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PREVENTIVE DETENTION AND THE PROPOSED AMENDMENTS TO THE BAIL REFORM ACT OF 1966

Preventive detention of accused non-capital offenders is an often discussed, highly controversial subject. Until now the controversies have surrounded the concept in the abstract—for preventive detention of non-capital defendants has never been permitted by law. In mid-July 1969, however, at the behest of the Administration, bills were introduced in both the Senate[1] and the House[2] which would amend the Bail Reform Act of 1966[3] to embody authorization for judicial officers to subject suspected offenders in certain non-capital felony cases to detention before trial. Consideration of not only the likelihood of flight but the dangerousness of the accused if he is released would be permitted in reaching a determination.[4] For the first time in United States history, under specified conditions, a non-capital offender might be incarcerated pending trial without a right to bail.

Since this concept has come under discussion, there has been much comment about the need for enabling legislation, whether such legislation would be constitutional, and the efficacy of the legislation if found to be constitutional. This study seeks to provide a synopsis of the precursory controversy surrounding this proposed legislation and inquire into whether the proposal is an answer to skeptics and critics of the idea of preventive detention—those whose opposition is based upon constitutional grounds or who, indeed, question either the adequacy of or alternatively the need for such legislation.

CONSTITUTIONALITY

The discussion of whether or not a preventive detention statute would violate the Constitution centers around interpretations of the fifth[5] and eighth[6] amendments. Since bail and bail procedures have been a part of our legal system since even before adoption of the Bill of

1. S. 2600, 91st Cong., 1st Sess. (1969), reprinted in 115 CONG. REC. S7908-09 (daily ed. July 11, 1969).

2. H.R. 12806, 91st Cong., 1st Sess. (1969).

3. 18 U.S.C. §§ 3146-52 (Supp. IV, 1969).

4. The only recognized purpose for bail has been to ensure the presence of an accused at trial. *See, e.g., Id.* § 3146(a); Stack v. Boyle, 342 U.S. 1, 8 (1951).

5. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

6. "Excessive bail shall not be required . . . ."

Rights,[7] it is surprising that the Supreme Court has not yet had occasion to pass on the question of whether or not there is an absolute right to bail in non-capital cases.[8] Because it has not, theories abound, and inapplicable decisions are dissected in search of some indication of the light in which the Court is likely to view a law which would permit an accused non-capital felon to be incarcerated without bail or right to bail.

The Fifth Amendment

The due process clause of the fifth amendment, it is argued, precludes a court from imprisoning an accused because of his likelihood of committing "another" crime while on bail awaiting trial. The assumption that he has committed the offense for which he is in custody, inherent in the premise that he might commit "another" crime if released, is repugnant to our legal system's presumption of innocence until proven guilty at a trial by one's peers.[9]

Opposing this argument is one which would show that the presumption of innocence is at once a rule of evidence and an ideal embodied in our system of laws.[10] It is a rule of evidence relating to the burden of proof at trial.[11] On the other hand, the presumption of innocence upon which pretrial freedom might be based is not a factual presumption but a manifestation of the ideal that one must not be deprived of liberty without due process of law.[12] Today, the soundness of this argument is supported by the observation that persons accused of capital crimes or those found incompetent to stand trial are imprisoned before trial.[13]

7. The Judiciary Act of 1789, passed two years before final ratification of the first ten amendments, specified the conditions under which bail was to be granted. *See* note 17 *infra*.

8. The precise question of a right to bail before trial in non-capital criminal cases has yet to be brought before the Supreme Court. Such tangential matters as bail pending appeal or pending deportation (technically not a criminal action) have been touched upon and will be discussed *infra*.

9. *See* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1501 (1966); *cf.* Stack v. Boyle, 342 U.S. 1, 4 (1951).

10. *See* Note, *supra* note 9, at 1501.

