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I. INTRODUCTION

When Alexis de Toqueville surveyed America in 1832, he found our bail system:

> . . . hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce, even in a civil case; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. . . . Nothing can be more aristocratic than this system of legislation.[1]

This abhorrent characteristic of de Toqueville's day remains as much a part of our jurisprudence as when the narrator singled it out for criticism. Nearly one hundred and fifty years later, the prevailing method of pretrial release in this country remains mired in the concept of money bail—a concept which dictates that inability to meet standard financial conditions of release results in pretrial incarceration. It stands as a monumental injustice that during the past twenty years the United States Supreme Court never subjected to constitutional scrutiny the apparent inequality of money bail.[2] Although during this time the Court enunciated various substantive and procedural rights of the accused, it refused to vindicate the right to pretrial freedom of eligible accused indigents.[3]

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1. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 45 (1945).

2. These two decades comprised generally what has come to be known as the "Warren Court" era, a period known for its accent upon the rights of the individual. Nevertheless, the closest the Court ever came to finding the requirement of financial bail a denial of equal protection was favorable dicta in an opinion by Justice Douglas in Bandy v. United States, 82 S. Ct. 11, 12 (Douglas, Circuit Justice, 1953): "Can an indigent be denied freedom where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"

3. During the past two decades, the Supreme Court afforded indigents various rights, including the right to be provided with transcripts on appeal, appointed counsel at trial and on appeal, and an array of other hitherto unrecognized rights. What has been popularly termed the "law revolution," *see, e.g.*, M. BELLI, THE LAW REVOLUTION (1968), began with the decision in Griffin v. Illinois, 351 U.S. 12 (1956), holding that a state statute

Furthermore, lest the consequences of pretrial incarceration be forgotten, dismissed, or underestimated, it should be noted that no scant

which conditioned a criminal appeal upon the payment of costs for a trial transcript violated the equal protection clause. *See also* Draper v. Washington, 372 U.S. 487 (1963) (mere summary of trial proceedings—where indigent was not provided complete transcript—is insufficient basis for determining frivolousness of appeal); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958) (dismissal of indigent petitioner's appeal from murder conviction for want of a transcript, which the trial court denied him, contravened fourteenth amendment). *Accord,* Long v. District Court of Iowa, 385 U.S. 192 (1966); McCrary v. Indiana, 364 U.S. 277 (1960). In Lane v. Brown, 372 U.S. 477 (1963), the Court required that transcripts be provided at public expense for indigents taking *coram nobis* appeals. This holding was extended in Roberts v. LaVallee, 389 U.S. 40 (1967), to invalidate, as violative of the equal protection clause, a state statute requiring payment of a fee for a transcript of a preliminary hearing in a criminal case, as applied to deny a transcript to an indigent. Gardner v. California, 393 U.S. 367 (1969), required states to provide an indigent prisoner, filing a new habeas corpus petition in an appellate court, a free transcript of a lower court's habeas hearing when: (1) under state law, the lower court's denial of habeas corpus relief is not appealable; (2) under state law, the new petition in the appellate court must recount what transpired in the lower court; (3) a transcript is available; and (4) there is no suggestion that there exists any adequate substitute for a transcript. Finally, in Williams v. Oklahoma, 395 U.S. 458 (1969), the Court announced that an indigent prisoner convicted of drunken driving must be provided with a trial transcript at public expense when needed to perfect an appeal to which he is entitled "as a matter of right." *See also* Mayer v. Chicago, 404 U.S. 189 (1971). It is also interesting to note, that the Court held a state may not require reimbursement from a prisoner's institutional earnings for the expense paid by the county for a transcript necessary for the prisoner's in forma pauperis appeal where there exists no similar repayment requirement for one fined, given a suspended sentence, or placed on probation. Rinaldi v. Yeager, 384 U.S. 305 (1966).

A second branch of the law revolution, that dealing with the appointment of counsel, commenced with the Court's holding that in federal court, an indigent must be afforded counsel on appeal when he challenges a certification that the appeal was not taken in good faith. Johnson v. United States, 352 U.S. 565 (1967). *Johnson* was quickly followed by the Court's ruling that a court of appeals may not deny leave to appeal in forma pauperis when the appeal is not frivolous, nor may the court screen for frivolousness an in forma pauperis appeal more vigorously than a paid appeal. Rodriguez v. United States, 395 U.S. 327 (1969); Nowakowski v. Maroney, 386 U.S. 542 (1967); Ellis v. United States, 356 U.S. 674 (1958). *See generally* Coppedge v. United States, 369 U.S. 438 (1962). Then, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court announced that an individual accused of a felony in state court shall enjoy the right to the assistance of counsel at trial, and, if he cannot afford counsel, one will be provided for him. This requirement was made retroactive in Pickelsimer v. Wainwright, 375 U.S. 2 (1963). *See also* Kitchens v. Smith, 401 U.S. 847 (1971). Furthermore, in a decision announced the same day as *Gideon,* the Court required states to provide counsel on appeal for indigent defendants pursuing a statutorily guaranteed appeal. Douglas v. California, 372 U.S. 353 (1963). In Mempa v. Rhay, 389 U.S. 128 (1967), the Court held that the sixth amendment requires that counsel be provided for a felony defendant in a post-trial proceeding for revocation of his probation and imposition of deferred sentencing. *See also* Swenson v. Bosler, 386 U.S. 258 (1967). *See generally* Entsminger v. Iowa, 386 U.S. 748 (1967); Anders v. California, 386 U.S. 738 (1967). Recently, in Argersinger v. Hamlin, 92 S. Ct. 2006 (1972), the Court held that defendants charged with any offense, no matter how petty, which may result in incarceration, have the right to appointment of counsel.

A third branch of the law revolution concerned a state's refusal to allow an indigent into court because he could not afford a filing fee. In Burns v. Ohio, 360 U.S. 252 (1959), the Court found that an indigent's access to the state's highest court may not be foreclosed because he is unable to pay the filing fee. *Accord,* Douglas v. Green, 363 U.S. 192 (1960). *Burns* was expanded in Smith v. Bennett, 365 U.S. 708 (1961), where the Court condemned a state practice of assessing indigent prisoners a filing fee before processing their petition for a writ of habeas corpus.

The law revolution continued in Williams v. Illinois, 399 U.S. 235 (1970), where the Court held that the equal protection clause is violated when an impecunious defendant's denial of a fair opportunity to pay a fine results in his imprisonment in excess of the

number of severe disadvantages inhere in the prospects of the detained accused. He is handicapped in the preparation of his defense because he cannot search for witnesses or even consult with his attorney except under the most strained and embarrassing conditions. His employment is jeopardized as is the economic welfare of his family. Indeed, the detained indigent accused may even be denied the right to vote.[4] Finally, although other prejudicial effects, some psychological, are difficult to measure or even estimate, their existence is hardly subject to question.[5]

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maximum term fixed by the statute for the substantive offense. *See* Morris v. Schoonfield, 399 U.S. 508 (1970). Similarly, in Tate v. Short, 401 U.S. 395 (1971), the Court found a violation of equal protection in the practice of imprisoning indigents incapable of paying a fine, where the only authorized penalty for the substantive offense is a fine.

Moreover, it should be noted that judicial activism on behalf of poor criminal defendants is not without its analogue on the civil side. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (state statutes denying welfare benefits to resident aliens not residing in the United States for a specific number of years violates equal protection clause); Harper v. Virginia Board of Elections, 383 U.S. 363 (1966) (poll tax unconstitutional because it conditions exercise of important rights upon a payment of money). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969). Recently, the Court held that in light of the state monopoly of the means for dissolving marriage, due process prohibits a state from denying, solely because of inability to pay court fees and costs, access to the judicial process to indigents who in good faith seek dissolution of their marriage. Boddie v. Connecticut, 401 U.S. 371 (1971).

4. *See, e.g.*, Goosby v. Osser, 452 F.2d 39 (1971), *cert. granted*, 40 U.S.L.W. 3617 (June 27, 1972), where appellants, untried detainees in Philadelphia jails, brought an action to protect their right to vote. Because they were in jail, they could neither be present at any recognized voter registration office, nor could they qualify as absentee voters in the forthcoming elections. In the prisoners' suit to have the controlling sections of the election code ruled unconstitutional as applied, the court of appeals distinguished between the mechanics of controlling the exercise of the franchise, on the one hand, and its selective distribution, on the other. Relying upon McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969), the court of appeals stated: "Regulations setting forth the mechanics of controlling the exercise of the franchise are measured by the test that 'statutory classifications will be set aside only if no grounds can be conceived to justify them.'" 452 F.2d at 40. Thus, the court found "the Pennsylvania legislative schema requiring that places of registration be open to the public, . . . and that absentee ballots not be made available to those 'confined in a penal or a mental institution,' . . . clearly may not be set aside." 452 F.2d at 40-41. This is not to suggest, however, that *Goosby* was correctly decided, even in light of *McDonald*. As the dissent from the denial of the petition for rehearing points out, in *McDonald* the prisoners' complaint did not suggest that these prisoners had attempted to use alternative means to exercise their franchise. This crucial omission prompted the Supreme Court to note:

> Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.

452 F.2d at 41-42. *Cf.* Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971), where the court stated that untried detainees "retain all the rights of an ordinary citizen except the right to go and come as they please." *Accord*, Hamilton v. Love, 328 F. Supp. 1382 (E.D. Ark. 1971); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971).

