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Bail Reform in the State and Federal Systems

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LEGISLATION

Bail Reform in the State and Federal Systems

I. Bail in England

The origin of the institution of bail is not entirely known, but it is believed to have originated in medieval England as a device to free untried prisoners. The definitive structure of the process seems to have been first codified in 1275 in the Statute of Westminster. The institution developed gradually and eventually became so well established that the English Bill of Rights of 1688 provided that "excessive bail ought not to be required."[1] The factors contributing to the development of the institution of bail were primarily matters of practical importance. Disease-ridden jails, delayed trials by traveling justices, and insecure prisons led the ancient sheriffs, into whose custody the accused was given, to allow the accused to be "bailed" to his friends or family. The "bailment" was conditioned upon the promise of the third party that the accused would be present on the trial date. If the defendant escaped, the third party surety was required to surrender himself to the court in place of the accused. With the passage of time, sureties, who were usually required to be land owners, were permitted to forfeit promised sums of money or real estate instead of themselves in the event the accused failed to appear for trial. The benefits resulting from this ancient practice were twofold: first, the accused was allowed personal freedom until found guilty of a crime; and second, the state was saved the expense incident to incarceration.[2] The relationship between the accused and his surety remains a personal one in England today. Yet the discretionary manner in which the English courts consider the institution of bail permits denial of bail in cases where the magistrate believes that the defendant is likely to tamper with the evidence or commit new offenses if released.[3]

II. Bail in America

A. *Early History*

With some modification, the English concept of bail has been accepted in America. The United States Constitution does not expressly provide for a right to bail, for the eighth amendment states only that "excessive bail shall not be required, nor excessive fines imposed, nor

1. Bill of Rights, 1688, W. & M. 2, c. 2, § 2(10).

2. 2 Pollock & Maitland, The History of English Law Before the Time of Edward I 584-90 (2d ed. 1898).

3. Freed & Wald, Bail in the United States: 1964, 2 (1964).

cruel and unusual punishment inflicted." Yet bail was unequivocally set forth as a matter of right in non-capital criminal cases by the Judiciary Act of 1789. Since the eighth amendment was not ratified until 1791, the Judiciary Act of 1789 was actually passed by Congress before the eighth amendment, although both were enacted by the same session.[4] This absolute right, recognized by the Judiciary Act of 1789, is continued today in the form of Rule 46 of the Federal Rules of Criminal Procedure.[5] In the leading case of *Stack v. Boyle*,[6] Justice Jackson stated that: "From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail." Whether or not the eighth amendment, by implication, guarantees the right to bail in non-capital cases is a matter of speculation. The modern view, as illustrated by the recent case of *Trimble v. Stone*,[7] seems to be that the "excessive bail" clause of the eighth amendment guarantees, by implication, the right to bail.[8] The dispute is of little significance, however, for all but seven states have guaranteed the right to bail in non-capital cases in either state constitutions or by statute.[9]

The purpose of the bail system in America "is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect."[10] American courts have repudiated the doctrine of preventive detention as contrary to our system of law. As Mr. Justice Jackson pointed out in *Williamson v. United States*:[11]

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.[12]

Bail in America should serve one function—to release the accused with assurance that he will return at trial.[13]

4. Comment, *Constitutional Law—Right to Bail*, 51 MICH. L. REV. 389 (1953).
5. FED. R. CRIM. P. 46.
6. 342 U.S. 1, 4 (1951).
7. 187 F. Supp. 483 (D.D.C. 1960).
8. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109 (1966). Professor Paulsen points out that the eighth amendment may come within the realm of those provisions of the Bill of Rights which have been incorporated into the due process clause of the fourteenth amendment and applied as a restriction on state action.
9. For an extensive listing of the states which provide a right to bail by either constitutional provision or by statute, see FREED & WALD, *op. cit. supra* note 3, at 2 n.8.
10. United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).
11. 184 F.2d 280 (2d Cir. 1950).
12. *Id.* at 282-83.
13. FREED &WALD, *op. cit. supra* note 3, at 8.

