first undertaking: The Manhattan Bail Project.

The bail project was financed in part by a grant from the Ford Foundation and had the assistance of a student working force from the New York University Law School. The project procedure was as follows: When prisoners were brought to the court holding area prior to first appearance, law students checked their previous records and current charges. If eligible (depending upon established criteria), prisoners were interviewed to determine whether they had community ties. Questions were asked about their job situations, length of employment, local family ties and family support, receipt of unemployment insurance or welfare relief. After the interviews, the students scored the defendants according to a point weigh-

23 R. GolDFARB, supra note 22, at 152.
24 U.S. DEPT. OF JUSTICE, PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1964) at 43 [hereinafter cited as NATIONAL BAIL CONFERENCE].
25 The initial guidelines were that the defendants charged with homicide, felonious assault on a police officer, forcible rape, impairing the morals of a minor, carnal abuse, and narcotics offenses, were automatically excluded from consideration along with all non-indigent defendants. Toward the end of its first three years of operation, the class of excluded offenses was substantially narrowed so that only defendants charged with homicide and certain narcotics offenses were ineligible. Another change was that both indigent and non-indigent defendants were considered.
ing system. If a particular prisoner was considered a good "O.R." (own recognizance) risk, the interviewer obtained his written consent to allow the interviewer to contact a friend, relative or employer in order to verify the information. The verification was done either by phone or in the visitors' section of the courtroom. The interview generally lasted about 10 minutes and the verification less than an hour. After completing the verification, if the defendant was considered a good risk, a summary of the information was sent to the arraignment court. The judge, the district attorney and defense counsel received copies of the recommendation and supporting information.\(^2\)

During the first year of the project, a separate control group constituting half of the recommendable cases was studied. This was done in order to demonstrate how accused persons who met "good risk" criteria fared without the Vera recommendation. It was found that the courts granted "O.R." releases in 60 percent of the cases in which a recommendation was made; but in the parallel control group cases, only 14 percent were released. Thus, it was shown that four times as many accused persons were being released by the courts as a result of the verified information.\(^2\)

During three years of operation, 3,505 accused persons were released on their own recognizance as a result of recommendations made by the Manhattan Bail Project. Of this number, 98.4 percent returned to court when required; 1.6 percent, or 56 persons, wilfully failed to appear compared to a 3 percent forfeiture rate on bail bonds during the same period.

As of April, 1965, 3,202 of the persons released through the project had their cases finally disposed of in the courts. Of these, 48 percent were acquitted or had their cases dismissed. Seventy percent of those found guilty received suspended sentences, while 10 percent were given prison terms. The remaining 20 percent received alternative fines or jail sentences.\(^2\)

2. National Conference on Bail and Criminal Justice. As a result of this extremely successful experiment, the Manhattan Bail Project concept spread rapidly throughout the United States. In May of 1964, the Vera Foundation and the Justice Department co-sponsored the first National Conference on Bail and Criminal Justice, attended by more than 400 judges, prosecutors, defense lawyers, police, bondsmen and prison officials. During the Conference, they analyzed and discussed alternatives to monetary bail

\(^{26}\) National Bail Conference, supra note 24, at 44.
\(^{27}\) Id. at 45.
\(^{28}\) Id. at xxii.
based on the experience of the Manhattan Bail Project and the other programs which followed in its wake. As a result of the Conference, tremendous impetus was given to the spread of the bail reform movement over the entire United States.

The federal system was also affected due to the involvement of Attorney General Robert Kennedy in the activities of the Conference. A district-by-district study of pretrial release practices was instituted, aimed at minimizing pretrial detention wherever possible. In addition, extensive hearings were conducted in the Eighty-eighth Congress by two Senate Judiciary Subcommittees on legislation to allow for the release of indigents on personal recognizance. This activity culminated in enactment of the Federal Bail Reform Act of 1966.

3. Federal Bail Reform Act of 1966. The Bail Reform Act of 1966 was adopted by a nearly unanimous Congress and constituted the first major overhaul of federal bail law since 1789, when the First Congress adopted the eighth amendment, barring excessive bail, and enacted the Federal Judiciary Act, providing the right to bail in non-capital cases. The stated purpose of the Reform Act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

The Bail Reform Act went beyond the experience of the projects which had inspired it. First, it created a presumption of the right to release without payment of money before trial; thus, release without money bail was to become the norm, not the exception. The system was designed to shift the emphasis from release

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29 Id. at xiv. Of particular relevance to this article's main subject was the statement in the Interim Report of the Conference which pointed out that "the most perplexing of all problems raised at and since the conference is the issue of so-called preventive detention, i.e., the intentional setting of bail beyond the means of a defendant believed to be dangerous for the purpose of assuring that he will not be released prior to trial." The conference report criticized this practice as follows: "Because high bail setting at the trial level is hardly ever accompanied by a judicial opinion or a statement of reasons, and is rarely the subject of appellate review, the practice at present is largely unseen. The defendant simply fails to raise the bond premium and remains in jail. No standards are currently described by rule or statute for authorized pretrial detention, except in capital cases. A substantial body of opinion supports the view that setting high bail to detain dangerous offenders is unconstitutional." NATIONAL BAIL CONFERENCE, supra note 24, at xxix.

30 Id. at xv-xx.

31 Id. at xx-xxi.


of specially qualified defendants on personal recognizance to re-
lease of all defendants on conditions tailored to their individual
risks. If a defendant could not obtain his release, a clear statement
of reasons for imposing conditions which he could not meet was
required on which to base further review.

Among the various conditions, in addition to or in lieu of
personal bond, which the Act allowed were the following: (1) plac-
ing the person in custody of a designated person or organization;
(2) restricting his travel, association, or place of abode; (3) re-
quiring execution of an appearance bond in a specified amount
with a deposit of cash or other security not exceeding 10 percent
of the amount of the bond with the deposit to be returned upon the
performance of the conditions of release; (4) requiring execution
of a bail bond or deposit of cash in lieu thereof; (5) imposing any
other condition deemed reasonably necessary to assure appear-
ance as required, including the requirement that the person return
to custody after specified hours.\(^3\)

In determining the conditions of release, the Act requires that
the judicial officer consider the "available information, tak[ing]
into account the nature and circumstances of the offense charged,
the weight of the evidence against the accused, the accused's family
ties, employment, financial resources, character and mental condi-
tion, the length of his residence in the community, his record of
convictions, and his record of appearance at court proceedings or
of flight to avoid prosecution or failure to appear at court pro-
ceedings."\(^3\)

If the defendant cannot obtain his release under the stated
conditions, after 24 hours he may apply to the judicial officer who
imposed the conditions for a review. Unless the conditions are
amended and the person released, the judicial officer must set forth,
in writing, the reasons for requiring the stated conditions.\(^3\) Ex-
pedited court review and the right of appeal are also provided by
the Act.\(^3\) The same provisions are applicable in capital and post-
conviction cases unless the court has "reason to believe that no
one or more conditions of release will reasonably assure that the
person will not flee or pose a danger to any other person or to the
community."\(^3\)

Except with respect to persons released pending appeal, no

\(^3\) 18 U.S.C. § 3146(a).
\(^3\) Id. § 3146(b).
\(^3\) Id. § 3146(d).
\(^3\) Id. § 3147.
\(^3\) Id. § 3148.
provision was made for detention of defendants considered dangerous or likely to commit future crimes. In this regard, the report of the Senate Committee on the Judiciary (submitted to the Congress at the time that the bill [S.1357] was first reported out) stated the following:

The bill is not intended to deal with the problem of preventive detention of an accused because of the possibility that his liberty might endanger the public welfare, either because of the accused's predisposition to commit further acts of violence during the pretrial period, or because of the likelihood that his freedom might result in the intimidation of witnesses or the destruction of evidence. While it is recognized that the preventive detention problem is intimately related to the bail reform problem, the committee feels that the need for reform of existing bail procedures is so pressing that such reforms should not be delayed with the hope of enacting more comprehensive legislation that might deal also with the preventive detention problem. Consequently the present bill deals only with the bail reform problem reserving the preventive detention problem for additional study.  