5. In addition to the above inequities of pretrial detention for the poor, Professor Foote, in *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1147-48 (1965), notes five "subtle facets of the problem," not susceptible of empirical proof:

> (1) [T]he expectations of law enforcement personnel often prejudge the jail case as a failure, and this prejudgment may color the actual disposition of the case;
>
> (2) [T]he dispair caused by such a dismal outlook may result in the defendant sharing this expectation of failure;

Moreover, consider the futility of this array of devastating hardships when the trial results in an acquittal, fine, or suspended sentence.

This article undertakes an examination of the prevailing methods of pretrial release on the state and federal levels.[6] After assessing the advantages and weaknesses of each of these methods, the article will describe and recommend a rational and realistic scheme of pretrial release. This scheme, combining many of the advantages of the present methods, is designed primarily for the federal level, but is adaptable to state bail systems as well.

II. Pretrial Release in the United States

A. *Traditional Money Bail*

The distinctive pattern of the traditional money bail system commences when an individual suspected of having committed an offense is brought before a judge or magistrate who will determine the accused's eligibility for pretrial release. If the magistrate decides in favor of eligibility, he will designate a sum of money which the accused must pledge to the court in return for his freedom. This figure established by the magistrate purportedly serves neither a punitive purpose nor is it intended to be so exorbitant as to preclude release,[7] but rather is solely to assure the accused's presence at trial.[8]

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(3) [T]he quality of legal representation may be affected by the circumstances and conditions under which consultation must take place, and the infrequency of consultation caused by counsel's concern about his low work-fee ratio;

(4) [T]he defendant's realization that he did not have a hand in choosing his counsel, and that he may be merely a charity case receiving second-class representation under an "adversary" system wherein his public defender counsel is paid by the state;

(5) [B]ecause these aspects of the detention experience breed the impression that "if you have money you get out," they create animosity toward the administration of justice, and reduce the prospects for rehabilitation.

6. Because the article deals with methods of *release*, only instances where an arrest has already occurred are discussed. Thus, beyond the scope of the article are citation or station-house releases, where an officer issues a warrant requiring appearance before an appropriate judicial officer rather than place the alleged offender under arrest. For a discussion of citation releases *see* Note, *Beyond the Bail System: A Proposal for Pretrial Release in California*, 57 Cal. L. Rev. 1112 (1969). For a proposed statute pertaining to citation releases *see* § 3.1, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 39 (1968) [hereinafter referred as Standards Relating to Pretrial Release].

7. Untold numbers of judges and magistrates, however, view oppressive bail as a vehicle for preventive detention. See Standards Relating to Pretrial Release, *supra* note 6, at 6:

Yet it is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release. While the practice is pervasive it is also generally regarded as a distortion of the bail sys-

In an ordinary case, for example, an accused charged with robbery is brought before a magistrate. Generally, the magistrate determines the amount of bail solely upon the basis of the gravity of the offense. That is, a magistrate may set bail for all defendants charged with robbery at ten thousand dollars.[9] In some instances, before setting bail, the magistrate may desire background information concerning the accused's criminal record. If this investigation discloses an existing arrest record, the standard bail for the offense generally increases in proportion to the gravity and number of past offenses. Significantly, however, even when the magistrate obtains the criminal arrest record of the accused, the determination of the amount of bail represents a function of merely two variables: the nature of the offense charged and the criminal record of the accused. Once the magistrate determines that the individual accused of robbery has no prior criminal record, he sets bail at ten thousand dollars. Then, depending upon the financial status of the defendant, three possibilities become available.[10] Where the accused or his family is financially secure, he may execute and present to the court a secured cash or property bond, and obtain immediate pretrial release. When he fulfills all of the conditions of his release, the bond is returned to him and his pretrial release costs him nothing.

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tem. Moreover, in the cases of some defendants deemed highly likely to continue their depredations, the organized criminals, the judge's attempt to protect the public is often thwarted simply because the defendant's "organization" has ample resources with which to meet high bail. . . . So-called "preventive detention" should be dealt with openly and on its own merits, not masked behind manipulations of bail amounts.

See Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 255 (1969) [hereinafter referred to as 1969 *Hearings*]: "As a practical matter, Senator, we have preventive detention. We know that district judges are setting high bail for people they believe to be dangerous, and we know that appellate courts are affirming these bail settings." (testimony of James F. Hewitt, Legal Aid Society of San Francisco). *See also* testimony of former Senator Tydings at 77; testimony of Harry L. Subin, Associate Director, Vera Institute of Justice, New York, at 228-29; testimony of Harry D. Steward, Executive Director, Defenders, Inc., San Diego, at 248.

8. *See, e.g.*, Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

9. The $10,000 figure suggested in the hypothetical is a realistic one in robbery cases. *See* McCabe v. State, 314 F. Supp. 917 (M.D.N.C. 1970), where the court held that $10,000 bail in robbery cases reflects no abuse of discretion lacking a showing that such bail is arbitrary or discriminatory.

10. *See* Wettick & McClellan, *Bail Practices in Allegheny County*, 8 Duq. L. Rev. 32 (1970). On April 1, 1972, the Court of Common Pleas Bail Agency of Allegheny County began operation. It is funded through a federal grant under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701 (1970), with the approval of the Governor's Justice Commission. The agency provides for the posting with the court of bond in the amount of eight percent of the bail set, nominal bond, or a full cash bond. When eight percent bond is posted, all but a $10 processing fee is returned to the defendant upon appearance at trial.

Most defendants, however, even those having some money or property, find themselves financially unable to execute a bond in the full amount of the bail. Such a defendant must choose between remaining in jail to await trial, or seeking the services of an individual unique in all the world to the United States and the Philippines—the bail bondsman.[11] The bondsman, usually a private businessman, must make two determinations before the accused can gain pretrial freedom: whether to do business with the accused, and how much to charge for his services. Therefore, although the court found the accused eligible for bail and established the amount required to secure pretrial release, the ultimate decision of whether to afford the accused that release rests with the bondsman.[12] And, because the bondsman is not an arm of the court, that body exercises virtually no control over these decisions.[13]

Because the bondsman is certain to be a cautious and discriminating businessman, he will be careful to analyze the accused with a scrutiny assuring a handsome return on his investment. If he judges the accused a bad risk, it is unlikely that he will do business with him. Furthermore, although the bondsman usually charges as his fee ten percent of the face amount of the bond,[14] where the bondsman fears the accused represents a potential risk to his investment, he may exact an enormous sum for his services. Once the bondsman decides to deal with the accused, collects his fee, and posts the bond no portion of this fee is refunded when the defendant returns for trial no matter what the disposition of the case; this is the price the accused must pay for his freedom. Essentially then, because the court exercises so little control over the bondsman's decisions, the ironic result of the traditional bail system is that individual citizens have established private organizations

11. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 6, at 61.

12. In Pannel v. United States, 320 F.2d 698 (D.C. Cir. 1963), Judge Wright in a concurring opinion, pointed out the frailties of such a system.

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fee remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Id. at 699.

13. One source of control the court exercises over the rates and other activities of bondsmen results from the requirements of the UNIFORM BAIL BOND ACT. Section 305 of the Act requires bondsmen to file affidavits indicating the nature and amount of any security received for their undertaking. Very few states, however, have adopted this Act. *See, e.g.*, CAL. INS. CODE §§ 1800-21 (West 1972); FLA. STAT. §§ 903.02-.36 (1971); 23 D.C. CODE §§ 601-12 (1961).

14. D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964, at 23 (1964) [hereinafter referred to as FREED & WALD].

whose business is to determine which of those individuals adjudged eligible for pretrial release by the court shall enjoy that freedom.

Additional objectionable aspects of bondsman-controlled bail are deserving of mention. Liability for the full amount of the bond will generally cause the bondsman, who enjoys a private power to arrest his bailee,[15] to embark upon a search for the fugitive accused. Thus, once the bondsman's custodial function becomes retrieval, there results a judicially sanctioned hunt whereby the bondsman seeks to recoup his contractual loss.[16] The embarrassment wrought upon the court as a result of its passive role in this unseemly chase is exacerbated because the bondsman often feels tempted to teach his client a lesson upon apprehension.[17] Interestingly, most bondsmen carry insurance to protect against loss occasioned by absconding defendants. Yet, even these bondsmen may pursue a bail jumper as strenuously as those lacking insurance coverage "in order to maintain a reputation for relentless pursuit as a general psychological deterrent to flight."[18]

Finally, a return to our hypothetical wherein the magistrate set bail at ten thousand dollars demonstrates the effect of that bail determination on the third class of defendants—the poor. Because for them the bondsman's fee is as unobtainable as the face amount of the bond they remain in jail to await trial because their indigency precludes their pretrial release.[19] Their poverty has become a "punishable crime."[20]

It is suggested that no advantages whatsoever result from the present bail system. Indigents are denied freedom. The middle class are treated to the degrading and financially hazardous experience of doing busi-

15. Taylor v. Taintor, 83 U.S. 366, 371 (1872); Smith v. Rosenbaum, 333 F. Supp. 35, 39 (E.D. Pa. 1971).

16. Actually, when the accused fails to fulfill the conditions of his bond, the bondsman's obligation rarely matures immediately. Most states provide for grace periods extending from 10 to 90 days. During this time, the bondsman must locate the accused, and bring him before the court, if he wants to avoid responsibility for the face amount of the bond. *See* FREED & WALD, *supra* note 14, at 28.

