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Speedy Trial Schemes and Criminal Justice Delay

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NOTES

SPEEDY TRIAL SCHEMES AND CRIMINAL JUSTICE DELAY

The guarantee of a speedy trial for criminal defendants has long been recognized by the common law of England[1] and by the Constitution of the United States.[2] Heavy burdens, however, have been placed upon an accused who claims that he has been denied a speedy trial; American courts have traditionally been reluctant to place any affirmative duty upon the state to bring a criminal defendant promptly to trial.[3]

Today problems of delayed justice have reached massive proportions[4] and have prompted court administrators and legislators to

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1 The MAGNA CHARTA, 25 Edw. 1, c. 29 (1297), states: "We will sell to no man, we will not deny or defer to any man either justice or right." *See* Habeas Corpus Act of 1679, 31 Car. 2, c. 2; W. BLACKSTONE, COMMENTARIES *438; text accompanying notes 36-39 *infra*.

2 U.S. CONST. amend. VI. *See* Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); United States v. Ewell, 383 U.S. 116 (1966); Smith v. United States, 360 U.S. 1 (1959); Pollard v. United States, 352 U.S. 354 (1957); Beavers v. Haubert, 198 U.S. 77 (1905). The Supreme Court in 1967 declared that the sixth amendment right to a speedy trial applied to the states through the fourteenth amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967).

3 *See* notes 15-28 and accompanying text *infra*.

4 As of June 30, 1970, more than 6,000 federal district court criminal cases (30% of all pending cases) had been awaiting trial for one year or more, although about one-half of these backlog cases involved fugitive defendants. JUDICIAL CONFERENCE OF THE UNITED STATES, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 1970, at 155-57 (1971). The report characterized those district courts with greater than 30% of their criminal cases pending one year or more as facing an "emergency" situation; included in this group were the New York Southern, West Virginia Southern, New York Western, Rhode Island, Alabama Southern, and New Jersey districts. *Id.*

On December 13, 1970, Bernice Just of the American Friends Service Committee and a group of law students interviewed 597 men awaiting trial in District of Columbia jails. She reported that

> [o]ne had been confined 35 months, 11 others in excess of 18 months, and another 11 for a full year or more. Still another 72 men had been in jail for at least six months. . . .
>
> . . . [N]early 70 percent of defendants with cases pending in the U.S. District Court had been confined at least three months, including 10 percent jailed at least one year.

Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 87 (1971) [hereinafter cited as *Hearings*]. According to Just, "[T]he total detention experience is worse for unconvicted defendants whose legal status is ambiguous, than for those adjudged guilty and committed to prison." *Id.* at 88.

Critics placed much of the blame for the New York City jail riots in 1970 on the fact that 40% of the inmates had been waiting one year or more for trial. *See* N.Y. Times, March 8, 1971, at 69, col. 1.

attempt redefinition of the nature of the speedy trial guarantee. Various schemes, implemented by either court rules[5] or statutes,[6] have recently set specific time limits within which an accused must be brought to trial. Although these plans are primarily concerned with fairness to the accused—especially the accused who is incarcerated prior to trial[7]—they also seek to reduce the high cost of delay to the community.[8] In addition, they may make preventive detention[9] unnecessary and may

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5 *E.g.*, 2D CIR. RULES REGARDING PROMPT DISPOSITION OF CRIM. CASES [hereinafter cited as 2D CIR. R.]; ARIZ. R. CRIM. P. 236; FLA. R. CRIM. P. 3.191; IND. R. CRIM. P. 4; N.M.R. CIV. P. 95.

In New York a speedy trial rule was promulgated by the state's Judicial Conference in April, 1971 and was to have become effective on May 2, 1972. 22 N.Y.C.R.R. § 29. The rule never took effect, however, because in April, 1972 the state legislature passed a substitute measure explicitly superseding the Judicial Conference rule. Ch. 184, [1972] N.Y. Laws 398. State legislators apparently were unwilling to provide adequate resources for implementation of the Judicial Conference rule (requiring a time limit for trials) and replaced it with a statute dealing only with prosecutorial delay. *See* note 135 *infra*. This Note will cite various provisions of the now superseded Judicial Conference rule, both because it represents an enlightened approach to the problem of delayed justice and because it was politically significant as a stimulus to legislative change. Unfortunately, the legislative response in New York was less than satisfactory. *See* notes 113 & 114 and accompanying text *infra*.

6 *E.g.*, CAL. PENAL CODE § 1382 (West 1970); ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1970); IOWA CODE ANN. § 795.2 (Supp. 1972); NEV. REV. STAT. § 178.556 (1969); WASH. REV. CODE ANN. § 10.46.010 (1961); WIS. STAT. ANN. § 971.10 (1971); ch. 184, [1972] N.Y. Laws 398.

7 Most speedy trial schemes require that prisoners incarcerated pending trial be brought to trial within a shorter time than those who have been released on bail or on personal recognizance. *See* note 45 and accompanying text *infra*.

The burdens imposed on the defendant by court delay are severe:

> The defendant's memory of the events in issue fades, potential defense witnesses disappear, and other evidence becomes available [*sic*]. The human costs of delay are staggering, especially when the defendant is unable to secure his pretrial release and must remain in jail awaiting trial. Loss of employment, disruption of family and other relationships, and continuing anxiety are the frequent accompaniment of prolonged delay in a criminal case. Even if the defendant is at length acquitted, he can never fully recover what he has lost by reason of delay.

Hearings 33 (testimony of D. A. Rezneck of the American Civil Liberties Union).

8 It costs thousands of dollars of public funds to keep a defendant in jail for a year while he awaits his trial. Furthermore, a speedy trial is the most effective weapon against crime yet developed. Swift trial, conviction, and sentencing of the gnilty are a major deterrent to crime. Delay destroys this deterrent.

Failure to provide a speedy trial also greatly impedes the rehabilitation of convicted persons. The sooner the process of rehabilitation begins in the case of a guilty defendant, the better its chances for success.

Trial delays are also unfair to victims and other witnesses of crimes. They necessitate repeated trips to court, often at the cost of a day's wages the victim or defendant can not afford to lose. Eventually such persons may simply give up and stop coming. The result is a miscarriage of justice and an erosion of confidence in the judicial process . . . .

Id. 33-34.

9 *See* notes 145-47 and accompanying text *infra*.

compel state legislatures to allocate more resources to judicial operations.[10] Their ultimate goal is to ensure justice without delay in all criminal prosecutions.[11]

This note will explore the likelihood that these schemes will succeed. Some speedy trial plans are inherently unable to cure the major problems of delayed justice[12] and others, though potentially effective, may fail for inadequate financing. Moreover, there is the latent danger in almost all these plans that inadequate judicial resources coupled with strict time limits may lead to procedural "short-cutting."[13] Indeed, speedy trial proposals may be seen by some policy makers as invitations, or at least opportunities, to attack legislatively or judicially what they regard as the true cause of court congestion and delay—the extensive substantive and procedural rights afforded the criminal defendant.[14]

I

THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL: THE TRADITIONAL VIEW

In a recent case a North Carolina court stated that

> [u]ndue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated

10 *See* notes 131-44 and accompanying text *infra.*

11 Existing speedy trial schemes, however, do not uniformly ensure this result. Some (*e.g.*, WIS. STAT. ANN. § 971.10(2) (1971)) retain the notion that an accused must demand a speedy trial or else waive his right. *See* notes 96-104 and accompanying text *infra.* Others (*e.g.*, IND. R. CRIM. P. 4) only protect the accused from prosecutorial delay, thereby excluding passive delay caused by court congestion. *See* notes 105-30 and accompanying text *infra.* Still other schemes (*e.g.*, WASH. REV. CODE ANN. § 10.46.010 (1961)) provide broad "good cause" exceptions to the guarantee (*i.e.*, the time limit is tolled during delay shown to be for good cause). Such exceptions to the speedy trial guarantee facilitate state avoidance of an affirmative duty to provide speedy trials. *See* notes 71-75 and accompanying text *infra.*

12 *See* text accompanying notes 89-130 *infra.* Some prosecutors feel that speedy trial schemes will encourage defendants who might otherwise plead guilty to seek trial, hoping for mandatory dismissal by failure of the state to meet the deadlines. Since nearly 90% of all criminal prosecutions are currently disposed of by guilty pleas (PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967) [hereinafter cited as CRIME COMM'N REPORT]), these critics feel that such schemes will further delay rather than speed up the criminal justice system. *See, e.g.*, Hearings 113 (statement of W. H. Rehnquist, Assistant U.S. Attorney General); N.Y. Times, Feb. 14, 1971, at 61, col. 1. Such concern, however, is misplaced if a judicial system is provided with sufficient resources to ensure that court congestion will not lead to massive noncompliance with deadlines and thus to mass dismissals. *See* notes 131-44 and accompanying text *infra.*

13 *See* notes 148-52 and accompanying text *infra.*

14 *See* note 152 *infra.*

> factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.[15]

The component parts of this statement provide a focus for analysis of the traditional and still prevailing view of the constitutional speedy trial guarantee.

A. *Length of the Delay*

The Supreme Court in 1905 noted that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances."[16] No precise time limit is expressed in the Constitution, nor have judicial decisions provided such a limit. The "essential ingredient" of the guarantee, in fact, has been said to be "orderly expedition, and not mere speed."[17] In some cases, however, if an "unreasonably" long delay occurs between indictment and trial, the defendant has been relieved of his burden of proving prejudice owing to the delay.[18]

B. *Cause of the Delay*

A defendant who by his own motions, continuances, or dilatory tactics causes a delay in bringing his case to trial cannot later claim that he was denied a speedy trial.[19] Even when the prosecution is the cause of the delay, the defendant often must prove that the delay was "pur-

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15 State v. Ball, 277 N.C. 714, 717, 178 S.E.2d 377, 380 (1971).

16 Beavers v. Haubert, 198 U.S. 77, 87 (1905).

17 Smith v. United States, 360 U.S. 1, 10 (1959). In McDonald v. Hudspeth, 113 F.2d 984 (10th Cir. 1940), defendant was arrested and held in jail 10 months while awaiting trial. Because there were other criminal cases to be tried ahead of his, defendant was held not to have been denied his right to a speedy trial.

18 *E.g.*, United States v. Lustman, 258 F.2d 475, 477-78 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); United States v. Blanca Perez, 310 F. Supp. 550, 551 (S.D.N.Y. 1970); United States v. Mann, 291 F. Supp. 268, 271 (S.D.N.Y. 1968). In Hedgepeth v. United States, 364 F.2d 684 (D.C. Cir. 1966), the court stated that "the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." *Id.* at 687 n.3. For a discussion of prejudice caused by delay, see notes 23-26 and accompanying text *infra*.

19 *See, e.g.*, United States v. Kabot, 295 F.2d 848, 852 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962) (defendant twice requested adjournment and acquiesced in repeated adjournments by the government); United States v. Lustman, 258 F.2d 475, 477 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (delay of more than five years between indictment and trial owing largely to defendant's own motions held not to constitute violation of sixth amendment); Sawyer v. Barczak, 229 F.2d 805, 812 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956) (delay caused by the dilatory motions of the defendant not a denial of speedy trial).

poseful or oppressive."[20] If the prosecution has not willfully caused the delay and is not grossly negligent in its duties, delay will generally be excused.[21] It follows that if the prosecution is prepared to proceed with the case and delay is caused only by the congested condition of the criminal calendar, the defendant has no grounds to contend that he was denied his constitutional right to a prompt trial.[22]

C. *Burden of Proving Prejudice*

Under the traditional approach, before an accused may claim he was denied a speedy trial, he must allege and prove that he was prejudiced by the delay.[23] Only in the rare case will prejudice be presumed,

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20 Pollard v. United States, 352 U.S. 354, 361 (1957). Some federal courts have adopted a broader concept of inexcusable delay under the sixth amendment, one utilizing an "arbitrary, purposeful, oppressive or vexatious" test. *See* Smith v. United States, 331 F.2d 784, 787 (D.C. Cir. 1964). In practice, however, this test like its predecessor excuses many delays for which the defendant is in no way responsible. *See, e.g.*, Hinton v. United States, 424 F.2d 876 (D.C. Cir. 1969) (15-month delay owing to prosecution's honest but mistaken belief that defendant was at large when he was actually in jail for another offense held not arbitrary, purposeful, oppressive, or vexatious); Chinn v. United States, 228 F.2d 151 (4th Cir. 1955) (10-month delay between indictment and trial held acceptable since trial held as soon as orderly conduct of court's business permitted). *But see* Marshall v. United States, 337 F.2d 119, 122 (D.C. Cir. 1964) (43-month delay occasioned by hung jury at first trial and vacated judgment at second trial though not purposeful, held to be avoidable, vexatious, and arbitrary).

