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# The Bail Reform Act of 1966: Need for Reform in 1969

WARREN L. MILLER\*

Enactment of the Bail Reform Act of 1966<sup>1</sup> signified a departure from the traditional eligibility standards utilized for the pretrial release of defendants in noncapital cases.<sup>2</sup> Two fundamental premises were established by the Act: (1) that a person's financial status should not be a reason for denying pretrial release; and (2) that danger of nonappearance at trial should be the only criterion considered when bail is assessed.<sup>3</sup>

Although only federal courts apply the Bail Reform Act, their experiences have influenced and will continue to affect decisions at state and local levels on similar issues.<sup>4</sup> Furthermore, the questions posed and issues examined in this analysis are not at all unique to federal forums, for neither crime nor the practice of bail is unique to federal jurisdictions.

By way of explanation, it should be noted that nearly all the statistics and opinions referred to in this analysis deal with the District of Columbia. This is attributable to the fact that although the Act applies to federal courts throughout the country, it has had a far greater impact in the nation's capital than in any other federal jurisdiction.<sup>5</sup> While criminal jurisdiction in other district courts is limited to crimes set forth in the United States Code,<sup>6</sup> the

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1. 18 U.S.C. §§ 3146-52 (Supp. IV, 1969).

2. Traditionally, bail has been conditioned on "the financial ability of the defendant." FED. R. CRIM. P. 46(c). See generally McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L.J. 675 (1965); *Proceedings of the Conference on Bail and Indigency*, 1965 U. ILL. L.F. 1 [hereinafter cited as *Bail & Indigency*].

3. 18 U.S.C. § 3146(a) (Supp. IV, 1969).

4. The passage of the Bail Reform Act has had a liberalizing impact on the states. Since 1966, several states have adopted the principle of release on personal recognizance. See, e.g., CONN. GEN. STAT. ANN. § 54-63c (1968); PA. R. CRIM. P. 4001-14.

5. In the District of Columbia, cases involving crimes against the person constitute over half of the criminal caseload. By contrast, the incidence of these crimes in the other circuits is only about eight percent. Vinson, Preface to Note, *The United States Court of Appeals for the District of Columbia Circuit: 1967-1968 Term*, 57 GEO. L.J. 308, 311 (1968).

6. 18 U.S.C. § 3231 (1964).

District Court for the District of Columbia has complete felony jurisdiction under both the United States Code<sup>7</sup> and the District of Columbia Code.<sup>8</sup> Moreover, the Act applies to the District of Columbia Court of General Sessions in which all misdemeanors are tried and in which judges sit as committing magistrates in felony cases for the district court.<sup>9</sup> In 1967, the Court of General Sessions set bail in more than 40 percent of all the cases covered by the Bail Reform Act.<sup>10</sup> It is therefore necessary and desirable to assess the Act's effectiveness in light of its implications and administration in the District of Columbia.

This analysis outlines the bail system as it existed prior to implementation of bail reform, with the intrinsic abuses and deficiencies of that system enumerated. The dispositive provisions of the Bail Reform Act are discussed briefly, followed by an extensive analysis of the problems that have arisen under the Act. Although no detailed legislative proposals are proffered, there are certain general guidelines advanced in respect to future legislative action. The purpose of this analysis is not to promulgate specific remedial legislation, but rather to correct certain misconceptions<sup>11</sup> that have arisen and to achieve a proper focus on how the inherent weaknesses of the Bail Reform Act can be eliminated.

### *The Bail System Prior to Reform*

The administration of bail in the District of Columbia, as well as throughout the federal system, had long been predicated upon the use of financial bond to secure the appearance of an accused at the various stages of the criminal process.<sup>12</sup> Under this system, a person charged with a criminal offense

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7. *Id.* See *Arnstein v. United States*, 296 F. 946 (D.C. Cir.), *cert. denied*, 264 U.S. 595 (1924).

8. D.C. CODE § 11-521 (1967). The District of Columbia Code functions as both a municipal code and state-type statute for the District of Columbia.

9. D.C. CODE § 11-963(c) (1967).

10. *Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 32 (1969) (statement of Chief Judge Harold H. Greene) [hereinafter cited as *Amendment Hearings*].

11. Common misconceptions include notions that: bail is a constitutional right; that preventive detention violates an accused's right to be presumed innocent until proven guilty; and that preventive detention is per se unconstitutional.

12. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *accord*, *Forest v. United States*, 203 F.2d 83 (8th Cir. 1953).

There is a distinction to be drawn between the words "bail" and "bond" as used in this context. When a defendant is admitted to bail, his reappearance is secured by any number of conditions which are within the judge's discretion to impose, including the defendant's personal recognizance, a periodic check with a court officer, work release, or the posting of a sum of money. Bond, on the other hand, is more narrow, referring only to the posting of money to secure the defendant's appearance.

would appear initially before a committing magistrate who would determine the conditions of his pretrial release.<sup>13</sup> Although release on personal recognizance was technically possible,<sup>14</sup> this procedure was rarely used.<sup>15</sup> Rather, a money bond was set, thereby confronting the accused with the alternative of either making bond or suffering incarceration until trial.<sup>16</sup>

One of the most frequently voiced criticisms of the financial bond system that existed before reform and which continues to exist in many nonfederal jurisdictions is that it discriminates against and punishes the poor.<sup>17</sup> The financially well-established can easily afford to and do purchase their freedom, while the victims of the financial bail system, the poor, are jailed because they cannot raise the money for a bond. In effect, the ability to pay often becomes the sole criterion for deciding who goes free and who languishes in jail.<sup>18</sup> The inherent unfairness of this practice raises the question of whether or not financial bail is constitutional<sup>19</sup> in the light of the eighth amendment's express declaration that "[e]xcessive bail shall not be required."<sup>20</sup> The Supreme Court has held that since the purpose of bail is to ensure an accused's presence at trial, the fixing of financial bail "must be based upon standards relevant to the purpose of assuring the presence of that defendant."<sup>21</sup> Financial bail is constitutional; its imposition violates the eighth amendment only if it is in excess of that which is necessary to assure court appearance.<sup>22</sup> The Court, however, has not addressed the problem of "excessive bail" in light of the fourteenth amendment's guarantee of equal

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13. 18 U.S.C. § 3041 (1964).

14. Statutory authority for personal recognizance was available only by implication. See 18 U.S.C. § 3731 (1964). But Mr. Justice Douglas provided judicial authority by holding that, in proper cases, no security is required for release of a defendant on his own recognizance where there is no substantial risk that the defendant will not comply with the conditions of his release. To deny an indigent defendant release merely because he lacks sufficient property to pledge for his freedom is a denial of his constitutional right of equal protection. *Bandy v. United States*, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960). See also ATTORNEY GENERAL'S COMM. ON POVERTY & THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE REP. 58 (1963) [hereinafter cited as ATT'Y GEN. REP.]; Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 433 (1967); McCarthy & Wahl, *supra* note 2 at 681-703.

15. The rate of pretrial releases on personal recognizance in federal courts prior to March 1963 averaged only about six percent. ATT'Y GEN. REP. 58. See also Ervin, *supra* note 14 at 430-38.

16. See D.C. BAIL PROJECT, FINAL REPORT: BAIL REFORM IN THE NATION'S CAPITAL 3 (1966) [hereinafter cited as D.C. BAIL PROJECT].

17. See Ares & Sturtz, *Bail and the Indigent Accused*, 8 CRIME & DELINQUENCY 12 (1962); *Bail & Indigency*, *passim*.

18. See R. GOLDFARB, RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32 (1965) [hereinafter cited as GOLDFARB].

19. For a discussion of the constitutional right to bail see notes 82-89 *infra* and accompanying text.

20. U.S. CONST. amend. VIII.

21. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

22. *Id.*

protection under the law.<sup>23</sup> It can be argued that to a wealthy defendant a \$30,000 bond may be fair, reasonable and necessary to ensure his presence at trial; whereas to an indigent accused a \$300 bond may be unfair and excessive. Notwithstanding the undecided validity of such a constitutional argument, the situation unquestionably punishes the economically unfortunate.