B. *The Commercial Bondsman*

The purpose of bail, however, has been distorted in America by the appearance of the commercial bondsman. The close personal relationship between the surety and the accused which existed in England proved to be suitable for the immobile, land-oriented population of the feudal age. In the United States, on the other hand, practical factors gradually required the system to evolve into an impersonal relationship based upon the promise of monetary forfeiture if the accused person failed to appear for trial. This impersonal relationship between the surety and the accused foreshadowed the appearance of the professional bondsman.[14] It has been suggested that commercial bondsmen emerged in this country to meet the needs of accused persons whose right to bail would otherwise be thwarted by the lack of a personal surety, real estate or adequate cash.[15] Although the bail bondsman system in America possibly serves this purpose, it has been challenged as undermining the whole purpose of bail. The concurring opinion in the recent case of *Pannell v. United States*[16] pointed out that the accused's eligibility for release and the amount of the accused's bond may not be intimately related.[17] Judge Brazelon, concurring and dissenting, stated that such an assumption presupposes that an appellant with higher bail has a more substantial stake and therefore a greater incentive not to flee.[18] While this may be true if no professional bondsman is involved, Judge Bazelon continued, when a bondsman is involved it is he and not the court who determines the appellant's real stake. It is the bondsman who ordinarily makes the decision whether or not to require collateral for the bond, and if he does, then appellant's stake may be related to the amount of the bond. But if he does not, Judge Bazelon concluded, "then appellant has no real financial stake in complying with the conditions of the bond, regardless of the amount, since the fee paid for the bond is not refundable under any circumstances. Hence, the court does not decide—or even know—whether a higher bond for a particular applicant means that he has a greater stake."[19] Thus, in the American system of bail, a frankly monetary condition is imposed on release pending trial. While the forfeiture of money may be adequate insurance that the accused will appear for trial, it is quite obvious that this necessarily discriminates against those who have little or no money.

14. Comment, *The Administration of Bail and Pretrial Freedom in Texas*, 43 TEXAS L. REV. 356, 357 (1965).
15. FREED & WALD, *op. cit. supra* note 3, at 22.
16. 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).
17. *Ibid.*
18. 320 F.2d at 701.
19. 320 F.2d at 702.

As former Attorney General Robert Kennedy pointed out in a recent article, numerous studies indicate that there is little, if any, relationship between appearance at trial and ability to post bail.[20]

C. *Constitutional Problems*

The courts, when faced with an indigent defendant who obviously would find it difficult to secure a bond in any amount, have the difficult problem of determining by the constitutional standard of the eighth amendment in what amount bail would not be excessive.[21] There is some indication in an early federal court case[22] that the court was keenly aware of this problem, but thus far the courts have failed to formulate a reasonable test for the "excessive bail" provision of the eighth amendment. Rather, the courts have sought to follow objective standards such as the suitability of the amount as proportionate to the offense charged,[23] which fail to reach and deal with the crucial question of whether the bail is excessive as to the instant defendant. In recent years, however, the Supreme Court has challenged the validity of requiring financial bail from an impoverished defendant. Mr. Justice Douglas pointed out that considerable problems for the equal administration of the law are raised by continuing to demand a substantial bond which the indigent defendant is unable to secure: "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[24] Thus, there appears to be some authority indicating that bail must be tailored to the individual defendant, and if the bail is held to be excessive, it may be found to deny the individual of a constitutional right.

D. *Present Problems*

The present system of bail is contrary to two of the most fundamental beliefs of our system of law: first, that there is equality of all men before the law; and second, that there is a presumption of innocence until one is proven guilty. One authority has stated that: "As many of those accused of crime are indigent or have very limited financial resources . . . there is implicit in the requirement of financial security a factor of economic and class discrimination which is difficult

20. Kennedy, *Criminal Justice,* 5 WM. & MARY L. REV. 167, 170 (1964).

21. Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 992 (1965).

