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Steven Duke

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## Bail Reform for the Eighties: A Reply to Senator Kennedy

### Cover Page Footnote

Professor of Law, Yale University. B.S. 1956, Arizona State University; J.D. 1959, University of Arizona; L.L.M. 1961, Yale University.

# BAIL REFORM FOR THE EIGHTIES: A REPLY TO SENATOR KENNEDY

STEVEN DUKE\*

## INTRODUCTION

THE Bail Reform Act of 1966<sup>1</sup> may rank as the most significant legislative reform of the criminal process of this century.<sup>2</sup> A product of the "New Frontier" and the "Great Society," it reflected a broad consensus that society had the ability and the duty to alleviate the disadvantages caused by poverty, racism, and powerlessness. The Act recognized that pretrial incarceration was frequently unnecessary to assure appearance at trial and that it was unjust and discriminatory when reasonable alternatives were available. Money bail<sup>3</sup> was deemphasized, and the courts were directed to release persons without it when circumstances permitted.<sup>4</sup>

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\* Professor of Law, Yale University. B.S. 1956, Arizona State University; J.D. 1959, University of Arizona; L.L.M. 1961, Yale University.

1. Pub. L. No. 89-465, 80 Stat. 214-16 (1966) (codified at 18 U.S.C. §§ 3141-3156 (1976)).

2. See generally Ervin, *Foreward: Preventive Detention—A Step Backward for Criminal Justice*, 6 Harv. C.R.-C.L. L. Rev. 291 (1971); Ervin, *The Legislative Role in Bail Reform*, 35 Geo. Wash. L. Rev. 429 (1967). For reports of bail studies strongly supporting the reforms incorporated in the Bail Reform Act, see D. Freed & P. Wald, *Bail in the United States: 1964* (1964); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958). By 1971, at least 36 states had enacted similar reforms. See Murphy, *Revision of State Bail Laws*, 32 Ohio St. L.J. 451, 485 (1971).

3. Throughout the Article, "money bail" will be used broadly to include all financial conditions required to assure appearance for trial if they involve the actual posting with the court of cash, property, or a professional surety bond. Occasionally, as the context will indicate, the term is employed more narrowly and excludes surety bonds.

4. The key provision of the Bail Reform Act stipulates that in other than capital offenses, the accused shall be ordered released until trial either on his own recognizance or upon execution of an unsecured appearance bond. If the judge requires more assurance of appearance, he may impose the first of five conditions, and if "no single condition gives that assurance, any combination of the . . . conditions." The conditions are: (1) third person custody; (2) restrictions on travel, association or place of abode; (3) execution of an appearance bond and a deposit not to exceed 10% of the face value of the bond; (4) a surety bond or cash deposit; (5) "any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." 18 U.S.C. § 3146(a) (1976).

The Bail Reform Act, however, was not a panacea. As the focus of reformers shifted to other areas, bail reform efforts began to ebb and dormant forces reasserted themselves. Judges in many jurisdictions reverted to their old practices of requiring money bail of persons who posed any bail risks and inflicting prohibitive bond requirements on those suspected of being dangerous.<sup>5</sup> The prompt appellate review of bail decisions, mandated by the Bail Reform Act<sup>6</sup> became moribund.<sup>7</sup> Funding for bail studies disappeared, and service agencies so essential to the operation of a liberal pretrial release program found it increasingly difficult to function.<sup>8</sup>

The Nixon administration then replaced the "War on Poverty" with the "War on Crime." A principal weapon of that campaign was preventive detention, the denial of pretrial release to criminal defendants who are determined to pose "a clear danger to the community."<sup>9</sup> Due largely to the efforts of Senator Sam Ervin,<sup>10</sup> an attempt to enact a preventive detention statute was defeated, except in the District of Columbia.<sup>11</sup> The preventive detention proposals did succeed, however, in temporarily refocusing attention on problems of pretrial incarceration. Shortcomings in the administration of the Bail Reform Act were recognized, new studies conducted, and remedies proposed.<sup>12</sup>

Recently, the Senate Committee on the Judiciary, virtually without debate,<sup>13</sup> attached a replacement of the Bail Reform Act<sup>14</sup> to the proposed Federal Criminal Code.<sup>15</sup> The bail provisions, incorporated in section 3502,<sup>16</sup> were adopted by the Committee and await

5. See W. Thomas, *Bail Reform in America* 8, 31-32 (1976); Wald, *The Right to Bail Revisited: A Decade of Promise without Fulfillment*, in *The Rights of the Accused* 177, 184-86 (S. Nagel ed. 1972).

6. 18 U.S.C. § 3147 (1976).

7. See C. Whitebread, *Criminal Procedure*, 345-46 (1980); Wald, *supra* note 5, at 186.

8. See Wald, *supra* note 5, at 186.

9. See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1223 (1969) (footnote omitted).

10. See *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Preventive Detention Hearings*]; W. Thomas, *supra* note 5, at 229-31.

11. A preventive detention provision was incorporated in the District of Columbia Court Reform and Criminal Procedure Act of 1970. Pub. L. No. 91-358, § 210(a), 84 Stat. 644 (1970) (codified at D.C. Code Encycl. § 23-1322 (West Supp. 1970)).

12. See W. Thomas, *supra* note 5, at 8-10.

13. See *Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10323, 10340, 10350 (1979) [hereinafter cited as *Hearings on S. 1722 and 1723*].

14. 18 U.S.C. §§ 3141-3156 (1976).

15. S. 1722, 96th Cong., 1st Sess. (1979) (available from the U.S. Government Printing Office).

16. *Id.* § 3502. As originally introduced in the Senate, S. 1722 carried forward the provisions of the Bail Reform Act.

further action in the Senate. In an article in the *Fordham Law Review*, Senator Kennedy, as a sponsor of these provisions, urged their enactment.<sup>17</sup> The Senator finds only "one important shortcoming" in the "traditional approach" to bail as a means of assuring an accused's appearance at trial—its failure "to deal effectively with those defendants who commit crimes while they are free on bail."<sup>18</sup> Section 3502 represents a "new approach," which purports to be a "middle course" between preventive detention and "release . . . based solely on the likelihood of flight."<sup>19</sup> The goals of this new approach are to confront the problem of pretrial crime, while avoiding the pitfalls of preventive detention, and to "bring new candor to the bail release decision by ending abusive practices."<sup>20</sup>

Although the proposed bail provisions of S. 1722 may be substantially "new," they are not in the "middle course." Rather, the new proposal is far to the right of the Nixon administration concept of preventive detention and poses a greater threat to individual liberty than any preventive detention scheme espoused by John Mitchell.<sup>21</sup> It is surprising to have such a proposal from Senator Kennedy, one of the nation's most ardent and eloquent advocates for the poor and the powerless. The explanation lies, I think, in a failure to appreciate how the provisions of the bill will function within the reality of the criminal process. Senator Kennedy also overlooks many facets of the problem of pretrial release that should be considered by those concerned with the plight of the weak and the poor.

### I. PREVENTIVE DETENTION AND SECTION 3502

During the preventive detention debates in the late sixties and early seventies, proponents promised that pretrial incarceration of "dangerous defendants" would significantly reduce crime rates.<sup>22</sup> Opponents argued that it was unconstitutional<sup>23</sup> and merely a palliative

17. See generally Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 *Fordham L. Rev.* 423 (1980).

18. *Id.* at 423.

19. *Id.* at 434-35.

20. *Id.* at 435.

21. See generally Mitchell, *supra* note 9.

22. See *Preventive Detention Hearings*, *supra* note 10, at 271-88 (statement of Richard Kleindienst). See generally Hruska, *Preventive Detention: The Constitution and the Congress*, 3 *Creighton L. Rev.* 36 (1969); Mitchell, *supra* note 9.

23. By prohibiting "excessive bail," the eighth amendment of the United States Constitution arguably precludes denial of pretrial release for any reason but risk of flight. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). In any event, preventive detention is a deprivation of liberty without due process. See Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 *Va. L. Rev.* 371 (1970). Equal protection problems also arise. See Foote, *The Coming Constitutional Crisis in Bail* (pts. 1-2), 113 *U. Pa. L. Rev.* 959, 1125 (1965); cf. Goldstein & Katz, *Dangerousness and Mental Illness Some Observations on the Decision to Release Persons Acquitted*

to the crime problem.<sup>24</sup> Most cogently, perhaps, the critics pointed out that it was virtually impossible to predict dangerousness accurately. Any attempt to do so was certain to lead to over-prediction and the erroneous jailing of the great majority of detainees. Prevention of one crime might require the incarceration of as many as twenty persons.<sup>25</sup> Regardless of constitutionality, this would be an exorbitant and unprecedented price for an insignificant reduction in the crime rate. Indeed, crime might be more effectively prevented if the money required for detention hearings, jailing and maintaining the detainees, as well as supporting their dependents, was allocated to other crime prevention activities.<sup>26</sup>

Senator Kennedy seems to join opponents of preventive detention in acknowledging that "accurate predictions of a defendant's future criminality are difficult to make."<sup>27</sup> He agrees that pretrial detention "is contrary to the presumption of innocence and undermines the accused's constitutional protections,"<sup>28</sup> and that "[i]t is questionable whether such complete pretrial incarceration is constitutionally permissible."<sup>29</sup> Citing the experience in the District of Columbia,

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by *Reason of Insanity*, 70 Yale L.J. 225, 237-38 (1960) (the continued detention of a person who is no longer insane but still potentially dangerous is constitutionally questionable); Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1499-1500 (1966) (the right to bail is implied but undefined by the eighth amendment). *But see* Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L.J. 1381 (1972); Mitchell, *supra* note 9, at 1224-31. *See also* Wald, *supra* note 5, at 190-92 (summarizing several other legal issues).

24. Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia (1969) (minority views of Beaudin, Bowers, Bowman, Freed and Wald), reprinted in *Preventive Detention Hearings*, *supra* note 10, at 703, 738-42; Tribe, *supra* note 23, at 371-74.

25. *See* Dershowitz, *Imprisonment by Judicial Hunch*, 57 A.B.A.J. 560, 563 (1971). *See generally* Dershowitz, *Preventive Detention: Social Threat*, Trial, Dec-Jan, 1969-70, at 22; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. Legal Educ. 24 (1970); *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 300 (1971) [hereinafter cited as *Empirical Analysis*]. Reliable predictors of pretrial crime are unavailable. *See* National Bureau of Standards Report, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants* (1970), reprinted in *Preventive Detention Hearings*, *supra* note 10, at 765; P. Wice, *Freedom For Sale* 77-80 (1974).

26. A recent study indicated that it costs approximately \$70 per day, almost \$26,000 per year, to confine a prisoner in a New York City jail. N.Y. Times, Mar. 2, 1978, § B, at 7, col. 1.

27. Kennedy, *supra* note 17, at 430.

28. *Id.* at 428.

29. *Id.* at 430. The constitutionality of the District of Columbia preventive detention provisions, D.C. Code Encycl. § 23-1322 (West Supp. 1970), has never been decided by an appellate court. *But see* Blunt v. United States, 322 A.2d 579 (D.C. 1974), which upheld its application to a defendant who had repeatedly threatened a prosecution witness. The court believed that there was ample authority for the detention even without the preventive detention provisions of D.C. Code Encycl. § 23-1321(a) (West Supp. 1970). *See also* Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969).

where a preventive detention measure has been in effect since 1970, Senator Kennedy faults that statute on more pragmatic grounds: it simply has not worked. Prosecutors have not used it<sup>30</sup> because it is burdensome, time-consuming, and requires expedited trials. Moreover, it is unnecessary. Judges are willing to circumvent it *sub rosa* by imposing high money bail, ostensibly because of the risk of flight. Thus, preventive detention appears "in disguise without the need to comply with due process requirements and an expedited trial date."<sup>31</sup>

Senator Kennedy asserts, however, that "the critical problem of crimes committed by persons on bail cannot be ignored."<sup>32</sup> He states that persons on bail are being arrested and charged with serious felonies with "increasing frequency." Moreover, "the likelihood of a person committing additional crimes while on bail is not only higher than the crime rate for the general population, . . . it is also much higher than the likelihood of the suspect's failing to appear at trial."<sup>33</sup> The first claim, that arrests for pretrial crime are increasing in "frequency," is not surprising in view of the growth in population and crime rates, and the woeful failures of our correctional systems.<sup>34</sup> The second, that the statistical "likelihood" of such crime is "higher than the crime rate in general," is not new. Persons charged with crime are, for the most part, members of disadvantaged groups—racial and ethnic minorities, young males, the unemployed, those deficient in skills or education—who account for a disproportionate share of recorded crime. Members of these groups who are not charged with crime are also statistically more likely to commit crimes than the general population.<sup>35</sup> The third contention, that pretrial crime occurs at a rate "much higher than the likelihood of the suspect's failing to appear at trial," is puzzling. Although pretrial crime is

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30. Preventive detention could have been invoked in 1,500 cases in 1977, but prosecutors requested it in only 40. See Kennedy, *supra* note 17, at 430-31. See also N. Bases & W. McDonald, *Preventive Detention in the District of Columbia: The First Ten Months (1972)*; Wald, *supra* note 5, at 193.

31. Kennedy, *supra* note 17, at 431.

32. *Id.* at 428.

33. *Id.*

34. Senator Kennedy's principal source for his statement on the increase in pretrial crime rate is P. Wice, *supra* note 25, at 73-77. Professor Wice's statistics do not show that the percentage rate of rearrest while on bail has increased in recent years. Rather, his report on a 72 city survey found that "half of the cities surveyed experienced an increase in the number of crimes committed by defendants awaiting trial for another crime." *Id.* at 76 (emphasis added).

35. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 43 (1967) [hereinafter cited as *President's Report on Crime*]; D.C. Bail Agency, *Report for the Period January 1, 1977—December 31, 1977*, at 17-20 [hereinafter cited as 1977 D.C. Bail Agency Report]; C. Silberman, *Criminal Violence, Criminal Justice* 48-50 (1978); *Empirical Analysis*, *supra* note 25, at 306-07.

doubtless a more serious problem than nonappearance for trial under present bail practices,<sup>36</sup> Senator Kennedy seems to conclude from this comparison that there is a "failure of our bail laws to balance the likelihood of the defendant's appearance at trial with the needs of community safety."<sup>37</sup> Assuming Senator Kennedy means that courts should consider dangerousness as well as risk of flight in bail decisions, the conclusion simply does not follow from the data. Low rates of nonappearance, either in absolute terms or relative to crime rates, are simply not relevant to the seriousness of the crime problem or the need to reform bail decisionmaking to transform it into a "crime-fighting device."<sup>38</sup> Infrequent willful failures of releasees to appear for trial merely suggest that courts are too stringent in setting release conditions to assure appearance.

Neither Senator Kennedy's statistics nor his analysis indicates that the problem of pretrial crime during release has altered significantly since 1970.<sup>39</sup> He is undoubtedly correct that the problem "cannot be

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36. The study cited by Senator Kennedy, J. Roth & P. Wice, *Pretrial Release and Misconduct in the District of Columbia II-45 to -59* (Institute for Law & Social Research, PROMIS Research Project No. 16 1978) [hereinafter cited as *Inslaw Study*], showed a willful nonappearance rate in the District of Columbia of 3.5% for felonies and 2.5% for misdemeanors. Kennedy, *supra* note 17, at 428 n.38. Another recent study of a random sample of felony defendants drawn from eight federal districts, thought to represent "a cross section of the federal bail system in terms of geography, criminal caseload size, and PSA [pretrial service agency] versus non-PSA districts," found a "failure to appear" rate of 3.4%. General Accounting Office, *Statistical Results of the Bail Process in Eight Federal District Courts 1, 27* (1978) [hereinafter cited as *GAO Study*].

37. Kennedy, *supra* note 17, at 424.

38. *Id.* at 430.

39. Some of the more alarming statistics cited by Senator Kennedy, including 40% rearrest rates for larceny and forgery, and 33% for robbery, *id.* at 423-24, are not new. During the preventive detention debates of 1969-70, there were claims of rearrest rates as high as 70%. See Hruska, *supra* note 22, at 40; Mitchell, *supra* note 9, at 1236. The most serious and reliable studies show a rearrest rate of approximately 10%. See, e.g., P. Wice, *supra* note 25, at 75 (7% in multi-city survey); National Bureau of Standards Report, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants* (1970), reprinted in *Preventive Detention Hearings*, *supra* note 10, at 767 (11% in District of Columbia); *Empirical Analysis*, *supra* note 25, at 308-09 (in Boston, 14.5% released defendants rearrested, of which 64%, or 9.6% of the total sample, were convicted of offense for which rearrested). A more recent study found a 13% rearrest and less than 50% conviction rate among persons charged with felonies in the District of Columbia Superior Court in 1974. *Inslaw Study*, *supra* note 36, at II-48 to -51. Another recent General Accounting Office study of eight representative federal districts found a rearrest rate of 9%, 25% of which were misdemeanor charges. *GAO Study*, *supra* note 36, at 30-31. Employing post-release arrests as the measure of crimes on release is problematic. In the District of Columbia, for example, only half those arrests result in convictions, as noted above. Most of the data on arrests during pretrial release also fail to distinguish between arrests for pre-release offenses and those for post-release offenses. A post-release arrest, moreover, is a convenient device for police to "appeal" a release deci-



ignored," but the issue is what role it should play in bail decisionmaking.<sup>40</sup> Senator Kennedy believes the answer is found in the proposed legislation. Section 3502, however, not only sanctions preventive detention, it fails to provide the procedural safeguards found in the nation's only other preventive detention statute. This may be demonstrated by a direct comparison of section 3502 with the much criticized preventive detention provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970.<sup>41</sup>

A. *Section 3502 and the District of Columbia  
Preventive Detention Statute: A Comparison*

Section 3502 directs the judge to release on his own recognizance or an unsecured appearance bond, any person whose signature will "reasonably assure" his appearance for trial.<sup>42</sup> Such an accused is to be released on the condition that he "not commit a federal, [s]tate, or local crime."<sup>43</sup> If more assurance of appearance is required, the judge may impose "the least restrictive condition or combination" of eleven conditions of release that will provide that assurance.<sup>44</sup> The court then determines whether the accused's release "will endanger the safety of any other person or the community" and may impose another combination of the same conditions that will reasonably assure community safety.<sup>45</sup> The first ten conditions—third party cus-

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sion they do not like. Such an arrest is likely to result in pretrial detention, *sub rosa* or otherwise. Thus, there may be a relationship between liberal pretrial release and arrests during release that has nothing to do with pretrial crime.

40. The crime rate among the general population is said to be more than 5%. U.S. Dep't of Justice, Uniform Crime Reports for the United States 35 (1978). It is doubtful that more than 5% to 10% of the nation's crime is committed by persons on pretrial release, who at any given time number less than 1% of the population. Hence, if all persons arrested were incarcerated, the reduction in the crime rate might be insubstantial. Even with respect to robbery, where recidivism is said to be very high, it has been estimated that jailing all defendants during the entire pretrial period would only reduce this crime by about 5%. See W. Thomas, *supra* note 5, at 238. It has also been established that pretrial crime rates increase as the time between arrest and disposition lengthens. See National Bureau of Standards, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants* (1970), reprinted in *Preventive Detention Hearings*, *supra* note 10, at 765, 770; *Empirical Analysis*, *supra* note 25, at 299, 389. According to these studies, less than half the rearrests occurred during a 90 day period following arrest. If the Speedy Trial Act of 1975, 18 U.S.C. §§ 3161-3174 (1976), which aims at trying cases within 100 days of the charge, is ever fully implemented, pretrial crime could be halved. See generally Project, *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713 (1979).

41. D.C. Code Encycl. § 23-1322 (West Supp. 1970).

42. S. 1722, 96th Cong., 1st Sess. § 3502(a) (1979).

43. *Id.* § 3502(c).

44. *Id.* § 3502(a),(d).

45. *Id.* § 3502(b),(d).

tody, restrictions on travel, regular reporting, no contact with witnesses, no firearms, psychiatric treatment, drug or alcohol treatment, money bail and surety bonds<sup>46</sup>—are drawn in large measure from existing law and practice in the District of Columbia. The District of Columbia Court Reform and Procedure Act of 1970 did not merely add preventive detention to the Bail Reform Act, it modified the latter by requiring the judge to select a combination of release conditions not only to assure appearance for trial, the only purpose in all other federal districts, but to assure community safety.<sup>47</sup> Accordingly, all of the first ten conditions in section 3502 have been utilized in the District of Columbia.<sup>48</sup> What is truly new about section 3502 is condition eleven, which requires that the defendant "return to official detention after specified hours or during specified periods, and abide by such other severe restrictions on the person's freedom, associations, or activities that the court deems appropriate."<sup>49</sup> It is condition eleven, which, according to Senator Kennedy, makes section 3502 a middle course and, which, according to the Committee, avoids "the controversies and practical arguments surrounding preventive detention."<sup>50</sup> Although Senator Kennedy states that outright confinement should be a last resort under section 3502, he acknowledges that it is permissible and that "[h]ow close this provision comes to actual preventive detention will ultimately depend upon how the courts use it."<sup>51</sup> If conditions of release fail to offer an adequate assurance of safety, however, section 3502 implicitly mandates denial of release. There is no difference between preventive detention and denial of release.

### 1. Eligibility

The District of Columbia statute provides that, except for one who injures or intimidates a prospective witness or juror, no one is subject to a preventive detention hearing unless he is charged with a "dangerous" or a "violent" crime.<sup>52</sup> These concepts are, for the most

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46. *Id.* § 3502(b),(d)(1)-(10).

47. D.C. Code Encycl. §§ 23-1321-1332 (West Supp. 1970).

48. See generally W. Thomas, *supra* note 5, at 171-79.

49. S. 1722, 96th Cong., 1st Sess. § 3502(d)(11) (1979).

50. S. Rep. No. 553, 96th Cong., 2d Sess. 1078 (1980).

51. Kennedy, *supra* note 17, at 434. Because condition 11 explicitly authorizes detention "during specified periods," S. 1722, 96th Cong., 1st Sess. § 3502(d)(11) (1979), it literally authorizes unconditional detention. If there were any ambiguity, it would be removed by the Committee Report, which states that "[t]here may be rare cases in which some form of pretrial detention is required" and cites two cases, *United States v. Abrahams*, 575 F.2d 3 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978) and *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (Crim. Ct. 1970), in which detention would be proper. S. Rep. No. 553, 96th Cong., 2d Sess. 1078 (1980).

52. D.C. Code Encycl. § 23-1322(a)(1)-(3) (West Supp. 1970).

part, intelligibly defined,<sup>53</sup> though overbroad.<sup>54</sup> If the crime charged is "violent" but not "dangerous," a defendant is eligible for preventive detention only if he has a prior conviction for such a crime or was free on bail for a previous charge of a violent crime.<sup>55</sup> It seems unlikely that more than thirty percent of defendants charged with federal felonies would even qualify for a hearing<sup>56</sup> under the District of Columbia statute. Under section 3502, every person accused of *any offense*, even a misdemeanor or an "infraction," may be considered a threat to community safety and have his dangerousness determined.<sup>57</sup>

## 2. Triggering Mechanisms

Under the District of Columbia provisions, there can be no hearing unless the prosecutor requests it<sup>58</sup> and, with respect to one charged with a "dangerous crime," certifies that there is no other way to as-

53. "Dangerous crime" includes robbery, burglary, arson, rape, attempts to commit such crimes, and the distribution of drugs. *Id.* § 23-1331(3). Violent crime includes homicide, rape, kidnapping, robbery, burglary, extortion or blackmail accompanied by threats of violence, and various other offenses, including, regrettably, taking "immoral, improper, or indecent liberties with a child under the age of sixteen years." *Id.* § 23-1331(4).

54. Professor Tribe points out that "a person convicted of indecent exposure in 1960 and charged with purse-snatching in 1970 is among [Nixon's] 'hard core recidivists.'" Tribe, *supra* note 23, at 382-83.

55. D.C. Code Encycl. § 23-1322(a)(2) (West Supp. 1970).

56. In a random sample of District of Columbia felony defendants in 1971, only 67 of 200, or about 33%, apparently met the criteria. N. Bases & W. McDonald, *supra* note 30, at 61. The Federal Court for the District of Columbia was at that time, however, a court of general jurisdiction, analogous to a state court. "[O]nly 30 percent of the caseload [was] comparable to that of the federal courts in the other 89 districts." Administrative Office of the U.S. Courts, Federal Offenders in the United States District Courts 27 (1970). It is conjectural, therefore, whether the incidence of charges of "violent" or "dangerous" crimes in the federal courts as a whole is greater or less than that in the District of Columbia in 1971. In 1978, of the 15,847 criminal cases pending in all federal district courts, 4,671, or approximately 30% of the total, were homicides, robberies, assaults, burglaries, or narcotics violations. Administrative Office of the U.S. Courts, 1978 Annual Report of the Director 121 [hereinafter cited as Director's Annual Report]. Some of these cases would not qualify as "dangerous" crimes, or even "violent" ones, though some of the charges in other categories, such as "weapons and firearms," might. A large percentage of persons charged with "violent" but not "dangerous" crimes, moreover, do not qualify because they lack the requisite prior conviction or bail status. See *Empirical Analysis*, *supra* note 21, at 306.

57. S. 1722, 96th Cong., 1st Sess. § 3502(b) (1979). These provisions apply to any person charged with an offense, which is defined as any violation of the Criminal Code, including not only misdemeanors, but infractions, offenses for which not more than five days imprisonment is authorized. *Id.* § 111. Indeed, because § 3502 is not limited to persons who are arrested, it even applies to defendants who are simply summoned to court.

58. D.C. Code Encycl. § 23-1322(c)(1)-(2) (West Supp. 1970).

sure community safety.<sup>59</sup> If no motion for detention has been made, a judge cannot be faulted for releasing a person without first having determined his eligibility for preventive detention. Under section 3502, however, a determination of dangerousness is *required* with respect to every person "charged with an offense" whom the judge thinks can reasonably be expected to appear for trial.<sup>60</sup> Thus, the judge is open to criticism for every crime committed by one whom he has released.

### 3. Procedural Protections

Detention cannot be ordered under the District of Columbia provisions without a hearing held expressly for that purpose, with the accused represented by counsel<sup>61</sup> and granted an opportunity to adduce evidence on the issues.<sup>62</sup> Moreover, the ultimate issue of "safety of the community," although not defined, is surely limited, by *pari materia*, to a risk of commission by the defendant of a "dangerous"<sup>63</sup> or "violent" crime,<sup>64</sup> or the intimidation of witnesses or jurors.<sup>65</sup> The prosecution has the burden of proof on all issues of fact, including the risk to community safety and the probability of defendant's guilt of the crime charged.<sup>66</sup> Proof, although it need not be admissible under the rules of evidence applicable to trials,<sup>67</sup> must be "clear and convincing."<sup>68</sup> If a defendant testifies, his testimony cannot be used against him "on the issue of guilt in any judicial proceeding."<sup>69</sup> In addition, the judge must make "written findings of fact and the reasons for [a detention order]."<sup>70</sup>

Although the District of Columbia provision contains serious procedural deficiencies,<sup>71</sup> virtually all its protections and safeguards are missing from section 3502. The new proposal is "conspicuously silent"<sup>72</sup> on the burden of proof or persuasion, the right to counsel, the right to adduce evidence, or the use that may be made of the

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59. *Id.* § 23-1322(a)(1).

60. S. 1722, 96th Cong., 1st Sess. § 3502(a)-(b) (1979).

61. D.C. Code Encyl. § 23-1332(c)(4) (West Supp. 1970).

62. The accused is "entitled to present information by proffer or otherwise, to testify, and to present witnesses in his own behalf." *Id.* He is also entitled to a continuance of the hearing for up to five days. *Id.* § 23-1322(c)(4).

63. *Id.* § 23-1331(3).