The economics of the financial bail system are even more complicated than the choice between raising \$300 and sitting in jail suggests. When a defendant cannot make bail and is incarcerated until trial, he sustains a loss of earnings and may lose his job due to his absence. In some cases the accused's family may be forced to solicit public funds to replace the loss of earnings. In addition, the Government must bear the cost of maintaining pretrial detention facilities and feeding the accused. Consequently, the financial bail system is economically self-defeating both for society and for the accused individual.<sup>24</sup>

A second criticism of the financial bail system which forces indigents to accept pretrial detention is that such detention hinders the preparation of an adequate defense by the accused and his counsel. As stated by the Attorney General's Committee on Poverty and the Administration of Criminal Justice, "[t]here is persuasive evidence that a person held in custody in the interval between arrest and trial may thereby be deprived of the opportunity to make adequate defense to the charges against him."<sup>25</sup> The proposition that a defendant's ability to prepare an adequate defense is hampered by incarceration is supported further by the report of the Junior Bar Section of the District of Columbia Bar Association which concluded that the defendant's availability for office interviews and his help in locating witnesses undoubtedly would relax the burden placed upon his court-appointed counsel and lead to more effective preparation of his defense.<sup>26</sup> Moreover, the prospect of detention for several weeks pending trial may cause a defendant to plead guilty or waive his right to a jury.<sup>27</sup> Pretrial detention, therefore, not only

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23. U.S. CONST. amend. XIV. Though the fourteenth amendment only protects against state action, similar protection is afforded against federal action through the fifth amendment's due process clause which has been held to protect against arbitrary and invidious discrimination. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

24. See GOLDFARB 32.

25. ATT'Y GEN. REP. 58.

26. COMM. ON THE ADMINISTRATION OF BAIL OF THE JUNIOR BAR SECTION OF THE BAR ASS'N OF THE DISTRICT OF COLUMBIA, REPORT: THE BAIL SYSTEM OF THE DISTRICT OF COLUMBIA 5 (1963) [hereinafter cited as JUNIOR BAR SECTION REP.].

27. See McCarthy & Wahl, *supra* note 2 at 686-93.

affects pretrial liberty, but, in fact, may affect the very outcome of the trial itself.<sup>28</sup>

A third criticism of the system is that pretrial detention, in effect, constitutes pretrial punishment. Socially, the wife and family of the accused may be ostracized by neighbors and friends because the husband is a "criminal in jail." The resultant humiliation may occur solely because of the inability to raise the necessary funds for the bail bond. Further, the psychological effects of incarceration have a destructive effect on human character and may embitter the prisoner against the society which has "unjustly" jailed him.<sup>29</sup> These effects were amply documented by a congressional investigation which examined conditions existing in federal and state penal institutions.<sup>30</sup> The prevalence of forced homosexual abuses, racial tension, and indiscriminate beatings by fellow prisoners are realities in almost all penal systems, and the defendant who is unable to make a money bond must cope with such treatment notwithstanding the fact that he has not yet been adjudged guilty of any offense.

The financial bond system has also been attacked for placing too much reliance upon the use of professional bondsmen—businessmen whose public image leaves much to be desired.<sup>31</sup> In many places the bonding business has been infiltrated by racketeers and other criminal elements. The "quick money" aspect of the business, combined with common contacts with the "grapevine" and among prospective clients makes bail-bonding a natural business for such persons.<sup>32</sup> Furthermore, the nature of the bail-bond business invites corruption by way of "fee-splitting" referrals between bondsmen and lawyers and by "kick-back" arrangements with police, jailers, and court personnel. But the most objectionable aspect of using professional bondsmen is the considerable power which comes to reside in these individuals.<sup>33</sup> A

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28. JUNIOR BAR SECTION REP. 5; see PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA REP. 523 (1966) [hereinafter cited as D.C. CRIME COMM'N REP.].

29. "The typical jail is dirty and overcrowded. The food is deplorable. Supervision is scant. . . . The typical jail has little to inspire the prisoner and much to demoralize him. The result is that he must spend his time there vegetating and degenerating. And worse." *Hearings on Federal Bail Procedures Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 46 (1964) (statement of James V. Bennett, Director of the United States Bureau of Prisons).

30. *Hearings Before the Subcomm. on Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

31. See GOLDFARB 102. See generally D.C. BAIL PROJECT 11-18; *Bail & Indigency*, *passim*.

32. See GOLDFARB 102.

33. The judges are aware of the odious power the bondsman has concerning who remains in jail and who goes free:

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as

bondsman is invested with sole discretion as to whether he will write even the smallest bond, and his decision is not reviewable by a court of law.<sup>34</sup> The bondsman's discretionary power not to act as surety for an accused is, in effect, a veto power over both the defendant's ability to obtain bail and the court's determination that an accused is qualified for release. Yet this discretion is not the only example of the bondsman's unwelcome usurpation of functions that in the past have been exclusively governmental. A bondsman also has certain quasi-police powers of arrest and extradition over defendants released under his bond who have fled the jurisdiction.<sup>35</sup> In many respects the bondsman can act as a *de facto* state officer, exercising virtually the same powers as can police authorities.<sup>36</sup>

The possession of these powers by bondsmen becomes shocking when it is considered that they are free to exercise such powers arbitrarily, unrestrained by the constitutional safeguards that ordinarily regulate such conduct.<sup>37</sup> Bondsmen often arrest and return defendants without regard to extradition procedures. The defendant may also be subjected to physical abuse and overbearing conduct by a bondsman who, in order to deter flight by other clients, must maintain a reputation for "bringing back his man." Finally, although a bondsman can relieve himself of all obligations by surrendering a defendant to court authorities,<sup>38</sup> he is still entitled to retain his bond premium. Hence, the bondsman has greater powers and is subjected to fewer controls than his police counterpart. It is fair to conclude that

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surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, *and the ones who are unable to pay the bondsmen's fees*, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

34. As a practical matter, many bondsmen refuse to write bonds for small amounts which yield only a minimal fee. Consequently, a defendant might find that a bondsman is far more willing to write a higher bond than a lower one, and the indigent defendant accused of committing a minor offense for which a small money bond is set is perhaps more likely to remain incarcerated than a defendant charged with a serious offense for which a higher bond is set. See D.C. BAIL PROJECT 11-12.

Although the courts in the District of Columbia have been given wide discretion to regulate professional bondsmen, D.C. CODE § 23-608 (1967), they have not required that bondsmen write bonds in all amounts. See D.C. CT. GEN. SESS. (CRIM.) R. 5; D.C. CT. GEN. SESS. (JUV.) R. 22.

35. 18 U.S.C. § 3142 (1964); see GOLDFARB 116-17.

36. These powers rest on the premise that the principal is in the custody of his sureties, and that the original imprisonment has not been discontinued. Therefore, the bondsman may seize his principal at any time, imprison him at will, have him reincarcerated, pursue him across state lines and break into his house. "The seizure is not made by . . . new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner." Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

37. GOLDFARB 115-18.

38. 18 U.S.C. § 3142 (Supp. IV, 1969).

while the indigent accused is the victim of the financial bail system, the bondsman is its beneficiary.<sup>39</sup>

### *The Bail Reform Act of 1966*

Enacted by a nearly unanimous Congress,<sup>40</sup> the Bail Reform Act of 1966 became effective on September 20, 1966. It signified the first major overhaul of federal bail law since 1789 when, by passage of the Judiciary Act,<sup>41</sup> the first Congress made bail a matter of right in noncapital cases.

By its terms, the Bail Reform Act fosters release of defendants, both before trial and pending appeal, on terms other than financial bond. It does not, however, eliminate a judge's right to require a money bond.<sup>42</sup> Under Section 3146, the judicial officer is authorized to impose whatever "conditions of release" he deems appropriate to insure the accused's appearance at trial. The factors that are considered when conditions of release are set include: community and family ties, employment, length of residence in the community, prior convictions, financial resources, the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the defendant's record of appearance at previous court proceedings, including any prior flight to avoid prosecution.<sup>43</sup>

The clear import of the Bail Reform Act is to make release without posting a money bond the norm, not the exception. "[T]he system's emphasis shifts from release of specially qualified defendants on personal bond to release of all defendants on conditions suited to their individual risks."<sup>44</sup> Moreover, a defendant who, as a result of his inability to meet the conditions of release, remains detained for over 24 hours is entitled, upon application, to have the conditions reviewed by the judicial officer who imposed them.<sup>45</sup> If the judicial officer refuses to amend the original order, he is required to "set forth in writing the reasons for requiring the conditions imposed."<sup>46</sup> The defendant can then challenge the order in an appellate court having proper jurisdiction.<sup>47</sup>

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39. GOLDFARB 115-18.