21 *See, e.g.*, Pollard v. United States, 352 U.S. 354, 361 (1957) (accidental two-year delay in sentencing and therefore in completion of trial held not purposeful or oppressive since promptly remedied on discovery); Hinton v. United States, 242 F.2d 876, 881 (D.C. Cir. 1969) (institutional inefficiency in not locating defendant who was in jail on another offense neither arbitrary, purposeful, oppressive, nor vexatious conduct on part of prosecution nor product of indifference); United States *ex rel.* Solomon v. Mancusi, 412 F.2d 88, 91-92 (2d Cir.), *cert. denied*, 396 U.S. 936 (1969) (11-month delay caused by mistake by court or district attorney in believing first appointed counsel was still handling defendant's case held not purposeful or oppressive); State v. Hadley, 249 S.W.2d 857, 862 (Mo. 1952) (delay in initiating second trial because of belated discovery of fatal error in first trial held to be no denial of constitutional right to a speedy trial since not the fault of prosecution).

22 The Supreme Court has not yet addressed itself directly to this question. Chief Justice Burger, however, writing for the majority in Dickey v. Florida, 398 U.S. 30 (1970), stated in dictum that court docket congestion and lack of judicial manpower may excuse delay. *Id.* at 38. In King v. United States, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959), a delay of five months attributable to court congestion was held constitutional. *See also* McDonald v. Hudspeth, 113 F.2d 984 (10th Cir. 1940); State v. Ball, 277 N.C. 714, 178 S.E.2d 377 (1971); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 857-59 (1957).

23 *See, e.g.*, Harling v. United States, 401 F.2d 392, 395 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1068 (1969); United States v. Jackson, 369 F.2d 936, 939 (4th Cir. 1966); United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 624 (2d Cir. 1963).

and then only if the delay is prima facie unreasonable.[24] Despite Supreme Court dicta broadly delineating the dangers of trial delay,[25] prejudice is often interpreted very narrowly—only delay which harms the defendant's ability to prepare his defense may be considered truly prejudicial.[26]

D. *Waiver and the Demand Rule*

Traditional constitutional doctrine holds that an accused impliedly waives his right to a speedy trial by not asserting that right during the period of delay.[27] Presumably the purpose of such a rule is to prevent a defendant from alleging constitutional violation when he earlier acquiesced in the delay for his own advantage.[28]

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24 *See, e.g.*, United States v. Provoo, 17 F.R.D. 183, 203 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); note 18 and accompanying text *supra*.

25 *E.g.*, United States v. Ewell, 383 U.S. 116 (1966), which described the sixth amendment as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *Id.* at 120.

26 King v. United States, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959), held a post-indictment delay not to constitute a denial of a speedy trial, in part because "[t]he defendant's case was not prejudiced, even though he may have suffered hardship from the delay." *Id.* at 570; *accord*, Porter v. United States, 270 F.2d 453 (D.C. Cir. 1959), *cert. denied*, 363 U.S. 805 (1960). The *Porter* dissent, however, stated that lengthy pretrial incarceration was itself prejudicial. *Id.* at 455.

In Bynum v. United States, 408 F.2d 1207 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 935 (1969), it was held that no prejudice had been proved even though a prima facie case of undue delay—one and a half years between arrest and trial—had been presented. The court reasoned that "no substantial possibility appears in this case that the defense was weakened due either to the unavailability or diminished recollection of witnesses." *Id.* at 1209.

Similarly, in United States v. Verville, 281 F. Supp. 591 (E.D. Wis. 1968), defendant's conviction was reversed and his case remanded for a pretrial hearing. The pretrial hearing was delayed for 21 months owing to unavailability of a judge and calendar congestion. The accused alleged that he was prejudiced by the delay in that pending charges created personal anxiety, aroused public suspicion, damaged his reputation, and led to legal expense. The court held that prejudice "in the constitutional sense" had not occurred since the defendant had "not alleged impairment of memory or loss of witnesses." *Id.* at 593. *But cf.* United States v. Marion, 404 U.S. 307, 321-22 (1971) (possibility of prejudice to defendant's case not sufficient reason to extend sixth amendment to prearrest delay).

27 *See, e.g.*, United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967); Mathias v. United States, 374 F.2d 312 (D.C. Cir. 1967); Chinn v. United States, 228 F.2d 151, 153 (4th Cir. 1955). These cases hold that the right to a speedy trial is personal and may be waived. Failure to object to a continuance requested by the prosecution has also been held to constitute a waiver of the right to a speedy trial. *See, e.g.*, Collins v. United States, 157 F.2d 409 (9th Cir. 1946).

28 *See* Note, *supra* note 22, at 853.

II

MINORITY EROSION OF THE TRADITIONAL VIEW: THE AFFIRMATIVE DUTY CONCEPT

To avoid the harsh results of placing such a heavy burden on the accused, a significant number of judges over the years have evidenced a willingness to question and change accepted notions of the speedy trial guarantee. By abandonment of the traditional constitutional view, some judges would in effect place on the state an affirmative duty to provide an expeditious criminal justice system even in the absence of a speedy trial plan.[29] In a strong dissent from a District of Columbia Circuit decision holding that a crowded criminal calendar justified an otherwise unreasonable delay, Chief Judge Bazelon wrote:

> [T]he application of [the sixth amendment], providing that "the accused shall enjoy the right to a speedy . . . trial," does not turn on the question of responsibility. Even if no agency or instrumentality of the Government is responsible for the delay, where there has *in fact* been a substantial delay not of the defendant's own choosing . . . there has *in law* been a denial of a speedy trial.[30]

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29 Interpreting the right to a speedy trial under the United States and Alaska Constitutions, the Alaska Supreme Court recently rejected the demand rule, held that court congestion did not justify delay, and presumed prejudice from a 14-month delay between arrest and trial. Rutherford v. State, 486 P.2d 946 (Alas. 1971). Quoting Glasgow v. State, 469 P.2d 682 (Alas. 1970), the court construed the constitutional right to a speedy trial as placing "a *positive duty* . . . upon the courts and prosecutors to see that criminal defendants are afforded a speedy trial." *Id.* at 949 (emphasis added). *But see* United States v. Smalls, 438 F.2d 711 (2d Cir. 1971), in which the Second Circuit reaffirmed the demand rule and the actual prejudice test. When this case was decided the Second Circuit had already promulgated its new rules which abolished these two conditions to the right. *See* notes 95 & 99 and accompanying text *infra*. But the new rules had not yet become effective at the time of the *Smalls* case and, in the absence of such rules, the court continued to interpret the constitutional right strictly.

30 King v. United States, 265 F.2d 567, 572-73 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959) (emphasis in original). The *King* majority, although holding that the petitioner had not been denied a speedy trial, did warn the government about not providing judicial machinery to handle the criminal caseload: "If the legislature were to refuse to install sufficient judicial machinery to perform the judicial tasks, it might be necessary to turn some accused persons loose." *Id.* at 569. But the court added that "[a] method of disposition which reasonably accommodates practicalities is not illegal." *Id. See also* Falgout v. Trujillo, 270 F. Supp. 685 (D. Colo. 1966), which held that the congested condition of the criminal docket in the state court justified the accused's eight-month pretrial prison term. But the court issued a caveat in these words:

> [The court clerk] testified that petitioner's case was being processed no differently from all of the other cases on the criminal docket. It is clear that *there has to be some point at which the period of delay becomes so intolerable that it is not enough that one is being treated the same as other defendants.* The Court is not

In a case involving a 102-day delay between indictment and trial where the defendant spent nearly six months in jail, the court held that since the delay was not arbitrary or purposeful and since the defendant had failed to demand a speedy trial, he had not been denied his sixth amendment rights.[31] Judge Wright, however, in a strong dissent argued that

> [u]nlike Continental concepts of criminal justice, under our law a man charged with crime is presumed innocent. But, under today's decision, an innocent man may be held in jail for almost six months awaiting his trial. Under this ruling, for the first six months after accusation, the presumption of innocence—and the right to a speedy trial—mean very little to a defendant unable to make bond.[32]

The demand rule has also been attacked in some opinions,[33] and the rule that a defendant must prove prejudice from the delay in order to avail himself of the right to a prompt trial has similarly been criticized as unduly harsh.[34] It is in the context of this limited judicial questioning of traditional views on the right to a speedy trial[35] and of strong criticism of doctrines that harshly burden the criminal defendant that new speedy trial schemes have developed.

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prepared to say, however, that the eight month delay in petitioner's case constitutes such a period.

Id. at 688 (emphasis added).

31 Smith v. United States, 331 F.2d 784, 787-89 (D.C. Cir. 1964).

32 *Id.* at 793.

33 According to Mr. Justice Brennan, "The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay." Dickey v. Florida, 398 U.S. 30, 50 (1970) (concurring opinion). In People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955), the New York Court of Appeals stated that

> [i]t is the state which initiates the action and it is the state which must see that the defendant is arraigned. It is likewise the state which has the duty of seeing that the defendant is speedily brougbt to trial. And from this it follows that the mere failure of the defendant to take affirmative action to prevent delay may not, without more, be construed or treated as a waiver.

Id. at 358, 130 N.E.2d at 895 (footnote omitted). *See also* United States v. Mann, 291 F. Supp. 268, 274-75 (S.D.N.Y. 1968); United States v. Dillon, 183 F. Supp. 541, 543 (S.D.N.Y. 1960); Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 VALPARAISO L. REV. 197, 199-201 (1969). With regard to other constitutional rights waiver must be voluntary and knowing. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938).

34 [C]oncrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses.

Dickey v. Florida, 398 U.S. 30, 53 (1970) (concurring opinion). *See* Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 493-97 (1968); *cf.* note 18 *supra*.

35 *See* note 29 *supra*.

III

SPEEDY TRIAL SCHEMES IN GENERAL

Speedy trial statutes are not a new phenomenon. The Habeas Corpus Act of 1679[36]

> enabled a person arrested to call upon his accuser to bring forward his indictment the first session after his imprisonment, and to try him on it at the next; on failure of which, he was, in the first instance, entitled to bail, and in the last, to a final discharge from the accusation.[37]

In the United States, many states adopted some form of the Habeas Corpus Act of 1679.[38] The time limit was generally measured, as in the Habeas Corpus Act, by the number of court terms that had elapsed.[39]

Today, however, these older statutes have proven unable to cope with the immense problems of delayed criminal justice.[40] For the most part, judicial interpretation of these statutes has traced judicial interpretation of the constitutional right to a speedy trial[41] and therefore has placed heavy burdens on the accused to prove prejudice, to comply with the demand rule, and to show "purposeful or oppressive" prosecutorial delay.[42] In other words, some state statutory provisions

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36 31 Car. 2, c. 2 (1679).

37 1 M. HALE, THE HISTORY OF THE COMMON LAW 87 (5th ed. 1794). *See also* United States v. Provoo, 17 F.R.D. 183, 196-97 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955), describing the English statutory background to the speedy trial guarantee.

38 *E.g.*, MO. ANN. STAT. §§ 545.890, .900 (1953); OKLA. STAT. ANN. tit. 22, § 812 (1969).

39 For classifications of these older statutes according to the length of time between intervals, see Note, *supra* note 22, at 851-52 nn.34-35. The federal courts have never operated under a time limit system, although several proposals that they do so have recently been put forward. *See* note 142 *infra*.

40 *See* note 4 *supra*.

41 *See* notes 15-28 and accompanying text *supra*.

42 WASH. REV. CODE ANN. § 10.46.010 (1961), which specifies a 60-day time limit for trial after indictment, has been interpreted to retain the demand rule. State v. Christensen, 75 Wash. 2d 678, 684, 453 P.2d 644, 648 (1969). If the prosecution shows "good cause" for the initial delay, the defendant is shackled with the traditional requirements of proving both prejudice and purposeful or oppressive conduct. *See, e.g.*, State v. Garmen, 76 Wash. 2d 637, 641, 458 P.2d 292, 295 (1969). A congested trial docket has been held to be "good cause" for delay beyond 60 days. State v. Dunn, 70 Wash. 2d 572, 576, 424 P.2d 897, 899-900 (1967).