64. *Id.* § 23-1331(4).

65. *Id.* § 23-1322(a)(3). *But see* note 113 *infra*.

66. *See* Mitchell, *supra* note 9, at 1238.

67. D.C. Code Encyl. § 23-1322(c)(5) (West Supp. 1970).

68. *Id.* § 23-1322(b)(2).

69. *Id.* § 23-1322(c)(6). This testimony may be used, however, in perjury proceedings and for impeachment purposes. *Id.*

70. *Id.* § 23-1322(b)(3).

71. *See generally* Tribe, *supra* note 23.

72. Kennedy, *supra* note 17, at 434.

defendant's testimony. The key concept, "endanger the safety of any other person or the community,"<sup>73</sup> is not defined. Section 3502 seems to anticipate that the defendant's threat to the "safety of the community" will routinely be decided as part of the normal bail determination.<sup>74</sup> An accused may therefore find himself labelled a risk to community safety without realizing the question was in issue<sup>75</sup> and before he has counsel.<sup>76</sup> The entire section contains only two references to a hearing procedure. First, "[a]ny information may be presented . . . regardless of its admissibility."<sup>77</sup> Second, the judge, "on the basis of available information," must "take into account (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; and (3) the history and characteristics of the person."<sup>78</sup> A judge, acting on the presumption that all persons

73. See S. 1722, 96th Cong., 1st Sess. §§ 3502-3510 (1979).

74. See also notes 131-35 *infra* and accompanying text.

75. Cf. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (notice of the true nature of the charges is the first requirement of due process); *Bouie v. Columbia*, 378 U.S. 347, 350 (1964) (criminal statute must give fair warning of the conduct it proscribes).

76. Counsel is usually appointed to represent a defendant after the defendant's first appearance, where bail will normally have been set. See *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975), which held that there is no constitutional right to counsel at probable cause hearings. Once he has counsel, a defendant may, of course, move for reconsideration of the bail terms, S. 1722, 96th Cong., 1st Sess. § 3502(g) (1979), but he then encounters the usual obstacles involved in convincing a judge to change his mind or overrule a magistrate. See P. Wice, *supra* note 25, at 48. The constitutional right to assistance of counsel has been cast into doubt by the Court's decision in *Scott v. Illinois*, 440 U.S. 367 (1979). The Court purported to hold that regardless of the sentence actually authorized upon conviction, "the Sixth and Fourteenth Amendments to the United States Constitution require *only* that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74 (emphasis added). In the unlikely event that the Court meant what it said in *Scott*, an indigent defendant could be denied counsel throughout the entire proceedings, even in a felony prosecution, provided he is not "sentenced" to jail. His pretrial incarceration could then become his punishment. I have argued, on the contrary, that any criminal charge, however petty, invokes the constitutional right to appointed counsel if the defendant is subject to being jailed, as a pretrial detainee or as part of a sentence. Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 Am. Crim. L. Rev. 601, 613-14 (1975). Even if he has counsel and notice that dangerousness is in issue, the defendant is denied the right to confront witnesses against him. See S. 1722, 96th Cong., 1st Sess. § 3502(i) (1979). His dangerousness will also be determined under § 3502 without ascertainable standards for decision, *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), without written findings of fact, and without meaningful appellate review. Such a procedure would not support the deprivation of a driver's license, *Bell v. Burson*, 402 U.S. 535 (1971), or welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970). It would not warrant the replevy of a television set from a delinquent buyer, *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *Board of Regents v. Roth*, 408 U.S. 564 (1972) (refusal to rehire university teacher); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation violation).

77. S. 1722, 96th Cong., 1st Sess. § 3502(i) (1979).

78. *Id.* § 3502(e).

charged with serious crimes are dangers to community safety, could cast the burden on the accused to prove otherwise. The accused would be in a position to offer little more than plaintive assurances of his good character and intentions. The judge would certainly be entitled to disbelieve these assertions, and his disbelief would never be proven wrong if the defendant was incarcerated.<sup>79</sup>

#### 4. Time Limits

A person cannot be jailed on the basis of risk to the community safety under the District of Columbia provisions for more than sixty days.<sup>80</sup> There is no time limitation under section 3502.<sup>81</sup> Whatever bail conditions are imposed will continue, unless modified, until the disposition of the defendant's case. A person could, therefore, be detained under section 3502 for a period longer than that for which he could be imprisoned if convicted of the offense charged.<sup>82</sup>

#### 5. Appellate Review

Both the District of Columbia statute<sup>83</sup> and section 3502<sup>84</sup> provide for appellate review on behalf of one who is detained. They also require affirmance if the order "is supported by the proceedings below."<sup>85</sup> Inasmuch as section 3502 places no restrictions on evidence, requires no evidentiary hearing or written findings of fact, and does not define the criteria of dangerousness,<sup>86</sup> it is unclear how any order could be found procedurally defective. Moreover, given the acknowledgement in Senator Kennedy's article<sup>87</sup> and in the Committee Report<sup>88</sup> that predicting dangerousness is a difficult and speculative undertaking, it is unlikely that any appellate court would demand concrete evidence of dangerousness.<sup>89</sup> Under section 3502, the district court is probably insulated from review if it explicitly grounds its find-

79. The only visible failure of this system is that pretrial crimes may be committed on release. See Tribe, *supra* note 23, at 375.

80. D.C. Code Encycl. § 23-1322(d)(2) (West Supp. 1970).

81. S. 1722, 96th Cong., 1st Sess. § 3502 (1979). The bill provides that a defendant subjected "to severe restrictions" under condition 11, "shall be brought to trial expeditiously pursuant to the [Speedy Trial Act]." *Id.* § 3502(d)(11). This is redundant.

82. Cf. *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (unconstitutional to jail a defendant to "work off" fines beyond the period of authorized sentence).

83. 18 U.S.C. § 3147(a) (1976).

84. S. 1722, 96th Cong., 1st Sess. § 3506 (1979).

85. 18 U.S.C. § 3147(b) (1976); S. 1722, 96th Cong., 1st Sess. § 3506(b) (1979).

86. See notes 72-79 *supra* and accompanying text.

87. See Kennedy, *supra* note 17, at 428.

88. S. Rep. No. 553, 96th Cong., 2d Sess. 1077-78 (1980).

89. To require real proof of dangerousness, when such proof is rarely available, would condemn the crime prevention aspects of § 3502 to instant desuetude.

ing of dangerousness on one or more of the three factors that it is told to consider,<sup>90</sup> and specifically finds that only denial of release will "assure the safety of . . . the community."<sup>91</sup> Indeed, short of a finding of unconstitutionality, it is hard to imagine a situation in which an appellate court would ever reverse a finding of dangerousness under section 3502.

The statutory promise of prompt appellate review does not guarantee that it will be available. The prompt appellate review provided under the Bail Reform Act of 1966, for example, is virtually nonexistent.<sup>92</sup> Despite long experience with predicting likelihood of flight, appellate courts are unwilling to reverse district judges who set *sub rosa* preventive detention bonds. This is true even though the only legitimate risk is an erroneous prediction of appearance, which is minimal in most cases.<sup>93</sup> These are the same courts that will review detention orders under section 3502. An appellate court is unlikely to second-guess a district judge for failure to impose one or more of the ten conditions that precede the preventive detention provision, when almost nothing is known of their efficacy in curbing crime.<sup>94</sup> A reversal under section 3502 would involve assuming not only the responsibility of nonappearance but also the responsibility for pretrial crime. Relief from such responsibilities is one of the attractions of elevation to an appellate court, and will not be surrendered easily.

It is thus clear that, rather than being a "middle course," section 3502 gives the courts something approaching *carte blanche* to imprison anyone charged with any offense if they think he is dangerous. Of course, it does not *require* such detention, but then neither does the District of Columbia scheme. Section 3502, unlike the District of Columbia statute, also requires the judge to impose conditions that will assure community safety *in every case* brought before him.<sup>95</sup> Furthermore, section 3502 may deprive the defendant of personal liberties without the procedural safeguards afforded by the District of Columbia statute. In addition, section 3502 contains another unique provision that carries a sizeable potential for abuse.

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90. S. 1722, 96th Cong., 1st Sess. § 3502(e) (1979).

91. *Id.* § 3502(b).

92. See note 7 *supra* and accompanying text.

93. See W. Thomas. *supra* note 5, at 87-105 (noting difficulties in evaluating the data); note 36 *supra*.

94. S. Rep. No. 553, 96th Cong., 2d Sess. 1077-78 (1980).

95. See notes 52-57 *supra* and accompanying text. In form, the non-preventive detention provisions in the District of Columbia also require the judge routinely to set such conditions as will provide that assurance. D.C. Code Encycl. § 23-1321(a) (West Supp. 1970). He is denied authority to impose financial conditions for that purpose, however, and may only incarcerate a defendant for specified hours. *Id.* The burden placed upon the judge is so contradictory, therefore, that it is all but meaningless. Moreover, the presence of an elaborate preventive detention scheme arguably precludes a judge in the District of Columbia from legitimately considering community safety in the normal course.

### B. *The Mandatory Condition*

The mandatory condition of section 3502 requires that everyone charged with an offense, who is released, shall be released on the "explicit . . . condition . . . that the person not commit a federal, [s]tate or local crime during the period of his release."<sup>96</sup> Violation of this condition can result in revocation of bail and confinement of the accused.<sup>97</sup> Although Senator Kennedy considers this provision as perhaps "the most important" release condition,<sup>98</sup> he does not explain how pretrial detention for violation of a condition as broad as section 3502(c) is constitutionally permissible.<sup>99</sup> The only plausible theory is that a defendant, having been warned of the consequences of a condition violation, willfully "forfeits" or "waives" his right to pretrial liberty by the subsequent misconduct.<sup>100</sup> Yet, the theory of "waiver" or "forfeiture" in this context cannot rationally rest on such a vague and overinclusive prohibition.<sup>101</sup> The mandatory condition of section 3502(c) applies to a "crime," but a crime, as defined by S. 1722, includes an offense for which a term of imprisonment of more than five days is authorized.<sup>102</sup> If a person released on bail commits a local traffic offense for which he could theoretically receive in excess of five days in jail, he has violated the mandatory release condition. His bail may be revoked during the entire period from revocation to disposition of the original charge, regardless of its length.<sup>103</sup> To con-

96. S. 1722, 96th Cong., 1st Sess. § 3502(c) (1979).

97. *Id.* § 3507(b).

98. Kennedy, *supra* note 17, at 433.

99. The Committee cites *State v. Cassius*, 110 Ariz. 485, 520 P.2d 1109 (1974) (en banc), *cert. dismissed*, 420 U.S. 514 (1975) (per curiam), for the proposition that "it is permissible to condition pretrial release by a requirement that the defendant conduct himself as a law-abiding citizen." S. Rep. No. 553, 96th Cong., 2d Sess. 1075 n.19 (1980). The case, however, merely affirms the obvious right of the state to declare and punish, as a crime, in a criminal proceeding, the commission of a felony during pretrial release. The broadness of the mandatory condition is suspect. In *Bitter v. United States*, 389 U.S. 15 (1967) (per curiam), the trial judge had revoked the defendant's bail because he was 37 minutes late to court. The Court reversed his conviction on the charges *for which he had been on trial*, saying "the trial judge's order of commitment . . . had the appearance and effect of punishment. . . . Punishment may not be so inflicted." *Id.* at 17.

100. See *Illinois v. Allen*, 397 U.S. 337 (1970) ("waiver" of right to be present at one's own trial); Hall, *Subsequent Misconduct as Ground for Forfeiture of the Right to Release on Bail—A Proposal*, 15 N.Y.L.F. 873 (1969).

101. See *Empirical Analysis*, *supra* note 25, at 365-67. On the generally murky question of waiver and forfeiture, see Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265 (1978); Westen, *Forfeiture by Guilty Plea—A Reply*, 76 Mich. L. Rev. 1308 (1978).

102. S. 1722, 96th Cong., 1st Sess. § 111 (1979).

103. *Id.* § 3507. This provision is also inconsistent with another provision, which authorizes the court to "dispose of an offense that is a misdemeanor or an infraction" by declaring a forfeiture of collateral. *Id.* § 3502(k). Section 3502(c) is an invitation to political repression. The authorities might easily confine a person to jail for several



dition release on a prohibition of any "federal, [s]tate or local crime" is illogical. The commission of a great many "crimes" is a matter of little public concern and *no federal concern*, and has nothing to do with the defendant's likelihood of appearance or danger to community "safety."

It has been argued that confinement for a violation of the mandatory condition is not the functional equivalent of preventive detention because the defendant is being denied his liberty not on a prediction of future criminal behavior, but on the allegation of criminal behavior during the release period.<sup>104</sup> On close examination, the distinction blurs. Under the District of Columbia preventive detention provisions, a person is confined because of two factors: (1) what he is believed to have done, commission of a violent or dangerous crime or intimidating witnesses, and (2) a prediction that he would be dangerous if released. Under section 3502(c), a defendant would be confined for what he is believed to have done, violated the mandatory condition by commission of a "crime," and for what he is predicted to do in the future, fail to appear for trial, endanger community safety, or further violate conditions.<sup>105</sup>

## II. THE PRACTICAL EFFECTS OF SECTION 3502

Senator Kennedy believes that legitimating considerations of community safety will have beneficial effects throughout the bail system.<sup>106</sup> I think that he is clearly mistaken, and that, on the contrary, his proposal will produce more "hypocrisy" and more *sub rosa* bail decisions without any offsetting improvements.

### A. Judicial Burdens

One effect of the proposal *can* be safely predicted. Pretrial incarceration will significantly increase. Judges, at present, are subjected to inordinate pressure from the press, the public, the police, and the

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months by first charging him with some offense, following this with pretrial release, and then by a misdemeanor charge. For a discussion of numerous instances in which bail has been used for similar purposes, including a \$25,000 bond for driving without a license, see R. Goldfarb, *Ransom: A Critique of the American Bail System* 49-81 (1965).