22. United States v. Lawrence, 26 Fed. Cas. 887 (No. 15576) (C.C.D.C. 1835).

23. Foote, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693, 696 (1958).

24. Bandy v. United States, 81 Sup. Ct. 197-98 (1960).

to reconcile with the goal of equal justice."[25] Many arrested persons, unable to provide bail, spend relatively long periods of time in jails or in similar detention awaiting trial. A substantial number of these are never convicted. While the system of bail discriminates against the poor in favor of the wealthy, not all that is wrong with bail results from the system itself. In many instances discrimination in bail procedures results from the practice of those who administer the system. In a study of the bail system in Chicago initiated in 1927, it was found that bail setting followed an arbitrary schedule geared to the alleged offense. The committing magistrates seldom considered any individual aspects of the case.[26] A study of the bail system in New York in 1957 revealed essentially the same unfortunate pattern. This system has been severely criticized for failing to consider the character of the individual defendant and his financial ability to give bail and for placing an inordinate degree of importance on the nature of the offense.[27] While many magistrates are not aware of the unjust result which is obtained from these bail practices, there is some indication that bail has been, and is being consciously used for improper reasons. Some magistrates have admitted that they set bail unreasonably high to "break" crime waves, keep the defendant in jail, cut him off from his narcotics supply, protect women, make an example of a particularly abusive defendant, make him "serve some time" even when acquittal was a certainty, or protect arresting officers from false arrest suits.[28] Thus, in many instances the purpose of the bail system in America—to release the accused with assurance that he will return for trial—has been distorted, if not completely lost.

The effects of misapplication of the bail system can be far reaching. Beely, in describing the bail system of Chicago, stated that police lockups, where arrested persons were jailed pending bail determinations, were places where "a person with any decency would feel that one night there defiled him for life."[29] Former Attorney General Robert Kennedy has pointed out that the present bail system dramatically affects young adults accused of crime. Since many of them lack the

25. Foote, *The Bail System and Equal Justice*, 23 Fed. Prob. 43 (1959).

26. BEELEY, THE BAIL SYSTEM IN CHICAGO 59-68 (1927).

27. Foote, *supra* note 23. A similar study of Philadelphia made in 1954 revealed that committing magistrates in that city only considered police evidence in the majority of the cases before setting bail. See Comment, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954). Bail practices in federal courts were carefully reviewed in 1963. It was found that practically the only facts considered in initial bail decisions by United States Commissioners were the charge against the defendant and the circumstances of the alleged offense, as communicated by the prosecuting attorney. See FREED & WALD, *op. cit. supra* note 3, at 17.

28. Foote, *supra* note 25, at 46-47.

29. BEELEY, *op. cit. supra* note 26, at 42.

money to buy a bail bond, the resulting pre-trial imprisonment often throws them into the company of hardened criminals. "This time in jail—prior to trial—is equivalent, in the words of Justice Douglas, 'to an M.A. degree in crime.' "[30] Since a defendant who cannot post bail must stay in jail until his trial, it is generally agreed that the jailed defendant will be convicted more readily than the defendant who has been able to post bond. It is more difficult for a jailed defendant to assist in the preparation of a proper defense, for he cannot contribute to the location of witnesses or to the finding of exculpatory evidence. Interviews with the defense counsel are less easily arranged and can only be for limited periods of time. For the jailed defendant who is a daily wage-earner, detention renders him unable to earn the money needed to hire an attorney to represent him; and by the time he is tried and acquitted, he will have lost his job. Another disadvantage which the jailed defendant suffers is the impression which he makes on the jury when he enters the courtroom for trial. He enters the courtroom through the door leading from the lockup in the company of an officer, and it is thought that this unduly prejudices the defendant in the minds of the jury.[31] In a Philadelphia survey limited to certain serious crimes, 48 per cent of bailed defendants were acquitted compared with 18 per cent of jailed defendants. In a similar New York survey, the grand jury dismissed 24 per cent of the bail cases and 10 per cent of the jail cases.[32] Not only does the accused suffer from pre-trial detention, but his family suffers as well. If he is a daily wage-earner, and most probably he will be, his family must find some means of subsistence until the defendant is tried. Yet millions of dollars are spent each year for the pre-trial detention of accused persons who will eventually be acquitted. Federal detainees spent an estimated 600,000 jail days in prison in 1963, at a cost to the federal government of 2 million dollars.[33] In 1962, 58,458 persons spent an average of 30 days in pre-trial detention in New York City, at a cost to the city of 6.25 dollars per day, or over 10 million dollars per year.[34] When most penal institutions are inade-