Two-and-one-half years later, on January 21, 1969, the subject of preventive detention amendments to the Bail Reform Act was taken up by the Senate Subcommittee on Constitutional Rights. In calling the first meeting to order, the Chairman of the Subcommittee, Senator Sam Ervin, stated:

One major problem [in the application of the Bail Reform Act] is that the provisions of the Act which restrict the imposition of money bail and which require any pretrial detention be justified in writing by the judicial officer as necessary to prevent flight to avoid prosecution have resulted in the release of many allegedly dangerous defendants who previously could have been detained extra-legally by setting high money bail. This has led many persons to suggest that the Act be amended to authorize expressly the outright detention of defendants considered to represent a high risk of further criminal conduct, as well as those considered to represent a high risk of flight.  

One year after the Bail Reform Act was signed into law, a Justice Department study of its effectiveness was undertaken. This study showed that the Act was not completely fulfilling its objectives. Out of 479 jail inmates who were interviewed, 458 were found to be technically eligible for pretrial release. Two hundred and thirteen of the eligibles were interviewed intensively. The information received from 90 percent of these prisoners was verified by the researchers; nevertheless, they remained in custody. Fur-
thermore, of the sample group which had been verified, only 19, or 9 percent, had been recommended for release by the District of Columbia Bail Agency, which was responsible for carrying out the investigative functions necessary to assist the courts. The researchers also found that "[i]t is an 'open secret' that judges consider a defendant's 'dangerousness' in setting bail."42

Although the administration of the Act was not completely successful, nevertheless, after the Act took effect over 40 percent of the defendants in the District Court for the District of Columbia were released without money bail, whereas the number of persons so released before was infinitesimal.43 Statistics reported by the President's Commission on Crime in the District of Columbia showed that in 1950 only 0.7 percent obtained their release on personal bond or recognizance; in 1955, 1.4 percent did so; in 1960, 3.3 percent did; and in 1965, 9.8 percent obtained their release in this way.44

During its hearings in early 1969, the Senate Subcommittee received numerous suggestions for improving the administration of the Act. These included recommendations for expansion and increased funding of the Bail Agency for more rapid collection of verified information, and to allow for supervision of release conditions and for providing adequate advance notice of court appearances to defendants.45

A Judicial Council Committee of the District of Columbia also recommended steps designed to minimize danger to the public, such as release conditions to inhibit crime, strict supervision of release conditions by the Agency, and expedited trials for defendants charged with crimes of violence and for those who had violated their conditions of release or had been indicted for a felony during the period of their release.46 A recommendation was also made for consecutive sentences for persons convicted of additional crimes while on release.

Specific recommendations were made regarding the kinds of conditions which could be imposed if the Act were amended to authorize consideration of a defendant's potential danger.47 These included such things as requiring the defendant to reside at a spe-

42 Senate Hearings, supra note 5, at 650.
43 Id. at 127, 552, 595, 694.
44 Id. at 595.
45 Id. at 6: Testimony of Hon. Geo. L. Hart, Judge, U.S. District Court, Chairman of D.C. Judicial Council Committee on the Bail Reform Act.
46 Id.
47 Id. at 30: Testimony of Hon. Harold H. Greene, Chief Judge, D.C. Court of General Sessions.
cified place and to obtain permission to change his residence; re-
quiring him to be employed at a particular job and to obtain prior
approval to change it; prohibiting absence from his residence or
employment for a period of more than one or two hours without
prior authority; imposing a nighttime curfew; prohibiting associa-
tion with certain persons or groups; periodic reporting to the
bail agency and the probation department; deducting a portion of
earnings to deposit with the Agency as security for appearance;
and other restrictions appropriate to particular circumstances.48

Related to the problem of preventive detention was the inci-
dence of crime committed pending bail. The District of Columbia
District Court statistics for 1968 show that there were 153 persons
re-arrested among a total of 1,540 released pending trial—10 per-
cent of the total.49 One thousand and seventeen persons were re-
leased without money bail, and 96 (9.4 percent) were re-indicted,
compared to 57 re-indictments (10.9 percent) of 523 persons out
on money bail.50

The recidivism rate for persons out of custody in the District
of Columbia was 8.8 percent in 1967 and 7.5 percent in 1966.51
The District of Columbia Crime Commission statistics for the
period 1963-65 show a re-indictment rate for released persons of
7.46 percent.52

4. American Bar Association’s Advisory Committee Recom-
endations on Pretrial Release Standards. The subject of bail re-
form was studied by the American Bar Association’s Advisory
Committee on Pretrial Proceedings for 3 years. The Committee’s
recommendations were approved in August, 1968, by the ABA
House of Delegates.53 These proposals involve reforms based on
the data of earlier studies and the experience of the Manhattan
Bail Project.

In making these recommendations, the Committee listed the
numerous inequities of the present system, including the following:

48 Id. at 33. Judge Greene also suggested that the Bail Agency be provided with
sufficient personnel for “meaningful supervision, investigation and inspection;” that
penalties for offenses committed while on bail be increased; that greater efforts be
made to apprehend and punish “bail jumpers;” and that trials be expedited by ap-
pointment of sufficient numbers of judges, prosecutors and other supporting personnel.
49 Id. at 696.
50 Id.
51 Id. at 554, 591.
52 Id. at 601. These statistics show a 33.3 percent increase of post-Act over
pre-Act recidivism (7.5 percent to 10 percent) whereas there was an 18 percent in-
crease in crime as reflected by the increase in the number of criminal cases in the
District Court during the same period (1,603 in 1965 to 1,892 in 1968). (See tables
shown at 596, 687.)
53 ABA STANDARDS, supra note 11.
(1) that it inevitably discriminates against the poor; (2) that bail is generally set at the time of a defendant's first appearance when counsel has usually not entered the picture, with no particular effort to develop the facts bearing on the question of bail and without any systematic attempt to relate the decision to the individual condition and background of a particular defendant; (3) that grave consequences result from unnecessary pretrial detention by subjecting those who are presumed to be innocent to psychological and physical conditions which are more onerous than what is imposed upon convicted defendants, together with loss of employment, inability to assist in preparing one's defense, and the infliction of severe hardship on innocent family members; (4) that such defendants suffer convictions more frequently than those who are on bail, and are more likely to receive a jail sentence rather than probation; and (5) that unnecessary detention results in tremendous costs to the public in maintaining prisoners in custody as well as for welfare payments to their families.

