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# CRIMINAL LAW

# DANGER AND DETENTION: A SECOND GENERATION OF BAIL REFORM*

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> Some risk is therefore imposed on the innocent; in the name of our right to freedom, our other rights are not protected by society at all costs.[1]

## I. INTRODUCTION

Given two decades of controversy and reform preceding the passage of the Federal Bail Reform Act of 1984 by the 98th Congress, the federal preventive detention law represents landmark legislation—if not for actually breaking new ground, at least for formally legitimizing the direction in bail, pretrial release and detention procedure in the United States innovated in the District of Columbia and a number of states during the 1970's.[2] Responding to heightened public fear of crime during the mid and late 1970's, legislatures increasingly have scrutinized bail practices during the 1980's. The resulting variety of revisions has been motivated by the common assumption that, as best summarized by the United States Senate,

> there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure

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[1] Bedau, *Capital Punishment* in MATTERS OF LIFE AND DEATH 150, 169 (T. Regan ed. 1980).

[2] *See* Federal Bail Reform Act of 1984, Pub. L. 98-473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762) [hereinafter cited as Federal Bail Reform Act of 1984].

> the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.[3]

In new laws in many jurisdictions in the United States during the 1970's and 1980's,[4] dramatic changes in legal policy aimed at public safety have superimposed a second wave of "reform" over the accomplishments and/or shortcomings of the earlier bail reform movement.

The underlying philosophy of recent reforms is markedly different from those of the 1960's which aimed principally at eliminating the use of inappropriate pretrial detention, especially among poor defendants held in crowded urban jails.[5] Shaped primarily out of concern for protecting the public from potentiallv dangerous defendants, the spirit and substance of the new laws[6] stand in striking contrast to goals related to assuring the defendant's appearance at court proceedings that dominated debate and reform efforts during the 1960's.[7]

The concerns about pretrial detention and bail that motivated the first decade of bail reform ranged from the conditions of confinement in American jails to questions about the constitutionality of pretrial detention.[8] Critics argued that bail practices determining

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[3] S. REP. No. 225, 98th Cong., lst Sess. 8, at 6-7 (1983) [hereinafter cited as S. REP. No. 225].

[4] *See infra* notes 57 and accompanying text. As of December 1984, in addition to the Federal government, 34 states and the District of Columbia have provisions expanding the use of pretrial detention or of more restrictive release conditions, ostensibly in response to concerns about public safety or the danger posed by defendants released before trial.

[5] *See* D. FREED & P. WALD, BAIL IN THE UNITED STATES: *1964* (1964) (working paper for National Bail Conference); R. GOLDFARB, RANSOM (1967); W. THOMAS, BAIL REFORM IN AMERICA (1976); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67 (1963).

[6] *See, e.g.*, S. REP. No. 225, *supra* note 3, at 8.

[7] *See, e.g.*, STANDARDS RELATING TO PRETRIAL RELEASE introduction (Tent. Draft 1968). In the early 1960's the Vera Institute sought to reform judicial bail practices in New York through the pioneering efforts of the Manhattan Bail Project, thus launching the bail reform movement. *See* A. BEELEY, THE BAIL SYSTEM IN CHICAGO (reprint ed. 1966); CRIMINAL JUSTICE IN CLEVELAND (F. Frankfurter & R. Pound eds. reprint ed. 1968); Special Project, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); [hereinafter cited as Foote, *Compelling Appearance in Court*]; Programs in Criminal Justice Forum—Vera Institute of Justice Ten-Year Report 1961-1971, Vera Institute of Justice, (1972). Contemporaneously, the Federal government was inaugurating the War Against Poverty. *See* POVERTY IN AMERICA, (M. Gordon ed., 1965). Also, the United States Supreme Court embarked on a decade of expanding the rights of criminal defendants. *See* BUREAU OF NATIONAL AFFAIRS, INC., THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1974 (1975).

[8] For discussions of the conditions of confinement in American jails at the time, see R. GOLDFARB, JAILS: THE ULTIMATE GHETTO (1975); NATIONAL ADVISORY COMMISSION

the allocation of detention among defendants were: *(1)* arbitrary and chaotic; *(2)* that they discriminated among defendants based on their relative wealth or lack of it; *(3)* that judges abused their discretion in deciding bail and wielded bail and detention punitively or in line with other nonlegitimate purposes; *(4)* that judges used bail not only to assure the appearance of defendants in court but to detain defendants they viewed as dangerous; and *(5)* that detention before trial was tantamount to punishment prior to adjudication.[9] In the 1960's, among the responses to these questions were: *(1)* the Vera-type reform that advocated increased use of personal recognizance release (ROR) based on information about defendants' community ties;[10] *(2)* the National Bail Conference convened in 1964;[11] *(3)* enactment of the Federal Bail Reform Act of 1966;[12] and *(4)* conditional release and deposit bail programs which proliferated during the late 1960's and early 1970's.[13]

A major policy debate during the 1960's centered on the goals of bail and the acceptable uses for pretrial detention. Many critics condemned the then prevailing system of cash bail that allowed judges to detain defendants indirectly by setting unaffordable bail without giving reasons and for questionable purposes, chiefly to

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ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 101 (1973). Special reports on investigations of state and local jails during the 1960's and 1970's included: A. ASHMAN, LOCKUP: NORTH CAROLINA LOOKS AT ITS LOCAL JAILS (1969); CALIFORNIA BOARD OF CORRECTIONS, A STUDY OF CALIFORNIA JAILS (1970); H. MATTICK & R. SWEET, ILLINOIS JAILS (1969); NEW YORK STATE COMM'N OF INVESTIGATION, COUNTY JAILS AND PENITENTIARIES IN NEW YORK STATE (1966); G. Stracensky, C. Freil, J. Barrum & G. Killinger, Texas Jails—Problems and Reformation (Criminal Justice Monograph Vol. III, No. 4 1970). For examples of litigation involving jail issues, see generally Bell v. Wolfish, 441 U.S. 520, (1979); Gerstein v. Pugh, 420 U.S. 103 (1975); Wallace v. Kern, 520 F. 2d 400 (2d Cir., *cert. denied*, 424 U.S. 912 (1975); Cudnik v. Kreiger, 392 F. Supp. 305 (N.D. Ohio 1974); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974).

9 *See* A. BEELEY, THE BAIL SYSTEM IN CHICAGO (Reprint ed. 1966); D. FREED & P. WALD, *supra* note 5; R. GOLDFARB, *supra* note 5; NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: RELEASE (1968); STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7; P. WICE, FREEDOM FOR SALE; Foote, *The Coming Constitutional Crisis in Bail* (pts. I and II) 113 U. PA. L. REV. 959, 1125 (1969) [hereinafter cited as Foote, *Crisis in Bail I & II*]; Foote, *Compelling Appearance in Court, supra* note 7; Single, *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 CRIM. L. BULL. 459 (1972). *See generally* J. GOLDKAMP, TWO CLASSES OF ACCUSSED (1979); Goldkamp, *Bail: Discrimination and Control*, 16 CRIM. JUST. ABSTRACTS 1 (Mar. 1984); Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179 (1980).

10 The Vera reform was widely replicated across the United States during the 1960's. *See* T. THOMAS, *supra* note 5; Friedman, *The Evaluation of a Bail Reform*, 7 POL'Y SCI. (1976); Wice, *Bail Reform in American Cities*, 9 CRIM. L. BULL. 770 (1973); Wice & Simon, *Pretrial Release: A Survey of Alternative Practices*, FED. PROBATION, Dec. 1970, at 60.

11 *See* D. FREED & P. WALD, *supra* note 5.

12 Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) (repealed 1984).

13 *See* W. THOMAS, *supra* note 5.

confine defendants "preventively"[14] whom they viewed as dangerous. Commentators objected to preventive detention based on public safety concerns using a cash bail system for many reasons: *(1)* the "danger" concern was not an appropriate constitutional orientation for bail (for its only legitimate use was to insure the appearance of defendants at court);[15] *(2)* the cash system allowed danger-oriented detention decisions to be made *sub rosa* with no chance for redress by the defendant; *(3)* preventive detention was predicated on prediction of future conduct based on inconclusive data (such as arrest records) relating to past conduct; *(4)* judicial selection of particular cash bail amounts by judges had no practical relationship to the dangerous proclivities of defendants; and *(5)* defendants detained as a result of unaffordable bail were handicapped at later judicial stages.[16]

Preventive detention, as the "danger" perspective on bail and

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[14] *See, e.g.*, Foote, *Compelling Appearance in Court, supra* note 7; Foote, *Crisis in Bail I & II, supra* note 9.

[15] Reform-oriented critics buttressed their central premise, that bail was constitutionally designed only as a vehicle for assuring the appearance of defendants at court, partly by interpretations of the historical origins of bail. *See Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); *Amendments to the Bail Reform Act of 1966: Hearings Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Federal Bail Reform: Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195; and S. 1357 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). Foote, *Compelling Appearance in Court, supra* note 7; Foote, *Crisis in Bail I & II, supra* note 9. They also supported their arguments by citing a 1951 decision, *Stack v. Boyle*, in which the United States Supreme Court referred in dicta to "the traditional rights of the accused to freedom before conviction" and "the purpose of assuring the presence of the defendant." 342 U.S. 1, 4-5 (1951). Opponents of this strict interpretation pointed to a case heard bv the Supreme Court during the same term, Carlson v. Landon, 342 U.S. 524 (1952), for authority that in addition to insuring a defendant's attendance, bail could be decided to protect the public from potentially dangerous defendants as well. Historical rationales were employed by adherents of this point of view also. *See* Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Hess, *Pretrial Detention and the District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOKLYN L. REV. 277 (1971); Meyer, *Constitutionality of Pretrial Detention* (pts. 1 & 2), 60 GEO. L.J. 1139, 1381 (1972); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969). For a review of the two schools of thought, see J. GOLDKAMP, TWO CLASSES OF ACCUSED (1979).

[16] *See, e.g.*, J. GOLDKAMP, *supra* note 15; STANDARDS RELATING TO PRETRIAL RELEASE, *supra*, note 7; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970); Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 290 (1971); Foote, *Compelling Appearance in Court, supra* note 7; Foote, *Crisis in Bail I & II, supra* note 9; Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287 (1974); Paulsen, *Pre-trial Release in the United States*, 66 COLUM. L. REV. 109 (1966); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964); Single, *supra* note 9; Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970).

pretrial detention has become identified,[17] may have remained the minority view during the 1960's.[18] When Congress passed the first comprehensive preventive detention law in the United States for implementation in the District of Columbia,[19] however, Congress formally recognized its emergence as at least a co-equal bail rationale. Beginning in the 1970's and continuing into the 1980's, the "bail reform movement," which had launched such innovations as ROR, conditional release and deposit bail programs based on a platform that insuring a defendant's appearance was the sole appropriate business of bail, tellingly modified its platform to accommodate concern for protecting the public from dangerous defendants.[20]

Prior to the passage of the Federal law in 1984, evidence of the degree to which emphasis in bail matters had shifted began appearing in surprisingly explicit language in legislation. The recent Florida law, for example, instructed quite clearly that "[i]t is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons."[21] A provision that sought to amend the California constitution (included in the larger "Victims' Bill of Rights" package of the summer of 1982) employed similar language mandating that "public safety shall be the primary consideration" in the bail decision, narrowly failed to be adopted.[22] Dicta in the United States Supreme Court's decision in

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17 Although it may just as well be applied to uses of bail to prevent defendants from absconding from court, "preventive detention" in common usage connotes practices designed to permit the detention of defendants likely to pose a danger of reoffending if released.

18 See, e.g., the language of the Federal Bail Reform Act of 1966 and the STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7. The Federal Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214 (1966) (codified as 18 U.S.C. §3146 (1966)), states that assuring the appearance of defendants is the only acknowledged purpose of the bail decision at least for persons charged in noncapital cases. In capital cases the judge may consider whether the defendant poses a "danger to any other person or to the community." 18 U.S.C. § 3148 (1966), *repealed by* Federal Bail Reform Act of 1984, *supra* note 2. In drafting its 1968 STANDARDS RELATING TO PRETRIAL RELEASE, the American Bar Association adopted a version recognizing only the appearance-insuring orientation of bail and almost endorsed a danger-oriented preventive detention approach. *See* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7, at Appendix C.

19 *See* D.C. CODE ANN. §§ 23-1321 to 1332 (1981 & Supp. 1985); *Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Preventive Detention Hearings*].

20 *See* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9.

21 *See* FLA. STAT. ANN. § 907.041(1) (West 1985).

22 Voters passed two amendments that included provisions modifying bail procedures under the CAL. CONST. art. 1, § 12 in the summer of 1982. The best-known measure, the "Victim's Bill of Rights," not only required that "public safety bail" be made the primary emphasis of bail practices, but also required judges to state reasons for the court record when setting, reducing or denying bail or granting personal recognizance release (California Proposition 8). The second measure, which was passed by a greater

*Schall v. Martin*,[23] a juvenile detention case, the Supreme Court's denial of certiorari in *U.S. v. Edwards*,[24] and the enactment of the Federal Bail Reform Act of 1984 further illustrate how dramatically the philosophy underlying the bail reform movement of the 1960's has been transmogrified.

Given the shift in emphasis away from the appearance orientation of the 1960's, this Article examines the emergence of the unmistakable public safety focus in the laws of the 1980's[25] and evaluates its implications for the practice of pretrial release and detention in the United States in the future. Due to the historical controversy surrounding bail and pretrial detention and the nearly "fait accompli" nature of these new reforms, it is critical that lawmakers and the key participants in the American judicial process squarely confront the character of these new laws, their underlying philosophy, and their likely consequences.

## II. The Traditional Legal Framework Governing Detention Policy

Before considering the pronounced public safety emphasis of recent bail laws, this section briefly will describe the key components of bail law that have most influenced the use of pretrial detention and release in the United States. Although bail laws are structurally diverse, common mechanisms have not only determined detention policy in the past but, as a result of their modification under the new laws, are shaping the new direction.

Prior to recent statutory revisions in which outright denial of pretrial release is expressly contemplated and authorized for "dangerous" defendants, policies regulating the pretrial detention of criminal defendants in the United States generally have been only indirectly discernible in the various statutes dealing with bail and other pretrial release mechanisms. Except for the traditional provisions which exclude persons charged with capital offenses (or in some states, persons charged with offenses punishable by life

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margin and thereby took effect over the provisions of the "Victim's Bill of Rights," added instances in which defendants may be detained when they pose a danger. *Id.*

[23] 104 S. Ct. 2403, 2413 (1984).

[24] 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982) (the District of Columbia Court of Appeals opinion reviewed the constitutionality of the preventive detention law in the District).

[25] Just as the passage of legislation lags behind public sentiment on particular issues, the practical impact of legislation may not be felt until sometime after its enactment. Thus, this analysis focuses on federal and state statutes, rules and constitutional amendments, not so much to suggest that such laws have been translated directly into current changes in practice, but to underscore the potentially great effect these laws may have.

imprisonment),[26] detention policy has not been treated directly, but

[26] *See* Table 1 in the appendix. Table 1 charts the prevalence of the three standard features of traditional bail provisions which have limited the right to bail: limitations of the right to bail based on capital charges or the availability of life imprisonment, proof-and-presumption clauses, and prohibitions against excessive bail.

Before the new wave of pretrial detention legislation of roughly the last 15 years, persons for whom bail (and pretrial release) "as a matter of right" could be denied directly were defined by a traditional formula that differed little from state to state. These laws generally excepted murder cases from the right to bail. *See e.g.*, ALA. CONST. art. I § 16; CONN. CONST. art. I § 8; N.D. CONST. art. I, § 11; PA. CONST. art. I, § 14; TENN. CONST. art. I, § 15; ALA. CODE § 15-13-3 (1975). Some states have modified this traditional formula slightly by the inclusion of treason, IND. CONST. art. I, § 17; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9, or offenses punishable by life imprisonment as nonbailable. *See Ex Parte* Hickerson, 95 Okla. Crim. 246, 244 P.2d 349 (1952); FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 9; NEV. CONST. art. I § 7; S.C. CONST. art. I, § 15; WIS. CONST. art. I, § 8; HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984); VA. CODE § 19.2-120 (1950).

Virtually all right-to-bail provisions further condition ineligibility for release on bail by the requirement that the judge determine whether the "proof is evident and the presumption is great." States without such a "proof-and-presumption" clause include New York, North Carolina, West Virginia and Wisconsin. Other variations of the theme conditioning denial of bail on a judicial presumption of guilt are found in Alabama, Georgia, South Carolina and Vermont. *See* S.C. CONST. art. I, § 15; VT. CONST. ch. II § 40; ALA. CODE § 15-13-3 (1975); GA. CODE ANN. § 27-901 (1983 & Supp. 1985). Interpretation of the precise meaning of this clause in case law is generally absent, but see the U.S. Supreme Court's questioning of the Assistant Attorney General of Nebraska in arguments in Murphy v. Hunt, 455 U.S. 478 (1982), in which Justice Brennan asked, "What does 'presumption great' mean?" 30 CRIM. L. REP. 4189, 4190. The Assistant Attorney General of Nebraska responded, "I suspect it means something considerably more than preponderance of the evidence and something less than a reasonable doubt. Perhaps it means that there is clear and convincing evidence that the defendant will be convicted." *Id.* at 4190. The Assistant Public Defender from Douglas County, Nebraska, later also responded to Justice Brennan's further inquiries on the "proof-and-presumption" clause in that state's constitution: "Practically every state uses this language in some manner or other. There seems to be three different interpretations of language like this. One is 'that you can't even put on evidence because the language creates an irrebuttable presumption.' Another is that the burden is upon the accused to show that proof isn't evident or the presumption great that he will be convicted. The third is that the state bears the burden of showing a high probability of guilt. Our position is that it means 'high probability of guilt.' " *Id.* at 4191.

The traditional approach also has included adoption by the states of the eighth amendment of the Federal Constitution, which prohibits excessive bail in cases where bail is allowed as a matter of right. The eighth amendment of the Constitution states only "nor should excessive bail be required." U.S. CONST. amend VIII. Interpretations of the excessive bail clause have left its precise meaning in doubt. In Stack v. Boyle, 342 U.S. 1 (1951), Chief Justice Vinson advised that "excessive" bail means "higher than usually set" or more than is required to assure the defendant's appearance at court. *Id.* at 4-5. The United States Court of Appeals addressed this issue in Sistrunk v. Lyons, 646 F.2d 64 (3d Cir., 1981) in which the court appeared to favor the interpretation that excessiveness questions may only be raised in cases having a right to bail. *Id.* at 72-73. The issue also was discussed by the Hawaii Supreme Court in Huihui v. Shimoda, 64 Hawaii 527, 644 P.2d 968 (1982), a case in which the Hawaii Supreme Court found that the traditional constitutional prohibition against excessive bail clashed with a new statute permitting outright detention of certain categories of defendants: "[i]t therefore

rather has been suggested or implied. This implied policy occurs first in laws addressing judicial determination of bail generally (and assignment of cash bail specifically),[27] and second in laws concerning personal recognizance or release on conditions.

### A. CRITERIA GOVERNING BAIL DETERMINATIONS GENERALLY

Even after the impetus toward reform of state laws provided by the Federal Bail Reform Act of 1966, today as many as ten states[28] offer little guidance to the bail judge beyond the gross criteria defining a right to bail.[29] In these states, the bail decision and, consequently, the allocation of pretrial detention, are largely left to the judiciary as "a matter of sound discretion";[30] some statutes or court rules, however, provide bail schedules which simply designate amounts of cash bail for categories of criminal charges.[31]

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defies logic to interpret that constitutional provision as prohibiting bail set so unreasonably high as to be unobtainable and not reflective of legitimate state concerns on one hand, while on the other as permitting the outright denial of bail absent reasonable grounds, since both actions, under like circumstances, amount to the same thing." *Id.* at 539, 644 P.2d at 976. *See also* Duker, *supra* note 15, Foote, *Crisis in Bail I & II, supra* note 9.

[27] Throughout Anglo-Saxon history, "bail" has stood for the arrangements made to guarantee that an arrested person will appear in court to meet judgment. Financial or cash bail, one form of such an assurance, is a reasonably recent (and predominantly American) historical development. *See* Duker, *supra* note 15. More currently the "bail decision" generally refers to the selection of a particular option— such as ROR, release on conditions, or cash bail—designed to constrain a defendant from flight, or in some jurisdictions, from crime during pretrial release.

An analysis of the U.S. Department of Justice's first national survey of inmates of local jails, for example, found that 28 percent of detained defendants were held without bail. The remainder were held because they could not raise their financial bails. *See* J. GOLDKAMP, INMATES OF AMERICAN JAILS: A DESCRIPTIVE STUDY (1978); U.S. DEPARTMENT OF JUSTICE, NAT'L PRISONER STATISTICS BULLETIN No. SD-NPS-J-6P, CENSUS OF JAILS AND SURVEY OF JAIL INMATES, 1978 (Feb. 1979); Goldkamp, *American Jails: Characteristics and Legal Predicaments of Inmates*, 15 CRIM. L. BULL. 223 (1979).

[28] *See* CONN. CONST. art. I, § 8; IDAHO CONST. art. I, § 6, LA. CONST. art. I, § 18; MISS. CONST. art. III, § 29; OKLA. CONST. art. II, §§ 8, 9; R.I. CONST. art. I, §§ 8, 9; TEX. CONST. art. I, §§ 11, 11a, 13; UTAH CONST. art. I §§ 8, 9; W. VA. CONST. art. III, § 5; GA. CODE ANN. § 27-901 (1983 & Supp. 1985); IDAHO CODE §§ 19-2901 to 2937 (1979 & Supp. 1985); LA. CODE CRIM. PROC. ANN. art. 311-343 (West 1967 & Supp. 1985); MISS. CODE ANN. §§ 99-5-1 to -35 (1972 & Supp. 1985); R.I. GEN. LAWS §§ 12-13-1 to -20 (1956 & Supp. 1984); TEX. [CRIM. PROC.] CODE ANN. art. 17 §§ 01-38 (Vernon 1977); UTAH CODE ANN. §§ 77-20-1 to -9 (1982); W. VA. CODE § 62-lc-1 to -19 (1977).

[29] Table 2 summarizes the criteria that state laws require judges to consider when making the bail decision.

[30] GA. CODE ANN. § 27-901(a) (1983 & Supp. 1985).

[31] *See* CAL. [PENAL] CODE § 1269 (Deering, 1982); LA. CODE CRIM. PROC. ANN. art. 319 (West 1967 & Supp. 1985); MINN. STAT. ANN. § 629.71 (1983); MONT. CODE ANN. §46-9-301 (1983); NEB. REV. STAT. § 29:901.05 (1943); OKLA. STAT. tit. 22, § 1112 (Supp. 1984); TENN. CODE ANN. § 40-11-105 (1982); WIS. STAT. § 969.065 (1985); KY. RULES CRIM. PROC. Appendix A (1983); OHIO RULES CRIM. PROC. 46(d)(3); ALA. JUD.

In other states, the impact of bail reform of 1960's vintage is more evident in laws that list for judicial consideration at bail specific factors, such as the following: *(1)* the nature of the current charge; *(2)* the weight of the evidence and the likelihood of conviction; the possible criminal penalty; *(3)* the defendant's prior criminal history (including in three states, juvenile history);[32] *(4)* prior record of appearance in court; *(5)* whether the defendant was on probation, parole or pretrial release in connection with an earlier offense; *(6)* age; *(7)* length of residence in, and ties to the community; *(8)* employment; *(9)* financial resources; *(10)* character, reputation and mental condition; *(11)* past general conduct; *(12)* the availability of persons to assist the person in attending court; and *(13)* whether the person is an alcoholic or a drug addict.[33] To the extent that judges actually weigh these criteria in ruling out ROR and setting unaffordable cash bail, these legal provisions may have an important impact on detention policy.[34]

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AD. RULES 2 (Alabama Supreme Court Rules). Bail schedules have been criticized strenuously since the earliest years of bail reform because of the inequity inherent in setting financial bail solely in line with the ranked seriousness of the criminal charges. Similarly charged persons will have different abilities to afford the bail and thus different likelihoods of release, regardless of the risks they may pose. See the discussion of Standard 10-5.4 in American Bar Association, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, (1980) [hereinafter cited as A.B.A., PRETRIAL RELEASE], which states in 10-5.4 (f) that "monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the specialized circumstances of each defendant." *Id. See also* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9, at 27; Pugh v. Rainwater, 557 F.2d 1189, 1200 (5th Cir. 1977), *rev'd en banc on other grounds*, 572 F.2d 1053 (5th Cir. 1978). *Cf.* Schilb v. Kuebel, 404 U.S. 357 (1971).