17. *See, e.g.*, McCaleb v. Peerless Insurance Co., 250 F. Supp. 512 (D. Neb. 1965); United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960); Shine v. State, 204 So. 2d 817 (Ala. 1967).

18. Note, *Bailbondsmen and the Fugitive Accused—The Need For Formal Removal Procedures*, 73 YALE L.J. 1098, 1106 n.40 (1964).

19. Right now my problem is trying to explain to a client who is in this isolation cell, in lieu of money bail, that there is equal justice for the poor, because he does not quite understand that. He doesn't understand why the big criminal who is rich and has friends can buy his way out on bail while he has to stay in under these conditions. I am at a loss to explain to him why he is there myself.
1969 *Hearings*, *supra* note 7, at 253 (testimony of James F. Hewitt, Legal Aid Society of San Francisco).

20. 1969 *Hearings*, *supra* note 7, at 3 (statement of Sen. L. Hruska).

ness with the bondsman. Most importantly, however, the judicial system suffers irreparable damage to its integrity and authority as a result of its continued allegiance to the bail bond-bondsman method of pretrial release. Therefore, this article advocates not that the imposition of money bail be "restricted,"[21] nor "that money bail be used only in very unusual circumstances,"[22] but rather proposes the complete and total abolition of every last vestige of the concept of money bail.

The proposition that an individual accused of crime need not suffer pretrial confinement if he is financially secure enough to afford the costs of bail is constitutionally intolerable.[23] Cogent analysis along equal protection lines compels the conclusion that there exists a violation of the eighth amendment's "excessive bail" clause in denying freedom to accused indigents.[24] Indeed, some courts have inferred, while others have categorically concluded, that inequality results from admitting some defendants to bail while confining the poor. A federal district court sitting in Pennsylvania held that although there exists constitutional authority for a state to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, there is no concomitant justification for an "additional inequality" of treatment beyond that which is inherent in the confinement itself.[25] For example, recently in *Workman v. Cardwell*[26] a federal district court subjected to scrutiny an Ohio statute which permitted the Adult Parole Authority, if the trial judge so recommended, to reduce an adjudged sentence with credit for pretrial confinement. In *Workman*, where the plaintiff spent 359 days in jail prior to trial be-

21. 1969 *Hearings*, *supra* note 7, at 1 (statement of Sen. S. Ervin).

22. 1969 *Hearings*, *supra* note 7, at 5 (statement of Judge G.L. Hart, U.S. District Judge for the District of Columbia).

23. Financial conditions of pretrial release have been the target of much criticism. *See, e.g.*, Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67 (1963); Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967); Foote, *The Coming Constitutional Crisis in Bail: I & II*, 113 U. PA. L. REV. 959, 1125 (1965). Note, *Bail in the United States—A System in Need of Reform*, 20 HASTINGS L.J. 380 (1968); Note, *Bail: An Ancient Practice Re-Examined* 70 YALE L.J. 966 (1961).

24. Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969), *aff'd*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1970); Hodgson v. United States, 365 F.2d 679 (8th Cir.), *cert. denied*, 385 U.S. 1029 (1966); United States v. White, 330 F.2d 811 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964). *Cf.* Simon v. Woodson, 454 F.2d 161 (5th Cir. 1972), where, although the court reversed a district court's finding that $20,000 bail for assault on a policeman was excessive, and although the court stated that the Constitution does not require that the ability of the accused to meet bail be controlling, the court did find that the ability to make bond is an important element in fixing the appropriate amount of bail. 454 F.2d at 166.

25. Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

26. 338 F. Supp. 893 (N.D. Ohio 1972).

cause he could not afford bail, the trial judge did not recommend a reduction in sentence. The district court held the statute:

> . . . unconstitutional on its face. In substance, it compels an indigent prisoner to be confined for a period longer than one who is released on bail between verdict or plea and commitment. The Equal Protection Clause requires that all time spent in any jail prior to trial and commitment by prisoners who were unable to make bail because of indigency must be credited to his sentence. The Fourteenth Amendment does not conscience discretion in such matters.[27]

The Supreme Court's equal protection inquiry, on the other hand, extends only to whether the challenged legislation provides a rational link between the end sought and the means employed, or whether there exists "invidious discrimination" against any group or individual. Yet, the Court has never evaluated the constitutionality of money bail according to these standards. Its reluctance to do so can be regarded as tacit recognition that financial conditions of release are constitutionally valid under existing equal protection guidelines. It appears necessary, therefore, to devise an alternative standard for determining whether legislation accords with the equal protection clause. Professor Michelman contributed insight into the formulation of such a standard although he was not even addressing himself to the bail problem. He suggested that usually equality results when, for example, all individuals pay a uniform market price for consumer goods. The official act of setting the conditions governing an individual's access to the goods—the price—clearly comports with equal protection mandates because all pay the same amount for identical goods. There are certain select goods, however, that are *required* by all people. Because these goods are universally needed, equality consists of a "compensatory assurance," guaranteeing everyone access to these goods, whereas discrimination results when "access . . . is so straitened, by a uniform price or other impediment, that some persons are effectively deprived of it."[28] That is, equality results when a poor person pays less than another for this select, universally required product. This formula shifts the constitutional focus from the act of establishing the conditions of one's access to the product, to the effect of the price determination on the individual. Under this approach, the Court should not be put to strain to

27. *Id.* at 901.
28. Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 12-13 (1969).

decide that because the pretrial freedom of eligible accuseds is fundamentally required, their detention resulting from inability to pay a uniform price denies them equal protection of the laws. Since eligible indigents have a fundamental right to pretrial release, and because a "compensatory assurance" in financial terms would be a meaningless gesture in light of the defendant's indigency, it becomes increasingly apparent that an accused's financial status must never be considered in making a determination of whether he may be at large until trial.[29] Rather, American constitutional interpretation must achieve a complete intellectual reorientation toward the purpose and effectuation of pretrial release.

B. *The Passing of the Bondsman*

The only prominent variation on the obsolescent theme of money bail resulted in 1963 when the Illinois legislature completely overhauled that state's bail laws.[30] The new legislation provides two alternative means of pretrial release.[31] First, where the court determines the accused will return for trial without the use of financial bail, the defendant may be released on his own recognizance.[32] Second, where the court believes the accused will fail to return unless he is apt to suffer the economic loss coincident with forfeiture,[33] the court will set

29. Although the Supreme Court has never squarely faced this argument in the context of bail reform, in Dandridge v. Williams, 397 U.S. 471 (1970), the Court appeared less than receptive to a similar theory. There, the Court noted that the "standard of need" of each eligible family under the Federal Aid to Families With Dependent Children (AFDC) program, 42 U.S.C. §§ 601-43 (1971), may be determined by the state to decrease proportionally the greater the number of children in the family. The Court found that so long as the state's action has a rational basis and is free from invidious discrimination it passes muster under the equal protection clause. Although the Court rejected an argument similar to that advanced here, it did so by employing the rational basis and invidious discrimination tests, and it cannot be inferred that a state's retention of financial bail could be treated comparably. Certainly the Court would have no easy task in finding a legitimate state interest in keeping only poor suspects in jail, while freeing others. At best, the practice seems to lack a rational basis, at worst, it represents invidious discrimination. *See also* James v. Valtierra, 402 U.S. 137, 142 (1971): "But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." *Accord,* Jefferson v. Hackney, 92 S. Ct. 1724 (1972).

30. ILL. REV. STAT. ch. 38, §§ 110-1 to -15 (1965).

31. This article is not intended to provide an exhaustive study of the Illinois bail revision. Rather, it serves merely as a survey of that legislation to assess its overall worth. For a more thorough analysis of this enactment, *see, e.g.,* Bowman, *The Illinois Ten Per Cent Bail Deposit Provision,* 1965 ILL. L.F. 35; Boyle, *Bail Under the Judicial Article,* 17 DE PAUL L. REV. 267 (1968); Kamin, *Bail Administration in Illinois,* 53 ILL. B.J. 674 (1965).

32. ILL. REV. STAT. ch. 38, § 110-2 (1965).

33. Thus, an initial defect of the Illinois Act resides in its failure to recognize that non-appearance at trial does not fluctuate whether recognizance or financial release is utilized. *See, e.g.,* 1969 *Hearings, supra* note 7, at 65 (testimony of Bruce D. Beaudin, Director, District of Columbia Bail Agency).

traditional money bail, secured by a deposit, "with the clerk of the court." The accused may post the entire amount of the bond by depositing (1) cash, (2) stocks or bonds authorized for trust funds in Illinois, or (3) unencumbered, non-exempt Illinois real estate valued at twice the amount of the bail.[34] If the accused cannot meet the full amount of the bail, he may post instead "a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25."[35] Once the conditions of release have been fulfilled, in the former case the accused is given a complete refund of his bail deposit, whereas in the latter case the accused receives a ninety percent refund. Ten percent, or a minimum of five dollars is retained for costs.[36]

A few obvious advantages inhere in the Illinois system.[37] Initially, because it recognizes the value of recognizance releases, and suggests that this form of release be preferred over financial bail, it represents at least a slight degree of refinement over traditional bail practices. Further, although the Illinois scheme maintains the prejudicial feature of money bail, the new method has at least rid that state of the bondsman. Moreover, whereas under the traditional bail practice the bondsman's fee is non-refundable, the Illinois plan returns ninety to one hundred percent of the deposit.