104. See *Empirical Analysis*, *supra* note 25, at 367.

105. The proposed legislation directs the judge, upon a finding of a violation of the mandatory condition, to revoke bail and confine the accused unless he is assured that the accused will appear for trial, will not endanger community safety, and will not violate the mandatory condition again. S. 1722, 96th Cong., 1st Sess. § 3507(b) (1979). Thus, even if the accused is a perfect bail risk and offers no risk to community safety, he is to be confined if he might again commit a federal, state, or local crime. *Id.* It is virtually impossible for anyone to avoid committing minor offenses and thus impossible to provide the necessary assurance that will preclude incarceration.

106. See *generally* Kennedy, *supra* note 17.

prosecutors to keep persons arrested for serious charges in jail.<sup>107</sup> As a result, many judges routinely flout their oaths of office, blink at the Bail Reform Act and the eighth amendment, and impose unrealistic money bail requirements.<sup>108</sup> The same judges, under even increased pressure, will administer section 3502. If this proposal is enacted, they will have been conscripted by Congress into "crime-fighting"<sup>109</sup> and given the responsibility of assuring community safety in every case presented to them. Under the Bail Reform Act, a judge who is criticized for releasing a person pending trial can contend that he was fulfilling his duties.<sup>110</sup> The procedural safeguards of the District of Columbia preventive detention model protect not only the defendant but the judge by buffering his decisionmaking from pressures. All this is stripped away under section 3502, leaving the judge alone, unprotected, unfettered, and unguided.<sup>111</sup> Section 3502 could conceivably reduce "abusive practices,"<sup>112</sup> but its success would hinge on the elimination of standards and criteria by which a practice may be evaluated. It is indeed difficult to think of an abuse under section 3502 in terms of willful disregard of clear statutory commands, for

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107. The tribulations of Judge Bruce McM. Wright amply illustrate this pressure. Dubbed "Turn 'Em Loose Bruce" by the police for his liberal bail decisions as a Criminal Court Judge, Judge Wright even had the Mayor of New York City publicly condemn one of his decisions as "bizarre." See N.Y. Times, Apr. 22, 1979, § 4, at 6E, col. 3; *id.* Apr. 18, 1979, § B, at 1, col. 6; *id.* Apr. 17, 1979, § B, at 3, col. 6; *id.* Apr. 16, 1979, § B, at 1, col. 6; *id.* Apr. 14, 1979, § A, at 1, col. 1; *id.* Apr. 13, 1979, § A, at 1, col. 2.

108. See Kennedy, *supra* note 17, at 428. This *sub rosa* practice has often been acknowledged. See, e.g., United States v. Melville, 306 F. Supp. 124, 126-27 (S.D.N.Y. 1969); W. Thomas, *supra* note 5, at 246; P. Wice, *supra* note 25, at 2-3. A similar argument was urged as justification for preventive detention during the 1969-70 debates, see Hruska, *supra* note 22, at 38-39, and noted as such during enactment of the preventive detention provisions in the District of Columbia. See H.R. Rep. No. 907, 91st Cong., 2d Sess. 83 (1970). Recognition of the practice long preceded the 1969-70 debates. See President's Report on Crime, *supra* note 35, at 131; D. Freed and P. Wald, *supra* note 2, at 53; Foote, *supra* note 2, at 1039. Indeed, it was implicit in Beeley's study. See A. Beeley, The Bail System in Chicago 154-56, 160 (1927). Senator Kennedy offers no authority indicating that *sub rosa* preventive detention is on the increase. Insofar as that might be sensed in the District of Columbia, one cannot infer any parallels in the 89 other districts, since the practice in the District of Columbia is not as plainly illegitimate as it is in other districts. As noted earlier, the judge in the District of Columbia is authorized to "consider" community safety in every bail decision. See notes 47-48 *supra* and accompanying text. Moreover, lurking in the background of bail decisionmaking in the District of Columbia is the possibility of a detention hearing. This surely puts a damper on a defendant's willingness and ability to contest the amount and conditions of money bail, a deterrent not present in other districts though there are, to be sure, many other deterrents in all districts. See note 173 *infra* and accompanying text.

109. See Kennedy, *supra* note 17, at 430.

110. See United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969) (per curiam).

111. See pt. I *supra*.

112. See Kennedy, *supra* note 17, at 435.

there are few. On the other hand, the abuse of fundamental ideals regarding the judicial function and the treatment of presumed innocent defendants would be extreme.

The judge may be unconfined by criteria in section 3502, but he is by no means free. He has a duty to make responsible decisions.<sup>113</sup> Everyone cannot be locked up; the judge must differentiate among defendants. Section 3502 offers no assistance in making distinctions on procedural grounds,<sup>114</sup> determining who is dangerous, or even deciding what dangerous means.<sup>115</sup> Senator Kennedy and the Committee hope, however, that the judge will make "inventive" use of the other ten release conditions to protect community safety, and use confinement only as a last resort.<sup>116</sup> The availability of these conditions<sup>117</sup> offers little protection against excessive incarcerations.

Section 3502 dictates that the choice of release conditions assure community safety but provides only a few that have any substantial relationship to curbing pretrial crime. The community peril posed by a defendant who becomes violent when drunk might be minimized if he were compelled to undergo treatment for alcoholism.<sup>118</sup> An accused with a severe psychiatric problem that manifests itself in violence might be rendered relatively docile if subjected to psychotropic drug therapy.<sup>119</sup> Some defendants might be less apt to commit crimes if subject to extensive supervision or committed to the custody

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113. See generally Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978); Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671 (1980).

114. See notes 71-79 *supra* and accompanying text.

115. During the preventive detention debates, Associate Deputy Attorney General Donald Santarelli argued that "danger to the community" was broader than risk of a violent or dangerous crime, and could include not only a risk of petty theft but of any crime. *Preventive Detention Hearings*, *supra* note 10, at 91, 95. Senator Kennedy notes that § 3502 is "conspicuously silent" regarding the "prerequisites" of "preventive detention," as if that were a virtue of his proposal. Kennedy, *supra* note 17, at 434. Nowhere in his article does he suggest what the phrases "endanger the safety of any other person or the community" or "assure the safety . . ." mean. S. 1722, 96th Cong., 1st Sess. § 3502(b) (1979). Nor does the Committee report cast any light on this question. S. Rep. No. 553, 96th Cong., 2d Sess. 1072-82 (1980). Presumably, but not ineluctably, that concept would mean the same thing it means in the D.C. Code, see D.C. Code Encycl. § 23-1322(a)(1) (West Supp. 1970), but that meaning has never been clarified due to the absence of appellate decisions. Of course, the concept is not entirely new and is presently applicable to bail on appeal, but there are few decisions on the point. See 8B J. Moore, *Federal Practice* ¶ 46.10[2] (2d ed. 1980).

116. See S. Rep. No. 553, 96th Cong., 2d Sess. 1075-78 (1980); Kennedy, *supra* note 17, at 433-35.

117. S. 1722, 96th Cong., 1st Sess. § 3502(d) (1979).

118. *Id.* § 3502(d)(8).

119. *Id.*

of a social service agency.<sup>120</sup> These services, however, are seldom available and are not created by the proposed statute. Moreover, treatment is practical only when related to specific propensities, and someone makes arrangements with the relevant institution. These services also require a well-staffed, well-financed bail or pretrial service agency, which does not exist in the federal system.<sup>121</sup>

Even assuming provision for adequate related services, the judge must still determine who, among the sea of criminal defendants,<sup>122</sup> have dangerous propensities that are directly related and confined to drug or alcohol abuse, or controllable mental illness. He must then decide which of those defendants are likely to respond promptly and affirmatively to the treatment conditions. These inquiries are guzzlers of judicial time, ultimately speculative, and not germane to the typical accused.

The availability of self-administered conditions provided by section 3502, such as refraining from "excessive use" of alcohol,<sup>123</sup> unprescribed controlled drugs,<sup>124</sup> possession of dangerous weapons,<sup>125</sup> and contact with witnesses,<sup>126</sup> do not assist the judge in determining who must be confined in the name of community safety. These conditions must be widely and routinely imposed to have any significant effect on the crime rates, but if they are widely imposed, no pretrial service or bail agency would ever have the resources to supervise them, and no district court would have the time to entertain and act upon the violation notices. Moreover, a defendant who is truly dangerous is not likely to comply with any such conditions. By making such conditions of release available to the court and asking it to devise some "combination" to assure community safety, section 3502 will not affect the ultimate treatment accorded most defendants. In the face of the court's prediction of real dangerousness, a poised proclivity for violent crime, the defendant who would be kept in jail through a prohibitive bond under present *sub rosa* practices will remain in jail.

If judges are required to consider the safety of the community in their bail decisionmaking under the provisions of section 3502, they

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120. *Id.* § 3502(d)(1). As Senator Kennedy notes, however, a recent study by the D.C. Bail Agency calls into doubt the assumption that increased supervision will reduce pretrial crime. D.C. Bail Agency, *How Does Pretrial Supervision Affect Pre-trial Performance?* 19 (1978); see Kennedy, *supra* note 17, at 423-24 nn.6 & 7.

121. The District of Columbia Pretrial Services Agency (formerly, D.C. Bail Agency) is, by all accounts, an excellent agency with a comprehensive mandate, but it is constantly hampered by lack of funds. See, e.g., 1977 D.C. Bail Agency Report, *supra* note 35, at 11, 13, 27. Congress has authorized pretrial service agencies in 10 other districts. 18 U.S.C. §§ 3152-3155 (1976).

122. There are about 55,000 defendants entering the federal criminal process annually. GAO Study, *supra* note 36, at i.

123. S. 1722, 96th Cong., 1st Sess. § 3502(d)(5) (1979).

124. *Id.*

125. *Id.* § 3502(d)(7).

126. *Id.* § 3502(d)(6).

will be demoralized and impossibly overburdened. More persons charged with crime will be confined prior to trial. Gross disparities and inequalities in the treatment of defendants will result from chaotic, lawless decisionmaking based on the prediction of dangerousness. Defendants, their friends, and their families will justifiably resent the legal system. Finally, the judicial system will be subjected to ridicule for failing to perform an impossible task. There is, however, an escape from the dilemma that section 3502 poses, an escape most judges would quickly locate and employ. They can simply increase their reliance upon money bail.

### B. Dubious Benefits

Senator Kennedy thinks his proposal will eliminate the "abusive practice" of *sub rosa* preventive detention achieved through high money bail<sup>127</sup> because the proposal dictates "a two-step analysis"<sup>128</sup> under which the judge first determines the appropriate conditions of release necessary to assure appearance at trial, and then, "[a]fter . . . the person has indicated that he can satisfy those conditions," considers the safety of the community and imposes conditions appropriate to that risk.<sup>129</sup> Financial conditions may not be used in the second stage of the analysis.<sup>130</sup> This "two-step analysis" is the cornerstone of Senator Kennedy's argument.<sup>131</sup> Upon examination, however, it crumbles.

Although section 3502 states that the judge shall first order release of the defendant based upon considerations of flight and then consider dangerousness if the defendant indicates he can satisfy the first conditions,<sup>132</sup> busy judges cannot be expected to construe these provisions as requiring a bifurcated bail hearing. Nothing in the bill purports to mandate two hearings or two discrete stages of the same hearing with the determinations based solely on the evidence adduced at that stage.<sup>133</sup> The court will consider identical evidence in determining risk of nonappearance and endangerment of community safety.<sup>134</sup> Moreover, the factors that may be used to determine dangerousness may also be used to determine the risk of nonappear-

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127. See Kennedy, *supra* note 17, at 435.

128. *Id.* at 431.

129. S. 1722, 96th Cong., 1st Sess. § 3502(a)(b) (1979).

130. *Id.* § 3502(b).

131. See Kennedy, *supra* note 17, at 431-32.

132. S. 1722, 96th Cong., 1st Sess. § 3502(a)-(b) (1979).

133. This is not to say that the judge may not order a second hearing and receive more evidence of dangerousness. See S. 1722, 96th Cong., 1st Sess. § 3502(h) (1979), which permits modification of conditions of release "at any time."

134. *Id.* § 3502(e)(3).

ance.<sup>135</sup> The evidence will therefore appear in one, unsegregated mass. Based upon such evidence, or lack thereof, the judge will be free to avoid deciding "community safety," with all its burdens and complexities, by exhibiting an intense concern over the likelihood of flight.<sup>136</sup> If he has a glimmer of doubt about the defendant's dangerous propensities, he may neatly sidestep the thorny thicket of "community safety" and simply set prohibitive money bail.<sup>137</sup> The judge who imposes exorbitant money bail requirements need not explicitly consider or make findings on the safety of the community. Indeed, he is not authorized to consider such factors *until* and *unless* he has first set conditions, which the accused "has indicated . . . he can

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135. Such indicators include "history and characteristics of the person, including his character, mental condition, family ties, employment, past conduct, length of residence in the community, [and] financial resources . . ." *Id.* § 3502(e)(3).

136. The burdens include not only determining questions of "community safety," a task that is not within traditional judicial functions, particularly as that question is posed by § 3502, *see* notes 113-15 *supra* and accompanying text, but when the judge explicitly undertakes to "determine" that question, he relinquishes considerable control over the course of the proceedings and their outcome. The judge has a great deal at stake, he can be "proven wrong" by a release decision and caustically criticized for it. *See* note 107 *supra*. He may wish to direct the flow of "information" to provide the desired resolution. A judge also knows that bringing the issue of "dangerousness" to the fore may produce an emotionally freighted, ugly affair, with unpredictable outbursts, unexpected evidence, and plaintive pleadings, matters which the judge cannot comfortably confine, control, or publically "evaluate." The weight of the evidence may restrict his ability to follow what external pressure suggests is the right course. By ostensibly confining the inquiry to risk of appearance, the judge can more easily build the appropriate record and control the time spent on the issue. In reaching his *sub rosa* decision, he can rely heavily on quasi-statistical methods. *See generally* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 *Yale L.J.* 1405 (1979).