40. See 112 CONG. REC. 12488-505 (1966).

41. Judiciary Act of 1789, ch. XX, § 33, 1 Stat. 73, 91; see Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966).

42. 18 U.S.C. § 3146(a) (Supp. IV, 1969). The committing magistrate may require the execution of a secured appearance bond or a "bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof . . . ." 18 U.S.C. §§ 3146(a)(3), (4) (Supp. IV, 1969).

43. 18 U.S.C. § 3146(b) (Supp. IV, 1969).

44. Wald & Freed, *supra* note 41 at 941.

45. 18 U.S.C. § 3146(d) (Supp. IV, 1969).

46. *Id.*

47. *Id.* § 3147(b).



A provision of the Act that could be of considerable significance is Section 3150 which provides penalties for those who willfully fail to appear.<sup>48</sup> While this section calls for stringent penalties, in practice courts and prosecutors have not routinely enforced the provision.<sup>49</sup> The difficult burden of proving that a defendant "willfully failed to appear" has made the Government reluctant to initiate proceedings under Section 3150. Prosecutors recognize that a defendant can easily create reasonable doubt in a jury's mind merely by giving a plausible explanation for his nonappearance.<sup>50</sup> Thus, the difficulty of proving willful nonappearance, coupled with the enormous backlog of cases on court calendars, has made enforcement of Section 3150 impractical and ineffective.

Mention should also be made of Section 3148 which concerns "release in capital cases or after conviction."<sup>51</sup> Pursuant to this section, a person accused of an offense punishable by death or a person who has been convicted of any offense and is appealing the conviction or awaiting sentence "shall be treated in accordance with section 3146 [release in noncapital cases]."<sup>52</sup> However, the judge is expressly authorized to consider "danger to any other person or to the community" as a proper element in setting bail in such cases. This provision recognizes the constitutional distinction between pretrial and post trial bail and entrusts the judge with greater discretion in dealing with the convicted criminal who seeks bail pending appeal than in dealing with an accused who has not yet been tried.

The aforementioned sections constitute the major substantive provisions of the Bail Reform Act. Although in principle the Act is progressive and provides badly needed reforms, in practice serious problems have evolved from its implementation and administration. It is to these problems and the implications of the Act that analysis must now be directed, for it is

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48. This section provides that a defendant who willfully fails to appear in court shall incur a forfeiture of any security which was given for his release, and be subject to a fine of \$5,000 or five years imprisonment, or both, if he had been released in connection with a felony charge, or be subject to a fine of \$1,000 or one year imprisonment, or both, if his release had been in connection with a misdemeanor. 18 U.S.C. § 3150 (Supp. IV, 1969).

49. Chronic manpower shortages have precluded full implementation of service of warrants by the United States Marshal. The FBI is reluctant to serve warrants for bail jumping because of other work pressures. REPORT OF THE JUDICIAL COUNCIL COMM. TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 11 (1969) (The Judicial Council issued its initial report in 1968, but has continued to oversee the implementation of its recommendations. The 1969 report is its progress report.) [Hereinafter cited as HART COMM. REP. 1969].

50. Among the more commonly used excuses are confusion of dates, lack of notice to appear, illness, death in the family, and inability to pay for transportation back to the jurisdiction.

51. 18 U.S.C. § 3148 (Supp. IV, 1969).

52. *Id.*

impossible to advance remedial suggestions without first identifying the causes and evaluating the problems involved.

*Experience with Bail Reform—Problems and Proposals*

*Recidivism on Bail*

When the bail system was reformed to permit the pretrial release of most defendants, only limited consideration was given to the protection of society from crimes which might be perpetrated by persons released under the Act; in fact, Congress specifically postponed consideration of those issues relating to crimes committed by persons released pending trial.<sup>53</sup> Ironically, however, the problem of recidivism during pretrial release has proved to be one of the most acute problems that has arisen with respect to administration of the Bail Reform Act.

The importance of the problem is such that it cannot be ignored. A recent report related that during one six week period in 1966, three separate homicides and a related suicide in the District of Columbia were attributable to persons released on bond.<sup>54</sup> Other statistics demonstrating the seriousness of the bail-recidivism problem were suggested by the Judicial Council's Committee to Study the Operation of the Bail Reform Act in the District of Columbia—the Hart Committee.<sup>55</sup> Although this committee found only a nine percent recidivism rate during pretrial bail in the District of Columbia for 1967 and a rate of seven percent for 1968,<sup>56</sup> these rates were based solely upon the number of persons *actually indicted for a felony* allegedly committed while on bail.<sup>57</sup> The statistics fail to reflect many intangible but relevant factors that affect the recidivism rate. First, many crimes go undetected or are not brought to the attention of the police authorities.<sup>58</sup> Second, many crimes remain unsolved and never result in an arrest, much less an indictment.<sup>59</sup> Third, a significant number of felonies are "broken down" to misdemeanors by the prosecution to help ease the backlog of pending felony cases on the court calendar.<sup>60</sup> Finally, in accordance with the familiar practice of plea bargaining, quite often a felony charge is dropped if the defendant pleads guilty to a lesser offense; similarly, multiple charges are

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53. See H.R. REP. NO. 1541, 89th Cong., 2d Sess. 6 (1966).

54. D.C. CRIME COMM'N REP. 513.

55. HART COMM. REP. 1969 at 18-26.

56. *Id.* at 19.

57. These statistics could be misleading because they exclude incidents not leading to indictment and include cases which resulted in acquittal and reversal. *Id.* at 19-20.

58. FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1968 at 4.

59. See *id.* at 30-32.

60. D.C. CRIME COMM'N REP. 233.

frequently dropped in exchange for a guilty plea on one count.<sup>61</sup> Consequently, the recidivism figures published by the Hart Committee must be considered minimal rates at best. Present estimates of crime committed by persons on bail in the District of Columbia go as high as 70 percent,<sup>62</sup> and, as the Committee concluded, "[c]rime charged against persons released on bail continues at a significant level in the District of Columbia."<sup>63</sup>

Further analysis of the recidivism problem reveals that robbery is the most frequent offense for which persons on bail are reindicted<sup>64</sup> and that narcotics offenders are the most frequent perpetrators of crime while on bail.<sup>65</sup> One report has indicated that 34.6 percent of all persons originally indicted for robbery in the District of Columbia between July 1, 1966 and June 30, 1967 were reindicted for at least one additional felony committed while free on bail.<sup>66</sup> According to another study, 70 percent of 345 persons who had been indicted in the District Court for the District of Columbia in 1968 for robbery offenses and who later were released on bond were arrested at least once more during the year for an additional offense.<sup>67</sup>

Other statistical data, although based on studies conducted before the Bail Reform Act went into effect, reveal that persons who commit additional crimes while on bail tend to commit offenses of the same type as the one originally charged.<sup>68</sup> Also, a high incidence of prior arrests and convictions exists among defendants rearrested while on bond. According to the same report, 88 percent of those who allegedly committed offenses while on bail had prior criminal records.<sup>69</sup>

#### *Coping with Recidivism—Preventive Detention*

Several proposals have been advanced to deal with the problem of recidivism on bail.<sup>70</sup> The most frequently advocated of these calls for amending the

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61. *Id.* at 234.

62. HART. COMM. REP. 1969 at 18.

63. *Id.*

64. *Id.* at 24.

65. Address by Will Wilson, Assistant United States Attorney General, American Bar Association Annual Meeting, Aug. 12, 1969. For a study of the relationship between drug abuse and crime, see D.C. CRIME COMM'N REP. 562-73.

66. *Amendment Hearings* 76 (statement of Senator Joseph Tydings).