Typical of the older statutes is the Oklahoma speedy trial statute. OKLA. STAT. ANN. tit. 22, § 812 (1969). It states that if trial is not postponed on the application of the defendant and if the defendant is not brought to trial in the next term of court in which the indictment is triable after it is filed, the court must dismiss the indictment unless good cause is shown for the delay. In Pickle v. Bliss, 418 P.2d 69 (Okla. Crim. App. 1966), it was held that the defendant must demand a speedy trial before he is entitled to relief under the statute. *Id.* at 74. Furthermore, the defendant was deemed to have the burden

for speedy trials, despite their more definite time limits,[43] have been interpreted to include the same conditions as the constitutional right.

Although more modern speedy trial plans differ in details, certain common characteristics can be identified, including the setting of time limits, provisions for extension of the time limits, and sanctions for failure to comply.

A. *Time Limits*

The American Bar Association's *Standards Relating to Speedy Trial* recommends that limits within which the accused must be brought to trial should be set "in terms of days or months running from a specified event."[44] Some speedy trial plans distinguish between defendants in custody awaiting trial and those free on bail or personal recognizance.[45] Schemes providing for a shorter time limit in misdemeanor

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of proving that delay was owing to laches on the part of the prosecution. *Id.* at 73. Although the defendant in this particular case was able to rebut the presumption of lawful cause for delay, his burden of proof was quite heavy in view of the explicit language of the statute.

43 FED. R. CRIM. P. 48(b) sets no specific time limit in federal criminal prosecutions. It reads:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is *unnecessary delay* in bringing a defendant to trial, the court *may* dismiss the indictment, information or complaint.

(emphasis added). Thus there is no federal parallel on either a procedural or substantive level to state statutes setting definite time limits for trials. *See* notes 45-59 *infra*. *But see* note 142 *infra*.

Thus far delay because of court congestion has not been considered a sufficient ground for dismissal under Rule 48(b). The prejudice and the demand rules have consistently been applied in federal courts. *See, e.g.*, United States v. Verville, 281 F. Supp. 591 (E.D. Wis. 1968). *But see* 2d CIR. R. 8. *See also* note 142 *infra*.

44 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1 (1970) [hereinafter cited as ABA STANDARDS]. The commentary to section 2.1 notes that most older speedy trial plans expressed time limits according to how many court terms had elapsed. Such schemes are criticized as causing "lack of uniformity throughout a jurisdiction and [being] difficult for defendants and counsel to understand." *Id.* § 2.2, Comment at 14.

45 The New York Judicial Conference rules were typical of this approach. *See* note 5 *supra*. They provided that if a defendant was in custody and was not brought to trial within 90 days from the date of his arrest, he would be released on bail or his own recoguizance. 22 N.Y.C.R.R. § 29.1. The section, however, did not apply to a defendant in prison for other offenses or in custody pending trial on other charges with regard to which the 90 days had not yet elapsed. Section 29.2 provided that in any criminal prosecution other than homicide, whether or not the defendant was in custody, unless he was tried within six months from the date of his arrest, the charges would be dismissed. *See also* ABA STANDARDS § 4.2. The current New York statute (*see* note 5 *supra*) and the Second Circuit rules establish a similar dichotomy, but only require that the prosecution be *ready* for trial within the specified limits. Ch. 184, § 2, [1972] N.Y. Laws 398-99; 2D. CIR. RR. 3-4.

Illinois provides that a defendant in custody must be brought to trial within 120 days

cases are found in California[46] and Florida,[47] and some plans specify shorter limits or calendar preference for those accused of felonies.[48]

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from the date he was taken into custody and that a defendant released on bail or recognizance must be tried within 160 days from the date he demands trial. ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1970). For a discussion of speedy trial plans which retain the demand rule, see notes 96-104 and accompanying text *infra*.

Although the Florida rule distinguishes between felonies and misdemeanors (*see* note 47 *infra*), the same time limits apply whether the accused is held in custody or is free on bail or recognizance pending trial. FLA. R. CRIM. P. 3.191(a)(1); *see* CAL. PENAL CODE § 1382 (West 1970).

Under the Second Circuit's rules, criminal defendants incarcerated prior to trial are also given docket preference over criminal defendants released pending trial. 2D CIR. R. 1.

46 CAL. PENAL CODE § 1382 (West 1970) provides for a 60-day time limit between indictment and trial on felony charges. A defendant accused of a misdemeanor must be brought to trial within 30 days after he is arraigned if he is in custody, and otherwise within 45 days after his arraignment. The new New York statute (ch. 184, § 2, [1972] N.Y. Laws 398) establishes different time limits depending on whether the charge is a felony (six months), a misdemeanor carrying a possible sentence of more than three months (90 days), a misdemeanor carrying a possible sentence of three months or less (60 days), and a violation (30 days). If the prosecution is not ready for trial within these limits, a motion to dismiss the charges must be granted. Those defendants incarcerated prior to trial must be released from custody if the prosecution is not ready for trial within 90 days for felonies, 30 days for misdemeanors carrying a possible sentence of more than three months, 15 days for misdemeanors carrying a possible sentence of three months or less, or five days for violations. The time limits do not apply to those charged with homicide. *See also* WIS. STAT. ANN. § 971.10 (1971).

47 FLA. R. CRIM. P. 3.191 provides that without demand a defendant accused of a felony must be tried within 180 days of indictment or information; one accused of a misdemeanor must be brought to trial within 90 days. In either case, however, if a defendant demands a speedy trial, he must be tried within 60 days of the information or indictment. *See* notes 96-104 and accompanying text *infra*.

48 ABA STANDARDS § 1.1(b) recommeuds that calendar priority be given to those defendants whose pretrial liberty is reasonably believed to present unusual risks. *See* 2D CIR. R. 1(b). The 1970 report of the Judicial Conference of the United States recommended a rule which would provide for a more prompt disposition of cases involving persons whose pretrial liberty the United States Attorney believed to be dangerous. JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 4, at 56. Such a recommendation has been followed in new FED. R. CRIM. P. 50(b). *See* note 142 *infra*. Philadelphia established a special calendar under which defendants charged with crimes of violence are brought to trial within 30 days of their indictments. *See* CRIME COMM'N REPORT 131.

All persons charged with a crime in New Mexico must be tried within six months of the filing of the information or indictment (N.M.R. CIV. P. 95), but the courts are bound to fix, within 90 days from the time of arrest, a trial date for all those charged with a felony. N.M. STAT. ANN. § 41-11-4.1 (Supp. 1971). Dismissal of the charges, however, will only occur if the trial is not commenced within six months. *Id.* For a discussion of sanctions under the various speedy trial schemes, see notes 76-88 and accompanying text *infra*.

As bail reform progresses, "a greater number of defendants posing [serious threat to society] will gain their pretrial liberty." ABA STANDARDS § 1.1, Comment at 11. Opponents of preventive detention feel that effective speedy trial legislation may make lengthy pretrial incarceration unnecessary. *See* note 145 *infra*. In analyzing how elimination of excessive pretrial delay might prove an alternative to preventive detention, Senator Sam Ervin stated, "If we must tolerate delays in trial, it would be better to delay the less serious cases and speed up the trials of the felonies." 116 CONG. REC. 15,888 (1970).

Florida, in an extremely intricate court rule,[49] distinguishes not only between defendants in and out of custody and between those accused of felonies or misdemeanors, but also has a different time limit for those who demand trial.[50] Some proposals do not draw such distinctions between types of crime or defendants.[51]

Speedy trial plans also may be classified according to the time from which the limitation period begins to run.[52] Complicated time calculations may be necessary if there is a mistrial[53] or if the accused is in jail for another conviction.[54] Generally, however, time limits run either from the time the accused is taken into custody,[55] the time of arrest,[56] or the time the information or indictment is filed.[57] Prein-

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Shorter time limits for trial of alleged misdemeanants probably reflects a view that misdemeanor cases can be more easily processed through the criminal justice system. Shorter time limits or docketing advantages for accused felons probably reflects the notion that the criminal justice system should give primary attention to serious offenders. In addition, it may be that accused felons, because of the possibly greater threat they pose to society, are more frequently incarcerated prior to trial. Even if an accused felon is released prior to trial, statistics show that he is less likely to commit another crime during his release if he is quickly tried. *See* note 145 *infra*. Of course speedy trials for both accused misdemeanants and felons are clearly most desirable.

49 FLA. R. CRIM. P. 3.191.

50 *See* note 4 *supra*.

51 *See, e.g.*, S. 895, 92d Cong., 1st Sess. (1971). This bill provides that any defendant charged with an offense against the Uuited States be brought to trial within 60 days of his arrest (or within 60 days of the filing of information or indictment). *Id.* § 3161. Distinction is made neither between defendants in custody and those released pending trial nor between those accused of felonies and those accused of misdemeanors. Excepted from the time limits, however, are those charged with criminal offenses under the antitrust, securities, or tax laws of the United States. *Id.* § 3163(b).

52 The ABA suggests that unless the defendant was either held continnonsly in custody or released on bail or recognizance prior to the filing, the time limit for trial should commence from the date the charge is filed. When, however, the accused has been held in custody before charges are filed based upon his alleged conduct in a criminal episode, time should commence running at the date he was held to answer. ABA STANDARDS § 2.2.

Some schemes set other specific time limits for the various stages of the criminal justice process. California, for example, provides that a person accused of a crime must have an information filed against him within 15 days after he has been held to answer for the offense. CAL. PENAL CODE § 1382(1) (West 1970). *See also* NEV. REV. STAT. § 178.556 (1969); CRIME COMM'N REPORT 155-56.

53 *E.g.*, CAL. PENAL CODE § 1382(3) (West 1970).

54 *E.g.*, FLA. R. CRIM. P. 3.191(b)(1)-(3).

55 *E.g.*, ILL. ANN. STAT. ch. 38, § 103-5(a) (Smith-Hurd 1970); FLA. R. CRIM. P. 3.191(a)(1).

56 *E.g.*, 22 N.Y.C.R.R. §§ 29.1-.2; *see* note 5 *supra*. *But see* ch. 184, § 2, [1972] N.Y. Laws 398-99 (time limit begins to run from the commencement of the criminal action for dismissal of charges but from the date of commitment for release time limits).

57 *E.g.*, N.M.R. CIV. P. 95.

In the Second Circuit the time commences at either the date of arrest, service of summons, detention, or the filing of the charge, whichever is earliest. 2D CIR. R. 2. The proposed federal statute provides that the time limit runs "from the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed, then

dictment delay is generally excluded from the computation.[58] The length of the time limits differs among the various arrangements, with the shortest set at sixty days for felonies and thirty days for misdemeanors.[59]

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within sixty days from the date of such filing . . . ." S. 895, 92d Cong., 1st Sess., § 3161 (1971).

[58] *See, e.g.*, People v. Nettles, 107 Ill. App. 2d 143, 148-49 (1969). *See also* ABA STANDARDS § 2.2(a), Comment at 23: "Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof."

Although the sixth amendment's protection may extend to the period before formal charges are filed, it does not reach the period before arrest. United States v. Marion, 404 U.S. 307, 321-22 (1971). *But see* United States v. Wahrer, 319 F. Supp. 585 (D. Alas. 1970); United States v. Parrot, 248 F. Supp. 196 (D.D.C. 1965); United States v. Burke, 224 F. Supp. 41 (D.D.C. 1963). Unless a state's speedy trial formula extends to the prearrest or preindictment periods, therefore, a defendant's only protection from preaccusation delay is the statute of limitations. If purposeful delay by the prosecution results in actual prejudice, however, a defendant may show he was denied due process. United States v. Marion, *supra* at 315 n.8.

[59] CAL. PENAL CODE § 1382(2)-(3) (West 1970). The California courts have in fact operated under a 60-day limit since 1880. Ch. 47, § 106, [1880] Calif. Code Am. 29.

The proposed federal statute provides a 60-day time limit for trial of both felony and misdemeanor cases. S. 895, 92d Cong., 1st Sess. § 3161 (1971). Some observers fear that such a 60-day limit does not take into account the current capabilities of the federal judiciary. Senator Charles H. Percy, a co-sponsor of S. 895, conceded that although 60 days is a desirable goal, a 60-day limit would currently be impossible to meet. He recommended a 180-day limit. *Hearings* 66-67.

In New York, bills providing for various time limits within which a defendant must be tried (as distinguished from time limits within which the prosecution must be *ready* for trial (*see* note 45 *supra*)) have failed to get legislative support. *See* (1971) Sen. Int. No. 6047 (Rules Comm.); (1971) Assy. Int. No. 6189 (Mr. Walsh); (1971) Assy. Int. No. 4035 (Mr. Pisani). The time limits were criticized by Bronx District Attorney Burton B. Roberts as both artificial and unrealistic. N.Y. Times, Feb. 14, 1971, at 69, col. 1. The Judicial Conference plan was thus promulgated in the form of a court rule setting such "time for trial" deadlines (22 N.Y.C.R.R. § 29) but was superseded by a statute adopting a "ready rule." *See* note 5 *supra*; notes 113-14 and accompanying text *infra*.