The liabilities of the Illinois method of pretrial release should be apparent. It retains, and indeed relies heavily upon, the prejudicial money bail concept, and, as such, it is just as constitutionally infirm as the traditional bail system. Thus, our hypothetical defendant still needs one thousand dollars to be released. Further, the provision permitting the state to retain one percent of the total amount of the bail when the accused deposits ten percent with the court, deprives those who are unable to pledge the entire amount of the bond of their property, while it retains no costs from those who post the full amount of the bond.[38] Therefore, although clearly an improvement over bonds-

34. ILL. REV. STAT. ch. 38, § 110-8 (1965).
35. ILL. REV. STAT. ch. 38, § 110-7 (1965).
36. ILL. REV. STAT. ch. 38, § 110-7(f) (1965).
37. Although the ten percent scheme is referred to as the "Illinois Plan," similar statutes have been enacted in several states. *See, e.g.*, ALASKA STAT. § 12.30.020(b)(4) (1971); IOWA CODE § 763.16.10 (1971); N.Y. CODE CRIM. PROC. § 520.10-30 (McKinney 1971); WIS. STAT. § 969.03(1)(c) (1969).
38. In Schilb v. Kuebel, 404 U.S. 357 (1971), the cost retention provision of the statute came under attack and was held constitutional. Schilb, who was charged with two traffic offenses, deposited $75 with the clerk of the court after bail was set at $750. At the ensuing trial, he was convicted of one offense and acquitted of the other. Because he fulfilled the conditions of his release, ninety percent of the amount deposited was returned to him, while $7.50 was retained as "bail bond costs." Schilb attacked the one percent retention provision on equal protection and due process grounds. He argued that because

man-controlled release, because the Illinois-modeled method is premised upon the theory that an accused must have money to obtain release, it remains totally unacceptable.

C. *Release on Recognizance*

When the court believes that it can release the accused and he will return at the appointed time to stand trial, without providing the incentive of returning the bail money he might otherwise post with the court, the release is said to be on the accused's own recognizance.[39] Much credit must be assigned to the Vera Foundation's Manhattan Bail Project for providing a tremendous impetus to recognizance releases.[40] The Manhattan Bail Project originated in 1961, with law students interviewing newly-arrested defendants to determine whether they were good risks for release. The Project's founders recognized the inadequacy of the straitened approach of traditional bail, and instead, evaluated all defendants on the basis of four key factors: (1) residential stability; (2) employment history; (3) family contacts; and (4) prior criminal record.[41]

Each of the defendant's answers—usually subject to verification within the hour—is assigned a designated point value.[42] If the accused

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the state stipulated that the costs of administering bail are substantially the same whether ten percent or the entire amount of the bond is deposited, it is discriminatory to charge one group of individuals costs and not charge the other. The Court ruled, however, that the retention provision does not discriminate against the less affluent because one who deposits the full amount of the bond is dispossessed of a productive asset throughout the period of deposit, and the interim possession by the state accrues to its benefit; whereas when only ten percent of the bond is deposited, neither the concommitant disadvantages to the accused nor the advantages to the state are as great. Moreover, the majority found that, "the State's protection against the expenses that inevitably are incurred when bail is jumped is greater when one hundred percent cash or securities or real estate is deposited or obligated than when only ten percent of the bail amount is advanced." 404 U.S. at 367. Dissenting, Justice Douglas stated that the retention provision is in reality the imposition of a court cost upon an accused who has been acquitted, and, as such, violates the due process clause. Justices Stewart and Brennan, dissenting, found that the decision to impose administrative costs upon those released under the ten percent provision, but not upon those released on recognizance, for whom administrative costs are equally as great, violates the equal protection clause.

39. Recognizance release originated in England where sheriffs were vested with discretion to release an accused on his own promise to return for trial, or to entrust the accused to the custody of a third party who acted as surety for the defendant. If the accused fled, the surety was obliged to surrender himself to the sheriff. FREED & WALD, *supra* note 14, at 1. Later, only those individuals known personally to the court as respectable or prominent members of the community merited release on recognizance.

40. For a thorough analysis of the Manhattan Bail Project and its progeny, *see* Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67 (1963).

41. FREED & WALD, *supra* note 14, at 59.

42. A typical Vera Project "score sheet" resembles the following:

To be recommended a defendant needs:

totals a sufficient number of points, the interviewer generally will recommend to the court that he be released on recognizance. Of course, not all such determinations are this formalized. Indeed, the court itself may question the defendant concerning these factors, and obtain immediate verification through the services of court and law enforcement personnel. After determining to release the accused, the court may fashion any conditions it chooses to impose upon the defendant's release to assure further his return for trial. If the accused has a relatively clean record, the court may want to provide merely for periodic residence or employment checks by an arm of the court, or for occasional visits by the defendant to a parole officer. Where further safeguards are indicated, other conditions may include restrictions on the place of the defendant's residence or employment, guidelines con-

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1. An area address where he can be reached, AND
2. A total of five points from the following categories:

*Int	Ver	
		PRIOR RECORD
2	2	No convictions
1	1	One misdemeanor conviction
0	0	Two misdemeanor convictions or one felony conviction
—1	—1	Three or more misdemeanor convictions or two or more felony convictions
		FAMILY TIES
3	3	Lives with family AND has weekly contact with other family members
2	2	Lives with family OR has weekly contact with family
1	1	Lives with nonfamily person
		EMPLOYMENT
3	3	Present job one year or more
2	2	Present job 4 months OR present and prior job 6 months
1	1	Current job OR receiving unemployment compensation or welfare, OR supported by family or savings
		RESIDENCE (In area; not on and off)
3	3	Present residence one year or more
2	2	Present residence 6 months OR present and prior 1 year
1	1	Present residence 4 months OR present and prior 6 months
		TIME IN AREA
1	1	ten years or more
		DISCRETION
1	1	Pregnancy, old age, poor health, or attending school
		TOTAL INTERVIEW POINTS
**R	NR	
		TOTAL VERIFIED POINTS
R	NR	

* Interview, Verification
** Recommended, Not Recommended

STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 6, at 52-53.

cerning his movement and associations, or any other conditions the court might deem appropriate.[43]

Foremost of the advantages of recognizance release is that it frees the dependable defendant who would otherwise remain incarcerated because of inability to meet financial conditions of release. He can consult with his attorney outside the depressing confines of a jail cell. Because he might possess intimate knowledge of the people and places in the area where the alleged offense occurred, he may be able to ferret out witnesses and uncover facts unavailable to his attorney. This is especially true where, for example, an attorney finds himself shut off from information by a tightly-knit subculture of the ghetto or worker camp. In *Kinney v. Lenon*,[44] for example, the Ninth Circuit ordered the release of a young black from an Oregon juvenile detention home, pending trial on charges arising out of a schoolyard fist fight, so he could assist his attorneys. The court acknowledged that the youth made a "strong showing" that his white attorneys "would . . . have great practical difficulty in interviewing and lining up" other young blacks who saw the fight.[45]

Although recognizance release programs effect the pretrial release of untold numbers of individuals who would remain incarcerated under the money bail system, as presently structured these programs are not without their victims. Significantly, the standards against which a newly-arrested accused must compile "points," factors such a family ties and substantial contacts within the community, length of time at residence and place of employment, represent the hallmarks of white, middle-class respectability in America. Although the stratum of values important to most Americans is not necessarily under indictment, nevertheless, once this white, middle-class value system becomes the measuring rod for the prediction of an accused's reliability—an accused who is not white, but rather black or Hispano-American, and who is not middle-class—there results such an egregious transposition of cultural standards as to cause the projected reliability itself to be unreliable. That is, because an individual is judged by the standards of a totally alien culture, one which would credit him with "points"

43. The ABA Study on Pretrial Release, proposed § 5.2, suggests imposition of the following conditions when warranted: release of defendant into the custody of a qualified person or organization; place defendant under supervision of probation officer; impose reasonable conditions on the activities, movements, associations, and residences of defendant; and release defendant during working hours and require his return to custody at night. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 6, at 56.

44. 425 F.2d 209 (9th Cir. 1970).

45. *Id.* at 210.

when he attains plateaus important to that culture, he will rarely be recommended for pretrial release. Because this present structure of recognizance release results in substantial prejudice to a vast portion of our population, that structure cannot remain a part of the American bail scene.

