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THE BAIL REFORM ACT OF 1966: ADMINISTRATIVE TAIL WAGGING AND OTHER LEGAL PROBLEMS*

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The Bail Reform Act of 1966 became effective on September 22, 1966. It brought with it a long-needed change in this country's attitude towards bail and is part of the searching reappraisal of the assumptions upon which the concept of bail has so long relied. A reason often advanced for allowing bail is that an individual, under our theory of justice, is presumed innocent until proven guilty.[1] Reducing this postulate to its logical conclusion, an accused should have an absolute right to bail pending trial irrespective of the nature of the crime for which he is charged. In most jurisdictions, however, bail may be denied in capital cases.[2] Moreover, the presumption is usually viewed as a procedural device which comes into operation only at the trial.[3] The "presumption of innocence," therefore, is not really the focal point when deciding whether an individual has a right to bail. Rather, the fundamental concepts upon which the right to bail is based are the eighth amendment's prohibition against excessive bail[4] and the fifth and fourteenth amendments' guarantee of

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1 *See* Note, *Preventive Detention*, 36 GEO. WASH. L. REV. 178, 183 (1967); Note, *Preventive Dentention Before Trial*, 79 HARV. L. REV. 1489, 1501 (1966).

2 Note, *Preventive Detention Before Trial, supra* note 1, at 1500.

3 Note, *The Bail Reform Act of 1966*, 53 IOWA L. REV. 170, 193 (1967); Note, *Preventive Detention Before Trial, supra* note 1, at 1501.

4 U.S. CONST. amend. VIII provides that "[e]xcessive bail shall not be required." Although there are no direct holdings on the point, it appears that bail is not "excessive" merely because it is set at an amount higher than the accused is able to pay. Note, *Bail: The Need for Reconsideration*, 59 NW. U.L. REV. 678, 682 (1964).

due process of law.[5] Hence, any approach which denies an individual the right to remain at liberty through an act of financial discrimination, through predisposed feelings towards a particular type of offender, or through an improper classification procedure, could violate his constitutional rights. Arguments relating to the individual's need to be free to effectively prepare his defense or to protect his community standing (*e.g.*, his job and family life) in the event he is found innocent also are predicated upon the Constitution.[6] These considerations, taken together, constitute one side of any inquiry into the area.

The other side of the coin is society's need to assure the appearance of the accused at trial and the need to protect its members from the potentially dangerous defendant. Although it is commonly stated that society's only interest in setting bail is the former,[7] it is imperative that one realize that in a significant number of bail proceedings, the judicial officer is primarily concerned about a given individual's danger to the community if released, and only secondarily concerned about the probability of his flight to avoid prosecution.[8]

Working from the assumption that danger to the community is a prime consideration, the thrust of this article is not so much whether the Bail Reform Act, as written, is a cohesive whole, or simply a humane advance from prior procedures; rather, the emphasis is on the practical enforceability of the Act in light of the conflicting interests of both society and the individual, and the Act's relationship to the existing system of administration of justice. The article will analyze how and why the Act

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Since there has been a federal statutory right to bail since 1789, the Supreme Court has never reached the question of whether the language of the eighth amendment implies a right to bail. Many persons have asserted that it does, arguing that it would not make sense to prohibit excessive bail unless there was some type of right to release. *See, e.g.*, Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 969 (1965); Note, *Preventive Detention Before Trial*, *supra* note 1, at 1499. Caleb Foote has concluded:

> It is my thesis that the particular form in which the bail question appears in the Constitution is the result of an historical accident, and that the most plausible resolution of the constitutional riddle is to find an intention to grant such a right. Foote, *supra* at 965.

For detailed discussions of the history of the eighth amendment, see REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 520 (1966) [hereinafter cited as D.C. CRIME COMMISSION REPORT]; Foote, *supra*.

[5] Many persons also have argued that the equal protection clause of the fourteenth amendment is applicable when the pretrial liberty of an accused is dependent upon his economic status. Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1151-64 (1965); Note, *The Bail System: Is it Acceptable?*, 29 OHIO ST. L.J. 1005 (1968).

[6] *See, e.g.*, United States *ex rel.* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959) (denial of due process if continued imprisonment makes it impossible for the accused to locate a crucial witness).

[7] *E.g.*, Stack v. Boyle, 342 U.S. 1, 5 (1951); D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964 at 8 (1964); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 60 (1963) [hereinafter cited as ATTORNEY GENERAL'S REPORT].

[8] *See* Smith, *A New Approach to the Bail Practice*, 29 FED. PROB. 3, at 3, 4 (Mar. 1965).

came into being, the Act itself, some of the problems experienced in its operation, and its effectiveness as both a positive and negative force in the bail area. Included is an analysis of the standards used for granting or denying bail pending trial and a discussion of whether such standards are logically consistent. The article will conclude by setting forth some recommendations for reaching an acceptable equilibrium, both theoretically and practically.

THE BASIS FOR THE ACT

Since the Judiciary Act of 1789,[9] an individual accused of a noncapital federal crime has been afforded a right to bail. Nevertheless, as recently as the early 1960's, it was found that a substantial number of the defendants in the federal courts remained incarcerated pending trial because they were unable to meet the bail requirements.[10] Thus, a survey of four districts[11] showed that 58, 83, 43 and 23 percent respectively, of the accused individuals were unable to make bail.[12] Even when bail was set at $500 or less, 29, 78, 36, and 11 percent, respectively, remained in jail.[13] In 1960, almost 24,000 federal defendants were detained prior to sentencing for an average period of 25.3 days.[14]

In recent years, the bail system has been subjected to severe criticism. Far too often the bail hearing has been a perfunctory proceeding where the only matters considered were the charge against the accused and the recommendation of the prosecutor.[15] In many jurisdictions, bail has been set according to an arbitrary, predetermined schedule based upon the gravity of the offense.[16] Little or no consideration has been given to the character, employment history, residential ties, or financial ability of the accused.[17] Indeed, fact-finding mechanisms to gather the information which can lead to meaningful bail decisions have been almost nonexistent.[18] Consequently, a bail system has developed whereby the pretrial release of the accused is conditioned upon his financial ability to procure a commercial bond. Because the system places the indigent de-

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[9] 1 Stat. 91, § 33.

[10] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 67.

[11] The four districts polled were the Northern District of California (San Francisco), the Northern District of California (Sacramento), the Northern District of Illinois, and the District of Connecticut.

[12] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 134, table III.

[13] *Id.* at 67, 135, table IV.

[14] BUREAU OF PRISONS, FEDERAL PRISONS 1960 at 60-61, table 22 (1960).

[15] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 62; D. FREED & P. WALD, *supra* note 7, at 18. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE 55 (Tent. Draft, Mar. 1968) [hereinafter cited as ABA DRAFT].

[16] A. BEELY, THE BAIL SYSTEM IN CHICAGO 59-69 (1927); D. FREED & P. WALD, *supra* note 7, at 18; Comment, *The Administration of Bail and Pretrial Freedom in Texas*, 43 TEXAS L. REV. 356, 372 (1965).

[17] D. FREED & P. WALD, *supra* note 7, at 18; Comment, *The Administration of Bail and Pretrial Freedom in Texas*, *supra* note 16, at 372.

[18] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 62-63. *See* D. FREED & P. WALD, *supra* note 7, at 56.

fendant at a sharp disadvantage, it has been roundly condemned, and adoption of more rational means of securing the appearance of the accused at trial has been urged.[19]

An individual in detention suffers not only the deprivation of his liberty per se, but, concomitantly, numerous other adverse consequences. Detention makes it more difficult for the accused to assist in his defense, for he alone may be able to locate key witnesses or find exculpatory evidence. Moreover, communication with counsel is severely limited.[20] Since an incarcerated accused is unable to work, he is deprived of a source of income that could contribute to his defense or to the support of his family. And even though he may not be convicted, he often loses his job.[21] In addition, a defendant detained prior to trial is more likely to be convicted or sentenced to jail than a defendant who has been free on bail.[22]

Prompted by the unfairness of the existing system, various projects have been undertaken for the purpose of determining whether other means may be as effective as money bail in assuring the presence of the accused. One of the first of these projects, and probably the most notable, was the Manhattan Bail Project. In determining whether the accused would appear for trial, four factors were considered: residential stability, employment history, local family contacts, and prior criminal record. This information was collected by interviewing each accused and then verified by telephone. If the accused was found to be a good risk, he was recommended for release on his own recognizance.[23] During the first 3 years of the program, approximately 10,000 defendants were interviewed[24] and about 4000 recommended for release. Of those actually released on their own recognizance, only about 1 percent failed to appear at their trial.[25]

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19 *See, e.g.*, D. FREED & P. WALD, *supra* note 7.