11. *Id.*; *Hearings on Amendment to the Bail Reform Act of 1966 Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 125 (1969) (remarks of Halleck, J., D. C. Ct. Gen. Sess.) [hereinafter cited as *1969 Hearings*].

12. Note, *supra* note 9, at 1501.

13. *Id.*; *e.g.*, An accused murderer is presumed innocent and his guilt must be established at trial but no absolute right to bail is his while awaiting trial, nor does due process require that it should be. *See* note 26 *infra*.

The Eighth Amendment

The eighth amendment command that "[e]xcessive bail shall not be required . . ." has aroused the most passionate voices. This clause is perhaps the most ambiguous in the Constitution,[14] and for that reason it is understandable that its meaning has been subjected to varied interpretations. Realizing in advance that the ultimate interpretation may evolve from a Supreme Court ruling, a summary of those that have been proposed may be profitable.

Every interpretation of this amendment begins with an historical allusion. Possibly, were it not for the nearly two hundred years of tradition underlying our system of laws, these facts of history would illustrate the true meaning. But our emphasis upon the rights of the individual and his protection from the power of the state has been nurtured and has grown until what appears to be merely a prohibition of excessive bail is often read as an absolute right to bail.

It has been noted that our bail clause was taken from the English Bill of Rights Act.[15] In England this clause was "never . . . thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." [16] The first Congress established the right to bail in the Judiciary Act of 1789.[17] Discussion of that act and of the first ten amendments to the Constitution occurred simultaneously, the Judiciary Act being enacted two days before the Bills of Rights was approved.[18] It was another two years before the amendments received the necessary approval of three-fourths of the states and were ratified.[19] It therefore would appear that Congress reserved to itself the right to define the crimes which are bailable, and stipulated in the Constitution that bail for those crimes shall not be excessive—a commonplace in English law at that time.[20]

14. *See generally* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 969-71 (1965) [hereinafter cited as Foote, *Crisis in Bail*]. This is an excellent, comprehensive work by one of the recognized experts on the subject of bail.

15. 1 W. & M., c. 2 (1689); *see generally* Foote, *Crisis in Bail*, at 965-68.

16. Carlson v. Landon, 342 U.S. 524, 545 (1952).

17. ...And upon all arrests in criminal cases, bail shall be admitted, except where punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law. Judiciary Act § 33, 1 Stat. 73, 91 (1789).

18. Foote, *Crisis in Bail*, at 971-73.

19. The necessary three-fourths of the states had ratified the amendments by December 15, 1791.

20. *See* Foote, *Crisis in Bail* at 972-74.

Opposing this, it is said that if the bail clause does not give a right to bail there exists "the extraordinary result of a constitutional provision being merely auxiliary to some other law, which in the federal system must be statutory." [21] Therefore the eighth amendment must necessarily be read as implying a constitutional right to bail. This implication would be "most consistent with the historical evolution of the eighth amendment." [22] Justice Black noted that if there were no implied right to bail, the eighth amendment would be nothing but a "pious admonition." [23] However, even fair-minded proponents of this "implication theory" are troubled by the question of why, if the founding fathers intended the eighth amendment to provide a right to bail, they cloaked their intent in ambiguity instead of specifically reciting their desire in the Constitution?[24]

That a recognized right to bail has existed in non-capital cases since the earliest times is beyond dispute. While some assume, without citing support, that this right is constitutional and unconditional in nature,[25] it appears generally accepted that, in fact, it has been provided statutorily throughout our history.[26] While tradition may militate against it, there appears no reason why the Congress cannot change even so venerable a provision of the Judiciary Act as that concerning bail.[27]

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21. *Id.* at 969.

22. *Id.* at 970.

23. Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting). This case dealt with an alien held without bail pending deportation for violating the Internal Security Act. As noted in the opinion, deportation hearings are not criminal proceedings nor is deportation a punishment. *Id.* at 537. Therefore, although the decision was one upholding the government's right to detain until deportation, the case is not authority for the proposition that the same right exists pending trial on criminal charges.