32 In Indiana, in determining the "amount of bail," the judge considers, among other factors, "the defendant's criminal or juvenile record, insofar as it demonstrates instability and disdain for the court's authority to bring him to trial. . . ." *See* IND. CODE ANN. § 35-33-8-4 (West Supp. 1985). Since 1975, Louisiana law has provided access to juvenile court history for defendants at bail. *See* LA. CODE CRIM. PROC. ANN. art. 317 (West 1967 & Supp. 1985). Similar juvenile and youthful offender criminal history are available to judges determining bail in New York. *See* N.Y. [CRIM. PROC.] LAW §510.30 (2)(a)(v) (McKinney 1984).

33 Variations of the decision criteria summarized in Table 2 in the Appendix are discussed in J. GOLDKAMP, TWO CLASSES OF ACCUSED, *supra* note 9.

34 Several studies of judicial bail practices strongly suggest that in contrast to the lists of considerations provided in the laws of some states, few criteria actually come into play in judges' decisions. *See, e.g.*, J. GOLDKAMP & M. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM, (1985); J. GOLDKAMP, TWO CLASSES OF ACCUSED, *supra* note 9; J. ROTH & P. WICE, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA (1978) (prepared for the U.S. Dept. of Justice, Nat'l Institute of Justice); Bock & Frazier, *Official Standards Versus Actual Criteria in Bond Dispositions*, 5 J. CRIM. JUST. 321 (1977); Ebbesen & Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 805 (1975). Two empirical studies of bail decisionmaking have shown that actual decision practices com-

Although, theoretically, the criteria listed in laws instructing judges how to formulate bail decisions ought to play an important role in shaping bail practices and the use of pretrial detention that follows, in fact, their influence on detention policy is considerably diluted for two reasons: judges are free to ignore alternative criteria and focus rather on criminal charge and prior criminal record, and because the extent of detention resulting from cash bail decisions either intentional (by conscious design of the bail judge) or unintentional (largely from a defendant's lack of financial resources), is unknown. Financial bail may be set as a reasonable assessment of what it would take to encourage the defendant to appear at trial or possibly to refrain from criminal behavior during pretrial release (that is, because of the threat of financial loss, the judge may have set bail based on a *deterrent rationale*), or it may be assigned at a level deliberately beyond the defendant's likely ability to afford it, as a *sub rosa* method of detention to prevent a defendant from fleeing or committing further dangerous acts (based on an *incapacitative rationale*). Accordingly, statutes specifying factors to be considered in setting bail tend to be imprecise indicators of implicitly operating detention policy.

### B. *ROR* POLICY

Included among provisions for pretrial release and detention determinations are laws outlining principles guiding the use of direct release options, such as ROR or other nonfinancial conditions. These policies are central because, to the extent that they are adhered to by judges, they could have a great effect in determining who definitely will *not* be a candidate for detention.[35] The treatment of ROR[36] policy in state laws varies notably in substance and emphasis depending upon the state.[37] Many state laws make mention of ROR to note that it is permitted or to limit its applicability.[38] In

port little with criteria outlined in statutory provisions or court rules. *See* J. GOLDKAMP, TWO CLASSES OF ACCUSED, *supra* note 9. Bock & Frazier, *Official Standards Versus Actual Criteria in Bond Dispositions*, 5 J. CRIM. JUST. 321, 324-28 (1977).

35 Table 3 in the Appendix summarizes the policies regarding ROR and the use of nonfinancial conditions in American laws.

36 For the purpose of this analysis, unsecured bail—or bail requiring no deposit for release but involving liability to court in the event of defendant flight—is treated as equivalent to personal recognizance release or ROR.

37 Eight states do not refer to ROR as a bail option, including Connecticut, Georgia, Idaho, Mississippi, Oklahoma, Rhode Island, Texas and West Virginia.

38 For example, under New Hampshire law, all persons arrested for crime "shall, before conviction, be released on personal recognizance or be bailable by sufficient sureties, whichever justice may require." N.H. REV. STAT. ANN. § 597:1 (1974).

In states where it is listed only as an option, ROR provisions quite obviously con-

the remaining states and the District of Columbia,[39] the Federal law's presumption[40] that all defendants (in bailable categories) should be released on ROR or unsecured bail, unless grounds exist to believe that a defendant will pose an unusual risk not addressed through outright pretrial release, has been adopted in some version. To the extent that the presumption favoring ROR stated in the laws

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tribute little toward forging a selective detention policy. Absent a strong release policy, it may be assumed that pretrial detention would include a wide array of defendants and reflect a more frequent, non-selective resort to confinement. *See also* CAL. CONST. art. I, § 12; HAWAII CONST. art. I, § 12; ALA. CODE § 15-13-4 (1975) (for misdemeanors only); CAL. [PENAL] CODE §§ 1269(c), 1270 (Deering 1982); COLO. REV. STAT. §§ 16-4-104(a), -105(0), -111 (1973) (limited); ILL. REV. STAT. ch. 38, § 110-2 (1980 & Supp. 1985); IND. CODE § 35-33-8-3 (Supp. 1985); KAN. STAT. ANN. § 22-2802(2) (1981); MASS. GEN. LAWS ANN. ch. 276, § 58 (1972 & Supp. 1985); MO. REV. STAT. § 544.455 (Supp. 1985); MONT. CODE ANN. § 46-9-111 (1985); NEV. REV. STAT. § 178-4851 (1983) (limited to misdemeanors for defendants with no prior records); N.Y. [CRIM. PROC.] LAW § 530.20 (McKinney 1984); UTAH CODE ANN. § 77-20-3 (1982); VA. CODE § 19.2-123 (1950 & Supp. 1985); ARK. RULES CRIM. PROC. § 9.1; FLA. RULES CRIM. PROC. 3.130(4); LA. CODE CRIM. PROC. ANN. art. 319 (West 1967); N.J. RULES CRIM. PROC. § 3:26-1(a).

In some laws that mention ROR as a permissible bail option, its applicability is limited. For example, the Colorado statutes permit ROR in a strictly limited fashion. Specifically, COLO. REV. STAT. § 16-4-104(a) (1973), allows that "[t]he defendant may be released from custody upon execution by him of a personal recognizance" but states in another section, COLO. REV. STAT. § 16-4-105(o) (1973), that "[n]o person shall be released on personal recognizance until and unless the judge ordering the release has before him reliable information concerning the accused, prepared or verified by a person designated by the court, or substantiated by sworn testimony at a hearing before the judge, from which an intelligent decision based on the criteria set forth . . . can be made." *Id.* Any defendant with a prior conviction for a class 1 misdemeanor within two years or a felony within five years may not be released on ROR "unless the district attorney consents." COLO. REV. STAT. § 16-4-106(n) (1973). Section 16-4-111 further limits its applicability to persons charged with the least serious misdemeanors or "petty offenses, or any unclassified offense for a violation of which the maximum penalty does not exceed six months' imprisonment" and even in these cases, further restrictions are provided. COLO. REV. STAT. § 16-4-111 (1973).

[39] *See* ALASKA STAT. § 12.30.020 (1962); DEL. CODE ANN. tit. 11, § 2105 (1974 & Supp. 1984); D.C. CODE ANN. § 23-1321 (1981 & Supp. 1985); IOWA CODE § 811.2 (Supp. 1985); KY. REV. STAT. § 431.520 (1981); ME. REV. STAT. ANN. tit. 15, § 942 (1964 & Supp. 1984); MICH. COMP. LAWS § 765.6 (1982); NEB. REV. STAT. § 29:901 (1943); N.C. GEN. STAT. § 15A-534(a),(b) (1983); OR. REV. STAT. § 135.245(3) (1985); S.C. CODE ANN. § 17-15-10 (Law. Co-op 1976); S.D. COMP. LAWS ANN. § 23A-43-2 (1979 & Supp. 1984); TENN. CODE ANN. § 40-11-115, -116 (1982); VT. STAT. ANN. tit. 13 § 7554 (1974); WIS. STAT. §§ 969.01, .02 (1985); ARIZ. RULES CRIM. PROC. 7.2(a); KY. RULES CRIM. PROC. 4.02; MINN. RULES CRIM. PROC. 6.02; N.D. RULES CRIM. PROC. 46(a); N.M. [RULES] CRIM. PROC. 22(a); WASH. SUPERIOR CT. CRIM. RULES 3.2; WYO. RULES CRIM. PROC. 8(c)(1). Maine law permits speedy review in cases of bailable defendants in which ROR has not been granted. ME. REV. STAT. ANN. tit. 15, § 942(3) (1964). In Maryland and Michigan, the presumption of ROR is strengthened by requiring the judge to write reasons when ROR is not granted. Md. Rules 4-216; MICH. CT. RULES § 6.110 (1985). *See* People v. Spicer, 402 Mich. 406, 263 N.W. 2d 256 (1978).

[40] Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214 (1966) (originally codified 18 U.S.C. § 3146 (1966); repealed by Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, § 203(a), 98 Stat. 1976 (1984)).

is translated into judicial practice, and this is a questionable assumption,[41] the effect of these provisions on detention practices should be to screen broad categories of defendants away from confinement, thus producing a more restricted or selective use of pretrial detention than where such provisions do not exist.

### C. POLICY GOVERNING PRETRIAL RELEASE ON CONDITIONS

A related feature of bail laws involves the employment of "conditions of release," nonfinancial as well as financial, thus offering an option beyond outright pretrial release (ROR) but short of confinement. Conditional release provisions, products of the bail reform movement of the 1960's and 1970's, are significant because in the deceptive jargon of some of the statutes, defendants who cannot "meet the conditions of release" set by the judge will remain detained; and whether such probation-like alternatives are exhausted as a matter of policy before selecting restrictive options likely to result in detention has great weight in determining which kinds of defendants are likely to be detained routinely.

Although most jurisdictions discuss conditions of release in their statutes, eighteen states are silent on this subject.[42] Conditions of release are treated in other states very unevenly. Some states discuss release conditions for very narrow areas, such as in cases involving domestic or family violence,[43] or in cases in which the defendant is viewed as posing a specific danger.[44] Laws in other states mention conditions that *may* be set in addition to ROR or cash bail designed to further reduce the risk of flight, or depending upon the state, the danger posed by the defendant.[45]

These states list either a full range of release conditions to be

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41 *See supra* note 34.

42 In Table 3 in the Appendix are the provisions dealing with conditional release. States that do not have such provisions are Alabama, Georgia, Idaho, Louisiana, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and West Virginia.

43 *See, e.g.*, ALASKA STAT. § 12.30.025 (1962); MINN. STAT. § 629.72 (1980); N.Y. [CRIM. PROC.] LAW § 530.12, .13 (McKinney 1984).

44 *See* HAWAII REV. STAT. § 804-71 (Supp. 1984); N.M. [RULES] CRIM. PROC. § 22(c).

45 *See* ALASKA STAT. § 12.30.020(b) (1962); CAL. [PENAL] CODE § 1269d (Deering 1982 & Supp. 1985); COLO. REV. STAT. § 16-4-103(2) (1973); DEL. CODE ANN. tit. 11, § 2108 (1974); ILL. REV. STAT. ch. 38 § 110-10 (1980 & Supp. 1985); IND. CODE ANN. § 35-33-8-3 (West Supp. 1985); KAN. STAT. ANN. § 22-2802(1) (1981); KY. REV. STAT. § 431.520 (1981); MO. REV. STAT. § 544-455(1) (Supp. 1985); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1976), VA. CODE § 19.2-123 (1983 & Supp. 1985); WIS. STAT. §§ 969.02, .03 (1985); FLA. RULES CRIM. PROC. 3.131(6); KY. RULES CRIM. PROC. 4.12; N.J. RULES GOVERNING CRIM. PRAC. 3:26-1(a); OHIO RULES CRIM. PROC. 46(C),(D). In these states no specific policy governing the use of conditions of release is provided; rather the statutes instruct, for example, that "in connection with either a secured release or on unsecured

considered, or very few.[46] Among the most common nonfinancial conditions found in these provisions are the following: *(1)* custody by a pretrial services or other public agency; *(2)* custody to a third party or organization; *(3)* regular reporting to or supervision by a pretrial services, probation or law enforcement agency; *(4)* restrictions on residence, travel, associations and activities; *(5)* prohibitions against possessing weapons, alcohol or drug usage; *(6)* requirements that employment be found or maintained, that educational or vocational programs be initiated or continued; *(7)* requirements that a defendant participate in counseling, drug or alcohol treatment programs; and *(8)* part-time custody. Financial conditions commonly include unsecured bail, deposit bail,[47] cash, or solvent sureties.[48]

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release of any person the court may also impose one or more of the following conditions. . . ." DEL. CODE ANN. tit. 11, § 2108 (1974).

[46] *See* Table 3 in the Appendix.

[47] Deposit bail, an innovation implemented first in Illinois during the mid-1960's, is now provided for in 20 states, the District of Columbia and under Federal law. In Oregon, deposit bail is the only form of financial bail permitted when set as a condition of release. OR. REV STAT. § 135.265(2) (1985). Kentucky law makes deposit bail universally available in cash cases at the judge's option, and Michigan law has a presumption favoring deposit bail. *See* 18 U.S.C.A. § 3146 (Supp. 1985); ALASKA STAT. § 12.30.020(b)(4) (1962); CAL. [PENAL] CODE § 1269d (Deering 1982 & Supp. 1985) (for misdemeanors); D.C. CODE ANN. § 23-1321 (1981 & Supp. 1985), FLA. STAT. ANN. § 903.105 (West 1985); ILL. REV. STAT. ch. 38, § 110-7 (1980 & Supp. 1985); IND. CODE § 35-33-8-3 (Supp. 1985); IOWA CODE § 811.2 (1979 & Supp. 1982); KY. REV. STAT. § 431.520 (1981); ME. REV. STAT. ANN. tit. 15, § 942(2)(c) (1964) (fifty percent deposit plan); MICH. COMP. LAWS ANN. § 780.66 (1982); MO. REV. STAT. § 544.455(1) (Supp. 1985); NEB. REV. STAT. § 29-901 (1979); R.I. GEN. LAWS § 12-13-10 (1956 & Supp. 1985); S.D. CODE ANN. § 23A-43-3 (1979 & Supp. 1984); VT. STAT. ANN. tit. 13, § 7554 (1974); ARK. RULES CRIM. PROC. 9.2(b); KY. RULES CRIM. PROC. 4.12; N.J. RULES GOVERNING CRIM. PRAC. 3:26-4(a); N.M. [RULES] CRIM. PROC. 22(a); N.D. RULES CRIM. PROC. tit. 46(a); PA. RULES CRIM PROC. 4006(1); WASH. SUPERIOR CT. CRIM. RULES 3.2; WYO. RULES CRIM. PROC. 8(c)(1). The Colorado scheme offers an interesting contrast to these jurisdictions with deposit bail plans. Not only does Colorado law not include a provision permitting a deposit option, but a Colordado court has interpreted COLO. REV. STAT. § 16-4-104(1)(b) (1973) as not allowing judges to have discretion to employ deposit bail to release defendants. People v. Dist. Ct. of Eighteenth Judicial Dist. *ex rel.* County of Arapahoe, 196 Colo. 116, 581 P.2d 300 (1978). The implication is that defendants having cash bail set must employ a bondsman if they do not have the financial resources themselves. For a discussion of deposit bail and criticism of the bondsman's role, see, e.g., STANDARDS RELATING TO PRETRIAL RELEASE *supra* note 7; NATIONAL ASSOCIATION OF PRETRIAL SERVICE AGENCIES, *supra* note 9; W. THOMAS, *supra* note 5. *See also* A. BEELEY, *supra* note 7 at 39 (the bondsman is "anomalous parasite" to the American system of justice and an "extra-legal liaison."

[48] Many jurisdictions list "mandatory" conditions accompanying grants of pretrial release, usually requiring that the defendant appear in court, not leave the state, and be on "good behavior," or specifically, refrain from committing any crime. *See* 18 U.S.C. § 3142 (Supp. 1985); ARIZ. REV. STAT. ANN. § 13:3967(D) (1978); CAL. [PENAL] CODE § 1318 (Deering 1981 & 1985); COLO. REV. STAT. § 16-4-103 (1973); DEL. CODE ANN. tit. 11, § 2108 (1974); ILL. REV. STAT. ch. 38 § 110-10 (1980 & Supp. 1985); IND. CODE § 35-

Theoretically, considerably more influence on detention policy should be contributed by the conditional release provisions of the remaining seventeen states, the District of Columbia, and the Federal government which stress release under the least onerous condition(s).[49] The wording of these statutes generally resembles Arizona's which states that

> [a]ny person charged with an offense bailable as a matter of right shall be released pending or during trial on his own recognizance, unless the court determines in its discretion that such a release will not reasonably assure his appearance as required. If such a determination is made, *the court may impose the least onerous condition or conditions* . . . which will reasonably assure his appearance.[50]

In these states, release conditions are prioritized in order of their perceived onerousness, beginning usually with ROR, then unsecured bail, followed by other nonfinancial, probation-like conditions, deposit bail, cash bail, part-time custody, and ending up, in some cases, with outright custody. There is a presumption that cash bail will be used as a last, drastic alternative because it may produce detention. In the District of Columbia, Wisconsin and the Federal jurisdiction, financial conditions may not be applied when the goal is to constrain the danger posed by defendants.[51]

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33-8-3 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 276, § 58 (West 1982 & Supp. 1985); NEV. REV. STAT. § 178.487 (1984); OR. REV. STAT. § 135.250 (1981); PA. CONS. STAT. ANN. tit. 18, § 4956 (Purdon 1983); S.C. CODE ANN. § 17-15-20 (Law. Co-op. 1976); VA. CODE § 19.2-135 (1983); WIS. STAT. §§ 969.02, .03 (1985); ARIZ. RULES CRIM. PROC. 7.2, 7.3; R.I. RULES CRIM. PROC. 46(2)(d)(Superior Ct.).

[49] Provisions of most of these state laws are patterned on the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146 (1966) (repealed 1984). *See* ARIZ. REV. STAT. ANN. § 13:3967(E) (1978); CONN. GEN. STAT. §§ 54-63c, -63d, -64a (Supp. 1985) (simplified version of least onerous); D.C. CODE ANN. § 23-1321 (1981 & Supp. 1985); IOWA CODE § 811.2 (1979 & Supp. 1982); ME. REV. STAT. ANN. tit. 15, § 942(2) (1964); NEB. REV. STAT. § 29-901 (1943); N.C. GEN. STAT. § 15A-534(a), (b) (1983); OR. REV. STAT. § 135.245(3) (1985); S.D. COMP. LAWS ANN. § 23A-43-3 (1976 & Supp. 1984); TENN. CODE ANN. § 40-11-116 (1982); ARIZ. RULES CRIM. PROC. 7.2(a); ARK. RULES CRIM. PROC. 9.1(a), 9.2(a); MD. RULES 4-216 (criminal cases); MINN. RULES CRIM. PROC. 6.02; N.M. [RULES] CRIM. PROC. 22(a); N.D. RULES CRIM. PROC. 46(a); WASH. SUPERIOR CT. CRIM. RULES 3.2: WYO. RULES CRIM. PROC. 8(c)(i).

[50] ARIZ. RULES CRIM. PROC. 7.2(a) (emphasis added).

[51] *See* WIS. CONST. art. I §8(2); D.C. CODE ANN. § 23-1321(a)(1981 & Supp. 1985); S. REP. No. 225, *supra* note 3, at 16. *See also* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9; K. Feinberg, Promoting Accountability in Making Bail Decisions: Congressional Efforts at Bail Reform (Feb. 1982) (paper presented at the Conference on Public Danger, Dangerous Offenders, and the Criminal Justice System, Harvard University).

## III. Evaluating the Public Safety Provisions in Recent Statutory Revisions

Recent laws have transformed pretrial release and detention policy by adopting provisions explicitly or implicitly focusing on the restraint of defendants perceived as constituting a "danger" if released. Judges traditionally have responded to public safety concerns *sub rosa*, detaining defendants by setting unaffordable bail. Except for very specific situations,[52] however, Federal and state laws had not explicitly authorized judicial consideration of defendant dangerousness at bail until passage of the Federal Bail Reform Act of 1966[53] and the District of Columbia Court Reform and Criminal Procedures Act of 1970.[54] The District of Columbia law was the first comprehensive attempt to address the many substantive and procedural questions that long have been at the center of the preventive detention controversy.[55] By 1978, twenty-three states in addition to the District of Columbia had laws addressing defendant danger as an aspect of bail or pretrial detention decisionmaking.[56] Only six years later, the number had grown to thirty-four states, the District of Columbia and the Federal jurisdiction.[57] During the period following enactment of the District of Columbia statute, approximately ten states revised their laws through constitutional amendments.[58]

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52 *See, e.g.*, Fernandez v. United States, 81 S. Ct. 642 (1961) (Supreme Court authorized denial of bail in cases in which defendants were likely to interfere with the "orderly progress of the trial and the fair administration of justice." *Id.* at 644); Carbo v. United States 81 S. Ct. 662 (1961) (Supreme Court noted that "keeping a defendant in custody during the trial to render fruitless any attempt to interfere with witnesses or jurors may, in extreme or unusual cases, justify denial of bail." *Id.* at 668 (citation omitted)). These specific "danger" oriented uses for bail, in contrast to the broader concepts of danger discussed in the text, have not been viewed as controversial during the debates of the last two decades.

53 The reference to defendant danger in the Federal Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966), was restricted to the narrow class of defendants charged with capital offenses or seeking release pending appeal of their cases.

54 D.C. Code Ann. §§ 23-1321, -1332 (1981 & Supp. 1985).

55 *See Preventive Detention Hearings, supra* note 19.

56 By 1978, the District of Columbia and almost half the states had laws addressing defendant danger in bail decisions. The states were Alabama, Alaska, Arkansas, Colorado, Delaware, Kentucky, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia and Washington. *See* J. Goldkamp, Two Classes of Accused (1979); Gaynes, Typology of State Laws Which Permit the Consideration of Danger in the Pretrial Release Decision, Pretrial Services Resources Center (1982) (mimeograph).

57 By the end of 1984, Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Nevada, South Dakota, Wisconsin and the Federal government had added danger provisions. Colorado revised its laws in the preceding six years along public safety lines.

58 *See* Ariz. Const. art. II § 22; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19;

The social and historical shift in the recent decades, away from poverty and civil liberty concerns and toward a climate marked more by heightened public fear of crime and "law and order" politics may explain the evolution of the danger-oriented agenda of bail and pretrial detention practices. History will judge the second wave of bail reform by looking at its implications for the legal principles undergirding bail and pretrial detention in the United States, and its impact on reducing serious crimes committed by defendants who are released pending adjudication of earlier charges. A sound test for evaluating preventive confinement laws based on dangerousness is described by von Hirsch: "*(1)* there must be reasonably precise legal standards of dangerousness; *(2)* the prediction methods used must be subjected to careful and continuous validation; and *(3)* the procedure for commitment must provide the defendant with certain minimal procedural safeguards."[59]

### A. LEGAL STANDARDS OF DANGEROUSNESS IN BAIL AND PRETRIAL DETENTION

Clearly defined standards for confining an individual are needed so that the individual knows the proscribed action and its consequences and so that the appropriateness of the deprivation of liberty is determined in a legal arena which protects not only the interests of the state, but also the rights of the individual.[60] In short, given the substantial hardships faced by defendants who may be detained under such measures, it is essential to ask, "Danger of what?" In response to criticism of the highly discretionary *sub rosa* approach to detention based on defendant dangerousness under the traditional cash bail system, a number of the new measures have sought to make the public safety rationale in bail explicit and to formulate criteria through which the detention of dangerous defendants might be specified and regulated.[61]

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FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 9; TEX. CONST. art. I, § 11a; UTAH CONST. art. I, § 8; WIS. CONST. art. I, § 8.

59 *See* von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 725 (1972).

60 *Id.* at 725-26.