20 ATTORNEY GENERAL'S REPORT, *supra* note 7, at 71; Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 633 (1964); Note, *The Bail Reform Act of 1966*, *supra* note 3, at 171; Note, *Bail Reform in the State and Federal Systems*, 20 VAND. L. REV. 948, 953 (1967).

21 ATTORNEY GENERAL'S REPORT, *supra* note 7, at 70-71; Note, *The Bail Reform Act of 1966*, *supra* note 3, at 171; Note, *Bail Reform in the State and Federal Systems*, *supra* note 20, at 953.

22 ATTORNEY GENERAL'S REPORT, *supra* note 7, at 70, 72; 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); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Wald, *supra* note 20, at 635. Patricia Wald concluded that detained first offenders were twice as likely to be convicted and six times as likely to be sentenced to prison than were bailed first offenders. Moreover, a detained first offender, when compared to a bailed repeat offender, was more likely to be given a prison sentence.

23 Personal recognizance may be defined as a "promise to appear without any further security." D. FREED & P. WALD, *supra* note 7, at 62.

24 When the project began, defendants charged with certain serious offenses were excluded from consideration. Eventually, however, all defendants, except those charged with homicide, certain narcotics offenses, and certain sex offenses, were interviewed and considered for release. D. FREED & P. WALD, *supra* note 7, at 59.

25 For informative discussions of the project see D. FREED & P. WALD, *supra* note 7, at 59-62; Note, *The Bail Reform Act of 1966*, *supra* note 3, at 173.

Similar projects have been conducted in other cities, including Washington, D.C., St. Louis, Chicago and Des Moines, and only a negligible percentage of defendants released on their own recognizance have failed to appear.[26] The State of Illinois, meanwhile, has adopted another approach. If a defendant does not qualify for release on his own recognizance, but instead, is released on bail, he may—in lieu of procuring a bond—deposit with the court cash equal to 10 percent of the bail. Ninety percent of this amount is refunded upon his appearance; the full amount of the bail is forfeited if he fails to appear. The Illinois experiment has been highly successful: a greater percentage of defendants released under the 10 percent plan have appeared than defendants released under the bail bond system.[27]

Bail practices in the federal system have been governed by Federal Rule of Criminal Procedure 46. Former rule 46 provided for release on bail bond, personal security, or the defendant's own recognizance. In determining the proper release condition, the factors considered were the nature and circumstances of the offense, the weight of the evidence, the character of the defendant, and his financial ability.[28] However, as in many of the non-federal bail systems, often the only factors actually evaluated were the nature of the crime involved and the circumstances surrounding its commission as communicated by the prosecutor.[29] Release without bond was infrequently allowed,[30] and the release policies vastly differed from district to district.[31] For instance, in one 3-year pierod, 65 percent of the accused in the District of Columbia were released on their own recognizance, whereas in four other districts, none of the accused were so released.[32] Yet it was determined that of the 3390 defendants released in 63 districts, only about 3 percent failed to appear.[33] This fact prompted the Attorney General's Committee on Poverty and the Administration of Criminal Justice to urge the Department of Justice to formulate a policy favoring release on recognizance, which the Department did.[34] As a result, the number of such releases tripled.[35] However, wide variances continued to exist from district to district.[36]

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[26] D. FREED & P. WALD, *supra* note 7, at 64-66.
[27] Note, *The Bail Reform Act of 1966*, *supra* note 3, at 174.
[28] Fed. R. Crim. P. 46(c), 327 U.S. 869 (1946).
[29] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 62.
[30] Note, *The Bail Reform Act of 1966*, *supra* note 3, at 175.
[31] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 74-75; D. FREED & P. WALD, *supra* note 7, at 67.
[32] ATTORNEY GENERAL'S REPORT, *supra* note 7, at 75.
[33] *Id.*
[34] *Id. at* 75-76; D. FREED & P. WALD, *supra* note 7, at 67-68.
[35] D. FREED & P. WALD, *supra* note 7, at 68; Note, *The Bail Reform Act of 1966*, *supra* note 3, at 176. In the year, 1963-64, over 6000 defendants in the federal courts were released on their own recognizance, with a default rate of only 2.5 percent. D. FREED & P. WALD, *supra* note 7, at 68.
[36] D. FREED & P. WALD, *supra* note 7, at 68; Note, *The Bail Reform Act of 1966*, *supra* note 3, at 176.

Subsequently, Federal Rule of Criminal Procedure 46 was amended in order to effectuate a "policy against unnecessary detention of defendants pending trial."[37] Unlike its predecessor, which permitted only monetary release conditions or no conditions,[38] amended rule 46 allowed nonmonetary release conditions.[39] The judicial officer thus was given an increased opportunity to formulate individualized plans of release. Many Congressmen apparently believed, however, that judicial reform would not be forthcoming under revised rule 46 and that procedural guidelines were needed to aid the officer in exercising his broad discretion.[40] Hence, the Bail Reform Act of 1966 was promulgated with the avowed purpose of ensuring that "all persons, regardless of their financial status, shall not needlessly be detained . . . when detention serves neither the ends of justice nor the public interest."[41]

THE BAIL REFORM ACT OF 1966[42]

I. *Pretrial Release*

The Act provides that any person charged with a noncapital crime shall be released on his personal recognizance or upon the execution of an unsecured appearance bond, unless it is determined that additional safeguards are required to assure the appearance of such person, whereupon a judicial officer may impose additional conditions.[43] Thus, release upon personal recognizance or execution of an unsecured bond is mandatory in the absence of the need for additional safeguards.

Conditions of release are determined at a hearing before a judicial officer,[44] and a prompt hearing is required.[45] A lapse of time before a

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[37] FED. R. CRIM. P. 46(c).
[38] FED. R. CRIM. P. 46(d), 327 U.S. 869 (1946).
[39] FED. R. CRIM. P. 46(d).
[40] *See* Note, *The Bail Reform Act of 1966*, *supra* note 3, at 177, 188.
[41] Act of June 22, 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214.
[42] 18 U.S.C. §§ 3041, 3141-43, 3146-52, 3568 (Supp. III, 1968). The Act has been the center of considerable interest by groups having a stake in the administration of justice. *See* ABA DRAFT, *supra* note 15; REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA (May, 1968) [hereinafter cited as D.C. JUDICIAL COUNCIL REPORT ON BAIL]. Both the ABA DRAFT and the D.C. JUDICIAL COUNCIL REPORT ON BAIL examine the Bail Reform Act and use it as a starting point for recommending further changes in the bail area. A careful analysis of either work is beyond the scope of this article. In conjunction with the D.C. JUDICIAL COUNCIL REPORT ON BAIL see H. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 40-42 (1966) and the D.C. CRIME COMMISSION REPORT, *supra* note 4.

The following discussion derives, in part, from an analysis of the Act made by Mr. Bogomolny for the Department of Justice and distributed to United States Attorneys.

[43] 18 U.S.C. § 3146(a) (Supp. III, 1968).
[44] 18 U.S.C. § 3152(1) (Supp. III, 1968) provides:

> The term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States . . . .

[45] FED. R. CRIM. P. 5(a) requires that an arresting officer take the arrested

"release hearing" effectively dilutes the right to release and may raise constitutional problems concerning violations of the right to bail.[46]

Throughout the Bail Reform Act, with one exception described below,[47] the focus is upon determining which conditions will assure the appearance of the accused at trial.[48] If the judicial officer determines that there is a need for additional release conditions, he must select and impose only those which are reasonably necessary to assure appearance.[49] This requirement of "reasonable assurance" gives the officer some discretion; it also indicates that when choosing an appropriate condition, he need not be absolutely certain that the defendant will appear. The additional conditions available are set forth in the Act, and the officer is required to consider them under a priority system determined by the order in which they are listed.[50]

A. Third Party Custodians

The first condition to be considered by the judicial officer is the placing of the accused in the custody of a third person or organization.[51] Although the Act does not specify who would qualify as a proper custodian, the Senate debate suggests that the accused's attorney, minister, employer, relative or any other person or group considered by the court to be responsible and from whose custody the accused is not likely to flee, would be an appropriate custodian.[52]

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person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. Section 701(a) of the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 3501(c) (Supp. 1969) (effective June 19, 1968), provides that there has been "unnecessary delay" if more than 6 hours elapses between arrest and arraignment.