D. *Pretrial Release Under the Bail Reform Act*

The enactment of the Bail Reform Act in 1966 achieved a degree of bail reform on the federal level.[46] By purporting to permit financial bail only in severely restricted instances, and by announcing that recognizance release would be the preferred method of pretrial release, the Bail Reform Act appeared to be a noteworthy improvement over traditional bail laws. Briefly, under the Act, the pretrial release determination operates upon two distinct classes of individuals: (1) those charged with non-capital offenses;[47] and (2) those charged with offenses punishable by death, or those seeking release following a conviction, while awaiting appeal or certiorari.[48] In the case of non-capital crimes, the sole factor the court may consider in deciding to grant pretrial release is whether release will reasonably assure the appearance of the defendant at trial.[49] If the court decides that personal recognizance release, without other restriction, will not adequately provide that assurance, the court may impose any one or more conditions upon the release, such as placing the accused in the custody of a reliable person or organization, placing restrictions on travel, or "impose any other condition deemed reasonably necessary."[50] When fashioning conditions of release, the judicial officer may consider the weight of the evidence against the accused, his family ties, employment, financial resources, and length of residence in the community.[51] Significantly, although the accused is adjudged eligible for release, inability to comply with any of the conditions imposed results in continued incarceration. When the accused is charged with a capital crime, or is seeking review of his conviction, all of the above conditions and stipulations apply *unless*

46. 18 U.S.C. §§ 3146-52 (1969) [hereinafter referred to as Act]. *See* Note, *Bail Reform Act of 1966*, 11 ARIZ. L. REV. 201 (1969); Note, *Bail Reform Act of 1966*, 53 IOWA L. REV. 170 (1967).
47. 18 U.S.C. § 3146 (1969).
48. *Id.* § 3148.
49. United States v. Alston, 420 F.2d 176 (D.C. Cir. 1969) (absolute certainty of return for trial not required).
50. 18 U.S.C. §§ 3146(a)(1)-(5) (1969).
51. *Id.* § 3146(b).

the judicial officer determines that "no one or more conditions of release will reasonably assure that the person will not flee or prove a danger to any other person or to the community."[52] Failing that assurance, the individual in this second category may be detained.

This sketch of the provisions of the Act evinces its fundamental rationale that defendants charged with capital crimes must be treated differently from those charged with non-capital offenses. Release, presumably available for both groups of defendants, is a function of the non-capital defendant's ability to fulfill court restrictions and the capital defendant's being adjudged sufficiently harmless to the community. It is suggested that such a distinction between alleged capital and non-capital offenders is devoid of merit. The logical extension of the Act's disparate treatment is that no non-capital defendant might flee or reasonably be expected to pose a threat to the community, but rather that such menaces are reserved solely for alleged capital offenders. Such simplistic logic ignores facts and circumstances of the particular case, in favor of the assumption that the individual *accused* of murder, for example, poses a greater danger to the community than the thrice-*convicted* rapist. Finally, the distinction loses all merit in what may be the last days of capital punishment in America.[53]

Furthermore, the Act acknowledges the constitutionality of money bail. Although it has been suggested that money bail should be imposed only as a last resort[54]—when all non-financial conditions of release are deemed inadequate to guard against flight—in 1969, in Washington, D.C., forty-two percent of the defendants arraigned in district court,

52. *Id.* § 3148.

53. *See, e.g.*, People v. Anderson, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), where the death penalty was held unconstitutional as an affront to the basic standards of decency of contemporary society and as violative of the California Constitution's "cruel or unusual" punishment clause. The *Anderson* court may have prophesied the outlook many courts will assume toward bail for capital offenses once capital punishment is abolished in their jurisdictions. *See* Furman v. Georgia, 92 S. Ct. 2726 (1972). In amending its ruling in *Anderson*, the court held that its decision did not affect the denial of bail in certain traditionally capital cases. The court viewed bail as a function of the gravity of the offense, not of the punishment. *Cf.* Commonwealth v. Hallowell, 11 Cr. L. Rep. 2070, April 26, 1972 (Phila. Ct. of Common Pleas, March 14, 1972). There the court was faced with the retrial of a defendant who received a life sentence at his first trial for first degree murder. The trial court, faced with defendant's bail application, took the position that although he would again be tried for first degree murder, because he could not receive the death penalty, technically, he was not charged with a capital crime. Thus, because the court interpreted bail as a function of punishment rather than of the gravity of the offense itself, appellant was found eligible for bail. *Accord*, United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969) *Ex parte* Contella, 11 CRIM. L. REP. 2505 (Tex. Crim. App. Sept. 6, 1972). *See also* United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970); Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968).

54. United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969). *See also* United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970); Wood v. United States 391 F.2d 981 (D.C. Cir. 1968).

and sixty-nine percent in general sessions court, were still being assigned financial conditions of release.[55] Because the accused may be unable to post the established bond, the most prejudicial aspect of the traditional bail system is incorporated into the pretrial release scheme governing federal tribunals. Therefore, the federal Bail Reform Act is not without inequities characteristic of other traditional systems.

E. *Pretrial Release in the District of Columbia*

Until the enactment of the Court Reform and Criminal Procedure Act of 1970,[56] the provisions of the Bail Reform Act of 1966 governed pretrial release in the District of Columbia. In an effort to reduce the commission of offenses by individuals already charged with crimes, the Court Reform Act employs the first broad-based experiment with preventive detention. The Court Reform Act provides that an accused may be detained upon: first, a finding of a "substantial probability" that the accused committed the offense for which he is present before the court; and second, a "clear and convincing" showing that the defendant is dangerous. More precisely, the Court Reform Act permits pretrial detention hearings for an individual charged with: (1) a "dangerous crime";[57] (2) a "crime of violence";[58] or (3) "any offense" if the person attempts to, or does, in fact, threaten, injure, or intimidate prospective jurors or witnesses.[59] Thus, the Court Reform Act marks a significant departure from previous legislation which permitted detention only to assure the defendant's presence at trial. It provides that only the gov-

55. 1969 *Hearings*, *supra* note 7, at 140 (statement of Patricia M. Wald, Member of the President's Commission on Crime in the District of Columbia).

56. D.C. CODE ANN. §§ 23-1321 to -32 (Supp. V, 1972) [hereinafter referred to as Court Reform Act].

57. *Id.* § 23-1331(3) defines the term "dangerous crime" as:
(A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adopted 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 adoptable 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 distibution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year.

58. *Id.* § 23-1331(4) defines "crime of violence" as:
. . . 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 years, mayhem, kidnapping, robbery, burglarly, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

59. *Id.* § 23-1322(a)(3).

ernment may move for a preventive detention order.[60] Upon such motion, a detention hearing is held immediately, with the accused entitled to representation by counsel, and the right to testify and present witnesses. If the hearing results in the defendant's detention, "his trial shall be given priority."[61]

Although the Court Reform Act will be discussed in more detail in the following section, it is interesting to note that from it's inception until March, 1972, the government moved for preventive detention in only twenty cases.[62] In ten of those cases the defendants were ordered detained, and in five of these, the detention orders were either reversed on appeal or rescinded pending review. Of these five defendants whose detention was overturned, four obtained pretrial release. Thus five of the ten defendants originally ordered detained, were actually incarcrated under the detention order until their trial. More significant, however, is that of the ten individuals who were never under a detention order, either because the government withdrew its detention motion, or because the court found that the accused was not sufficiently dangerous to warrant detention, eight remained incarcerated pending trial.[63] These eight individuals, all deemed eligible for pretrial release, remained in jail because they could not afford financial conditions of release imposed by the court,[64] or because they were unemployed and unable to find "suitable employment."[65]

These statistics indicate that the same defect which afflicts other pre-

60. *Id.* § 23-1322(a)(1), (c)(1)(2). There does exist, however, at least one instance of a district judge, sua sponte, ordering detention following a hearing. N. BASES & W. MCDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS 49 (1972) [hereinafter referred to as PREVENTIVE DETENTION].

61. The Court Reform Act states that if one defendant has not been brought to trial within 60 days, for reasons other than the defendant's own motion, he will be treated in accordance with the provisions of section 23-1321, containing a presumption of releaseability. D.C. CODE ANN. § 23-1321(a) (Supp. V, 1972). Of course, since section 23-1321 contains a provision permitting the imposition of conditions upon any release, and since inability to meet any of these conditions results in incarceration, there is no guarantee of freedom when the trial is not held within 60 days.

62. PREVENTIVE DETENTION, *supra* note 60, at 44.

63. *Id.*

64. *Id.* at 28.

65. *Id.* at 10-11. In at least one case bail was as high as $100,000 for a defendant with no past criminal record, but charged with assault with a deadly weapon. At presentment, the judge indicated that he believed the defendant was dangerous and should be detained. When defense counsel objected that the government must move for preventive detention, the judge suggested that the prosecution so move. The prosecution did move, but withdrew the motion when they informed the judge that because the defendant had no past conviction, pending charges, or indication of drug use, he did not meet the statutory criteria for a detention order. The judge stated that the statute should be amended, that the defendant was indeed dangerous, and set bail at $100,000. Thus, the court effectively denied bail in a non-capital case, after every indication pointed to eligibility for release. *Id.* at 26-27.

trial release legislation is found in the Court Reform Act. When it was under consideration critics of its preventive detention provisions predicted that judges would abuse the procedures provided and find a "dangerous person" lurking behind every detention motion. Yet, no criticism whatsoever was leveled at subsections (a)(3) and (4) of section 23-1321, which provide for release upon strictly financial terms, or subsection (b) of section 23-1321 of the Court Reform Act, which permits consideration of such "crucial" white, middle-class standards as family ties, employment, length of residence in the community, and financial resources. Nonetheless, in only twenty-five percent of those cases where detention was sought were defendants held under the order, whereas inability to meet standard financial or social conditions of release kept behind bars eighty percent of those defendants specifically found eligible for release. The anomalous result is that under the Court Reform Act more people are being preventively detained because they are poor and transient than because they present a danger to the community.