61 Advocates of reform during the 1960's centered their criticism on the unbridled discretion employed by judges deciding bail and their strong belief that bail practices supposedly aimed only at ensuring the defendant's appearance at trial were actually operating as a *sub rosa* system of preventive detention responding to public safety concerns. *See, e.g.*, Foote, *Compelling Appearance in Court, supra* note 7; Foote, *Crisis in Bail I, supra* note 9; Foote, *The Bail System and Equal Justice*, FED. PROBATION 43 (September, 1955); D. FREED & P. WALD, *supra* note 5; STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7; National Council on Crime and Delinquency, *Preventive Detention: A Policy Statement*, 17 CRIME & DELINQ. 1 (1971). Proponents of preventive detention measures agreed that

### 1. *References to Pretrial Danger: Definitional Problems*

Clear definition of public safety concerns is the first obstacle in the study of the recent bail and pretrial detention laws that focus on pretrial danger. Over one-third of the public safety-oriented laws provide no definition of danger. Of the thirty-six jurisdictions having bail or pretrial detention provisions responding to the issue of pretrial danger, only twenty-four states, the District of Columbia and the new Federal law make explicit reference to danger or public safety concerns.[62] Recent debates have focused on two broad categories of concerns, the danger posed generally to the public by a defendant, and the danger posed specifically to victims, witnesses or

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the discretionary and hidden application of pretrial detention was objectionable, but argued that the public safety orientation was legitimate and necessary. *See* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9; American Bar Association, *Task Force on Crime* (Criminal Justice Section 1981) [hereinafter cited as *Task Force on Crime*]; Feinberg, *supra* note 51; Mitchell, *supra* note 15. See also the laws in the District of Columbia (D.C. CODE ANN. §§ 23-1321 to 1332 (1981 & Supp. 1985)) and Wisconsin (WIS. CONST. art. I, § 8) and the Federal Bail Reform Act of 1984 (18 U.S.C.A. § 3142 (c) Supp. 1985)) which authorize detention of defendants in a more comprehensive fashion than previous law in the United States, but also prohibit the use of cash bail as a decision option when pretrial danger is the primary concern.

62 The following states have *no* provisions that are classified as specifically oriented to pretrial danger concerns: Connecticut, Idaho, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, New Jersey, North Dakota, Oklahoma, Rhode Island, Tennessee, Wyoming and West Virgina. States with direct references to pretrial danger include: Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, Wisconsin as well as the District of Columbia and the Federal jurisdiction.

Ten States with measures that imply danger concerns are Alabama, Arkansas, Indiana, Kentucky, Nebraska, Nevada, New York, Oregon, Texas, and Utah. Classification of these states as having implicit danger orientations is based on the finding that, although their provisions do not contain explicit mention of danger uses for bail or pretrial detention, they do parallel those of other jurisdictions with explicit references. An example may help illustrate the rationale underlying their classification as "danger states": In Texas (TEX. CONST. art. I § , 11a), the following categories of defendants may be excluded from a right to bail: (a) persons charged with felonies who have two prior convictions for felonies; (b) persons charged with felonies who are on pretrial release in connection with a prior felony; and (c) persons accused of a felony involving the use of a weapon who have one previous felony conviction. Although there is no discussion of danger in that or related Texas bail provisions (TEX. [CRIM. PROC.] CODE ANN. art. 17 §§ 01-38 [Vernon 1977]), the inference that this is a bail measure responding to pretrial danger concerns as opposed to strictly appearance-oriented concerns is drawn because of its similarity to provisions in California, Colorado, Georgia, Hawaii, Illinois and the District of Columbia. *See, e.g.*, CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; ILL. CONST. art. I, § 9; D.C. CODE ANN. §§ 23-1321 to 1332 (1981 & Supp. 1985); GA. CODE ANN. § 27-901 (1983 & Supp. 1985); HAWAII REV. STAT. §§ 804-1 to -9 (1976 & Supp. 1984); ILL. REV. STAT. ch. 38 § 110-6 (1980 & Supp. 1985). This approach was employed in the classification of the remaining nine states with implied danger orientations as "danger states." The provisions containing danger references are presented in Tables 4 and 5 in the Appendix.

prospective jurors if that defendant is released before trial.[63] Laws vary noticeably, however, in their definition of these dangers, both in terms of emphasis and specificity.[64]

In approximately half of the states with explicit references, the definition of danger is vague. Those definitions include, "safety of the community,"[65] "danger to the public,"[66] "inimical of public safety,"[67] or "danger to any other person or to the community."[68] Several other states attempt to be more precise by adding modifiers to the general language just illustrated.[69] The specific safety concern that witnesses or jurors may be harmed or intimidated by defendants on pretrial release is stated explicitly in only nine states, the District of Columbia and Federal law.[70] Also, in six states the courts may use bail and pretrial detention to prevent defendants from interfering with the "judicial process" or the "orderly administration of justice."[71] Other unusual danger definitions include a Georgia law that considers the potential "threat" a defendant may pose to "any *property* within the community" as a legitimate con-

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63 *See* J. GOLDKAMP, TWO CLASSES OF ACCUSED (1979); NATIONAL ASSOCIATION OF PRETRIAL SERVICE AGENCIES, *supra* note 9; *Task Force On Crime, supra* note 61.

64 See Table 4 in the Appendix for the specific phrasing of danger-related references.

65 DEL. CODE ANN. tit. 11 §§ 2101, 2105, 2107 (1974).

66 VT. STAT. ANN. tit. 13 § 7554(a), (b) (1974).

67 MINN. RULES CRIM. PROC. 6.02.

68 *See, e.g.*, 18 U.S.C.A. § 3142(b)(1985); ALASKA STAT. § 12.30.020 (1962); MD. ANN. CODE, art. 27, § 616½ (1957 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 276, § 58 (West 1982 & Supp. 1985).

69 For example, in Colorado the concern is that a released defendant might place the public in *"significant* peril." COLO. CONST. art. II, § 19. In South Carolina and Virginia the fear is that the defendant will pose an *"unreasonable* danger". S.C. CODE ANN. § 17-15-10 (1976), VA. CODE § 19.2-120 (1983). In Arizona, defendants may be detained if they pose a *"substantial* danger." ARIZ. CONST. art. II, § 22(3). Other states are somewhat more precise in specifying that the danger risked by release of certain defendants is the "danger" or "substantial" danger that they "will commit a serious crime." *See, e.g.*, HAWAII REV. STAT. § 804-7.1 (1976 & Supp. 1984); N.C. GEN. STAT. § 15A-534(b) (1983); N.M. [RULES] CRIM. PROC. Rules 22(c); WASH SUPERIOR CT. CRIM. RULES 3.2(a). Other states refer to the danger that other persons or the community will be exposed to the risk of "physical" or "bodily harm" or "great" or "serious bodily harm." *See* CAL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; WIS. CONST. art. I, § 8; COLO. REV. STAT. § 16-4-111 (1973).

70 18 U.S.C. § 3142(f)(2)(B) (1985); CAL. CONST. art. I, § 12; WISC. CONST. art. I, § 8; D.C. CODE ANN. § 23-1322(a) (1981 & Supp. 1985); GA. CODE ANN. § 27-901(c)(4) (1983 & Supp. 1985); HAWAII REV. STAT. § 804.71 (1976 & Supp. 1984); MINN. STAT. § 629.72 (subd. 2) (1983) (in the context of domestic assault cases); N.C. GEN. STAT. § 15A-534, -534.1 (1983); WASH. SUPERIOR CT. CRIM. RULES 3.2 (a); ALA. JUD. AD. RULES 2.

71 FLA. CONST. art. I, § 14; GA. CODE ANN. § 27-901(c)(4) (1983 & Supp. 1984); HAWAII REV. STAT. § 804-7.1 (1976 & Supp. 1984); ILL. REV. STAT. ch. 38, § 110-10(b) (1983 & Supp. 1985); N.M. [RULES] CRIM. PROC. 22(c); WASH. SUPERIOR CT. CRIM. RULES 3.2(c).

cern,[72] and laws in six states that allude to the danger defendants may represent to themselves.[73]

The vagueness of danger definitions in pretrial laws are made more problematic by the manner in which they are framed.[74] Three kinds of provisions contain danger references in bail laws in the United States: *(1)* provisions excluding particular categories of defendants from the right to bail and/or pretrial release; *(2)* provisions discussing "conditions of release"; and *(3)* provisions discussing the factors to be weighed by judges in fixing bail or other conditions of release.

### 2. *Danger References Contained in Provisions Excluding Defendants from a Right to Bail*

The most common danger provision expands upon the traditional categories of defendants that may be excluded from bail.[75] In Illinois, defendants charged with "forcible felonies" while already on pretrial release for a previous charge also may be denied bail.[76] In Indiana, defendants arrested while on probation or parole for an earlier conviction may be detained.[77] Defendants charged with one

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72 GA. CODE ANN. § 27-901(c)1 to (c)(4) (1983 & Supp. 1985); *but see United States v. Delker* (No. 84-1744) at 5 (the court acknowledges the legislative intent behind the Federal Bail Reform Act of 1984 giving "broader construction than merely danger of harm involving physical violence" to pretrial danger).

73 N.H. REV. STAT. ANN. § 597:6-a (1974); VA. CODE § 19.2-120 (1950); MD. RULES OF CRIM. PROC. 721(d)(6); MINN. RULES CRIM. PROC. 6.02; OHIO RULES CRIM. PROC. 46(D); PA. RULES CRIM. PROC. 4003; WASH. SUPERIOR CT. CRIM. RULES 3.2(c).

74 For classification of pretrial "danger" jurisdictions according to the kinds of provisions containing the danger references, see Table 5 in the Appendix.

75 Traditionally, persons charged with capital offenses have been denied bail. A number of states have added categories of defendants to those traditionally denied bail. *See* 18 U.S.C. § 3142 (Supp. 1985); ARIZ. CONST. art. II, § 22; CAL. CONST. art. I, § 12(b), (c); COLO. CONST. art. II, § 19; FLA. CONST. art. I, § 14; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; TEX. CONST. art. I, § 11a; UTAH CONST. art. I, § 8; ARIZ. REV. STAT. ANN. § 13-3961 (1978); D.C. CODE ANN. § 23-1322 (1981 & Supp. 1985); FLA. STAT. ANN. 47 § 903.046 (West 1985); GA. CODE ANN. § 27-901(c) (1983 & Supp. 1984); HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984); ILL. REV. STAT. ch. 38, § 110-6 (1980 & Supp. 1985); IND. CODE ANN. § 35-33-8-5, -6 (West Supp. 1985); MD. ANN. CODE art. 27, § 616½ (1957 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 276, § 58 (West 1982 & Supp. 1985); NEV. REV. STAT. § 178.487 (1984); N.Y. [CRIM. PROC.] LAW § 530.20 (McKinney 1984); VA. CODE § 19.2-120 (1950); ARK. RULES CRIM. PROC. 9.5. Several states include possible life imprisonment as a criterion for denial of bail. *See* FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 9; NEV. CONST. art. I, § 7; S.C. CONST. art. I, § 15; WIS. CONST. art. I, § 8; HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984); MD. ANN. CODE art. 27 § 638B (1957 & Supp. 1985).

76 ILL. REV. STAT. ch. 38, § 111-18 (1980 & Supp. 1985).

77 Under IND. CODE § 35-33-8-5-6 (Supp. 1985) persons charged with "forcible felonies" while on pretrial release for a previous charge may be detained outright for up to 15 days. In the District of Columbia, a similar provision provides for a maximum of five days detention for persons charged with "any offense" who may be on probation, parole

of a long list of crimes may have release denied in states such as Georgia,[78] while in Virginia the limitation on the right to bail does not depend on the charged offenses at all; rather it is predicated on whether there is "probable cause to believe that" a defendant "will not appear for trial . . . or [h]is liberty will constitute an unreasonable danger to himself or the public."[79]

Many of the state laws that incorporate a concern for defendant danger in bail and detention laws through exclusion from a right to bail directly allude to danger or public safety. In Arizona, the danger orientation is expressed in its constitution which excepts from a right to bail persons charged with "[f]elony offenses if the person charged poses a substantial danger to any other person or the community."[80] The California constitution directly denies the right to bail to persons charged with "[f]elony offenses involving acts of violence . . . when the facts are evident or the presumption great and the court finds . . . clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others."[81] Yet, in other states expanded categories of defendants may be detained outright despite the lack of a specific reference to a public safety purpose.[82]

### *3. Danger References Contained in Provisions Discussing Conditions of Release*

Twenty jurisdictions make explicit reference to danger goals in provisions discussing the use of alternative conditions of release beyond ROR or unsecured bail.[83] Perhaps the most directly stated is

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or mandatory release after a prison term. D.C. CODE ANN. § 23-1322(e) (1981 & Supp. 1985).

78 In Georgia, persons charged with murder, rape, armed robbery, arson, kidnapping, burglary, air hijacking, perjury, drug-related offenses, and aggravated assault are "not entitled to be released on bail." GA. CODE ANN. § 27-901 (1983 & Supp. 1984) (such defendants may be detained up to 10 days, then they may petition the Superior Court for a hearing to have bail granted as a matter of the judge's "sound discretion"). *See also* MICH. CONST. art. I, § 15.

79 VA. CODE § 19.2-120 (1983).

80 ARIZ. CONST. art. II, § 22(3).

81 CAL. CONST. art. I, § 12(6). *See supra* note 22.

82 In Texas, judges may deny bail to persons charged with capital offenses and to the following categories of persons: (1) persons charged with felonies that have two prior felony convictions; (2) persons charged with felonies while on pretrial release in connection with felony charges; (3) persons having a previous felony conviction who are charged with a felony involving the use of a weapon. TEX. CONST. art. I, §§ 11, 11a. *See also* NEB. CONST. art. I, § 9; N.Y. [CRIM. PROC.] LAW § 530.20 (McKinney 1984); NEV. REV. STAT. § 178.487.

83 *See* 18 U.S.C.A. § 3142 (Supp. 1985); ALASKA STAT. § 12.30.020 (1962); COLO. REV. STAT. § 16-4-111 (1973); DEL. CODE ANN. tit. 11, §§ 2101,-2105 (1974); D.C. CODE ANN. § 23-1321(a) (1981 & Supp. 1985); FLA. STAT. ANN. § 903.046 (West 1985); HA-

the Florida law which instructs that the legislature intended to make "the protection of the community from risk of physical harm to persons . . . the primary consideration" at bail.[84] The language of the Federal Bail Reform Act of 1966 has been adapted in several states.[85] The laws of the District of Columbia, Alaska, South Dakota, as well as the new Federal law state a strong presumption favoring release of all bailable defendants on ROR or unsecured bail, "unless the officer determines that the release of the person will . . . pose a danger to other persons and the community."[86]

In New Hampshire and Ohio, use of ROR or unsecured bail is conditioned on whether a defendant's physical, mental or emotional condition may pose a danger to himself or others.[87] In Washington, Hawaii and New Mexico, the judge may attach additional conditions of release if the judge fears that there is a danger that the defendant will commit a "serious crime" if released.[88] Under a statute ruled invalid by the Hawaii Supreme Court on other grounds, Hawaii judges may deny release altogether on that finding alone.[89] In

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WAII REV. STAT. § 804-7.1 (Supp. 1984); ILL. REV. STAT. ch. 38, § 110-10(b) (Supp. 1985); N.H. REV. STAT. ANN. § 597:6-a (1974); N.C. GEN. STAT. § 15A-534(b), -534.1 (1983); S.C. CODE ANN. § 17-15-10 (Law. Co-op 1976 & Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-43-2 (1979 & Supp. 1985); VT. STAT. ANN. tit. 13, § 7554(a) (1974); WIS. STAT. §§ 969.01 to .035 (1985); MD. RULES CRIM. PROC. 4-216; MINN. RULES CRIM. PROC. 6.02; N.M. [RULES] CRIM. PROC. 22(c); OHIO RULES CRIM. PROC. 46; PA. RULES CRIM. PROC. 4003; WASH. SUPERIOR CT. CRIM. RULES 3.2(c).

84 FLA. STAT. ANN. § 907.041(1) (West 1985). *See also* FLA. STAT. ANN. § 903.046 (West 1985), which states, in discussing conditions of release, that the "purpose of a bail determination . . . is to insure the appearance of the criminal defendant . . . and to protect the community against unreasonable danger from the criminal defendant."

85 *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214 (1966) originally codified 18 U.S.C. § 3146 (1966); repealed by Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, §203(a), 98 Stat. 1976 (1984).

86 ALASKA STAT. § 12.30.020 (1962); D.C. CODE ANN. § 23-1321(a) (1981 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 23A-43-2 (1979 & Supp. 1985). Also similar to the wording of the Bail Reform Act are the laws in Delaware, Illinois, Minnesota and Vermont. *See* 18 U.S.C.A. § 3142(b) (Supp. 1985); DEL. CODE ANN. tit. 11, §§ 2101, 2105 (1974); ILL. REV. STAT. ch. 38, § 110-10(b) (1980 & Supp. 1985); VT. STAT. ANN. tit. 13 § 7554(a) (1974); MINN. RULES CRIM. PROC. 6.02.

87 N.H. REV. STAT. ANN. § 597:6-a (1974); OHIO RULES CRIM. PROC. 46.

88 HAWAII REV. STAT. § 804-7.1 (Supp. 1984); N.M. [RULES] CRIM. PROC. § 22(c); WASH. SUPERIOR CT. CRIM. RULES § 3.2(c).

89 *See* HAWAII REV. STAT. § 804-7.1 (Supp. 1984). In 1978, 1980 and 1981, the Hawaii legislature revised the statutes governing bail and pretrial detention to incorporate danger concerns in both an expansion of pretrial detention and the addition of conditions of release (HAWAII REV. STAT. §§ 804-3, -7.1 (1976 & Supp. 1984). In Huihui v. Shimoda, 64 Hawaii 527, 644 P. 2d 968 (1982), the Hawaii Supreme Court struck down the statute based principally on the grounds that the Hawaii statute "exceeds the bounds of reasonableness and due process by conclusively presuming a defendant's dangerousness from the fact that he had been charged previously with a serious crime and presently with a felony, and by leaving no discretion in the trial judge to allow bail based on

Pennsylvania and Colorado, consideration of conditions of release beyond ROR is tempered by the same concern, expressed as a danger that the defendant will inflict "immediate physical"[90] or "imminent bodily" harm to himself or others.[91] In Wisconsin, the concern in weighing more restrictive options is the risk of "serious bodily harm."[92] In the provisions discussing the use of conditions of release in several states are allusions to preventing defendants from interfering with the administration of justice and to protecting witnesses and jurors from intimidation.[93]

### 4. *Danger References Contained in Provisions Discussing Specific Factors To Be Considered in Fixing Bail or Conditions*

The final source of references to defendant danger or public safety purposes for bail and pretrial detention in the new laws is found in provisions that instruct judges to weigh specific factors in selecting the particular conditions of release or, if cash bail is to be set, the amount of bail to be imposed. Explicit reference to a danger orientation in these kinds of provisions is rare. The Florida statute advises the judge that "when determining whether to release a defendant on bail or other conditions, and what that bail or those other conditions may be, the court shall consider," among other factors, "the nature and probability of danger which the defendant's

other factors which may be directly relevant to a determination of the likelihood of the defendant's committing other crimes." *Id.* at 543, 644 P.2d at 978. The Hawaii Supreme Court thus found the statute invalid on due process grounds holding that the Hawaii Constitution "prohibiting excessive bail, also protects persons accused of crimes from unreasonable or arbitrary denial of bail." *Id.* at 539, 644 P.20 at 976. The court agreed with the general public safety aims of the law ("we believe that this state has a legitimate interest in protecting its communities from those who threaten their welfare, and that this interest may be taken into account in the setting of pretrial bail." *Id.* at 542, 644 P.2d at 978) and did not attack the statute's other provisions that permitted outright detention or the application of additional conditions of release in line with the danger concern. The other provisions allow detention of (1) persons charged with an offense punishable by life imprisonment without parole; (2) persons who have previously been convicted of a serious crime within the last 10 years; and (3) persons who at the time of bail on a current charge are already on parole. Hawaii law also permits the judge to detain a person, or set additional conditions, upon a showing that "there exists a danger that the defendant will commit a serious crime or will seek to initimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice." HAWAII REV. STAT. §804-7.1 (Supp. 1984). It is uncertain whether the entire Hawaii statute, or merely the provision dealing with denial of bail to persons charged with felonies already on pretrial release, has been held invalid.

90 PA. RULES CRIM. PROC. 4003.

91 COLO. REV. STAT. § 16-4-111 (1973).

92 WIS. STAT. §§ 969.01 to .035 (1985).

93 ILL. REV. STAT. ch. 38, § 110-10(b) (1980 & Supp. 1985); N.C. GEN. STAT. § 15A-534(b) (1983); WASH. SUPERIOR CT. CRIM. RULES 3.2(c) (1980); WIS. STAT. §§ 969.01 to. 035 (1985) N.M. [RULES] CRIM. PROC. 22(c).

release poses to the community."[94] Delaware's bail statute is similar because it requires that in determining the amount of bail, judges should set "such bail as reasonably will assure . . . the safety of the community."[95] The Federal Bail Reform Act of 1984 quite explicitly asks the judicial officer to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."[96]

Though not directly expressed, the danger aims of bail are clearly implied by provisions in the statutes of other states.[97] In Arkansas, Colorado and Oregon, the judge is instructed to decide bail by taking into account "any facts indicating the possibility of violations of law if the defendant is released without restrictions."[98] Although its statutes are framed overall in terms relating to assuring the appearance of defendants at court, Kentucky law nevertheless manifests a concern for danger in instructing judges in considering the amount of cash bail to weigh "the past criminal acts and the reasonably anticipated conduct of the defendant if released."[99] In pronounced contrast, although danger is an appropriate focus in setting conditions of release under the new Federal law, in the District of Columbia and in Wisconsin,[100] those laws strictly prohibit danger-related factors from entering into selection by judges of the cash bail option.[101]

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94 FLA. STAT. ANN. § 903.046(2)(e) (West 1985).

95 DEL. CODE ANN. tit. 11, § 2107 (1974).

96 18 U.S.C.A. § 3142(g)(4) (Supp. 1985).

97 *See* COLO. REV. STAT. § 16-4-105(j) (1973); D.C. CODE ANN. 23 § 1321(b) (1981 & Supp. 1985) (note that cash bail may not be employed to respond to danger concerns in the District of Columbia); ALA. RULES SUP. CT. 22; ARK. RULES CRIM. PROC. 8.5; COLO. RULES CRIM. PROC. 46(4)(J); KY. REV. STAT. § 431.525(d) (1985); OR. REV. STAT. § 135.230(6)(g) (1983).

98 ARK. RULES CRIM. PROC. § 8.5; COLO. REV. STAT. § 16-4-105(j) (1973); OR. REV. STAT. § 135.230(6)(g) (1983); *see also* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7, at Standard 10-4.5(c)(vii); *but see* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9 (Standard III deletes such a criterion). Colorado includes the added consideration of "any facts indicating likelihood that there will be intimidation or harassment of possible witnesses by the defendant." COLO. RULES CRIM. PROC. 46(4)(K).

99 KY. REV. STAT. § 431.525(d) (1985).

100 18 U.S.C.A. § 3142(c) (Supp. 1985); WIS. CONST. art. I, §8; D.C. CODE ANN. 23 § 1321 (1981 & Supp. 1985); WIS. STAT. §§ 969.01(4), .02 (1985).

101 In concluding discussion of the kinds of provisions serving as sources of danger references in bail laws, it is important to point out another kind of provision. Arguably, there are public safety concerns in the state statutes which contain "mandatory conditions of release" that require the defendants to observe "good behavior" or refrain from committing crimes. *See* 18 U.S.C.A. § 3142(h) (Supp. 1985); ARIZ. REV. STAT. ANN. § 13:3967(D) (1978); CAL. [PENAL] CODE § 1318 (Deering 1982 & Supp. 1985); DEL. CODE ANN. tit. 11, § 21-2108 (1984); ILL. REV. STAT. ch. 38, § 110-2 (1980 & Supp. 1985); IND. CODE § 35-33-8-5 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 276, § 58 (1980

### 5. *Eligibility for Restrictive Bail or Pretrial Detention*

Not only do laws governing bail and pretrial detention in the United States differ in how explicitly they address pretrial danger concerns, in how they delimit those concerns, and in the kinds of provisions they employ to present them, they display great variation as well in the criteria they invoke to define the eligibility of defendants for more restrictive bail options or for pretrial detention based on some notion of anticipated danger. Despite the variety of approaches,[102] clear themes do emerge among the criteria defining "dangerous" candidates. Several patterns of criteria defining eligibility are noteworthy:[103] *(1)* eligibility tied to the nature of the charged offense (other than murder) as the sole criterion; *(2)* eligibility based on the defendant's current charge and past record of convictions; *(3)* eligibility based on the current charge and whether the defendant was on probation, parole, or mandatory release at the time of arrest; *(4)* eligibility based on the current charge and whether the defendant was on pretrial release for a previous charge at the time of arrest; *(5)* eligibility based on threats or likely threats posed by the defendant to witnesses or jurors; and *(6)* eligibility deriving from assessments of risk of the danger posed by a defendant.