24. *See* Foote, *Crisis in Bail*, at 970.

25. *See, e.g.*, Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); *see generally* Note, *supra* note 9, at 1500.

26. *See* Carlson v. Landon, 342 U.S. 524, 545 (1952); Stack v. Boyle, 342 U.S. 1, 4 (1951); *1969 Hearings* 28 (remarks of Hart, J., D.D.C.); FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 2 (1964). *Cf.* Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); Foote, *Crisis in Bail*, at 969.

FED. R. CRIM. P. 46(a) provides that

> [a] person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

27. *See 1969 Hearings* 28.

Purpose of Bail

Our pretrial bail laws have always had as their sole purpose the ensuring of the defendant's presence at trial.[28] That he might commit further crimes or be a menace to the community if released have not been proper considerations.[29] A judge at a bail hearing is required to determine that condition of release which is most certain to deter the flight of the accused and then release him.[30] It is clear, however, that a judicial officer will often make a *sub rosa* decision that a certain defendant is dangerous or is likely to injure other individuals if he is released.[31] He will then subvert both the spirit and the letter of the law and prescribe a bail bond which the defendant is unable to meet. Consequently, the defendant will be subjected, extrajudicially, to pretrial detention. The system is further corrupted by the fact that the wealthy or the organization criminal may be able to meet any financial condition of release, while the indigent person cannot.[32] These individuals will be forced to seek a bail bondsman who may or may not consider them good credit risks and will, in actuality, determine whether or not they are to have their freedom.[33] Moreover, it is socially wrong to permit a system wherein a judge acting according to his conscience and for the protection of society, is required to circumvent bail laws to effect the detention of some while the same system allows the wealthy defendant to "buy" his way free with a bond premium.

Need and Effectiveness

In recent years, court decisions and legislation have expanded and clarified the rights of the individual in relation to the processes of criminal law. Ideally, a balance between the protection of individual rights and the rights of the community should be maintained.[34] Arguably,

28. *See* note 4 *supra.*

29. Carlson v. Landon, 342 U.S. 524, 557 (1952) (Black, J., dissenting); Stack v. Boyle, 342 U.S. 1, 8 (1951); *cf.* Trimble v. Stone, 187 F. Supp. 483, 484-85 (D.D.C. 1960).

30. *E.g.,* Bail Reform Act of 1966, 18 U.S.C. § 3146(a) (Supp. IV 1969).

31. *See* R. Goldfarb, Ransom—A Critique of the American Bail System 12 (1965); Freed & Wald, *supra* note 26, at 49; Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole,* 38 N.Y.U.L. Rev. 67, 91 (1963).

32. *See* R. Goldfarb *supra* note 31, at 32-91; *cf.* Bandy v. United States, 82 S. Ct. 11, 13 (Douglas, Circuit Justice, 1961); Foote, *Crisis in Bail,* at 963.

33. *See* R. Goldfarb, *supra* note 31, at 92-126.

34. Senator Sam Ervin, Chairman of the Senate Subcommittee on Constitutional Rights, remains unconvinced of the desirability of an unprecedented preventive detention law. *See* Ervin, *The Legislative Role in Bail Reform,* 35 Geo. Wash. L. Rev. 429, 445 (1967). But Senator Ervin has recognized that ". . . during recent years we

it is unhealthy to focus all attention and effort upon one side of the human spectrum, upon individuals, and slight the other side, society. On the other hand, the resources of one person are seldom the match of those of the state. As news releases, studies, and surveys of late indicate,[35] however, there are a substantial number of persons who commit additional crimes while released on bail pending trial. There is no question but that government owes the governed protection from such dangers; only the means and methods to effect this protection are debated.