30. Kennedy, *supra* note 20, at 171.

31. Paulsen, *supra* note 8, at 113.

32. Foote, *supra* note 25, at 47. "More striking and probably more significant are the contrasts in disposition of guilty cases. In Philadelphia 59 per cent of the jail cases but only 22 per cent of the bail cases were sentenced to imprisonment, while in New York 84 per cent of the jail and only 45 per cent of the bail cases were sentenced to a penal institution." *Ibid.*

33. *Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judiciary Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 1, at 35 (1964) [hereinafter cited as *1964 Senate Hearings*].

34. *Ibid.*

quately equipped to handle the number of convicted individuals, pre-trial detention aggravates an otherwise bad situation. Pre-trial detention results in both the useless wastage of millions of dollars and an even greater wastage of human resources.

III. BAIL REFORM ACT OF 1966

In 1961 Attorney General Robert Kennedy stated: "I have a strong feeling that the law, especially in criminal cases, favors the rich man over the poor in such matters as bail, the cost of defense counsel, the cost of appeals and so on. We have appointed a study group to see what can be done to make the law more equitable in this respect."[35] Thus, in 1963, the bail practices in federal courts were carefully reviewed in the *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice.* The Committee disclosed that many of the abuses of the bail system described above existed in the federal court system.[36] The efforts of the Vera Foundation of New York City, the United States Department of Justice, and certain members of Congress in awakening the public to the need of reform in the American bail system,[37] at least in the federal courts, resulted in the Bail Reform Act of 1966.[38] Signed by the President on June 22, 1966, the Bail Reform Act was enacted "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[39] The Bail Reform Act is a major development in the field of criminal justice, for it goes far towards eliminating "bail" from the "glossary of criminal procedure." Under the new act, pre-trial release no longer depends upon the individual's wealth. As President Johnson said upon signing the bill:

> Because of the bail system, the scales of justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money.
>
> But now, because of the Bail Reform Act of 1966 which Congress has enacted and which I sign today, we can begin to insure that defendants are considered as individuals, not as dollar signs.[40]

35. Quoted in Ares & Sturz, *Bail and the Indigent Accused,* 8 Crime & Delinquency 12, 15 (1962).
36. *1964 Senate Hearings* at 211-21.
37. McCree, *Keynote Address: Bail and the Indigent Defendant,* 1965 U. ILL. L.F. 1.
38. 80 Stat. 214 (1966).
39. Bail Reform Act of 1966, 80 Stat. 214 (1966).
40. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, BAIL AND SUMMONS: 1965, at xxi (1966).

The Bail Reform Act creates a presumption of release before trial without the payment of money. If the United States Commissioner or district judge determines that the defendant's written promise to return for trial is not sufficient to guarantee his return, he must impose additional conditions of release.[41] In shaping release conditions appropriate to risk, the act requires judicial officers to consider the accused's family, employment and community ties, in addition to the accused's criminal record and history of nonappearance at trial. Since the act seeks to discourage bail bonds, criminal prosecutions take the place of bail bond forfeitures as the primary sanction against defendants who flee.[42] If the defendant cannot meet the conditions imposed by the act, he is entitled, after twenty-four hours, to a review of detention by the commissioner who imposed the conditions.[43] If the commissioner does not amend his order, he must set forth in writing his reasons for requiring the imposed conditions. The defendant may then move the district court to amend the order and have his motion promptly determined. If his motion is denied, the defendant is entitled to an expedited appeal. Although the Bail Reform Act goes far toward eliminating "money bail," it does not completely do away with it.[44] One of the conditions which may be imposed is an appearance bond; but instead of requiring the defendant to purchase a bond from a commercial bondsman for a non-refundable fee, the Bail Reform Act requires the defendant to deposit with the court ten per cent of the amount of the bond, "such deposit to be returned upon the performance of the conditions of release."[45] In essence, the act seeks to return to the concept of bail its true meaning—to release the accused with assurance that he will return for trial.