Contrary to the criticisms of bail practices by reform advocates of the 1960's that bail decisions should not rely primarily on the seriousness of the current charge to determine likely risk,[104] the

& Supp. 1985); NEV. REV. STAT. § 178-487 (1981); OR. REV. STAT. § 135-250 (1981); PA. STAT. ANN. tit. 18, § 4956 (Purdon); S.C. CODE ANN. § 17-15-20 (Law. Co-op. 1976 & Supp. 1983), VA. CODE § 19.2-135 (1950); WIS. STAT. § 969.02 (1985); ARIZ. RULES CRIM. PROC. § 7.3; R.I. RULES CRIM. PROC. § 46(2)(d). The requirement in COLO. REV. STAT. § 16-4-103 (1973), for example, that "further conditions of every bail bond shall be that the released person not commit any felony while at liberty" may imply a bail process oriented to preventing further serious crimes—a community protection purpose similar to ones discussed above. In Colorado and other states these provisions serve notice to a defendant obtaining pretrial release that commission of a crime during the pretrial release period is grounds for revocation of release.

[102] For a comprehensive analysis of the criteria employed in American jurisdictions making defendants eligible for restrictive bail and pretrial detention, see Table 6 in the Appendix.

[103] Almost all jurisdictions have the traditional provision excluding defendants charged with capital offenses (or in some instances, offenses punishable by life imprisonment) from a right to bail. It should be noted, however, that although this is true of the states with danger laws, existence of such a provision is not in itself evidence of a danger orientation. In fact, such exclusions from the right to bail exist in all non-danger states as well. Taken with other kinds of danger references, however, they are a foundation for the categorization of defendants who will be eligible for restrictive bail or pretrial detention. For that reason, Table 6 in the Appendix details these important provisions according to whether or not bail may be denied for murder, treason or offenses punishable by life imprisonment.

[104] The criticisms of bail practices concerning the seriousness of the criminal charge

predominant criterion for defining a defendant's eligibility for pretrial detention under the recent pretrial danger laws is the criminal charge. Although rarely the sole eligibility criterion for pretrial detention, it is the main criterion in many states.[105]

Provisions combining current charges with a defendant's past record of convictions as criteria for detention play a central role in nine jurisdictions.[106] The language varies markedly in these juris-

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are: (1) bail based solely on criminal charge does not take into account many other individual factors probably more related to bail risk; (2) bail based on criminal charge leads to inequity (those with financial resources will be released, those without will not, even though they may be charged with the same offenses). Recent research has shown that despite years of bail reform, charge nevertheless remains the principal factor influencing judges' bail decisions. *See* J. GOLDKAMP, TWO CLASSES OF ACCUSED, *supra* note 9; J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34; J. ROTH & P. WICE, *supra* note 34. Despite the hypothesized utility of community ties as better indicators of bail risk, predictive studies have not demonstrated that either charge or community ties are more strongly related to the concerns at bail of pretrial crime and defendant flight.

105 In three states, characteristics of the current charge serve as sufficient grounds for detaining a defendant outright. In Michigan, persons charged with criminal sexual conduct in the first degree, armed robbery and kidnapping with the intent to extort are detainable, in addition to those charged with murder or treason. MICH. CONST. art. I, § 15. Under WIS. CONST. art. I, § 8, a judge may deny release prior to a bail hearing up to 10 days to defendants charged with sexual assault that is punishable by a maximum imprisonment of 20 years. The Nebraska constitution permits the direct detention of persons charged with sex offenses "involving penetration by force or against the will of the victim." NEB. CONST. art. I, § 9.

In 1978 Nebraska amended its constitution to add persons charged with "sexual offenses involving penetration by force or against the will of the victim" to those charged with murder and treason who could be denied bail outright. *See* Murphy v. Hunt, 455 U.S. 478 (1982); Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981); Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, *cert. denied*, 444 U.S. 920 (1979). In *Hunt*, at the level of the U.S. Court of Appeals, the amendment was held unconstitutional. *Hunt*, 648 F. 2d. at 1164-165. The circuit court's decision in *Hunt* was later vacated by the U.S. Supreme Court in Murphy v. Hunt, 455 U.S. 478 (1982), when it held the appeal decided by the court of appeals moot, thus leaving for the time the question of the constitutionality of the state's detention law open. Under the ARIZ. CONST. art. II, § 22[3], merely being charged with a felony is sufficient for detention, if the judge at a hearing finds that the defendant poses a "substantial danger," that no conditions of release will be sufficient, and that the "proof is evident or the presumption great" on the present charge.

Alaska law, which also contains a strong presumption favoring release on ROR of defendants, permits detention of up to 2 days of persons charged with felonies, if the district attorney wishes to rebut the presumption that they should be released on ROR. ALASKA STAT. § 12.30.020 (1980). The Texas constitution denies the right to bail to persons charged with felonies involving a deadly weapon. TEX. CONST. art. I, § IIa. In the District of Columbia defendants charged with crimes of violence who are suspected of "being an addict" may be held for three days or longer. D.C. CODE ANN. § 23-1323 (1981 & Supp. 1985). In four states, special procedures allow for stringent conditions of release or temporary detention of persons accused of crimes involving domestic violence. *See* ALASKA STAT. § 12.30.025 (1980); MINN. STAT. § 629.72 (1983 & Supp. 1985); N.Y. [CRIM. PROC.] LAW §§ 530.12, .13 (1984); N.C. GEN. STAT. § 15A-534.1(1983).

106 *See* 18 U.S.C.A. §§ 3142 (e),(f) (Supp. 1985); COLO. CONST. art. II, § 19; MICH. CONST. art. I, § 15; TEX. CONST. art. I, § 11a; WIS. CONST. art. I, § 8; D.C. CODE ANN.

dictions.[107] The states with the most general formulas are Texas[108] and New York.[109] In these states, felony defendants with two prior convictions for felonies may be detained before trial.

Fourteen jurisdictions include as a criterion for pretrial detention persons arrested for a current serious charge who are also on pretrial release in connection with a previous serious charge.[110] The courts have discussed the constitutionality of this criterion for detention, basing detention as it does on two unproven crimes.[111] Apparently several states view this merely as grounds for revocation of pretrial release on the first charge that was conditioned on the defendant's refraining from criminal activity.[112]

Statutes in only three jurisdictions specifically employ threats to victims or witnesses as grounds for detaining a defendant,[113] although a fourth indirectly incorporates the concern in its bail law.[114] The Federal Bail Reform Act of 1984 permits detention of a defendant after a hearing if there exists "a serious risk that the per-

§ 23-1322 (1981 & Supp. 1985); GA. CODE ANN. § 27-901 (1983 & Supp. 1985); HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984); N.Y. [CRIM. PROC.] LAW § 530.20 (McKinney 1984).

107 See Table 7 in the Appendix for different versions of these criteria.

108 TEX. CONST. art. I, § 11a.

109 N.Y. [CRIM. PROC.] LAW § 530.20 (McKinney 1984). Other states restrict their exclusions to categories of defendants charged with and convicted of offenses designated as "crimes of violence," "dangerous crimes," "serious crimes," "violent felonies," or felonies involving "serious bodily harm." *See* Table 6 in the Appendix. A related approach in eight jurisdictions allows denial of pretrial release to persons charged with a serious current offense and on probation, parole or mandatory release as a result of a conviction for a previous serious offense. *See* 18 U.S.C.A. § 3142 (Supp. 1985); COLO. CONST. art. II, § 19; MICH. CONST. art. I, § 15; D.C. CODE ANN. § 23-1322 (1981 & Supp. 1985); GA. CODE ANN. § 27-901 (1983 & Supp. 1985); HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984) (Parole only); IND. CODE ANN. §§ 35-33-8-5, -6 (West Supp. 1985); UTAH CODE ANN. § 77-20-1 (1982).

110 *See* 18 U.S.C.A. § 3142 (Supp. 1985); COLO. CONST. art. II, § 19; MICH. CONST. art. I, § 15; TEX. CONST. art. I, § 11a; ARIZ. REV. STAT. ANN. § 13:3967 (1978); D.C. CODE ANN. § 23-1322 (1981 & Supp. 1985); GA. CODE ANN. § 27-901 (1983 & Supp. 1985); HAWAII REV. STAT. § 804-3 (1976 & Supp. 1984); ILL. REV. STAT. ch. 38, § 110-6 (1980 & Supp. 1985); MD. ANN. CODE art. 27, § 616 (1957 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 276, § 58 (1980 & Supp. 1985); NEV. REV. STAT. § 178.487 (1985); UTAH CODE ANN. § 77-20-1 (1982 & Supp. 1985); ARK. RULES CRIM. PROC. 9.6; MINN. RULES CRIM. PROC. 6.03.

111 For a discussion of the decision of the Hawaii Supreme Court see *supra* note 89. *See also* U.S. v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982) (approves of the constitutionality of the District of Columbia law which includes such a criterion).

112 *See, e.g.*, the provisions cited *supra* note 110, for Arkansas, Massachusetts, Illinois and Nevada.

113 18 U.S.C.A. § 3142(f)(2)(b) (Supp. 1985); CAL. CONST. art. I, § 12(c); D.C. CODE ANN. § 23-1322(a)(3) (1981 & Supp. 1985).

114 ALA. JUD. AD. RULES 2.

son will . . . threaten, injure or intimidate . . . a prospective witness or juror."[115] In the District of Columbia, the judge may order the detention of a person "charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates . . . any prospective witness or juror."[116] In California a person charged with a felony offense may be denied release if the person "has threatened another with great bodily harm" and if "there is a substantial likelihood that the person would carry out the threat if released."[117]

*6. Legal Standards for Bail and Detention Based on Danger: Conclusion*

Applying the von Hirsch criterion that "there must be reasonably precise legal standards of dangerousness" as a yardstick, current bail and detention laws are inadequate. More than one-fourth of the laws that have danger-oriented provisions make no explicit reference to dangerousness or public safety concerns.[118] Jurisdictions where pretrial danger is referred to explicitly use a variety of definitions of the anticipated future conduct as well as of criteria qualifying defendants for pretrial detention or for more onerous bail options. These definitions in many instances are vague, often including only mention of such generalities as the "safety of the community," or "danger to the public," or "danger to any other person or the community." In many of the recent laws not only are the definitions of danger vague, thus making it difficult for a person to avoid the proscribed behavior, but they are overbroad as well, with such wide latitude in their definitions that many kinds of defendants might be considered dangerous for different reasons.[119] Although vague pretrial danger laws may lend themselves too flexibly to the detention of many categories of defendants, specificity in their designation of classes of detainable defendants does not automatically remedy the problems of vagueness. One of the most spe-

115 18 U.S.C.A. § 3142(f)(2)(B) (Supp. 1985).

116 D.C. CODE ANN. 23 § 1322(a)(3) (1981 & Supp. 1985).

117 CAL. CONST. art. I, § 12(c). The criterion of risk is incorporated explicitly in the laws of 27 of the jurisdictions. Risk—variously formulated—constitutes not only a part of the definition of the legal standard governing the use of danger-oriented bail and detention, but is a major issue in itself; therefore this Article will examine risk in detail in the subsequent section.

118 Of the 36 jurisdictions classified as having danger-oriented bail and/or pretrial detention provisions, 10 do not explicitly mention danger concerns. These states are Alabama, Arkansas, Indiana, Kentucky, Nebraska, Nevada, New York, Oregon, Texas and Utah. See the discussion in *supra* note 62.

119 For a discussion of these and related issues generally as applied to a juvenile preventive detention statute, see Schall v. Martin, 104 S. Ct. 2403 (1984) and *supra* text accompanying notes 169-78.

cific statutes, the preventive detention code in the District of Columbia, has been criticized by commentators for being overly inclusive, based on categories of defendants not reasonably considered "dangerous."[120]

The avoidability issue in preventive detention is a difficult one to rationalize, revolving as it does around questions about the vagueness of definitions of pretrial danger and about the specificity of criteria triggering the application of pretrial detention. It is difficult because "avoidability" usually refers to notice that commission of certain acts will be punished as crimes. As a recent court of appeals decision has stated: "[c]hallenges to federal statutes on the ground of vagueness rest on the principle that a person should be free to plan his or her behavior based upon laws which are clear enough to afford one a reasonable opportunity to know what is permitted and what is proscribed."[121]

The concept of avoidability strains as an evaluative criterion for prevention detention measures, however, because pretrial danger measures do not deprive an individual of liberty as a result of a determination that the person committed a punishable act. Rather, they detain on the basis of some anticipated harm, some future act that is only generally defined and which can never be tested (because when a defendant is confined, the opportunity to pose the anticipated danger is removed). Thus, in an important sense, these dangers are by definition unavoidable because they are unfalsifiable.

Assurances that categories of defendants eligible for pretrial detention have been narrowly and specifically drawn do not resolve vagueness questions as they relate to definitions of pretrial danger. In fact they are descriptions of defendants not definitions of the feared acts. One court has resolved this conceptual dilemma as it relates to challenges of the new Federal act by ruling that because "[t]he new bail statute does not prohibit conduct" but "rather establishes a framework for a judge to detain an individual based on prediction of possible future conduct . . . . A vagueness claim is therefore not appropriate . . ."[122]

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120 *See generally* Angel, Green, Kaufman & Van Loon, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300 (1971) [hereinafter cited as Angel, *Preventive Detention*]; Greenberg & von Hirsch, *Detention of Accused Offenders Before Trial*, Staff Memorandum, The Committee for the Study of Incarceration, at 10 (April, 1973); von Hirsch, *supra* note 59.

121 Textile Pension Workers Fund v. Standard Dye & Finishing Co. Inc., 725 F.2d 843, 855 (2d Cir. 1984).

122 United States v. Payden, 598 F. Supp. 1388, 1396 (S.D.N.Y. 1984), *rev'd*, 759 F.2d 202 (2d Cir. 1985).

## B. ASSESSMENT OF RISK IN BAIL AND ITS VALIDITY AS AN ELIGIBILITY CRITERION

### *1. The Role of Risk Assessment*

> Prediction of the likelihood of certain conduct necessarily involves a margin of error, but it is an established component of our pretrial release system.[123]

In von Hirsch's criticism of preventive confinement, he notes that seldom has the accuracy of dangerousness predictions in the mental health or corrections fields been systematically tested to throw light on the utility of screening procedures.[124] In the past few decades, bail and pretrial detention practices aimed at public safety concerns have been derided because of the many problems that characterize such predictive decisions in which loss of liberty is the possible result. Senator Ervin criticized preventive detention on the grounds that "[i]t imprisons for unproved, anticipated crime, rather than actual criminal conduct."[125] From one perspective, the charge-related criteria rendering defendants eligible for pretrial detention in the laws may reflect legislative efforts to define eligibility for pretrial or preventive detention using "objective" indicators of the risk of danger. According to that perspective, these laws represent progress away from the standardless detention practices associated with the use of cash bail and toward explicit decisionmaking criteria. Yet, if bail and the resulting detention serve primarily predictive ends, and not questionable punitive goals, questions may be raised not only from a legal, but also from a social science perspective about the appropriateness of such approaches to pretrial detention. First, research has not demonstrated that charge-related criteria such as those contained in recent laws are the best, or even good, predictors of anticipated dangers.[126] Second, such approaches do not address

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123 *United States v. Edwards*, 430 A.2d at 1342.

124 von Hirsch, *supra* note 59, at 726. For a discussion of the prediction of dangerousness in the mental health field, see J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981).

125 Ervin, *supra* note 16, at 298; *see also* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9; STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7; A.B.A., *Pretrial Release, supra* note 31; Dershowitz, *supra* note 16; Foote, *Compelling Appearance in Court, supra* note 16.

126 S. CLARKE, J. FREEMAN & G. KOCH, THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE-TO-APPEAR IN COURT AND REARREST WHILE ON BAIL 2-4 (1976); J. GOLDKAMP, M. GOTTFREDSON & S. MITCHELL-HERZFELD, NATIONAL INSTITUTE OF CORRECTIONS, A STUDY OF POLICY GUIDELINES (1981) [hereinafter cited as J. GOLDKAMP, BAIL DECISIONMAKING]; Angel, *Preventive Detention, supra* note 120; Gottfredson, *An Empirical Analysis of Pretrial Release Decisions*, 2 J. CRIM. JUST. 287, 289 (1974); M. Freeley & J. MacNaughton, The Pretrial Process in the Sixth Circuit: A Qualitative and Legal Analysis (1974) (mimeograph).

the sizeable margins of error associated with detention caused by their use.[127]

The difficulties associated with predictive decisions notwithstanding, prediction of future danger is an unavoidable reality in bail: it has not only been practiced traditionally by judges at their discretion, but has been institutionalized in many of the recent laws. In twenty-seven of the thirty-six jurisdictions having danger or public safety orientations, laws require judges to distinguish dangerous defendants by assessments of the risk of danger, often through exceedingly vague instructions.[128]

The likely success of risk assessment depends first on the specificity of the definition of danger in the statute. In some instances the judge is required merely to gauge whether the release of a defendant will "pose a danger to the community" or to "any other person," while in others the assessment must be of the risk of "imminent bodily harm," "physical harm," "serious crime" or even "any felony."[129] A second reason for the difficulty in assessing danger is the level of risk: for example, some states ask the judge to discern merely that the defendant may pose "a danger"; in others, the judge must forecast a "substantial danger," a "significant peril," or an "unreasonable danger."[130]

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127 *See* Angel, *Preventive Detention, supra* note 120. *See generally* M. GOTTFREDSON & D. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 7-17 (1980); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979).

128 Table 8 in the Appendix is a compilation of the statutory language that asks the judge to assess the likely danger in conditioning the granting of ROR, fixing cash bail, or detaining defendants outright. *See* 18 U.S.C.A. §§ 3141, 3142 (Supp. 1985); ARIZ. CONST. art. II, § 22(3); CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; FLA. CONST. art. I, § 14; MICH. CONST. art. I, § 15; ALASKA STAT. § 12.30.020 (1962); ARIZ. REV. STAT. ANN. 13 § 3961 (1985); COLO. REV. STAT. §§ 16-4-111, -106 (1973); DEL. CODE ANN. tit. 11, §§ 2101, 2105, 2107 (1974); D.C. CODE ANN. § 23-1321, -1322, -1323 (1981 & Supp. 1985); FLA. STAT. ANN. § 903.046 (West 1985); GA. CODE ANN. § 27-901(c)(1) to (c)(4) (1983 & Supp. 1985); HAWAII REV. STAT. § 804-7.1 (1976 & Supp. 1984); ILL. REV. STAT. ch. 38, § 110-10 (1980 & Supp. 1985); KY. REV. STAT. § 431.525 (1981); MASS. GEN. LAWS ANN. ch. 276, § 58 (1972 & Supp. 1985); N.H. REV. STAT. ANN. § 597(6)(a) (1974); N.C. GEN. STAT. 26 §§ 15A-534, -534.1 (1983 ); OR. REV. STAT. § 135.230(6)(g) (1983); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1976 & Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-43-2 (1979 & Supp. 1984); VT. STAT. ANN. tit. 13, ch. 229, § 7554(b) (1974); VA. CODE § 19.2-120 (1983); ARK. RULES CRIM. PROC. 8.5; COLO. RULES CRIM. PROC. 46(4)(J); MINN. RULES CRIM. PROC. 6.02; N.M. [RULES] CRIM. PROC. 22(c); OHIO RULES CRIM PROC. 46; PA. RULES CRIM. PROC. 4003; WASH. SUPERIOR CT. CRIM. RULES 3.2(c).

129 See *supra* discussion of Table 4 in text accompanying note 62.

130 *Id.* In other areas of law where the liberty interests of an individual are at stake, such as civil commitment, the constitutionality of commitment procedures has hinged on examination of the two underlying dimensions of risk assessment. For example, in invalidating a District of Columbia sexual psychopath commitment statute, Judge Bazelon wrote that both the "magnitude" and the "likelihood of harm" must be mea-

Laws rarely instruct the judge making these assessments of likely danger how to measure such risk.[131] In several states, the defendant's eligibility for detention or more onerous bail is based on the judge's assessment of likely danger as tied to a current charge criterion.[132] In Arizona, the predictive danger assessments combine with a charge criterion to permit pretrial detention when a defendant is charged with a felony and the judge determines that the defendant "poses a substantial danger to any other person or the community" and that "no conditions of release . . . will reasonably assure the safety of the other person or the community," the defendant may be detained.[133]

In other jurisdictions, assessments by the judge that the defendant represents a danger may be the overriding factor in assigning more onerous conditions of release which may result in detention[134], even though danger is only vaguely defined and statutes offer the judge no tools for classifying defendants according to their relative risk. Surprisingly, in Virginia the assessment of danger is the sole criterion for determining whether the defendant may be released on bail or may be detained directly.[135] Similarly, in Hawaii the judge may deny the defendant release before trial "[u]pon a showing that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice . . . ."[136]

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sured in determining "preventive detention" of another sort. Cross v. Harris, 418 F.2d 1095, 1100 (D.C. Cir. 1969). California's constitution unusually combines a comparatively specific definition of danger with a relatively great level of certainty in the assessment in its detention provision, in requiring "a substantial likelihood" that a "person's release would result in great bodily harm to others." CAL. CONST. art. I, § 12.

131 Massachusetts is unusual because its law advises the judge how to assess danger. The law states that the judge should weigh the gravity, nature and circumstances of the offenses charged, the prisoner's record of convictions, if any, and whether said charges or convictions are for offenses involving the use or threat of physical force or violence against any person, whether the person is on probation, parole or other release pending completion of sentence for any conviction, . . . the prisoner's mental condition and any illegal drug distribution or present drug dependency. MASS. GEN. LAWS ANN. ch. 276, § 58 (1972 & Supp. 1985).

132 *See* ARIZ. CONST. art. II, § 22; CAL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, §§ 2105, 2107 (1974); D.C. CODE ANN. § 23-1322 (1981 & Supp. 1985).

133 ARIZ. CONST. art. II, § 22.

134 More onerous "conditions" may include financial bail that is unaffordable to the defendant and that, therefore, results in detention.

135 Va. Code § 19.2-120 (1983).

136 Hawaii Rev. Stat. 804-7.1 (1976 & Supp. 1984); *see supra* note 89.

### 2. *The Validity of Bail Predictions*

> Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.[137]

Although a number of studies have examined the predictive aspects of bail and pretrial detention decisionmaking,[138] direct evaluation of the accuracy of danger assessments at bail is confounded by a number of difficulties: *(1)* pretrial detention is often not a direct decision but rather the indirect result of a cash bail decision; *(2)* the factors actually influential in judges' decisions may correspond only slightly with those recommended for consideration by law or with those actually predictive of defendant misconduct;[139] and *(3)* only rarely do laws instruct judges to consider specific factors or to employ specific conditions of release in assessing and addressing danger concerns as differentiated from appearance concerns.[140]

Despite these and other methodological difficulties, several studies have attempted to predict crime committed by defendants during pretrial release and have had marginal degrees of success.[141] Few of these have studied the predictive efficacy of judicial bail decisions, and only rarely has a predictive scheme developed in such a study been independently validated.[142] Although many jurisdictions collect aggregate statistics describing rearrests of defendants

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137 Schall v. Martin, 104 S. Ct. 2403, 2417 (1984). *See also* Jurek v. Texas, 428 U.S. 262, 274 -75 (1976); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 16 (1979). The Supreme Court does not express the view that judicial prediction must meet scientific standards of accuracy. One recent Federal District Court decided a challenge to detention of a defendant under the Federal law on the basis of poor predictive powers by relying on the dictum from *Schall v. Martin*. *See* United States v. Hazzard, 598 F. Supp. 1442, 1451-52 (N.D. Ill. 1984).

