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A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform

Cover Page Footnote

Chairman, Committee on the Judiciary, United States Senate. A.B. 1954, Harvard College; LL.B. 1959, University of Virginia.

A NEW APPROACH TO BAIL RELEASE: THE PROPOSED FEDERAL CRIMINAL CODE AND BAIL REFORM

Edward M. Kennedy*

*[T]he present [bail] system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.***

INTRODUCTION

HISTORICALLY,¹ bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear.² Current findings suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.³ With increasing frequency, persons on bail are being arrested and charged with serious felonies.⁴ One recent study found that approximately thirteen percent of felony defendants in the District of Columbia were arrested for crimes committed while they were free on bail.⁵ In another study, sixty-five percent of those arrested for auto theft were arrested for another auto theft while out on bail.⁶ Other crime categories also showed high arrest rates during the pretrial release period: larceny and

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** A. Beeley, *The Bail System in Chicago* 160 (1927).

1. For a discussion of the development of the bail laws see 1 J. Stephen, *A History of the Criminal Law of England* 233-43 (1883); Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. Pa. L. Rev. 959, 965-89 (1965); Meyer, *Constitutionality of Pretrial Detention* (pt. 1), 60 Geo. L.J. 1139, 1145-78 (1972).

2. See D. Freed & P. Wald, *Bail in the United States*: 1964, at 1-8 (1964).

3. Address by Chief Justice Burger, ABA Midyear Meeting 9 (Feb. 3, 1980).

4. P. Wice, *Freedom for Sale* 73-77 (1974); J. Roth & P. Wice, *Pretrial Release and Misconduct in the District of Columbia* II-45 to -51 (Institute for Law & Social Research, PROMIS Research Project No. 16 1978) [hereinafter cited as *Inslaw Study*]. This landmark study focuses on the effectiveness of the pretrial release system in the District of Columbia. It is based on data pertaining to 11,000 felony and misdemeanor cases arraigned in the District of Columbia Superior Court during 1974. *Id.* at *Foreword*; see *Pretrial Release or Detention: Hearings and Markups Before the House Subcomm. on Judiciary & the House Comm. on the District of Columbia*, 94th Cong., 2d Sess. 50 (1976) (statements of Charles R. Work & William A. Hamilton); *id.* at 208 (statement of Frank Q. Nebeker); Report of the Judicial Council Comm. to Study the Operation of the Bail Reform Act in the District of Columbia (May, 1969), *reprinted in id.* at 303, 312-17, 355, 359-62.

5. *Inslaw Study*, *supra* note 4, at II-48. The rearrest rate for defendants charged with misdemeanors was seven percent. *Id.*

6. D.C. Bail Agency, *How Does Pretrial Supervision Affect Pretrial Performance?* 15 (1978).

forgery, forty percent; robbery, thirty-three percent; and burglary, twenty-seven percent.⁷ The failure of our bail laws to balance the likelihood of the defendant's appearance at trial with the needs of community safety indicates the need for reform.⁸ This Article presents a brief history of the federal bail laws, and outlines the debate concerning bail reform. It then offers an innovative, alternative approach to the bail release of the suspected offender—the bail provisions of the federal Criminal Code Reform Act of 1979 (S. 1722).⁹

I. THE FEDERAL BAIL LAWS

While the United States Constitution does not expressly provide a right to bail,¹⁰ federal statutes have historically mandated that "bail

7. *Id.* While this study is informative, it is not comprehensive. It focused on 300 defendants who were divided into three groups, each of which received a different level of bail release supervision by an outside agency. The study found that supervision affected appearance rates. It did not, however, reveal any relationship between differing levels of supervision and pretrial crime. *Id.* at 1-3.

8. This Article focuses on reform of the federal bail laws. This is not to underestimate similar problems arising in various states, but rather reflects my own experience as a United States Senator. The states, however, have also been very active in bail reform. For an overview of these efforts see W. Thomas, *Bail Reform in America* (1976). One notable reform has been in attempting to eliminate the need for bail bondsmen by permitting the suspect himself to post a percentage of the amount of the bond. If the defendant appears for trial, the deposit is returned to him at the conclusion of the case. See W. Thomas, *supra*, at 183-99; Center on Administration of Criminal Justice, University of California, Davis, *Cost Analysis—10 Percent Deposit Plan* (June 1979) (on file with the *Fordham Law Review*); Kannensohn & Howard, *Bail Bond Reform in Kentucky and Oregon* (1978). Perhaps the commercial system would be justifiable if it was more effective than the deposit plans. Statistics indicate, however, that the appearance rates under both approaches are similar. W. Thomas, *supra*, at 192-95.