137. Senator Kennedy concedes that if community safety "factors were considered at the time of the initial bail decision, it would constitute preventive detention." Kennedy, *supra* note 17, at 433. Yet, this prohibition ultimately represents an attempt to legislate the order in which a judge *thinks*. It is doubtful that Congress has any more control over that matter than law professors. To produce the preventive detention in disguise, a judge need not impose shockingly high bail bonds. Most defendants are able to post only very small amounts of money or surety bonds. In a 1957 New York study, 28% of all defendants could not make \$500 bail and 63% could not make bail at \$2,500. Note, *A Study of the Administration of Bail in New York City*, 106 *U. Pa. L. Rev.* 693, 707 (1958). Other studies have produced similar results. *See Introduction*, A.B.A. Standards Relating to Pretrial Release (Approved Draft, 1968). Under § 3502, the judge and the prosecutor can also exert great influence over the defendant's willingness to post a bond, by implicitly threatening to move to the "second stage of the analysis" if he does so. S. 1722, 96th Cong., 1st Sess. § 3502(b) (1979). If the defendant posts a surety bond, then, a day or two later, a "modification" hearing is held and the defendant is ordered confined, the defendant may lose the bond premium. Thus, even a defendant who is able to post the bond may decide against it if there is a veiled threat to consider community safety at a subsequent date.

satisfy,"<sup>138</sup> to assure appearance at trial. Ironically, therefore, section 3502 will not infuse "refreshing candor"<sup>139</sup> into bail decisionmaking. Rather, it will, by legitimating considerations of dangerousness, simply encourage further abuse of monetary conditions.<sup>140</sup>

Senator Kennedy's contention that open consideration of community safety will produce less hypocrisy in bail decisionmaking is not a new one. Precisely the same claim was made by the Nixon administration in support of *its* preventive detention plan.<sup>141</sup> Enactment in the District of Columbia, however, apparently had the opposite effect,<sup>142</sup> as would enactment of section 3502. If I am wrong, however, it is only because judges will substitute confinement for prohibitive money bail. It is hard to see what has been gained.

It could be claimed that, by legitimating considerations of safety and inviting candor in the proceedings, different kinds of evidence might be proffered in the bail hearing, thus making determinations of dangerousness more rational and reliable. There is, however, little reason for such a hope. Open discussion and free exchange of views on a subject that has concerned all societies, but about which little is known, will have minimal effect on the reliability of the ultimate decision.<sup>143</sup>

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138. S. 1722, 96th Cong., 1st Sess. § 3502(a) (1979).

139. Kennedy, *supra* note 17, at 432.

140. Although conceding that § 3502(a) provides that the judge can impose any financial condition to "assure appearance" that he can under current law, Senator Kennedy seems to argue that this discretion is somehow more limited under § 3502(a) than under the Bail Reform Act. He finds a priority for nonfinancial conditions implied in two features of § 3502: (1) the judge is directed to impose the "least restrictive" condition, and (2) the financial conditions are numbered (9) and (10) in subsection (d), being preceded by eight non-financial conditions. Kennedy, *supra* note 17, at 432 n.62. Arguably, however, a financial condition is *less* "restrictive" than any of the conditions which precede it in § 3502. Moreover, if the numbering of conditions was intended to specify their priorities, as in the Bail Reform Act, the bill would plainly have said so. Senator Kennedy seems to regard this as an inadvertent error in drafting. *Id.* at 434-35 n.83. It is, however, most unlikely, for example, that § 3502 contemplates that the court require a defendant, in the ordinary case, to "undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose," S. 1722, 96th Cong., 1st Sess. 3502(d)(8) (1979), in preference to money bail, yet that is implicit in the argument.

141. See note 108 *supra* and accompanying text.

142. See Kennedy, *supra* note 17, at 430-31.

143. See N. Morris, *The Future of Imprisonment* 62-73 (1974); A. Von Hirsch, *Doing Justice* 19-26 (1976); authorities cited in Underwood, *supra* note 136, at 1410-13. Implicit in the assumption that an open, candid hearing on the issue of dangerousness might improve the reliability of the decision is the premise that clinical methods are more reliable than statistical methods of prediction in this area, since the judge will normally rely on rough statistical notions in the absence of such a candid hearing. The validity of the assumption of clinical superiority, however, is disputed. Underwood, *supra* note 136, at 1420-29.

Furthermore, there is nothing in the proposal that promises that any different evidence of a defendant's dangerousness would be forthcoming when a judge is specifically directed to consider community safety.<sup>144</sup> The prosecutor's case is not strengthened, for he is free to offer the same evidence to prove likelihood of flight.<sup>145</sup> It is conceivable, however, that if a defendant knows his dangerousness is in issue, he might put a different light on the prosecutor's evidence, and one who might otherwise be determined to be dangerous could be released from custody. Yet, if the free flow of information was a goal of the Senator's proposal, it would have to be augmented by protections at least as generous as those in the District of Columbia model.<sup>146</sup> Moreover, any serious effort to encourage defendants to present their side of the dangerousness issue would certainly require immunizing the defendant's testimony, and probably any information offered on his behalf, against subsequent use by the prosecution.<sup>147</sup> Section 3502 offers no such protection. Rather, it promises the defendant that if he should have the temerity to offer any evidence on the issue, it will be used against him.<sup>148</sup>

Assuming, however, that despite minimal procedural protections or guidelines,<sup>149</sup> a defendant could persuade a judge that he is *not* dangerous, it does not follow that the judge's decision would be correct. Furthermore, the possibility that reliability would be enhanced by the defendant's opportunity to meet the issue of dangerousness is surely outweighed, or will seem to be outweighed, by the time wasted in hearing allegedly dangerous defendants attempt to rebut the prosecutor's evidence.

It is unlikely that the accused will acquire an enhanced respect for the judicial process by virtue of its candor. A person against whom a prohibitive money bond is set will either understand its *sub rosa* significance or feel that he is a victim of discrimination because of his poverty. If he believes that the only thing preventing his release is a lack of money, however, his attorney or more seasoned inmates of the jail will correct this error. The hypocrisy that the defendant perceives

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144. See notes 133-36 *supra* and accompanying text.

145. The illegitimacy of considerations of community safety has not prevented prosecutors from making available to the court relevant claims or evidence. After all, any evidence of defendant's "character and mental condition," as well as "his record of convictions" and "the nature and circumstances of the offense charged" are explicitly made relevant under the Bail Reform Act to the release decision. 18 U.S.C. § 3146(b) (1976).

146. See notes 62-79 *supra* and accompanying text.

147. Cf. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (a defendant's testimony in support of a motion to suppress evidence is not admissible at trial on the issue of guilt). See also 8B J. Moore, *Federal Practice* ¶ 46.06 (2d ed. 1980).

148. See S. 1722, 96th Cong., 1st Sess. § 3502 (1979).

149. The defendant may have no advance notice that dangerousness is in issue, no criteria for the determination of dangerousness, and he may also lack the effective assistance of counsel. See notes 71-79 *supra* and accompanying text.



in the bail process will by no means be his last exposure to that quality in the criminal process, and may even help prepare him for what is to come.<sup>150</sup>

An accused who is explicitly found to be dangerous and jailed for that reason acquires a set of resentments that surely exceed those produced by a *sub rosa* bail decision. He has been officially labelled "dangerous" and denied the opportunity to disprove the prediction.<sup>151</sup> He will feel that he has been punished not for what he has done, but for what a judge predicts he might do if released. Although there is a punitive-predictive element in every decision that imposes bail conditions, even if honestly based upon risk of nonappearance, the stigma associated with being perceived as a possible absconder is more subtle and evanescent, not only because it is a less serious matter, but because it is more widely shared and diffuse. Being labelled "dangerous" is also likely to prejudice the defendant in the determination of guilt or in sentencing. It is virtually a prejudgment of his case, and the conviction<sup>152</sup> and sentence that follow will seem to him, with some justification, to be a ratification.

### C. *Balancing the Equation*

#### 1. The Community Versus the Defendant

Senator Kennedy's basic justification for authorizing detention based upon predicted dangerousness is his belief that the Bail Reform Act fails "to protect the interests of both the community and the accused."<sup>153</sup> Section 3502 "attempts to balance this equation."<sup>154</sup> His

150. The criminal process is hypocritical from beginning to end. See J. Casper, *American Criminal Justice: The Defendant's Perspective* (1972); Alschuler, *Review of Silberman, Criminal Violence, Criminal Justice*, 46 U. Chi. L. Rev. 1007, 1019-41 (1979); Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc'y Rev. 15 (1967). See also Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (1977) [hereinafter cited as *Felony Arrests*].

151. See Underwood, *supra* note 136.

152. Efforts to prevent a jury from knowing a defendant is incarcerated are frequently unsuccessful. In a highly publicized case, the jury may know both the fact of and the reason for the incarceration. See Wald, *supra* note 5, at 194. Moreover, the vast majority of convictions are obtained on guilty pleas or bench trials in which everyone knows the defendant's pretrial status.

153. Kennedy, *supra* note 17, at 435.

154. *Id.* "If one accepts the premise that the rights of the community should also be included in the bail decision, it logically follows that once a defendant has been ordered released on bail, similar conditions should be readily available to protect the community." *Id.* at 433. This statement implies that pretrial release is a gift to the accused for which society should exact a quid pro quo of restricting his freedom to assure community safety.

premise is plainly false. The Bail Reform Act itself reflects a heavy sacrifice of the interests of the accused in favor of the interests of the community. Ostensibly to assure the presence of the accused at trial, the present system not only permits a person to be jailed without a determination of guilt,<sup>155</sup> it permits him to be treated as if he had been convicted of a crime.<sup>156</sup> Moreover, every study of the matter has indicated that an accused who is kept in jail pending trial suffers in the ultimate outcome of the case. He is more frequently convicted than one released; when convicted, he is more often sentenced to jail or to prison; when sentenced, he even gets a longer jail or prison term.<sup>157</sup> Despite these disadvantages, many defendants who are jailed pending trial—one in four in some places—are never convicted.<sup>158</sup> In the interests of assuring his presence at trial, he has

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155. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court said that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535. Because both parties conceded that pretrial detention for purposes of assuring appearance for trial was not "punishment," the court did not reach the question of "pretrial detention," *id.* at 534 n.15, but proceeded to hold that such things as unannounced room searches, searches of body cavities, "double-bunking," and other deprivations were constitutional. *Id.* at 543, 557, 560. On whether preventive detention is punishment under the Constitution, see Tribe, *supra* note 23, at 379. *Cf. In re Winship*, 397 U.S. 358, 368 (1970) (constitutional safeguards are required at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult); *Bitter v. United States*, 389 U.S. 15, 17 (1967) (per curiam) (a pretrial detention order appeared to be punishment when not "designed solely to facilitate the trial"). On the issue conceded by the parties in *Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979), see Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441, 452-54.

156. Most jails make no significant distinctions in treatment between detainees awaiting trial and convicts serving a criminal sentence. They are housed together, fed together, handcuffed together, transported to and from court together, and subjected to the same restrictions on clothing and personal possessions, visits, recreation and exercise. There has been much litigation over such treatment, see 6B J. Moore, *Federal Practice* ¶ 46.04[2] (2d ed. 1980), but most of it has been laid to rest, at least temporarily, by *Bell v. Wolfish*, 441 U.S. 520 (1979).

157. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 70-72 (1963) [hereinafter cited as Allen Report]; D. Freed & P. Wald, *supra* note 2, at 45; Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964); Zeisel, *Bail Revisited*, 1979 Am. B. Foundation Research J. 769, 779; *The Unconstitutional Administration of Bail*: Bellamy v. The Judges of New York City, 8 Crim. L. Bull. 459 (1972).

158. A recent study of felony dispositions in New York found that "only 56% of felony cases entering the criminal justice system resulted in conviction for some offense; 44% were dismissed or acquitted." *Felony Arrests*, *supra* note 150, at 1. In the District of Columbia in 1975, 1 of every 5 persons whose case was brought before the criminal court had no charges formally filed against him. Of the remainder who were charged, only 45% were convicted. 1977 D.C. Bail Agency Report, *supra* note 35, at 21. In the federal system in fiscal 1977, the "conviction rate for all defendants as well as felony defendants only was 79.5%." Director's Annual Report, *supra* note 56, at 114. Data on the percentages of defendants who were incarcerated prior to

experienced the horrors of jail, he may have lost his job, his family has suffered, and often the family relationship has been permanently ruptured.<sup>159</sup> For this sacrifice to the "interests of the community," he does not even get an apology. What he does get is angry and embittered, and an intensive education in crime from his fellow inmates. Defendants who are released on bail often have to pay for that right, not only in money but in serious deprivations of their liberty, all pursuant to the Bail Reform Act.<sup>160</sup>

## 2. The Accused Versus the Convict

In his critique of preventive detention, Senator Kennedy calls attention to the fact that the Criminal Code Reform Bill, S. 1722, puts "an end to the concept of rehabilitation as a justification for imposing a term of imprisonment" as "a recognition by Congress that predictions of an offender's future criminal behavior cannot accurately be made."<sup>161</sup> He finds it "somewhat surprising" that

those who advocate preventive detention are often in the vanguard of sentencing reform, acknowledging that predictions of future criminality cannot be made in the latter situation but refusing to accept the same premise with respect to bail. This inconsistency is all the more difficult to reconcile when one realizes that the bail decision involves an offender who has not yet been convicted of any crime, whereas sentencing reform efforts involve people already convicted.<sup>162</sup>

In light of these cogent observations, I find it mystifying that Senator Kennedy would propose this streamlined form of preventive detention, which authorizes detentions of anyone *charged* with *any* offense, based upon the same kinds of predictions, but without safeguards, definitions, guidelines, or time limits.

It is infinitely harder to predict that any individual will commit a specific type of crime in a relatively short period of time—between arrest and trial—than it is to predict that he will recidivate sometime

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trial but not convicted is not readily available. A Harvard study, however, found that 26% of the pretrial detainees were not convicted. *Empirical Analysis*, *supra* note 25, at 347. A New York study reported that 27% of detainees were not convicted. Rankin, *supra* note 157, at 642. In the GAO Study, which was a random sample of *all* felony defendants in representative districts, 19% of the defendants were detained during the entire pretrial period (an average of 60 days each). GAO Study, *supra* note 36, at 20, 25. Of those, 5% were never convicted. *Id.* at 33. Another 12% of the defendants were detained an average of 17 days but ultimately released. *Id.* at 20, 25. Of those, 17% were never convicted. *Id.* at 33.