138 *See, e.g.*, S. CLARKE, *supra* note 126; J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34; J. LOCKE, R. PENN, R. RICK, BUNTEN & G. HARE, NATIONAL BUREAU OF STANDARDS, TECHNICAL NOTE 535, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRETRIAL RELEASE OF DEFENDANTS: PILOT STUDY (1970) [hereinafter cited as J. LOCKE, PILOT STUDY]; J. ROTH & P. WICE, *supra* note 34; Angel, *Preventive Detention, supra* note 120; Gottfredson, *supra* note 126; Toborg, *Pretrial Release Assessment of Danger and Flight: Method Makes a Difference* (McClean, Va.: Lazar Institute, 1984); M. Feeley & J. McNaughton, *supra* note 126.

139 J. GOLDKAMP, TWO CLASSES OF ACCUSED, *supra* note 9; J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34; J. ROTH AND P. WICE, *supra* note 34; Bock & Frazier, *supra* note 34; Ebbesen & Konecni, *supra* note 34.

140 The Massachusetts provision dealing with the revocation of pretrial release of a defendant arrested on subsequent felony charges is a narrow, and only, exception. *See* MASS. GEN. LAWS ANN. ch. 276, § 58 (1972 & Supp. 1985). *See also supra* note 126.

141 *See supra* note 138.

142 *See* J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34; Angel, *Preventive Detention, supra* note 120; Gottfredson, *supra* note 126. The study by Toborg, *supra* note 138, may have employed validation, but evidence concerning validation is not presented.

granted pretrial release, rarely have judges incorporated actuarial information into their decisionmaking approaches or developed a means for reviewing the success of their decisions for subsequent modification of their approaches.[143] Thus, while the von Hirsch evaluative criterion calls for validation of the "predictive method" used in bringing about the preventive confinement of dangerous individuals, in most jurisdictions there is no known "method" of prediction in bail, much less a tested one. This rather dismal state of the art in prediction of pretrial crime notwithstanding, the United States Supreme Court has not been inclined to recognize the centrality of these issues.[144]

### C. PROCEDURAL SAFEGUARDS IN DANGER RELATED BAIL AND DETENTION

> Pretrial detention requires a predictive judgment about future conduct that depends on imperfect evaluative techniques.[145]
> [U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.[146]

Among the many reservations expressed in the debate over preventive detention, a key concern has been the likelihood that "preventive" decisionmaking will be unconscionably error-prone.[147] Proponents of preventive detention laws have recommended incorporating sufficient due process safeguards as a partial remedy for erroneously confining defendants.[148]

Due process safeguards differ widely in several important respects: *(1)* in the definition of criteria making defendants eligible

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143 J. GOLDKAMP & GOTTFREDSON, *supra* note 34.

144 *See supra* note 137.

145 *See United States v. Edwards*, 430 A.2d at 1356 (Ferren, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

146 *In re* Gault, 387 U.S. 1, 18 (1967).

147 *See, e.g.*, Angel, *Prevention Detention*, *supra* note 120; Dershowitz, *supra* note 16; Ervin, *supra* note 16; *Preventive Detention Hearings*, *supra* note 19. *But see* Schall v. Martin, 104 S. Ct. 2403, 2417-19 (1984) (majority finds post detention due process reviews sufficient to compensate for possible errors).

148 *See* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7, at 696-701; NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9, at 35-49; A.B.A., *Pretrial Release*, *supra* note 31, at 40-49; *Task Force on Crime*, *supra* note 61, at 11-13. *See also United States v. Edwards*, 430 A.2d at 740-61 (the District of Columbia Court of Appeals found the procedures under the District of Columbia law sufficient.) *But see also* the dissents by Associate Judge Ferren who recommended more stringent safeguards, 430 A.2d at 1350-61 (Ferren, J., dissenting) and Associate Judge Mack who viewed this classification of dangerousness as arbitrary and invalid under due process and equal protection concerns, 430 A.2d at 1365-72 (Mack, J., dissenting). *See also* Huihui v. Shimoda, 64 Hawaii 527, 644 P.2d 968 (1982); Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981). *See also* Schall v. Martin, 104 S. Ct. 2403 (1984).

for detention; *(2)* in the length of time that may pass before a detained defendant must have a hearing to review custody; *(3)* in the burden and level of proof that must be made by the court; and *(4)* in the availability of "minimum requirements of due process"[149] at any hearings. Of the thirty-six jurisdictions that have danger-related pretrial laws, nearly half include neither routine hearings to decide the defendant's eligibility for direct detention nor basic reviews of the custody of defendants who have not raised cash bail and consequently remain confined in their laws.[150]

The law in the District of Columbia, which includes both kinds of procedures, was the earliest comprehensive preventive detention law.[151] The law requires that a defendant whom the government wishes to detain be brought before the judicial officer for a hearing immediately after arrest.[152] At the hearing to determine whether the defendant will be detained, the defendant may be represented by counsel, may cross examine and "present information by proffer or otherwise," and may testify and present witnesses.[153] The "information" offered by either party at the hearing does not under District of Columbia law need to conform to the rules governing the admissibility of evidence at trial.[154]

To have the defendant detained, the U.S. Attorney must bear the burden of proof on three issues: *(1)* that "there is *clear and convincing evidence* that the person is a person" falling within the "dangerous crime," "crime of violence," or intimidations provisions;[155] *(2)* that *"there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community;"* and *(3)* in the case of the "dangerous crime" or "crime of violence" categories, that there is *"a substantial probability that the person committed*

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149 *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 480-82 (1972).

150 The states with laws providing for no hearings or reviews are Alabama, Delaware, Hawaii, Indiana, Maryland, Minnesota, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota and Virginia. *See* Table 9 in the Appendix.

151 *See* United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982); Bases & McDonald, *Preventive Detention in the District of Columbia: The First Ten Months* (Washington, D.C.: Georgetown Institute of Criminal Law and Procedure and Vera Institute of Justice 1972).

152 The hearing requirement may be postponed for three days if the government requests a continuance or for up to five days if the defendant so requests. D.C. CODE ANN. § 23-1322 (1981 & Supp. 1985).

153 D.C. CODE ANN. § 23-1322(c)(4) (1981 & Supp. 1985).

154 *Id.* at §23-1322(c)(5).

155 D.C. CODE ANN. §§ 23-1322(1) to (a)(3) (1981 & Supp. 1985).

*the offense* for which he is present before the judicial officer."[156] In detaining a defendant, under the District of Columbia laws, the judge must issue an order containing written findings of fact. The detained defendant has a right to appeal the decision[157] and to have the case placed on an "expedited calendar."[158]

In the nineteen jurisdictions other than the District of Columbia in which defendants may be detained directly,[159] eleven provide for detention hearings in a variety of ways.[160] According to the tradi-

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156 D.C. CODE ANN. §§ 23-1322(a), (b) (1981 & Supp. 1985). *See United States v. Edwards*, 430 A.2d at 1350-65 (Ferren, J., dissenting), 1365-72 (Mack, J., dissenting).

157 D.C. CODE ANN. § 23-1322(c)(7) (1981 & Supp. 1985).

158 D.C. CODE ANN. § 23-1322(d) (1981 & Supp. 1985).

159 *See supra* note 75. This discussion ignores the traditional practice of denying bail in capital cases.

160 *See* Table 9 in the Appendix. In Arizona, for example, a defendant has the right to a hearing to determine detention within twenty-four hours of initial appearance, to be represented by counsel, and to present information in a fashion similar to the District of Columbia provisions. For detention to be ordered, the court must find: (a) by *"clear and convincing evidence that the person charged poses a substantial danger to another person or the community;"* (b) that *"the proof is evident or the presumption great that the person committed the offense for which he is charged;"* and (c) that *"no condition or combination of conditions of release may be imposed which will reasonably assure the safety of any other person or the community."* ARIZ. REV. STAT. ANN. § 13:3961(B) (1978 & Supp. 1985). Evidence submitted for consideration need not conform to the rules governing admissibility of evidence at trial. ARIZ. REV. STAT. ANN. § 13:3967(H) (1978 & Supp. 1985).

Detained defendants are placed on "an expedited calendar consistent with the administration of justice" according to Arizona statutes. ARIZ. REV. STAT. ANN. § 13:3961 (1978 & Supp. 1985).

Under new Colorado law, defendants who fall into the detainable categories are entitled to a hearing within 96 hours at which the state must demonstrate (a) that the *"proof is evident and the presumption is great" that the defendant committed the alleged offense and* (b) that *"the public would be placed in significant peril* if the accused were released on bail." COLO. CONST. art. II, § 19(b).

Wisconsin law provides for a detention hearing within 10 days at which the state must prove (a) by *"clear and convincing evidence that the defendant committed the current felony offense;"* and (b) that *"available conditions of release will not adequatelv protect members of the community from serious bodily harm or prevent the intimidation of witnesses."* WIS. STAT. ANN. § 969.035(6) (1985). Unlike other states having detention hearings, Wisconsin law provides that the use of information at the hearing *will* conform to the rules of evidence governing trial procedure. WIS. STAT. § 969.035(6)(c)(1985).

Texas law alludes to a hearing, stating that defendants falling within its categories excluded from bail may have their detention continued beyond seven days "upon *evidence substantially showing the guilt* of the accused." TEX. CONST. art. I, § lla.

The Massachusetts detention proceeding is narrow in scope, framed as a revocation of pretrial release proceeding, although along with revocation of release on the first charge, the defendant may be detained as long as sixty days on the new charge. MASS. GEN. LAWS ANN. ch. 276, § 58 (West 1982 & Supp. 1985). At the hearing at which the defendant may be represented by counsel, the court must find: (1) *" 'probable cause to believe' the defendant has committed a crime during pretrial release;"* and (2) "in the exercise of its discretion, *whether the release of said prisoner will seriously endanger any person* or the community." *Id.* The Massachusetts law requires the court to state the reasons for the finding if detention results, and provides for an appeal procedure and requires that the

tional formula denying the right to bail to defendants charged with capital crimes when the proof is evident and the presumption is great, the reviewing judge may grant bail upon a showing that guilt is in doubt or that the proof is not evident and the presumption is not great.[161] In the three states that permit direct detention of defendants through expansion of categories excluded from a right to bail, although no hearing is required to cause the detention of the eligible defendants in the first place, hearings with strict standards are provided in instances when defendants detained under the provisions may request release on bail.[162]

In contrast with the danger-law states having hearings dealing directly with the detention question, the laws of eleven jurisdictions incorporate routine reviews of persons remaining in custody because the bail, "conditions of release," set could not be met.[163] In

"prisoner so held shall be brought to trial as soon as reasonably possible." *Id.* Illinois law closely parallels Massachusetts' by specifying that persons arrested for "forcible felonies" while already on pretrial release may be detained outright after a hearing in open court and *"upon a showing by the state the defendant did commit the forcible felony by clear and convincing evidence."* ILL. REV. STAT. ch. 38, § 110-6 (1980 & Supp. 1985). *But see* ARK. RULES CRIM. PROC. 9.6, in which a defendant committing a felony while on pretrial release for any crime may have release revoked upon a finding in any court of probable cause as to the new charges.

161 *See, e.g.*, ARIZ. RULES CRIM. PROC. 7.2(b).

162 The Michigan constitution provides that persons charged with crimes in one of the excluded categories (criminal sexual conduct in the first degree, armed robbery, and kidnapping with intent to extort) may petition the court for release and then the judge may consider bailing them only if the judge finds that the defendant is *"not* likely to flee or present a danger to any other person." MICH. CONST. art. I, § 15. In Utah, persons excluded by the constitution from a right to bail may achieve release at the discretion of the court "after hearing and finding that the interests of justice do not require detention without bail." UTAH CODE ANN. § 77-20-1 (1982). In Georgia, defendants in the many categories excluded from a right to bail may petition the court within ten days for bail. The court may set bail only if it finds the following: (1) "no significant risk of fleeing;" (2) "no significant threat or danger to any person or to the community or to property within the community;" (3) "no significant risk of committing any felony pending trial;" and 4) "no significant risk of intimidating witnesses or otherwise obstructing the administration of justice." GA. CODE ANN. § 27-901 (1983 & Supp. 1984).

163 *See* ALASKA STAT. §§ 12.30.020(d) to .020(g) (1962 & Supp. 1983); CAL. [PENAL] CODE § 1271 (Deering 1982); COLO. REV. STAT. § 16-4-105(2) (1973); D.C. CODE ANN. § 1321(d) (1981 & Supp. 1985); FLA. STAT. ANN. § 903.132 (West 1985); KY. REV. STAT. § 431.520(6) (1985); NEB. REV. STAT. § 29-901.03 (1979); OR. REV. STAT. § 135.245 (1985); VT. STAT. ANN. tit. 13, § 7554(d) (1974); KY. RULES CRIM. PROC. 14.38; N.M. [RULES] CRIM. PROC. 22(c),(d),(e); N.D. RULES CRIM. PROC. 46(a)(iii) — (1)(vii).

The requirement to review the custody of defendants held under conditions they were unable to meet stems not so much from the public safety impetus to revise bail and pretrial detention laws as from the general effort of bail reform and its model legislation, the Federal Bail Reform Act of 1966. The laws of other non-danger law states provide for similar reviews. *See* IOWA CODE § 811.2 (1979 & Supp. 1985); KAN. STAT. ANN. § 22:2802(6) (1981); ME. REV. STAT. ANN. tit. 15, § 942(3) (1964); MO. REV. STAT. § 544.455(1) (1957 & Supp. 1985); WYO. RULES CRIM. PROC. 8(2).

Florida, all defendants held for seventy-two hours have a right to a "nonadversarial probable cause hearing" at which they do not need to be present to have detention reviewed. Neither findings concerning flight risk nor danger are involved in the hearing.[164] In six jurisdictions and the District of Columbia, the language of the Federal Bail Reform Act of 1966 is adopted almost verbatim.[165] In these states within twenty-four or forty-eight hours, depending on the jurisdiction,[166] a defendant remaining in custody is entitled to a review of the conditions of release set by the original judge before the same or another judicial officer. These jurisdictions require a written statement of the original conditions of release and, if the reviewing judge does not choose to alter the original conditions, written reasons for the conditions holding the defendant. The procedural requirements for this review are unclear in these jurisdictions, but no formal requirements are stated explicitly .[167]

### D. MINIMAL PROCEDURAL SAFEGUARDS IN DANGER-RELATED BAIL AND DETENTION: CONCLUSION

There is clearly considerable unevenness in the availability of due process safeguards for eligible defendants (von Hirsch's third critical theme in the evaluation of preventive confinement procedures). For example, this Article documents that nearly half of the jurisdictions fail to provide for either full hearings for determining pretrial detention or for reviews of custody resulting from cash bail decisions. Among jurisdictions with some form of hearing or re-

164 FLA. STAT. ANN. § 903.132 (West 1985). This hearing only reviews whether there is probable cause to believe the detained defendant committed the offense charged. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

165 *See* 18 U.S.C.A. § 3146(d) (Supp. 1985); ALASKA STAT. §§ 12.30.020(d) to 020(g) (1962); D.C. CODE ANN. § 23 § 1321(d) (1981 & Supp. 1985); KY. REV. STAT. § 431.520(6) (1985); NEB. REV. STAT. § 29-901.03 (1979); VT. STAT. ANN. tit. 13, § 7554(d) (1974); N.M. [RULES] CRIM. PROC. 22; N.D. RULES CRIM. PROC. 46(a)(1)(iii)-(vii).

166 In the District of Columbia, Kentucky, Nebraska, New Mexico and Vermont, the review of the conditions causing the detention of defendants must occur within 24 hours; in Alaska and North Dakota, the reviews may occur within 48 hours of initial custody. See *supra* note 165.

167 Although a bail hearing is not provided for in Alaska statutory law, case law provides that defendants have a right to a hearing and to confront witnesses regarding the amount of bail or the terms and conditions of bail. Carman v. State, 564 P.2d 361 (Alaska 1977). In Colorado, detained defendants may petition for a 48 hour review of the conditions set that cause them to be held, but the reviewing judge may "summarily deny" the petition or "promptly conduct a hearing." COLO. REV. STAT. § 16-4-105(2) (1983). In California, detained defendants are entitled to an automatic review of the "order fixing the amount of bail" within three days of the initial bail decision, although the requirements of that review are not discussed. CAL. [PENAL] CODE § 1271 (Deering 1982).

view, there is a great diversity in the safeguards available to the defendant, the standards of evidence and the formality of the proceedings. In certain instances, little was required of the judge reviewing the detention question and few rights were afforded the defendant; in other instances, rather a full range of protections were afforded, including full adversarial proceedings, demanding evidentiary requirements and standards for findings of dangerousness, written explanations for the findings, appeals procedures and expedited calendars for defendants remaining in detention. A number of states provide both detention hearings for defendants directly detainable and review procedures for defendants remaining in custody after "normal" bail procedures.[168]

Despite the handful of jurisdictions with fully developed procedural safeguards—such as the Federal jurisdiction, the District of Columbia, Wisconsin and Massachusetts—generally danger-related uses of pretrial detention and bail have expanded in the United States, while due process safeguards for defendants eligible for such measures have not.

Yet, even if all jurisdictions had due process provisions in their current danger statutes, difficult questions about what are the ideal procedural safeguards nevertheless would remain. Evaluation of the sufficiency of procedural requirements is linked inexorably to resolution of the substantive issues at the heart of pretrial release and detention practice—precisely the issues framed by von Hirsch in focusing on legal standards of dangerousness and the validity of its prediction. The question of whether the elaboration of some "minimum due process" at the bail or detention stage counterbalances the freer access to outright pretrial detention of defendants viewed as dangerous is made more difficult by the knowledge that full review of detention decisions—even in jurisdictions observing a full complement of procedural safeguards—may not be available until already made moot by the passage of the pretrial period during which the defendant has remained confined.

## IV. The Arrival of Federal Preventive Detention

If critics' doubts about the legitimacy of a public safety orientation in bail decisionmaking or about the constitutionality of laws permitting direct detention of persons on the basis of estimates of danger had not been resolved earlier, they must have been substantially put to rest during 1984. In that year, the United States Supreme Court upheld the constitutionality of a contested juvenile

168 *See* Table 9 in the Appendix.

detention statute in New York in *Schall v. Martin*[169] and Congress enacted the Federal law permitting pretrial detention on the basis of pretrial danger or flight.

### A. THE MESSAGE OF *SCHALL V. MARTIN*

In *Martin* the Court reviewed the New York juvenile detention law permitting preventive detention on the basis of anticipated future crime to determine whether it was compatible with "fundamental fairness required by due process," whether within the context of the juvenile justice system such detention served a "legitimate state objective" and whether the procedural safeguards contained in the act were "adequate to authorize the pretrial detention of at least some juveniles charged with crimes."[170] Although the Court's holding that a legitimate interest of the state was being served and that the due process provided for was adequate, and while it was limited to juvenile proceedings and tied to *parens patriae* questions, there were strong clues concerning the Supreme Court's likely evaluation of preventive detention in the adult sphere.

Building on its finding in *Bell v. Wolfish* that pretrial detention designed to assure a defendant's appearance in court serves a legitimate regulatory function and is not tantamount to punishment,[171] the Supreme Court in *Martin* offered unequivocal support to the community protection aims of detention decisions in writing:

> The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted[172]. . . . We have stressed before that crime prevention is a weighty social objective and this interest persists undiluted in the juvenile context.[173]
>
> The substantiality and legitimacy of the state interests underlying this statute are confirmed by the widespread use and judicial acceptance of preventive detention for juveniles.[174]
>
> In light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings.[175]
>
> Preventive detention under the Family Court Act serves as the legitimate state objective, held in common with every state in the country, of both protecting both the juvenile and society from the hazards of

169 104 S. Ct. 2403, 2417-18 (1984).
170 *Id.* at 2410.
171 Bell v. Wolfish, 441 U.S. 520, 535-38 (1979).
172 Schall v. Martin, 104 S. Ct. at 2410.
173 *Id.*
174 *Id.* at 2411.
175 *Id.* at 2412.

pretrial crime.[176]

*Martin* suggests that the Supreme Court would have little conceptual difficulty in accepting preventive detention in the adult system aimed at community protection, because of the importance it has placed on crime prevention as a social objective, because of its widespread use and judicial acceptance, and/or in light of the uniform legislative judgment that pretrial detention of adults promotes a compelling state interest.

Not only did the *Martin* court find little difficulty with the danger agenda in juvenile detention as found in the New York statute or with the danger defined therein,[177] it rejected the argument that prediction of dangerous juveniles was likely to be so error-prone that preventive detention should be held unconstitutional on due process or equal protection grounds:

> But appellees claim, and the district court agreed, that it is virtually impossible to predict future criminal conduct with any degree of accuracy. Moreover, they say the statutory standard fails to channel the discretion of the Family Court judge by specifying the factors on which he should rely in making that prediction. The procedural protections . . . are thus, in their view, unavailing because the ultimate decision is intrinsically arbitrary and uncontrolled. Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about prediction of future criminal conduct . . . and we have specifically rejected the contention . . . 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.'
>
> We have also recognized that a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified.[178]

In reviewing the due process safeguards available to the juvenile under the New York statute, the Supreme Court noted that they exceeded what were minimally necessary under *Gerstein v. Pugh*.[179] By applying the *Gerstein* standard, as opposed to those outlined for parole revocation in *Morrissey v. Brewer*,[180] the Supreme Court may be revealing how it would review existing adult detention statutes for due process. That the Court viewed these procedures as suffi-

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176 *Id.* at 2415.

177 The Court described the danger in New York as a serious risk that the child may commit an act before the return date which if committed by an adult would constitute a crime. *Id.* at 2417.

178 *Id.* at 2417-18.

179 Gerstein v. Pugh, 420 U.S. 103, 123 (1975). The New York minimum requirements included notice of the charges, two hearings, access to and counsel representation by counsel, an opportunity to offer testimony and to call witnesses, a determination (at the second hearing) of probable cause that the juvenile committed the alleged offense and a written statement of reasons for the detention of the juvenile.

180 408 U.S. 471 (1972). *See* U.S. v. Delker 757 F.2d 1390 (3d Cir. 1985).

cient, taken with the fact that detention would be for a limited period of time and that review of detention was readily available "for correcting on a case-by-case basis any erroneous detentions,"[181] may be an additional signal that jurisdictions providing an equivalent level of due process at the detention stage in the adult system might not be faulted.

### B. KEY FEATURES OF THE FEDERAL BAIL REFORM ACT OF 1984

That Congress has overcome its reluctance to address preventive detention issues in passing the Federal Bail Reform Act of 1984 is fundamentally important in helping civil libertarians determine how questions concerning the constitutionality of pretrial detention based on defendant dangerousness will be decided. This Article will briefly review the features of the new Federal law, highlight the latest orthodoxy pertaining to danger concerns in pretrial release and detention decisionmaking and illustrate how Congress has addressed some of these issues. In a fashion closely derivative of the District of Columbia prototype, the Federal Bail Reform Act of 1984 made public safety a central concern in the judicial officer's choice between four pretrial custody options: *(1)* release of the defendant directly on a written promise to appear and to refrain from crime; *(2)* release of the defendant with certain conditions imposed; *(3)* temporary detention in specific circumstances; and *(4)* outright pretrial detention for a period of up to seventy days.

#### *1. The Presumption Favoring ROR and Release Under Least Restrictive Conditions*

The initial presumption that defendants should be released on personal recognizance survives from the Reform Act of 1966. In the 1984 revision, which follows the District of Columbia Model, however, public safety concerns also temper its granting: "unless [such release] will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community."[182] The law retains release under the least restrictive alternatives as the central principle guiding the selection of release options and the judicial officer is directed to choose an option "subject to the least restrictive further conditions" after ROR, "or combination of conditions, that he determines will reasonably assure the appearance of the person . . . and the safety of any other person and the

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181 *Schall v. Martin*, 104 S. Ct. at 2419.

182 18 U.S.C.A. § 3142(b) (Supp. 1985).

community."[183] Certainly, the Federal law provides a list of conditions for the judge's consideration that is both lengthier and more diverse than those of other laws.