9. S. 1722, 96th Cong., 1st Sess. (1979) (available from the U.S. Government Printing Office). S. 1722 codifies and modernizes the entire federal criminal law. Its bail provisions are not limited to the issues surrounding the pretrial bail release decision. For example, S. 1722 establishes new requirements governing the issuance of bail to those defendants convicted and awaiting sentence, *id.* § 3504(a), or appellate review of their convictions, *id.* § 3504(b). See S. Rep. No. 553, 96th Cong., 2d Sess. (1979). S. 1722 is the culmination of more than 25 years of effort in the area of criminal code reform. See generally *Reform of the Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st-94th Cong. (1971-1975); Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952). For a more detailed discussion of criminal code reform in general, and my role in particular, see Kennedy, *Federal Criminal Code: An Overview*, 47 Geo. Wash. L. Rev. 451 (1979); Kennedy, *Reforming the Federal Criminal Code: A Congressional Response*, 8 N.C. Cent. L.J. 1 (1976); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353 (1979).

10. Scholars have debated whether a constitutional right to bail can be implied from the command of the eighth amendment that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. Compare Foote, *supra* note 1, at 965-89 (yes) with Meyer, *supra* note 1, at 1179-94 (no). The Supreme Court has spoken on this issue only once. In *Carlson v. Landon*, 342 U.S. 524 (1952), petitioners were arrested and charged with being members of the Communist Party. Pursuant to provisions of the Internal Security Act, petitioners were being held without bail pending resolution of deportation proceedings. *Id.* at 528-29. The Court, noting that the eighth amend-

shall be admitted"¹¹ in noncapital cases.¹² The Supreme Court has construed this language as providing a "traditional right to freedom before conviction."¹³ This right, however, is not absolute; it "is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."¹⁴ Until recently, this "adequate assurance" generally took the form of a bail bond purchased from a professional bail bondsman.¹⁵ Thus, a suspect who could afford to pay the bail premium was released, while his indigent counterpart, unable to raise the necessary money, remained in jail pending trial.¹⁶ In the 1960's, scholars began to question the fairness of these bail procedures.¹⁷ Their studies revealed that, in addition to losing his freedom, the defendant who remains in jail often loses his job and is unable to provide for his family.¹⁸ More importantly, complete pretrial incarceration hinders the defendant in preparing his defense:

He cannot help locate witnesses or evidence which may be more accessible to him than to any outsider. His contacts with counsel may be impeded by having to plan a defense in cramped jail facilities within the limited hours set aside for visitors. The pretrial prison experience may adversely affect his demeanor and attitude in the courtroom or on the witness stand. If convicted, the defendant who has lost his job and been removed from his family will stand a far poorer chance for probation than the one who has earned money, kept his job, and maintained strong family ties.¹⁹

In an attempt to find an alternative bail procedure that would lessen the almost universal dependence on commercial bail bonds, a number

ment had not prohibited Congress from specifying those crimes for which bail would not be allowed, concluded that "the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." *Id.* at 546; *accord*, *United States v. Kirk*, 534 F.2d 1262, 1281 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977).

11. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91 (current version at 18 U.S.C. § 3146 (1976)).

12. A noncapital offense is one not punishable by death. 18 U.S.C. § 3146 (1976). Bail release for capital offenses is within the discretion of the court. *Id.* § 3148.

13. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

14. *Id.*

15. This practice derived from the English bail system in which a third party assumed responsibility for the future appearance of the accused. Because of colonial America's vast frontier, however, this custom of personal responsibility was not practical. The surety's promise to produce the defendant, therefore, gradually eroded into a promise to pay a sum of money if the accused did not appear at trial. This development created a need for commercial bondsmen. Note, *Bail: An Ancient Practice Reexamined*, 70 *Yale L.J.* 966, 966-68 (1961); see D. Freed & P. Wald, *supra* note 2, at 2-3. For an explanation of the role of the bail bondsman see *id.* at 22-38.

16. *Id.* at 21; see S. Rep. No. 750, 89th Cong., 1st Sess. 6 (1965); Subcomms. on Constitutional Rights & Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Summary Report on Constitutional Rights and Federal Bail Procedures 1 (Comm. Print 1964) [hereinafter cited as Summary Report].

17. D. Freed & P. Wald, *supra* note 2, at 9-21. This inquiry continues today. See Zeisel, *Bail Revisited*, 1979 *Am. B. Foundation Research J.* 769.

18. D. Freed & P. Wald, *supra* note 2, at 42-43.

19. *Id.* at 46 (footnotes omitted); see S. Rep. No. 750, 89th Cong., 2d Sess. 7 (1965).

of pilot projects were undertaken.²⁰ Under these programs, a defendant was released on his own recognizance if an evaluation of his employment, family, and community relationships indicated that he was likely to appear at future court proceedings.²¹ In the Manhattan Bail Project, one of the most successful of these pilot programs, ninety-nine percent of those released on their own recognizance returned to court as required.²²

The Congressional response to these findings was the Bail Reform Act of 1966.²³ While this Act reaffirms the basic proposition that in noncapital cases a person is to be released on bail under minimal conditions reasonably required to ensure his presence at trial,²⁴ it is premised on the belief that a poor defendant is no more likely than his wealthy counterpart to flee the jurisdiction.²⁵ The Act, therefore, attempts to narrow the discrepancy in pretrial release opportunities for the rich and poor by mandating a presumption in favor of release, either on personal recognizance or on execution of an unsecured appearance bond, for all those charged with a noncapital criminal offense.²⁶ If the judicial officer determines that neither of these approaches is adequate, the Act lists a number of other conditions which may be imposed upon the defendant to ensure his appearance in court.²⁷ Although the imposition of a money bond is still permitted, it is to be imposed only after the court has determined that all other nonfinancial conditions, such as placing the defendant in the custody of another person, or placing restrictions on the defendant's travel, are inadequate to ensure his future appearance.²⁸