Some time limits in effect in other states include ARIZ. R. CRIM. P. 236 (60 days); IND. R. CRIM. P. 4 (50 days from date of demand of defendant in custody, one year for defendant not in custody); IOWA CODE ANN. § 795.2 (Supp. 1972) (60 days after indictment); MASS. ANN. LAWS ch. 277, § 72 (1968) (six months for defendant in custody); NEV. REV. STAT. § 178.556 (1969) (60 days after indictment); WASH. REV. CODE ANN. § 10.46.010 (1961) (60 days); WIS. STAT. ANN. § 971.10 (1971) (60 days for misdemeanors, 90 days from date of demand for felonies).

The President's Commission on Law Enforcement and Administration of Justice, in suggesting a model timetable for felony cases, recommended that the time between arrest and trial should not exceed four months. CRIME COMM'N REPORT 154-56.

For a discussion of the relation of prompt trial plans to more efficient court administration, see notes 148-49 and accompanying text *infra*. For a discussion of how speedy trial schemes might be used to compel greater legislative allocation of resources to the judiciary, see notes 131-44 and accompanying text *infra*. Other typical speedy trial timetables are discussed in notes 44-48 & 51 *supra*.

B. *Extensions of the Time Limit: Exclusions, Continuances, and "Good Cause"*

Exceptions to a speedy trial formula, conditions which either toll the running of the time limit or allow its extension, are important considerations in evaluating the probable impact and effectiveness of such schemes. In particular the "good cause" exception,[60] whether defined specifically in the plan or by judicial interpretation, will determine in many instances the extent of the state's affirmative duty[61] to provide speedy trials.

Although some formulations merely provide for time extensions or tolling for "good cause" or "exceptional circumstances" without further definition,[62] some modern schemes state with some particularity what periods of delay are to be excluded from computation.[63] Typical of specified exclusions from the running of the time limits are delay resulting from other proceedings concerning the defendant,[64] con-

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60 Under many speedy trial schemes, if the prosecution can show that its delay beyond the time limit was for "good cause," such delay will be excused. *See* notes 62 & 71-73 *infra*. For a discussion of good cause in a constitutional framework, see notes 20-22 and accompanying text *supra*.

61 *See* notes 89-130 and accompanying text *infra*.

62 *E.g.*, N.M.R. CIV. P. 95 (2), which provides for extension of the six-month limit "for good cause shown." Such an extension, however, can only be issued by a justice of the state supreme court or a judge designated by the court. Either party may petition for such an extension by filing with the court a petition which states with particularity the facts deemed to constitnte good cause. *Id.* (3).

The ABA does not recommend such a broad "good cause" exception:

> In states with only a general "good cause" provision or with a far from complete listing of proper bases for delay, the appellate courts—and presumably the trial courts—have found the task of determining what events justify extension of the statutory limits a most difficult one.

ABA STANDARDS § 2.1, Comment at 15; *see* note 63 *infra*.

63 Under the ABA proposal "[c]ertain periods of necessary delay should be excluded in computing the time for trial, and these should be *specifically identified* by rule or statute *insofar as is practicable*." ABA STANDARDS § 2.1 (emphasis added).

64 *E.g.*, ch. 184, § 2, [1972] N.Y. Laws 399-400, which states that the following period will not be computed in the time limit formula:

> [A] reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of his competency and the period during which defendant is incompetent to stand trial; pretrial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court . . . .

See also 2D CIR. R. 5(a); FLA. R. CRIM. P. 3.191(d)(2)(iv); ABA STANDARDS § 2.3(a). Similar to the New York and Second Circuit rules on this matter is the proposed federal statute, S. 895, 92d Cong., 1st Sess. § 2161(c)(1) (1971). It does not, however, specifically exclude from calculation the period during which other proceedings concerning the defendant are under consideration by the court. *Cf. Hearings* 35 (testimony of D. A. Rezneck):

> If a Judge takes a pretrial motion under advisement after hearing, for example, the time between the hearing and his decision of the motion should not be excluded from the 60 day period. Such motions are often held under advisement

tinuances granted upon application of the defendant or with his consent,[65] and continuances granted to enable the prosecution to obtain specific material evidence impossible to gather within the time limit.[66] Absence or unavailability of the defendant during the time period generally tolls the running of the statute.[67] If a defendant is joined for

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for long periods, and extension of the 60 day limitation for such a purpose would thwart the purpose of the limitation.

[65] *E.g.*, CAL. PENAL CODE § 1382(2) (West 1970). The defendant who requests a continuance cannot later logically claim a statutory violation because of the resultant delay. His consent to a continuance may be either express or implied from his silent acquiescence in a delay. In either case, if the defendant is not represented by counsel, he will not be deemed to have consented to a delay unless the court has explained to him his rights and the effect of his consent. *Id.* § 1382(3). The Second Circuit rules provide that a continuance at defendant's request be granted only after a consideration of whether the postponement is in the "interest of justice, taking into account the public interest in the prompt disposition of criminal charges." 2D CIR. R. 5(b); *see* ch. 184, § 2, [1972] N.Y. Laws 400; ABA STANDARDS § 2.3(c).

Under the proposed federal statute, only upon a showing of good cause will a continuance be granted to the defendant. The request would have to be made at least 15 days prior to the date set for trial, and the maximum duration would be seven days. S. 895, 92d Cong., 1st Sess. § 3161(c)(6) (1971). Since the purpose of such continuances is usually to obtain key witnesses, one commentator has suggested that such a seven-day limit be omitted. *Hearings* 35 (testimony of D. A. Rezneck). If the limit were abandoned for the defendant, however, the prosecution would also be able to obtain unlimited continuances upon a showing of good cause; court congestion itself might qualify as good cause. *See* notes 105-30 and accompanying text *infra*. The 15-day provision was evidently added to S. 895 to prevent unjustified last minute stalling by either the defendant or the prosecution. But often the necessity for a continuance becomes apparent only shortly before trial. *See Hearings* 68-69 (testimony of Senator C. Percy).

[66] *E.g.*, ILL. ANN. STAT. ch. 38, § 103-5(c) (Smith-Hurd 1970). The Illinois provision, as well as others that contain this specific exclusion from the time limit (*e.g.*, 2D CIR. R. 5(c)(i); 22 N.Y.C.R.R. § 29.3(c)(1); ABA STANDARDS § 2.3(d)(i)), condition the continuance on the prosecution's diligence in seeking to obtain the evidence within the time limit and the existence of reasonable grounds to believe the evidence can only be obtained at a later date. In Illinois the maximum length of such a continuance is 60 days. ILL. ANN. STAT. ch. 38, § 103-5(c) (Smith-Hurd 1970). Florida permits the prosecution only two continuances on this ground. FLA. R. CRIM. P. 3.191(f)(iii). The proposed federal statute makes no explicit mention of a continuance to obtain material evidence, although the prosecution may obtain a continuance upon a showing of good cause under the same conditions as the defendant. *See* S. 895, 92d Cong., 1st Sess., § 3161(c)(7) (1970); note 65 *supra*.

[67] *E.g.*, FLA. R. CRIM. P. 3.191(a)(1). Periods during which the defendant is absent or unavailable are also excluded from the computation of the time limit in the proposed federal statute. S. 895, 92d Cong., 1st Sess. § 3161(c)(3) (1971); *see* 2D CIR. R. 5(d); ch. 184, § 2, [1972] N.Y. Laws 400. ABA STANDARDS § 2.3(e) stipulates that a defendant is absent "whenever his whereabouts are unknown and in addition he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence." The "due diligence" wording is designed to prevent intentional delay in prosecution under a spurious excuse of defendant's absence. The defendant is unavailable "whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial." *Id.*

trial with a codefendant whose time limit has not run and good cause is shown for not granting a severance, resulting delay to the first defendant is often excluded from computation.[68] Some rules and statutes exclude certain periods from computation or extend the time limit when a defendant is in jail pending trial on other charges or serving a sentence for a prior conviction.[69] Periods during which the defendant is without counsel are sometimes excluded from computation.[70]

Generally, after enumerating a series of specified exclusions and grounds for continuances, speedy trial schemes adopt a discretionary catchall ground for continuances stated in terms of a showing of "good cause"[71] or "exceptional circumstances."[72] Illinois has certain specified

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[68] *E.g.*, ch. 184, § 2, [1972] N.Y. Laws 400; *see* S. 895, 92d Cong., 1st Sess. § 3161(c)(5) (1971); 2D CIR. R. 5(e); FLA. R. CRIM. P. 3.191(f)(v); ABA STANDARDS § 2.3(g).

[69] A reasonable period of delay beyond the specified time limit is sanctioned by New York if the defendant is detained in another jurisdiction and the prosecution has made reasonably diligent efforts to obtain his presence for trial. Ch. 184, § 2, [1972] N.Y. Laws 400. *See also* 2D CIR. R. 5(f). The ABA recommends special procedures to be followed by the prosecution to ensure that an accused person in prison in another jurisdiction is speedily brought to trial. ABA STANDARDS § 3.1. Such procedures are particularly important in light of Smith v. Hooey, 393 U.S. 374, 383 (1969), which held that a state is obliged under the sixth amendment to make a diligent, good faith effort to bring an accused to trial on a state charge if he is imprisoned in a federal institution or in another state's institution. The Court's reasoning was that even though a person is in jail in another jurisdiction he is prejudiced by not being tried on the new charge. Not only does delay hamper his defense, but a speedy trial might enable him to serve his sentences concurrently and to avoid the personal anxiety of a pending charge. *Id.* at 378-80. *See also* 2D CIR. R. 7.

Florida has instituted a complex scheme of different time limits for those who are already incarcerated when charged. FLA. R. CRIM. P. 3.191. The time limits vary, depending on whether the accused is in prison in Florida or elsewhere and also on whether a demand for trial is made. A Florida prisoner who does not demand trial must be tried within one year if the crime charged is a misdemeanor or felony not involving violence, and within two years if the crime charged is a capital offense or violent felony. *Id.* § 3.191(b)(1). Any Florida prisoner demanding trial, however, must be tried within six months of his demand. *Id.* § (b)(2). Prisoners outside the jurisdiction must demand trial; when they do, they must be tried within six months or a reasonable time from the time the prosecution files a detainer to secure presence for trial. *Id.* § (b)(3). *See* note 103 and accompanying text *infra*. *See also* WIS. STAT. ANN. § 971.11 (1971).

[70] 2D CIR. R. 5(g) provides that a period during which a defendant is without counsel will be excluded from computation of the time limit if his lack of counsel was not occasioned by failure of the court to provide counsel for an indigent or the insistence of the defendant to proceed *pro se*. *See* ch. 184, § 2, [1972] N.Y. Laws 400. A defendant who is not represented by counsel, in some schemes, may not be considered to have consented to a continuance unless his rights are made known to him. *Id.* *See* discussion of the California plan, note 65 *supra*.

[71] *E.g.*, CAL. PENAL CODE § 1382 (West 1970). New Mexico provides for no specific exclusions but continuances may be granted "for good cause shown." N.M.R. CIV. P. 95. *See* note 62 *supra*.

Although it does not contain a general good cause provision, the proposed federal statute provides for exclusion from the time limit of

[a]ny other period of delay resulting from a continuance granted at the request

exclusions from the computation of the time limit, but provides no general "good cause" exception.[73] Judicial interpretation of these "good cause" provisions will answer the question of whether court congestion constitutes good cause for delay.[74] Some plans specifically state that general court congestion is not such an exceptional circumstance as to excuse delay past the statutory time limit.[75]

> of the defendant or his counsel or the United States attorney upon a finding by the judge that, unless such a continuance is granted, the ends of justice cannot be met. No such period of delay . . . shall be excludable . . . unless the court, after first having considered the right of the defendant to a speedy trial and the public interest in a prompt disposition of the case, sets forth in writing in the record of the case its reason for granting such continuance.

S. 895, 92d Cong., 1st Sess. § 3161(c)(8) (1971). Continuances granted under this provision have no seven-day length limitation as do continuances available to the prosecution and defendant under sections (c)(6) and (7). *See* note 65 *supra*. The strict requirements of this section appear designed to prevent its wholesale use to destroy the effectiveness of the entire law, and the inapplicability of the seven-day limitation is perhaps designed to preserve some flexibility for special situations such as the prosecution of large and complex conspiracy cases.