[46] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 25 (1958).

[47] *See* p. 213 *infra*.

[48] S. REP. No. 750, 89th Cong., 1st Sess. 10 (1965).

[49] 18 U.S.C. § 3146 (Supp. III, 1968).

[50] *Id. See also* S. REP. No. 750, 89th Cong., 1st Sess. 11 (1965).

[51] 18 U.S.C. § 3146(a)(1) (Supp. III, 1968).

[52] 111 CONG. REC. 4099 (1965) (remarks of Senator Ervin). Third party custodians are widely used in juvenile courts and in English courts. D. FREED & P. WALD, *supra* note 7, at 76.

In 1963, Tulsa, Oklahoma instituted a program providing for release of the defendant in the custody of his attorney. If the defendant fails to appear for trial, the attorney's name is removed from the approved list and he is thereafter deprived of the privilege of obtaining a client's release without cash or bond. Almost 200 defendants are released each month under this plan, and 3000 have been released since the plan was initiated. Less than 1 percent have failed to appear. D. FREED & P. WALD, *supra* note 7, at 76-77.

Schools, labor unions, and probation officers also might be appropriate custodians. As to the last, the House of Representatives deleted a provision from the Act allowing a probation officer to serve as third party custodian because it was felt that there might be a constitutional problem arising out of the conduct of the probation officer, a government official, in contacting the accused before trial. H.R. REP. No. 1541, 89th Cong., 2d Sess. 3 (1966). It is not clear whether the failure of Congress to prohibit the use of probation officers leaves courts to assign such officers as custodians. However, in Contee v. United States, Misc. No. 2812

The Act requires that the group or party supervising the accused agree to take custody. This raises a difficult problem concerning the responsibility of the custodian if the accused violates the terms of release. It has been suggested that subjecting third persons or groups to a criminal penalty would defeat the objective of this condition because the penalty would not be enforced or, if it was enforced, third parties would decline to serve as custodians.[53] However, there are two distinct situations which may occur when an accused is placed in the custody of a third party or group and violates the conditions of release: the violation may be without the knowledge and help of the custodian;[54] or the custodian may know of or participate in the breach of the release order. In the first instance, there does not appear to be any reason to hold the custodian responsible since he is a victim of the accused's behavior. In the second case, a criminal penalty may be appropriate.[55]

B. Restrictions on Travel, Abode, and Associations

If the above condition for release is deemed inadequate, restrictions may be placed on the movement, associations, or residence of an accused.[56] Residence and travel restrictions are particularly appropriate in areas near territorial borders, such as in the southwestern or northern sections of the United States. They also may be appropriate when the defendant is an alien; he may be required to surrender his passport.[57]

C. Appearance Bond Secured by Percentage Deposit

The third condition set forth in the Act authorizes the judicial officer to require the execution of an appearance bond in a specified amount *and* a deposit in the registry of the court of a sum not to exceed 10 percent of the bond.[58] The deposit may be security or cash and is to be refunded when the accused has complied with the terms of his release.[59]

Several benefits derive from this release procedure. Cash bail eliminates the bondsman as middleman and reduces the financial loss to the

(D.C. Ct. App. 1965), the court released a defendant in the custody of a probation officer.

53 D. FREED & P. WALD, *supra* note 7, at 76.

54 It is possible that the custodian will not know of the violation because of failure to perform his job. If this happens, he might be subject to judicial sanction. However, it seems best to simply consider such a custodian as disqualified from future service because stringent penalties might discourage prospective custodians.

55 If a custodian has knowledge of a breach of condition other than flight from the hearing and does not report the default, it would seem better to disqualify the custodian from future service for the same reason as set forth in note 54 *supra.*

56 18 U.S.C. § 3146(a)(2) (Supp. III, 1968).

57 A related problem is the releasing of persons accused of crimes in the Canal Zone. Often, the accused enters Panama and it is quite difficult to procure his return to the Canal Zone for prosecution. Conditions restricting travel in this instance are often meaningless and unenforceable.

58 18 U.S.C. § 3146(a)(3) (Supp. III, 1968).

59 *Id.*

accused who performs his obligation. The deterrent value is theoretically greater than when the accused is required to post a purchased bond since the sum spent in purchasing a bond is not recoverable.[60] Moreover, by providing for a refund, the provision assures that the accused will have the future use of the money to aid in his own defense.[61]

D. Bail

The fourth condition provides for the posting of a bail bond or cash in lieu of a bond,[62] and is essentially equivalent to most state bail systems. This is the only available condition which inflicts monetary loss upon the accused and, as previously mentioned, is not to be considered until the other three conditions are found to be inappropriate.[63]

E. Auxiliary Conditions

The fifth condition permits the judicial officer to impose any requirement deemed reasonably necessary to assure the appearance of the accused.[64] Thus, additional flexibility is built into the Act by giving the judicial officer power to tailor the conditions to fit a particular individual. Furthermore, the Act specifically provides that a person may be required to return to custody after designated hours.[65] This provision is derived from a post conviction program known as "daytime release," and enables the court to keep a close watch on the accused and to institute immediate proceedings against him if he flees.[66]

II. *Criteria To Be Examined By Judicial Officer*

In testimony before the House Committee on the Judiciary, the then Deputy Attorney General, Ramsey Clark, stated that the primary purpose of bail reform is to produce a bail system operating on an individualized basis so that information concerning the character and reliability of each accused can lead to fashioning conditions of release which reflect the risk *he* presents.[67] Additional testimony before a Senate committee sug-

[60] The deterrent value is diluted, of course, if the accused borrows the money. However, since the lenders will be reimbursed if the accused appears at trial, one would suspect that they would be inclined to closely oversee his activities. *See* Note, *The Bail Reform Act of 1966*, *supra* note 3, at 182.

[61] 111 CONG. REC. 4099 (1965) (remarks of Senator Ervin).

[62] 18 U.S.C. § 3146(a)(4) (Supp. III, 1968).

[63] The ABA DRAFT, *supra* note 15, § 5.3, permits money bail only when no other conditions of release will insure a defendant's appearance in court. This is essentially in keeping with the philosophy of the Bail Reform Act.

[64] 18 U.S.C. § 3146(a)(5) (Supp. III, 1968).

[65] *Id.*

[66] The words "daylight hours" have been omitted from the statute to indicate that it might be appropriate to allow release at night or at any period. Since this type of release requires part time custody, it was placed as the last condition because the Act favors absolute release whenever possible. H.R. REP. No. 1541, 89th Cong. 2d Sess. 3, 4, 10 (1966).

[67] *Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R.*

gested that the primary focus of a bail hearing should be on the accused's stability and roots in the community.[68] The studies of bail in the United States and the various bail projects have shown that the most important factors in determining whether a person will honor his bail commitment are his ties and associations in the community.[69] In response to the need for individualized treatment, the Act sets forth a variety of factors to be considered when determining which conditions of release will reasonably assure the appearance of the accused.[70]

On the basis of available information, the judicial officer is required to take into account the nature of the offense charged, the evidence against the accused, and the accused's family ties, employment, financial resources, character, length of residence in the community, and prior convictions. Also to be considered are the accused's record of appearances at court proceedings and past instances of flight to avoid prosecution.[71] The importance of each factor should be dependent upon the factor's relationship to the question of whether the accused will appear when required. For example, the accused's history may indicate a record of mental illness. However, if the illness is not of such a nature as to cause him to miss a hearing and it is possible to treat him on an outpatient basis, the accused should not be committed for mental observation.

Since the judicial officer has a duty to determine which release conditions are appropriate for the particular individual, it seems that some affirmative effort on his part should be required to ensure that all pertinent information is available at the bail hearing. Thus, if necessary facts are not within the officer's knowledge, it would seem that he should be required to question the defendant in order to obtain them. The officer also should be required to collect data concerning the defendant's past criminal history. Section 3146(b) clearly indicates that a bail hearing no longer should be a perfunctory proceeding; rather, it should be a fact-finding procedure to ensure that the conditions of release are appropriate for the case at hand.

6934, H.R. 10195, and S. 1357 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong. 2d Sess., ser. 13, at 21 (1966).

[68] S. REP. No. 750, 89th Cong., 1st Sess. 11 (1965).

[69] *See, e.g.*, D. FREED & P. WALD, *supra* note 7, at 76; 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); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

[70] 18 U.S.C. § 3146(b) (Supp. III, 1968). The section incorporates and adds to FED. R. CRIM. P. 46(c) which provides:

> If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.