II. THE BAIL REFORM DEBATE

During the past decade, the debate concerning appropriate bail procedures has intensified.²⁹ On one side of the debate are those who ad-

20. For a summary of these projects see D. Freed & P. Wald, *supra* note 2, at 9-21; P. Wice, *supra* note 4, at 98-108.

21. D. Freed & P. Wald, *supra* note 2, at 59-70.

22. Summary Report, *supra* note 16, at 5. For a more thorough discussion of the research methods used in the Manhattan Bail Project see Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963).

23. Pub. L. No. 89-465, 80 Stat. 214-16 (codified at 18 U.S.C. §§ 3146-3151 (1976)).

24. Summary Report, *supra* note 16, at 4; Ryan & Carver, *A Perspective on the Public Policy Implications of Pretrial Detention 5* (1978) (on file with the *Fordham Law Review*); see note 2 *supra* and accompanying text.

25. Summary Report, *supra* note 16, at 5-7.

26. 18 U.S.C. § 3146(a) (1976).

27. *Id.* at (1)-(5).

28. *Id.*; S. Rep. No. 750, 89th Cong., 2d Sess. 11 (1965).

29. See, e.g., Cohen, *Wealth, Bail, and the Equal Protection of the Laws*, 23 Vill. L. Rev. 977 (1978); Gottfredson, *An Empirical Analysis of the Pretrial Release Decision*, 2 J. Crim. Just. 287 (1974); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev.

vocate retention of the present bail system, which is grounded in the traditional notion of likelihood of flight.³⁰ This approach is followed by most federal and state statutes which specify that judges, in deciding whether to permit a suspect's release on bail, may consider only those factors necessary to secure his appearance at future court proceedings.³¹ On the other side of the debate are those who champion a substantial modification of the present bail scheme to permit the court to consider community safety in determining whether bail should be granted in a given case.³² Under this approach, judges are permitted to consider the potential threat the defendant poses to the community to which he returns.³³

Expanding the bail decision to incorporate considerations of community safety presents two basic concerns. First, some scholars argue

1223 (1969); Nat'l Assoc. of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Release* (1978); Nat'l Center for State Courts, *An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs* (1975); Ryan & Carver, *supra* note 24; Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970).

30. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 5 (1951); Foote, *supra* note 1, at 998-99; Tribe, *supra* note 29, at 376-77.

31. See, e.g., 18 U.S.C. § 3146 (1976); Ariz. Rev. Stat. Ann. § 13-3967(c) (West 1978); Cal. Penal Code § 1275 (West 1970); Idaho Code § 19-2902 (1979); Ill. Ann. Stat. ch. 38, § 110-2 (Smith-Hurd 1970); Iowa Code Ann. § 811.2 (West 1979); Kan. Stat. Ann. § 22-2802(1) (Supp. 1978); Ky. R. Crim. P. 4.00; La. Rev. Stat. Ann. § 15.81 (West 1967); Me. Rev. Stat. Ann. tit. 15, § 216 (1980); Mass. Ann. Laws ch. 276, § 65 (Michie/Law. Co-op Supp. 1978); Miss. Code Ann. § 99-5-11 (1973); Mo. Ann. Stat. § 544.040 (Vernon Supp. 1980); Mont. Rev. Codes Ann. § 95-1101 (1969); Neb. Rev. Stat. § 29-901 (1975); N.M. R. Crim. P. 18; N.Y. Crim. Proc. Law § 510.30 (McKinney 1971 & Supp. 1979); N.D. R. Crim. P. 46(a)(1); Ohio R. Crim. P. 46(A); S.D. Codified Laws Ann. § 23A-43-2 (1979); Tenn. Code Ann. § 40-1215 (Supp. 1979); Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon 1977); Wis. Stat. Ann. § 969.01 (West 1971 & Supp. 1979).

32. Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 Brooklyn L. Rev. 277, 296-304 (1971); Mitchell, *supra* note 29, at 1223. One interesting approach to bail release has been advanced by the Office of the Deputy Mayor for Criminal Justice of the City of New York. That office has authored a study bill which would permit the court, for certain designated felonies, to deny bail regardless of the likelihood that the defendant will flee the jurisdiction. Under this plan, community safety considerations are brought into the bail decision through the back door. Although the bail release decision purportedly continues to be a decision based solely on considerations of flight, the court has the power to deny bail on the ground that "the People's interest in the [defendant's case] is such that no risk of the defendant's non-appearance should be taken." Proposal to Amend N.Y. Crim. Proc. Law § 510.30 (on file with the *Fordham Law Review*); N.Y. Times, May 15, 1979, § A, at 18, col. 1. An obvious problem with this approach is that there is some question as to whether a defendant charged with a more serious crime is, in fact, less likely to appear at trial. See Inslaw Study, *supra* note 4, at IV-18 to -21.