Besides the aforementioned constitutional argument, which necessarily casts a shadow of doubt over the validity of a preventive detention statute, objections are raised that dangerousness to the community is not a proper consideration when setting bail; only the likelihood of defendant's failure to appear should be considered.[36] Those who would relent

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have had a rather unrealistic solicitude for the welfare of the accused. I think that a lot of times we have lost sight of the fact that society and the victims of crime are just as much entitled to justice as the accused." *1969 Hearings* 108. *See also Id.* at 18 (remarks of Hart, J., D.D.C.).

35. Most studies conducted in the bail field are similar to the Vera Foundation's Manhattan Bail Project (*see generally* Ares, Rankin & Sturz, *supra* note 31) and have as their objective the release of selected defendants on their own recognizance until trial. Accordingly, following interviews and background investigations, researchers recommend for release those they deem reasonably safe risks. Judges, of course, are free to accept or reject such recommendations. Generally the recidivism rate among those so released is cited when discussing the instances of crime by persons on bail, for these are the only studies available. The statistics quoted are low, ranging from 7.5% to 20% of subjects released, but this is doubtlessly an incomplete picture. The processes of selection appear to have secured the release of the most stable while those who were not recommended normally remain in jail, unable to meet bail. Judge Greene of the D.C. Ct. Gen. Sess. has noted that "the statistics that have been cited vary so widely, and are based on so many assumptions, some of them correct and some of them dubious, that I do not think at this point anyone knows what the pattern of predictability is." *1969 Hearings* 41-42. *See generally* REPORT OF THE JUDICIAL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA (1968) reprinted in *1969 Hearings* 507; MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL: FINAL REPORT OF THE D.C. BAIL PROJECT (1966); Rankin, *The Effect of Pre-Trial Detention,* 39 N.Y.U. L. REV. 641 (1964); Ares, Rankin & Sturz, *supra* note 31.

36. In Trimble v. Stone, 187 F. Supp. 483, 485 (D.D.C. 1960), which was a hearing on the commitment of a juvenile to reform school, the court gratuitously said that "[t]he right to bail pending trial is absolute, except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant may be." While there is no right to bail pending appeal (*see* FED. R. CRIM. P. 46(a)(2)), Justice Jackson refused to deny it in a Smith Act case and in a much quoted passage said: "Imprisonment to protect society from predicted but as yet uncommitted 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 . . . ." Williamson

in that objection to the point of allowing such a consideration, maintain that today there exists no judge or other person or body capable of accurately predicting which accused might be dangerous.[37] There may be no adequate answer to such a charge since neither those who make it nor those who oppose it cite any proof that they are correct. Moreover, there have been numerous bail studies conducted[38] wherein certain accused persons have been recommended for pretrial release on their own recognizance based upon background surveys and the seriousness of the charges against them. Researchers report that few of those released have committed crimes while on bail.[39] While these results are hailed as proof that too many are unnecessarily detained because of inability to meet bail, they might indicate a deeper truth. Since the researchers have obviously, through their processes, selected the best risks, to some degree those who remain may be said to be poor risks. Though such a simplistic conclusion may not be fully warranted, it may be suggested that such procedures might be used to assist a magistrate in making his determination.[40] It may well be asserted that, armed with these facts, and possessing experience and knowledge of people

v. United States, 184 F.2d 280, 282-83 (Jackson, Circuit Justice, 1950). *Contra* Rehman v. California, 85 S. Ct. 8, 9 (Douglas, Circuit Justice, 1964); Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962); *cf.* Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

37. *See 1969 Hearings* 610-14; Foote, *Crisis in Bail*, pt. I, 964, pt. II, at 1165-66. Yet while the predictability of future criminal conduct is questioned, there is an inherent presumption that it is a proper and successful inquiry when considering bail on appeal. *See* FED. R. CRIM. P. 46(a)(2); Rehman v. California, 85 S. Ct. 8, 9 (Douglas, Circuit Justice, 1964); Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice, 1962). Though the court has the benefit of a conviction indicating a substantial certainty that the convict is guilty of the crime for which he was charged, the rationale for approval of attempts to predict future conduct in these instances and disapproval of attempts pending trial is incomprehensible. It would seem that a judge, given adequate background information, could capably predict future conduct under both circumstances. Judge Halleck, D. C. Ct. Gen. Sess., "firmly believe[s] that an experienced trial judge can make such a prediction based upon adequate factual material relating to a defendant's past record and his current community situation." *1969 Hearings* 91. *But see Id.* at 139 (statement of Mrs. Wald, Judicial Council Committee to Study the Bail Reform Act).