72 *E.g.*, ch. 184, § 2, [1972] N.Y. Laws 400; 2D. CIR. R. 5(h).

Flexibility in the Second Circuit is assured since, besides a catchall "exceptional circumstance" clause, a special provision allows the prosecution "additional time to prepare the government's case [when] additional time is justified by the exceptional circumstances." 2D CIR. R. 5(c)(ii).

73 ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1970). Because of the statute's narrowly drawn exclusions, Illinois courts have interpreted time limits strictly against the state, placing an affirmative duty on the state to comply with the 120-day time limit for trial of those in custody. *E.g.*, People v. Siglar, 127 Ill. App. 2d 256, 261 N.E.2d 27 (1970). For those released on bail or personal recognizance pending trial, however, the demand rule has been specifically retained in the statute. *Id.* § 103-5(b).

74 *See* note 115 *infra*.

75 *E.g.*, FLA. R. CRIM. P. 3.191(f): "[E]xceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays." This provision is consistent with Florida cases decided prior to the new rule. *E.g.*, State *ex rel.* Leon v. Baker, 238 So. 2d 281, 283 (Fla. 1970).

The ABA proposal agrees that general court congestion is no excuse for noncompliance with the statutory time limits; it does recommend, however, a provision excluding from computation of time limits "[t]he period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances." ABA STANDARDS § 2.3(b). This provision is explained in the comments:

> Although it is fair to expect the state to provide the machinery needed to dispose of the usual business of the court promptly, it does not appear feasible to impose the same requirements when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition. Thus, when a large-scale riot or other mass public disorder has occurred, some leeway for additional time is required to ensure that the many resulting cases may receive adequate attention from the prosecutor's office, defense counsel (possibly a single defender office), and the judiciary.

Id. § 2.3(b), Comments at 28. *See also* notes 105-30 and accompanying text *infra*.

C. *Sanctions*

Federal Rule of Criminal Procedure 48(b) provides that if there is unnecessary delay in bringing a defendant to trial, the court *may* dismiss the charges against him. The dismissal is thus not mandatory and may be ordered without prejudice, with the result that the accused may be reindicted on the same offense or on another offense arising out of the same criminal episode.[76] Some older state statutes modeled after the English Habeas Corpus Act[77] provide that the charges must be dismissed when time limits are exceeded but that such dismissal does not bar subsequent prosecution.[78] Others provide that such a discharge bars subsequent reprosecution of misdemeanors but not of felonies.[79]

The ABA proposal recommends that if a defendant is not brought to trial within the terms of the statute, the charges should be dismissed with prejudice;[80] any subsequent prosecution on the same offense or on offenses required to be joined with that offense would thus be barred. Most modern speedy trial plans adopt a similar sanction.[81] The reasoning behind such a strong sanction is that

> [i]f, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offence, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless.[82]

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76 *See* Mann v. United States, 304 F.2d 394, 398 (D.C. Cir. 1962); United States v. Mark II Electronics, Inc., 283 F. Supp. 280 (D. La. 1968).

77 *See* notes 36-39 and accompanying text *supra*.

78 *E.g.*, N.D. CENT. CODE § 29-18-06 (1960); WASH. REV. CODE ANN. § 10.43.010 (1961), *interpreted by* State v. Christensen, 75 Wash. 2d 678, 453 P.2d 644 (1969).

79 *E.g.*, UTAH CODE ANN. § 77-51-6 (1953); *see* Note, *A Look at the New Second Circuit Rules for the Prompt Disposition of Criminal Cases*, 56 MINN. L. REV. 73, 83 (1971).

80 ABA STANDARDS § 4.1.

81 *E.g.*, S. 895, 92d Cong., 1st Sess. § 3162 (1971); FLA. R. CRIM. P. 3.191(h)(1); N.M.R. CIV. P. 95. *See also* ILL. ANN. STAT. ch. 38, § 114-1(e) (Smith-Hurd 1970); N.Y. CODE CRIM. PRO. § 210.20(1)(g)(4) (McKinney 1971); United States v. Ewell, 383 U.S. 116, 126 (1966) (dissenting opinion).

California courts have consistently held that dismissal under the state's speedy trial law (CAL. PENAL CODE § 1382 (West 1970)) does not preclude the filing of a second complaint on the same charge. The judge may dismiss the case with prejudice in his discretion. People v. Hernandez, 250 Cal. App. 2d 842, 58 Cal. Rptr. 835 (2d Dist. 1967); People v. Nooner, 205 Cal. App. 2d 723, 23 Cal. Rptr. 355 (3d Dist. 1962); People v. Sorrentino, 146 Cal. App. 2d 149, 303 P.2d 859, (1st Dist. 1956).

82 ABA STANDARDS § 4.1, Comment at 40-41; *see Hearings* 21 (testimony of Senator P. Hart). In recommending that the proposed federal statute require dismissal with prejudice as a sanction for noncompliance, Senator Hart said, "A 'rollover' provision for dismissal without prejudice, under which charges could be reinstated, would not afford adequate incentive to speedy trial, even if leave of the court were required." *Id.*

By prohibiting further prosecution of the defendant for the same offense or an offense required to be joined originally, the statutes prevent prosecutors from "circumvent[ing] the speedy trial requirements by unduly delaying trial on one charge and then subsequently proceeding on another closely related charge."[83] Even when a speedy trial scheme rejects the demand rule,[84] it may require that once the time limits have been exceeded a defendant must either make a motion before trial that the charges be dismissed or be considered to have waived his right to dismissal.[85]

Critics of speedy trial formulations have voiced concern that delay beyond the time limits—especially delay which results in dismissal with prejudice even when occasioned only by court congestion—will in effect create a "legalized jail break."[86] Proponents maintain that "a bill without teeth will only repeat the policy declarations from the judiciary and the bar favoring speedy trials"[87] without ensuring compliance. Dismissal with prejudice would seem to be a necessary element of any scheme that purports to place an affirmative duty[88] on the state to comply with prompt trial time limits.

IV

Effects of Speedy Trial Schemes

A well-drafted, effectively enforced speedy trial scheme should accomplish what the majority of courts have been unwilling to do under the constitutional speedy trial guarantee—place an affirmative duty on the state to bring the accused to justice within certain reasonable time limits. But such formulations can and should accomplish much

83 ABA Standards § 4.1, Comment at 41.

84 *See* text accompanying notes 98-101 *infra*.

85 *E.g.*, ch. 184, § 2, [1972] N.Y. Laws 398; 2d Cir. R. 8; *see* People v. House, 10 Ill. App. 2d 556, 558, 141 N.E.2d 12, 13 (1957); S. 895, 92d Cong., 1st Sess. § 3162 (1971).

The rule that a defendant must move for dismissal on speedy trial grounds prior to trial is not as harsh as the requirement that he demand a speedy trial as a prerequisite to statutory protection. Under more modern schemes, the latter type of demand rule is eliminated. *See* notes 98-101 *infra*. The rationale behind requiring a motion for dismissal under the statute is that the right to a speedy trial, as a personal right, may be waived if not asserted before trial. *See* ABA Standards § 4.1, Comment at 41. A defendant not represented by counsel should not be required to make a motion for discharge. *See* 2d Cir. R. 8; 22 N.Y.C.R.R. § 29.5; *cf.* note 65 *supra*.

86 Burton B. Roberts, Bronx District Attorney and President, New York Ass'n of District Attorneys, *quoted in* N.Y. Times, Dec. 29, 1971, at 35, col. 8.

87 *Hearings* 21 (testimony of Senator P. Hart).

88 For discussion of the affirmative duty concept, see notes 89-130 and accompanying text *infra*.

more. By commanding the release of defendants who are not brought to trial within the prescribed time, such schemes may coerce those in charge of funds to allocate additional resources for the administration of criminal justice. By ensuring that defendants will be brought to trial within a period short enough to minimize the risks of pretrial crime, speedy trial plans may enhance the attractiveness of bail reform measures as alternatives to preventive detention. But at the same time the formulas may yield undesirable consequences. Sacrificing the rights of the accused, for example, may present an all too convenient way to meet the time limits.

A. *Effect on Prejudice, the Demand Rule, and the Purposeful or Oppressive Test*

A few courts have either interpreted the demand rule as incompatible with the constitutional speedy trial guarantee[89] or have abolished the requirement of proving actual prejudice[90] or purposeful delay by the prosecution[91] even in the absence of a prompt trial statute. The Supreme Court has yet to address these questions.[92] If court rules and statutes designed to expedite criminal trials are to be truly effective both in establishing new standards for defining the constitutional guarantee and in assuring fairness to both the public and the accused, they must place upon the state an affirmative obligation to bring the accused to trial promptly. Not all speedy trial schemes by their terms impose such an obligation.

I. *Effect on Prejudice*

Judicially developed notions that the defendant has the burden of proving actual prejudice resulting from delay must be abandoned by any speedy trial plan which seeks to place an affirmative duty on the

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89 *E.g.*, State v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); *see* note 33 and accompanying text *supra*.

90 Hinton v. United States, 424 F.2d 876 (D.C. Cir. 1969); United States v. Blanca Perez, 310 F. Supp. 550 (S.D.N.Y. 1970); United States v. Mann, 291 F. Supp. 268 (S.D.N.Y. 1968); *see* notes 18 & 34 and accompanying text *supra*.

91 *See* notes 30-31 and accompanying text *supra*.

92 In his concurring opinion in Dickey v. Florida, 398 U.S. 30 (1970), Mr. Justice Brennan observes:

> I do not read the Court's opinion as deciding that in post-*Klopfer* cases . . . (2) [the defendant] is not entitled to a speedy trial unless he demands it at the time of the delay; (3) he must prove actual prejudice, or (4) the delay must be deliberately caused by the government. *It is timely to note that the Court has as yet given scant attention to these and other questions essential to the definition of the speedy-trial guarantee.*

Id. at 40 (emphasis added).

state. When the statutory or regulatory time limit has passed, prejudice should be presumed and the burden placed upon the prosecutor to show that the delay was specifically permitted or excused.[93] Presuming prejudice when delay exceeds the prescribed time limits has the effect of placing at least a limited affirmative duty on the state to try defendants with dispatch.[94] Most modern prompt trial formulas implicitly create a presumption of prejudice when delay exceeds the time limit as extended by specific exclusions.[95]

2. *Effect on the Demand Rule*

The demand rule has come under increasing attack by those who feel the state should have a constitutional duty to provide a speedy trial.[96] The rule places on the defendant the burden of demanding a speedy trial or being considered to have waived the right.[97] The ABA proposal suggests that the demand rule be explicitly eliminated in any speedy trial rule or statute.[98] Both the Second Circuit rule[99] and the

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93 *See* People v. Wilson, 60 Cal. 2d 139, 151, 383 P.2d 452, 460, 32 Cal. Rptr. 44, 52 (1963) (dictum) (defendant need not show prejudice to assert his rights under the California statute). Several years later People v. Bryant, 5 Cal. App. 3d 563, 85 Cal. Rptr. 388 (2d Dist. 1970), held:

> Section 1382 subdivision 2, Penal Code, requires a dismissal unless good cause is shown why defendant is not brought to trial within 60 days after the filing of an information; when such an issue arises before trial, prejudice will be presumed from a defendant's right to a speedy trial unless the People successfully meet their burden of showing good cause for delay.

Id. at 571, 85 Cal. Rptr. at 394, *citing* People v. Wilson, *supra*.

If, however, violation of the time limit is asserted on appeal, the defendant in California still must prove prejudice from the delay. People v. Wilson, *supra* at 151-52, 383 P.2d at 460, 32 Cal. Rptr. at 52; People v. Ludviksen, 8 Cal. App. 3d 996, 999, 87 Cal. Rptr. 781, 783 (1st Dist. 1970).

94 An Illinois appellate court has interpreted the state's speedy trial statute (ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1970)) to require that prejudice be presumed when no reason is shown for delay exceeding the statutory time limit: "The burden is upon the State to promptly try offenses where a defendant is within the jurisdiction." People v. Olbrot, 118 Ill. App. 2d 142, 149, 254 N.E.2d 849, 852 (1969).

95 *See* note 93 and accompanying text *supra*. In Alo v. United States, 439 F.2d 751, 755 n.9 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971), the Second Circuit noted that under its rules the defendant would have been relieved of the burden of proving actual prejudice. Since the case was decided (and the indictment filed) before the effective date of the rules, however, the court refused to relieve the defendant of that burden.

96 *See* note 33 and accompanying text *supra*.