41. In the event that the judicial officer finds that release on personal recognizance is not sufficient to guarantee the defendant's return for trial, the officer must impose the first of the following conditions which he considers adequate, or a combination of any two or more if no single condition is sufficient: "(1) place the person in the custody of a designated person or organization agreeing to supervise him; (2) place restrictions on the travel, association, or place of abode of the person during the period of release; (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release; (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." 80 Stat. 214 (1966).

42. *Hearings Before the Subcommittee of the House Committee on the Judiciary*, 89th Cong., 1st Sess., at 40-41 (1966) [hereinafter cited as *1966 House Hearings*].

43. H.R. REP. No. 1541, 89th Cong., 1st Sess. 11 (1966).

44. Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940-42 (1966).

45. Bail Reform Act of 1966, 80 Stat. 214 (1966).

Within a few days following the signing of the Bail Reform Act, the President signed the District of Columbia Bail Agency Act.[46] The purpose of this act was to create a permanent bail agency to take over the work of the Washington, D.C., Bail Project which expired in September, 1966. The agency will collect the information needed by United States Commissioners and district judges to determine whether accused individuals should be released pending trial on his personal recognizance. Closely akin to the previous two acts, on February 28, 1966, the Supreme Court adopted new amendments to Rule 46 of the Federal Rules of Criminal Procedure. The new amendments emphasize a policy against unnecessary detention of defendants pending trial, and provide that "the attorney for the government shall make a bi-weekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. . . . As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody."[47]

IV. MANHATTAN BAIL PROJECT

The reform movement which has swept the federal court system has not completely bypassed the courts of the various states. In 1961 the Vera Foundation, in cooperation with New York University Law School, launched the Manhattan Bail Project. The Bail Project was essentially an experiment with the increased use of release on recognizance as an alternative to bail. The project clearly demonstrated that judges were more willing to release accused persons on their own recognizance when presented with verified information about their family ties, residence, and employment, than without such information.[48] Possibly of more importance, it also clearly demonstrated that defendants with community ties would nearly always return to court at the appointed time, whether or not bail had been posted. The Manhattan Bail Project not only led to the establishment of a permanent pre-trial release operation in New York City, but it also has served as the model for similar projects in close to 100 communities in over half the states of the United States.[49] A second major project which

46. Pub. L. No. 89-519, 89th Cong., 1st Sess. §§ 2-11 (July 26, 1966).

47. FED. R. CRIM. P. 46.

48. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, *op. cit. supra* note 40, at xiii.

49. For an extensive listing of projects similar to the Manhattan Bail Project, see FREED & WALD, *op. cit. supra* note 3, at 56-57. See also NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, *op. cit. supra* note 40, at xiv. In McWilliams, *The Law of Bail*, 9 CRIM. L.Q. 21, 34 (1966), it is reported that the Manhattan Bail Project is the model for a similar project instituted in Toronto, Canada.

has been undertaken by a number of jurisdictions is the so-called "stationhouse release." This second development in the movement to increase pre-trial release without bail has been pioneered by the New York City Police Department in its experimental Manhattan Summons Project. The stationhouse release is designed to avoid detention on minor criminal charges by allowing the accused, when he is brought to the precinct station, to be interviewed and his residence, employment, family ties, and other community roots verified precisely as in the bail program.[50] This program does not eliminate arrest, but if the accused is found to be a good risk by the interviewer, the accused is recommended to the precinct officer for release. If released, the defendant is given a citation directing him to appear in court at a later date.[51] The program avoids unnecessary loss of liberty for the accused, and it substantially eliminates the setting of money bail for the defendant who has proven his reliability by appearing in response to the summons or citation.[52]