See pp. 207-09 *supra*.

[71] 18 U.S.C. § 3146(b) (Supp. III, 1968).

III. *Order Governing Release*

The Bail Reform Act further provides that the judicial officer authorizing the release of an individual shall issue an order containing the conditions imposed.[72] The order is extremely important since it may constitute the only guidance an accused has concerning his release obligations. It is essential, therefore, that the accused receive a clearly worded order so that he may fully understand the conditions of his release. In addition, the judicial officer is required to inform the accused of the penalties applicable to a violation of the conditions of release and that a warrant for his arrest will be issued immediately upon his failure to appear.[73]

IV. *Twenty-Four Hour Review*

Congress evidenced an intention that an accused be released whenever possible by including in the Act extensive review provisions.[74] The Senate debate points out some problems of past abuse which the provisions seek to avoid. Senator Ervin, quoting in part from the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice*, stated:

> It is also important to note . . . that our Federal bail system, in practice, is often used as a punitive weapon or a means of protecting the public from predicted—but as yet unconsummated—offenses. As stressed in the Attorney General's report, such 'subrosa and extra legal uses of the bail-setting power are encouraged and made possible by the fact that the great bulk of bail decisions are not subjected to the supervision of appellate courts.'[75]

Under section 3146(d), if a person is unable to meet his conditions of release and is still in detention 24 hours after the bail hearing, or if such person is regularly required to return to custody at a specified time (daytime release), he may file an application for review by the judicial officer who imposed the original conditions. If the release conditions are not modified, the officer is required to set forth in writing the reasons for imposing the conditions.[76] In discussing this provision, Congressman

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72 18 U.S.C. § 3146(c) (Supp. III, 1968).

73 *Id.* The Attorney General's Committee on Poverty and the Administration of Criminal Justice had found that in many districts a released individual usually was "not warned of the criminal consequences of bail jumping, thereby depriving the system of such deterrent effects as the statute defining that offense might be expected to produce." ATTORNEY GENERAL'S REPORT, *supra* note 7, at 63.

74 18 U.S.C. §§ 3146(d), (e) & 3147 (Supp. III, 1968).

75 111 CONG. REC. 4099 (1965).

76 18 U.S.C. § 3146(d) (Supp. III, 1968). The specific nature of the writing required is not delineated by the Act. In order to make appellate review meaningful, it will be necessary that the writing contain all relevant facts concerning the accused and an evaluation of the pertinent factors specified under § 3146(b). S. REP. No. 750, 89th Cong., 1st Sess. 19 (1965), indicates that a statement of evidence also should be included in the initial order and in the trial court's order on the accused's motion to amend (the latter to be discussed *infra*).

Rogers of Colorado, in the House debate, stated:

> [T]he objective of this legislation is to authorize and compel the bailing officer to place in writing his reasons for imposing the conditions, and to give the defendant, or the person charged with the crime, an opportunity to appeal the decision. At the present time it is very difficult sometimes to ascertain what reasons the judge or the committing magistrate may have used in placing these conditions.[77]

V. *Amendment of Release Order*

The judicial officer is permitted to amend the order in writing to impose additional or different release conditions when he, subsequent to the hearing, receives new information indicating that other conditions are more appropriate.[78] Because of the short time period between arrest and arraignment, it is sometimes difficult to gather adequate information for the hearing, especially in cases involving a court-appointed attorney for an accused indigent.[79] Therefore, after-acquired information may be highly relevant and the power to amend adds useful flexibility.

There is no requirement that a hearing be held before release conditions can be amended.[80] However, if the amended conditions result in an accused being detained in custody, even if only at specified times (*e.g.*, daytime release), the accused is entitled to apply for review under section 3146(d).[81]

VI. *Appeal From Conditions of Release*

The Act gives a detained party the right to file a motion for review of the release conditions and a subsequent right to appeal if such motion does not result in his release.[82] The first two steps of review, 24 hour review and the power to amend orders, have already been described. Section 3147 deals with the last two steps: motion to the court having original jurisdiction over the offense, and appeal to the court having appellate jurisdiction.

A person detained or required to return to custody at a specified time who desires review of the release conditions must first file an application for review under section 3146(d) (24 hour review). Once the section

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77 112 CONG. REC. 12, 492 (1966).

78 18 U.S.C. § 3146(e) (Supp. III, 1968). *See* S. REP. No. 750, 89th Cong., 1st Sess. 13 (1965). Both the D.C. JUDICIAL COUNCIL REPORT ON BAIL, *supra* note 42, app. H at 55, and the ABA DRAFT, *supra* note 15, at 71-74, provide for revocation of a defnedant's release.

79 Very often a defense attorney is appointed at the initial hearing.

80 H.R. REP. No. 1541, 89th Cong., 2d Sess. 11 (1966). Of note is the fact that this situation may result in the United States Attorney's office not being notified in advance. In such a situation, the Government would be ill-prepared to effectively assist or argue amendment proceedings.

81 18 U.S.C. § 3146(e) (Supp. III, 1968).

82 18 U.S.C. § 3147 (Supp. III, 1968).

3146(d) review is exhausted, such person, if still detained, may move to amend the order of release in the court having original jurisdiction over the offense.[83] This court must promptly review the motion.[84] The legislative history of the Act specifically defines what constitutes prompt determination:

> Prompt determination as required by this subsection [3147 (a)], means that such a motion shall be given priority and that determination shall be expedited in conformity with the underlying purpose of this legislation, namely, that the accused shall not needlessly be detained pending his appearance to answer charges when such detention serves neither the ends of justice nor the public interest.[85]

The Act does not require that the court, on a section 3147(a) motion, issue a written order setting forth its decision; however, legislative history indicates that a written order is contemplated since it may be reviewed by the appellate court.[86] Moreover, considering the possibility of such review, the order should be as detailed as possible and should delineate all relevant facts as well as the basis for the court's decision.

If the court of original jurisdiction denies the motion to amend or imposes additional release conditions, an appeal may be taken to the court having appellate jurisdiction.[87] Legislative history indicates that the appellate court shall review the statement of evidence in the release order and the order of the trial court on the accused's motion to amend.[88] If the court finds that the order "is supported by the proceedings below," it must affirm.[89] Conversely, if the court finds that the order is not supported by the proceedings, it may remand the case for a further hearing, it may request additional evidence, or it may order that the person be released pursuant to section 3146(a).[90]

VII. *Release in Capital Cases or After Conviction*

Section 3148 deals with release of a person who either has been charged with an offense punishable by death or has been convicted of an offense and is awaiting sentence, appealing, or petitioning for a writ of

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[83] 18 U.S.C. § 3147(a) (Supp. III, 1968). Such motion need not be filed and a direct appeal may be taken if the judicial officer who sets the conditions and holds the 24 hour review is a judge of the court having original jurisdiction over the offense. *Id.*

[84] *Id.*

[85] H.R. REP. No. 1541, 89th Cong., 2d Sess. 14 (1966). The statute does not establish guidelines for the hearing on this type of motion. Since this is a motion to amend rather than an appeal, presumably a de novo investigation may be undertaken.

[86] 112 CONG. REC. 12,492 (1966) (remarks of Congressman Rogers).

[87] 18 U.S.C. § 3147(b) (Supp. III, 1968). The appeal must be heard promptly. *Id.*

[88] S. REP. No. 750, 89th Cong., 1st Sess. 19 (1965).

[89] 18 U.S.C. § 3147(b) (Supp. III, 1968).

[90] *Id.*

certiorari. Neither statutes nor case law have acknowledged a right to release in either situation;[91] and even those who believe that the "presumption of innocence" creates an absolute right to bail pending trial would deny that a convicted defendant has a right to release, since the presumption disappears upon conviction. Congress, by providing for a different release procedure in cases involving a capital offense or a conviction, clearly recognized their distinctive features.[92]

A person within the purview of section 3148 presumptively is to be treated pursuant to the provisions of section 3146; however, he may be detained if the court has "reason to believe" that no conditions of release will reasonably assure that he will not flee, or that his release will pose a danger to any person or to the community, or that the appeal or writ is frivolous or has been taken for purposes of delay.[93] This is the only section of the Act which allows preventive detention for persons who may be dangerous.[94] Unfortunately, the Act does not set forth any specific standards to be used by the court in determining whether a person is likely to flee or to pose a danger to another person or the community. However, in making the determination, the criteria listed in section 3146 (b) should be highly relevant.[95]

The Act provides that the review provisions of section 3147 are inapplicable to a defendant accused of a capital offense or convicted of a crime.[96] However, the Act further provides that "other rights to judicial review . . . shall not be affected."[97]

VIII. *Penalties for Failure to Appear*[98]

Section 3150 sets forth penalties for anyone who willfully fails to

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91 *See* Leigh v. United States, 82 S. Ct. 994 (Warren, Circuit Justice, 1962); Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961). *But see* White v. United States, 4 CRIM. L. REP. 2236 (D.C. Cir. Nov. 22, 1968). The ABA DRAFT, *supra* note 15, § 5.1, retains the distinction made in the Bail Reform Act regarding capital offenses. The commentary to § 5.1 states: "Historical treatment of capital defendants is continued. A capital charge should not preclude release in appropriate cases but outright detention is provided where necessary." *Id.* at 56.