33. There are a few states which follow this approach. See, e.g., Alaska Stat. § 12.30.020(a) (1979); Del. Code Ann. tit. 11, § 2105(a) (1979); Hawaii Rev. Stat. § 804-1, -7.1 (1976 & Supp. 1978); Minn. R. Crim. P. 6.02; N.H. Rev. Stat. Ann. § 597:5, -6-a (1974); N.C. Gen. Stat. § 15A-534 (1978 & Supp. 1979); S.C. Code § 17-15-10 (1976); Vt. Stat. Ann. tit. 13, § 7554(a) (1974); Va. Code § 19.2-120 (Supp. 1979).

that to consider factors other than flight is contrary to the presumption of innocence and undermines the accused's constitutional protections.³⁴ Second, it is difficult to predict with any degree of certainty which suspects are likely to pose a danger to the community.³⁵ Nevertheless, the critical problem of crimes committed by persons on bail cannot be ignored.³⁶ Statistics indicate that the likelihood of a person committing additional crimes while on bail is not only higher than the crime rate for the general population,³⁷ but that it is also much higher than the likelihood of the suspect's failing to appear at trial.³⁸ Further, although federal and state bail laws largely ignore these facts, judges do not. It appears to be an established practice for judges to set high bail or to jail a suspect because the court is convinced the accused is dangerous and will commit another crime if released.³⁹ Community safety is, therefore, an underlying consideration in bail decisions even though most statutes speak only in terms of flight.⁴⁰ This approach is neither

34. Compare Ervin, *Foreword, Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 289, 297-98 (1971); Tribe, *supra* note 29, at 380-90, 396-406 with Meyer, *supra* note 1, (pt. II) at 1382. See generally notes 29-30 *supra*.

35. ABA, Advisory Comm. on Pretrial Release, Standards Relating to Pretrial Release § 5.5, Commentary at 68 (Approved Draft 1968); Foote, *supra* note 2, (pt. II) at 1169-74. The difficulty of predicting the future dangerousness of a defendant has been documented. Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus*, in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 244 (A. Blumstein, J. Cohen & D. Nagin eds. 1978); see N. Morris, *The Future of Imprisonment* 31-43, 62-73 (1974). But see Meyer, *supra* note 1, (pt. I) at 1142.

36. See notes 4-7 *supra* and accompanying text.

37. In 1974, the year analyzed in the Inslaw Study, *supra* note 4, at *Foreword*, the crime rate in the United States was 4.85%. U.S. Dep't of Justice, *Uniform Crime Reports for the United States* 37 (1977). This rate is based on a measure known as a crime index, which consists of seven crimes: murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft. *Id.* at 36.

38. The Inslaw Study revealed an overall nonappearance rate of approximately 11%. Inslaw Study, *supra* note 4, at II-51. This percentage dropped, however, when the nonappearance was categorized as willful or nonwillful. Only 3.5% of felony defendants and 2.5% of misdemeanor defendants willfully avoided court appearance. *Id.* at II-59. See also P. Wice, *supra* note 4, at 65-73.

39. One of our most distinguished federal judges, Marvin E. Frankel, acknowledged this practice in his opinion in *United States v. Melville*, 306 F. Supp. 124 (S.D.N.Y. 1969): "While 'danger to any other person or to the community' is not in itself a proper consideration for pretrial bail in a noncapital case, we doubt that a defendant's powerful disposition to incur further criminal liabilities could be ignored utterly in judging what will 'reasonably assure' his appearance for trial. . . . [I]t is apparent that in this instance, as in many others familiar to all of us, the statement of the astronomical [amount set for bail] is not meant to be literally significant. It is a mildly cynical but wholly undeceptive fiction, meaning to everyone 'no bail.' There is, on the evidence adduced, no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set." *Id.* at 126-27 (footnotes omitted); see *Hairston v. United States*, 343 F.2d 313, 313 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 382 U.S. 856 (1965); H.R. Rep. No. 907, 91st Cong., 2d Sess. 84-85 (1970); P. Wice, *supra* note 4, at 2-3; Cohen, *supra* note 29, at 997; Tribe, *supra* note 29, at 372 n.5.

40. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. Legal Stud.

candid nor fair. Moreover, such *ad hoc* bail decisionmaking promotes arbitrariness because no candid reason is articulated for granting or denying bail in a particular case.

Bail reform is a complex matter. True reform requires that a careful balance be struck between the historical function of bail as a means to ensure the defendant's appearance at trial and the legitimate community safety concerns of the public. How to strike this balance is the fundamental challenge in bail reform.