### 2. *Elimination of Cash Bail as a Means for Detaining Defendants*

The Federal Bail Reform Act of 1984 moves beyond the laws in the District of Columbia and Wisconsin,[184] the only two jurisdictions to restrict the use of cash bail from danger applications, in prohibiting use of financial bail to detain defendants: "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."[185] Theoretically at least, this innovation might have a more profound impact on the bail system in the United States than any other feature of the act because the traditional, *sub rosa* means for securing pretrial detention could well be abrogated.

The bail decision under this model becomes an unmuddied choice for the judicial officer between granting the defendant pretrial liberty or confinement. In contrast to traditional cash-based detention practices which leave the judge's intention concerning custody disguised by the defendants' varying abilities to afford bail, the Federal law would force an explicit detention versus release decision: either the judge intends to release the defendant (and only then has to decide under which conditions, if any) or the judge decides to detain the defendant (either temporarily or for the seventy day period allotted). Cash may only be applied as a condition of release. This approach is different from other jurisdictions with formal detention laws because the traditional cash system is not allowed to co-exist with the new preventive detention procedures.

### 3. *Pretrial Detention Decision*

When the judge has determined that no conditions of release will minimize the risk posed by a defendant to the safety of "any other person or the community," the judge may detain the defendant as long as certain eligibility criteria are met. In defining candidacy for preventive detention based on danger, federal procedure follows some of the patterns discussed earlier, including: *(1)* a formula based on current charge and prior record criteria; *(2)* a central role for predictive assessment of risk by the judicial officer; and

183 18 U.S.C.A. § 3142(c)(2) (Supp. 1985). *See* United States v. Payden, 598 F. Supp. 1388, 1392 (S.D.N.Y. 1984), *rev'd*, 759 F.2d 202 (2d Cir. 1985).

184 *See supra* note 51.

185 18 U.S.C.A. § 3142(c) (Supp. 1985).

*(3)* a full repertoire of procedures designed to make the conditions of release and detention decisions based on danger fair and reviewable.[186]

Like several other jurisdictions, the new Federal law provides the judge with the ability to detain defendants temporarily upon finding that the individual was on pretrial release for a felony, on release pending imposition of a sentence, or appeal, on probation or parole, or is not a citizen and "the person may flee or pose a danger to any other person or the community."[187] The law does not discuss the level of finding necessary to establish that the person may flee or pose a danger. Also the judge may detain a defendant in this instance without a hearing.[188] If the appropriate authorities have not responded within the ten day period, the defendant will be entitled to have release conditions set like any other defendant.

Extended pretrial detention may be invoked for three categories of defendants under the Federal Act:

*a.* those who fall within certain categories of current criminal charges or of certain charges and prior convictions in combination and for whom the judge finds that no conditions of release will assure their appearance nor protect the community;[189]

*b.* those for whom, because they fall within the same categories and other factors apply, no presumption for release exists (a "rebuttable presumption" arises that no condition of release will assure their appearance or ensure the safety of the community);[190] and

*c.* those who a judge or United States Attorney shows pose "a serious risk that the person will flee" or "a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror."[191]

Like other jurisdictions, the eligibility of defendants in the first and second categories for pretrial detention is based on a formula using current charges and prior convictions: they are eligible if the charge is for one of a number of "crimes of violence," if the charged offenses are punishable by death or life imprisonment, if the charge involves a specified drug or weapons offense punishable by ten years

186 *See* 18 U.S.C.A. § 3142(c)-(h) (Supp. 1985).

187 18 U.S.C.A. § 3142(d)(2)(Supp. 1985). The Federal judge or magistrate may detain a defendant temporarily for a period of up to 10 days. If the appropriate authorities have not responded by that time, then the judicial officer will set conditions of release for the defendant as in the normal fashion. 18 U.S.C.A. § 3142(d) (Supp. 1985).

188 *Id.*

189 18 U.S.C.A. § 3142 (e), (f) (Supp. 1985).

190 *Id.* at § 3142 (e).

191 *Id.* at § 3142 (f)(2)(B).

confinement or more, or if the current charge involves a felony and the defendant has a previous record of two or more felony convictions.[192] For persons in the second category, no presumption that they should be released exists if persons charged with specified offenses have prior convictions for those offenses, if such an offense was committed while on pretrial release for a similar offense, and if persons charged with such an offense had been convicted of a similar offense within the past five years or had been released from imprisonment for a similar offense within five years.[193]

To define the first and third categories of detainable defendants, the judicial officer must decide that no conditions of release will assure the defendant's appearance or protect the community sufficiently. The judicial officer must make that prediction based on "clear and convincing evidence" and a list of "factors to be considered" in determining whether any conditions of release will be sufficient to minimize the defendant's risk of flight and crime. This list generally resembles those in laws instructing judges how to decide bail dating back to the Bail Reform Act of 1966.[194] The principal addition is the factor related to "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."[195]

The due process features of the Federal Bail Reform Act of 1984 compare to those of the other jurisdictions providing for detention hearings or reviews of the conditions of release. These safeguards include a right to a hearing, the right to be present at the hearing, the right to be represented by counsel, the right to offer testimony, the right to present and cross-examine witnesses and the right to prompt appeal.[196] In addition, a defendant is entitled to a statement of the conditions or order of detention as well as to written reasons for the judicial officer's decision.[197] The defendant is informed in writing of the conditions of release and is required to refrain from crimes or is subject to additional criminal penalties.[198]

### C. THE IMPLICATIONS OF THE FEDERAL ACT

The Federal Bail Reform Act of 1984 is the most decisive development in the evolution of a public danger policy orientation in bail

192 *Id.* at § 3142 (e), (f).
193 *Id.* at § 3142 (e).
194 *Id.* at § 3142 (g).
195 *Id.* at § 3142 (g)(4).
196 *Id.* at § 3142 (f).
197 *Id.* at § 3142 (i).
198 *Id.* at §§ 3142 (h), 3146, 3147.

and detention laws in the United States since the United States Supreme Court decided *Carlson v. Landon*[199] in 1952. American jurisprudence has taken an undeniable step in institutionalizing an approach which, until the passage of the Federal law, was still controversial, if increasingly popular in some form in many states. Important questions remain unresolved, such as whether the United States Supreme Court will find the Federal Act constitutional, and if so, to what extent the diverse other danger laws will also be found acceptable.

There have been a number of challenges testing the constitutionality of the Federal Act on a variety of issues in cases that have reached the United States Court of Appeals. Several courts refuted the argument that preventive detention under the Federal Act was punitive and therefore violative of the due process clause of the Fifth Amendment. Relying on *Martin, Wolfish* and *Edwards*, each court confirmed that, just as pretrial detention on the basis of risk of flight was a legitimate regulatory function, detention based on community protection was also not "penal" in nature.[200]

In one federal district court, a defendant appealed his detention by a magistrate under the Act claiming that it violated both the right to bail implied in the eighth Amendment and the prohibition against excessive bail.[201] The court relied on dicta in *Carlson v. Landon* and "the conclusion that history refutes an absolute right to bail" to dismiss the first contention and disagreed with the second argument that denial of bail was tantamount to setting excessively high bail.[202]

Two courts addressed questions relating to the sufficiency of the definition of danger applied in the federal preventive detention measure. In *United States v. Payden*, a federal district court decision, the defendant contended as part of a "void for vagueness" argument, that the statute did not "define the danger to which it applies." The court agreed but found the fact the statute did specify "a number of factors to be considered by the court in ordering detention" sufficient.[203] A Third Circuit decision found that the legislative history supported a conclusion that the danger referred to in the Federal Act "be given broader construction than merely danger of harm involving physical violence" and that a judicial officer could

199 342 U.S. 524 (1952).

200 United States v. Jessup, 757 F.2d 378, 384-85 (1st Cir. 1985); United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984); United States v. Payden, 598 F. Supp. 1388, 1391-92 (1984).

201 *Hazzard*, 598 F. Supp. at 1448-49.

202 *Id.*

203 *Payden*, 598 F. Supp. at 1395-96.

view a defendant charged under the RICO statute for "conducting a pattern of racketeering" as posing a danger and therefore detain the defendant.[204]

The remaining early challenges centered on various due process issues. In *United States v. Payden*, a defendant appealing his detention argued that the statute is unconstitutionally vague.[205] The court rejected the argument by finding the void-for-vagueness reasoning inapplicable: "[t]he new bail statute does not prohibit conduct, rather it establishes a framework for a judge to detain an individual based on prediction of possible future conduct. A vagueness claim is therefore not appropriate for this statute."[206]

In other cases, defendants have questioned the sufficiency of procedures attendant to detention under the Federal Act. Two circuit courts have ruled that the safeguards in the law are sufficient, and exceed the minimum required based on *Martin* and *Gerstein* and that detention hearings did not have to be "mini-trials."[207] The First Circuit also found that hearsay was permissible in these hearings.[208] At this early stage, thus, it is clear both that the Act is being used with some frequency,[209] and that so far the decisions have repelled attacks on its constitutionality.

## V. Implications of Pretrial Danger Measures

### A. Confusing the Deterrent Versus the Incapacitative Aims of Pretrial Release and Detention

The marked expansion of pretrial detention as well as the addition of an explicit danger orientation in the determination of conditions of release in recent laws carry important implications for bail theory in American criminal jurisprudence. Because under traditional practices pretrial detention was effected through the use of cash bail rather than by direct detention decisions,[210] the deterrent and incapacitative functions of the bail process often have been confused and too easily mixed with inappropriate punitive aims.

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204 United States v. Delker, 757 F.2d 1390, (3d Cir. 1985).

205 "The defendant contends that the 'statute fails to give notice of the conduct which will lead to pre-trial detention.' " *Payden*, 598 F. Supp. at 1395.

206 *Id.* at 1396.

207 *Delker*, 757 F.2d at 1397; *Jessup*, 757 F.2d at 386-87.

208 United States v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985).

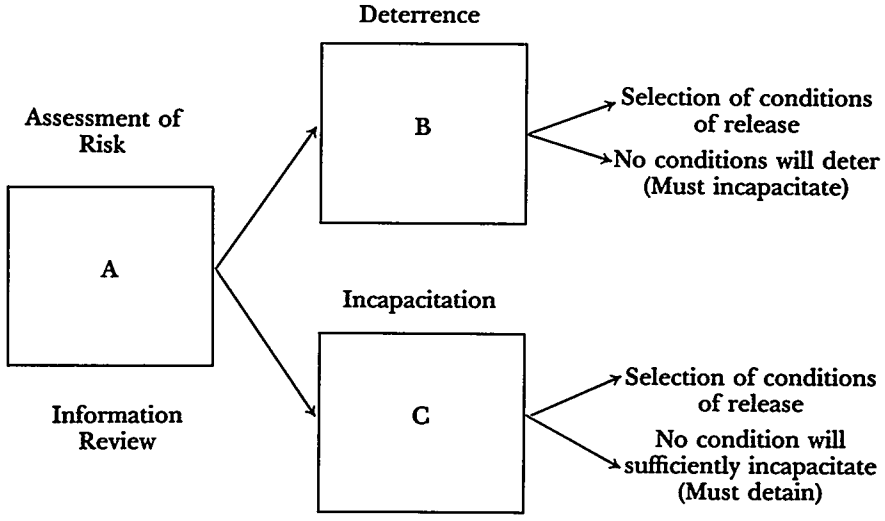
209 *See* Pretrial Reporter VIII/3 at 4-5 (Dec. 1984); U.S. Marshals Service, United States Marshals Service First Year Implementation of Comprehensive Crime Control Act of 1984 (U.S. Dept. of Justice 1986).

210 The only "direct" detention decisions under traditional laws have been the denial of bail to persons charged with either capital offenses, or in some states, treason and offenses punishable by life imprisonment. *See* Table 1 in the Appendix.

Although cash bail is often set to cause the detention of defendants, an incapacitative use, it is frequently and misleadingly discussed as if it were intended as a deterent to flight.[211] Figure 1 outlines the theoretical underpinnings of the bail task.

**FIGURE 1**

**THEORETICAL COMPONENTS OF THE PRETRIAL RELEASE/DETENTION DECISION**




The pretrial release/detention task begins the same way, no matter which theoretical rationale is employed. First the judge must digest available information to assess the likely danger, or more broadly, risk of flight as well as danger, represented by a given defendant. A judge will select a deterrent or an incapacitative approach based on a predictive assessment. For low-to moderate-risk

211 It is this distinction between deterrent and incapacitative uses of bail that has resulted, for example, in the provisions of laws in Wisconsin, the District of Columbia and the Federal Bail Reform Act of 1984 that permits cash bail to be set as a condition of release (to deter flight only) and prohibit its use to bring about a defendant's detention (to incapacitate a public safety menace). These laws require that incapacitative detention be decided and reviewed explicitly and directly. *See* WIS. CONST. art. I, § 8; 18 U.S.C.A. § 3142(c) (Supp. 1985); D.C. CODE ANN. § 1321(a) (1981 & Supp. 1985); WIS. STAT. § 969.01,- .02 (1985).

defendants, in cases in which the defendant's interest in remaining at large outweighs the risk to the public or to judicial processes, the judge may opt for a specific deterrence approach. In order to minimize the chances that an individual defendant will abscond or engage in a serious crime, the judge selects the condition of release that counterbalances the level of risk represented by the defendant. The deterrent threat underlying the selected conditions is that more severe conditions may replace the original choice, release may be revoked or, if cash bail had been assigned, the defendant may face financial loss.[212] The requirement in some jurisdictions that the defendant must face additional criminal penalties if apprehended after absconding, or if convicted of a crime during pretrial release, reflects a deterrence orientation.

In selecting a specific deterrent option, the judge wishes to guard against both insufficiently deterring the defendant and needlessly burdening the defendant with an oppressive release option designed for higher risk defendants. Should the judge, in weighing the available information, determine that no release option could deter the defendant from flight or crime during the pretrial period, the decision would shift into the incapacitative mode.[213]

When operating within the incapacitative mode, the bail judge once again begins by considering a range of conditions that, while permitting a defendant to remain at liberty, might sufficiently constrain the defendant from engaging in misconduct (flight and/or crime) during a period of pretrial release. From this perspective, a judge might prefer a "partial-incapacitation" approach for low to moderate risks and choose to require regular reporting to a probation or police officer, to remain in home detention—or, even, to

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212 From this perspective, commentators have raised questions about the deterrent properties of cash bail. *See, e.g.*, Foote, *Compelling Appearance in Court*, *supra* note 7. Foote argued that bondsman-brokered financial bail served no deterrent ends, for the defendant would neither gain back the fee paid to the bondsman to post the bail even with a perfect attendance record at court, nor would the defendant realistically face having to pay the full amount of the bail for which the bondsman would be responsible in the event of flight. Others have suggested that third party deposit bail does in fact retain deterrent value. *See, e.g.*, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9. That is, with the court accepting a percentum of the full bail amount (in effect donning the role of the bondsman), a relative posts the defendant's bail. The theory is that the threat of financial loss on the part of a wife or parent would prove a powerful deterrent to misconduct by the defendant during the pretrial period. *See also* J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34.

213 Under this formulation, detention cannot be a result of a deterrence-oriented bail decision, unless, conceivably, the judge has in mind a short period of detention (caused by setting bail inconveniently but not impossibly high) designed to teach a lesson about what might be in store if the defendant engages in misconduct during the subsequent period of pretrial release.

wear an "ankle bracelet" capable of transmitting the defendant's whereabouts to the supervising agency.

In cases in which the judge has determined both that a deterrent approach and a partially incapacitative approach will not assure the public safety (or the defendant's appearance in court), outright detention would represent the most drastic incapacitative decision option. The aim in employing detention would, thus, not be special deterrence but rather elimination of the defendant from society for the duration prior to adjudication of the case. In these instances, the predictive assessment of the judge (or of the legislature in drafting the detention statutes) has led to the assumption that no less onerous condition of release could serve as a sufficient constraint to the defendant,[214] and that the defendant's interest in continued liberty is far outweighed by the public's right to safety. Thus, in the usual sense of the term, pretrial detention *cannot* serve as a deterrent, although it is premised as well on a predictive assessment; rather it seeks the defendant's temporary removal from the at-risk population through incapacitation.

If this model accurately depicts the theoretical goals of the bail function, then the current bail laws carry inevitable implications for these deterrent and incapacitative goals. To illustrate, a large number of jurisdictions have adopted provisions outlining a range of bail options and have instructed judges that the least onerous condition of release sufficient to minimize a defendant's risk ought to be selected.[215] In these states, both deterrent and incapacitative conditions of release are incorporated within the legal framework. No research has demonstrated, however, the appropriateness of deterrent versus incapacitative uses nor the effectiveness of the application of conditions of release in line with either theoretical perspective.[216] In addition, commentators have seriously ques-

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214 *See, e.g.*, jurisdictions that permit detention when "no one or more conditions of release will reasonably assure that the person will not . . . pose a danger to any other person or the community." This theme, derived from a provision of the Federal Bail Reform Act of 1966 dealing with release of defendants charged in capital cases or convicted persons seeking release before appeal (18 U.S.C.A. § 3148 (Supp. 1985)), has been adapted, using similar language, in Arizona, the District of Columbia, Florida and Wisconsin. *See* ARIZ. CONST. art. II, § 22; FLA. CONST. art. I, § 14; WIS. CONST. art. I, § 8; D.C. CODE ANN. §§ 1322(a)(1), (b)(2), 1323(c)(B) (1981 & Supp. 1985); WIS. STAT. § 969.035(6)(b) (1985). *See also* similar provisions of the Federal Bail Reform Act of 1984, 18 U.S.C.A. § 3142(e), (f) (Supp. 1985); NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9 at vi-c.

215 *See* Table 3 in the Appendix.

216 Missing from the bail literature are studies of the differential effectiveness of release conditions for given risk-defined categories of defendants when decisions are oriented to either deterrent or incapacitative goals. *But see* J. GOLDKAMP & M.

tioned the deterrent value of financial bail, some arguing that it offers little advantage in securing a defendant's appearance and provides little constraint against defendants who, once they have purchased their release, will commit new crimes.[217]

Moreover, evaluation of actual bail practices based on this analytic framework prompts concern about the current use of conditions of release when the deterrent and incapacitative goals are uncritically confused: just as incapacitative pretrial detention may be totally inappropriate to large numbers of persons confined, to a lesser degree, onerous conditions of release may be inappropriate and may unnecessarily impose control over defendants who would perform perfectly well if instead released on ROR without any added conditions. If a goal of pretrial release decisionmaking includes balancing the risk posed by the defendant against the presumptive interest of the defendant to unrestrained pretrial liberty, then use of conditions of release for either theoretical purpose must be tempered by the question: How does the judge know this defendant would not perform perfectly well on unconditioned or less restricted pretrial release?[218]

Incapacitative pretrial detention, besides denying freedom on the basis of unproven past acts and anticipated future conduct, has other potentially serious drawbacks, although the courts have not appeared persuaded by them. First, because incapacitative detention rests on a predictive (often subjective) assessment of the risks posed by individuals accused of crimes, it will produce mistakes: some defendants will be released and go on to commit serious crimes and some defendants will be needlessly confined who would never have committed future crimes or who may be absolved of their current criminal charges. Recent research has suggested that

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GOTTFREDSON (recent Philadelphia experiment), *supra* note 34. The Washington, D.C. Pretrial Services Agency is a pioneer in the development of conditions of release designed to respond to specific kinds of risks posed by the defendant, although not based as yet on empirical research. *See* District of Columbia Pretrial Services Agency, *Recommendation Guidelines*, 1981. This report states that "any restrictive condition imposed must relate to the risk posed . . . and be designed to minimize that risk *not* eliminate it. Total elimination of all risk is an inappropriate and unconstitutional standard." *Id.* at 7. Research describing the use of urine testing to supervise defendants during pretrial release is forthcoming from that agency.

217 *See supra* note 212.

218 As part of the National Evaluation of Pretrial Release (Phase I), Thomas evaluated the use of supervised conditional release in Washington, D.C. His findings offer evidence of the possible unnecessary use of more onerous bail conditions. He reported that "where previously over forty percent of the defendants in the District were released on OR without conditions, by 1972 less than five percent were so released." Thus, a large segment of defendants who had established their reliability on straight OR release were burdened with conditions." W. THOMAS, *supra* note 5, at chapter 15.

the margin of error may be as poor as ten inappropriate confinements to secure one appropriately-held.[219] von Hirsch underscores this point of view in arguing that:

> if a system of preventive incarceration is known systematically to generate mistaken confinements, then it is unacceptable in absolute terms because it violates the obligation of society to *individual* justice. Such a system cannot be justified by arguing that its aggregate social benefits exceed the aggregate amount of injustice done to mistakenly confined individuals.[220]

The proponents of pretrial detention as pretrial incapacitation measures either do not address or purposely beg the questions of error surrounding predictive pretrial incapacitation. As timeworn as discussions of false positives in pretrial detention may be, the inescapably poor record associated with any use of incapacitative measures must be confronted, especially because of the questionable effectiveness of due process measures at this stage of the system. Given that the substance of current statutes clearly announces an expanded role for pretrial incapacitation, it would be unrealistic to expect incapacitative detention provisions to effectuate better predictions of dangerous behavior than judges traditionally have produced.[221]

Second, pretrial incapacitation rests on a highly questionable assumption that removing certain categories of defendants from society will prevent large amounts of crime.[222] Research findings have seriously questioned this assumption in two ways: persons held on more onerous bail conditions generally may be releasable under lesser options with no worse result,[223] and detention of defendants designated as detainable by statute results in very large amounts of unnecessary detention and is likely to contribute greatly to jail overcrowding but very little to the reduction of crime.[224]

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219 *See* Angel, *Preventive Detention, supra* note 20, at 318.

220 von Hirsch, *supra* note 59, at 740 (emphasis in original).

221 In fact, in a test of the predictive validity of the District of Columbia detention statute, Angel, et. al., found the detention criteria to be poorly related to the commission of the feared, serious crimes. *See generally*, Angel, *Preventive Detention, supra* note 120.

222 Currently, the virtue of "selective" incapacitation is hotly debated in the arena of sentencing. *See* P. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (1982); Blackmore & Welsh, *Selective Incapacitation: Sentencing According to Risk*, 29 CRIME & DELINQ. 504 (Oct. 1983); von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE (1974).

223 *See* W. THOMAS, *supra* note 5; Ares, Rankin & Sturz, *supra* note 5; Gottfredson, *supra* note 126; Toborg, *supra* note 138. *See also* a report by Austin, Krisberg, and Litsky (forthcoming, National Institute of Justice, 1985) (national study of "supervised" pretrial release conducted by NCCD).

224 *See* Angel, *Preventive Detention, supra* note 120; *but see* Goldkamp, *Questioning the Practice of Pretrial Detention: Some Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY

B. THE PRACTICAL UTILITY OF CURRENT PRETRIAL DANGER MEASURES

Apart from the narrow use of bail and pretrial detention to protect witnesses and/or jurors from intimidation by defendants, danger in bail laws usually translates as a concern to prevent crime committed by defendants during pretrial release. Compared to the dramatic scope of the recent revision of bail laws to incorporate pretrial danger measures, the actual phenomenon of pretrial crime may seem minor. Estimates of pretrial crime vary widely.[225] Toborg reviewed available studies and reported that from ten to seventeen percent of persons arrested for crimes had been on pretrial release for previous charges at the time of their arrests.[226] Studies following up noncomparable samples of released defendants have found varying proportions subsequently rearrested for crimes committed during the pretrial period, averaging from ten to twenty percent; only about half of the rearrests were for crimes of the serious variety of primary concern in the recent danger laws and even less were later convicted of them.[227] Although any number of serious crimes represents a grave challenge to the ability of law enforcement to protect the public, their low rates of commission by defendants during pretrial release make them difficult to reduce through the relatively gross incapacitative device of pretrial detention. Available research suggests that to reduce a five percent rate of rearrest for serious crimes among released defendants a percentage point or two in a jurisdiction would require increasing the use of pretrial detention substantially and systematically.[228]

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1556 (1983)(jails may in fact be holding defendants who pose the greatest risks of absconding and pretrial crime).

225 Studies of pretrial danger inevitably are forced to rely on arrests of defendants who have committed crimes during pretrial release associated with earlier charges. This measure suffers the same handicaps that arrest data generally are known to carry with them. They poorly reflect the actual level of crime, some persons rearrested did not commit the crimes for which they were arrested while others who committed crimes have not been rearrested, and only a fraction of those rearrested will be convicted of the crimes. *See* Angel, *Preventive Detention, supra* note 120, at 317-23.