92 *See* S. REP. No. 750, 89th Cong., 1st Sess. 19 (1965).

93 18 U.S.C. § 3148 (Supp. III, 1968).

94 Note that 18 U.S.C. § 3146(a)(5) (Supp. III, 1968) creates a type of detention since the corollary of part-time release is part-time detention. *See* United States v. Erwing, 280 F. Supp. 814 (N.D. Cal. 1968).

95 *See* p. 206 *supra*. *But see* United States v. Porter, 5 CRIM. L. REP. 2062 (D.C.D.C. Mar. 24, 1969), where Judge Aspell states: "The defendant, a young adult, was convicted of a street robbery. His acts with nothing more would fully justify this court in denying his release pending appeal as posing a danger to the community." *Id.*

96 18 U.S.C. § 3148 (Supp. III, 1968).

97 *Id.*

98 18 U.S.C. § 3150 (Supp. III, 1968) replaces 68 Stat. 747 (1954). The new penalty provisions differ from the old in several respects. The deleted section was entitled "Jumping Bail" and covered persons admitted to bail who incurred a forfeiture of bail and willfully failed to surrender themselves within thirty days following the forfeiture.

appear as required.[99] A person released in connection with a felony charge, or while awaiting sentence, or pending appeal or certiorari after conviction of any offense, who willfully fails to appear as required, can be fined up to $5,000 or imprisoned up to five years, or both.[100] If a person is released in connection with a misdemeanor charge, he can be fined up to the maximum amount provided for such misdemeanor or imprisoned up to one year, or both.[101] A person who is released for appearance as a material witness and fails to appear can be fined up to $1,000 or imprisoned up to one year, or both.[102] In addition, when bail has been posted, it is subject to forfeiture. Forfeiture is governed by Federal Rule of Criminal Procedure 46(f) which provides that upon breach of a condition of the board, the court shall declare a forfeiture. However, if it appears to the court that justice does not require enforcement of the forfeiture, it can be set aside. When a forfeiture has been declared, the court, on its own motion, must enter a judgment of default and issue execution on the bond.

Section 3150 is inapplicable to a violation of a condition of release short of failing to appear as required before a judicial officer. Thus, failure to appear before a probation officer or a third person does not subject an accused to section 3150 penalties. To illustrate, a person may be required to live at a specified address and report to a specified person, but even if he lives elsewhere and fails to report, he does not violate section 3150 if he appears as required before the judicial officer.[103]

THE ADMINISTRATIVE TAIL WAGGING THE LEGAL DOG

Although the Bail Reform Act was promulgated amidst a spirit of reform unparalleled in modern congressional history,[104] 2½ year's ex-

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[99] 18 U.S.C. § 3150 (Supp. III, 1968).

[100] *Id.*

[101] *Id.*

[102] *Id.* There is no thirty day "grace period" during which an offender may appear before being subject to penal sanctions as was allowed by the former statute. If a person willfully does not appear as required, he is immediately subject to the penalties of § 3150.

[103] There are two possible ways of handling violations not covered by § 3150. First, the conditions of release can be amended to include additional conditions to be performed by the accused which take into account the violation of the prior release conditions. Second, a warrant for arrest can issue immediately upon violation of release conditions pursuant to § 3146(c). 18 U.S.C. § 3151 (Supp. III, 1968) specifically states that nothing contained in the Act shall be deemed to interfere with the court's power to punish for contempt.

[104] The House vote on the Bail Reform Act was 319 in favor, 14 opposed and 98 not voting.

One may wonder why this problem seemed to tickle congressional fancy. Cynically, there has been speculation to the effect that legislative reform took place because this was not, at the time, an area of partisan politics. (Crime committed by persons released on bail has since become a subject of widespread debate. H.R. 2781, 91st Cong., 1st Sess., introduced Jan. 9, 1969, provides a consecutive penalty for those who commit crimes while free on bail. In addition, unlike the situation in many other areas of criminal procedure, independent studies in the bail area already had begun and numerous problems had been exposed. Finally, and probably most im-

perience under the Act indicates that the contemplated reform has not been forthcoming. In fact, all indications point in one direction: the Act has had slight effect upon the detention procedures of persons accused of crimes. In explanation of this rather startling result, it appears that Congress woefully failed in its estimate of the actual needs of the public and of the institution charged with administering the Act.

I. *Disparity Between Theory and Practice—Preventive Detention*

Preventive detention may be defined in practice as the intentional setting of bail beyond the financial means of an accused believed to be dangerous in order to ensure that the accused will remain in detention prior to trial.[105] Prior to the Bail Reform Act, preventive detention had never been authorized by federal statute, and the Supreme Court, construing the Judiciary Act of 1789[106] and Federal Rule of Criminal Procedure 46,[107] had held that where a right to bail exists, bail set at an amount greater than was necessary to ensure the appearance of the accused was "excessive" within the meaning of the eighth amendment.[108] Thus, in theory, the sole justification for setting bail was to ensure the appearance of the accused; the setting of bail to ensure the detention of a potentially dangerous defendant was unauthorized and unlawful. Nevertheless, preventive detention was a common practice and there remained a "vast gap between theory and practice."[109] The reason for the gap is evident: certain individuals, particularly recidivists and professional criminals, often pose a danger to society.[110]

The problem of preventive detention clearly was recognized by the draftsmen of the Bail Reform Act. However, the lack of judicial authority and precedent in the bail area left the constitutional aspects of preventive detention unclear.[111] Moreover, there was a lack of statistical and psychological data upon which the draftsmen could rely in attempting to identify

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portant, the underlying philosophical premise of bail reform, *i.e.*, that an accused should not be required to sit in jail while awaiting trial merely because of lack of financial means, was receiving widespread approval and was felt by many to be closely linked to the democratic principles of our society.

105 *See* Note, *Bail Reform in the State and Federal Systems*, *supra* note 20, at 959.

106 *See* p. 203 *supra.*

107 *See* p. 205 *supra.*

108 Stack v. Boyle, 342 U.S. 1 (1951).

109 Smith, *supra* note 8, at 3; *cf.* ATTORNEY GENERAL'S REPORT, *supra* note 7, at 60; D. FREED & P. WALD, *supra* note 7, at 49-55.

110 For example, one individual was arrested and indicted for burglarly and released on bail. Prior to his trial, he was arrested for burglary and similar crimes 7 more times, indicted on 8 counts, and released each time. His total bail equalled $48,500. Note, PREVENTIVE DETENTION BEFORE TRIAL, *supra* note 1, at 1491.

111 Although the Supreme Court has been in the forefront of reform in many areas of criminal law administration, the bail problem is one area in which the Court has played a passive role. Thus, there is no landmark decision approving or disapproving preventive detention. *See* Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 959 (1965).

potentially dangerous defendants.[112] Faced with these problems, Congress concluded that it was better to institute overall reform of the bail system and defer action on the issue of preventive detention, rather than do nothing and thereby perpetuate an unfair system.[113] Therefore, except for convicted defendants and those accused of a capital offense,[114] the Act makes no provision for preventive detention, and authorizes release conditions predicated merely upon the likelihood of flight. The judicial officer is thus faced with a familiar dilemma: he must either observe the spirit of the Act and release a defendant whom he feels poses a danger to society, or just pay lip service to the Act and detain the defendant. Over 2 years experience under the Act indicates that the second approach is often followed and that the practice of detaining dangerous defendants has been just as prevalent as it was prior to the Act. Thus, on many occasions, release conditions ostensibly based upon the statutory language concerning appearance actually have been based upon the danger posed by the accused to the community.[115]

The Supreme Court has never held preventive detention to be unconstitutional. Even if one finds implicit in the eighth amendment a right to bail,[116] this right need not be absolute. Individual rights long have been balanced against the needs of the public. Witness the restrictions placed upon the explicit first amendment guarantee of free speech.[117] Similarly, one would expect that any implicit eighth amendment right to bail would

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[112] Freed & Wald, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940, 944-45 (1966).