III. PREVENTIVE DETENTION: A SIMPLISTIC SOLUTION

The reform most often advanced as an alternative to existing federal law is preventive detention.⁴¹ Under this theory, a person accused of a crime can be incarcerated until trial if the court determines that the suspect is likely to commit another crime if released on bail.⁴² In 1969, a number of bills were introduced in Congress to amend the Bail Reform Act⁴³ to include preventive detention provisions.⁴⁴ Although Congress never enacted any of these proposals, it did include a preventive detention provision in the District of Columbia Court Reform and Criminal Procedure Act of 1970.⁴⁵ This statute permits the court to incarcerate a suspect prior to trial (1) if the suspect is charged with a dangerous crime and the government certifies that the suspect's past and present behavior indicates there are no release conditions which will ensure the safety of the community;⁴⁶ or (2) if the suspect is charged with a violent crime and has either committed another violent

287, 326-27 (1974) ("it would not be unreasonable to conclude that the principal social function of the existing bail system (as it operates [in 1971] in New York City) is to prevent defendants from committing additional crimes, rather than from disappearing.") (footnotes omitted); see note 31 *supra* and accompanying text.

41. See, e.g., Hruska, *Preventive Detention: The Constitution and the Congress*, 3 Creighton L. Rev. 36 (1969); Mitchell, *supra* note 29; Address by Richard G. Kleindienst, Am. Trial Lawyers Ass'n (Jan. 30, 1970), reprinted in *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 1187 (1970) [hereinafter cited as *Preventive Detention Hearings*]; Ryan & Carver, *supra* note 24, at 1.

42. See H.R. Rep. No. 907, 91st Cong., 2d Sess. 82 (1970); Tribe, *supra* note 29, at 376-78.

43. See notes 23-28 *supra* and accompanying text.

44. *Preventive Detention Hearings*, *supra* note 41, at 517, 520, 529, 544, 573.

45. Pub. L. No. 91-358, § 210(a), 84 Stat. 644 (codified at D.C. Code Encycl. § 23-1322 (West Supp. 1970)). The District of Columbia is the only jurisdiction in the United States with a formal preventive detention statute, and its enactment resulted in widespread debate. See N. Bases & W. McDonald, *Preventive Detention in the District of Columbia: The First Ten Months 4-8 (1972)*. The debate continues today as Congress tries to make the statute more effective. See *Pretrial Release and Detention: Hearings on H.R. 7747 Before the Subcomm. on Governmental Efficiency and the District of Columbia of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978).

46. D.C. Code Encycl. § 23-1322(a)(1) (West Supp. 1970). "Dangerous crime" is defined at *id.* § 23-1331(3).

crime within the past ten years or has allegedly committed the present crime while on bail or probation;⁴⁷ or (3) if the suspect is charged with any offense and "for the purpose of obstructing or attempting to obstruct justice, [he] threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror."⁴⁸ Before pretrial detention can be ordered under the statute, a judicial officer must conduct a hearing.⁴⁹ He must find that the imposition of any release conditions will not reasonably ensure the safety of the community, and that there is a substantial probability that the suspect committed the offense for which he is charged.⁵⁰ If the court orders pretrial incarceration, the defendant's case must be tried within sixty days.⁵¹

Preventive detention is a beguiling solution to the problem of crimes committed by people on bail. It is questionable whether such complete pretrial incarceration is constitutionally permissible.⁵² Moreover, based on the experience in the District of Columbia, preventive detention appears to be an ineffective crime-fighting device not only because accurate predictions of a defendant's future criminality are difficult to make,⁵³ but also because statistics indicate that prosecutors are reluctant to use the statute. In 1977, there were approximately 1,500 cases

47. *Id.* § 23-1322(a)(2). Violent crime is defined at *id.* § 23-1331(4). If a person charged with a violent crime is a drug addict, he may be held in pretrial detention under supervision. *Id.* § 23-1323.

48. *Id.* § 23-1322(a)(3).

49. *Id.* § 23-1322(b).

50. *Id.* This finding of substantial probability is not required to be made when the defendant is charged either with actually injuring or threatening a witness or juror, or attempting to do so. *Id.* § 23-1322(b)(2)(C).

51. *Id.* § 23-1322(d).

52. It has been argued that the pretrial detention permitted in the District of Columbia is contrary to the due process clause of the fifth amendment and the prohibition against excessive bail under the eighth amendment. See *Preventive Detention Hearings*, *supra* note 41, at 5-7 (statement of Sam J. Ervin, Jr.); Tribe, *supra* note 29. But see H.R. Rep. No. 907, 91st Cong., 2d Sess. 91-94 (1970); Meyer, *supra* note 1, (pt. II) at 1454; Mitchell *supra* note 29. See generally notes 29-30, 32 *supra*. For a summary of the debate surrounding preventive detention see Wald, *The Right To Bail Revisited*, in *The Rights of the Accused* 189-95 (S. Nagel ed. 1972).