In order to overcome these deficiencies, the Standards are aimed at minimizing pretrial custody. Thus, it is provided that police officers be encouraged and in some cases required to issue citations in lieu of making an arrest when acting without a warrant.65

In regard to the issuance of arrest warrants by judicial officers, they should be given authority to issue a summons rather than an arrest warrant, and should issue a warrant only when reasonable cause exists to believe the defendant will flee or will fail to respond. A summons should be mandatory whenever the penalty for the offense is less than six months' imprisonment.

At the first court appearance, a defendant should be released "O.R." without any special inquiry if the case involves an offense subject to less than one year's imprisonment; an exception to this is provided if the prosecution gives notice of intent to oppose the release. For charges involving a maximum exceeding one year, a "pre-first appearance inquiry" is recommended. This consists of an investigation by an independent agency or by an arm of the court.

As for the release decision itself, the Standards recommend a presumption that a defendant is entitled to an "O.R." release unless

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54 Id. at 1-3.
55 Id. § 1.1.
56 Id. §§ 2.1-2.5.
57 Id. §§ 3.1, 3.3.
58 Id. § 3.2.
59 Id. § 4.4.
60 Id. § 4.5.
61 Id. § 4.5(b).
there is a finding of substantial risk of non-appearance or if special circumstances require the imposition of conditions. If the court decides that an "O.R." release is not warranted, the reasons for that decision must be stated.

The ABA Standards set forth the kinds of specific conditions that may be imposed for conditional releases. These include such things as releasing the defendant into the care of a qualified person or organization; placing him under the supervision of a probation officer or other official; imposing reasonable restrictions on his activities, movements, associations and residences; and releasing him during working hours but requiring a return to custody at specified times.

When there are no other conditions of release which will reasonably assure the defendant's appearance, only then should the court impose money bail—preferably a deposit of an amount of cash equal to 10 percent of the face of the bond. A specific prohibition is recommended against the use of money bail "to punish or frighten the defendant, to placate public opinion or to prevent anticipated criminal conduct." The most far-reaching provision is that which prohibits compensated sureties.

The most difficult problem confronting the ABA Committee was that of preventive detention. The operation of such detention under the present system was described as follows:

[It is no secret that many judges, when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release. While the practice is pervasive, it is also generally regarded as a distortion of the bail system. Moreover, in the cases of some defendants highly likely to continue their depredations, the organized criminals, the judge's attempt to protect the public is often thwarted simply because the defendant's "organization" has ample resources with which to meet high bail. Beyond this fact, it has seemed to the Advisory Committee that only confusion and dissatisfaction can result from attempting to twist the bail system in order to prevent crime. So-called preventive detention should be dealt with openly and on its own merits, not masked by manipulations of bail amounts.

After considerable debate, the ABA Committee delayed recommending outright preventive detention but did propose new methods

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62 Id. § 5.1.
63 Id. § 5.1(d).
64 Id. § 5.2.
65 Id. § 5.3.
66 Id. § 5.3(b).
67 Id. § 5.4.
68 Id. at 6.
for meeting the problem. These included release revocations for violation of conditions or after indictment, or a holding order for a subsequent felony.69

This background on the bail reform movement provides the necessary perspective for the following examination of the pending legislation and debate on preventive detention.

THE LEGISLATION AND DEBATE ON PREVENTIVE DETENTION

Proposed Legislation

1. The Administration's Bill.70 The Nixon Administration has proposed amendments to the Bail Reform Act to allow pretrial detention of persons charged with “a dangerous crime”;71 for a “crime of violence” while on bail or parole for another such crime or if convicted before within a 10-year period;72 for an offense involving the obstruction of justice, such as threatening or harming witnesses or jurors.73 Authority is also allowed to detain persons charged with crimes of violence who are found to be narcotics addicts.74

The procedural requirements are that a judicial officer must conduct a hearing and find by “clear and convincing evidence” that the defendant comes within one of the proscriptive categories. It must also be found that no release condition or combination of conditions would “reasonably assure the safety of any other persons or the community,” and that there is “a substantial probability” that the person is guilty of the charged offense.75 If the defendant is ordered detained, written findings of fact and reasons for the order are required.

The above procedures are initiated and carried out as follows: If a defendant is already before the court, the United States Attorney may make an oral motion for detention. In other cases, he may file an ex parte written motion, and an arrest warrant may be

69 Id. §§ 5.6-5.8.
71 A “dangerous crime” is defined in Section 7 of the bill as robbery, burglary, arson, rape, lewd conduct with a child, and sale or distribution of drugs.
72 A “crime of violence” is defined in Section 7 as murder, rape, carnal knowledge of a female under the age of 16, lewd conduct with a child, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion, blackmail with threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit these crimes.
73 Id. Bill, supra note 3, §§ 2, 3146A(a)(3).
74 Id. § 3146B.
75 Id. § 3146A(c).
issued followed by the detention proceedings. The detention hearing must be held "immediately" when the defendant is brought before the judicial officer unless a request for a continuance is made, in which case the hearing may be delayed for not more than five calendar days on motion of the defendant, or not more than three days, at the request of the prosecution. At the hearing, the defendant is entitled to counsel, to present "information," to testify, and to present and to cross-examine witnesses. The "information" offered need not conform to the rules for the admissibility of evidence, and defendant's testimony at the hearing is not admissible later on the issue of guilt except that it may be used in prosecutions for failure to appear, for crimes committed while on release, for contempt of court in violating release conditions, for perjury prosecution or for impeachment in any subsequent proceedings. Appellate review of detention orders is allowed as in appeals from conditions for releases.

Persons detained under the new provisions would receive "an expedited trial," and would be entitled to release after 60 days unless the trial had begun in the meantime or a delay had been requested by the defendant.

The bill also provides for additional penalties for crimes committed while on release pending trial. One to five years of additional and consecutive imprisonment is required for a felony conviction, and 90 days to one year for a misdemeanor offense. Violations of release conditions may also be penalized by revocation of release and detention and by prosecution for contempt of court.


Senator Byrd proposed a broadly drawn amendment which would allow the court to consider "danger to other persons or the community" in determining release conditions. He also proposed the outright denial of bail for persons charged with a crime of violence who have previously been convicted of such an offense.