[113] H.R. REP. No. 1541, 89th Cong., 2d Sess. 5-6 (1966) states:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial [*sic*] period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused. While it is true that the Constitution does not specifically grant a right to bail, nevertheless, the eighth amendment states: 'Excessive bail shall not be required.' However, the Judiciary Act of 1789 provided that 'upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death.' It made bail in capital cases discretionary, depending upon the nature and circumstance of the offense and of the evidence and usages of law. Obviously, the problem of preventive detention is closely related to the problem of bail reform. A solution goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis. The present problem of reform of existing bail procedures demands an immediate solution. It should not be delayed by consideration of the question of preventive detention. Consequently, this legislation is limited to bail reform only.

S. REP. No. 750, 89th Cong., 1st Sess. 5 (1965).

[114] 18 U.S.C. § 3148 (Supp. III, 1968). *See* p. 213 *supra.*

[115] This could not be done so easily if the attorneys representing the defendants took a more rigorous role in the bail setting process than the authors' experience indicates that they currently take.

[116] See note 4 *supra.*

[117] *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919).

be subject to limitation when the public interest in detention outweighed the individual's right to release.[118] Aside from an implied right to bail, it is also arguable that the excessive bail provision of the eighth amendment prohibits preventive detention. Here again, however, the right of an accused to pretrial freedom might be balanced against the societal need for security, and what is "excessive" should depend upon the facts of each case and the individual characteristics of the particular defendant.[119]

One also must be cognizant of the lack of factual data needed to identify in advance potentially dangerous defendants. The focus of Congressional and Governmental investigation has been on available descriptive material such as the crime charged or prior criminal history. The responsibility of the Government should be to develop standards of predictability based on psychological information, coupled with careful collection and analysis of relevant factual data concerning the defendant. Until this is done, rationally accurate standards cannot be articulated and the decision to detain will be, at best, a hopeful conjecture by a judicial officer.

Given the frequent use of preventive detention and society's need for some form of protection, the advantages which would flow from a statutory scheme which authorizes detention with clearly defined procedures and standards of predictability to be used in determining whether it is appropriate for the particular defendant are apparent. It is likely that such a scheme, assuming money bail is not retained, would ensure that fewer defendants are detained than under the present system where no standards exist and a defendant may be detained under the dubious rubric of "possibility of flight," when in fact no such possibility is readily apparent.[120] Furthermore, reviewability would be greatly enhanced be-

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[118] *See* Note, *Preventive Detention Before Trial, supra* note 1, at 1500.

[119] Note, *The Bail Reform Act of 1966, supra* note 3, at 193. It is also arguable that preventive detention violates the constitutional guarantees of due process and equal protection of the laws. The due process objection is that the defendant is deprived of his liberty prior to trial and conviction. However, pretrial interference with an accused's liberty is permitted in a number of situations. Witness the non-capital cases where the defendant is unable to make bail and remains incarcerated or the capital cases where bail may be denied. Thus, the sweeping conclusion that preventive detention violates due process "without reference to a particular form of preventive detention" is of dubious validity. ABA DRAFT, *supra* note 15, at 57. For a good discussion of preventive detention and due process see Note, *Preventive Detention Before Trial, supra* note 1, at 1500-05. As to the equal protection argument:

> Equal protection . . . does not require that all persons be treated equally, but only that . . . there must be a *reasonable* . . . basis for classification. Danger to the community is a sufficient basis for allowing differing treatment of defendants before trial, and is certainly a more desirable basis than defendant's financial ability. Note, *The Bail Reform Act of 1966, supra* note 3, at 193. (emphasis added).

[120] *See* ATTORNEY GENERAL'S REPORT, *supra* note 7, at 60; Note, *Preventive Detention Before Trial, supra* note 1, at 1493; Note, *Bail Reform in the State and Federal Systems, supra* note 20, at 960.

cause the judicial officer would no longer have to conceal his true reasons for denying bail amidst broad generalities alluding to appearance, but instead, could candidly elucidate the basis for his decision to detain the defendant.[121] Most importantly, statutory authorization would eliminate the *sub rosa* use of preventive detention, a practice which has degraded the entire judicial process.[122]

II. *Additional Deficiencies of the Bail Reform Act*

Even setting aside the existing conflict between the idealistic and pragmatic considerations referred to above, there are several problems basic to the Bail Reform Act which have never been adequately resolved. The principle, that for every action there is a corresponding reaction, applies to the effect which the new legislation has upon established rights and procedures in the federal judicial system. An examination of the type of bail hearing required by section 3146 shows that the Act has far-reaching effects upon the basic nature of the hearing itself, the right against self-incrimination, the right to a public trial, the right to be free from prejudicial publicity, the establishment of release conditions, and procedural due process. Query, whether adequate allowances were made for the effect the Bail Reform Act may have on the existing system.

The congressional debates concluded that the bail hearing should be a non-adversary proceeding.[123] In addition, the Act itself provides that the rules of evidence do not apply at a bail hearing.[124] This "non-adversary," informal evidentiary approach to a bail hearing is consistent with bail reform as it assumes a fundamental unity of interest between the defendant, the Government, and the public (as represented by the judicial officer who reaches the release decision) in eliminating unnecessary detention. However, it ignores the fact that the judicial process in this country historically has been based upon adversary proceedings. Given the nature of our system, it seems unrealistic to expect a defense attorney at a bail hearing to abandon his traditional role of advocate and subordinate the interests of his client to the interests of the public. Moreover,

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[121] Note, *The Bail Reform Act of 1966*, *supra* note 3, at 193; *Bail Reform in the State and Federal Systems*, *supra* note 20, at 960.

[122] The D.C. JUDICIAL COUNCIL REPORT ON BAIL, *supra* note 42, app. H. at 54, contains a proposed bill which would allow the judicial officer to consider the person's danger to the community when imposing conditions, in addition to whether the conditions imposed will insure his return for trial. The D.C. CRIME COMMISSION REPORT, *supra* note 4, at 513, 529, specifically recommends the outright detention of dangerous persons. On the other hand, the draftsmen of the ABA DRAFT, *supra* note 15, after thoughtful analysis, decided not to recommend the adoption of preventive detention. *Id.* at 56-71.

[123] *Hearings on S. 2838, S. 2839, S. 2840. Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 88th Cong., 2d Sess. 170 (1965).

[124] 18 U.S.C. § 3146(f) (Supp. III, 1968) provides: "Information stated in, or offered in connection with any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law."

one cannot always expect the prosecutor to be neutral. He may, for example, desire the continued incarceration of the defendant because he feels that his release would affect the Government's ability to prove its case. Thus, it appears that if bail is to be removed from the realm of a contested hearing, more is necessary than the desires of the legislative draftsmen; what is required is a vast change in the present structure of the judicial system.[125]

The Act also has affected the existing system in its impact on rights protected by the fifth amendment. Section 3146(b) charges the judicial officer with the duty of making a determination on the basis of "available information." If the defendant makes full disclosure with respect to the criteria set forth in section 3146(b),[126] he may expose evidence damaging to his defense. For example, the defendant's disclosure of his past criminal record, his aliases (if any), or his history of drug use or of mental illness, may aid the Government in proving its case. At the same time, if the defendant remains silent or is unresponsive, he prejudices his chances of receiving a favorable release order. Therefore, there is an inherent conflict between the fifth amendment right against self-incrimination and the right to pretrial release under the Act.

The Government is also faced with a difficult choice, for in order to obtain the release conditions desired it may have to disclose more of its case than it normally would. It is not the purpose of this article to analyze the advantages and disadvantages of discovery;[127] however, it is important to note that Congress has afforded defendants an additional opportunity for discovery through an expanded bail hearing.

A further effect upon the existing system concerns the extent to which information elicited by either party at the bail hearing may be used at trial either as direct testimony or for impeachment purposes. For the defendant, this again raises the fifth amendment conflict referred to earlier. As to the Government, the hearing has the built-in potential of eliciting statements from unprepared witnesses, which may later prove to be embarrassing to the Government in its efforts to prove its case. There is one obvious advantage, however, in allowing testimony at a bail hearing to be used against any of the parties thereto at a later time. The knowledge of the possibility of such use would tend to cause those persons presenting information to exercise greater care with respect to any representations they might make. This would help insure truthfulness since such testimony may be used later at trial for impeachment purposes.