67. HART COMM. REP. 1969 at 24-25.

68. D.C. CRIME COMM'N REP. 518. Furthermore, more than 80 percent of the crimes committed while on bail were as or more serious than the original offense. *Id.*

69. *Id.* These statistics are further supported by the Hart Committee which revealed that 57.8 percent of bail offenders (persons indicted while on bail pending disposition of a prior felony case) had one or more prior felony convictions within the preceeding ten years. HART COMM. REP. 1969 at 25.

70. Evidence of the increasing concern over recidivism are these bills, all introduced during the first session of the ninety-first Congress: S. 288 (additional standard for bail of danger to others or to the community); S. 289 (allowing denial of bail to

Bail Reform Act to allow both consideration of "danger to the community" in the setting of bail<sup>71</sup> and preventive detention<sup>72</sup> of those defendants who do not qualify for release under this new criterion. Although the objection is voiced that a judge is unable to predict future criminal conduct, such objection seems untenable when considered in context with the other difficult decisions a judge must make in setting bail. The present criteria upon which the decision to set bail is based require a judicial officer to assess the likelihood of flight by an accused. A judge or committing magistrate is just as competent, if not better able, to predict danger to the community as he is to predict flight.<sup>73</sup>

Also to be considered is the fact that the security and safety of witnesses essential to the Government's case may be imperiled if a dangerous defendant is released. The prospect of having a defendant who is charged with the commission of a serious or violent crime returning to the same neighborhood where the crime was committed creates an ideal milieu for intimidation and duress of the victims and witnesses of the original offense.

Contrasted with the broad support for allowing "danger to the community" as an element to be considered in setting bail, the proposal to preventively detain certain defendants before trial is a source of widespread concern and intense disagreement. Opponents of preventive detention argue that to consider any factor other than danger of flight is unconstitutional; that preventive detention violates the presumed innocence of the defendant;

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persons charged with a capital offense or persons who are charged with crimes of violence and who have been previously convicted of a crime of violence); S. 546 (detention of persons charged with a felony); S. 547 (detention of capital defendants and anyone convicted); S. 2600 (consideration of danger to the community and providing for pretrial detention of dangerous persons); H.R. 323 (pretrial detention of persons determined to be a danger to the community); H.R. 325 (investigative detention and search of suspects); H.R. 335 (standard of danger to community); H.R. 1033 (standard of danger to community); H.R. 2781 (pretrial detention based on additional standard of danger to community).

71. This proposal has met only minimal opposition. It has been supported by the Hart Committee, the D.C. Crime Commission, and by all the judges of the Court of General Sessions. *Amendment Hearings* 33 (statement of Chief Judge Harold H. Greene), 534-35 (the Hart Committee), 607 (the D.C. Crime Commission).

72. It is important to recognize that the terms "preventive detention" and "pretrial detention" are not synonymous. Preventive detention is detention for the purposes of preventing flight, insuring the safety of witnesses, or protecting the public from additional crimes by the accused. Pretrial detention is detention before trial solely because the individual has been charged with a crime. See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE 83 (1968).

73. Danger to the community is not a novel criterion in determining whether a release should be allowed. The Bail Reform Act itself permits such a factor to be considered when deciding if release should be granted pending appeal. See text accompanying note 52 *supra*. Danger to the community is also a common criterion for release from a mental institution in which one has been involuntarily confined. See, e.g., D.C. CODE § 21-546 (1967).

that it is punishment before conviction; that it is impossible to predict future criminal activity; that it violates the defendant's right to due process of law; and that bail is a constitutional right afforded by implication through the eighth amendment.<sup>74</sup> Each of these contentions, however, is rebuttable.

As already stated, a judicial officer setting bond is as competent to determine whether a defendant poses a danger to society as he is to predict whether a defendant is likely to flee the jurisdiction. A defendant's prior criminal record, coupled with a showing of strong incriminating evidence on the pending charge affords sufficient criteria from which a judge can predict whether the accused is likely to commit an additional offense if released.<sup>75</sup>

The claim that preventive detention offends the traditional presumption of innocence can be rebutted by recognizing that the presumption is merely a procedural rule of evidence, operative only at trial.<sup>76</sup> It never was intended to require that all defendants be treated as if innocent until found guilty at trial. A defendant can be denied pretrial liberty when there is a finding of probable cause by a judicial officer that he committed an offense and where there are strong reasons for temporarily detaining him. This determination in no way impairs his presumption of innocence at trial; nor should it be construed as a determination of guilt in advance. Rather, the defendant is detained for what he may do in the future, which is necessary because of what there is probable cause to believe he has done in the past.<sup>77</sup>

The proposition that pretrial detention amounts to pretrial punishment is probably the most difficult argument to reconcile. Perhaps the only realistic reply to such an assertion is that a utilitarian approach is a necessary evil of our system of justice in which immediate trials are not possible. As in other areas of constitutional law, societal interests must be balanced. In this case, society's interest in protecting itself from the danger posed by persons released pending trial must be balanced against society's interest in the freedom of its citizens in the absence of proof by trial of violations of the law. Since the vast majority of those prosecuted are ultimately adjudged guilty,<sup>78</sup> and since most defendants are released on some type of bail, the possibility of

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74. See D.C. CRIME COMM'N REP. 520-24.

75. Likelihood of recidivism can be estimated by considering many of the same factors which are considered to predict flight. In addition, the underlying causes of certain crimes, when shown by competent evidence to exist in the accused, can result in a high degree of accuracy in these predictions. For example, it has been shown that narcotic addiction leads to the commission of crime to support the habit. It must also be remembered that the prediction of flight is hardly an exact science.

76. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1501 (1966). But see D.C. CRIME COMM'N REP. 520.

77. *Amendment Hearings* 399-400 (statement of Judge James A. Belson).

78. The overall felony conviction rate by plea or trial is consistently over 75 percent. D.C. CRIME COMM'N REP. 240.

the rights of any one individual being violated is minimal. It also should be noted that the Bail Reform Act expressly provides that a defendant shall be given credit toward service of his sentence for any time spent in custody while awaiting trial for that offense.<sup>79</sup>

Whether preventive detention infringes upon the constitutional right of "due process" depends upon the facts of the particular case in question. The judicial determination that a defendant poses a danger to the community, and thus should be detained, must be based on the weight of the evidence, the seriousness of the alleged crime, the defendant's record, and other information pertinent to the particular case. As long as the ruling to detain is not arbitrary and the defendant is afforded a hearing, a right to appeal the ruling, and a right to a speedy trial, then the fifth amendment's guarantee of due process has not been violated.<sup>80</sup> The due process clause is not an absolute bar to governmental restraint of individuals prior to trial and final adjudication of conviction.<sup>81</sup> So long as the restraints imposed on the liberty of the accused are reasonable in light of society's acknowledged interest in protecting its citizens and preventing the commission of additional crimes, then the requirements of due process are satisfied.

Finally, opponents of preventive detention argue that it violates a defendant's constitutional right to bail. The eighth amendment, however, states only that "[e]xcessive bail shall not be required;" it does not establish a right to bail.<sup>82</sup> The law respecting bail in noncapital cases is a statutory right, not a constitutional right. It was established by Congress in 1789 at the same time that the eighth amendment was enacted.<sup>83</sup> It is important to note, however, that at that time nearly all of the more serious crimes carried the death penalty.<sup>84</sup> Consequently, the original bail law, providing that all crimes not punishable by death should be subject to bail, was very narrow in its applicability. It was not until 1882 that the number of capital offenses in the laws of the United States was substantially reduced.<sup>85</sup> Yet when Con-

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79. 18 U.S.C. § 3568 (Supp. IV, 1969).

80. See Note, *Preventive Detention Before Trial*, *supra* note 76 at 1500-05.

81. "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.

The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." *Zemel v. Rusk*, 381 U.S. 1, 14 (1965).

82. See H.R. REP. NO. 1541, 89th Cong., 2d Sess. 8 (1966): "Thus, there is no specifically granted right to bail." Also, the eighth amendment prohibition against excessive bail has been judicially construed as not establishing, *per se*, a right to bail. *Mastrian v. Hedman*, 326 F.2d 708, 710-11 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964). See Note, *Preventive Detention Before Trial*, *supra* note 76 at 1498.