226 This estimate includes arrests for *any* crimes, not just for serious crimes such as those serving as the focus of most of the preventive detention laws. *See* Toborg, Yezer, Tseng & Carpenter, *Pretrial Release Assessment of Danger and Flight: Method Makes a Difference* (paper presented at Conference on Public Danger, Dangerous Offenders and the Criminal Justice System, Harvard University 1982), at 2. *See also* W. THOMAS, *supra* note 5.

227 S. CLARKE, J. FREEMAN & G. KOCH, *supra* note 126; J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34; J. ROTH & P. WICE, *supra* note 34; T. THOMAS, *supra* note 5; Angel, *Preventive Detention, supra* note 120; Gottfredson, *supra* note 126.

228 *See e.g.*, Angel, *Preventive Detention, supra* note 120. *See also* J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34 (description of the guidelines experiment in Philadelphia in which one group of randomly selected judges employed decision guidelines based in part on an actuarial classification of defendants).

Although the goal of recent measures to protect society from defendants who would take advantage of pretrial release to prey upon the public or upon victims or witnesses now appears legally appropriate, in the aggregate the revised bail and pretrial detention laws risk being neither effective nor just. In attacking the pretrial danger problem, a number of previous recommendations continue to merit consideration. For example, a number of observers have suggested that the length of time required to bring a defendant to trial ought to be kept to a minimum.[229] Others have proposed a diminishing presumption to release, or to release on ROR or other of the least onerous conditions, when defendants granted pretrial release either abscond or are rearrested for crimes committed during the period of pretrial release.[230] Several states and the Federal government which favor a strong initial presumption to release under nonfinancial conditions reserve the power to revoke pretrial release,[231] or to institute stiff criminal penalties for abuse of pretrial release through absconding or arrests for new crimes.[232]

### C. DEFINITION OF THE PROBLEM OF PRETRIAL DANGER

If bail and pretrial detention laws are to be modified in reaction to fears about the phenomenon of defendant danger, then the concept of danger has to be defined as precisely as possible. In the laws

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229 *See* S. CLARKE, J. FREEMAN & G. KOCH, *supra* note 126; NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 9; Angel, *Preventive Detention, supra* note 120; Gottfredson, *supra* note 126. Note that the implementation of truly speedy trials which would have the effect of shortening the period released defendants would be "at-risk" may come into conflict with another common recommendation that detained defendants be placed on an accelerated court calendar. That concept is contained in the statutes of Alabama, Arkansas, Colorado, the District of Columbia, Illinois, Massachusetts, Minnesota and Wisconsin. *See* Table 9 in the Appendix.

230 *See* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 7; A.B.A., *Pretrial Release, supra* note 31; Angel, *Preventive Detention, supra* note 120; von Hirsch, *supra* note 59.

231 *See supra* note 165. *See also* Federal Bail Reform Act of 1984, 18 U.S.C.A. §3142(c)(2) (Supp. 1985).

232 *See* 18 U.S.C.A. §§ 3146, 3147 (Supp. 1985); WIS. CONST. art. I, § 8(3); ALASKA STAT. § 12.30.060; (1962); ARK. STAT. ANN. § 43-723.1 (1971); CAL. [PENAL] CODE § 1320 (Deering 1982); DEL. CODE ANN. §§ 1321(c), 1327, 1328 (1974); ILL. REV. STAT. ch. 38, § 110 (1980 & Supp. 1985); MD. ANN. CODE art. 27 § 638A(b) (1957 & Supp. 1985); NEB. REV. STAT. § 29-909 (1979); N.H. REV. STAT. ANN. § 597(14)(a) (1974); N.M. STAT. ANN. § 31-3-9 (1984); N.C. GEN. STAT. § 15A-543 (1983); OHIO REV. CODE ANN. § 2937.99 (Page 1975); OR. REV. STAT. §§ 162.195, 162.205 (1981); PA. CONS. STAT. ANN. tit. 18, § 4956 (Purdon 1983); S.C. CODE ANN. § 17-15-90 (Law. Co-op. 1976 & Supp. 1983); VT. STAT. ANN. tit. 13, § 7559(d) (1974); VA. CODE § 19.2-128 (1950); WASH. REV. CODE § 10.19.130 (1980); WIS. STAT. § 969.035(ii) (1985); MINN. RULES CRIM. PROC. 6.02(3); WASH. SUPERIOR CT. CRIM. RULES 3.2(d). The same provisions in the District of Columbia and Pennsylvania enhance the penalty for crimes committed during pretrial release for earlier charges.

to date, with few exceptions, this is a major shortcoming, although it is not apparently perceived as such by the courts. Rigorously developed knowledge of the phenomenon of concern ought to guide formulation of precise definitions on which strategies may be grounded, including sound estimates of the frequency of serious pretrial crime as well as of the harm or loss resulting from it. Included in this definitional focus should be an attempt to differentiate the deterrent and incapacitative functions of the bail process, to realign the bail function so that it responds to those concerns pragmatically, if indeed they are viewed to be desirable or legitimate, and to clarify the use of release and of incarceration.

In selecting conditions of release to deter potential pretrial "recidivists," for example, it is essential to evaluate the effects of the commonly employed conditions on the occurrence of pretrial crime, such as the posited deterrent impact of cash bail. Incapacitative strategies must confront questions about their constitutional implications, which are dramatic and must not much longer be overlooked,[233] as well as prevent or reduce the incidence of serious crime committed by released defendants. If the policy debate concludes that pretrial incapacitation is inappropriate and unacceptable, current laws as well as further reforms must be altered fundamentally.

## VI. CONCLUSION

Once the dangers that form the basis of bail and detention procedures are better defined, better studied and understood, there remains the difficult issue of balancing potential "progress" in minimizing pretrial crime against the costs to defendants *and* to the justice system when those procedures are applied. The idealistic goal that restrictive bail or "selective" pretrial detention practices should be targeted on the greatest risks among all defendants should be weighed against the knowledge that it is exceedingly difficult to know with reasonable accuracy who the greatest risks are and that procedures that screen defendants, whether empirically derived

233 Clearly, questions are raised about the notion of presumption of innocence by giving legitimacy to the practice of incapacitating defendants at the pretrial stage. Although the United States Supreme Court in *Bell v. Wolfish* asserted that pretrial detention is not punitive and that it does not conflict with the presumption of innocence, a concept applying mainly to the trial stage, pretrial detention as pretrial incapacitation of the criminally accused has not been discussed. 441 U.S. 520, 535-38 (1979). The new Federal statute explicitly recognizes the issue but simply states that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C.A. § 3142(j) (Supp. 1985).

or based on official "conventional wisdom," will be clumsy and produce sizeable margins of error.

The only conceivable counterpoint to this troublesome reality, although arguably an inadequate remedy, will be for policy makers to give equal attention to due process rights of defendants eligible for preventive bail or incapacitative confinement. Although the courts have been satisfied with the safeguards in the District of Columbia and the Federal law, not many jurisdictions possess similar procedures. "Tough" pretrial detention measures that are not balanced by sufficient due process constraints and are not monitored for effectiveness may eventually amount to a "tail wagging the dog" as court calendars become further overburdened, the prosecutor becomes immeshed more deeply in routine bail decisions, and the populations of jails breach even the extraordinary present levels.

Critics still may argue that even with the apparently elaborate due process safeguards of the new Federal law, or of the Wisconsin or District of Columbia measures, the shortcomings of pretrial incapacitation cannot easily be redressed. Procedures that authorize detention on the basis of anticipated but unprovable future conduct nevertheless accept the predictability of dangerousness on faith.

No matter how elaborate the safeguards, if a defendant falls within one of the diverse categories specified in the new laws as detainable, the defendant cannot demonstrate very easily that a feared future act will not occur; because of the detention, the proposition is untestable. Moreover, by the time a wrongly-held defendant is able to carry appeals of his or her detention to the highest levels, the question will probably be moot due to the completion of the pretrial period.

The current pretrial danger laws generally have ignored potentially the most important area: the front-line decisionmaking practices of criminal court judges.[234] Judicial bail practices have suffered because judges have conducted bail in a low-visibility, highly improvisational fashion with little meaningful guidance concerning how to transact bail to realize optimal results. What the United States Supreme Court has recently referred to as "experienced prediction" in bail practice often amounts to guessing conducted in a vacuum.[235] Judges have not had the opportunity to monitor the results of their individual decisions over time, nor to compare their practices and results with those of their colleagues.

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234 The laws of Wisconsin and North Carolina, which require courts to develop guidelines or policies to implement the aims of bail at the court level, are rare exceptions. *See* N.C. GEN. STAT. § 15A-535 (1983); WIS. STAT. § 969.065 (1985).

235 *See supra* note 178 and accompanying text.

The only results most judges learn about are the rare but sensational cases involving defendants whom they have released and who then have committed especially atrocious crimes. Such feedback generates cumulatively more conservative decisionmaking, out of proportion with former successful bail decisions.

Constructive experimentation focusing on pretrial release and detention decisionmaking by the judiciary is almost nonexistent.[236] Thus, judicial decisionmaking has not "learned from experience" in a balanced manner. Future pretrial danger strategies will have to develop methods for assisting courts in reviewing their operating bail policies, in organizing their discretionary and improvisational release and detention practices, and in monitoring their consequences. In the final analysis, hope for affecting the phenomenon of pretrial crime depends on the ability of the bail judge to make an informed decision from within a rational policy framework.

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236 For a discussion of one recent effort to assist the judges in the Philadelphia criminal courts to review bail practices and develop bail policy, see J. GOLDKAMP & M. GOTTFREDSON, *supra* note 34. Similar research is now underway in the Boston, Phoenix and Miami courts.

# APPENDIX

## TABLE 1

### PROVISIONS LIMITING THE RIGHT TO BAIL IN THE UNITED STATES, DECEMBER, 1984

[Note: A = Constitution B = Statutes or court rules]

| Jurisdiction | Limitations on right to bail: Capital Cases | Life Imp. | Others | Proof and Presumption Clause | Excessiveness Prohibition |
|---|---|---|---|---|---|
| Alabama | AB | — | AB[1] | AB[3] | A |
| Alaska | AB | — | — | A | A |
| Arizona | A | — | AB[2] | A | A |
| Arkansas | AB | — | B[2] | A | A |
| California | A | — | A [2] | A [3] | A |
| Colorado | A | — | A [2] | A | A |
| Connecticut | AB | — | — | A | A |
| Delaware | AB | — | — | AB | A |
| D.C. | B | — | B[2] | — | A [4] |
| Florida | AB | — | AB | A | A [4] |
| Georgia | B | — | B[2] | B[3] | A |
| Hawaii | — | B | B[2] | B | AB[4] |
| Idaho | AB | — | — | AB | AB |
| Illinois | AB | A | AB[2] | AB | — |
| Indiana | A | — | A [2] | A | A |
| Iowa | A | — | B[2] | A | A |
| Kansas | AB | — | — | AB | A |
| Kentucky | AB | — | — | AB | A |
| Louisiana | A | — | — | A | A |
| Maine | A [1] | B | — | A | A |
| Maryland | B | B | B[2] | — | A |
| Massachusetts | B | — | B[2] | — | A |
| Michigan | AB | — | AB[2] | A | A |
| Minnesota | A | — | B[2] | A | A |
| Mississippi | A | — | — | A | A |
| Missouri | AB | — | — | A | A |
| Montana | A | — | — | A | A |
| Nebraska | A | — | A [2] | A | A |
| Nevada | A | A | AB[2] | AB | A |
| New Hampshire | B | — | — | B | A |
| New Jersey | AB | — | — | AB | A |
| New Mexico | A | — | — | A | A |
| New York | B | — | B[2] | — | A |
| North Carolina | B | — | B[2] | — | A |
| North Dakota | A | — | — | A | A |
| Ohio | A | — | — | A | A |
| Oklahoma | AB | — | — | A | A |
| Oregon | AB | — | AB[2] | A | A |
| Pennsylvania | A | — | — | A | A |
| Rhode Island | AB | AB | — | A | A |
| South Carolina | A | A | — | A [3] | A |
| South Dakota | AB | — | — | A | A |
| Tennessee | AB | — | — | AB | AB[4] |
| Texas | A | — | A [2] | A | A |
| Utah | AB | — | B[2] | A | A |
| Vermont | AB | A | — | A [3] | A |
| Virginia | — | — | B[2] | B[3] | A |
| Washington | AB | — | — | AB | A |

## TABLE 1 (CONT'D)

### PROVISIONS LIMITING THE RIGHT TO BAIL IN THE UNITED STATES, DECEMBER, 1984

[Note: A = Constitution B = Statutes or court rules]

| Jurisdiction | Limitations on right to bail: Capital Cases | Life Imp. | Others | Proof and Presumption Clause | Excessiveness Prohibition |
|---|---|---|---|---|---|
| West Virginia | B | B | — | — | A |
| Wisconsin | A | — | AB[2] | — | AB[4] |
| Wyoming | A | B | — | A | A |
| Federal | B | — | B[2] | — | A |

[1]In Alabama and Maine, there are slight variations of the traditional constitutional exclusion of bail from persons in capital cases. In Alabama, in addition to persons charged with capital crimes, persons charged with crimes involving "serious injury likely to produce death" are denied bail. ALA. CONST. Art. I, § 16. In Maine, the constitution denies bail to persons charged with "any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution." ME. CONST. Art. I, § 9.

[2]For a discussion of the "other" categories of defendants beyond those capitally charged or eligible for sentences of life imprisonment, see Table 6 in the Appendix.

[3]Alabama, California, Georgia, South Carolina, Vermont, and Virginia have employed language that varies from the traditional instruction that bail may be denied in capital cases "when the proof is evident and the presumption is great." *See* ALA. CONST. Art. I, § 16; CAL. CONST. Art. I, § 12; GA. CODE § 27-901 (1983); S.C. CONST. Art. I, § 15; VT. CONST. Art. II, § 40; VA. CODE § 19.2-120 (1982).

[4]The excessiveness prohibition in the Constitution (eighth amendment) applies to the District of Columbia. Most states have adopted the wording of the Constitution literally. Illinois has no excessiveness prohibition. The Florida constitution states that defendants are "entitled to release on reasonable bail with sufficient surety." *See* FLA. CONST. Art. I, § 14. In Hawaii, in addition to the traditional constitutional prohibition against excessiveness, HAWAII REV. STAT. § 804-9 states that bail "should be so determined as not to suffer the wealthy to escape by the payment of pecuniary penalty, nor to render the privilege useless to the poor." In Tennessee (TENN. CODE ANN. § 40-11-17), the law provides additionally that "[s]uch bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required."

## TABLE 2

### CRITERIA USED IN BAIL AND PRETRIAL RELEASE DECISIONS, BY JURISDICTION, AS OF DECEMBER 1984*

| DECISION CRITERIA | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Conn. | Del. | D.C. | Fla. | Ga. | Hawaii | Idaho | Ill. | Ind. | Iowa | Kan. | Ky. | La. | Me. | Md. | Mass. | Mich. | Minn. | Miss. | Mo. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Legal factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Nature of charge | B | B | AB | B | B | AB | | B | B | | B | B | | AB | B | B | B | B | B | B | | B | AB | B | | B |
| Probability of conviction/weight of evidence | B | B | B | B | | B | | B | B | | | | | | B | | B | B | B | | | | A | B | | B |
| Possible penalty | B | | B | B | | B | | | | | | B | | | B | | | | | | | B | | | | |
| Prior criminal record | B | B | AB | B | B | B | | B | B | B | | | | B | B | B | B | B | B | B | | B | AB | B | | B |
| Prior arrests | | | B | | | | | | | | | | | | | | | | | | | | | | | |
| Prior record of court appearance (failure to appear) | | B | B | B | | B | | B | B | B | | | | B | B | B | B | | | B | | B | | B | | B |
| On probation or parole when presently charged | | | | | | | | | B | | | B | | | | | | | | B | | B | A | | | |
| On pretrial release for a previous charge | | | A | B | | AB | | | B | | | B | | | | | | | | B | B | B | A | | | |
| **Community ties factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| General community ties | | | | B | | B | | | | | | | | | B | | | | | | | | | | | |
| Age | B | | | | | | | | | | | | | | | | | | | | | | | | | |
| Residence, length of residence | B | B | B | B | | B | | B | B | B | | | | | B | B | B | | | B | | B | | B | | B |
| Family ties | B | B | B | B | | B | | B | B | B | | | | | B | B | B | | | B | | B | | B | | B |
| Employment, employment history | B | B | B | B | | B | | B | B | B | | | | | B | B | B | | | B | | B | | B | | B |
| Defendant's financial resources | B | B | B | B | | B | | B | B | B | | B | | B | B | B | B | B | B | B | | B | B | B | | B |

* Source: Adapted and revised from J. GOLDKAMP, TWO CLASSES OF ACCUSED (1979). Reprinted by permission.

## TABLE 2 (CONT'D)

### CRITERIA USED IN BAIL AND PRETRIAL RELEASE DECISIONS, BY JURISDICTION, AS OF DECEMBER 1984

| DECISION CRITERIA | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Conn. | Del. | D.C. | Fla. | Ga. | Hawaii | Idaho | Ill. | Ind. | Iowa | Kan. | Ky. | La. | Me. | Md. | Mass. | Mich. | Minn. | Miss. | Mo. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Community ties factors (cont'd)** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Character | | B | B | B | | B | | B | B | B | | | | | B | B | B | B | | | | B | | B | | B |
| Reputation | | | | B | | B | | | | | | | | | B | | | B | | | | B | | | | |
| Mental condition | | B | B | | | | | B | B | B | | | | | B | B | B | | | | | B | | B | | B |
| Past or present conduct | | | | | | | | | B | B | | | | B | | | | B | | | | | B | | | |
| Persons to assist accused in attending court | | | | B | | B | | | | | | | | | | | | | | | | | | | | |
| Addiction to drugs or alcohol | | | | | | | | | B | | | | | | | | | | | | | B | | | | |
| **Other factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Consultation with victim | | | | | | | | | | B | | | | | | | | | | | | | | | | |
| Likelihood of violation of law if released | | | | B | | B | | | | AB | | B | | | | | | B | | | | | | | | |
| General risk of nonappearance | | | | B | B | B | | B | | B | | | | B | B | | | B | B | B | B | B | B | B | | |
| Nature of danger posed | | | | | | | | | | B | | | | | | | | | | | | | | | | |
| "Not oppressive" but "sufficient" bail | | | | | | B | | | | | | | | B | | | | B | | | | | | | | |
| Policy against unnecessary detension | | | | | | | | B | | | | | | | | | B | | | | | | | | | |
| Source of funds | | | | | | | | | | B | | | | | | | | | | | | | | | | |

## TABLE 2 (CONT'D)

### CRITERIA USED IN BAIL AND PRETRIAL RELEASE DECISIONS, BY JURISDICTION, AS OF DECEMBER 1984

| DECISION CRITERIA | Mont. | Neb. | Nev. | N.H. | N.J. | N.M. | N.Y. | N.C. | N.D. | Ohio | Okla. | Or. | Pa. | R.I. | S.C. | S.D. | Tenn. | Tex. | Utah | Vt. | Va. | Wash. | W.Va. | Wis. | Wyo. | Federal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Legal factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Nature of charge | B | B | B | | | B | B | B | B | B | | B | B | | B | B | B | B | B | B | B | B | B | AB | B | B[1] |
| Probability of conviction/weight of evidence | | | | | | B | B | B | B | B | | | B | | | B | B | B | | B | B | | | B | B | B |
| Possible penalty | | | | | | | B | | | | | | B | | | | B | | | | | | | B | | |
| Prior criminal record | B | B | B | | | B | B | B | B | B | | B | B | | B | B | B | B | | B | B | B | B | AB | B | B |
| Prior arrests | | | | B | | | | | | | | | | | | | | | | | | | | | | |
| Prior record of court appearance (failure to appear) | | B | | | | B | B | B | B | B | | B | B | | B | B | | | | B | B | B | | B | B | B |
| On probation or parole when presently charged | | | | | | | | | | | | | | | | | | | AB | | | | | B | | B |
| On pretrial release for a previous charge | | | B | | | | | | | | | | | | | | | B | AB | | | | | B | | |
| **Community ties factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| General community ties | | | | | B | | | | | | | B | B | | | | B | | | | | B | | | | B |
| Age | | | | | | | | | | | | | B | | | | | | | | | | | | | |
| Residence, length of residence | | B | | B | B | B | B | B | B | B | | B | B | | B | B | B | | | B | B | B | | B | B | |
| Family ties | B | B | | B | B | B | B | B | B | B | | B | B | | B | B | B | | | B | B | B | | | B | B |
| Employment, employment history | B | B | | B | B | B | B | B | B | B | | B | B | | B | B | B | | | B | B | B | | | B | B |
| Defendant's financial resources | B | B | B | | | B | B | B | B | B | | B | B | | B | B | B | B | | B | B | B | B | B | B | B[2] |
| Character | | B | B | B | | B | B | B | B | B | | | B | | B | B | B | | | B | B | B | | B | B | B |

## TABLE 2 (CONT'D)

### CRITERIA USED IN BAIL AND PRETRIAL RELEASE DECISIONS, BY JURISDICTION, AS OF DECEMBER 1984

| DECISION CRITERIA | Mont. | Neb. | Nev. | N.H. | N.J. | N.M. | N.Y. | N.C. | N.D. | Ohio | Okla. | Or. | Pa. | R.I. | S.C. | S.D. | Tenn. | Tex. | Utah | Vt. | Va. | Wash. | W.Va. | Wis. | Wyo. | Federal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Reputation | | | | | B | | B | | | | | | B | | | | B | | | | | B | | B | | |
| **Community ties factors (cont'd)** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Mental condition | | B | | B | | B | B | B | B | B | | | B | | B | B | B | | | B | | B | | | B | B |
| Past or present conduct | | | | | | | | | | B | | | | | | | | | | | | | | | | B |
| Persons to assist accused in attending court | | | | | | | | | | | | B | | | | | B | | | | | B | | | | |
| Addiction to drugs or alcohol | | | | | | B | | B | | | | | B | | | | | | | | | | | | | B |
| Physical condition | | | | | | | | | | | | | | | | | | | | | | | | | | B |
| **Other factors:** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Consultation with victim | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Likelihood of violation of law if released | | | | | | B | | | | | | B | | | | | | | | | | B | | | | |
| General risk of nonappearance | | | | B | B | B | | B | | | | B | B | | | B | B | B | | | B | | B | | | |
| Nature of danger posed | | | | | | | | | | | | | | | | | | | | | | | | | | B |
| "Not oppressive" but "sufficient" bail | B | | | | | | | | | | | | | | | | | B | | | | | | | | |
| Policy against unnecessary detention | | | | | B | | | | B | | | | | | | | | | | | | | | B | | B |
| Source of funds | | | | | | | | | | | | | | | | | | | | | | | | | | B |

[1]Under 18 U.S.C. § 3142(g)(1) (Supp. 1985), the nature of the charge includes a specific concern for whether the crime alleged is a "crime of violence" or "involves a narcotic drug."

[2]Under 18 U.S.C. § 3142 (Supp. 1985), consideration of a defendant's financial resources has been dropped, although the judge is instructed to investigate the nature and source of the property to be used if financial or property bail is to be required as a condition of release.