53. See note 35 *supra* and accompanying text. Indeed, the comprehensive sentencing reforms found in S. 1722, *supra* note 9—an end to the indeterminate sentence, *id.* §§ 2001-2009, the abolition of parole release, *id.* § 3824(a), and an end to the concept of rehabilitation as a justification for imposing a term of imprisonment, *id.* § 2302(a)—are a recognition by Congress that predictions of an offender's future criminal behavior cannot accurately be made. It is somewhat surprising, therefore, that those who advocate preventive detention are often in the vanguard of sentencing reform, acknowledging that predictions of future criminality cannot be made in the latter situation but refusing to accept the same premise with respect to bail. This inconsistency is all the more difficult to reconcile when one realizes that the bail decision involves an offender who has not yet been convicted of any crime, whereas sentencing reform efforts involve people already convicted.

in which the preventive detention statute could have been invoked. It was requested, however, in only forty cases and actually granted only thirty-four times.⁵⁴ Numerous reasons have been advanced for the government's hesitancy to use the statute. Prosecutors may be unable or unwilling to meet the requirements of the preventive detention hearing.⁵⁵ Further, because a preventive detention decision requires that the defendant's case be placed on an expedited trial schedule,⁵⁶ the government may be forced to prosecute the case sooner than it would otherwise desire.⁵⁷ Finally, there is rarely any need to invoke the statute because, at the prosecutor's request, the judge will normally impose unrealistically high money bail, which the defendant cannot raise, on the pretext that the defendant is likely to flee the jurisdiction.⁵⁸ The result is the same—preventive detention in disguise without the need to comply with due process requirements and an expedited trial date.

The goal of bail reform should not be to jail more defendants pending trial but, rather, to develop a more rational policy for determining who should be released and on what conditions. What is needed is a more balanced approach, a middle ground between the polar opposites of preventive detention on the one hand and bail laws based solely on considerations of flight on the other. What is needed is the enactment of the bail provisions of S. 1722.

IV. S. 1722: TOWARD A NEW SYSTEM OF BAIL RELEASE

The bail provisions of S. 1722 employ a two-step analysis. The first step incorporates existing law by requiring the court to make an initial bail release decision based solely on the likelihood of the defendant's future appearance at trial.⁵⁹ If it is determined that release of the defendant is appropriate, the court then considers whether the risk of the suspect fleeing the jurisdiction warrants the imposition of any additional restrictions.⁶⁰ Like the Bail Reform Act,⁶¹ S. 1722 permits the

54. Inslaw Study, *supra* note 4, at I-33.

55. *Id.* at I-11; Ryan & Carver, *supra* note 24, at 6; *see* note 49-50 *supra* and accompanying text.

56. *See* note 51 *supra* and accompanying text.

57. Inslaw Study, *supra* note 4, at II-59.

58. *See* Suffet, *Bail Setting: A Study of Courtroom Interaction*, in *Crime and Justice in Society* 292 (R. Quinney, ed. 1969); notes 39-40 *supra* and accompanying text.

59. S. 1722, *supra* note 9, § 3502(a) ("A person charged with an offense . . . shall . . . be ordered released pending trial . . . unless the judge determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required.") (emphasis added).

60. *Id.* The release conditions which may be imposed to ensure the defendant's appearance include an order that the suspect "(1) remain in the custody of a designated person who agrees to supervise him . . . (2) abide by specified restrictions on his travel, associations, or place of abode . . . (9) execute an appearance bond in a specified amount and deposit in . . . court . . . a sum not

imposition of a money bond in this first step only if the court finds that all other nonfinancial conditions are inadequate to ensure the defendant's appearance.⁶²

Once a decision to release a defendant on bail has been made, the court proceeds to the second step of the analysis and determines whether the release of the accused will endanger the community.⁶³ Thus, S. 1722 brings a refreshing candor to bail decisionmaking by expressly substituting the concept of community safety for what has heretofore been a *sub rosa* practice of the court. To remedy the unacceptable current practice in which judges use high money bail as a vehicle to jail defendants perceived to be dangerous,⁶⁴ S. 1722 prohibits the use of financial conditions in this second stage of the analysis.⁶⁵ If a defendant is deemed dangerous, the court should say so, and then use its discretion to impose appropriate nonfinancial conditions of

to exceed ten percent of the amount of the bond, which deposit is to be returned upon the performance of the conditions of release; (10) execute a bail bond with solvent sureties, or deposit cash in lieu of such a bond." *Id.* § 3502(d). These conditions may also be imposed under present law. 18 U.S.C. § 3146 (1976).

61. 18 U.S.C. § 3146 (1976); see notes 23-28 *supra* and accompanying text.

62. S. 1722, *supra* note 9, expresses a preference that the accused be released "on his personal recognizance, or upon the execution of an unsecured appearance bond." *Id.* § 3502(a). If the court determines that neither of these methods is satisfactory, the judge is directed to impose "the least restrictive condition or combination of conditions of release set forth in subsection (d) that will reasonably assure the appearance of the person for trial." *Id.* The provisions relating to money bonds are the last specific conditions enumerated in subsection (d). *Id.* § 3502(d).