83. Judiciary Act of 1789, ch. XX, § 33, 1 Stat. 91.

84. See Crimes Act of 1791, ch. IX, 1 Stat. 112.

85. Act of July 1, 1882, ch. 258, § 7, 22 Stat. 127.

gress, in response to public sentiment demanding more humane punishment and treatment of criminals,<sup>86</sup> reduced the penalties of many of the most serious crimes from death to imprisonment,<sup>87</sup> there was no corresponding change made in the law with respect to bail. By this action, however, Congress did not establish an unqualified right to bail for such offenses;<sup>88</sup> nor did it foreclose itself from subsequently amending the bail act if it deemed such action necessary. Regardless of the reasons for which Congress chose not to alter the bail statute in 1882, it is certainly free to amend the statute today if it should so desire.<sup>89</sup>

The arguments advanced in support of preventive detention, combined with the spiraling crime rate,<sup>90</sup> suggest that adoption of some type of discretionary preventive detention is necessary; but such a procedure must be carefully circumscribed in order to minimize the possible invasion of individual liberty. Every defendant is entitled to and must be afforded the legal safeguards constituting due process. Such safeguards should include the following:

1. Authority to detain without bail should be restricted to cases involving crimes of violence;<sup>91</sup> especially when such offenses involve the use of a dan-

86. See G. WILLIAMS, *SALMOND ON JURISPRUDENCE* 115-24 (11th ed. 1957); Note, *Preventive Detention Before Trial*, *supra* note 76, at 1500.

87. Act of July 1, 1882, ch. 258, § 7, 22 Stat. 127.

88. See *Allen v. United States*, 386 F.2d 634 (D.C. Cir. 1967); Note, *Preventive Detention*, 36 GEO. WASH. L. REV. 178, 182 (1967). See also *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 433 (1967).

89. See Note, *Preventive Detention Before Trial*, *supra* note 76 at 1499, 1501-03. See also *Carlson v. Landon*, 342 U.S. 524 (1952).

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases. . . . The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. . . . Indeed, the very language of the Amendment fails to say all arrests must be bailable.

*Id.* at 545-46.

90. See FBI, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1967* 2, 3 where statistical data reveals that from 1960-67 there was an 89 percent increase in the number of criminal offenses; that while the population increased 10 percent, the crime rate (number of offenses per 100,000 population) increased 71 percent. According to the Uniform Crime Reports (1968 Preliminary Annual Release), during calendar year 1968 crime increased nationally 17 percent over 1967 with violent crimes rising 19 percent and robbery 29 percent. Also, the Uniform Crime Report for Jan.-Mar. 1969 shows a 10 percent, nation-wide increase in crime over the same period in 1968, with robbery rising 22 percent.

Statistics for Washington, D.C. reveal a sharp increase in crime, with an increase in robbery offenses from 5,759 in 1967 to 8,622 in 1968, and for the period Jan.-Mar. robberies have increased from 1,777 in 1968 to 2,788 in 1969.

91. D.C. CODE § 22-3201, *as amended*, (Supp. II, 1969):

"Crime of violence" . . . means any of the following crimes, or an attempt to commit any of the same, namely: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnapping, burglary, robbery, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery,

gerous weapon;<sup>92</sup> cases in which the defendant is a narcotic addict; cases in which the defendant is accused of committing a serious offense involving "moral turpitude"<sup>93</sup> while released pending trial on a prior felony charge; cases in which evidence shows a dangerous psychic disturbance or psychic motivation in the defendant's conduct (*e.g.*, sexual psychopaths); or cases in which the accused is likely to flee the jurisdiction if released.

2. A judicial officer's determination to detain a defendant must be based upon evidence adduced at a special hearing requested for such purpose by the prosecution. At such a hearing, the Government would have the burden of establishing that the defendant is within the purview of the statute and particularly that his release would endanger the community or occasion likelihood of flight. Further, all testimony and evidence adduced at the hearing would be inadmissible at trial.<sup>94</sup>

3. Periods of detention should be for a maximum of 30 days, after which, if trial has not begun, a defendant must be released on his own recognizance. The 30 day period may be extended, however, if the defendant consents or causes a trial delay or upon request and a showing by the Government of good cause for delaying the trial. In no event, however, would the Government be entitled to more than one 30 day extension. All defendants who are detained without bond would be placed upon an expedited trial calendar to ensure that a trial of the case was begun within the designated time limit.

4. Appeal to the appropriate appellate court should be a matter of right for any defendant held without bail under the provisions of such a statute. Appellate review of such detention must be exercised and a ruling on the matter rendered within 48 hours after an appeal is filed.<sup>95</sup> This right of appeal should exist as to both initial and extended detention orders.

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assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment in the penitentiary.

92. A dangerous weapon is one likely to produce death or great bodily injury. *Scott v. United States*, 243 A.2d 54 (D.C. Ct. App. 1968). More specifically, any instrument designed or used for offense becomes a dangerous weapon. *Tatum v. United States*, 110 F.2d 555 (D.C. Cir. 1940); *accord*, *Patten v. United States*, 42 App. D.C. 239 (1914).

93. Whether an offense is one of "moral turpitude" would be a question within judicial discretion. Generally, however, crimes *malum in se* would be included whereas offenses *malum prohibitum* would not.

94. Procedurally, it would be no problem to hold such hearings on the same day on which a defendant is arraigned or appears for presentment on a felony charge. The Government would be required to give the court and defense counsel notice of its intention to request that a defendant be detained without bond, and a hearing set for the same afternoon. All such hearings would be before one judge specially assigned to handle these proceedings, thereby minimizing any adverse effects that such hearings might have on the backlog of pending cases. As to the inadmissibility of the proceedings at trial *cf.* *Simmons v. United States*, 390 U.S. 377 (1968).

95. The appellate court would summarily review the detention order to determine if there was abuse of judicial discretion or if the defendant did not come within the



This proposal presupposes that an expedited trial would be set, thereby preventing a defendant from being held involuntarily for several months while awaiting trial. If defense counsel felt that he had not been afforded a reasonable time in which to prepare the case for trial, however, he would be entitled to a continuance.

Critics of preventive detention will argue that an up-to-date court calendar would obviate the need for preventive detention. But the prospect of having speedy trials in the District of Columbia is not a reality at present, and will not be so for several years.<sup>96</sup> Even if dangerous defendants could be tried within 30 or 45 days after arrest, there will still be certain ones who should not be released even for that length of time.<sup>97</sup>

The harsh consequences occasioned by the use of preventive detention are far more palatable, and indeed preferable to the setting of high money bonds to reach the same result. Whereas preventive detention is supportable both legally and morally on its own merits, setting high money bond for the same purpose is repugnant to the eighth amendment's prohibition against excessive bail and repulsive to the concept of "equal justice under law." The law should be above such subterfuge. If a judicial officer feels compelled to detain a dangerous defendant, he should not have to conceal his purpose by manipulating the amount of a money bail beyond a defendant's ability to pay.

### *Bail During Civil Disorders*

Directly related to the issue of preventive detention is the question of suspending the Bail Reform Act during civil disorders. The fact that avowed opponents of pretrial preventive detention would allow detention of certain persons arrested during the course of a riot evidences the support for such a proposal.<sup>98</sup> The Hart Committee expressly recommended that judicial officers be given "additional authority to deny release entirely for persons charged with certain riot connected offenses for the duration of an officially declared emergency."<sup>99</sup> Proponents of such a suspension, however, are unable to agree on which offenses should be subject to such a measure.<sup>100</sup>

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purview of the statute. Upon such a finding by the appellate court an order would be issued directing the lower court to immediately set a financial bond or other conditions of release.

96. HART COMM. REP. 1969 at 29, 33; *see* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, REPORT—THE CHALLENGE OF CRIME IN A FREE SOCIETY 154-56 (1967) (delay prevalent in courts across the nation).

97. *See* HART COMM. REP. 1969 at 33 (recidivists, narcotic addicts, and those charged with crimes posing danger to the community during riots should not be released).