38. *See* note 35 *supra*.

39. *Id.*

40. *See* FREED & WALD, *supra* note 26, at 57. *Cf. 1969 Hearings* 125 (remarks of Halleck, J.); *Id.* at 139 (statement of Mrs. Wald); Foote, *Crisis in Bail*, pt. II, at 1165. The Congress has, in fact, taken a step in this direction by its passage in 1966 of the District of Columbia Bail Agency Act, Pub. L. No. 89-519, 80 Stat. 327 (1966). The act establishes an organization which is designed to provide to the courts of D.C. verified and timely reports on arrested persons which will aid in the bail determination. The agency is independent of the court and is in no manner an instrumentality of the police

and the law, a court will consistently be correct. To offhandedly disqualify a judge from making a determination of future dangerousness, were he possessed of the above facts concerning the accused, would be to ignore the considerable discretion he already possesses in other areas where his decision may to no lesser degree affect the life and fortunes of his fellow man.

Support for preventive detention legislation, albeit oblique support, is found in the observation that it would codify that which has been the practice anyway.[41] Yet if written findings and a review procedure were required, the rights of an accused would be improved rather than denigrated.[42]

The Proposed Legislation

The proposed amendment to the Bail Reform Act of 1966 is primarily a preventive detention law. It was submitted to Congress with knowledge of the controversial nature of the subject. Setting the stage for the procedural aspects of the amendment is the permission granted to a judicial officer to consider "the safety of any other person or the community," in addition to the likelihood that the defendant might flee or fail to appear, when determining the proper condition of pretrial release.[43] While the original act considerably liberalized the forms which bail might take, and deemphasized financial conditions, such conditions are still permitted.[44] The proposal, however, would prohibit a judge from freeing a person considered dangerous on a money bail.[45]

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or prosecution. Since the bulk of federal criminal cases is found in Washington, the effectiveness of this information-gathering body over a proper period of time will no doubt shed light on the validity of the proposition that a judge, having such information at hand, can make a rational determination about the probability of further criminal acts by an accused awaiting trial.

41. *Supra* note 31.

42. *See* R. Goldfarb, *supra* note 31, at 250; Freed & Wald, *supra* note 26, at 111.

43. S. 2600, 91st Cong., 1st Sess. (1969), Proposed Amend. to Bail Reform Act of 1966, 18 U.S.C. § 3146(a) (Supp. IV, 1969).

44. The Bail Reform Act of 1966 requires a judge to release the accused offender on his own recognizance unless he determines such release would not satisfactorily guarantee defendant's presence for trial. In that event a wide range of non-financial conditions are available, any combination of which the judicial officer may impose. Financial conditions are to be used only when no other conditions are deemed appropriate. 18 U.S.C. § 3146(a) (Supp. IV, 1969).

45. Proposed Amend. to Bail Reform Act of 1966, 18 U.S.C. § 3146(a) (Supp. IV, 1969).

The obvious rationale is that, if one is indeed dangerous, the fortuity of his wealth or connections should not permit him freedom to commit the apprehended act.