159. There are other serious collateral consequences of pretrial detention. See Thaler, *supra* note 155, at 452-54.

160. See 18 U.S.C. § 3146(a) (1976) (restrictions on travel, association and place of abode; and placing the person in the custody of a designated person).

161. Kennedy, *supra* note 17, at 430 n.53.

162. *Id.*

in the future. Yet it is the latter type of prediction that S. 1722 substantially disavows in its sentencing provisions as not within our present capabilities.<sup>163</sup> No society that proclaims incompetence in predicting recidivism in the sentencing of offenders can sensibly undertake to imprison anyone on the hazy hunch that he may commit a crime if released.

#### D. Curbing Crime

Section 3502 could have only a minimal effect in reducing the crime rates even if it resulted in an incarceration of a much larger portion of the defendant population.<sup>164</sup> Such imprisonments would enormously strain the resources of law enforcement and the courts and instill deep resentments in detainees while they were confined in the greenhouse of crime, the local jail. A significant reduction in crime will not be achieved until we can learn to foster respect for the legal process and the rights that the process attempts to preserve. A preventive detention proposal such as that contained in section 3502 could only help to destroy that respect. Despite the uncertainties about how to curb crime, most agree that courts must have the capacity to deal adequately and intelligently with their basic tasks of adjudicating guilt and sentencing offenders. Most courts in urban areas, including federal courts, lack this capacity and, as a consequence, a system of adjudication has largely been replaced by a system of plea-bargaining.<sup>165</sup> To shackle this sick system with the additional burdens contained in the proposed legislation would be counterproductive.

There is no evidence that a person charged with a crime is significantly more likely to commit another crime in the near future than others who have similar characteristics generally thought to be predictive of criminal behavior.<sup>166</sup> Assuming, however, that the exist-

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163. For current views on sentencing, see P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System* (1977); Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 Mich. L. Rev. 1361 (1975); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353 (1979).

164. See notes 23-26 *supra* and accompanying text.

165. The Vera study of 100,739 felony arrests in New York, in 1971, discovered that nearly half the cases resulted in dismissals, and only 15% resulted in felony convictions. Felony Arrests, *supra* note 150, at 1-2. Only 2.3% of the cases went to trial. *Id.* at 6. In fiscal 1977, about 15% of defendants in the federal system had a bench or jury trial. Director's Annual Report, *supra* note 56, at 114.

166. It seems plausible that the crime rate among young, unemployed males is as high as among persons charged with crime. The stresses and deprivations associated with being an accused obviously present temptations to crime but these may be offset by the realization that one is under greater scrutiny as an accused and that a crime while pending trial is likely to be punished more severely than would otherwise be the case.

tance of a criminal charge is a rational segregating principle,<sup>167</sup> total pretrial incarceration to prevent pretrial crimes is simply too expensive,<sup>168</sup> as well as too extreme. Persons who are charged with crime can receive close surveillance by the police, and even be required to report regularly to the police. Punishment can be enhanced for persons who commit crimes while on bail, and this can be heavily advertised. Social service agencies could make serious efforts to help the accused deal with his problems, and financial assistance and guidance could be provided for his dependants. These steps have never been tried on a serious, sustained basis. Such efforts are, of course, uncertain and expensive, but not necessarily more uncertain, or more expensive, or less efficient than pretrial incarceration. Moreover, they possess possibilities of permanence and radiation. They also have the virtue of minimal judicial involvement in experimentation with human life and liberty.

The nation already has the power to confine dangerous persons. Drug addicts may be subjected to compulsory treatment,<sup>169</sup> and the mentally ill who are dangerous may be hospitalized.<sup>170</sup> Confinement is permissible, however, only after a fair procedure under intelligible criteria, and on competent proof.<sup>171</sup>

### III. SECTION 3502: A SIMPLISTIC SOLUTION TO BAIL REFORM

Senator Kennedy's proposal purports to be a comprehensive solution to problems of bail, based on his premise that the "one impor-

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167. See generally Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969); Thaler, *supra* note 155. If dismissal of charges is accepted as evidence that they were erroneous, then the data indicating that approximately 50% of cases in some urban areas and in more than 20% of all federal courts are dismissed casts doubt on the rationality of relying on arrests for any presumption or inference of guilt or dangerousness. At the other extreme, if it is presumed that all persons arrested are guilty, the criminal justice system appears unable to process effectively some 20% to 60% of the guilty persons whom it undertakes to convict. See note 158 *supra*. New York is unable to impose the statutory *minimum* sentence on more than 5% of the felons it charges. *Felony Arrests*, *supra* note 150, at 1-2.

168. See note 26 *supra*.

169. See *Robinson v. California*, 370 U.S. 660, 665 (1962). See generally Aronowitz, *Civil Commitment of Narcotics Addicts*, 67 Colum. L. Rev. 405 (1957).

170. See *Addington v. Texas*, 441 U.S. 418 (1979).

171. The Court held that due process requires "clear and convincing evidence" of the mental illness and the need for hospitalization; *id.* at 431-33; the accused must be "dangerous to either himself or others and [be] in need of confined therapy." *Id.* at 429. On other procedural requirements, see *Lynch v. Baxley*, 386 F. Supp. 378, 390-92 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974). If § 3502 is enacted, it will not take prosecutors, and others, long to discover that *all* these requirements for civil commitment can be circumvented by the simple expedient of bringing a criminal charge—any charge, even an infraction—then have the judge detain or decline to release the defendant, or release him to a hospital or treatment center.

tant shortcoming" lies in the failure to consider candidly the question of danger to the community.<sup>172</sup> Even if his proposal does not increase the use of money bail to respond to the problem of community safety, it will not significantly reduce the practice of its unwarranted imposition. Senator Kennedy seems to believe that the major reason for imposing prohibitive money bail is the perception that dangerous persons must be jailed to prevent pretrial crime. No evidence is cited for this proposition, however, and it is inherently implausible.

#### A. Detention and Bail Are Functional Punishments

Pretrial incarceration and high money bail perform several significant, yet abusive, functions apart from preventing pretrial crime. Pretrial incarceration begins the process of punishment promptly and summarily, serving strong retributive interests.<sup>173</sup> It eliminates uncertainties over whether the suspected miscreant will be punished, bypassing difficulties of proving guilt. Pretrial incarceration also heavily burdens the defendant in both his ability and his willingness to contest the charges. He is not only demoralized by the inhumane conditions he finds in jail, he soon learns that prison conditions are better. He completely lacks control over the amount of time and attention paid to the preparation of his defense.<sup>174</sup> He cannot conduct investigations or locate witnesses or other evidence helpful to his defense. Obviously, he cannot keep or find a job, or otherwise conduct himself in a way likely to produce a lenient sentence.<sup>175</sup> Moreover, the longer he remains in jail, the less he fears conviction because the system credits the time spent in jail against a prison sentence.<sup>176</sup> Pre-

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172. Kennedy, *supra* note 17, at 423.

173. See generally National Conference on Bail and Criminal Justice, Proceedings and Interim Report 192-93 (1965); Allen Report, *supra* note 157, at 83 n.17 (noting practice of imposing impossible bail to force a defendant to become a prosecution witness); R. Goldfarb, *supra* note 103; 8B J. Moore, Federal Practice ¶ 46.03 (2d ed. 1980) (noting "taste of jail" practices); Pye, *The Legal Needs of the Poor: The Administration of Criminal Justice*, 66 Colum. L. Rev. 286, 293 (1966). Thaler, *supra* note 155.

174. See note 157 *supra*. The logistical burdens that being jailed impose on the defense preparation are often noted. D. Freed and P. Wald, *supra* note 2, at 46. I illustrate these burdens as I have because of the findings of Douglas Rosenthal that the aggressive involvement of client and lawyer tends to produce favorable outcomes. See D. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974).

175. See D. Freed and P. Wald, *supra* note 2, at 46.

176. 18 U.S.C. § 3568 (1976). This perception may, of course, be an illusion. One circuit court has held that one is not entitled to such credit unless he was sentenced to the statutory maximum. *Jackson v. Alabama*, 530 F.2d 1231, 1237 (5th Cir. 1976). Other circuits hold that one is entitled to credit regardless of the maximum. *Ham v. North Carolina*, 471 F.2d 406, 408 (4th Cir. 1973). Even under this view, because a defendant rarely gets the maximum sentence, he has no way of knowing that the sentencing judge did not merely add the required credit to the sentence he would have otherwise imposed. See also note 157 *supra* and accompanying text.

trial incarceration might be more accurately described as "preguilty plea" incarceration because it is an essential ingredient in the plea-bargaining system through which approximately ninety percent of convictions are obtained.<sup>177</sup>

Jailing defendants serves the convenience of all participants in the judicial process, except the defendant and the Marshal's service. The defense lawyer can see the accused when he wants for as long as he wants.<sup>178</sup> Police can use the defendant for lineups, show-ups, and various other investigative devices, including interrogation.<sup>179</sup> The prosecutor has better access to a demoralized defendant, who is more amenable to plea bargaining.

The imposition of money bail serves a similar punitive function even when the accused is able to meet the financial conditions to secure release. Before posting money bail a defendant must consider the disadvantages of this decision. If he is permitted to deposit cash with the court, the lost access to money may adversely affect him or his family. These may be the funds he needs to hire a lawyer or an investigator for the preparation of his defense. Moreover, some courts will consider a defendant who is able to post substantial cash bail to be ineligible for court-appointed counsel.<sup>180</sup> In many other courts, the posted bail money, though theoretically refundable following disposition of the case, will be confiscated either as a fine or as reimbursement to the state or government for a court-appointed lawyer, investigator, or expert.<sup>181</sup> The ability of a defendant, who is charged with or suspected of a money-producing crime, to post a cash bond

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177. See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 58 n.27 (1968).

178. Pretrial incarceration eliminates problems of notifying defendants concerning appearance dates, breakdowns in communication, and delays in waiting for defendants to arrive in court or locate the proper courtroom. On the other hand, the jailing of the client can be inconvenient to the lawyer if, for example, there are strict visiting hours or the jail is far away. If the lawyer has numerous clients in the same jail, however, having them there is often a convenience, especially because he need not be concerned with irritating office visits.

179. Although such interrogation will often violate the defendant's sixth amendment rights, see *Brewer v. Williams*, 430 U.S. 387 (1977), it may still be a useful investigative tool and defendant's statements can probably even be used against him if he testifies in his own defense. Cf. *Harris v. New York*, 401 U.S. 222 (1971) (prior inconsistent statement inadmissible against defendant in prosecution's case in chief due to lack of procedural safeguards may be used for impeachment).

180. D. Oaks, *The Criminal Justice Act in the Federal District Courts* 29 (1969); L. Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* 107-08 (1965).

181. See D. Oaks, *supra* note 180, at 28-29. But see *People v. Cook*, 27 Crim. L. Rep. (BNA) 2368 (Ill. Sup. Ct. June 30, 1980), holding that a defendant's cash bail cannot be forfeited for reimbursement of appointed counsel fees absent a fair hearing and proof of ability to pay. See also *Fuller v. Oregon*, 417 U.S. 40 (1974) (payment of costs of indigent defense can be a condition of probation).

may be taken as evidence of guilt and may adversely affect him at sentencing.<sup>182</sup>

Surety bonds present similar disadvantages with one major addition. The premium that the defendant pays to the professional bondsman is not returnable, regardless of the prompt trial appearance of the defendant and the outcome of the case. The bond premium ranges from five to fifteen percent of the face amount of the bond<sup>183</sup> and is often a prohibitive sum. A defendant may also have to post collateral with the bondsman, inviting prejudicial inquiries or inferences regarding the source of the collateral and its availability to pay fines, court-costs, or counsel fees. Thus, like pretrial incarceration, the imposition of financial bail conditions, even when these conditions can be met, is swift and certain summary punishment and greases the plea-bargaining process.<sup>184</sup> The punitive functions of pretrial incarceration and money bail are far more powerful producers of abuse than *sub rosa* consideration of community safety, yet section 3502 and Senator Kennedy ignore them.

### B. Replacing Money Bail

Any comprehensive, serious effort at bail reform must acknowledge these realities and deal with them. Although I do not read Senator Kennedy's article as claiming to have done so, one witness before his Committee believed that section 3502 would "deemphasize monetary bail, and, [eliminate] surety bail which makes little sense in this country today."<sup>185</sup> This hope rests in the increased number of non-financial conditions contained in that section.

Under section 3502, if a judge determines that more than the accused's signature is required to assure his appearance at trial,<sup>186</sup> he may impose "the least restrictive condition or combination of [the eleven] conditions that . . . will reasonably" provide that assurance.<sup>187</sup> Section 3502 does not define "least restrictive,"<sup>188</sup> and unlike the Bail Reform Act,<sup>189</sup> does not specify the priority of the conditions.<sup>190</sup> A judge remains free to select a money bond or a surety bond. Indeed, he may be freer, because nothing in section 3502 requires prior consideration of nonfinancial conditions, and a money

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182. Some courts conduct inquiries into the source of posted bail funds. See D. Oaks, *supra* note 180, at 59.

183. The average is about 10%. D. Freed and P. Wald, *supra* note 2, at 23.

184. See 8B J. Moore, *Federal Practice* ¶ 46.08 (2d ed. 1980) (noting punitive uses of bail bonds, called "taste of bail").

185. *Hearings on S. 1722 and S. 1723*, *supra* note 13, at 10328 (statement of Alan Dershowitz).

186. S. 1722, 96th Cong., 1st Sess. § 3502(a),(d) (1979).

187. *Id.* § 3502.

188. *Id.*

189. 18 U.S.C. § 3146(a) (1976).