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76 Id. § 3146A(c) (3).
77 Id. § 3146A(c) (6).
78 Id. § 3146A(c) (7).
79 Id. § 3146A(d).
80 Id. §§ 6, 3150A.
81 Id. § 3150B.
82 Both bills are reproduced in Senate Hearings, supra note 5, at 483, 486 and 492.
83 S. 288, cited in Senate Hearings, supra note 5, at 486.
84 S. 299, cited in Senate Hearings, supra note 5, at 489.
The Tydings bill would allow pretrial detention for a period not exceeding 30 days after an evidentiary hearing in certain specified cases. Such hearings would be required on application of the Government in three situations: (1) if the defendant, while on release pending trial or appeal on a felony, has been charged either with a felony involving serious bodily harm or with the threat of such conduct; or (2) if he has been charged with such an offense or threat and the prosecution alleges by affidavit that the defendant, if released, will inflict serious bodily harm on another, or because of a prior pattern of behavior, constitutes "a substantial danger to other persons or to the community;" or (3) if the charge is armed robbery.85

The hearing must occur within two days. All "relevant evidence and testimony" may be received and the defendant is entitled to counsel and to present evidence and cross-examine witnesses; his testimony may not be considered at any other judicial proceeding nor does it constitute a waiver of his privilege against self-incrimination.86 If there is "clear and convincing evidence" that the defendant will intimidate witnesses, unlawfully interfere with the administration of justice, cause the death of or serious bodily harm to another, or take part in an armed robbery, the judicial officer is authorized to impose appropriate conditions of release. But if these are not adequate to provide "the necessary protection," pretrial commitment is required for not more than 30 days.87 A statement of reasons for the court's order is required; the right of appeal is allowed; and the case must be placed on an "expedited trial calendar."88

In a companion bill, Senator Tydings has also proposed two important additional innovations.89 One would allow the Bail Reform Act to be applied to a person charged with a capital offense when the court believes that he would not flee or pose a danger to others.90 Another feature of the same bill is a change which would deny a release while awaiting sentence or appeal unless the court believes that the defendant is not likely to flee, pose a danger, or commit other offenses, and that his appeal is not frivolous.91

The Debate

1. The Constitutional Issue. There are two basic facets to the constitutional issue on preventive detention. The first is whether

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85 S. 546, § 3146A(a), cited in Senate Hearings, supra note 5, at 492-93.
86 Id. § 3146A(c) (d) at 494.
87 Id. § 3146A(c) at 494-95.
88 Id. § 3146A(g) at 495.
89 S. 547, cited in Senate Hearings, supra note 5, at 497.
90 Id. § 3148(a) at 497.
91 Id. § 3148(b) at 498.
such detention violates the bail provision of the eighth amendment of the Federal Constitution, and the second is whether it is contrary to the due process clause of the fifth amendment.

The eighth amendment issue is somewhat confused by the language of the bail clause which prohibits "excessive bail." A literal interpretation indicates the amendment merely relates to the amount of bail when bail is set. However, it has been argued, on the basis of a historical analysis, that the clause must be interpreted broadly to mean that a right to bail exists in virtually all cases.

The case most often cited by the proponents of a narrow interpretation of the clause is *Carlson v. Landon.* In a five-to-four decision, the Supreme Court upheld a denial of bail to alien Communists pending deportation proceedings. This ruling was based on the view that deportations were "civil proceedings" to which the eighth amendment did not apply. In dictum, the majority observed that the bail clause had been taken from the English Bill of Rights Act, which had never been interpreted to allow the right to bail in all cases but only to prohibit excessive bail in those cases where it was proper. It was further noted that the eighth amendment had not prevented Congress from defining the classes of cases in which bail should be allowed; thus, in capital cases it was not compulsory. Other decisions which have followed the *Carlson* interpretation are *Mastrian v. Hedman,* *People v. Keeper of City Prisons,* and *Vandford v. Brand.*

Opposed to the view of the majority in *Carlson* was the dissent of Mr. Justice Black, who forcefully argued that the majority's interpretation would nullify the eighth amendment protection since it meant that the basic right to be implemented by the bail provision could be restricted out of existence by the legislature, and that it was a contradiction to say on the one hand that the eighth amendment prohibits denial of release by excessive bail but leaves open the possibility of legislative emasculation of the right.

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92 U.S. Const. amend. VIII. The Amendment provides in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."


95 Id. at 345-46.

96 326 F.2d 708, 710-11 (8th Cir. 1964), cert. denied, 376 U.S. 965 (1964).


98 126 Ga. 67, 54 S.E. 822 (1906).

99 In a stinging criticism of the majority's view, Justice Black stated: "Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all. Stated still another way, the Amendment
The reliance on English precedent by the majority in *Carlson v. Landon* and by advocates of pretrial detention has been criticized by Professor Caleb Foote as "substantially irrelevant because it is perfectly clear from colonial and early American history that major deviations were made from English practices, that early American practice in regard to pretrial liberty in the seventeenth and eighteenth centuries was in effect a repudiation of the restrictions of then existing British bail law."\(^{100}\)

Professor Foote has also criticized "laudatory references" to continental European pretrial procedures, citing his own personal experiences in Rome during the Summer of 1966:

I sat for two days in the office of the Chief Magistrate . . . of the criminal courts of the City of Rome in Italy, and I went over with him case after case of the folders that were on his desk. I was there does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition. Maybe the literal language of the framers lends itself to this weird, devitalizing interpretation when scrutinized with a hostile eye. But at least until recently, it has been the judicial practice to give a broad, liberal interpretation to those provisions of the Bill of Rights obviously designed to protect the individual from governmental oppression. I would follow that practice here. The Court refuses to do so because (1) the English Bill of Rights 'has never been thought to accord a right to bail in all cases . . .' and (2) 'in criminal cases bail is not compulsory where the punishment may be death.' As to (1): The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689. And it is well known that our Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution. See *Bridges v. California*, 314 U.S. 252, 264-265. As to (2): It is true bail has frequently been denied in this country 'when the punishment may be death.' I fail to see where the Court's analogy between deportation and the death penalty advances its argument unless it is also analogizing the offense of indoctrinating talk to the crime of first degree murder . . . Prior to this Amendment's adoption, history had been filled with instances where individuals had been imprisoned and held for want of bail on charges that could not be substantiated. Official malice had too frequently been the cause of imprisonment. The plain purpose of our bail Amendment was to make it impossible for any agency of Government, even the Congress, to authorize keeping people imprisoned a moment longer than was necessary to assure their attendance to answer whatever legal burden or obligation might thereafter be validly imposed upon them. In earlier days of this country there were fond hopes that the bail provision was unnecessary, that no branch of our Government would ever want to deprive any person of bail. On this subject Mr. Justice Story said, 'The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.' Story on Constitutional Law, 5th ed., Vol. 2, p. 650. Perhaps the word 'atrocious' is too strong. I can only say that I regret, deeply regret, that the Court now adds the right to bail to the list of other Bill of Rights guarantees that have recently been weakened to expand governmental powers at the expense of individual freedom."\(^{101}\)

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\(^{100}\) See testimony of Senator Tydings, *Senate Hearings*, supra note 5, at 81-83.

\(^{101}\) See testimony of Professor Foote, *Senate Hearings*, supra note 5, at 354.
during the first week of August. The folders on his desk were of men arrested almost indiscriminately for serious and not serious crimes, the arrests having taken place the latter part of March and the first two weeks of April. These folders were on his desk as the first part of a stage of determination of whether to proceed with criminal prosecution, and all this time the men were languishing in the Roman jails. The leisurely pace was accentuated by the fact that most cases took a full year to go through the period of preliminary investigation. He had some cases on his desk that went back 9 and 10 years where the man had been in preventive detention for that period of time awaiting the decision of the [Magistrate] and the prosecutor as to whether to proceed with formal prosecution.\textsuperscript{102}

Foote noted that similar situations existed in Holland and Belgium, and he cited a letter from a West German lawyer who wrote that a waiting term of 5 years was not unusual in big cases and claimed that his country held the world's record of 7 years. Foote corrected him, however, observing that he had personally seen a case in Rome where the period of waiting was 9 years.