63. "The court upon ordering [the] release of a person . . . shall determine, in the exercise of its discretion, whether such release will endanger the safety of any other person or the community." *Id.* § 3502(b). In making this determination, the court is directed to consider a number of factors, most of which have been drawn from existing law. See 18 U.S.C. § 3146(b) (1976). These factors are applicable to all bail release decisions made under S. 1722, whether based on flight or community safety, and include "(1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; and (3) the history and characteristics of the person, including his character, mental condition, family ties, employment, past conduct, length of residence in the community, financial resources, record of convictions; record of appearance, flight to avoid appearance, or nonappearance at court proceedings." S. 1722, *supra* note 9, § 3502(c). S. 1722 further expands this list of general factors to include considerations that are primarily directed to the issue of community safety such as "illegal drug use; whether [the suspect] was on probation, parole, or other release pending completion of sentence for a conviction . . . and whether he was on pretrial release or release pending sentence or appeal . . . at the time of the current arrest." *Id.* Statistically, a prior criminal record and a history of drug use seem to be strong positive indicators that the defendant is likely to commit a crime while free on bail. Inslaw Study, *supra* note 4, at III-29.

64. See notes 39-40 *supra* and accompanying text.

65. S. 1722, *supra* note 9, § 3502(b) ("No financial condition . . . may be imposed to assure the safety of any person or the community."). The District of Columbia provides a similar limitation. D.C. Code Encycl. § 23-1321(a) (West Supp. 1970). This safeguard, however, is not present in every bail statute which permits the court to weigh community safety considerations. See, e.g., Alaska Stat. § 12.30.020(a) (Supp. 1979); Minn. R. Crim. P. 6.02; S.C. Code § 17-15-10 (1977).

release.⁶⁶ Federal law presently provides a number of release conditions which may be imposed upon a defendant to ensure his appearance at trial.⁶⁷ If one accepts the premise that the rights of the community should also be included in the bail decision, it logically follows that once a defendant has been ordered released on bail, similar conditions should be readily available to protect the community. Further, because the community safety consideration is not undertaken until the court has decided to release the accused, S. 1722 avoids the constitutional pitfalls of preventive detention.⁶⁸ Indeed, if such safety factors were considered at the time of the initial bail decision, it would constitute preventive detention.⁶⁹ Once the defendant has been ordered released, however, a new balance can be struck and the community's safety legitimately considered. Obviously, one can no more readily predict dangerous behavior in setting bail release conditions than one can in ordering preventive detention itself.⁷⁰ In the latter situation, however, an inaccurate prediction can result in complete incarceration before trial, whereas under S. 1722 the bail restrictions are imposed upon an offender who has been released pending trial.

If the judge determines that the suspect will pose a danger to the community, S. 1722 specifies a number of release conditions which may be imposed.⁷¹ Perhaps the most important of these conditions is a new, mandatory requirement that the suspect not commit a crime while on bail.⁷² Although such a requirement has traditionally been considered self-evident,⁷³ the drafters of S. 1722 wanted to make the requirement express because a violation of this condition permits summary revocation of bail through the use of the court's contempt power.⁷⁴ S. 1722 also permits the court to impose conditions which

66. See note 71 *infra* and accompanying text. Allowing the court to consider danger to the community would alleviate arbitrary bail decisions. See note 40 *supra* and accompanying text.

67. 18 U.S.C. § 3146 (1976); see notes 23-28, 60 *supra* and accompanying text.

68. See note 51 *supra*.

69. See note 42 *supra* and accompanying text.

70. See note 35, 51-52 *supra* and accompanying text.

71. S. 1722, *supra* note 9, § 3502(d); see notes 60 *supra*, 76-79 *infra* and accompanying text.

72. S. 1722, *supra* note 9, § 3502(c) ("The judge shall provide as an explicit release condition for any person ordered released pursuant to this subsection, that the person not commit a federal, [s]tate, or local crime during the period of his release.").

73. *Bitter v. United States*, 389 U.S. 15, 16 (1967) (per curiam); *United States v. Kirk*, 534 F.2d 1262, 1280-81 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); *United States v. Cozzetti*, 441 F.2d 344, 350 (9th Cir. 1971); *United States v. Gilbert*, 425 F.2d 490, 491-92 (D.C. Cir. 1969); *United States v. Clark*, 412 F.2d 885, 890 (5th Cir. 1969); *United States v. Fogel*, 395 F.2d 291, 293-94 (4th Cir. 1968).

74. S. 1722, *supra* note 9, § 3507(a) ("A person . . . who has violated a condition of release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court."). In such a case, pretrial detention is based not on unreliable predictions of future criminal behavior but on the violation of an existing bail condition. Such procedures governing revocation

heretofore had been imposed only when a defendant was released on probation.⁷⁵ These restrictions are designed to safeguard the community and include conditions requiring the suspect to report on a regular basis to law enforcement agencies⁷⁶ and to refrain from excessive use of alcohol or drugs.⁷⁷ Additionally, other conditions require that the accused not possess a dangerous weapon,⁷⁸ and that he agree to undergo any needed medical or psychiatric treatment.⁷⁹