V. State Legislation

A. *Current Status*

Beginning in 1964, legislation encouraging the use of release without bail or on nominal bail has been proposed, drafted, or passed in Alabama, Alaska, Delaware, Florida, Illinois, Kansas, Maryland, Michigan, Missouri, New Jersey, Ohio, Oklahoma, Oregon, Texas, and Virginia.[53] The leader in the realm of state legislative reform has been Illinois. In 1963 the Illinois Code of Criminal Procedure[54] was enacted with an emphasis on personal recognizance rather than bail. The judges and magistrates are instructed that the code section dealing with pre-trial release "shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused."[55] Many avenues have been suggested for state legislative reform of the present bail system. One which has received considerable attention is a "summons in lieu of arrest." This method suggests that one accused of a minor offense might bypass arrest and bail altogether. Instead of arrest and bail, it is maintained that a summons or citation should be issued by a

50. National Conference on Bail and Criminal Justice, *op. cit. supra* note 40, at xiv-xv.
51. LaFave, *Alternatives to the Present Bail System*, 1965 U. Ill. L.F. 8, 14-15.
52. National Conference on Bail and Criminal Justice, *op. cit. supra* note 40, at xv.
53. National Conference on Bail and Criminal Justice, *op. cit. supra* note 40, at xvi.
54. Ill. Ann. Stat. §§ 110-12 (Smith-Hurd 1964).
55. *Ibid.*

judge or police officer to the accused, directing him to appear in court at a designated time for hearing or trial. Although a few states and the federal courts have statutory provisions for judicially issued summons in lieu of warrants, or for police citations in lieu of sight arrests, their use is presently limited to traffic offenses and violations of municipal codes and county ordinances. Yet, in minor crimes or misdemeanors, estimated to constitute over ninety per cent of all American crimes, there appears to be little if any need to invoke the arrest process with its consequent reliance on bail.[56] The other proposed methods of reform have been wholly or partially incorporated into the federal Bail Reform Act of 1966. While it may appear that the reform movement within the several states is progressing toward the accomplishments of the federal act, it has been pointed out that the federal system goes beyond the present bail projects in several respects. Under the federal system, factual inquiry is required regardless of whether a neutral fact-finding agency exists. Release without money in the federal courts is the norm, not the exception, for the system's emphasis shifts from release of specially qualified defendants on personal bond to release of all defendants on conditions suited to their individual risks. Last of all, defendants under the federal system who are not released are entitled to a clear statement of reasons on which to base further review.[57]

B. *Bail Reform Act as a Model for State Legislation*

It has been suggested that the Bail Reform Act of 1966 may become the model for reformation of state systems of criminal justice.[58] Built upon results obtained from such empirical studies as the Manhattan Bail Project, the Bail Reform Act has incorporated within it the suggestions of leading legal scholars in the field. Yet there appear to be several obstacles which must be overcome before the federal act would be an appropriate model for state legislative reform. First, the effective administration of the Bail Reform Act requires the existence of a neutral fact-finding agency that will collect the data needed to decide whether the accused should be released on his own recognizance. One authority has suggested that the functions of obtaining, verifying, and reporting relevant information for judicial officers should ideally be carried out by law students.[59] If law students are not available, graduate students doing work in related fields should be used. If neither law students nor graduate students are available,

56. LaFave, *supra* note 51, at 13-14.
57. Wald & Freed, *supra* note 44, at 941.
58. Wald & Freed, *supra* note 44, at 940.
59. McCarthy, *Practical Results of Bail Reform*, 29 Fed. Prob. 10, 14 (1965).

the work of the fact-finding agency may be a proper function of the junior sections of local bar associations. With the cooperation of local law firms, young attorneys could be made available on a rotating basis to carry out the work of the agency. Both the cooperating firms and the young lawyers would benefit from this experience, for the recent graduates would receive valuable legal and courtroom experience.[60]