In conclusion Professor Foote stated: It seems to me perfectly clear that it is precisely the kind of abuse found today in continental Europe which the English Petition of Right of 1628 was designed to avoid by bringing the Magna Carta to bear upon the principle of pre-trial detention. It was precisely the kind of abuse which prevails in continental Europe today that our colonial practices and constitutional protections were designed to prevent.\textsuperscript{103}

The second constitutional impediment regarding preventive detention is that of due process. There are three basic objections on this ground: (1) that pretrial detention punishes a defendant before he is tried, thus violating the principle that an accused is presumed to be innocent; (2) that it creates a substantial handicap to the accused's ability to prepare his defense; and (3) that strong empirical evidence exists to demonstrate that pretrial detention has a substantially adverse effect on the final disposition of a defendant's case. The first two grounds have been traditionally cited by preventive detention opponents. More recently, the latter ground has been added after being initially articulated by Professor Foote.\textsuperscript{104}

The authority most often cited for the first two due process grounds is \textit{Stack v. Boyle},\textsuperscript{105} which held that bail in an amount greater than necessary to assure a defendant's appearance was excessive under the eighth amendment. In the Court's opinion, Chief Justice Vinson wrote:

\textsuperscript{102} Id. at 354-55.
\textsuperscript{103} Id.
\textsuperscript{105} 342 U.S. 1 (1951).
The traditional right to freedom before conviction permits the unhindered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.\(^{106}\)

In response, the proponents of preventive detention argue that the presumption of innocence is not a valid objection because it is merely "a procedural rule of evidence which operates only at trial, placing the burden of proof upon the prosecution."\(^{107}\) They also point out that the presumption of innocence does not arise during the pretrial process of the case when the defendant can be arrested and indicted merely on probable cause to believe him guilty.

In opposition to this view, former Attorney General Ramsay Clark has stated:

The thing we're talking about is holding people who we say we presume innocent. If I had to look for all the causes of turbulence in our time, and particularly among our young people—I would put as one of the three greatest, our failure to insist upon human dignity. I think you can find that as an underlying cause of a great part of all the wildness of our times.

The presumption of innocence is basic to one philosophy of life, and it says essentially that the individual counts for something—that we really do believe in him—that he matters and that when he is in a contest with the state (which will never be equal)—we presume he is innocent, until by evidence beyond a reasonable doubt, he is convicted.

If that sounds pretty far out, compare that with the statement of the spokesman for the Administration—the Assistant Attorney General for the Criminal Division at the American Bar Association meeting in August, when he said, "the presumption of innocence is a mere rule of procedural evidence." I'm not sure what mere rules of procedural evidence are—I didn't bother to ask him. But to call the presumption of innocence a mere rule of procedural evidence, to me, really misses the issue.\(^{108}\)

Preventive detention advocates contend that there is ample precedent for detentions involving capital punishment cases or when a defendant is incompetent and unable to stand trial. The question, however, is whether this should be expanded to include detention to protect against the danger of future crimes or of interference with witnesses. Such detention has often been opposed by the frequently cited dictum of Mr. Justice Jackson in *Williamson v.*

\(^{106}\) Id. at 4.

\(^{107}\) Address by Will Wilson, Assistant Attorney General, on Preventive Detention before ABA, Dallas, Texas, Aug. 12, 1969. See also NATIONAL BAIL CONFERENCE, supra note 24, at 177.

\(^{108}\) Remarks of Mr. Ramsay Clark on Preventive Detention at 1969 convention of the National Legal Aid and Defender Association, New York City, Oct. 29, 1969.
United States\textsuperscript{109} that such imprisonment is "unprecedented" and "fraught with danger of excesses and injustice . . . ."

Opposed to this, however, are the more recent statements of former Chief Justice Warren and Justice Douglas. In Carbo v. United States,\textsuperscript{110} Justice Douglas stated in dictum that the denial of bail on appeal would be justified if the safety of the community would be jeopardized.\textsuperscript{111} A similar view was expressed by former Chief Justice Warren in Leigh v. United States.\textsuperscript{112} These cases, however, may be distinguished from the pretrial detention situation on the ground that they involved defendants on appeal who had been tried and found guilty, thus removing the presumption of innocence. Likewise, detentions involving capital cases have been distinguished on the basis of tradition, while sexual psychopath and mental illness detentions have been distinguished on the ground that, because of the mental or emotional abnormality of persons subjected to those proceedings, such persons are not responsive to the deterrents provided by criminal sanctions and, therefore, cannot be dealt with through the usual processes of the criminal law.\textsuperscript{113}

In regard to the due process objection, based on the impairment of a defendant's ability to assist in the preparation of his defense, the Administration's bill seeks to overcome this by allowing release "for good cause shown" into the custody of the United States Marshal or "other appropriate person" for limited periods in order to prepare defenses.\textsuperscript{114}

While this provision seems to answer the problem, yet a defendant's ability to aid his defense might remain hampered in two significant ways. First, it would be necessary to disclose an intended defense in the course of establishing the "good cause" necessary to obtain a defendant's release. This could easily provide the prosecution with information leading to incriminating evidence which could be used against the defendant. Thus, serious fifth amendment problems could arise.\textsuperscript{115}

The other potential problem with the Administration's proposal for releasing the defendant to assist in preparing his defense relates

\textsuperscript{109} 184 F.2d 280, 282 (2d Cir. 1950). See text at note 9, supra.
\textsuperscript{110} 369 U.S. 868 (1962).
\textsuperscript{111} He repeated this observation in Rehman v. California, 85 S. Ct. 8 (1964).
\textsuperscript{112} 82 S. Ct. 994, 996 (1962).
\textsuperscript{113} See Note, Preventive Detention Before Trial, 79 HARV. L. REV. 1475, 1504 (1966).
\textsuperscript{114} Adm. Bill, supra note 3.
\textsuperscript{115} Cantillon v. Supreme Court, No. 69-1186-FW (U.S. Dist. Ct., Central Dist. of Calif., Sept. 11, 1969), declaring pretrial prosecution discovery of alibi witnesses to be a violation of the right against self-incrimination.
to the circumstance of a defendant being in police custody during this effort. Many criminal cases, especially in large urban areas, involve minority, ghetto residents and witnesses from the same racial or class sub-culture. In these cases, the accused very often is the only one who can locate and induce reluctant witnesses to come forward.\textsuperscript{116} The ability of a minority defendant to do so when accompanied by a police officer (usually considered \textit{persona non grata} in ghetto areas) may be virtually impossible.

Due process implications also arise with respect to the proven prejudicial effect of pretrial detention upon final disposition of cases. The leading exponent of this theory has been Professor Caleb Foote.\textsuperscript{117} Based upon a study made by Professor Rankin of New York University Law School in 1964,\textsuperscript{118} Professor Foote contends that empirical data shows that "pretrial detention has a direct adverse effect on the disposition of the accused's case."\textsuperscript{119}

The Rankin study compared the dispositions of 374 defendants on bail with 358 in pretrial custody. It was found that only 17 percent of the out-of-custody defendants received prison sentences whereas 64 percent of those in custody received such sentences. Forty-seven percent of the bailed defendants were acquitted compared to only 27 percent of those who were detained. Thirty-six percent of the bailed defendants were convicted without receiving a prison sentence, whereas only 9 percent of the jailed defendants avoided such a sentence after conviction.