97 *See* notes 27-28 and accompanying text *supra*.

98 ABA STANDARDS § 2.2. Not only does elimination of the demand rule protect the defendant, but it also serves the public interest in speeding up the judicial process. The commentary to the ABA proposal states that "the trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge." *Id.* § 2.2, Comment at 17.

99 2D CIR. R. 8.

former New York Judicial Conference plan[100] follow the ABA recommendation.[101]

Some speedy trial schemes implicitly or partially retain the demand doctrine.[102] Others have explicitly retained it but have eliminated the harshness of the waiver concept.[103] Making demand a condition of dis-

100 22 N.Y.C.R.R. § 29.5; *see* note 5 *supra*. The new New York statute does not explicitly mention the elimination of the demand rule. Ch. 184, [1972] N.Y. Laws 398. The demand rule has been eliminated by judicial decision in New York, however. People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); *see* note 33 *supra*.

101 The proposed federal statute, although not explicitly rejecting the demand doctrine, contains strong language delineating the government's affirmative duty to meet speedy trial deadlines. It provides for dismissal of the charges "[i]f a defendant, *through no fault of his own or his counsel*, is not brought to trial [within the prescribed limits]." S. 895, 92d Cong., 1st Sess. § 3162 (1971) (emphasis added). This language apparently eliminates the demand doctrine as well as the doctrine of "purposeful or oppressive" delay, unless defendant's "fault" can be interpreted to include failure to demand a prompt trial.

102 Although the California statute makes no explicit mention of the demand rule, if a criminal case is continued beyond the 60-day limit and the defendant does not object to such delay, it is presumed that the postponement met with his approval. CAL. PENAL CODE § 1382 (West 1970). Such "waiver by silence" is merely an alternative formulation of the demand doctrine. *See* People v. Miller, 190 Cal. App. 2d 361, 365, 11 Cal. Rptr. 920, 922 (2d Dist.), *cert. denied*, 368 U.S. 881 (1961).

Illinois specifically requires a defendant free on bail or his own recognizance to demand trial and only then requires that he be brought to trial within 160 days. ILL. ANN. STAT. ch. 38, § 103-5(b) (Smith-Hurd 1970). But no demand is required of a defendant in jail pending trial for him to be protected under the statute's 120-day rule. *Id.* § 103-5(a); *see* Village of Midlothian v. Walling, 118 Ill. App. 2d 358, 255 N.E.2d 23 (1969); People v. Rockett, 85 Ill. App. 2d 24, 228 N.E.2d 219 (1967). Indiana, on the other hand, retains the demand rule for defendants in jail but not for defendants on recognizance. IND. R. CRIM. P. 4. The Wisconsin law retains the demand rule only in felony cases (WIS. STAT. ANN. § 971.10 (1971)) and Iowa eliminates the demand rule if the defendant is not represented by counsel (IOWA CODE ANN. § 795.2 (Supp. 1972)). *See also* State v. Christensen, 75 Wash. 2d 678, 684, 453 P.2d 644, 648 (1969) (construing Washington statute as retaining the demand rule).

103 *E.g.*, FLA. R. CRIM. P. 3.191(a)(2). Under this rule if a defendant demands trial he must be tried within 60 days of his demand. But even without demand, if the offense is a misdemeanor the defendant must be brought to trial within 90 days of the filing of the indictment or information, or within 180 days if the crime charged is a felony. *Id.* R. 3.191(a)(1). Failure to demand trial, therefore, merely lengthens the time limit but does not constitute a waiver of the statutory right to be tried within some definite period. Those in prison in Florida because of other convictions also may demand trial on pending charges and therefore be subject to a shorter time limit than those who do not. *Id.* RR. 3.191(b)(1)-(b)(2). Prisoners outside the state charged with a crime in Florida must demand trial to trigger the running of a six-month time limit. *Id.* R. 3.191(b)(3).

The ABA proposal indicates that a demand requirement for those imprisoned for other crimes is not inconsistent with the general no-demand policy:

> The prisoner should have the option (1) of demanding trial in order to overcome whatever disadvantages may flow from the fact a detainer has been lodged against him, or (2) of not making the demand in the hope the charges will be dropped before or at the time he completes his sentence.

ABA STANDARDS § 2.2, Comment at 18.

charge following delay beyond the time limits is not equivalent to requiring demand for a prompt trial.[104] The former concept merely recognizes that the defendant may waive statutory dismissal by not making a motion for it; the latter places the burden on the defendant to ensure that the state complies with its deadlines. If the state is to have an affirmative duty to provide speedy trials, the defendant should not have this burden.

3. *Effect on the Purposeful or Oppressive Test*

Judicial interpretation of the constitutional right to a speedy trial often required the defense to prove that delay was caused by the laches or "purposeful or oppressive" conduct of the prosecution.[105] Although some schemes explicitly address this question,[106] most leave to judicial interpretation the question of whether delay other than that caused by the purposeful or oppressive conduct of the prosecution is excused.[107]

Although the purposeful or oppressive test was adequate in a time when prosecutorial procrastination was the chief cause of pretrial delay the test seems grossly inadequate today. The primary cause of delay today is the congestion of court calendars,[108] although some delay may be occasioned by intentional dilatory tactics of either defense or prosecution. A speedy trial scheme which condones delay based on court congestion, though perhaps relieving some of the harshness of traditional constitutional interpretation, will fail to achieve a primary goal—speeding up the judicial process.

Even before adoption of the present Florida rule which explicitly excludes general court congestion from those "exceptional circumstances" which justify delay,[109] the Florida Supreme Court held court

104 *See* note 85 and accompanying text *supra.*

105 *E.g.*, Pollard v. United States, 352 U.S. 354, 361 (1957); *see* notes 20-22 and accompanying text *supra. But see* note 30 and accompanying text *supra.*

106 *E.g.*, FLA. R. CRIM. P. 3.191(f), which explicitly provides that general court congestion does not justify delay; *see* note 75 *supra. But see* ARK. STAT. ANN. § 43-1710 (1964); IND. R. CRIM. P. 4; OHIO REV. CODE ANN. § 2945.72 (Anderson 1954). These three states explicitly excuse delay occasioned by congestion in the courts.

107 *See* notes 71-74 and accompanying text *supra.* Even in a proposed addition to Rule 45 of the Federal Rules of Criminal Procedure which would set specific time limits for each stage of the criminal process, the Judicial Conference of the United States explicitly refused to take a position on the question of whether court congestion should be considered an adequate excuse for delay. The question would be left to the discretion of each district court. Proposed Fed. R. Crim. P. 45, Advisory Comm. Note 11-12 (Tent. Draft No. 2, 1971). Such specific time limits were ultimately rejected by the Judicial Conference in favor of the less stringent proposed Rule 50(b). *See* note 142 *infra.*

108 *See* People v. Ganci, 27 N.Y.2d 418, 422, 267 N.E.2d 263, 265, 318 N.Y.S.2d 484, 486 (1971); *Introduction* to ABA STANDARDS 1.

109 FLA. R. CRIM. P. 3.191(f); *see* notes 75 & 108 *supra.*

congestion to be inadequate justification for violation of an earlier statutory[110] time limit.[111] In rejecting the purposeful test of delay, the court in an even earlier case said, "The accused is entitled to a speedy trial and the only delay which is to be excused is delay which is caused by the accused."[112] Florida courts have thus been quite determined, through their opinions and promulgation of new court rules, to place an affirmative burden on the state to provide speedy trials to criminal defendants.

On the other hand, courts and legislatures have sometimes been reluctant to extend statutory protection to defendants when delay is not attributable to the prosecution. The Second Circuit rules do not require that a trial be held within the prescribed time limits, but only require that within that time "the government . . . be ready for trial."[113] The New York legislature, in response to a Judicial Conference rule that would have required the dismissal of charges if a defendant were not tried within six months, enacted a similar "ready rule."[114] Delay caused by docket congestion is therefore implicitly excluded; this omission makes such rules and legislation an incomplete answer to the problem of trial delay.

A court system with inadequate resources to relieve its congested calendars is in a quandary. It must fear public reaction if it is forced to release a great number of accused criminals because of its inability to meet trial deadlines; yet it is violating the speedy trial guarantee if it does not release them. There are only limited alternatives. A court could ignore delay owing to court congestion, either by attacking only prosecutorial delay as was the approach of the Second Circuit, or by

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110 Law of July 2, 1970, ch. 70-339, § 107, [1970] Fla. Laws 1040 (repealed 1971).

111 State *ex rel.* Leon v. Baker, 238 So. 2d 281, 283 (Fla. 1970).

112 State *ex rel.* Johnson v. Edwards, 233 So. 2d 393, 395 (Fla. 1970).

Although under the new Florida rule the prosecution can obtain a continuance for failure after a diligent effort to obtain a material witness (FLA. R. CRIM. P. 3.191(f)(iii)), in the absence of such an express continuance the unavailability of a state's witness does not toll the running of the statutory time limit. *See* Anderson v. Edwards, 234 So. 2d 720 (Fla. App. 1970). *See also* People v. Siglar, 127 Ill. App. 2d 256, 261 N.E.2d 27 (1970):

> [T]he burden of taking steps necessary to bring about a prompt trial [within 120 days] rests with the People. . . . Unless the delay is occasioned by the defendant, failure to try him within the time specified entitles him to discharge.

Id. at 260, 261 N.E.2d at 29 (citations omitted).

113 2D CIR. RR. 3-4. One commentator suggests that the Second Circuit's attitude reflects the opinion that under the present conditions, "application of the rules to [delay caused by court congestion] would produce far too drastic an effect." Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059, 1074 (1971).

114 Ch. 184, [1972] N.Y. Laws 398; *see* note 5 *supra*. Such a rule, guarding as it does only against delay by the prosecution, is of little aid to the defendant who must continue to wait many months for trial due to the congested condition of the court's docket.

characterizing court congestion as "good cause" for delay and therefore excusable.[115] Second, it could order the discharge of any person who, without fault of his own, is not brought to trial in accordance with the time limits. This method might effectively force the legislature to allocate more resources for criminal justice administration.[116] Third, if available resources are not increased, the courts could adopt short-cuts in criminal procedure. This alternative would threaten the constitutional rights of the accused,[117] but would enable a court to avoid the mass release of persons charged with criminal offenses.

Whether court congestion is good cause for delay is in many jurisdictions still an unanswered question.[118] A recent New York case, although decided prior to either the Judicial Conference rule or the legislative "ready rule,"[119] illustrates judicial disagreement on this issue. In *People v. Ganci*,[120] decided under New York's former Code of Criminal Procedure,[121] the defendant's trial was delayed for sixteen months[122]

115 Most modern speedy trial schemes do not specify whether court congestion is good cause for delay. *See* notes 72-75 & 106 and accompanying text *supra*. In Application of Hansen, 387 P.2d 659 (Nev. 1963), owing to docket congestion the defendant was not brought to trial within the statutory time limit of 60 days. The opinion of the lower court that no speedy trial violation had occurred was affirmed. *Id.* at 660. A similar statute is in effect today in Nevada. NEV. REV. STAT. § 178.556 (1968). Rather than providing a "good cause" exception, the law states that the court "may" dismiss the indictment if it is continued beyond the time limit. *See also* State v. Dunn, 70 Wash. 2d 572, 576, 424 P.2d 897, 899-900 (1967) (construing congested trial docket as "good cause" under state statute).

116 *See* notes 131-44 and accompanying text *infra*.

117 *See* notes 149 & 152 and accompanying text *infra*.

118 *See* notes 71-74 and accompanying text *supra*. *But see* note 106 *supra*. In California a very early case held that the state has a "special duty" under the speedy trial law: "the mere statement of the judge that the court has been otherwise engaged does not show good cause." People v. Buckley, 116 Cal. 146, 153, 47 P. 1009, 1012 (1897). *But see* Murphy v. Superior Court, 53 Cal. App. 6, 200 P. 483 (1st Dist. 1921); People v. Holmes, 13 Cal. App. 212, 216, 109 P. 489, 490-91 (2d Dist. 1910).

In *In re* Vacca, 125 Cal. App. 2d 751, 271 P.2d 162 (1st Dist. 1954), the California Superior Court was operating under a rule which provided that the departments handling criminal cases "shall be sufficient in number to hear all criminal cases within the time required by law." *Id.* at 753, 271 P.2d at 163. Under this rule, continuances beyond the time limit "solely on the ground that the court was then engaged in the trial of other defendants whose cases preceded in date of information filed that of this petitioner" were held not to be for good cause. *Id.* at 752, 271 P.2d at 163. Today the superior courts of Los Angeles and San Francisco counties operate under a similar rule. CAL. SUPER. CT. R. 248(a). *But cf. In re* Lopez, 39 Cal. 2d 118, 120, 245 P.2d 1, 3 (1952) (initial delay beyond 60 days was with defendant's consent, and delay thereafter held reasonable because of court congestion).