In analyzing the effects of the Act upon the criminal law, one may

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125 For a discussion of the Bail Reform Act and the nature of the bail hearing see Freed & Wald *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940, 943 (1966).

126 *See* p. 210 *supra*.

127 *See* Brady v. Maryland, 373 U.S. 83 (1963); Jencks v. United States, 353 U.S. 657 (1957). *See also* FED. R. CRIM. P. 16.

wonder whether Congress gave careful thought to peripheral problems such as discovery, impeachment and the fifth amendment privilege against self-incrimination. Because of the lack of congressional comment or review concerning these areas and because of the apparent conflicts created, it would appear they were not carefully considered.

The Act also raises issues with respect to free press and fair trial. If a case is of sufficient public interest, information volunteered at a bail hearing might well find its way into the newspapers and become public information.[128] This could prejudice the defendant's ability to select impartial jurors. For example, the defendant might have a long history of sex crimes, evidence would be inadmissible at trial, but would be a relevant consideration at a bail hearing. This type of information could be most damaging to the defendant's case. In addition, since the same judge may preside at the bail hearing and the trial, one may question the ability of such a judge to eliminate such information from his deliberations at the trial itself.[129] Indeed, one may question whether the problem of adverse publicity was explored at all when the Act was drafted.

Inquiry thus far has been directed toward the general needs of the public and the accused. In addition, the interplay of these often competing interests must be viewed with respect to the administrative aspects of the new bail system and its institutional requirements. Too often attention is limited to the framework of constitutional rights or the generalized rights of the public, without any regard for the institution charged with administering these rights. In a sense, to ignore the institutional problems involved is as foolhardy as the failure to recognize a need to change the system. This is true because once a reform measure becomes law and is turned over to an agency for administration, the public and the legislature often consider the issue closed. However, if the institution cannot effectuate the reform, it may be rejected as a failure. In the interim, the initiators of the program look to new areas, satisfied that a major problem has been resolved.[130] Two years of experience under the Bail Reform Act raises suspicions that the Act has afforded no exception to the above-described pattern.

The draftsmen of the Act clearly were aware of the administrative, as opposed to the legislative, problems of bail reform. Undoubtedly,

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[128] *See* Brown v. Folger, No. 11,802 (4th Cir., Oct. 5, 1967).

[129] The authors are aware of cases which indicate that this type of conflict is not considered prejudicial to the defendant's interest. *See, e.g.*, Smith v. United States, 360 F.2d 590 (5th Cir. 1966). *But see* Bruton v. United States, 391 U.S. 123 (1968). Nevertheless, one wonders if this is a realistic possibility.

[130] This pattern has been evident in such areas as rehabilitation of drug addicts, treatment of the criminally insane, and, to some degree, rehabilitation of 911 criminals. Most notable would be the treatment of juveniles. For years, juveniles were given "special treatment" which theoretically recognized their peculiar needs. However, recent cases such as *In re* Gault, 387 U.S. 1 (1967), show that this "special treatment" in many instances was a euphemism for an institutional system which ignored basic rights.

they were more cognizant of these problems than they were of the indirect effects which bail reform would have upon the criminal system as a whole. Several provisions of the Act highlight this awareness. For example, the requirement that the release determination be articulated and available to the public[131] indicates an awareness of the *sub rosa* use of bail as a preventive detention device. To alleviate this problem, the detailed review and appellate proceedings were incorporated in the Act,[132] as were the involved release procedures favoring release without money bail.[133] All of these requirements demonstrate an attempt to force the institutional machinery to conform to the spirit and requirements of the law. It would be helpful now to isolate specific requirements of the Act and examine how they actually are being handled within the existing institutional framework.

The heart of the determination upon which the Act succeeds or fails, with respect to the record of appearances of defendants, is the availability of information concerning each accused. Unfortunately, the history of the statute is surprisingly silent on this question. Congress did provide for a bail agency which would gather necessary information in the District of Columbia,[134] but aside from this agency, the federal courts were left more or less to their own resources. The Justice Department has taken the position that the major source of information is the defendant and his attorney. Considering the resources made available by Congress, it seems that the Department has taken the only possible position.[135] In some instances, where the arrest is based on a continuing investigation (which happens in many federal cases), the required information may be available to the court. There are many crimes, however, such as narcotics offenses, liquor violations, or interstate transportation of stolen motor vehicles, where information has not been developed by the Government and the judge must rely principally on the statements of the defendant. It is generally recognized that this source of information is not the most reliable since an accused is concerned primarily with securing his freedom. At the same time, defense counsel must accept defendant's proffer, with little time to verify the accuracy of the information.

The effect of the failure of the Act to provide an adequate method of gathering verifiable information cannot be overemphasized. This de-

131 18 U.S.C. § 3146 (Supp. III, 1968).
132 18 U.S.C. §§ 3146, 3147 (Supp. III, 1968).
133 18 U.S.C. § 3146 (Supp. III, 1968).
134 District of Columbia Bail Agency Act, D.C. CODE ENCYCL. ANN. § 23-901 (Supp. 1968).
135 The Department of Justice and the Administrative Office of the United States Courts have developed a form to help procure the information which is useful if the necessary information can be supplied at an early enough time. This form asks the defendant and a representative of the Government to supply information needed to make a release decision based upon the criteria in 18 U.S.C. § 3146(b) (Supp. III, 1968). A defendant cannot, of course, be compelled to supply information, but this form provides a convenient method to get information before the judicial officer.

ficiency has led in many instances to a continued use of a money bond. Moreover, when release is granted, there is built-in uncertainty in the procedure because of determinations based upon inadequate information. This greatly effects the quality of the release hearing and the confidence with which a judicial officer approaches the release decision. Furthermore, without an adequate flow of information, there never will be sufficient accumulated data for comprehensive studies to determine, with greater accuracy, what facts lend themselves more readily to determining the various conditions of release.

The Act requires that the judicial officer make his release determination on the basis of "available information."[136] At the same time, section 3146(a) creates a presumption in favor of release on personal bond or the defendant's own recognizance unless the judicial officer makes a contrary determination. If the officer is unable to "rebut" the release presumption, the defendant is entitled to be released. This creates, in theory, an anomalous situation in that the defendant, whose likelihood of flight is unknown, must be released. The dilemma thus presented to the officer setting bail is succinctly described in the case of *United States v. Penn.*[137]

> In most cases the Court is placed in an untenable situation. On the one hand the defendant is now presumed to be entitled to release on personal bond, unless factors appear which reasonably suggest that such a procedure would not assure the appearance of the accused at trial. On the other hand, the burden is placed on the Court to justify any condition other than personal bond. In order to do this, the Court must point to reasons why it acts, but because of the totally inadequate information-gathering technique provided for by the statutory scheme the Court is usually without sufficient information to make any informed decision, or to point to reasons for denying personal bond. The less the Judge knows about a defendant, the higher the risk in placing him on personal bond. Yet, the less the Judge knows, the more difficult it is to justify any condition other than personal bond.[138]

No judicial officer wants to assume the risk of releasing someone about whom he knows nothing. Moreover, an Assistant United States Attorney does not want to undertake the responsibility of recommending release when there is inadequate information. The Act takes this position because, ideally, the presumption favoring release is fair to the defendant when there is insufficient information to warrant holding him prior to trial. However, the presumption may operate to the detriment of the public and of the institution—which have a right to ensure defendant's return for trial—and it is the authors' belief that judges presently are using a money bond to detain a defendant when they know little about him.

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136 18 U.S.C. § 3146(b) (Supp. III, 1968).
137 2 CRIM. L. RPTR. 3139 (D.C. Ct. Gen. Sess. 1968).
138 *Id.* at 3141.

If the Act is to be workable within its limited criteria respecting the possibility of flight, an adequate information system must be developed. It seems that Congress could solve this problem in two ways: first, by providing manpower to gather adequate bail information, such as a funded national bail agency, or second, by providing for intermediate bail conditions, perhaps in the form of money bond, until sufficient information can be gathered to enable a judicial officer to reach his final decision in an intelligent manner.