If an accused does in fact fall into one of the categories of persons which the proposal specifies may be detained upon a showing of probable cause,[46] he will receive a formal hearing prior to a detention order being entered.[47] This hearing affords the accused the opportunity "to present information, to testify, and to present and cross-examine witnesses." [48] Any testimony which is given by the accused during this pretrial detention hearing is inadmissible on the issue of his guilt at trial.[49] Of course, counsel may be present at all phases of the procedure.[50]

It is proposed that the hearing itself shall be held immediately upon the person's being brought before the court but that the accused may request a continuance for up to five days during which time he may be detained.[51] A three-day continuance may be granted to the prosecution for good cause shown.[52]

46. The proposal narrowly prescribes those categories of offenders subject to detention. There are four categories: a) Persons charged with a dangerous crime. PROP. § 3146A(a)(1). Dangerous crimes are specified as robbery, burglary, arson, rape and other sex offenses, or attempt to commit the foregoing, and unlawful sale or distribution of narcotics if punishable by imprisonment for more than one year. PROP. § 3152(3). b) Persons charged with a crime of violence allegedly committed while on bail or other type of release if the prior charge was a crime of violence or the person has been convicted of a crime of violence within the past ten years. PROP. § 3146A(a)(2). Crimes of violence are defined as murder, rape and other sex offenses, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense or with a dangerous weapon, or any attempt or conspiracy to commit any of the foregoing. PROP. § 3152(4). c) Persons charged with an offense who, for the purpose of obstructing justice, threaten, injure, intimidate or attempt to threaten, injure or intimidate any prospective witness or juror. PROP. § 3146A(a)(3). d) A person charged with a crime of violence when, at a hearing, there is clear and convincing evidence that he is an addict, it is determined that there are no other conditions or combination thereof that will reasonably assure the safety of any person or the community and there is a substantial probability that the person committed the offense of which he is charged. Such person will be held in custody under medical supervision. PROP. § 3146B. The term "addict" is defined in PROP. § 3152(5).

47. PROP. § 3146A(b)(1).

48. PROP. § 3146A(c)(4).

49. PROP. § 3146A(c)(6).

50. PROP. § 3146A(c)(4).

51. PROP. § 3146A(c)(3).

52. *Id.*

The hearing seeks to determine whether the defendant falls within one of the categories of defendants that may properly be detained, and there must be clear and convincing evidence establishing this fact.[53] The judicial officer must determine that there is "no [other] condition or combination of conditions of release which will reasonably assure the safety of any other person or the community." [54] Based upon all the evidence that it has before it, the court must be satisfied that there is a substantial probability that the accused committed the crime of which he has been charged.[55] If, based upon his findings in the hearing, a judicial officer determines that the defendant should be detained, he must reduce his findings of fact to writing and cite his reasons for the order.[56]

Once an accused has been committed to jail pending trial under this proposal, he is to be given all reasonable opportunity to consult with counsel and to assist in his own defense.[57] Such assistance may require that defendant be released for short periods of time, which would be permitted for good cause shown.[58] To the extent practicable, he would be confined in facilities separate from those housing convicted criminals.[59]

The proposal requires that if the accused has not been tried within sixty days, unless the trial is then in progress or has been delayed at his request, he is to be released under the provisions of section 3146 of the Bail Reform Act of 1966.[60] Even before expiration of the sixty-day period, the court may order the accused's release if the basis for his detention no longer exists.[61] In any event, persons detained pursuant to this act are to receive an expedited trial if at all practicable.[62]

The proposal seeks to strengthen the authority of the court in dealing with those who have been released on bail who violate a condition of

53. PROP. §§ 3146A(b)(2)(A), 3146B(c)(2)(A).

54. PROP. §§ 3146A(b)(2)(B), 3146B(c)(2)(B).

55. PROP. §§ 3146A(b)(2)(C), 3146B(c)(2)(C). These sections do not, however, apply to one who is charged with obstructing justice. *See* PROP. §§ 3146A(a)(3), (b)(2)(C).