98. *See generally Amendment Hearings* 398-99 (statement of Edward L. Barrett, Jr.).

99. HART COMM. REP. 1968 at 30.

100. Within the Hart Committee alone there have been three separate formulations of offenses which would warrant suspension of bail: (1) arson, possession or use of

Additional disagreement has been encountered with regard to the types of emergencies that would require suspension and the duration of the suspension once invoked. Neither of these problems can be solved by application of definite and permanent criteria. Rather, flexible criteria are needed—criteria that are capable of adapting to the exigencies of the moment, while still affording the defendant adequate procedural safeguards.

One possible solution would be to limit the length of time that courts are empowered to suspend the Bail Reform Act. Detention for 24 to 72 hours would be both practical and realistic since most major civil disturbances are well under control within this time.<sup>101</sup> An added precaution, however, could be built into such legislation by a provision allowing for additional detention if the crisis persisted. Furthermore, because of the increased dangers of mistaken identity during a civil disturbance, the arresting officer's presence should be mandatory at a bail hearing if detention of the offender is sought. Finally, as to which offenses should be included under such a statute, it is untenable to contend that looters and individuals charged with inciting to riot<sup>102</sup> should be released to engage in new riot-connected activities. Although it has been alleged that looters are merely "swept up on the temptations of the moment"<sup>103</sup> and do not constitute a danger if released immediately, justifiable concern exists that once released, looters might return to the scene of the disorders and be "swept up" again. A person charged with "inciting to riot" likewise presents a danger to the community, and temporary detention of such offenders is warranted.

#### *Bail Reform and the Narcotic Addict*

Another significant problem arising from the application of the Bail Reform Act concerns release of a defendant who is either a narcotic addict or user. According to Senator Joseph Tydings, Chairman of the Senate District of Columbia Committee, as much as three-fourths of the crime in the Nation's capital is attributable to narcotic addicts.<sup>104</sup> As a practical matter, the narcotic addict is forced to commit additional crimes while on bail in order to

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firearms, and possession of explosives; (2) inciting to riot, burglary, and assault with a dangerous weapon; and (3) anyone who would pose "a grave danger to the community" if released. HART COMM. REP. 1968 at 29, 30. See also HART COMM. REP. 1969 at 32.

101. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 359-407 (1968). Although several of the disorders, notably Detroit and Newark, have lasted longer than three days, the Kerner Commission Report indicated that a person arrested at the first peak of the disorder and detained for 72 hours would be released after some order had been restored to the riot area. *Id.*

102. D.C. CODE § 22-1122 (Supp. II, 1969).

103. *Amendment Hearings* 143 (statement of Patricia M. Wald).

104. Office of Senator Joseph D. Tydings, Press Release (March 2, 1969).

support his addiction. Many addicts will admit to a \$40 or \$50 per day habit which is supported entirely by stealing. Release of such a defendant almost assures theft in excess of several hundred dollars per week. Consequently, addicts are released by courts with the knowledge that they will continue to prey on the innocent members of society in order to pay for their addiction.<sup>105</sup> The obvious approach would be to demand that the addict be detained pending an expedited trial. Yet the conclusion that narcotic addicts are usually recidivists cannot be considered under the present Bail Reform Act. Ironically, the fact that an addict cannot usually leave his source is relevant, since danger of flight is therefore minimal. Thus, they are considered good risks and the Bail Reform Act dictates they be released, notwithstanding the danger posed to the community in terms of future larcenies, burglaries, robberies, and tampering offenses.<sup>106</sup>

Hence, a conflict between what is right in theory and what is known in practice confronts the judicial officer setting bail. To adhere to the terms explicitly prescribed by the Bail Reform Act will work an injustice upon the interests of the community, yet refusal to set reasonable conditions of release according to Section 3146 of the Act seems manifestly unfair to the defendant, regardless of the collateral fact that he is an addict.

This dilemma can be solved by amending the Bail Reform Act to permit discretionary preventive detention of narcotic addicts. Such a provision would have to be consistent with the proposals already promulgated for dealing with recidivism on bail.<sup>107</sup> Further, where a defendant-narcotic addict would be held without bail, he could be committed to a hospital for treatment of his addiction during the pretrial period.<sup>108</sup>

The problem with such an amendment is how to ascertain which defendants are habitual drug users. This subject was touched upon by the Hart Committee's recommendation that an appropriate condition of release could be submission to regular checks for use of narcotics.<sup>109</sup> That recommendation would work ideally for the nonhabitual user, but would be ineffective in respect to the defendant with a heroin habit. The addict with a bad habit might of necessity be forced to commit crime to pay for his addiction, then be unable to appear for his "narcotic check" in view of the fact that the

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105. *Amendment Hearings* 220 (statement of Judge Tim Murphy).

106. *Id.*

107. See pp. 37-39 *supra*.

108. HART COMM. REP. 1969 at 5-6. There is some question whether such a proposal would violate the defendant's fifth amendment right not to be "compelled . . . to be a witness against himself" or if it would be considered only nontestimonial evidence. See *Schmerber v. California*, 384 U.S. 757, 760-61 (1966).

109. This might avoid the problem that punishment (detention) for addiction alone is violative of the eighth amendment's restriction against cruel and unusual punishment. See *Robinson v. California*, 370 U.S. 660 (1962).

results would be incriminating.<sup>110</sup> Consequently, a bench warrant must be issued, served, and the defendant made to reappear in court to have his bail revoked.<sup>111</sup> The net result would be a waste of time, money and manpower, all of which was predictable at the initial bail hearing.

A far more reasonable proposal is the one advanced by Senator Joseph Tydings, which calls for administration of a narcotics test to all defendants as a precondition to their release on bail.<sup>112</sup> According to the Tydings proposal, individuals charged with crimes against persons or property would be required to undergo urine tests to determine if they are addicted to narcotics. Those found to be addicted would be detained and given immediate treatment while awaiting trial.<sup>113</sup> In essence, the Tydings proposal would permit pretrial detention of defendants who, if released, would of necessity be forced to resort to crime to support their narcotic habit. It would insure protection of the community and at the same time enable the addicted defendant to receive immediate medical treatment.

Although the basic premise of the Tydings proposal is sound, in practical terms it is unrealistic unless made more restrictive in scope. The prospect of having urine samples taken of most defendants who appear in courts would require a huge staff of supporting personnel to process the specimens and present its findings to the court.<sup>114</sup> Such a procedure would present problems of inadequate facilities, lack of staff, prohibitive cost, and the danger of mislabeling due to the large number of specimens that would have to be processed daily. But even more troublesome is the time which such tests would require. At present, the court and the Bail Agency are hard pressed to get through the calendar each day. It is not uncommon for Assignment Court, where conditions of release are initially set, not to be adjourned until very late in the afternoon. To add the variable of time-consuming narcotic tests would make the situation both intolerable and unworkable. The only feasible way these tests could be administered would be to detain defendants overnight, thereby inundating the jails with individuals awaiting test results. Rather than making progress with the present backlog of cases, the net effect of such a procedure would be to further slow down the judicial process.

But by far the most objectionable feature of the Tydings proposal is that it would constitute an oppressive invasion of the rights of those defendants

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110. HART COMM. REP. 1969 at 5-6. *See also Amendment Hearings* 122 (statement of Judge Charles W. Halleck).

111. *See* HART COMM. REP. 1969 at 11.

112. Statement of Senator Joseph D. Tydings, news conference, Washington, D.C., Feb. 11, 1969.

113. Press Release, *supra* note 104 at 2.

114. *See generally* UNIFORM CRIME REP., *supra* note 58 at 89; *Amendment Hearings* 692-93.

who are not narcotic addicts. Unless probable cause exists that a defendant is an addict, subsection to a urine test derogates a defendant's right to due process.<sup>115</sup>

A more realistic approach would be to limit the administration of such tests to defendants who have narcotics histories or to defendants who have exhibited visible signs of addiction, *i.e.*, needle marks, withdrawal symptoms, or obviously being under the influence of drugs. Such a procedure would be restrictive enough in scope to satisfy both due process and administrative considerations, yet still be able to render the desirable results that would emanate from such tests. If there is any substance whatsoever to Senator Tydings' estimate that narcotic addicts are responsible for nearly 75 percent of the crime in the District of Columbia,<sup>116</sup> then implementing such a procedure would greatly reduce the rate of recidivism on bail. Congress cannot afford to ignore these factors if the spiraling crime rate is to be abated.