III. A Proposal for Reform

The principle injustice of traditional bail is the requirement that an accused must have some money to obtain his pretrial release. Typically, when an accused has a great deal of money, his release costs him nothing. If he is possessed of modest resources, depending upon whether he does business with a bondsman or deals directly with the court, freedom's price ranges generally from one to ten percent of the face amount of the bond. Of course, if the accused is indigent, he waits for justice in jail.

Generally, release on recognizance programs, including this technique as applied in the Bail Reform Act and Court Reform Act, appear as the only civilized approach to pretrial release in an otherwise medieval setting. But release on recognizance programs devise their questionnaires and, therefore, base their decisions upon white, middle-class values of stability of residence and employment, and family contacts and reputation within the community. The Bail Reform Act and Court Reform Act, besides including these factors as available bases for evaluation, categorize all defendants into two separate classes, and also permit the imposition of money bail. A bail reform statute, including selected features of the Bail Reform and Court Reform Acts, should read as follows:

§ 101. *Release Prior to Trial*

(a) Any person charged with an offense shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance, unless the officer determines that such a release will not reasonably assure the appearance of the person as required, or will pose a danger to any other person or the community. When such a determination is made, the judicial officer shall impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial and provide the necessary protection for the community or if no single condition gives such assurances, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, associations, or place of abode of the person during the period of release; or

(3) impose any other non-financial conditions deemed reasonably necessary to assure appearance as required or provide the necessary protection for the community, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance and protect the community, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's character and mental condition, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release, and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed, and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release

are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall also, after twenty-four hours, have the condition reviewed by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release; *Provided,* that if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

§ 102. *Detention Prior to Trial*

(a) If the court or judge finds that there exists clear and convincing evidence that no one or more conditions of release will reasonably assure that the person will not pose a danger to any other person or to the community, the person may be ordered detained. The provisions of section 104 shall apply to persons described in this section.

(b) If, after applying the provisions of section 104, the person remains detained, he must be brought to trial within thirty days of the time he was detained, unless he or his counsel requests a thirty-day extension, in which case he must be brought to trial within sixty days of the time he was detained, unless he or his counsel requests a further extension, in which case his trial will be given priority.

(c) If, after sixty days, the trial of the detained person has not begun, and he has requested no further extension, or if the trial

has not begun within thirty days of the last extension requested by the person detained, the person shall be treated in accordance with the provisions of section 101.

(d) The following provisions shall be applicable to any person detained pursuant to this section.

(1) The person shall be confined in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal.

(2) The person shall be afforded reasonable opportunity for private consultation with counsel, and, for good cause shown, shall be released upon order of the judicial officer in the custody of the United States marshall or other appropriate person for limited periods of time to prepare defenses or for other proper reasons.

§ 103. *Pretrial Detention Hearing*

No person shall be ordered detained unless the judicial officer holds a pretrial detention hearing in accordance with the following procedures:

(a) Whenever the person is before a judicial officer, the hearing may be initiated by the judicial officer sua sponte, or on oral motion of the United States attorney.

(b) Whenever the person has been released pursuant to section 101 and it subsequently appears that such person may be subject to pretrial detention, the United States attorney may initiate a pretrial detention hearing by *ex parte* written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person for proceedings in accordance with this section.

(c) The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer for such hearing unless the person moves for a continuance. A continuance granted on the motion of the person shall not exceed five calendar days. The person may be detained pending the hearing.

(d) The person shall be entitled to present information by proffer or otherwise, to testify, and to present witnesses in his own behalf.

(e) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

§ 104. *Appeal from Conditions of Release*

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review pursuant to section 101(d) or section 101(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such a court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 101(a). The appeal shall be determined promptly.

§ 105. *Release of Material Witnesses*

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 101. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

§ 106. *Penalties for Failure to Appear*

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, (1) if he was released in connection with a charge of

felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, be fined not more than $1,000 or imprisoned for not more than one year, or both.

§ 107. *Contempt*

Nothing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

§ 108. *Definitions*

As used in sections 101-107 of this chapter:

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the District of Columbia Court of General Sessions; and

(2) The term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an act of Congress and is triable in any court established by an act of Congress.

Modeled after the Bail Reform Act and the Court Reform Act,[66] this proposal is designed to preserve those statutes' desirable features and to eliminate their imperfections. The proposal abolishes financial bail, and eliminates the artificial distinction between those accused of capital and non-capital offenses. And, although society retains its ability to incarcerate dangerous and irresponsible persons prior to trial, the pro-

66. The proposal has greater similarity to the Bail Reform Act than the Court Reform Act. Although the Bail Reform Act suffers from numerous substantive drawbacks, from a drafter's standpoint, it represents a clear, concise, readable statute. The Court Reform Act, on the other hand, is so unweildy and stilted as to defy comprehension. This proposal demonstrates that a bail reform statute, with preventive detention provisions, need not be cumbersome and open to abuse. *See* Note, *The Costs of Preventive Detention*, 79 YALE L.J. 926 (1970).

posal makes it impossible for the financially disadvantaged to be detained solely on the basis of economic status.

Although the proposal contains a presumption of releaseability on recognizance, it also injects flexibility into existing bail laws. It provides that the judge or magistrate possesses limited power to detain, within prescribed guidelines, any suspected offender, no matter what crime he is presently charged with, if he makes an affirmative finding on the basis of clear and convincing evidence that none of the prophylactic measures found in section 101(a) will satisfactorily protect the community. The decision whether to detain or release an accused is based strictly upon relevant criteria: How has the defendant demonstrated that he may pose a danger to another individual or to the general community?[67] And, because the determination of whether an accused should be eligible for release emanates from an analysis of relevant data, this proposal fosters a more meaningful decision than that rendered presently on the basis of economic, status-oriented factors.

Of central importance is the proposal's complete disregard of the individual's personal economic status. Section 101(b) which would replace section 3146(b) of the Bail Reform Act, provides judges with a more restricted list of factors for determining which conditions of release will reasonably assure the suspect's appearance for trial and preserve the safety of the community. The current law permits judges to consider such economically oriented factors as the accused's employment, financial resources, family ties, and length of residence in the community.[68] The result is that a person's liberty can be legally restricted simply because of his lack of a job or his want of resources.[69]

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67. It has been held that protection of a witness is a proper consideration when determining whether the accused should be permitted bail. The court in United States v. Halloran, 327 F. Supp. 337, 341 (C.D. Cal. 1971), quoted Justice Douglas' opinion in Carbo v. United States, 82 S. Ct. 662, 669 (Douglas, Circuit Justice, 1962):

> [T]here is substantial probability of danger to witnesses should the applicant be granted bail; that this danger is relevant to the propriety of granting bail on appeal, since a new trial may be ordered; and in this case bail should be denied in the public interest.

This accents the most unfortunate aspect of preventive detention. Any system of preventive detention might seem to be working well—even if it is working poorly—because it reduces the volume of crime by jailing large numbers of people, some of whom would not commit crimes anyway. What will never be known is what proportion of those people confined would not commit crimes. 1969 *Hearings, supra* note 7, at 177 (testimony of A. M. Dershowitz, Professor of Law, Harvard University, Cambridge, Mass.).

68. 18 U.S.C. § 3146(b) (1970).

69. In United States v. Cook, 442 F.2d 723 (D.C. Cir. 1970), the circuit court remanded the case to the district court to consider whether some reduction should be made in the amount of bond. However, in considering the original application, the district judge stated that he was not disturbed by the defendant's lack of ties to the community and to the persons who offered to supervise him. "[T]ogether with what has been

A similar problem is faced by the accused who lacks community ties, since his transient status can be used to justify the imposition of extremely harsh conditions to his pretrial release. Thus, under the present law, the pretrial freedom of the indigent accused may be more severely restricted than that of his middle-class counterpart, even where the alleged offense is the same in both cases. Ironically, this result will often insure that the unemployed remains jobless, because one's ability to find and hold a position will become increasingly difficult in light of the interference of his obligations to the court.

The proposed statute seeks to reduce the possibility of the economically disadvantaged accused encountering these disproportionate hardships. In deciding which conditions to impose upon a given individual's pretrial release, the judge may consider only non-economic factors, for example, the nature and circumstances of the offense charged, the weight of the evidence against the accused,[70] the accused's character and mental condition, his record of convictions, and his record of appearance at court proceedings. These factors are decidedly more relevant to an accused's reliability than a measuring of his financial status. One who has failed to appear at court proceedings in the past may be given a restrictive release, whereas an accused with a record of appearing when required should not be considered as likely to flee merely because of his lack of residential, financial, or familial ties to the community.

In cases where unrestricted release is deemed imprudent, the judge must impose a condition upon the release granted. Existing federal

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adduced here as to his present financial resources, I think that under all conditions the bond should be a higher one." *Id.* at 724. Thus, a lack of strong community ties and, ironically, the fact that the defendant had no money, prompted the district court to set unusually high bail.