The Rankin study is particularly significant because it went beyond what other researchers had done\textsuperscript{120} by controlling the more obvious variables that might explain the more frequent unfavorable dispositions for those detained. These factors included previous criminal record, the amount of bail set, and whether or not the defendant was represented by appointed counsel. It was found that each of these factors was significantly related both to detention and to the likelihood of a prison sentence. Thus, it was a definite possibility that detained defendants more often received prison sen-

\begin{footnotes}
\item 119 Foote, \textit{supra} note 117, at 1151.
\end{footnotes}
tences than those who are free because more of the former have previous records.

In order to assess the effect of the detention factor, Professor Rankin separated the defendants into two groups, that is, those with records and those without. When this was done, it was found that among the group with no previous record, 59 percent of the defendants who were in custody received prison sentences compared to only 10 percent of the defendants on bail. Of the group of defendants with prior records, 81 percent of those who were jailed prior to trial were ultimately sentenced to prison, compared to only 36 percent of the defendants on bail. Thus, jailed defendants in each category were 49 percent and 45 percent, respectively, more likely to be sentenced to prison. These percentages were equivalent to the 47 percent difference existing when the previous record factor was not controlled.121

Similar findings were obtained when bail amount and type of counsel were separately controlled, with only a slight reduction when all three factors were held constant. Thus, Rankin’s study presents strong evidence of a causal relation between detention and disposition.

Professor Foote has articulated some of the reasons for the detrimental effect of pretrial detention. Among the obvious factors is the loss of employment which affects obtaining probation, earning a lawyer’s fee so that one may choose his own lawyer, and supporting one’s family. Other more subtle aspects include: (1) the effect of the bias of those involved in administering the criminal justice process (police, jailers, prosecution and defense counsel, judges, and probation officers) in pre-judging the jailed defendant as a failure and thus coloring their actual disposition;122 (2) the effect of a defendant sharing the idea that he is a failure, thereby reducing the chance of his being able to complete a period of probation successfully; (3) the quality of legal representation received by the jailed defendant in regard to the adverse physical situation surrounding the interview process whereby the defendant must be seen under conditions lacking privacy and mutual dignity, compared to the situation of the defendant who is out of custody and is able to consult his attorney in the lawyer’s office;123 (4) the adverse

121 Rankin, supra note 118, at 647-48.
122 Foote, supra note 117, at 1147. Professor Foote cites as an example a probation officer assigned to writing up a report on a jail case having a bias before he starts due to the defendant’s jail status. Thus, he suggests that the statistics showing the unfavorable dispositions received by jailed defendants may in fact be “nothing more than the operation of a self-fulfilling prophecy.”
123 Id. As Professor Foote points out, the frequency of pretrial consultation may
PREVENTIVE DETENTION

For these reasons, the opponents contend that pretrial detention adversely affects the disposition of a defendant's case and, in turn, is contrary to due process.

2. Practical Considerations: The Problem of Prediction and the Burden on an Already Overburdened Judicial System. The difficulty of prediction and the burden on the courts in administering a system of preventive detention are the two major practical objections which have been raised by the opposition.

With regard to the problem of prediction, recent statistics show that out of 2,557 persons indicted in the District of Columbia on felony charges during 1968, 153 were on bail at the time, or 6 percent of the total indicted. The District of Columbia Crime Commission did a survey over a two-and-one-half-year period which showed that 207 persons out of 2,776 cases were charged with committing new felonies while awaiting trial on another. An analysis of the recidivist defendants showed no discernible pattern on which a judge could have relied in determining whom to release.

For example, the Commission's study showed that among the eleven

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124 Id., n.247. In this regard Professor Foote describes a phenomenon which has been frequently observed by this writer. Despite the generally recognized high-quality representation provided by the defender's office of this county, defendants who are in custody sometimes express resentment over the fact that they must rely upon the public defender. Professor Foote attributes this to the "jailhouse consultations" which intensify a defendant's "disassociation with counsel" and confirm the suspicion that he is being given second-class legal services because of his indigence; this, in turn, induces resentment at being treated as a "charity case," confirming the belief that the adversary system is not truly adversary when one must rely upon a state supplied public defender whose career involves the representation of jailhouse failures.

Professor Foote also relates an experience he frequently observed when private lawyers interviewing newly admitted prisoners in a detention jail would ask each one: "How much money do you have or can you raise?" Foote reports that "the interview was terminated immediately if the answer was unsatisfactory. These rejected prisoners were later represented by the public defender and probably received better legal services than would have been provided by the private lawyers, who had reputations as fixers and as being legally incompetent. But the psychological undertones of such transactions are obvious and must impair the defendant's opinion of the fairness of the trial process."

125 Id. at 1147.
126 Senate Hearings, supra note 5, at 689.
127 Id. at 132: Testimony of Mrs. Patricia M. Wald, Attorney Member, Judicial
offenders charged with murder while on bond, four had no prior convictions. Another four had only a misdemeanor conviction, and three had but a single felony conviction each. Of the group which had committed rapes or attempted rapes on bail, there was not a single prior felony conviction. Of the persons who had committed robberies on bail, 48 percent had no prior record; while 40 percent had one prior felony conviction, and only 12 percent had more than one.¹²⁸

The dearth of knowledge with respect to predictability has been described by Professor Foote as follows:

We know almost nothing in criminology about the factors that distinguish those few accused robbers or rapists who will commit a crime on pretrial liberty from the majority of the accused robbers and rapists who will not commit such a crime on pretrial liberty. To imagine that, at a preliminary hearing soon after arrest, a judge could make a reliable determination about an accused's future dangerousness when very little data about the accused will then be available to him, and we do not know what that little data means anyway, it seems to me is to indulge in pure fantasy.¹²⁹

Professor Dershowitz has described the problem as follows:

Predictions of human conduct are generally difficult to make, and this should not be surprising, for man is complex, and the world he inhabits is full of unexpected occurrences. Predictions of rare human events are even more difficult. And predictions that a rare human event will occur within a short span of time are the most difficult of all. Acts of violence committed by persons released pending trial are rare events, and the relevant time span is relatively short. Accordingly, the kind of predictions under consideration here begin with heavy odds against their accuracy.¹³⁰

The ability of judges to predict the potential of a defendant to commit a crime while out on bail was the subject of a short test

Council Committee to Study the Bail Reform Act and Member of the President's Commission on Crime in the District of Columbia.

¹²⁸ Id. at 133. In a statement submitted to the Senate Subcommittee on Constitutional Rights, Chief Judge Harold H. Greene, District of Columbia Court of General Sessions, cited the statistics gathered by the D.C. Crime Commission showing that 124 (or 4.5 percent) of 2,776 cases involved a crime of actual or potential violence. These figures referred only to charges and not convictions; the conviction rate was approximately 75 percent so that, as Judge Greene pointed out, "only about 3 percent of all those released on bail during the survey period were found to have committed a violent crime while out on bail." Id. at 35. He also cited figures showing that in 1967, 190 defendants indicted for robbery were released, and of these, 22, or 11.6 percent, were subsequently indicted for another felony while out on bail. Thus, he observed that 8 persons would have to be detained in order to keep one defendant off the street who might commit another offense while out on bail.