#### *Conditions of Release and Their Enforcement*

Three years after implementation of the Bail Reform Act, administrative problems have clearly emerged, *e.g.*, enforcement of conditions of release and failure of defendants to appear in court when required. Each of these problems must be analyzed in respect to its cause, implications and solubility.

The Bail Reform Act expressly authorizes a wide range of restrictive conditions of release which a judicial officer may set in lieu of, or in addition to, the defendant's personal recognizance.<sup>117</sup> These conditions include restrictions on travel, association, residence, and "any other conditions deemed reasonably necessary to assure appearance as required."<sup>118</sup> It is this broad authorization for setting conditions of release which has enabled judges to impose conditions which are unrealistic and unenforceable. Although imaginative and innovative when set, many conditions of release prove impractical and impossible to enforce.<sup>119</sup> Unless conditions of release can be readily

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115. See *Schmerber v. California*, 384 U.S. 757, 767-71 (1966) (need for probable cause that defendant is intoxicated); *cf. Breithaupt v. Abram*, 352 U.S. 432 (1957) (state statutes allowing invasion of the body require probable cause); *Rochin v. California*, 342 U.S. 165 (1952) (invasion of the body's integrity without probable cause shocks the conscience).

116. See note 104, *supra* and accompanying text.

117. 18 U.S.C. § 3146(a) (Supp. IV, 1969).

118. *Id.* § 3146(a)(5).

119. Examples of such conditions are (1) requiring defendants to be home by a specified time, (2) prohibiting a defendant from going west of a certain street or into a certain neighborhood, (3) admonishing a narcotic addict to stop using narcotics, and (4) prohibiting a defendant from leaving the jurisdiction. See *Amendment Hearings* 102. Such conditions require many more bail agency and law enforcement officers than the District now has because of the constant supervision and coordination which each of these conditions requires. See D.C. CRIME COMM'N REP. 225-27, 407-09, 414-16.

supervised, they should not be imposed. When irrelevant and unenforceable conditions are set, the defendant becomes quickly aware of the lack of supervision and is needlessly tempted to violate such conditions. In addition, a defendant's violation of unenforceable conditions is likely to precipitate a general lack of respect for the seriousness of his obligation to obey court orders.

Even if reasonable and enforceable conditions of release are set, they are meaningless if there is not constant supervision by authorities.<sup>120</sup> At present the D.C. Bail Agency is unable to fully carry out those functions set out by statute.<sup>121</sup> If the Bail Agency is to be "in fact the 'bondsman' for all defendants released under the Bail Reform Act. It should be given the tools with which to do its job effectively."<sup>122</sup> These tools are money, trained personnel, and time to properly prepare reports and recommendations. Congress must realize that before effective supervision and enforcement is possible, the necessary commitment of resources must be made.

It should be recognized, however, that an efficient and expanded bail agency will not by itself achieve the desired results. Judges must be willing to take action against defendants who violate conditions of release. Presently, of the 21 judges on the District of Columbia Court of General Sessions, only one regularly holds hearings on bail violations.<sup>123</sup> Most judges set conditions but do not enforce them. This is particularly disconcerting when considered in light of Bail Agency records which reflect that over 50 percent of all defendants released weekly violate one or more conditions of their

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See also *Ball v. United States*, 402 F.2d 206 (D.C. Cir. 1968) (the defendant has since fled the jurisdiction and never been tried).

120. *Amendment Hearings* 33 (statement of Chief Judge Harold H. Greene):

Release conditions are only as effective as the ability to enforce them. . . . [B]ecause no agency . . . has ever had the capability of enforcing conditions, . . . many judges have felt it to be an exercise in futility to impose strict requirements or conditions. . . . [I]t is essential that . . . some . . . public department be given the responsibility and the personnel necessary for meaningful supervision, investigation, and inspection . . . to verify that the court's conditions are actually being complied with.

121. Statutorily, the District of Columbia Bail Agency was established to gather data on an arrested person that was pertinent to his bail status under the Bail Reform Act. This data was to be drafted into a written report and submitted to the appropriate court. D.C. CODE §§ 23-901 to 23-903 (1967). To do this work the Agency was given an annual budget of \$130,000. *Id.* § 23-908.

Additionally, the courts have given the Agency the task of supervising all nonfinancial bailees, including notifying them of court appearances. At present the Agency is not sufficiently staffed to properly fulfill its statutory obligations much less this added burden. Interview with Bruce D. Beaudin, Director, D.C. Bail Agency, in Washington, D.C., April 2, 1969. See also *Amendment Hearings* 30, 33, 99-107, 511-14, 529; HART COMM. REP. 1969 at 1-4, 6, 14; D.C. BAIL AGENCY, SECOND ANNUAL REP. 1, 2, 4 (1968).

122. *Amendment Hearings* 339 (statement of Chief Judge Edward M. Curran).

123. Interview with Bruce D. Beaudin, *supra* note 121. Even this effort has become

release.<sup>124</sup> Although Bail Agency statistics do not differentiate mere technical violations from serious deviations, the fact remains that fewer than ten percent of those who violate conditions are ever called to task by anybody.<sup>125</sup>

Yet judicial concern for enforcement of conditions of release will in all likelihood continue to be lax until the penalty provisions of the Bail Reform Act are expanded to include violation of conditions of release. At present, only failure to appear in court is punishable under Section 3150 of the Act.<sup>126</sup> Prosecution for contempt of court is available,<sup>127</sup> but ineffective as either a sanction or a deterrent against defendants who flagrantly violate the terms of their release. If the use of conditions of release is ever to be effective, significant penalties must exist for defendants who ignore their obligations.

Toward this end, the Bail Reform Act should provide for revocation of bail in cases where defendants violate their conditions of release. Furthermore, threats against witnesses or jurors or disruptive conduct during trial would also justify revocation of bail and preventive detention.<sup>128</sup> Revocation could be authorized by issuance of a court order upon receipt of an affidavit sworn to by an appropriate person, setting forth evidence of substantial non-compliance by the defendant.<sup>129</sup> Requiring a special hearing would be too time-consuming and afford merely another opportunity for appeal by the defendant. Instead, upon revocation of bail being ordered, the defendant would be detained pending trial, with the same guarantee of speedy trial offered him as would be afforded other defendants held without bail.<sup>130</sup>

The requirement of an affidavit under oath that sets forth substantial evidence of noncompliance would provide protection against revocation for minor violations or occasional inadvertence by a defendant. Yet such a provision would be sufficiently coercive in nature that defendants would adhere substantially to the conditions of their release.

The proposal which advocates that defendants who violate conditions of release be charged with a separate criminal offense and given severe sentences upon conviction, is both impractical and unrealistic. The courts are

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increasingly futile in light of the Bail Agency's inability to properly supervise bailees and to report violations to the court.

124. *Id.* See generally HART COMM. REP. 1968 at 17-21.

125. Interview with Bruce D. Beaudin, *supra* note 121.

126. See notes 48-50 *supra* and accompanying text.

127. See 18 U.S.C. § 402 (1964); D.C. CODE § 11-982 (1967).

128. *Carbo v. United States*, 82 S. Ct. 662, 668 (Douglas, Circuit Justice, 1962); *Fernandez v. United States*, 81 S. Ct. 642 (Harlan, Circuit Justice, 1961). See also *Bitter v. United States*, 389 U.S. 15, 16 (1967) (per curiam).

129. Although "substantial noncompliance" is a subjective test and would depend upon the circumstances of a particular case, such a provision is restrictive enough in scope to prevent revocation of bail for a mere technical violation.

130. See pp. 38-39 *supra*.

unable to effectively cope with the criminal calendar as it exists, much less attempt to enforce supervision of bailed defendants through criminal prosecutions. Such a proposal would constitute another hollow threat, whereas revocation of release coupled with pretrial detention is realistic, practical, and amenable to effective enforcement. When a defendant knows that such a severe sanction can and will be levied against him for failing to abide by the conditions imposed, compliance can be expected.