70. Permitting the judicial officer to consider the weight of the evidence against the accused in determining his eligibility for pretrial release does not deprive the defendant of his right to a presumption of his innocence. *See, e.g.*, Smith, *Bail Before Trial: Reflections of a Scottish Lawyer*, 108 U. PA. L. REV. 305 (1960), where the author notes:

> The "presumption of innocence," in Britain at all events, is a rule of evidence to secure fair trial, and implies that the guilt of an accused must be proved at his trial beyond all reasonable doubt. It does not mean that those who discharge executive or administrative functions prior to trial should be bound to act as though the suspect had behaved, and would pending trial behave, as a law-abiding citizen. This would be to contradict the experience of mankind over the ages. To take extreme examples—the householder who apprehends the housebreaker rifling his desk, and the police officer who arrests the armed robber, weapon in hand, by the corpse of his victim, have no doubt about the guilt of the accused. . . .

Id. at 309. Although this last sentence appears somewhat rash in light of the possibility of some mitigating circumstances or justification not apparent at first blush, still it should be emphasized that the presumption of innocence is a procedural device at trial requiring proof of guilt beyond a reasonable doubt. Thus, excluding the possibility of pretrial detention is not indicated merely because there exists a presumption of innocence at trial. *See also* 1969 *Hearings*, *supra* note 7, at 125 (testimony of Judge Charles W. Halleck, District of Columbia Court of General Sessions).

statutes supply a gradation of such conditions, each being somewhat more restrictive than the preceding one, with the court required to impose the first of the conditions in this series which will reasonably assure the presence of the accused at trial.[71] Of the five conditions listed in section 3146, however, two are directly related to the depth of an accused's pockets. Section 3146(a)(3) permits the court to require the accused to execute an appearance bond by depositing a sum not to exceed ten percent of the bond. The deposit is refunded upon performance of the conditions of release. This provision is in the general style of the Illinois statute, and consequently, it suffers from the same infirmities. It should suffice to point out that section 3146(a)(3) serves only those individuals who have either money or property. Section 3146(a)(4) is equally objectionable because it provides for the execution of a bailbond with "sufficient solvent sureties" or a cash deposit. In short, these provisions represent nothing more than a camouflage of the most flagrant defects of the money-bail system.[72]

In view of some potential for over cautious administration of the statute,[73] it is important to appreciate that certain procedural protec-

71. 18 U.S.C. § 3146(a) (1970); *see* 2 U.S. CODE CONG. & AD. NEWS 2300 (1966).

72. In Allen v. United States, 386 F.2d 634 (D.C. Cir. 1967), the accused was charged with robbery, assault with a dangerous weapon, and carrying a dangerous weapon. The judicial officer determined that the first condition of release which would reasonably assure the accused's appearance at trial was a bond set at $5,000 with an eight percent cash deposit. Because the accused was unable to raise the cash, he moved for release on recognizance, or, alternatively, non-financial conditions of release. The court of appeals recited 18 U.S.C. § 3146(b) (1970), permitting the court to consider the accused's employment and financial resources in determining the conditions of release, noted that the accused was unemployed, and then held proper the imposition of financial conditions of release.

73. Predicting the "danger potential" of an accused looms as no slight task. Occasionally, judges will prove to be false prophets. Moreover, because judges will be loathe to loose upon the community an individual who may ravage the populace, initially there may result an over-prediction of dangerousness. It is submitted, however, that this possibility does not provide sufficient reason to forestall the adoption of a limited form of preventive detention. After all, predicting dangerousness in terms of preventive detention should provide no more of a challenge than that taken up every day in determining whether a convicted defendant granted parole will continue to engage in criminal conduct.

Although it is foreseeable that cases of unwarranted incarceration will arise, and that in certain of these instances the decision reached will not be so obviously erroneous as to constitute an abuse of judicial discretion, in the final analysis all judicial decisions are the product of human judgment, and of the prejudices and preconceived notions which hold victim judges as they do all men. In this sense, criticism of the expanded discretion given the judiciary under the proposal is necessarily an indictment of our entire legal system. Indeed, should the proposed statute provide too many opportunities for judicial abuse, some provisions limiting judicial discretion to detain could easily be incorporated. For example, with respect to a showing of dangerousness, the court might have to find (1) that the accused has been convicted of a crime of violence within the last five years, (2) that the accused was previously arrested during judicially-granted pretrial release, (3) that he has made specific threats of violence to others, or (4) that a victim of the crime with which the accused is charged suffered serious physical harm as a result of the crime. Some comfort can be derived from the pragmatic observation that

tions afforded the accused by the Bail Reform Act have been retained or broadened by the proposal. For example, section 101(c) of the proposed statute incorporates the provision of the Bail Reform Act requiring the judge to inform the releasee of the penalties applicable to violations of the terms of his release.[74] Section 101(d), providing for review of the conditions of release by the judge who imposed them, also a part of the current federal law, is retained. The proposal does, however, offer a slight variation of the review procedure contemplated by the Bail Reform Act. Section 3146(d) presently requires review of the initially imposed conditions of release only "upon application" of the detainee. Experience has proven that frequently, because counsel fails to request this review, his client remains incarcerated unless the defendant himself files a motion to be released.[75] The proposed statute, in section 101(d), provides for an automatic review within twenty-four hours by the judicial officer who imposed the conditions of release or the detention. This automatic twenty-four hour review is absolutely essential. When the court lacks sufficiently credible information to release a potentially dangerous accused, it may detain him. During the subsequent twenty-four hour period, the accused's counsel, along with court personnel, may obtain relevant information and verification on the defendant's behalf, and possibly bring to light previously unavailable mitigating or exculpatory evidence.

Despite the fact that the present section 3146(d) has its most significant impact upon persons who are required to execute appearance or bail bonds,[76] even after the need to execute such bonds is eliminated there will doubtless exist instances where persons are unable to meet the conditions of release imposed. For example, a transient accused might experience difficulty in finding a person or organization willing to supervise him until the time of his trial. Where his release depends

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in borderline cases it is most prudent for the first judicial officer viewing the case to conclude that the suspect is dangerous or is likely to abscond, thereby giving the benefit of the doubt to society. Moreover, it should be noted that this temporary pragmatic solution is subject to an automatic twenty-four hour review.

74. Penalties for failure to appear are contained in section 106 of the proposed statute. It is firmly established that a releasee's failure to appear as required, or his violation of any condition of his release, empowers the court to revoke bail, to issue an arrest warrant, and, in the extreme case, to declare the violator in contempt of court. 18 U.S.C. § 401(3) (1970).

75. 1969 *Hearings*, *supra* note 7, at 8 (testimony of Judge Hart, United States District Court, District of Columbia, and Chairman of the Judicial Council Commission to Study the Operation of the Bail Reform Act in the District of Columbia).

76. Most cases which have arisen under 18 U.S.C. § 3146(d) (1970) concern the review of financial conditions imposed by the court. Typical of these cases is Salley v. United States, 413 F.2d 364 (D.C. Cir. 1968).

upon securing such a supervisor, as it may be under section 101(a)(1), release will not be forthcoming until a custodian is found. In cases of this type, it is imperative that the accused be provided with a channel of speedy, direct review to provide him with an opportunity to have the order adjusted in light of his inability to meet the condition imposed. Section 104, for example, providing for appellate review of cases where the accused is detained, is broader in scope than section 3147 of the current statute since it applies to all persons and not only to those accused of non-capital offenses.

Especially deserving of mention is section 103(b) of the proposed statute. It is generally conceded that if a pretrial release program containing a preventive detention provision is adopted, justice demands that the detained individuals be brought to trial as rapidly as constitutionally permissible.[77] Section 103(b) provides that once a person is detained prior to trial, he must be brought to trial within thirty days of the date of his detention. The proposal recognizes, however, that in some instances thirty days may prove an inadequate length of time to prepare for trial. In these more complex cases, the defendant may request a thirty-day extension. Lest a good faith effort to engage in additional preparation provide the opportunity for the defendant to get lost in a confused mass of clogged dockets, however, the statute indicates that the accused must be brought to trial during this subsequent thirty-day period. Where holding trial within sixty days would infringe upon due process guarantees, the defendant may request additional time to prepare. Even then, because the loss of one's freedom before trial is so devastating, his case is given priority on the court's calendar.[78] Moreover, every conceivable effort will have to be made to segregate those detainees awaiting trial from convicted prisoners.[79]

Section 106, concerning penalties for failure to appear, differs from section 3150 of the present law only in its exclusion of the provision

77. Patricia M. Wald expressed this view before the Senate Committee on the Judiciary:

> The grossest injustice would be to relegate preventively detained defendants to a vague, undefined priority in a hopelessly clogged court. A law which takes away so vital a right as bail must impose on the criminal justice system an enforceable obligation to provide a speedy trial. Open-ended detention periods under such circumstances should not be permitted.

78. 1969 *Hearings, supra* note 7, at 140. For reasons stated in note 77 the hastening of a defendant's trial must take on finite proportions. Only after the defendant has requested two extensions of time, does the statute grant the detainee's trial "priority."

79. *See* § 102(d) of the proposed statute. "It is clear that the conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

calling for forfeiture of any security deposited or pledged upon release. Naturally, this deletion is necessitated by the elimination of such a condition to release.