¹²⁹ Id. at 352.

¹³⁰ Id. at 173. See also discussion in ABA STANDARDS, supra note 11, at 68-69.
conducted by the Bail Agency of the District of Columbia in 1968.\textsuperscript{131} During a period of several months, the Agency made a follow-up study of defendants who appeared before two judges. One of the judges was known to follow the Bail Reform Act rather explicitly and was lenient in his release policy. The other judge, who claimed that he had the ability to choose between the "bad eggs and the good eggs," had a stricter policy. It was found that of 285 defendants who appeared before the judge who claimed that he was able to predict recidivism, he ascertained 144 bad risks. These were detained by high money bond whereas the 141 good risks were released. The other judge found 46 bad risks out of a total of 226. Thus the lenient judge had released 79 percent whereas the tough judge had released less than 50 percent. Of the 180 persons released by the lenient judge there were 16 offenses committed while on bail, whereas there were 12 bail offenders among the 141 good risks who were released by the tough judge. The recidivist rate was 8 percent for the judge who claimed that he had the ability to spot a bad risk, and 9 percent for the judge who released practically everyone—a difference of only 1 percent. It was also interesting to note that out of the 144 bad risks detained by the tough judge, 36 had their cases dismissed before trial, whereas another large percentage was acquitted, and of those convicted very few received time in jail.\textsuperscript{132}

Opponents also contend that actual experience with preventive detention has shown the difficulty of predicting future conduct. One area in which such experience has occurred is that of juvenile court proceedings. Most jurisdictions authorize judges to detain children for the best interest of the community to prevent danger as well as flight. In most places, detention facilities for such children are greatly overcrowded. Nevertheless, recidivism among juveniles released pending trial in the District of Columbia has been approximately 11 percent (2 percent to 4 percent higher than that for the District Court rate of recidivism).\textsuperscript{133}

Another example of the difficulty of predicting recidivism has been manifested in the experience with persons released pending appeal. Under the Bail Reform Act a defendant may be detained if the court believes that release would present a danger to the community. Despite this, however, the rate of recidivism for persons released pending appeal has been reported at 16 percent, compared to 8 percent or 9 percent for those on pretrial release.\textsuperscript{134}

\textsuperscript{131} Senate Hearings, supra note 5, at 182: Statement by Paul L. Woodard, Chief Counsel, Senate Subcommitte on Constitutional Rights.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 131: Testimony of Mrs. Wald.
\textsuperscript{134} Id.
Critics also cite the field of mental illness as another example of the poor ability to predict future conduct.\textsuperscript{135} It has long been assumed that psychiatrists are accurate in their predictions about patients who are diagnosed as dangerous and likely to cause serious harm if not confined. Unfortunately, this has not been systematically tested. Patients who are considered dangerous are confined; and thus there is no opportunity to demonstrate what they would have done had they been released. While erroneous predictions of violence are never learned, the doctor will almost certainly be told about mistakes in predicting non-violence—mainly from reading about them in the newspapers. Mistakes in underestimating the prospect of violence are highly visible compared to the relative invisibility of errors in overestimating such violence. Thus, as Professor Dershowitz has pointed out, the doctor’s “modus operandi becomes: when in doubt, don’t let him out.”\textsuperscript{136}

The accuracy of these psychiatric predictions was put to an inadvertent test when a Supreme Court decision in 1966 resulted in the release of numerous mentally ill persons who had been diagnosed as dangerous.\textsuperscript{137} At the time, considerable fear for the community’s safety was expressed, but studies made of these patients after they were released showed that the predictions of violence were greatly exaggerated. Similar studies in Baltimore also corroborate this conclusion.\textsuperscript{138}

Another practical objection made by critics of preventive detention is that of the effect that the administration of its procedures is expected to have in taxing an already overburdened court structure. This objection was recently made by veteran District Attorney Frank S. Hogan of New York City, who opposed a preventive detention proposal which was under study by the New York State Penal Law Revision Commission.\textsuperscript{139} The proposal was withdrawn after Mr. Hogan’s argument that “passage of the new section would smother the courts in a blizzard of hearings that were not required under existing procedures.”\textsuperscript{140}

A similar view was expressed by the American Bar Association’s Advisory Committee on Pretrial Release, which pointed out that the judicial mechanism for operating a system of preventive detention would require considerable improvement over what is now available.

\begin{itemize}
\item \textsuperscript{135} DERSHOWITZ, \textit{supra} note 10, at 22.
\item \textsuperscript{136} \textit{Id.} at 26.
\item \textsuperscript{137} Baxstrom v. Herold, 383 U.S. 107 (1966).
\item \textsuperscript{138} RAPPAPORT, \textit{THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL} (1968).
\item \textsuperscript{139} N.Y. Times, Sept. 3, 1969, at 1, col. 5.
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
and that to do so would "add greater burdens to an already strained judicial system."\textsuperscript{141}

In this regard, a serious question arises whether preventive detention will merely compound the problems of an overburdened criminal justice system in the large urban areas. For example, it has been pointed out that in October of 1968 the average time between indictment and final disposition of cases in the District of Columbia District Court was seven-and-one-half months, with some cases dragging on for as long as one or two years.\textsuperscript{142} Adding the burden of a preventive detention procedure upon this already overburdened court system without increasing judicial and legal manpower would be impossible.\textsuperscript{143} The ameliorative effect which an increase in court and legal staffing might have upon the incidence of recidivism while on bail would most certainly be impaired by the absorption of such additional manpower in the task of administering a preventive detention system.

3. The Need. In addition to the other aspects of the problem, there is much disagreement over the necessity of preventive detention. A "war" of statistics based upon various studies has gone on. Each side has its own study and statistical base to support its argument, all of which presents a very confusing picture to the observer.

An administration spokesman, Assistant United States Attorney General Will Wilson, has referred to one study showing a 10 percent recidivist rate in the District of Columbia as compared to other studies showing a 7 percent rate. He has also cited a recidivist figure of 60 percent for persons released on bail on robbery charges, a study by the Metropolitan Police Department during

\textsuperscript{141} ABA Standards, \textit{supra} note 11, at 60.

\textsuperscript{142} Senate Hearings, \textit{supra} note 5, at 12: Testimony of Hon. Geo. L. Hart, Jr., Judge of the District Court and Chairman of the Judicial Council Committee on the Bail Reform Act. Judge Hart stressed the need for more judicial and legal manpower, including a well-staffed public defender office, to decrease the number of frivolous motions and improve the quality and speed of trials. \textit{Id.} at 10-11, 20. His opinion was that if criminal cases could be tried within six weeks to two months there would be no need to amend the Bail Reform Act to provide for preventive detention.