A second obstacle which must be overcome before the federal act could be adopted as a model for state legislative action would be the need for state acceptance of the federal act's liberal exclusionary policy. The Bail Reform Act excludes only capital crimes from its provisions, but some present bail projects exclude all but minor crimes and misdemeanors.[61] While there is usually great public concern that serious offenses be excluded from the act, there is strong authority supporting the position that only capital crimes should be excluded.[62] To deny an accused individual his freedom, not on the ground that he will fail to reappear for trial, but rather on account of the seriousness of the charge against him, is thought by many to be inconsistent with the philosophy that bail determinations should be tailored to the individual defendant rather than the alleged offense.[63] Furthermore, data compiled from several bail projects indicates not only that selective release of defendants in serious cases can be accomplished successfully, but also that such released defendants as a class may be better risks than the class of persons charged with certain lesser crimes.[64] It would seem that only by adopting a liberal exclusionary policy, such as that incorporated in the federal act, can the desired goals of bail reform be fully achieved. All information available at the present time suggests that the seriousness of the alleged offense is not a reliable indication of whether the accused will return for trial.[65] The state, therefore, should find little reason to differ with the liberal exclusionary policy of the federal Bail Reform Act.

The last and most difficult obstacle which must be overcome concerns the perplexing issue of "preventive detention," *i.e.*, the current practice among state courts intentionally to set bail beyond the means of a defendant believed to be dangerous, for the purpose of assuring that he will not be released prior to trial. The issue of preventive detention has brought forth considerable criticism of the Bail Reform

60. *Ibid.*

61. FREED & WALD, *op. cit. supra* note 3, at 9-21.

62. *Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 57-58 (1965) [hereinafter cited as *1965 Senate Hearings*].

63. *Id.* at 58.

64. *1965 Senate Hearings* 58.

65. *1965 Senate Hearings* 56-59.

Act of 1966, and it has been suggested that the absence of this element in the federal act creates an alleged "key gap" in the law.[66] This key gap refers to the fact that judges, except in capital cases and after conviction, cannot consider danger to the community in deciding whether the defendant should be released pending trial. The controversial issue of whether a judge should be able to consider preventive detention in deciding upon pre-trial release received considerable attention in the *House Hearings Before the Subcommittee of the Committee on the Judiciary.*[67] The Senate was unable to reach an agreement as to whether the Bail Reform Act should allow preventive detention; but rather than allow the issue to impede the badly needed bail reform, the Senate decided to omit the issue from the act and consider it separately in more detail.[68] There have been several instances reported of individuals committing further criminal acts while free on bail, at times with a grievous cost to society,[69] and public officials and private citizens alike have expressed concern over the great deal of freedom given to the accused under the new bail act.

"These considerations," Senator Ervin of North Carolina has stated,

> have prompted many commentators on the American bail system to recommend that the present laws providing an absolute right to bail in certain cases should be discarded, that release should be optional in all cases, and that procedures for a prompt review of bail decisions should be developed. It is argued that the bail system, as thus modified, would not only be more effective in protecting society from dangerous offenders who can meet financial bail requirements or flee the jurisdiction of the court, but would also provide a more reliable bail system for releasing persons whose community ties qualify them for release.[70]

The advantages of allowing preventive detention as an element of a bail statute are readily apparent. Heightened public concern over the increasing crime rate emphasizes the importance of balancing a defendant's right to pre-trial freedom with the interest of the community in protection from threats to the physical safety of its citizens. A bail statute which allows for preventive detention might tend to eliminate unnecessary detention and yet make it possible to deny release altogether where monetary bail now frees dangerous persons.[71] Furthermore, spelling out standards for preventive detention would increase its reviewability.

66. Time, Feb. 3, 1967, p. 47.
67. *1966 House Hearings* 28-30, 50-52, 55-57.
68. *1966 House Hearings* 19.
69. See GOLDFARB, RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM 132-37 (1965). See also Time, Feb. 3, 1967, p. 47.
70. *1965 Senate Hearings* 3.
71. *1965 Senate Hearings* 58-59.