Considering the illusory benefits extended to the poor by much of the current federal bail law, clearly this proposal represents the next evolutionary step in the direction of establishing a truly equitable plan of pretrial release. Section 101(a) is more circumspect than section 3146(a) of the Bail Reform Act. Once the judge determines unconditional release to be unadvisable, he must choose from among only three conditions to the release, one of which promotes imaginative, individualized judicial guidelines. The advantage of this restructuring of the Bail Reform Act should be apparent. Most significantly, the law proscribes as impermissible any consideration of one's wealth or position in determining how best to deal with the criminal accused. This demise of the unsavory system which functions by economic intimidation will necessarily produce the simultaneous downfall of all of its remnants. Thus, the bondsman, long the heavy-handed scourge of the accused, will become an historical curiosity. Perhaps, however, society itself will prove to be the ultimate beneficiary of this proposal because all people may enjoy a subtle confidence that the rich and poor have finally emerged as bona fide equals in this confrontation with the courts.

IV. The Practical Effects of The New Bail Reform Act

Returning for one final look at our hypothetical robbery suspect, it should be instructive to explore the probable treatment his case will receive under the proposed statute. We shall add some additional background information at this juncture by characterizing the suspect as an unemployed transient. We shall assume further that he is not alleged to have been armed when he committed the crime, and that he was picked out of a police lineup by the victim.

At the arraignment, the judicial officer will accumulate all available relevant information concerning the suspect, *i.e.*, his criminal record, his record of appearance at court proceedings, etc. He may neither solicit nor consider data concerning the accused's employment status, income, financial resources, or length of residence in the community. This is not to say, however, that the magistrate is strictly forbidden to possess any knowledge concerning these matters. Clearly, he cannot

forget as a judge that which he knows as a man. Frequently, it will be unnecessary to inquire about a person's financial status since physical appearance and the circumstances of the offense can sometimes provide the answer. Similarly, where an accused's records derive from another jurisdiction and bear relatively recent dates, there certainly exists an inference that the individual has not developed strong ties to the community in which the court sits. Where these factors do come to the attention of the judicial officer, he must discipline himself, much as a jury should when instructed to disregard prejudicial evidence elicited at trial, and not permit this knowledge to color his judgment on the question of pretrial release. In short, the proper and successful operation of the proposed bail system will ultimately depend, as does almost every statute with its own unique procedural requirements, on the steadfastness and integrity of the judiciary.[80]

Having accumulated and examined the above information, the magistrate will address himself to the first of the three steps outlined in the statute, to determine whether the accused warrants unconditional pretrial release. Working in the accused's favor, of course, will be his

80. The accused's principle protection against arbitrarily imposed conditions of release or an unwarranted detention order is his right of appeal. See § 102 of the proposal. In reviewing the order of a lower court, the appellate court must bear in mind that the new statute creates a presumption of releasability on personal recognizance, just as under the Bail Reform Act. United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); White v. United States, 412 F.2d 145 (D.C. Cir. 1968).

In United States v. Williams, 412 F.2d 169 (D.C. Cir. 1969), decided jointly with *Leathers, supra,* appellant remained in jail more than three months pending trial, due to his inability to post a $5,000 bond which was set by the United States District Court for the District of Columbia. The court of appeals ruled that this financial condition of release was not supported by the evidence, especially in light of appellant's "fairly steady employment record, his apparent lack of any prior criminal record, and his stable family life in the District of Columbia." 412 F.2d at 171-72. The court implied that an accused with a similar criminal record, but with a history of unemployment and without relatives in the jurisdiction, might have remained in jail. But the utter irrelevancy of employment history and family ties was inferred by the court itself when it stated:

> Well-designed reporting procedures can reduce the temptation to flee by providing for prompt communications with judicial authorities if the individual departs from his usual routine. If conditions to release are violated, such a report can lead to prompt apprehension and possible prosecution under the criminal bail-jumping provision. All conditions of pretrial release have as their goal the close supervision of the defendant in order to curtail his opportunity to flee. A desirable by-product is that often any danger to the public presented by the release can also be minimized.

412 F.2d at 172-73.

Some months before it decided *Leathers, supra,* the District of Columbia Court of Appeals decided *White, supra.* There, appellant was accused of first degree murder and assault with intent to kill, arising from her participation in a "melee" in which a policeman was killed while trying to arrest her husband. The district judge determined that she posed a danger to the community and denied pretrial release. The court of appeals concluded that appellant's actions did not portend a risk of danger. The accused had no prior criminal record, and the government was unable to suggest any other factor which indicated that she was dangerous. The court pointed to appellant's stable position within the community and her steady employment record. The case is significant, however, in that it clearly demonstrates that conditions of release cannot be arbitrarily imposed.

lack of a previous criminal record. Thus, the magistrate can be expected to view the alleged offense as representing a significant deviation from the suspect's prior behavioral pattern. On the other hand, the victim's identification of the suspect as the man who robbed him provides most impressive evidence that this deviation has, in fact, occurred. In addition, the crime charged is a serious felony, carrying a sentence stringent enough to motivate the accused to remove himself from the jurisdiction.[81] Thus, one would expect the magistrate to find the accused ineligible for unconditional pretrial release.

Having considered and rejected his first alternative under the proposed statute, the magistrate must now decide whether the imposition of a conditional release would reasonably assure the suspect's return for trial.[82] Here the magistrate enjoys wide discretion in fashioning the type of condition he believes necessary to provide the required assurance. He must, however, consider the conditions enumerated in the statute before applying his own creativity to the case. Therefore, assuming that no individual or organization in the community will agree to supervise the accused between his arraignment and trial, and because he has no family or friends in the area, the first condition listed in section 101(a) will probably be dismissed as a possibility.

The magistrate will likely be unwilling to impose the second of the enumerated conditions as well, since he has already decided not to trust the accused to the point of granting him an outright release. Reflecting once more upon the seriousness of the charge and the seemingly strong evidence before him, predictably, the magistrate will require more than the mere imposition of restraints which the accused would be expected to observe voluntarily. Since the preferred conditions of section 101 are unsatisfactory in this case, the magistrate may structure any condition he believes will achieve the desired result. He will consider that under section 105 the accused is guilty of an independent crime if he were to violate the conditions of his release, a fact of which the accused will be apprised prior to his release. He will also take into account the fact that chances of successful flight are minimal when

81. It has been held that the severity of the sentence for the crime in question is not enough, in itself, to justify the outright denial of release. White v. United States, 412 F.2d 145 (D.C. Cir. 1968). *But see* United States v. Jackson, 297 F. Supp. 601 (D. Conn. 1969).

82. This hypothetical suspect probably would not be considered dangerous by a magistrate because this was not an armed robbery and because the accused has no previous criminal record. In cases involving suspects thought to be dangerous, the magistrate would employ the same test, but would grant a conditional release only if it would reasonably assure the safety of the community as well as the accused's presence at trial.

the person's identification is established, especially when the court can learn promptly of any flight. It might be reasonable, therefore, to project that the magistrate will release the suspect on the condition that he report daily to an officer of the court, thus providing the court with continuous assurance of his compliance with the release order.

Our robbery suspect thus emerges from the magistrate's chambers with a substantial portion of his personal liberty intact. As has been suggested, this will give him an opportunity to assist counsel in the preparation of his defense, search personally for potentially exculpatory evidence, and find or hold a job. Concededly, another magistrate might have dealt more harshly with the accused. In such an instance, however, the important consideration is that the more restrictive condition of release, or the order to detain, would be premised upon factors common to all potential suspects, thereby elevating the poor to a position of equality before the law. Once again, the goal is not to achieve an across-the-board grant of pretrial release, but rather to strike an informed balance between freeing reliable defendants and protecting the interests of society.

V. Conclusion

As presently structured, the various methods of pretrial release in the United States represent little more than a grossly haphazard failure, daily working a fraud on diverse portions of society. The poor wait in jail for months until their trials. The bondsman continues to play a vital role in executing or frustrating the courts' determinations of eligibility for pretrial release. Respect among the masses for the integrity of federal pretrial law enforcement is on the wane, while contempt for the system's dissimulation has soared.

The Bail Reform Act of 1966 clearly has not proven to be the expected panacea. Indeed, because federal judicial officers fail to apply uniformly the provisions of the Bail Reform Act, financial conditions of release still predominate. Furthermore, as long as the Bail Reform Act permits continued utilization of traditional money bail, the federal judiciary will stubbornly employ this method of release on a wide scale. The proposal advanced in this article dramatically confronts financial conditions of pretrial release by eliminating that concept from the American bail scene. With money bail no longer available, the

federal judiciary will be required to fashion more imaginative and effective forms of pretrial release.

In addition, not only will this proposal assure the release of reliable defendants, regardless of their financial status, but equally important, the predictably dangerous accuseds will be precluded from purchasing their freedom to prey upon the community and tamper with evidence and witnesses. And, although some defendants will be detained because they pose so serious a threat to the populace, or because there exist no conditions which will reasonably assure their return for trial, these individuals will be tried within thirty or sixty days of their confinement, unless they themselves request a further extension.

In conclusion, the proposal retains many of the noteworthy essentials of the Bail Reform Act, and provides additionally: (1) that the identical guidelines for eligibility for release be employed in all cases; (2) that as a last resort an accused may be detained prior to trial; (3) that where detention is deemed advisable, an efficient program of appellate review automatically commences; and (4) that the detained accused be guaranteed a speedy trial. Although this proposal may not eradicate all of the injustices inherent in the present methods of pretrial release, it does treat effectively the rights of the indigent and the middle-class, and of the community in general, and thus may enhance the faltering integrity of American pretrial release.

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