The experience in Santa Clara County provides an interesting comparison. A survey of cases in September of 1969 showed that the average time between arraignment in the Superior Court and final disposition in public defender cases was 42 days. Private counsel cases averaged 65 days.\textsuperscript{143} Senate Hearings, \textit{supra} note 5, at 87. The problem of administration was described by Senator Sam J. Ervin during the Senate Subcommittee hearings when he remarked: "It seems to me that this would be a cumbersome thing from the administrative standpoint, because there is nothing to prevent a lawyer from going in there and presenting his full case on the hearing, saying, 'My client ought not to be held at all. In fact he ought not to be even required to give bail because he is innocent.' And he can contend for his innocence before the judge. Then he has another chance to contend before the jury. It seems to me that it would be easier and more efficient to try the case in the first instance on its merits within a short period of time."
1967 indicating a 34.6 percent rate, and another one which reportedly showed a 70.1 percent rate.\textsuperscript{144}

On the other hand, in testimony before the Senate Subcommittee on Constitutional Rights, Chief Judge Harold H. Greene of the District of Columbia Court of General Sessions relied upon the District of Columbia Crime Commission Report of 1966 showing a general recidivist rate of 7.5 percent and a 4.5 percent rate for crimes of actual or potential violence. He also cited a study of robbery defendants who had been released on bail showing that 11.6 percent were subsequently indicted for another felony.\textsuperscript{145}

In her opposition to preventive detention, Mrs. Patricia M. Wald, Washington, D.C., attorney and member of the Judicial Council Committee to Study the Bail Reform Act, has relied upon 1968 statistics from the District of Columbia which showed a 6 percent rate of recidivism among those already on bail for prior offense compared to an 8 percent figure in 1967.\textsuperscript{146} Referring to other data gathered by the Judicial Council Committee (Hart Committee) she also made the statement that: "Although robbery is the most frequent new crime committed by offenders while on pretrial bail, 88 percent of all robbers indicted do not commit a new crime on bail. Nor do 93 percent of housebreakers, 84 percent of narcotics violators, and 84 percent of auto thieves."\textsuperscript{147}

Aside from the question of numbers, a further issue is whether preventive detention will accomplish what its advocates promise, that is, a significant reduction of crime. In this regard, one writer has expressed serious doubt on the basis that preventive detention would merely keep persons in custody who would have been detained in any event by judges purposely setting high bail.\textsuperscript{148} Another negative indicator is the existing experience with preventive detention in the juvenile court and on releases pending appeal. As noted by the opponents, there has been an 11 percent recidivist rate in the Juvenile Court in the District of Columbia and a 16 percent rate among defendants released pending appeal.\textsuperscript{149}

\begin{flushleft}
\textsuperscript{144} Address by Will Wilson, supra note 107, at 4-5.
\textsuperscript{145} Senate Hearings, supra note 5, at 35.
\textsuperscript{146} Id. at 144.
\textsuperscript{147} Id. at 139. In light of this conflict of statistics, one can readily agree with Mrs. Wald's statement before the subcommittee that, "One of the most discouraging aspects of the debate on preventive detention is the lack of adequate data on bail violators." She went on to suggest that the committee could make a great contribution to solving this problem of inadequate data by a systematic gathering of the necessary information.
\textsuperscript{148} A. Goldstein, Jail Before Trial, The New Republic, Mar. 8, 1969, at 15.
\textsuperscript{149} Senate Hearings, supra note 5, at 139.
\end{flushleft}
A dim view of the prospects for the success of preventive detention is reflected in Professor Foote's criticism that it is "essentially a gimmick" which seeks to improve the administration of criminal justice without any cost to the public as an alternative to spending more money for more efficient procedures in administration.\textsuperscript{150}

The gloomiest forecast of all has been expressed by Professor Goldstein, who wrote:

Perhaps the most important point to be made against the proposal is that the principle of pretrial preventive detention, once legitimated, is likely to develop a life of its own. More and more crimes will be regarded as sufficiently threatening to warrant detention before trial. This will do irreparable harm to the presumption of innocence and to the more concrete interests described earlier. It will, in addition, add materially to already clogged court calendars and an overburdened judicial system as new procedures are created to determine the issue of probable danger and new provisions for appellate review are devised to make preventive detention more palatable. Over time, the result may well be more trial delays, more extended pretrial detention, and, eventually, as some of the proposals contemplate, a requirement of release if the trial is not held within the stated period of time. This may lead, in turn, to a condition I have observed in at least one Latin American country: trials rarely held and preventive detention an entire substitute for post-conviction imprisonment.

The criminal law has always had to take into account that the restrictions we place on state power may cost us some measure of protection from danger. In the effort to avoid all danger, the proponents of preventive detention exaggerate what can be predicted about criminality to justify an indiscriminate practice of imprisoning persons whose guilt remains to be proved. Such a course would sacrifice too casually the liberty of too many people for a negligible increase in public safety. Worse, it may delude us into thinking something substantial is being done to reduce crime.\textsuperscript{151}

**CONCLUSION**

In this discussion we have attempted to review the background and the various facets of the current controversy on preventive detention. The problem presents itself as the logical culmination of the movement to eliminate money bail. The inequities of the money bail system have been adequately documented by studies beginning in 1927 and more intensively during the decade of the fifties. These studies culminated in the Manhattan Bail Projects and in other efforts leading to greater reliance upon release without money bail. The experience and success of those efforts were reviewed and dis-

\textsuperscript{150} Id. at 362.
\textsuperscript{151} A. Goldstein, supra note 148, at 17-18.
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seminated at the National Bail Conference of 1964 and led to the enactment of the Federal Bail Reform Act of 1966.

During the intervening period since the Bail Reform Act, there has been a dramatic rise in the crime rate throughout the United States in general and in Washington, D.C., in particular. Since the courts in the District of Columbia handle more criminal cases than any other federal jurisdiction, the Bail Reform Act has been applied there more frequently. That increased crime rate has involved a substantial number of recidivists, particularly in Washington, D.C.\(^{162}\)

National concern over this deteriorating crime situation inspired a presidential campaign on a theme of "law and order." Soon after taking office, the new Administration offered preventive detention as a concrete proposal aimed at improving the crime situation. Preventive detention was also the logical effect of the movement to eliminate money bail, which necessarily brings out into the open the practice of many judges in using high bail to detain persons considered dangerous.

In addition to the constitutional issues, that is, whether the eighth amendment precludes preventive detention, and whether such detention violates due process in controverting the presumption of innocence and inhibiting a defendant's ability to prepare his case, other practical questions are raised concerning the problems of prediction and the additional burden which would be imposed upon a judicial system which is unable to keep up with its present workload. Serious questions also arise with respect to the actual need for preventive detention, and whether it will have any real effect on the crime problem.

In considering the various pros and cons, it would seem that the critics, including the ABA Committee on Minimum Standards, have the leading edge in suggesting that more data is required, more quately supervised conditions of release, and in general, a beefing vigorous efforts and experience in controlling the problem by ade-up of the entire judicial system so as to afford speedier trials and swift justice. Only after such alternative efforts have been tried and accurate data obtained will it be possible to truly determine whether the drastic procedure of pretrial preventive detention should be formally engrafted into our system of criminal justice.

\(^{162}\) Senate Hearings, supra note 5, at 141. At the Senate Hearings it was reported that 92 percent of the offenders charged in the District Court had a past record, 45 percent had a record of violent crimes, 83 percent had some kind of conviction; and 65 percent had been in jail before.