190. S. 1722, 96th Cong., 1st Sess. § 3502 (1979).



bond might be considered less "restrictive" than most of the other conditions, which involve substantial deprivations of freedom.<sup>191</sup> A defendant may also be required to comply with both financial and nonfinancial conditions because they need not be considered in the alternative. Thus, a judge under section 3502 would have as much discretion to impose money bail as he now does under the Bail Reform Act.

Money bail will never be eliminated, unless flatly prohibited, as long as it serves punitive functions. Whether section 3502 can deemphasize its use to assure appearance, however, depends on the relative attractiveness of the nonfinancial conditions to the judge who has the discretion to select them. In evaluating that possibility, one must be indulged a measure of skepticism based upon present law and practice. Only four of the nine nonfinancial conditions in section 3502 seem to have a plausible relationship to assuring appearance, and all, according to the Committee, are already authorized under the omnibus provision of the Bail Reform Act.<sup>192</sup> Nevertheless, some of these conditions could provide substantial assurance that a person will appear for trial. The requirement that the accused maintain frequent, periodic contact with a law enforcement agency or a pretrial service agency<sup>193</sup> has obvious potential. This not only facilitates keeping the accused informed of court appearance dates, it assures that one who is inclined to flee will have little lead time in which to do so. His track will be fresh; he may be located and encouraged to return before default.<sup>194</sup> Restrictions on travel or place of abode<sup>195</sup> serve the same purpose. Requiring the accused to remain in the jurisdiction of the court and to reside at a specified location<sup>196</sup> permits periodic determinations of his whereabouts. Requiring the defendant to maintain his job, or look for one,<sup>197</sup> also tends to tie him down, facilitates checks, and reduces incentives for flight. These conditions, however, require supervision for effectiveness.

The substitution of similar nonfinancial conditions in lieu of money bail was extensively tried in the early 1970's in the District of Columbia, following an expansion of the District's Bail Agency.<sup>198</sup> These

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191. Arguably, § 3502, in contrast to the Bail Reform Act, explicitly encourages money bail. Senator Kennedy reads § 3502 differently. See note 140 *supra* and accompanying text.

192. See S. Rep. No. 553, 96th Cong., 2d Sess. 1076-78 (1980).

193. S. 1722, 96th Cong., 1st Sess. § 3502(d)(4) (1979).

194. It may also, unfortunately, facilitate the violation of the defendant's constitutional rights. See note 179 *supra*.

195. S. 1722, 96th Cong., 1st Sess. § 3502(d)(2) (1979).

196. *Id.* § 3502(d)(2).

197. *Id.* § 3502(d)(3).

198. See generally Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia (1969), reprinted in *Preventive Detention Hearings*, *supra* note 10, at 703; see also W. Thomas, *supra* note 5, at 174.

changes coincided with a reduced reliance on money bail and an increase in release rates.<sup>199</sup> The role played by more extensive reliance upon nonfinancial conditions, however, cannot be distinguished from the contribution of an enlarged, reorganized, and more adequately financed bail agency. Furthermore, the number of own-recognizance releases greatly decreased during the period, indicating that judges were simply tacking a set of conditions on to what would otherwise have been an own-recognizance release.<sup>200</sup> Conditions were imposed routinely, using a checklist, often without necessity or logic.<sup>201</sup> The result was wholesale violation of conditions,<sup>202</sup> which inundated both the agency and the courts in paper work.<sup>203</sup> The courts apparently ignored most of the reported violations; sanctions were rarely imposed, and arbitrariness in the imposition of sanctions appeared.<sup>204</sup> The system was abandoned in 1974,<sup>205</sup> and appearance rates have since remained fairly constant.<sup>206</sup> The District of Columbia experience strongly suggests that the wholesale imposition of nonfinancial conditions has minimal effect on increasing the likelihood of appearance, and even that minimal effect may result primarily from the efficacy of supervision and the reliability of sanctions. In the absence of adequately staffed pretrial service agencies in every district, therefore, money bail will still play a role.

The present system frequently relegates an important function to one of the most vilified participants in the bail process, the professional bail bondsman. Critics contend that the bondsman is merely a

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199. See W. Thomas, *supra* note 5, at 172.

200. *Id.* at 173. By 1972, the number of defendants released without conditions decreased from 40% to less than 5%. *Id.* The number of nonfinancial releases that included conditions increased to 94% of the total. D.C. Bail Agency, Report for the Period January 1, 1972—December 31, 1972, app. C., at 2.

201. At times, conditions were contradictory. The defendant, for example, would be required to live at a certain address and also required to stay away from the complaining witness, who lived at the same address. See W. Thomas, *supra* note 5, at 178 n.16.

202. In 1972, more than 65% of the people on release were guilty of technical violations and one-fourth of the defendants were reported to the court as condition violators. *Id.* at 175-76.

203. *Id.* at 174.

204. *Id.* at 177. In 1973, the Agency reported 2,608 violations, but sanctions were imposed in only 58 cases. D.C. Bail Agency, Report for the Period January 1, 1973—December 31, 1973, app. E., at 4. "[V]iolation notices were largely ignored . . . until the Major Violators Unit of the Police Department became involved. This unit found that condition violations were a good justification for revoking the release of certain 'target' defendants." W. Thomas, *supra* note 5, at 177.

205. W. Thomas, *supra* note 5, at 178.

206. Approximately a 3% failure to appear rate was experienced in 1971. D.C. Bail Agency, Report for the Period January 1, 1971—December 31, 1971, at 4, and this fluctuated between 2% and 5% in 1977. 1977 D.C. Bail Agency Report, *supra* note 35, at 23.

parasite on the system.<sup>207</sup> The claim in essence is that a professional surety bond does not tend to assure appearance for trial. The defendant himself need not necessarily post any collateral,<sup>208</sup> and the premium he pays is gone regardless of whether he shows up for trial.<sup>209</sup> The defendant, therefore, has no incentive to appear. This argument overlooks the important service the professional bondsman performs for the court. He conducts whatever investigation is necessary to satisfy him—a professional with a financial stake in the matter—that the accused is an acceptable bail risk. This investigation is conducted not at the expense of the Government but of the defendant. There need be only minimal court involvement when a surety bond is set. If, on the other hand, the defendant deposits collateral directly with the court, substantial inquiries and paperwork are required<sup>210</sup> with usually no court personnel trained or equipped to handle such matters.

Cash bail, as an alternative, presents no serious administrative problems, and, according to the Bail Reform Act, is preferred over surety bonds.<sup>211</sup> Yet, cash bail is rarely used in the federal system.<sup>212</sup> This may be explained by the facts that (1) surety bonds are more punitive, and (2) a given amount of cash available to a defendant—usually a very small amount—will purchase a higher degree of assurance against nonappearance than a cash deposit. The amount at risk is much larger, albeit primarily at the risk of the bondsman, and the bondsman is motivated not only to investigate the

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207. See A. Beeley, *supra* note 108, at 40; R. Goldfarb, *supra* note 103, at 92-118; P. Wice, *supra* note 25, at 50.

208. The posting of collateral is usually a matter of free market negotiation between the accused and the bondsman. The premiums are so high that they more than compensate for the minimal risk to the bondsman, especially because he may not be required to forfeit the bond when his client absconds. P. Wice, *supra* note 25, at 58-61.

209. *Id.* at 56.

210. *Id.* at 10-13.

211. There are two kinds of cash bail contemplated by the Bail Reform Act. One is a deposit of cash, coupled with an undertaking to forfeit in the event of nonappearance. Another is an undertaking to pay a specified sum of money on failure to appear, which is partly collateralized by the deposit of cash, usually 10% of the face amount. 18 U.S.C. § 3146(a)(3),(4) (1976). Literally, the Bail Reform Act ranks only the 10% type bond ahead of a surety bond, treating the simple deposit of cash as the equivalent of a surety bond in subsection (4). *Id.*

212. See D. Oaks, *supra* note 180, at 29. Ten percent cash bail has been extensively used in various states, most notably Illinois, where the professional bondsman has been eliminated. In his study of the Illinois system, Professor Thomas concluded that the system has "worked well." W. Thomas, *supra* note 5, at 199. Professor Wice, on the other hand, says that "[d]espite the good intentions of [the 10%] act, it has backfired on many poor defendants whom it was designed to help because of an inflationary rise in the amount of bail required for certain crimes." P. Wice, *supra* note 25, at 19.

defendant but to notify him of court appearance dates and to recapture him if he absconds.<sup>213</sup>

### C. Drastic Curtailments of Civil Liberty

Enactment of section 3502 is unlikely to produce any unemployment problems among surety bondsmen. Defendants who today remain in jail for inability to post a bond will remain in jail if section 3502 is enacted, with or without its crime prevention features. Assuming, however, that even in the absence of new support services, enactment of section 3502 might encourage some judges to select one or more of the conditions as alternatives to money bail, I have serious doubts about the wisdom of such "reform." Common sense and the District of Columbia experience strongly suggest that if such conditions are actually utilized as substitutes for money bail, they will be imposed wholesale. The imposition of conditions is easy, as easy as requiring a surety bond, if done routinely by checklist. Because the efficacy of most of the conditions is unknown, and most of them suspect, the number of conditions considered necessary to equal the deterrent effect of a surety bond is likely to be large. For every person relieved of the obligation to post a bond, fifty persons might be required to comply with a combination of conditions.

I perceive no strong objections to the standard conditions imposed under the Bail Reform Act, such as remaining in the jurisdiction or living in a particular place. The infringement on liberty involved in some of the other conditions, however, is alarming, and represents a high price to pay for marginal reform of money bail practices. Section 3502, under the aegis of assuring appearance at trial, explicitly authorizes the imposition of conditions that the Committee concedes are related only to community safety.<sup>214</sup> Indeed, many of these conditions of release were "drawn from those conditions deemed suitable for imposition of a sentence of probation, the nearest parallel."<sup>215</sup> There may be some sense in drawing a parallel between a convicted offender and an accused found to be dangerous, but the imposition of sanctions, which substitute for imprisonment, merely to augment an expectation that the accused will appear for trial is untenable. The absurdity is compounded because some of these conditions cannot even be imposed on a convicted offender under current law,<sup>216</sup> or even under S. 1722.<sup>217</sup>

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213. P. Wice, *supra* note 25, at 56-62.

214. S. Rep. No. 553, 96th Cong., 2d Sess. 1078 (1980).

215. *Id.* at 1076.

216. See *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945); *In re Mannino*, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971); *People v. Baum*, 251 Mich. 187, 231 N.W. 95 (1930); Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 Ga. L. Rev. 466 (1974).

217. The proposed statute specifies the conditions that may be imposed upon probation. S. 1722, 96th Cong., 1st Sess. § 2103 (1979). There is nothing there resembl-

Conditions of release that require the accused to "refrain from excessive use of alcohol, or any use of a . . . controlled substance"<sup>218</sup> or "undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency"<sup>219</sup> have only the most remote and speculative connection to appearance for trial<sup>220</sup> and far over-reach<sup>221</sup> those discrete situations in which there is a plausible connection. Similarly, a prohibition against associations<sup>222</sup> has no apparent relation to customary bail risks. In consideration of the likelihood of flight, the judge may order the accused released in the custody of a third person and require that person to offer reasonable assurance not only that the accused "will appear as required" but that he "will not pose a danger to . . . the community."<sup>223</sup> Even before his dangerousness is put in issue, the burden can thus be shifted to the accused to prove that he is not a peril to the public.

The imposition of some conditions may even have an adverse effect on appearance rates. For example, a defendant may be released on condition that he "avoid all contact with potential witnesses."<sup>224</sup> This condition is redundant as a protective device, because both existing law and S. 1722 provide ample sanctions for injuring, intimidating, or threatening witnesses.<sup>225</sup> Its sole function would be to inhibit lawful, constitutionally protected defense preparation.<sup>226</sup> The propensity of an arrestee to investigate his case, to pre-

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ing "severe restrictions on the person's freedom, associations, or activities that the court deems appropriate." *Id.* § 3502(d)(11). Moreover, although many of the authorized probation conditions are similar to those in § 3502, they are often narrower; for example, the probationer may be required to "refrain . . . from engaging in a specified occupation . . . bearing a reasonably direct relationship to the conduct constituting the offense." *Id.* § 2103(b)(6) (emphasis added). *See also* S. Rep. No. 553, 96th Cong., 2d Sess. 964 (1980) ("the court may not impose a condition of probation which results in a deprivation of liberty for the defendant unless that deprivation is 'reasonably necessary' to carry out the purposes of the sentence").

218. S. 1722, 96th Cong., 1st Sess. § 3502(d)(5) (1979).

219. *Id.* § 3502(d)(8).

220. In contrast, these requirements may have a logical relation to assuring community safety. *See* notes 118-20 *supra* and accompanying text.

221. A prohibition against "excessive use of alcohol, or any use of a . . . controlled substance, as defined in . . . (21 U.S.C. 802) . . . without a prescription," S. 1722, 96th Cong., 1st Sess. § 3502(d)(5), is unacceptably vague. What is "excessive" use of alcohol is a matter of personal prejudice and a section as lengthy and prolix as 21 U.S.C. § 802 (1976) gives little guidance to the determination of a "controlled substance." It includes not only "hard drugs," like heroin and cocaine, but hundreds of hallucinogenics, stimulants, and depressants. *Id.*

222. S. 1722, 96th Cong., 1st Sess. § 3502(d)(2),(11) (1979).

223. *Id.* § 3502(d)(1).

224. *Id.* § 3502(d)(6).

225. *Id.* § 1323. An arrestee who violates such provisions will not only have to answer these charges, but also can have his release revoked. *Id.* § 3507.

226. *See* *Faretta v. California*, 422 U.S. 806, 820-21 (1975) (recognizing that it is the defendant who is defending and the lawyer, if any, who is his "assistant"). As noted above, *see* note 149 *supra*, many defendants who are indigent have no right to counsel as the Constitution is presently being interpreted. The Court observed in

pare a defense in a lawful manner, does not remotely suggest that he will not appear for trial. On the contrary, it suggests that he intends to appear.