A second major problem emanating from the administration of the Bail Reform Act concerns the failure of defendants to appear in court when scheduled. Although existence of the problem is not disputed, its seriousness and significance is a matter of controversy. Indicative of the divergent views which exist are the unexplained disparities among figures kept on the number of bail jumpers.

According to statistics furnished by the D.C. Bail Agency, during the period from November 1, 1966 to May 31, 1967, only 62 of the 2,174, or 2.8 percent of the defendants released on nonfinancial pretrial bail failed to appear in court when due.<sup>131</sup> The Agency further reports that during the period June 1, 1967 to May 31, 1968, only 243 of 3,800, or 6.3 per cent of defendants released on nonfinancial pretrial bail failed to appear in court.<sup>132</sup>

At variance with these figures are those contained in a District of Columbia Court of General Sessions memorandum.<sup>133</sup> The memorandum categorically breaks down the number of attachments still outstanding for defendants who failed to appear in court when required. According to the figures therein, during 1967 attachments were issued for 355 defendants released on personal recognizance who failed to appear, and in 1968, attachments were issued for 641 similar defendants.<sup>134</sup> It is important to note that these figures do not include those attachments issued and successfully served on defaulting defendants, nor those attachments issued but subsequently quashed upon the voluntary appearance by a defendant. Consequently, the number of persons who actually defaulted while on personal bond is probably considerably higher than the figures in the memorandum reflect.<sup>135</sup> In this regard, it is important to note that the statistics enumerated in the memorandum refer only to the D.C. Court of General Sessions, and are exclusive of

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131. D.C. BAIL AGENCY, FIRST ANNUAL REP. 6 (1967).

132. D.C. BAIL AGENCY, SECOND ANNUAL REP. 6 (1968).

133. Interoffice memo from F.B. Beane, Jr., Chief Deputy Clerk, Criminal Division, D.C. Court of General Sessions to J.M. Burton, Clerk of D.C. Court of General Sessions, Jan. 8, 1969.

134. *Id.*

135. Interview with F.B. Beane, Jr., Chief Deputy Clerk, Criminal Division, D.C. Court of General Sessions, Washington, D.C., April 8, 1969.



attachments issued by the U.S. District Court.<sup>136</sup> Yet the Bail Agency figures reflect the combined total of both courts.<sup>137</sup>

Whether either of these reports accurately reveals just how many persons have failed to appear is doubtful. Of the two reports, the figures in the court memorandum seem to be far more realistic. Moreover, those figures are consistent with the opinions of many judges who have had actual experience with the problem of nonappearance.<sup>138</sup> Estimates as to the number of persons who default on conditions of release vary considerably,<sup>139</sup> but the experience of several informed individuals places the figure at around 25 percent.<sup>140</sup> In other words, one out of every four defendants freed on nonfinancial conditions of release fails to appear at trial.

There is a definite and acute problem of nonappearance by defendants. Although the problem is very real, it is not insoluble. Several recommendations aimed at alleviating this problem were advanced by the Hart Committee.<sup>141</sup> The most meaningful of these proposals included: (1) giving high priority to the prompt service of warrants in default cases;<sup>142</sup> (2) enactment of legislation to permit nationwide service of process against bail jumpers;<sup>143</sup> (3) referral of unserved warrants to the FBI for execution;<sup>144</sup> (4) imposition by courts of consecutive rather than concurrent sentences for convictions under Section 3150 of the Act;<sup>145</sup> (5) facilitation *by the courts* of the prosecution of bail jumpers by creating an inference that the failure of a defendant to appear in court as required after appropriate warning and notice is willful within the meaning of Section 3150 of the Act.<sup>146</sup>

At present, the criminal element is well aware that prosecution of bail

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136. Interoffice memo, *supra* note 133.

137. See D.C. BAIL AGENCY REPS., *supra* notes 131-32.

138. Judge Beard of D.C. Court of General Sessions estimates the extent of nonappearance to be about 30 percent; Judge Korman (D.C. Court of General Sessions) estimates the rate to be 40 percent; Judge Burka (D.C. Court of General Sessions) places the percentage at between 30 and 50 percent. Interview with Edward A. Beard, Judge, D.C. Court of General Sessions, in Washington, D.C., July 8, 1969; see *Amendment Hearings* 105 (statement of Judge Charles W. Halleck). See also HART COMM. REP. 1969 at 5, 12, 44.

139. *Amendment Hearings* 113-14 (statement of Judge Charles W. Halleck): "I have been consistently unable to obtain from any source any accurate figures showing just how many persons have failed to appear either in our court or in district court. My personal experience indicates to me that the number is astronomical."

140. Interview with Judge William Pryor, D.C. Court of General Sessions, July 9, 1969. Interview with Frederick B. Beane, Jr., D.C. Court of General Sessions, April 8, 1969. Interview with Alonzo Christian, Clerk of U.S. Assignment Court, Criminal Division, D.C. Court of General Sessions, April 8, 1969.

141. See HART COMM. REP. 1968 at 17-24.

142. See HART COMM. REP. 1969 at 5-13.

143. *Id.* at 11.

144. *Id.*

145. *Id.* at 12.

146. *Id.*

jumpers is minimal. Even if convicted, a concurrent sentence is the norm, not the exception. Judges argue that they cannot force the prosecution of bail jumpers since the decision to prosecute lies solely within the discretion of the United States Attorney. Yet limited prosecutions under Section 3150 are not surprising in light of the requirement that the Government prove that a defendant willfully failed to appear.

Before a strong prosecutive policy can be expected there must be enactment of legislation which creates a rebuttable presumption of willfulness upon the failure of a defendant to appear in court. The Hart Committee's recommendation seeks the right result, but through questionable means. It is doubtful that courts have the power to create an inference in Section 3150 of the Act that never was intended by Congress.<sup>147</sup> Congress made the law without any inference, and Congress must rectify its lack of foresight. Judicial legislation must be avoided, especially in cases of criminal statutes where the rule of strict construction is applicable.

In addition to inclusion of the proposals of the Hart Committee, the Bail Reform Act should be amended so that revocation of bail and preventive detention are permissible in the case of bail jumpers. This would eliminate the subterfuge of high monetary bonds being set to achieve the same result. However, in the event that there were extenuating circumstances, a defendant might be permitted to remain on the original or amended conditions of release. This would be a matter of judicial discretion. But the important factor is that a judge would have the power to detain defaulters.

### *Conclusion*

Whether the Bail Reform Act has been a primary cause of the spiraling crime rate is questionable, but that it has been a contributing factor is certain. Legislative action is necessary to allow for preventive detention if the problem of recidivism on bail is to be solved. Speedy trials are a desirable goal, but as a practical matter, an up-to-date court calendar will not solve the problem. It is a well known fact that speedy trials do not depend entirely upon adequate court facilities. Many defense lawyers indulge in dilatory tactics and delay trials as a matter of course. This is particularly true where a defendant is on bail. Rather than being desirous of a speedy trial, it is often to a defendant's benefit to stall as long as possible.<sup>148</sup> Further, even if speedy trials became a reality, there would still exist certain types of de-

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147. See notes 48-50 *supra* and accompanying text.

148. Some of the more frequent problems which the Government encounters when there is a lengthy delay between the date of the offense and the date of trial are: death or inability of Government witnesses to testify, a loss of interest by complaining witnesses, and an increased chance of loss of memory or confusion in testimony at trial.

defendants who pose such grave danger to the safety of the community that they should not be released for even a minimal period of time. The Bail Reform Act must be amended to provide for pretrial preventive detention of certain obviously dangerous offenders, including narcotic addicts and certain categories of defendants during periods of riot or civil disturbance.

Moreover, the Act must be amended to allow for effective administration and meaningful enforcement of conditions of release. Along with stringent supervision of defendants on conditions of release, if there is expeditious apprehension and prosecution of bail jumpers, coupled with the imposition of severe sentences, then renewed respect for the provisions of the Bail Reform Act can be anticipated.