119 *See* notes 5 & 114 *supra*.

120 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484 (1971).

121 The former Code of Criminal Procedure provided that a defendant must be brought to trial within the next term of court after indictment but contained a broad "good cause" provision excusing delay. N.Y. CODE CRIM. PRO. § 668 (1953).

122 Defendant was continuously incarcerated from June 1967 to the date set for his

owing to the fault of neither the defense nor the prosecution. The delay was attributable to "the congestion of the criminal trial calendar in Nassau County and the well-founded policy to process indictments in the sequence of their presentment."[123] Nassau County courts at that time were so congested that those in jail waited up to six months for trial, while those released prior to trial experienced delays of up to eighteen months.[124] Judge Bergan, writing for the majority, interpreted the state speedy trial guarantee as protecting a defendant only from prosecutorial delay: "[T]he delay is not here chargeable to the prosecutor and . . . it occurred for reasons beyond his control or the control of the court; hence . . . there was 'good cause' shown under code section 668 for not dismissing the indictment."[125]

In a vigorous dissent, Chief Judge Fuld,[126] citing *People v. Prosser*[127] as authority for placing an affirmative duty on the state to provide speedy trials, stated:

> [T]he fact that such delay was attributable to congested calendar conditions in Nassau County and that the district attorney was "ready" and judges "willing" to hear the case seems to me beside the point. As far as the defendant is concerned, he suffered the denial of a speedy trial whether the prosecutor or the court was at fault or completely blameless. . . .
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> . . . [I]t is the responsibility of the State, or of its subdivisions, to do what is necessary—by furnishing funds, facilities and personnel—to assure the effective operation of the judicial system, and that burden may not be shifted to the defendant. The rule is simply stated: constitution and statutes mandate a speedy trial, and it is incumbent on the State to provide it.[128]

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trial, September 30, 1968, a total of nearly 16 months. People v. Ganci, 27 N.Y.2d 418, 421, 267 N.E.2d 263, 264, 318 N.Y.S.2d 484, 485 (1971).

123 *Id.* at 422, 267 N.E.2d at 265, 318 N.Y.S.2d at 486.

124 *See id.*, 267 N.E.2d at 265, 318 N.Y.S.2d at 486-87.

125 *Id.* at 423, 267 N.E.2d at 265, 318 N.Y.S.2d at 487.

126 As Chief Judge of the State of New York and Chairman of the Administrative Board of the Judicial Conference, Stanley H. Fuld was a major force behind the Judicial Conference rule that was ultimately superseded by the legislative "ready rule." *See* note 5 *supra*; N.Y. Times, Dec. 29, 1971, at 35, col. 6.

127 309 N.Y. 353, 130 N.E.2d 891 (1955). In eliminating the demand rule in New York, the *Prosser* court spoke of the right to a speedy trial as placing an affirmative obligation on the state. *See* note 33 *supra*.

128 27 N.Y.2d at 430-31, 267 N.E.2d at 270, 318 N.Y.S.2d at 494 (dissenting opinion). Counsel for the petitioner had argued:

> The State has an affirmative duty to offer a forum to the accused within a short time after his arrest in order to avoid prolonged imprisonment of the defendant, sustained public suspicion, and delay making exculpatory proof difficult for the defendant to obtain.
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> . . . .
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> . . . Appellant submits that under no conceivable reasoning can the constitutional right to a speedy trial be subordinated to accommodate the inefficiency of the state's judicial system . . . .

The New York position on delay caused by court congestion has since been clarified. The Judicial Conference rule, although excluding delay caused by "exceptional circumstances," apparently would have included delay caused by court congestion in the computation of its time periods.[129] The legislative "ready rule" nullified the more enlightened Judicial Conference approach and avoided the issue by focusing solely on prosecutorial delay.[130]

B. *Compelling Legislative Bodies To Allocate More Resources to the Judiciary*

In a recent Pennsylvania case,[131] a court of common pleas instituted a mandamus proceeding to compel the mayor and city council of Philadelphia to appropriate additional funds for the administration of the court. In an opinion written by Chief Justice Bell, the Pennsylvania Supreme Court held the mandamus proceeding permissible, stating that the judiciary

> *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.[132]

Philadelphia's fiscal crisis was held to be no excuse for not providing such reasonable and necessary sums.[133]

> The burden upon the People to expedite the prosecution of criminal cases rests not only on the District Attorney, but upon the State of New York.

Brief for Appellant at 14-17, People v. Ganci, 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484 (1971).

129 22 N.Y.C.R.R. § 29.3(c)(6); *see* note 5 *supra*.

130 Ch. 184, [1972] N.Y. Laws 398. *But see* People v. Minicone, 28 N.Y.2d 279, 270 N.E.2d 300, 321 N.Y.S.2d 570, *cert. denied*, 404 U.S. 853 (1971), also decided prior to either the Judicial Conference or legislative rules. Relying on the dissent in *Ganci*, the court stated:

> But even [in *Ganci*] two of the Judges of the court were of opinion that the lack of public trial facilities was not good enough a ground to excuse the 16-month delay . . . and the period there considered seems to have approached the excusable limit of delay attributable to the absence of public trial facilities.

Id. at 281, 270 N.E.2d at 301, 321 N.Y.S.2d at 572.

131 Commonwealth *ex rel.* Carroll v. Tate, No. 3084 (C.P. Philadelphia County, Nov. 2, 1970).

132 Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 52, 274 A.2d 193, 197, *cert. denied*, 402 U.S. 974 (1971) (emphasis in original). *See* Judges for the Third Judicial Circuit v. County of Wayne, 383 Mich. 10, 172 N.W.2d 436 (1969); Leahy v. Farrel, 362 Pa. 52, 66 A.2d 577 (1949). In New York City, the Board of Corrections has filed suit in federal court to force the state government to allocate more funds to criminal justice administration and to compel the courts to set up a special bail review section to relieve overcrowding in the city jails. N.Y. Times, Nov. 18, 1971, at 1, col. 1.

133 "[T]he deplorable financial conditions in Philadelphia must yield to the Constitu-

Judicially enacted speedy trial rules are an indirect and somewhat more subtle way to coerce state legislatures and other fiscal bodies to appropriate more funds for the processing of criminal cases.[134] For the courts to meet the specific deadlines set forth in the rules, more money will have to be allocated to all component parts of the criminal justice system; more judges, courtrooms, prosecutors, legal aid personnel, public defenders, and probation officers will be necessary.[135]

The New York rule adopted by the state's Judicial Conference,[136] for example, was accompanied by a special caveat to the makers of fiscal policy. In a press release issued at the time the rules were made public, Chief Judge Stanley H. Fuld, Chairman of the Administrative Board of the Judicial Conference, stated:

> The Administrative Board is thoroughly aware of the fact that, if these rules are to prove effective, the wherewithal for additional facilities, personnel and services, so long denied to the courts and

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tional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice." Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 56, 274 A.2d 193, 199. *See* E. FRIESEN, E. GALLAS & N. GALLAS, MANAGING THE COURTS 79 (1971).

134 In dismissing charges against a defendant because he was denied his right to a speedy trial, a Florida court recently stated:

> The County Solicitor . . . has very effectively presented the plight of the courts in [his] county in processing a backlog of a thousand cases per month, but we feel that *this appeal should be made to the legislature and not to this court.*

Leonard v. McIntosh, 237 So. 2d 809, 811 (Fla. App. 1970) (emphasis added). People v. Ganci, 27 N.Y.2d 418, 424, 267 N.E.2d 263, 266, 318 N.Y.S.2d 484, 488 (1971) stated:

> If there are many dismissals of serious criminal charges because courts and prosecutors have too many cases to process in spite of full diligence, hopefully public opinion will spur State and local legislative bodies and administrators to provide money for additional services and facilities.

The *Ganci* court, however, declined to provide such a "spur" by releasing the defendant. *See* notes 120-128 and accompanying text *supra*. *But see* E. FRIESEN, E. GALLAS & N. GALLAS, *supra* note 133, at 79:

> A form of judicial extortion aimed at forcing the taxing and spending authority to provide additional funds to the courts is unlikely to have a positive impact on a long-range basis. If the confrontation reaches such a point, it would appear wiser to build a public record on the need.

135 In New York, it was estimated that at least $14 million would have been needed to implement the Judicial Conference rules completely. The City of New York alone would have required a bare minimum of $7 million in additional resources to implement the rule. N.Y. Times, Dec. 29, 1971, at 35, col. 6. The five district attorneys for the City of New York predicted that the city would need 32 new courtrooms. The Legal Aid Society in the City had planned to request an additional $5 million to prepare itself for adherence to the new deadlines. N.Y. Times, Nov. 7, 1971, at 28, col. 1. The state legislature completely avoided the problem of adequately funding the courts when it enacted a "ready rule" to supersede the Judicial Conference plan. *See* notes 5, 113-14, 129-30 and accompanying text *supra*.

136 22 N.Y.C.R.R. § 29; *see* note 5 *supra*.

other agencies involved will have to be made available by those having control of the purse strings.[137]

Inadequate funding of criminal justice administration ensures that trial deadlines will not be met. The result may be mass dismissals and releases from jail.[138] Alternatively, the consequence of insufficient resources may be the elimination of what one judge has called the "procedural luxuries" safeguarding constitutional rights of the accused.[139]

Despite the provision in many schemes for a delayed effective date,[140] problems of providing funds for the new schemes remain sub-

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137 Judicial Conference of the State of New York, Press Release, April 30, 1971. Judge Fuld reiterated this point several times throughout the release and concluded:

> [I]t now remains for the other coordinate branches of government to carry out their responsibilities and provide the necessary funds for the construction of facilities, for the procurement of additional prosecutors, public defenders, probation and correction and court personnel and for other essential auxiliary services.

Id.

138 "Several hundred" cases have reputedly been dismissed for failure to comply with Florida's rule. Kleindeinst, *Toward Speedy Justice*, TRIAL, Nov./Dec. 1971, at 13. Bronx District Attorney Burton B. Roberts was concerned that such might have been the result under the Judicial Conference plan: "If we don't get the wherewithal for additional personnel and new facilities . . . thousands of hardened criminals will walk out of jail." N.Y. Times, May 4, 1971, at 51, col. 6. The New York legislature, unwilling to make the necessary allocations, found this danger all too real and thus passed a "ready rule" to supersede the proposed plan. *See* notes 5, 114, 129-30 and accompanying text *supra*.

139 People v. Ganci, 27 N.Y.2d 418, 425, 267 N.E.2d 263, 267, 318 N.Y.S.2d 484, 489 (1971); *see* notes 148-52 and accompanying text *infra*.

140 The period of the delay between promulgation or enactment and effectiveness varies. The Florida rule (FLA. R. CRIM. P. 3.191(i)(1)) allowed only 30 days between adoption and effectiveness, but Florida case law and prior statutes had supplied the groundwork for the new scheme's implementation. *See, e.g.*, State *ex rel.* Leon v. Baker, 238 So. 2d 281 (Fla. 1970). The Second Circuit delayed the effective date of its statute for six months (*see* 8 BNA CRIM. L. REP. 2251 (1971)), New Mexico delayed 4½ months (N.M.R. CIV. P. 95), and the effective date of the Judicial Conference rule was delayed one year (22 N.Y. C.R.R. § 29). The New York statute, however, was immediately put into effect after its enactment in order to prevent the Judicial Conference rule from taking effect. Ch. 184, [1972] N.Y. Laws 398; *see* note 5 *supra*.

The proposed federal statute would apply different effective dates to different types of crime. For example, with regard to defendants accused of violent or dangerous crimes the law would become effective within 90 days after passage if the defendant is in jail pending trial, and within 120 days if he is free on bail or recognizance. For other crimes, the statute would apply after 180 days to those held in custody prior to trial, but only after 18 months to those free on bail or recognizance. S. 895, 92d Cong., 1st Sess. § 3163 (1971). A district court may request an extension of the effective date. *Id.* § 3164. One observer, however, has argned that the right to a speedy trial is so fundamental that in all cases the Act should become effective within six months of its enactment, and that any extension of time granted to a particular district court shonld be limited to 90 days. "Without a limit, the implementation of the speedy trial plan in a district might be indefinitely delayed, and the Act could become merely precatory." *Hearings* 36 (testimony of D. A. Rezneck).