56. PROP. §§ 3146A(b)(3), 3146B(c)(3).

57. PROP. § 3146(h)(2).

58. *Id.*

59. PROP. § 3146(h)(1).

60. PROP. § 3146A(d)(2)(A).

61. PROP. § 3146A(d)(2)(B).

62. PROP. § 3146A(d)(1).

release. Following a hearing where the court must decide whether the conditions were, in fact, violated,[63] it must determine that there are no other conditions of release reasonably likely to assure the person's presence at trial or that he will not be a danger to the community.[64] If the determination is against the accused, he may be detained, again with every effort made to expedite his trial.[65]

This law would permit pretrial detention if it was judicially determined after a hearing that no other release conditions would reasonably assure the safety of the community or the presence of the accused at trial. The findings of a hearing which results in incarceration must be in writing so that they are readily reviewable. The accused while confined is to be free to assist in the preparation of his defense and to receive priority on the trial docket. While there are many auxiliary facets to the proposal, this broad approach serves to illustrate the concept and to inquire into the procedures which have been established.

Conclusion

While the proposal in its present form may be to some highly circumspect, obvious attention has been paid to the rights of the accused. But of note is the fact that even while attentive to the rights of the accused, indeed even while expanding them, the interests of the community have buttressed. Moreover, although there is little doubt that constitutional objections will continue to be raised, such assertions should not be allowed to obfuscate the fact that this proposal would increase the constitutional safeguards of an accused. Where he might be denied bail for a two-month period (which occurs even without this legislation) such fact is more than offset by the procedural safeguards of the hearing which would precede his detention—and which would be reviewable.[66] Undoubtedly the system would be subject to abuse, but such abuse would be correctable on review while the abuses under the present system seldom are. The proposed amendment to the

63. Prop. § 3150B(b)(1).

64. Prop. § 3150B(b)(2).

65. Prop. § 3146A(d)(1).

66. 18 U.S.C. § 3147 (Supp. IV, 1969) would be amended by the proposal to allow appeal to the court exercising appellate jurisdiction by "a person [who] is ordered detained or [whose] order of detention has been permitted to stand by a judge of the court having original jurisdiction over the offense charged."

Bail Reform Act of 1966 is a commendable accomplishment of balancing the rights of the individual with the rights of society.[67]

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67. It seems fair to expect that this act, while permitting detention of dangerous individuals, will permit the courts to become more liberal in their terms of release for those they determine to be "safe risks." Since the Bail Reform Act encourages release on recognizance or other non-financial terms, such conditions of release should be resorted to almost exclusively. The practice of jailing the poor because of inability to secure a bond should cease.

Success of this federal law should encourage state legislatures to enact similar laws or seek constitutional changes so that all accused persons might some day be treated fairly in the vital area of bail. (*See* FREED & WALD, *supra* note 26, at 2 n.8 for a compendium of state bail provisions). However, recent activity in New York indicates that change in this regard is likely to be slow. *See* N.Y. Times, Sept. 3, 1969, at 1, col. 5. That state's Penal Law Revision Commission has elected not to recommend a preventive detention law. Besides the usual constitutional issues, one of the telling reasons for deciding against recommendation was that such legislation "would smother the courts in a blizzard of hearings that were not required under existing procedures." *Id.* at 39, col. 3. Concern for such logistical problems is commendable but the sacrifice of a law so remedial in nature is not. If the problem is so acute, and undoubtedly it is, appropriate administrative or legislative action should be taken to alleviate it. The hearings on the federal preventive detention amendment were cognizant of a similar objection from the D.C. District Court, *see, e.g., 1969 Hearings* 10-11 (remarks of Hart, J.), and it is to be expected that legislators will not enact such a law without consideration of its practicability with respect to judicial administration. And while it may be true that "[t]here are about 10 times more arrests for homicide, robbery, rape and burglary each year in New York City alone than there are in Washington," N.Y. Times, Sept. 3, 1969, at 39, col. 5, it is to be hoped that New York and states with similar problems will expeditiously resolve them in the interest of both the accused and the citizenry. Improvement of our judicial system should not be postponed or thwarted by fiscal objections.