The imposition of these severe restrictions of personal freedom, without even a finding of danger to the community, is irrational and constitutionally dubious. Some of these conditions are deprivations that cannot otherwise be inflicted by the legal system<sup>227</sup> and most cannot be imposed without a clear demonstration of need and a due process hearing.<sup>228</sup> In contrast, although the Committee acknowledges that there is little data demonstrating the relationship of these conditions either to appearance for trial or to dangerousness,<sup>229</sup> it invites judges to be "inventive" in their utilization.<sup>230</sup> It has encouraged inventiveness by removing all significant procedural requirements.<sup>231</sup>

Section 3502 provides limited access to appellate review of the imposition of such conditions.<sup>232</sup> It is not available to one who accepts the conditions and obtains his release, even if he subsequently rues the coercive bargain. Review, for what it is worth, is available only to one who "after twenty-four hours . . . continues to be detained as a result of his inability to meet the conditions of release."<sup>233</sup> The

*Stack v. Boyle*, 342 U.S. 1 (1951), that one of the most compelling reasons for "freedom before conviction" is that it "permits the unhampered preparation of a defense." *Id.* at 4.

227. It is most unlikely, for example, that the criteria required for civil commitment, *see* notes 162-63 *supra* and accompanying text, could be satisfied in the case of most alcoholics or users of nonaddictive drugs. *See generally* *Powell v. Texas*, 392 U.S. 514 (1968). It is one thing to conclude that such activities can be criminally punished, but quite another to conclude that a defendant may be institutionalized and treated for his sickness, or jailed for refusal to be treated. *Id.* at 532. Regulation of "associations," S. 1722, 96th Cong., 1st Sess. § 3502(d)(2),(11) (1979) raises the gravest of problems under the first amendment. *See* T. Emerson, *The System of Freedom of Expression* 289-96, 425-33 (1970). The power of the government to grant or deny benefits or other rights on the ground of assertion or exercise of fundamental rights, or, to obtain valid surrenders of those rights by offering benefits or imposing deprivations, is quite limited. *See, e.g., United States v. Jackson*, 390 U.S. 570 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958).

228. *See* notes 169-70 *supra* and accompanying text.

229. It is "under our existing knowledge . . . virtually impossible to single out in statutory form the kinds of defendants, the kinds of offenses, and the kinds of factors that will make for a reasonable total assessment of the likelihood of future flight or dangerousness." S. Rep. No. 553, 96th Cong., 2d Sess. 1077-78 (1980).

230. *Id.* at 1077.

231. A judge complies with § 3502 if the record shows that he "based his decision on . . . considerations set" forth in the section. *Id.* at 1085. Apparently, the judge must indicate that he has considered one or more of the characteristics of the charge and the accused specified in § 3502(f) and imposed "the least restrictive condition or combination of conditions . . . that will reasonably assure the appearance of the person for trial." S. 1722, 96th Cong., 1st Sess. § 3502(a) (1979).

232. S. 1722, 96th Cong., 1st Sess. § 3502(g) (1979).

233. *Id.*

defendant who remains in jail because he is unwilling, rather than unable, to accept compulsory hospitalization or a prohibition on unsavory associates or radical activities, is apparently denied access to appellate review. The defendant who accepts conditional release faces two obvious choices. He may either abide by the conditions of release, no matter how irrational or restrictive, or he may defy them and run the risk of incarceration.<sup>234</sup> Neither alternative is likely to engender a deep respect for the judicial system.

Because little is known about the causes of failure to appear, it is possible that some of these conditions of release might ultimately prove to be closely related to appearance for trial. Unfortunately, their "inventive" employment in bail decisionmaking and the absence of controls would obscure any meaningful evidence of their effectiveness.<sup>235</sup> Any experiment that deprives persons of basic freedoms must be carefully designed to yield significant data; section 3502 is not so designed.

#### D. *The Fundamental Question*

Any serious proposal for bail reform should recognize and resolve the fundamental question, skirted by the Bail Reform Act, by section 3502, by virtually all court decisions and most commentaries: what is the degree of risk of nonappearance the bail decision may appropriately assume? How many false imprisonments—erroneous predictions of nonappearance—should be tolerated to prevent a single false release—erroneous prediction of appearance? Professor Foote argues that the appropriate ratio is one to one. It is "just as important for the administration of the criminal law not to lock up an accused unnecessarily as it is not to permit a defendant to escape trial by flight."<sup>236</sup> If this hypothesis is accepted, one may doubt, as Foote does, that it is sensible to imprison anyone, other than a previous absconder, simply to assure his appearance at trial.

Tools for predicting likelihood of flight are almost as rudimentary as those for predicting dangerousness.<sup>237</sup> We know, for example, that

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234. *Id.* § 3502(j).

235. Conditional releases might appear to be effective if the proportion of defendants released on them and without money bail increases and the nonappearance rate remains fairly constant. This inference, however, is unwarranted if the proportion of unconditioned, own-recognition releases diminishes, as it did in the District of Columbia. When several conditions are imposed simultaneously, it is virtually impossible to determine their individual relation to appearance rates. See W. Thomas, *supra* note 5, at 173. Moreover, inferences would not be justified if the level of support of bail and pretrial service agencies fluctuates during the period. See notes 198-206 *supra* and accompanying text.

236. Foote, *The Coming Constitutional Crises in Bail* (pt. II), 113 U. Pa. L. Rev. 1125, 1170 (1965).

237. The empirical research is collected and evaluated in National Center for State Courts, *An Evaluation of Policy Related Research on The Effectiveness of Pretrial*

family ties and roots in the community correlate with appearance, but there is no data indicating that their absence correlates with flight.<sup>238</sup> Moreover, an intelligent assessment of risk of flight requires evaluation not only of the seriousness of the charge and the likelihood of conviction,<sup>239</sup> but of a host of individual factors that must be acquired and verified. This information carries a high price tag. It seems entirely possible that virtually all failures to appear can be eliminated if these resources were allocated to locating and apprehending the alleged absconder.<sup>240</sup> The typical criminal accused rarely has sufficient funds to leave town, much less the country. The only way for a person to abscond successfully, and remain in the United States, is to avoid arrest. Once he is arrested and fingerprinted, his flight is over. Moreover, it is simply not true that the system can tolerate no absconders.<sup>241</sup> We need to make a serious assessment of the likelihood of successful flight, the costs of recapture, the costs of bail investigation and supervision, and the costs of detention, then reorder our priorities on the basis of facts.

#### IV. TRUE REFORM

It is substantially easier to criticize than to create a bail reform proposal. A number of things, however, should have become obvious from our experience with the Bail Reform Act and preventive detention. Efforts at individualized bail determinations are doomed unless someone with an interest in obtaining pretrial release<sup>242</sup> is placed in

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Release Programs (1975). The conclusion is that "[a]lthough some useful research has been done in this area, we do not know what factors are most likely to be reliable indicators of future flight or future crime." *Id.* at 65.

238. See Wald, *supra* note 5, at 199.

239. This is a nearly universal assumption, justifying special standards of release for those on appeal and those facing capital charges. Even this assumption has been cast into some doubt by one study that found that persons charged with serious crimes had a much lower failure to appear rate than defendants charged with relatively minor misdemeanors. S. Shaffer, *Bail and Parole Jumping in Manhattan in 1967*, at 25-28 (1970). *But see* note 241 *infra*.

240. There are a host of reasons for failure to appear, including death, illness, accident, and confusion about dates and obligations. The true fugitive is virtually unknown in many courts. See W. Thomas, *supra* note 5, at 104.

241. In some jurisdictions, arrestees are encouraged to "abscond" after posting bail, the forfeiture being considered an efficient and adequate punishment for relatively minor offenses. This hypocrisy is even built into the proposed statute. S. 1722, 96th Cong., 1st Sess. § 3502(k) (1979). According to the Committee, permitting forfeiture of collateral in satisfaction of the charges is in accord with present law, 18 U.S.C. § 3146(g) (1976), and practice whereby "several hundred thousand offenses are disposed of annually in that manner in the Federal courts." S. Rep. No. 553, 96th Cong., 2d Sess. 1081 (1980).

242. Defense counsel are expected to perform these tasks in most jurisdictions, but this expectation has little basis in reality. See *United States v. Leathers*, 412 F.2d 169, 173 (D.C. Cir. 1969) (it is a judicial officer's duty to inquire into conditions



a position and given the resources necessary to make the investigations and recommendations and to provide supervision. An adequately funded bail agency is the appropriate candidate for these tasks. This agency must be sufficiently insulated from prosecutorial and judicial control to act effectively on behalf of the accused yet remain sufficiently responsible to the court to have credibility. Neither a bail agency nor a court can obtain the information required for an intelligent, informed bail decision if this information concerning the accused may be used against him in guilt determination or sentencing.<sup>243</sup> A quasi-privileged relationship between the accused and the agency should be provided, and the court should be forbidden to use evidence offered by the defendant in a bail hearing except in a prosecution for perjury. A bail agency should also have ample resources to assist the accused and his family in adjusting to the new status of a criminal accused, and to help, if needed, in obtaining employment, welfare, counseling, and treatment.

None of the foregoing proposals, however, will be effective if the institutional interests that favor pretrial detention or money bail remain in place. There can be no lasting reform until these interests are rearranged. To borrow Senator Kennedy's phrase for a very different purpose, a "new balance [must] be struck"<sup>244</sup> between the "interests of . . . the community and the accused."<sup>245</sup> The plea-bargaining system, which feeds off punitive bail practices, must be reformed so that the adjudication and sentencing functions are less dependent upon bail decisions. Short of a total overhaul of the system, however, there are measures that would reduce the institutional bias against release, and counteract the pressures for punitive use of bail.

The courts should recognize the probability that pretrial incarceration prejudices an accused in the ultimate disposition of his case.<sup>246</sup> An accused who is convicted after trial or even, perhaps, upon a plea of guilty or nolo contendere, should be permitted to assert that his pretrial incarceration contributed to this outcome.<sup>247</sup> The prosecu-

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of release and defense counsel should assist); Wald, *supra* note 5, at 186; Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 Harv. L. Rev. 752, 760 (1980). Such counsel often lack the expertise to perform initial tasks adequately; they also usually lack the motivation or the time. Their representations are not credited by the courts and their duties to their clients preclude effective supervision of pretrial release. See P. Wice, *supra* note 25, at 48; Wald, *supra* note 5, at 186. See generally Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 44 (1973). Indeed, in some districts the prosecutor conducts the bail interview of the accused. 8B J. Moore, *Federal Practice* ¶ 46.06 n.5 (2d ed. 1980).

243. See note 130 *supra* and accompanying text.

244. Kennedy, *supra* note 17, at 433.

245. *Id.* at 435.

246. See note 157 *supra* and accompanying text.

247. Violations of the Bail Reform Act or the eighth amendment, including the right to effective assistance of counsel in the bail process, are virtually always consid-

tion should then be required to prove "beyond a reasonable doubt" that there was no prejudice or that the denial of pretrial release was lawful.<sup>248</sup> If that burden cannot be met, the conviction or sentence should be set aside. Congress or the courts should prohibit inquiries into the source of money for bail and prohibit the consideration of such matters in determinations of eligibility for counsel or other investigative aids, or in sentencing.<sup>249</sup>

Congress should also create a compensation fund and establish a right of action for every defendant whose pretrial liberty was denied but who is ultimately exonerated. This right of action should also extend to recovery of money expended for the bond premiums required to purchase his freedom.<sup>250</sup>

Finally, pretrial detainees should be housed in facilities separate from convicted prisoners, under conditions appropriate to the function of their detention, assuring appearance for trial. They should be allowed as much liberty, including relatively free access to family, friends, lawyers, and recreational and educational opportunities, as is consistent with the limited purpose of their detention.

#### CONCLUSION

The proponents of S. 1722 should be commended for their efforts to correct perceived abuses of the present system, but their product must be condemned for the narrowness of its perception and its

ered to have been mooted by the conviction, through misapplication of the harmless error doctrine. *See, e.g.,* *Dorman v. United States*, 435 F.2d 385, 397-98 (D.C. Cir. 1970) (en banc); *Barnard v. United States*, 342 F.2d 309, 313-14 (9th Cir.), cert. denied, 382 U.S. 948 (1965). *But see* *Bitter v. United States*, 389 U.S. 15 (1967); *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970).

248. This is the standard of harmless error involving violations of constitutional rights adopted in *Chapman v. California*, 386 U.S. 18, 22-24 (1967). Given the presumptions in the Bail Reform Act, 18 U.S.C. §§ 3141-3156 (1976), the setting of financial conditions or severe restrictions on personal liberty should be unlawful absent evidence in the record of a likelihood of flight. This will seldom be the case unless the defendant has previously absconded or attempted to do so.

249. Inquiries into a defendant's wealth are relevant to determinations of indigency and the capacity to pay fines, but fines are not sensible sentences for perpetrators of serious crime other than corporations. Furthermore, few defendants will seek court-appointed counsel when they can afford to hire their own. *See* Casper, *supra* note 150. My proposal, moreover, does not prohibit inquiries regarding indigency for services under the Criminal Justice Act, it merely limits them.

250. *See* Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 Yale L.J. 229, 256-67 (1968). A suggestive model is contained in S. 1722, 96th Cong., 1st Sess. §§ 4111-4113 (1979), dealing with victim compensation. There would be problems in determining entitlements to compensation. Acquittal would be too narrow a criterion. On the other hand, using dismissal to trigger the right may be too generous, encompassing 10% to 20% of federal defendants. *See* note 158 *supra* and accompanying text. That should, however, be the ultimate aim. Some method might also be required to preclude waivers, so that the right to compensation would not merely become another chip for plea bargaining.

methods. If section 3502 is neither abandoned by its supporters nor rejected by Congress, the courts should declare large portions of it unconstitutional. Apart from the misguided and self-destructive preventive detention aspects of section 3502, its greatest vice is that it is disguised as reform. The certain result of this proposal would be to exacerbate existing abuses and threaten fundamental liberties. The problems of the bail system are numerous and pervasive, but better left undisturbed than obscured by experimentation with what is at best a patent palliative.