Most of the new speedy trial rules are not retroactive, but only apply to those arrested

stantial.[141] Whether a speedy trial plan should be implemented by court rules or by legislation directly relates to the financing problem.[142] Those favoring judicially promulgated rules dealing with speedy trials feel that the judiciary is best able to assess its own capabilities and design rules which reflect a realistic appraisal of the congestion problem.[143]

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or indicted after the effective date. *See, e.g.*, FLA. R. CRIM. P. 3.191(i)(1); N.Y. Times, Nov. 7, 1971, at 28, col. 3. The proposed federal rule would also apply time limits only prospectively. S. 895, 92d Cong., 1st Sess., § 3163 (1971). Senator Charles H. Percy has recommended, however, that the law be made sufficiently retroactive to allow at least currently incarcerated defendants to assert their right to a speedy trial. *Hearings* 69 (testimony of Senator C. Percy).

141 In New York, for example, the unveiling of the speedy trial rule promulgated by the Judicial Conference in April 1971 coincided with statewide and local fiscal cutbacks. In New York the courts are financed predominantly on a local basis, despite repeated legislative efforts to compel the state to take full financial responsibility. *See* (1971) Sen. Int. No. 1980 (Messrs. Dunne & Garcia); (1971) Sen. Int. No. 1645-A (Messrs. Hughes & Bloom); (1971) Assy. Int. No. 2673 (Mr. Crawford); note 135 *supra*.

142 An amendment to the Federal Rules of Criminal Procedure (FED. R. CRIM. P. 50(b)) has recently been approved (11 BNA CRIM. L. REP. 3014 (1972)) and a congressional speedy trial bill is currently pending (S. 895, 92d Cong., 1st Sess. (1971)). New Rule 50(b) requires that each district court prepare a plan outlining procedures for the prompt disposition of criminal cases. Each plan is required to include rules relating to time limits for each stage of the criminal process after indictment. The plans are subject to the approval of the judicial council of the appropriate circuit sitting together with the chief judge of the district. The Advisory Committee Note to the Rule suggests that such a procedure, permitting variations in the time limits from district to district, would permit a flexibility not provided for in the proposed federal statute. The rule "permits each district court to establish time limits that are appropriate in light of its criminal caseload, frequency of grand jury meetings, and any other factors which affect the progress of criminal actions." FED. R. CRIM. P. 50(b), Advisory Comm. Note. For similar reasons, the United States Judicial Conference has not recommended passage of a speedy trial bill. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 4, at 55-56 (1970).

Before approving Proposed Rule 50(b) the Judicial Conference of the United States had outlined two alternative drafts of speedy trial schemes to be implemented by amendment of Rule 45 of the Criminal Rules. The first was nearly identical to Proposed Rule 50(b). The second set specific time limits for the various stages of the criminal process, including a 90-day limit between arraignment and trial for defendants held in custody prior to trial, and 180 days for defendants not in custody. Failure to meet these time limits, however, did not require dismissal. Ultimately the Judicial Conference recommended the first draft in the form of an addition to Rule 50 rather than to Rule 45. Judicial Conference of the United States, Comm. on Rules of Practice & Procedure, Alternative Drafts of Proposed Amendments to Rule 45 Federal Rules of Criminal Procedure (March 1971); *see* note 107 *supra*.

However flexible Rule 50(b) may be, it does not guarantee, as a statute would, the congressional financial commitment necessary for effective implementation. *See Hearings* 21-22 (testimony of Senator P. Hart). Unfortunately, a number of speedy trial bills have died in congressional committees. *E.g.*, H.R. 14822, 91st Cong., 1st Sess. (1969); S. 3936, 91st Cong., 2d Sess. (1970). The current proposal (S. 895, 92d Cong., 1st Sess. (1971)) has been in committee since it was introduced on February 22, 1971. Rule 50(b), therefore, is at least a beginning in setting explicit federal standards for speedy trials.

143 *See, e.g.*, FED. R. CRIM. P. 50(b), Advisory Comm. Note. Florida by statute re-

But without legislative participation, there is no assurance that sufficient resources will be allocated to implement the rules.[144] If the speedy trial schemes are to be effective in expediting the judicial criminal process while ensuring fairness to both the accused and the public, the fiscal crisis of government must yield to the right to a speedy trial.

C. *Effect on Preventive Detention*

Although fairness to the accused is the major concern of speedy trial schemes, fairness to the public is also a fundamental consideration. A recent government study has suggested that if all defendants were tried within a period of sixty days from the time of their original arrest, the likelihood of recidivism during a sixty-day period of pretrial release would be minimal.[145] Thus the successful implementation of a speedy trial scheme having a short time limit for trials might minimize public demand for greater pretrial detention of accused criminals[146] and might serve to complement bail reform.[147] Speedy trial formulations with time limits short enough to minimize the risk of pretrial recidivism, coupled wth bail reform measures and rehabilitative services—or at least supervision for those released prior to trial—would be a salutary improvement of the current system.

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pealed an early speedy trial law and provided that the state supreme court should set up speedy trial procedures by rule of court. Ch. 71-1(B), §§ 6-7, [1971] Fla. Laws 3. The result was an interim rule, adopted by the Florida Supreme Court, which has now been codified by the legislature. FLA. R. CRIM. P. 3.191.

144 The potential for legislative-judicial conflict on this issue is well illustrated by the New York experience. *See* notes 5, 113-14, 135 and accompanying text *supra*.

145 The National Bureau of Standards of the Department of Commerce, selected by the Justice Department to conduct a study in Washington, D.C., found that "there is a strong indication that crime on pretrial release in the District of Columbia is almost directly related to the man-days released." *Quoted in Hearings on Preventive Detention Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 33 (1970). The study indicated that during the first 60 days of release, the likelihood of rearrest was very low, but after five to eight months of release pending trial the statistical likelihood of a defendant committing another crime was quite high. *Id.*

146 Senator Ervin feels that a law such as the proposed federal speedy trial legislation (S. 895, 92d Cong., 1st Sess. (1971)) would eliminate any necessity for preventive detention. 116 CONG. REC. 15,887 (1970) (remarks of Senator Ervin).

147 Some advocates of bail reform feel that current bail systems operate more harshly against the poor who are less able to raise bail money. *See, e.g., Hearings* 89-90 (testimony of B. Just). Presumably a speedy trial scheme, especially one which also provides for pretrial service agencies (*e.g.*, S. 895, 92d Cong., 1st Sess. §§ 3152-54 (1971)), would facilitate release of many indigent defendants without bail. The Bail Reform Act of 1966 (18 U.S.C. §§ 3146-52 (1970)), has as its goal reducing the number of defendants held in custody prior to trial. Speedy trial schemes could help achieve this goal since "a judge would be more willing to release a defendant on nonfinancial conditions knowing that the defendant would be brought to trial within 60 days and in the interim would receive meaningful supervision and assistance . . . ." *Hearings* 89 (testimony of B. Just).

D. *Safeguarding the Rights of the Accused*

In addition to protecting the accused, speedy trial schemes seek to induce increased appropriations for criminal justice administration and to stimulate more efficient judicial management.[148] But a speedy trial scheme which in the name of improving court management speeds up the administration of justice without adequately protecting other rights of the accused would be self-defeating. Even if a fundamental cause of trial delay and court congestion has been growth in the range of procedural safeguards afforded the accused,[149] the way to accelerate the judicial process is surely not to eliminate or bypass some of these safeguards.

Recently, many administrative reforms have been introduced in the judicial systems of various jurisdictions, some with relative success.[150] In response to speedy trial deadlines, pressure for more innovations in court management is likely to increase, especially if judicial resources are not augmented.[151] The proper vehicles for implementing speedy trial schemes are court management reforms and increased funding, not abandonment of procedural safeguards.[152] Procedural safe-

148 *See* notes 131-44 and accompanying text *supra*. Professor Daniel J. Freed, in testimony before the Senate Subcommittee on Constitutional Rights, spoke of three major themes of speedy trial schemes—"fixed time limits, better court management, and increased system resources." *Hearings* 134.

149 A recent federal case outlined what the court believed to be the five major contributors to court congestion: (*1*) growth in the number of crimes; (2) growth in procedural safeguards of the accused; (*3*) increases in pretrial motions and hearings on search and seizure, voluntariness of confessions, and witness identifications; (*4*) manpower shortages; and (*5*) increases in applications for post-conviction relief. United States *ex rel.* Frizer v. McMann, 437 F.2d 1312, 1314-15 (2d Cir. 1971).

150 For a discussion of New York City's general efforts to develop more efficient methods of court management, see N.Y. Times, Jan. 17, 1971, at 1, col. 5. Evening and weekend courts have been instituted to help ease the backlog of criminal cases in New York City. *See id.*, Sept. 28, 1971, at 78, col. 1. It has also been suggested that judges in New York City take shorter vacations. *Id.*, May 24, 1971, at 35, col. 2. Such efforts have met with some success: the 59,000 case backlog that existed in January 1971 had been cut to 28,000 by July 1, 1971. *Id.*, Aug. 4, 1971, at 1, col. 4.

In Philadelphia, a program of preindictment probation has been instituted for first offenders. If for a period of six months the released defendant stays out of trouble, charges against him will be dismissed. It is expected that 12% to 15% of all criminal cases will be handled this way, thus eliminating in many cases the need for a trial. *Id.*, March 8, 1971, at 26, col. 2. *See generally* E. FRIESEN, E. GALLAS & N. GALLAS, *supra* note 133.

An attempt to tighten appellate procedure is evidenced by a resolution of the Judicial Conference of the United States which suggests that trial counsel be appointed to conduct all appeals, that efforts be made to perfect appeals without full trial transcripts, and that use of printed briefs and oral argument be limited. Judicial Conference of the United States, Resolution Concerning Delays in the Disposition of Appeals in the Federal Courts, November 1, 1971.

151 *See* notes 131-46 and accompanying text *supra*.

152 The Justice Department has conditioned its support for a federal speedy trial

guards and an expeditious criminal justice system are not inherently contradictory; adequate protection of the accused should not serve as an excuse to justify trial delay, nor should delay serve as a justification for the abandonment of procedural safeguards.

CONCLUSION

Although speedy trial schemes may not alleviate all the pressing problems of criminal justice delay, a well-designed plan operated by adequately financed courts could be significantly effective and a valuable complement to other reform of the criminal justice system. It is time that more states and the federal government reevaluate existing statutes and court rules dealing with the speedy trial gnarantee and adopt measures which will ensure both judicial efficiency and procedural fairness to the accused.

Allen P. Rubine

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statute on the reform of the present federal habeas corpus law, 28 U.S.C. §§ 2241-55 (1970). Its proposal would bar post-conviction claims which are not "fundamental," such as claims based on the "exclusionary rule" or failure to give *Miranda* warnings. Such a rule would purportedly help alleviate court congestion and be more fair to prosecutors than the speedy trial law standing alone. *Hearings* 107-14 (statement of W. H. Rehnquist). Rehnquist made other suggestions for reducing court congestion, including modification of the exclusionary rule and implementation of a nonunanimous jury verdict. *Id.* at 107-08. *Cf.* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (dissenting opinion).

Alleged "fairness" to the prosecution under the speedy trial time limits should not be purchased at the cost of a defendant's ability to seek redress under habeas corpus if he feels he was dealt with unfairly or uuconstitutionally at trial. The concept of "fairness" to the prosecution seems misplaced in a system in which the accused is presumed innocent until the state meets its burden of proving guilt.

In People v. Ganci, 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484 (1971), Judge Bergan suggests telescoping pretrial hearings into the main trial to achieve more prompt disposition of cases. He describes "time-consuming protective procedures" as "procedural luxuries." *Id.* at 424-25, 267 N.E.2d at 266-67, 318 N.Y.S.2d at 488-89. Simultaneous presentation of certain evidence before the judge and jury at trial, without a pretrial hearing before the judge alone, raises constitutional questions, especially when the evidence is a confession whose voluntariness is disputed.

> I am unable . . . to agree to the telescoping of what are now pretrial hearings into the main trial. *It will likely impinge on the existing constitutional rights of defendants* in limiting their opportunity to testify at the one and not at the other, and in depriving them of the opportunity to plan for the trial of the main case. . . . Disregarded entirely is the opportunity of the prosecution to appeal before trial from adverse determinations on exclusions of evidence.

Id. at 430, 267 N.E.2d at 270, 318 N.Y.S.2d at 493 (Breitel, J., concurring) (emphasis added). *See* Jackson v. Denno, 378 U.S. 368 (1964).