On the other hand, the disadvantages of such a statute are numerous. As pointed out by the National Bail Conference Interim Report:

> It is difficult to secure agreement on standards for denying release: if drawn narrowly, they may eliminate the discretion which is desirable in hard cases; if drawn broadly, they may undermine the Anglo-Saxon tradition which favors pre-trial release. Some judges, moreover, may be reluctant to find a likelihood of future criminal conduct on the part of a defendant who has not been convicted on the charge which brought him into custody. Other judges may tend to detain accused persons whenever there is doubt about their dangerousness, especially in times of heightened community concern. A detention statute also raises problems of delayed release pending hearings on detention (in order to secure witnesses and appoint counsel); of prejudicing a defendant's right to a fair trial by adducing and giving attendant publicity to background evidence in detention hearings; and, through requiring damaging findings as prerequisites to detention, interfering with the presumption of innocence at trial and tainting the defendant's record even if he is later acquitted on the charge which caused his arrest.[72]

While there was considerable controversy concerning whether the federal Bail Reform Act should allow for preventive detention, the issue becomes even more acute when the federal act is considered as a model for state legislative reform. In considering the new act, one commentator has pointed out that since many federal cases involve white-collar crimes and relatively responsible defendants, the act should generally work very well.[73] The commentator continued, however, to conclude that "the law has run onto a prickly shoal in Washington, D. C., where federal courts handle all kinds of violent big-city crimes."[74] There is indeed a great divergence between the general nature of the crimes brought before federal and state courts. With the exception of those sitting in the District of Columbia and territories, federal courts are far less concerned with crimes of violence than are state courts. Thus, the issue of preventive detention is brought into much clearer perspective when it is realized that a state bail reform statute would deal with the most dangerous of criminals as well as innocent or minor offenders of the law. Should not a state judge or committing magistrate be allowed to consider the risk created to the community before releasing a dangerous criminal, even though he may feel sure that the accused will return for trial?

If a preventive detention provision were to be incorporated within a state bail statute, however, serious constitutional problems would arise.[75] Since most states guarantee a right to bail either by consti-

72. *1965 Senate Hearings* 59.

73. Time, Feb. 3, 1967, p. 47.

74. Time, Feb. 3, 1967, p. 47.

75. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 124-25 (1966).

tutional provision or by statute, it would be necessary to eradicate these provisions either by constitutional amendment or by legislative action. Furthermore, a substantial body of opinion supports the view that preventive detention is contrary to the eighth amendment and thereby unconstitutional under the federal constitution.[76] It seems probable, therefore, that an extensive revision of existing law and judicial policy would be required before either a state or a federal statute could contain a preventive detention provision. Yet, if judges and committing magistrates continue to employ the device of preventive detention, it should be codified in legislation rather than continued under the false pretense of detention to assure the defendant's presence at trial.[77] If, on the other hand, preventive detention is excluded from state bail statutes, the security of society may well be jeopardized. Since the federal Bail Reform Act applies to all courts of Washington, D.C., statistics should soon be available to determine if pre-trial release can be successfully administered without considering preventive detention. Washington, D.C., will probably become the proving ground for the Bail Reform Act of 1966, and should, in the last analysis, determine whether the act will be a suitable model for state legislative reform.

VI. CONCLUSION

The bail system in America has lost the purpose which it was designed to serve; and the constitutional provision of the eighth amendment that bail "shall not be excessive" has been ignored for almost two centuries. While the bail system has exacted an incalculable toll of human costs, it has wasted millions in the useless and needless detention of innocent individuals; and has discriminated against the poor in favor of the wealthy and influential. There is today a strong movement of reform and a new awareness of the injustice which the bail system perpetuates. The federal Bail Reform Act of 1966 was designed to eliminate this injustice, and while it has been criticized because it does not allow for preventive detention, it has been heralded as a major accomplishment in the field of criminal justice. Whether the Bail Reform Act of 1966 is an appropriate model for state legislative reform is a question difficult, if not impossible to answer at the present time. With the data which should soon be forthcoming from the operation of the Bail Reform Act in Washington, D.C., bail authorities will be better equipped to decide whether pretrial release can be safely effectuated without consideration of preventive detention.

76. *1965 Senate Hearings* 58.
77. Paulsen, *supra* note 75, at 125.