By adopting a middle course based on the notion of community safety in the formulation of conditions of release, S. 1722 clearly rejects the type of preventive detention statute currently found in the District of Columbia.⁸⁰ Nevertheless, S. 1722 does include an omnibus provision, known as condition eleven, which permits the court to impose severe custodial restrictions when it finds that the defendant's release poses a danger to the community which cannot be alleviated by the imposition of less restrictive conditions.⁸¹ While condition eleven does not foreclose the possibility of some form of pretrial detention in rare cases,⁸² it is conspicuously silent both as to the prerequisites which must be met before such detention can be imposed and as to the nature of that detention.⁸³ How close this provision comes to actual preventive detention will ultimately depend upon how the courts use it. There are, however, several indications that the drafters of S. 1722 do not intend that the court remand the suspect to jail for the entire pretrial

of bail have been urged for many years. *See, e.g., Hall, Subsequent Misconduct as Ground for Forfeiture of the Right to Release on Bail—A Proposal*, 15 N.Y.L.F. 873 (1969).

75. Present law does not specifically list conditions of probation but provides that their imposition be "upon such terms and conditions as the court deems best." 18 U.S.C. § 3651 (1976). The conditions enunciated in S. 1722, *supra* note 9, § 3502(d), fall well within the ambit of this general language. *See United States v. Pastore*, 537 F.2d 675, 679-81 (2d Cir. 1976); Note, *Judicial Review of Probation Conditions*, 67 Colum. L. Rev. 181, 182-88 (1967).

76. S. 1722, *supra* note 9, § 3502(d)(4).

77. *Id.* § 3502(d)(5).

78. *Id.* § 3502(d)(7).

79. *Id.* § 3502(d)(8). S. 1722 also contains a condition that the defendant avoid all contact with potential witnesses who may testify concerning the offense. Witnesses are often intimidated by those released on bail and this new condition enables the court to restrict defendant's access to potential witnesses before actual intimidation occurs. *Id.* § 3502(d)(6).

80. *See* notes 45-51 *supra* and accompanying text.

81. Condition eleven permits the court to require a defendant to "satisfy any other condition reasonably necessary to assure appearance as required . . . and to assure the safety of any other person or the community . . . including a condition requiring that the person return to official detention after specified hours or during specified periods, and abide by such other severe restrictions on the person's freedom, associations, or activities that the court deems appropriate." S. 1722, *supra* note 9, § 3502(d)(11). If a defendant is subjected to severe custodial restrictions under condition eleven, S. 1722 requires that he be "brought to trial expeditiously." *Id.* § 3502(d).

82. S. Rep. No. 553, 96th Cong., 2d Sess. 1078-79 (1979).

83. Condition eleven is drafted in general terms and does not specifically state what severe

period. First, condition eleven cannot be invoked unless and until a pretrial bail release decision, based solely on the likelihood of flight, has been made. Thus, it is different from the release/detain decision which the court must render prior to considering conditions of release based on community safety. Second, condition eleven is, after all, designated a *release* condition. The court, therefore, should not in the first step decide to release a defendant, and then in the second step determine that the appropriate release condition is complete incarceration under condition eleven. Finally, one must recognize that condition eleven has its genesis in a section of the Bail Reform Act known as the specified hours provision.⁸⁴ S. 1722 adopts this concept and applies it not only to the defendant's trial appearance but also to safeguard the community. The present specified hours condition expressly permits some form of pretrial incarceration but stops short of preventive detention.⁸⁵ It is this provision which should guide the courts in their interpretation of condition eleven.

CONCLUSION

Current bail practices constitute a major flaw in our existing criminal justice system because they fail to protect the interests of both the community and the accused. S. 1722 attempts to balance this equation. The bill is designed to deal with the growing problem of crimes committed by defendants while on bail through the innovative use of the concept of community safety in imposing bail release conditions. At the same time, S. 1722 attempts to bring new candor to the bail release decision by ending abusive practices whereby preventive detention is achieved by requiring high money bail on the pretext that a defendant is likely to flee the jurisdiction.

Effective bail reform presents an enormous challenge to those responsible for creating an equitable criminal justice system. We must no longer think in terms of the all-or-nothing solutions of the past—preventive detention versus bail release based solely on the likelihood

restrictions on the person's freedom are actually contemplated. S. 1722, *supra* note 9, § 3502(d)(11). Obviously, the entire panoply of possible restrictions cannot be listed in the statute. Nevertheless, it is intended that condition eleven be invoked only when the other conditions, specifically listed, cannot, in the court's discretion, effectively preserve community safety. The drafters of S. 1722 have inadvertently erred in failing to specifically state this intention. Compare note 62 *supra* and accompanying text.

84. Under this provision, a court may impose "a condition requiring that the person return to custody after specified hours." 18 U.S.C. § 3146(a)(5) (1976).

85. *Id.*

of flight. We must replace alternatives found wanting with more workable approaches. The bail provisions of S. 1722 constitute such an approach. They must be studied and debated in the current session of Congress.⁸⁶

86. S. 1722, *supra* note 9, was reported out of the Senate Judiciary Committee on December 4, 1979, by a vote of 14 to 1. It is scheduled to be debated on the floor of the United States Senate sometime this spring.