# TABLE 3

## POLICIES REGARDING THE USE OF ROR AND CONDITIONAL RELEASE IN THE UNITED STATES, DECEMBER, 1984

[*Note:* x = Found in law of indicated jurisdiction. Not necessarily danger-oriented. D = Condition applies to danger uses]

x / D = Indicates both applications noted

| | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Conn. | Del. | D.C. | Fla. | Ga. | Hawaii | Idaho | Ill. | Ind. | Iowa | Kan. | Ky. | La. | Me. | Md. | Mass. | Mich. | Minn. | Miss. | Mo. | Mont. | Neb. | Nev. | N.H. | N.J. | N.M. | N.Y. | N.C. | N.D. | Ohio | Okla. | Or. | Pa. | R.I. | S.C. | S.D. | Tenn. | Tex. | Utah | Vt. | Va. | Wash. | W.Va. | Wis. | Wyo. | Fed. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **ROR Policy** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Presumption favoring ROR | | x | x | | | | | x | x | | | | | | | x | | x | | x | | | x | x | | | | x | | | | x | | x | x | x | | x | x | | x | | | | | | | | |
| ROR mentioned as option | x | | | x | x | x | | | | | | x | | x | x | | x | | x | | x | x | | | | x | x | | x | x | x | x | | | | | | | | | | | | | x | | x | x | x |
| **Conditional Release Policy**[1] | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Release under least onerous conditions | | | x | x | | | x | | x | | | | | | | x | | | | x | | | | x | | | | x | | | | x | | x | x | | | x | | | | x | | | | | | x | x |
| Conditions for danger specified separately | | | | x | | | | | | | | x | | | | | | | | | | | | | | | | | | | | x | | | | | | | | | | | | | | | | | | | |
| **Conditions to be Considered** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Unsecured bond | | | x | | | | | x | x | x | | | | | | | | | | | | | | | | | | | | | | | x | | | | | | | | | | | | | x | | x | | |
| Additional conditions (unspecified) | | | | | | x | | | | | | | | | | | | | | | | | | | | | | | | x | | | | | | | | | | | | | | | | | | | | | |
| Custody of pretrial services (PTS), other public agency | | | | | | | | | | | | | | | | | | | | x | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Custody of third party or organization | | x | x | x | | x | | x | x | x | | | | | x | x | x | x | | x | | | | x | | x | | x | | | | x | | x | x | x | | | | | | x | x | x | | | x | x | x | x |
| Regular reporting to law enforcement, PTS or other agency; supervision by probation | | | x | D | x | | | x | | | | D | | x D | x | | x | | | | | | | | | x | | | | | | x | | | | | | | | | | x | | | | | | | x |
| Restrict residence, movement, travel | | x | x | x D | x | | | x | x | x | | D | | x D | x | x | x | x | | x | | | | x | | x | | x | | | | x | | x | x | x | | x | | | | x | x | x | | | x | x | x | x |
| Restrict activities (e.g., curfew) | | | | x | | | | x | | | | | | x D | x | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Restrict associations, contact with witnesses, victims, etc. | | x | x | x D | | | | | | x | | D | | x D | x | x | x | x | | x | | | | x | | x | | x | | | | x | | x | x | x | | x | | | | x | x | x | | | x | x | x | x |
| Prohibit weapon | | | x | D | | | | | | | | D | | x D | | | | | | | | | | | | | | | | | | D | | | | | | | | | | | | | | | | | x | | x |
| Prohibit alcohol, drugs | | | x | D | | | | x | | | | D | | x D | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | x |

## TABLE 3 (CONT'D)

### POLICIES REGARDING THE USE OF ROR AND CONDITIONAL RELEASE IN THE UNITED STATES, DECEMBER, 1984

[*Note:* x = Found in law of indicated jurisdiction. Not necessarily danger-oriented. D = Condition applies to danger uses]

x / D = Indicates both applications noted

| | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Conn. | Del. | D.C. | Fla. | Ga. | Hawaii | Idaho | Ill. | Ind. | Iowa | Kan. | Ky. | La. | Me. | Md. | Mass. | Mich. | Minn. | Miss. | Mo. | Mont. | Neb. | Nev. | N.H. | N.J. | N.M. | N.Y. | N.C. | N.D. | Ohio | Okla. | Or. | Pa. | R.I. | S.C. | S.D. | Tenn. | Tex. | Utah | Vt. | Va. | Wash. | W.Va. | Wis. | Wyo. | Fed. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Conditions to be Considered (cont'd)** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Maintain employment or seek it (support family) | | | | | x | | | x | | | | | | x D | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | x |
| Education/vocational program | | | | | | | | | | | | | | x D | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | x |
| Social Services (drug, alcohol, psychological, medical) | | | | | | | | x | | | | | | x D | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | x |
| Deposit bail | | x | | x | | -[3] | | | x | x | | | | x D | x | x | | x | | x[4] | | | | | | x | | x | | | x | x | | x | x | | | | | | | | | | | x | | x | x |
| Cash or solvent sureties | | x | x | x | | | | | x | x | | | | | x | x | | x | | | | | | x | | x | | x | | | | x | | | | | | | | | | | | | | x | | x | x | x |
| Part-time detention | | x | x | x | | | | | x | | | | | | | | x | | | x | | | | x | | x | | x | | | | x | | | x | x | | | | | | | | | | | x | | x | x | x |
| Detention (No conditions of release will suffice | | | x | x | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Any other relevant condition | | x | x | x | | | | | x | | | | | | x | | x | | | x | | | | | | | | | | | | D | | | | | | | | | | | | | | | | x | | x | x | x |
| Other: Miscellaneous | | x[2] | | | | | | | x | | | | | | | | | | | | | | | | | | | | | | | | x[5] | | | | | | | | | | | | | | | | | | |
| Least Onerous Conditions | | | x | x | | | x | | x | | | | | | | | x | | | | | | | x | | | | x | | | | | | | | | | | | | | | | | | | | | | | | |

[1]Classification of a jurisdiction as promulgating release under the least onerous condition is based on existence of provisions either explicitly stating the principle or implicitly prioritizing the use of conditions of release. Classification of conditions in this table does not include provisions discussing "mandatory" conditions of release.

[2]Alaska law separately discusses conditions of release for persons charged in domestic violence cases. ALASKA STAT. § 12.30.025 (1962).

[3]Not only does Colorado law not authorize deposite bail, the Colorado Supreme Court has ruled that judges may not in their discretion employ it as an option. People v. District Court, 196 Colo. 116, 581 P.2d 300 (1978).

[4]Under Maine Law, the deposit bail plan requires defendants to post an amount not to exceed fifty percent of the full amount with the court. ME. REV. STAT. tit. 15, § 942 (2)(c).

[5]Under New York law, conditions of release only are discussed for domestic assault cases. N.Y. CRIM. PROC. LAW § 530.12-.13 (McKinney 1984).

## TABLE 4

### REFERENCES TO DANGER/PUBLIC SAFETY CONCERNS IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| | DANGER REFERENCE | JURISDICTIONS WITH REFERENCE |
|---|---|---|
| I. | General Danger | |
| | Threat to society | Florida |
| | Safety of the community | Delaware, Florida |
| | Danger to the public | Vermont |
| | Inimical to public safety | Minnesota |
| | Protect the public from the defendant | Illinois |
| | Safety of any other person or the community | District of Columbia, Federal |
| | Danger to any other person or the community | South Dakota, Alaska, Maryland, Massachusetts, Michigan |
| | Threat to any other person or the community or property within the community | Georgia |
| | Danger . . . to himself and the person of others | Maryland |
| | Defendant's physical condition is such to jeopardize his safety or that of others | Washington |
| | Physical or mental condition will jeopardize neither himself nor the public | New Hampshire |
| | Physical, mental or emotional condition . . . danger to himself or others | Ohio |
| II. | Greater General Danger | |
| | Public would be placed in significant peril | Colorado |
| | Unreasonable danger to the community will result | South Carolina |
| | Protect the community against unreasonable danger from criminal defendant | Florida |
| | Unreasonable danger to himself or the public | Virginia |
| | Substantial danger to any other person or to the community | Arizona |
| III. | Danger of Serious Crime | |
| | Will commit a serious crime | Hawaii, New Mexico, North Carolina |
| | Substantial danger that the defendant will commit a serious crime | Washington |

## TABLE 4 (CONT'D)

### REFERENCES TO DANGER/PUBLIC SAFETY CONCERNS IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| | DANGER REFERENCE | JURISDICTIONS WITH REFERENCE |
|---|---|---|
| IV. | Danger of Bodily Harm | |
| | Protect the community from risk of physical harm to persons | Florida |
| | Danger of injury to any person | North Carolina |
| | Prevent imminent bodily harm to accused or another | Colorado |
| | Threat of immediate physical harm to himself or others | Pennsylvania |
| | Would result in great bodily harm to others | California |
| | Threat of bodily harm to arrested person or another | Minnesota |
| | Protect members of the community from serious bodily harm | Wisconsin |
| V. | Intimidation or Harm of Witnesses | |
| | Seek to intimidate witnesses | Hawaii, New Mexico, North Carolina, Washington |
| | Prevent intimidation of witnesses | Wisconsin |
| | Risk of intimidating witnesses | Georgia |
| | Threats made against victims or witnesses | Alabama |
| | Person threatens, injures, intimidates . . . prospective witness or juror | District of Columbia, Federal |
| | Will create a threat of bodily harm to another | Minnesota |
| | Has threatened another with bodily harm | California |
| VI. | Interfering with the Administration Justice | |
| | Assure the integrity of the judicial process | Florida |
| | Interfere with the orderly administration of justice | Hawaii, New Mexico, Washington, Illinois |
| | Otherwise obstruct the administration of justice | Georgia, Federal |

## TABLE 5

### KIND OF PROVISION CONTAINING REFERENCE TO DANGER CONCERNS IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

[Note: A = provision found in constitution
B = provision found in statutes or court rules]

| Jurisdiction | KINDS OF PROVISIONS: Limitation on right to bail or release | Discussion of purpose for (ROR) conditions of release | Discussion of factors to be weighed in fixing bail or conditions |
|---|---|---|---|
| Alabama | | | B |
| Alaska | | B | |
| Arizona | AB | | |
| Arkansas | B | | B |
| California | A | | |
| Colorado | A | B | B |
| Delaware | | B | B |
| District of Columbia | B | B | B |
| Florida | AB | AB | AB |
| Georgia | B | | |
| Hawaii | B | B | |
| Illinois | B | B | |
| Indiana | AB | | |
| Kentucky | | | B |
| Maryland | B | B | |
| Massachusetts | B | | |
| Michigan | A | | |
| Minnesota | B | B | |
| Nebraska | A | | |
| Nevada | AB | | |
| New Hampshire | | B | |
| New Mexico | | B | |
| New York | AB | | |
| North Carolina | | B | |
| Ohio | | B | |
| Oregon | | | B |
| Pennsylvania | | B | |
| South Carolina | | B | |
| South Dakota | | B | |
| Texas | A | | |
| Utah | A | | |
| Vermont | | B | |
| Virginia | B | | |
| Washington | | B | |
| Wisconsin | B | B | |
| Federal | B | B | B |

# TABLE 6

## ELIGIBILITY CRITERIA FOR RESTRICTIVE BAIL AND PRETRIAL DETENTION BASED ON DANGER IN LAWS IN THE UNITED STATES, DECEMBER, 1984

| ELIGIBILITY CRITERIA | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Del. | D.C. | Fla. | Ga. | Hawaii | Ill. | Ind. | Ky. | Md. | Mass. | Mich. | Minn. | Neb. | Nev. | N.H. | N.M. | N.Y. | N.C. | Ohio | Or. | Pa. | S.C. | S.D. | Tex. | Utah | Vt. | Va. | Wash. | Wis. | Fed. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. Clause limiting right to bail | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| - excludes capital offenses/murder | x | x | x | x | x | x | x | x | x | x | | x | x | x | | x | x | x | x | x | | x | x | x | x | x | x | x | x | x | x | | x | x | x |
| - excludes treason | | | | | | | | | | | | | x | | | | x | | x | | | | | | | | | | | | | | | | | |
| - excludes life imprisonment cases | | | | | | | | | x | | x | x | | | x | | | | | x | | | | | | x | | x | | | | x | | x | x |
| 2. Eligibility based on expanded list of excludable offenses | | | | | | | | | | x | | | | | | | x | | x | | | | | | | | | | | | | | | x | x |
| 3. Eligibility based on nature of current charge: other | x | x | x | | | | | | | | | | | | | | | x | | | | | x | | | | | | | x | | | | | x |
| 4. Eligibility based on current serious offense and being on pretrial release for earlier serious offense | | | x | x | | x | | x | x | x | x | x | | | x | x | x | | | x | | | | | | | | | x | x | | | | x |
| 5. Eligibility based on current serious offense and past conviction(s) for serious offense | | | | | | x | | x | x | x | x | | | | | | x | | | | | | x | | | | | | | x | | | | x | x |
| 6. Eligibility based on current serious offense and being on probation, parole or MR for previous serious offense | | | | | | x | | x | x | x | x | | x | | | | x | | | | | | | | | | | | | x | | | | | x |
| 7. Eligibility based on assessment of danger | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| - in conjunction with other criteria | | | x | | x | | | | x | x | | | | | | x | x | | | | | x | | | | | | | | | | | | | x |
| - as sole criterion | | | | x | | | | | | | x | | | | | | | | | | | | | | | | | | | | | | x | | | x |
| - as reason for more onerous conditions (which may result in detention) (or for no conditions) | | x | | | | | x | x | x | | | x | | x | | | | x | | | x | | | x | x | x | x | x | x | | | x | | | x |
| 8. Eligibility based on current serious offense and assessment of danger (incl. "pattern") | | | x | | x | | x | x | x | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 9. Eligibility based on current serious offense and actual or likely threat to witnesses, etc. | x | | | | x | | | x | x | | | | | | | | | | | | | | | | | | | | | | | | | | | x |
| 10. Eligibility based on current serious offense and being an addict | | | | | | | | x | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

## TABLE 7

### FORMULAS PERMITTING DETENTION BASED ON A DEFENDANT'S CURRENT CHARGE AND PAST CRIMINAL RECORD IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| STATE | DEFINITION OF CURRENT CHARGE | DEFINITION OF PRIOR RECORD |
|---|---|---|
| Colorado | crime of violence[1] | 2 felony convictions or 1 conviction: crime of violence |
| District of Columbia | (a) crime of violence[2]<br>(b) dangerous crime[3] | 1 conviction: crime of violence (within 10 years) past pattern of behavior[4] |
| Florida | dangerous crime[5] | (a) 1 conviction with death or life sentence<br>(b) 1 conviction within ten years of dangerous crime |
| Georgia | specified felonies[6] | 1 conviction: specified felonies |
| Hawaii | serious crime[7] | 1 conviction: serious crime (within 10 years) |
| Michigan | violent felony[8] | 2 convictions: violent felony |
| New York | any felony (and)<br>Class A felony[9] (or) | 2 convictions: any felonies |
| Texas | any felony | 2 convictions: felony |
| Wisconsin | felony: serious bodily harm | 1 conviction: felony with serious bodily harm |

## TABLE 7 (CONT'D)

### FORMULAS PERMITTING DETENTION BASED ON A DEFENDANT'S CURRENT CHANGE AND PAST CRIMINAL RECORD IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| | | |
|---|---|---|
| Federal | (a) crime of violence[10]<br>(b) life or death punishable<br>(c) drug offense with 10 year maximum<br>(d) any felony with 2 or more priors | conviction or imprisonment within 5 years for listed offenses |

[1] In Colorado crimes of violence are defined under COLO. REV. STAT. § 16-11-309(2) (1973).

[2] Under D.C. CODE § 23-1331(4) (1981), "the term 'crime of violence' means murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon. . ."

[3] Under the same section of the D.C. CODE § 23-1331(3), a "dangerous crime" is defined as (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering the attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug . . . if the offense is punishable by imprisonment for more than one year."

[4] No definition is provided under District of Columbia for "past pattern of behavior."

[5] Under FLA. STAT. § 907.041(4)(a) (1985) "dangerous crimes" include arson, aggravated assault, aggravated battery, illegal use of explosives, child abuse, hijacking, kidnapping, homicide, manslaughter, sexual battery, robbery, and burglary of a dwelling.

[6] The Georgia law, GA. CODE § 27-901 (1980), specifies as the following felonies: murder, rape, armed robbery, kidnapping, arson, burglary, aricraft hijacking, drug-related offenses and aggravated assault.

[7] In HAWAII REV. STAT. § 804-3 (1976), "serious crime" is defined as a "class A or B felony, except forgery in the first degree and failing to render aid."

[8] Under MICH. CONST. art. I, § 15, " 'violent felony' means a felony, an element of which involves a violent act or threat of a violent act against any other person."

[9] In New York, N.Y. [CRIM. PROC.] LAW 530.20 (McKinney 1984), Class A felony refers to an offense punishable by death.

[10] "Crime of violence" is defined under 18 U.S.C. § 3150 as an offense involving "use, attempted use, or threatened use of physical force against the person or property of another or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

## TABLE 8

### ASSESSMENT OF DANGER RISK AS A CRITERION FOR PRETRIAL DETENTION OR MORE ONEROUS CONDITIONS OF RELEASE IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| JURISDICTION | ASSESSMENT OF DANGER RISK |
|---|---|
| 1. Alaska | ROR: "unless the officer determines that the release of the person . . . will pose a danger" |
| 2. Arizona | Person charged with felony offenses detained: "if the person . . . poses a substantial danger to the community and no condition or combination of conditions will reasonably assure the safety. . . ." |
| 3. Arkansas | a) In pretrial release inquiry: "the possibility of violations of law if the defendant is released without restriction. . . ."<br>b) In setting conditions: "if there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses. . . ." |
| 4. California | Detention: if the court finds that there is a substantial likelihood the person's release would result in great bodily harm |
| 4. Colorado | a) ROR: "unless . . . the continued detention or posting of a surety is necessary to prevent imminent bodily harm"<br>b) In fixing financial bail: "factors indicating the possibility of violations of law if released . . . or . . . the likelihood that there will be an intimidation or harassment of possible witnesses. . . ."<br>c) Detention: if found "that the public would be placed in significant peril." |
| 6. Delaware | a) ROR: "consistent with . . . the safety of the community"<br>b) Bail generally: Such . . . as . . . will assure the safety of the community." |
| 7. D.C. | a) ROR: "unless . . . will not . . . reasonably assure the safety of any other person or the community"<br>b) Detention: if "there is no condition or combination of conditions which will reasonably assure the safety of the community" |
| 8. Florida | a) Detention: "if no condition of release can reasonably protect the community from risk of physical harm to persons. . . ."<br>b) Bail or other conditions: depending on "the nature and probability of danger which the defendant's release poses to the community" |
| 9. Georgia | Detained defendants may be released: if "poses no significant threat or danger to any person or to the community or to any property . . .; no significant risk of committing any felony pending trial . . .; . . . poses no significant risk of intimidating witnesses. . . ." |
| 10. Hawaii | Assign conditions or deny release: if "there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses or will otherwise unlawfully interfere with the orderly administration of justice" |

## TABLE 8 (CONT'D)

## ASSESSMENT OF DANGER RISK AS A CRITERION FOR PRETRIAL DETENTION OR MORE ONEROUS CONDITIONS OF RELEASE IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| JURISDICTION | ASSESSMENT OF DANGER RISK |
|---|---|
| 11. Illinois | Additional conditions: "if . . . court finds that such conditions are reasonably necessary to . . . protect the public from the defendant. . . ." |
| 12. Kentucky | In fixing bail: judge should be "considerate of past criminal acts and the reasonably anticipated conduct of the defendant if released. . . ." |
| 13. Massachusetts | Revocation of pretrial release (60 days detention): "if court determines . . . prisoner will seriously endanger any person or the community. . . ." |
| 14. Michigan | Detained defendants may be released: if "the court finds by clear and convincing evidence that the defendant is not likely . . . to pose a danger to any other person. . . ." |
| 15. Minnesota | a) Additional conditions: if "such release will be inimical to public safety"<br>b) Domestic violence, conditions or detention: if release "will create a threat of bodily harm to the arrested person or another" |
| 16. New Hampshire | ROR: when "defendant is of such condition, both physical and mental, that his release will jeopardize neither himself nor the public. . . ." |
| 17. New Mexico | Additional conditions: "upon a showing that there exists a danger that the defendant will commit a serious crime, will seek to intimidate witnesses. . . ." |
| 18. North Carolina | a) Conditions: if release of defendant "will pose a danger of injury . . . is likely to result in the destruction of evidence, subornation of perjury, or intimidation of potential witnesses. . . ."<br>b) Domestic violence, additional conditions or detention: ". . . The immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in the intimidation of the victim. . . ." |
| 19. Ohio | ROR in misdemeanors: "a person need not be released on his own recognizance . . . if his physical, mental or emotional condition appears to be such that he may pose a danger to himself or to others if released immediately. . . ." |
| 20. Oregon | Release criteria: "any facts indicating the possibility of violations of law. . . ." |
| 21. Pennsylvania | ROR for misdemeanors: when "the defendant poses no threat of immediate physical harm to himself or others" |
| 22. South Carolina | ROR: "unless the court determines in its discretion that . . . unreasonable danger to the community will result" |
| 23. South Dakota | ROR: "unless the court determines in the exercise of his discretion . . . that the defendant will pose a danger to any other person or to the community. . . ." |

## TABLE 8 (CONT'D)

### ASSESSMENT OF DANGER RISK AS A CRITERION FOR PRETRIAL DETENTION OR MORE ONEROUS CONDITIONS OF RELEASE IN BAIL AND PRETRIAL DETENTION LAWS IN THE UNITED STATES, DECEMBER, 1984

| JURISDICTION | ASSESSMENT OF DANGER RISK |
|---|---|
| 24. Vermont | ROR: "unless the court determines in the exercise of his discretion . . . that the defendant will pose a danger to the public. . . ." |
| 25. Virginia | May be detained: if "there is probable cause to believe that . . . his liberty will constitute an unreasonable danger to himself and the public" |
| 26. Washington | Additional conditions: "upon a showing that there exists a substantial danger that the defendant will commit a serious crime or that the defendant's condition is such to jeopardize his safety or that of others or that he will seek to intimidate witnesses. . . ." |

# TABLE 9

## DUE PROCESS FEATURES OF LAWS PERMITTING RESTRICTIVE BAIL OR PRETRIAL DETENTION BASED ON PRETRIAL DANGER CONCERNS IN THE UNITED STATES, DECEMBER, 1984

| DUE PROCESS FEATURES | Ala. | Alaska | Ariz. | Ark. | Cal. | Colo. | Del. | D.C. | Fla. | Ga. | Hawaii | Ill. | Ind. | Ky. | Md. | Mass. | Mich. | Minn. | Neb. | Nev. | N.H. | N.M. | N.Y. | N.C. | Ohio | Or. | Pa. | S.C. | S.D. | Tex. | Utah | Vt. | Va. | Wash. | Wis. | Federal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **I. Detention decision** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Detention hearing provided (stated or implied) | | | x | x | | x | | x | x | x | | x | | | (x) | (x) | x | | | | | | | | | | | | x | x | | | | x | x |
| Adversarial rights (lawyer, present and cross examine, etc.) | | | x | | | | | x | x | | | | | | | | | | | | | | | | | | | | | | | | | x | x |
| Burden of proof: detention for danger | | | x | | | x | | x | x | x | | x | | | | x | x | | | | | x | | | | | | | x | x | | | x | x | x |
| Rules of evidence at detention or conditions stage | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| - same as trial | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | x | |
| - not same as trial | | | x | | | | | x | x | | | | | | | | | | | | | | | x | | | | | | | | | | | | x |
| Burden at detention or conditions hearing borne by: | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| - state | | x | x | | | | | x | x | | | x | | | | | | | | | | | | | | | | | | | | x | | x | x | |
| - defendant | | | | | | | | | | x | | | | | (x) | | | | | | x | | | | | | | | | | | | | | | |
| Written reasons for detention finding required | | | | | | | | x | x | | | | | | | (x) | | | | | | | | | | | | | | | | | | | | x |
| Role for prosecutor specified | | x | x | x | | x | | x | x | x | | x | | | | | | | | | | | x | | | x | | | | | | x | | | x |
| **II. Additional conditions/detention as a result of conditions** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Written statement of conditions required | | x | x | x | | | | x | | | | | | x | x | | | | x | | | x | | x | x | x | x | x | x | | x | | x | | x |
| Reasons for conditions or for not altering required | | x | | | x | | x | | | | | | | x | x† | | x† | | x | | | x | | | | | | x | | | x | | | x | |
| Review or hearing to review custody | | x | x | | x | x | | x | x | | | | | x | | | | | x | | | x | | | | x | | x | | x | | | x | x | x |
| Appeals of conditions of release | | x | | | | | | | | | | | | | | x | | | | | | | | | | | | | | | | x | | | | |
| Expedited calendar for detained | x | | x | | | (x) | | x | x | | | x | | | | x | x | | | | | | | | | | | | | | | | | x | | |

( ) Denotes application to bail revocation proceedings.

† Denotes requirement that written reasons be provided when ROR is not assigned.