Either alternative would be costly. A national bail agency would require considerable professional and clerical personnel to adequately serve all of the judicial districts. Perhaps an alternative to creating a separate entity would be to graft the bail function onto the existing probation system.[139] A bail hearing requires some of the same information presently gathered by probation officers for judges prior to sentencing; in this regard, the methods and format for collecting information are already in existence. Moreover, utilization of this system would supply a supervisory staff to insure that conditions imposed on defendants are followed. Congress, however, specifically removed the Probation Department from the coverage of the Act. Two factors apparently influenced its decision: the existence of an already over-burdened Probation Department, and the overall cost of providing adequate information and supervision.[140]

The second alternative, that of establishing interim conditions, would also have some major shortcomings. It might well add to the judicial workload by requiring one additional hearing after the information has been gathered in order to determine the final bail conditions. At the present time, the Act provides for ex parte amendment of conditions of release[141] and 24 hour review of bail orders.[142] If these provisions were being used as contemplated, the incidence of additional rehearings under this proposal might indicate how many extra hearings would be needed and how such hearings could be expected to work. An alternative to this proposal would be to select interim release conditions *prior* to the release hearing. If money bail was used as an interim condition, it would have the advantage of allowing defendants to gain their release in the same way they could have prior to the Bail Reform Act. Of course, this interim money bail approach would disadvantage the indigent defendant. However, since it is temporary in nature, it is far more rational than the system was prior to the Bail Reform Act. Further, there is no requirement that straight money bail be the sole or principal condition at the interim

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139 The ATTORNEY GENERAL'S REPORT, *supra* note 7, at 79-80, recommended that the federal probation service be used to collect information, provided, however, that it first be supplied with additional manpower.

140 H. R. REP. No. 1541, 89th Cong., 2d Sess. (1966).

141 18 U.S.C. § 3146(e) (Supp. III, 1968).

142 18 U.S.C. § 3146(d) (Supp. III, 1968).

level. Cash deposits in the amount of 10 percent of the bond or daytime release would also be appropriate conditions. These interim conditions would not only be fairer to the defendant than the prior system, but also would give some protection to the public and the institution. Adoption of interim conditions would change the existing statute to the extent that it would not, in the absence of verifiable information, automatically entitle a defendant to release on his own recognizance. At the same time it would give the deserving defendant an automatic opportunity for review.[143]

It is true, of course, that under the existing statute, a defendant can seek 24 hour review. However, as a practical matter, this requires knowledge of the right to review and effective assistance of defense counsel in presenting his case. Neither factor has been present in the normal situation.[144] Resort to some form of interim conditions would prevent judicial perversion of the statute because judges would no longer be required to grant release on recognizance to a defendant about whom they know nothing.

Another aspect of the Bail Reform Act which presents administrative or institutional problems is the enforcement of the conditions imposed to ensure the accused's return to stand trial.[145] The first two alternatives—release on the defendant's own recognizance, or release on an unsecured bond—are in essence simple promises by the defendant to return as required. The compelling forces behind these alternatives are the moral imperatives of a promise, buttressed by the threat of subsequent prosecution for failure to appear.[146] Assuming for the moment that those defendants who fit into the simple moral imperative class can be isolated, it is then possible to review the problems that other defendants present to the system.

The additional conditions of release set forth in the Act are designed to apply to other defendants. The first condition is designed to supply an "alter ego" for the defendant—a third person who will help assure defendant's appearance at trial. This is a workable condition when such custodian is readily available. In such cases, the defense attorney or the defendant himself presents the custodian to the court, and the custodian then undertakes to assure the court of the defendant's appearance. On

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143 Another variation would be to give the court a specified time period in which to gather the necessary information and then automatically require a hearing, bringing into play the existing presumption in the Bail Reform Act favoring release.

144 The authors' experience in the courts of the District of Columbia indicates that many defense attorneys are not prepared for the bail hearing and do not adequately utilize the appellate remedies available under the Bail Reform Act.

145 *See* 18 U.S.C. § 3146(a) (Supp. III, 1968).

146 The work by the Vera Institute of Justice and the Attorney General's Committee on Poverty and the Administration of Criminal Justice indicates that, in a large number of cases, a promise is sufficient to assure appearance. *See* pp. 204-06 *supra.*

the other hand, if the defendant does not come forward with a third-person custodian, the judge is still required to determine whether placing a defendant in the custody of a designated person or organization agreeing to supervise him will assure his appearance. For example, if the defendant is a delinquent youngster far from home, there are big brother organizations, temporary orphanages, or other groups which could undertake his supervision. The Act, however, fails to provide a vehicle for producing such groups.[147] Presently, only the defendant has a direct stake in producing that type of supervisory group, and he is often unable to do so. Furthermore, neither the United States Attorney's Office nor the courts are in a position to assist him. Both are already understaffed and overworked. Moreover, the philosophy of the system demands an advocate's position on the part of the prosecutor and detached behavior on the part of the judge.

Not only does the Act fail to provide a method of finding a custodian but it also fails to provide for supervision over his behavior when he is found. If the custodian fails to live up to his representations, there is no effective method for enforcing his promises. The statute provides for the use of the contempt power,[148] but to employ this sanction against one who volunteers his services would defeat this condition since it would undoubtedly dissuade persons who might otherwise be willing to act as custodians.

The second condition deals with restrictions on travel, abode, or association during the period of release. It is certainly possible for the judge to release the defendant under an order containing a comprehensive series of restrictions to govern his behavior during release. For example, if a person is a narcotics addict, restricting him from associating with sellers, pushers and other users would greatly alleviate problems with respect to his release. Of course, the absurdity of such an order is immediately apparent. Simply instructing an addict not to use narcotics and to stay away from pushers will have no force or effect and is essentially a sterile judicial order. In order to make such restrictions effective, there must be a method of enforcement. Here again, however, the Act and the legislative history are silent as to the need for enforceable conditions and, concomitantly, fail to provide for the financial and manpower needs of the existing institutional organizations. Certainly one could not expect that a judicial system overburdened with cases and a Probation Department overburdened with probationers would volunteer their "resources" to enforce conditions imposed under an Act which adds to administrative demands without commensurate financial support.

The third and fourth conditions of release are financial in nature.

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147 Work to find adequate custodians has already commenced. *See* the D.C. JUDICIAL COUNCIL REPORT ON BAIL, *supra* note 42, at 23. If administrative machinery were available, it is apparent that many groups could be found to serve as custodians.

148 18 U.S.C. § 3151 (Supp. III, 1968).

Of course, any time a financial condition is imposed, it runs the risk of creating an unfair situation based on the economic status of the particular defendant. Moreover, the underlying concept that financial factors create a compelling force for defendants' return does not seem to be accurate. There have been many cases in which defendants have fled and forfeited substantial bail when they felt that standing trial was not in their best interests.[149] It has been postulated that the bail bondsman, because of his pecuniary interest and his extraordinary powers to effect the return of a fugitive, assures that the defendant will return;[150] but, even if true, this is at best a haphazard system which relies on someone outside the judicial system to perform a function necessary to the integrity of a trial.[151]

The final condition permits release of the defendant for work or some other appropriate justification. The system does not provide machinery either for finding a defendant a job, for job training, or for supervision to ensure that the defendant in fact appears at his job as required. Moreover, there is no planning agency in the federal system which is capable of helping the judicial officer in determining what other conditions of release might be appropriate for a given defendant.

CONCLUSION

The foregoing discussion is a microscopic view of the present administrative muddle which has resulted from enactment of reform legislation that was inspired by the highest motives and intentions, but has little else to effectuate the changes which were sought. The purpose of this article has been to highlight some of the problems under the Act and, hopefully, to propel some meaningful effort towards rectifying its deficiencies.

It is indeed a situation worthy of further effort. Legislative reform of criminal administration and procedure is an expanding avenue for change and should be nurtured and encouraged. With the growing problems and perplexities confronting our system of justice, legislative reform may well become, as a method of change, a *sine qua non*, to buttress the more piecemeal ad hoc changes flowing from the judicial system.

Congress must be informed that the existing legislative bail reform effort is both ineffective and unacceptable to those responsible for its administration; otherwise, there is a real danger that Congress will not legislate further in this area, with a resultant atrophy of progress.[152]

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149 *See, e.g.*, D. FREED & P. WALD, *supra* note 7, at 50.

150 *See* R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL 13 (1966); D. FREED & P. WALD, *supra* note 7, at 22, 30-31.

151 *See* Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion). *See also* Note, *Bail Bondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

152 On January 22, 1969, Senator Tydings introduced S. 546, which changes the conditional release section of the Bail Reform Act by providing for, *inter alia*, preventive detention. H.R. 2781, introduced on Jan. 9, 1969 by Congressman McCulloch, also provides for detention of persons who "pose a danger to the community or to any person or property in the community."