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## Last Days of Bail

John V. Ryan

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held inadmissible, stopping and questioning can still be constitutional and useful. Questioning may prove that the suspect should be arrested when the suspect's answers are obviously false or when he admits that he has committed or is about to commit a crime. Questioning at the time of the stop allows an innocent suspect to tell his story before he is booked. Thus questioning permits the innocent suspect to clear himself before

his name and reputation are blemished by a police record.<sup>62</sup>

In sum, it is obvious that stop and frisk statutes are both necessary and beneficial—to the police—to the courts—and to the individual citizen who is entitled to the protection of his life and property which can only be guaranteed by aggressive and efficient police procedures.

<sup>62</sup> 78 HARV. L. REV. 473, 477 (1964).

## THE LAST DAYS OF BAIL

JOHN V. RYAN

The modern system of granting a person accused of a crime his freedom based upon his ability to produce bail, security for his appearance at trial, developed in England.<sup>1</sup> Originally, the sheriff had the discretionary authority to release the accused to the custody of a third party. Probably the sheriff, who was personally responsible for his prisoners, initiated the bail system to relieve himself of this burden.<sup>2</sup> If the defendant failed to appear at trial, the third party was subjected to the punishment due the accused.<sup>3</sup> As time went on, the third party was allowed to promise that he would forfeit a stated amount of personal or real property, rather than his freedom, if the defendant did not appear at his trial. Thus, the bail system of pretrial release evolved from a hostage arrangement into a surety relationship.<sup>4</sup> Soon thereafter, the courts usurped the sheriff's discretionary power to allow an alleged criminal his freedom pending trial. With this innovation the bail system in England reached the stage of evolution at which we find it today.<sup>5</sup>

Because of the broad frontier and mobile population of the United States, the private surety device was not feasible. The defendant was often a new arrival in the locale with no acquaintances in the area who were willing to risk becoming his

surety. As a result, the commercial bail bondsman arose to replace the private surety in the American system of pretrial release. The bondsman, who is still a part of the American bail scheme, demands a premium from the accused; in return he will put up the security necessary to free the man. Since the bondsman makes his living by being a professional surety, the bases upon which he decides whether or not he will put up bail for a particular defendant are commercial and not personal. If he feels a prisoner might not appear at trial, he will either hedge against the possible forfeiture by demanding collateral or refuse to make his service available to the prisoner.<sup>6</sup> Although the bail system in the United States has evolved into a commercial bondsman system, the underlying policy of bail has remained the same—one arrested and accused of a crime may obtain his release pending trial if he can adequately assure the court that he will appear at the trial.<sup>7</sup>

Thus, history indicates that the basic philosophy underlying the monetary bail system in the United States was imported from England. There is some dispute as to what place the bail system was given in the hierarchy of American jurisprudence. Some scholars feel that the United States Constitution gives a right to bail.<sup>8</sup> This point has never been authoritatively decided. The right to bail, however,

<sup>1</sup> FREED & WALD, *BAIL IN THE UNITED STATES* 1 (1964).

<sup>2</sup> Note, *Bail: An Ancient Practice Reexamined*, 70 *YALE L. J.* 966 (1961).

<sup>3</sup> 2 POLLOCK & MATTLAND, *HISTORY OF ENGLISH LAW* 585-90 (3d ed. 1899).

<sup>4</sup> GOLDFARB, *RANSOM* 22 (1965). The change was formalized in 1275 by the Statute of Westminster. Note, *supra* n. 2 at 966.

<sup>5</sup> ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO TRIAL* 104 (1947); PARRY, *THE LAW AND THE POOR* 228-29 (1914).

<sup>6</sup> Note, *Preventive Detention Before Trial*, 79 *HARV. L. REV.* 1490 (1966); Comment, *The Administration Of Bail and Pretrial Freedom In Texas*, 43 *TEXAS L. REV.* 357-58 (1965).

<sup>7</sup> *Stack v. Boyle*, 342 U.S. 1, 4-5, 8 (1952).

<sup>8</sup> Professor Caleb Foote, in an exhaustive review of the legislative history of the Eighth Amendment, concluded that the only reason a right to bail was not expressly given was due to a drafting error. Foote, *The Coming Constitutional Crisis In Bail*: I, 113 *U. PA. L. REV.* 959-99 (1965).

in non-capital cases is a federal statutory right.<sup>9</sup> Most states, in constitutional or statutory form, have a similar provision.<sup>10</sup> The United States Constitution only mentions bail in the Eighth Amendment, which prohibits excessive bail.<sup>11</sup> But whether this prohibition applies to the states is a question that has never been decided by the Supreme Court.<sup>12</sup> One reason that the Court has never been called upon to answer the question is that most states, in their constitution or statutory law, have a similar provision prohibiting excessive bail.<sup>13</sup>

Despite the question of constitutional right, bail is a generally accepted procedure. Some theoreticians feel that some form of pretrial release is mandatory in our present day legal system. They base their argument, in part, upon the assumption that the presumption of innocence is more than an evidentiary trial rule, and attaches to an alleged criminal immediately upon his arrest.<sup>14</sup> The other basis utilized by this school of thought to justify its position is that the defendant should be unhampered in the preparation of his defense. Incarceration, they say, unduly restricts the accused in the preparation of his defense.<sup>15</sup>

<sup>9</sup> FED. R. CRIM. PROC. 46; *Carlson v. Landon*, 342 U.S. 524 (1952); *Stack v. Boyle*, 342 U.S. 1 (1952). Recently, the Bail Reform Act of 1966 has given a right to pretrial release in all non-capital cases unless no conditional release can reasonably assure appearance. 18 U.S.C. § 3146 (a), (b).

<sup>10</sup> For a list of the various state provisions see Note, *supra* n. 2 at 977.

<sup>11</sup> U.S. CONST. AMEND. VIII.

<sup>12</sup> Also, some lower courts recently have assumed that the Eighth Amendment has been incorporated in the Fourteenth. *E.g.*, *Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir. 1963), *cert. denied*, 376 U.S. 965 (1963).

<sup>13</sup> Note, *A Study Of The Administration Of Bail In New York City*, 106 U. PA. L. REV. 696 (1958). (hereafter called *N.Y. Bail Study*).

<sup>14</sup> REPORT OF THE U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 58 (1963) (hereafter called *ATT'Y GEN. REP.*).

<sup>15</sup> Recent empirical studies have revealed evidence, albeit inconclusive, that pretrial incarceration is prejudicial to the outcome of the trial in the following respects:

- a) the accused can not show that he is a gainfully employed member of the community, hence he has less chance to obtain probation,
- b) he is convicted more often than his freed counterpart,
- c) he receives longer sentences than his freed counterpart,
- d) he can not adequately prepare his defense due to restricted communications with his attorney,
- e) he can not adequately prepare his defense because he can not find witnesses whom he knows only by description or first name,

A pretrial release system based upon the above premises would free the great majority of those who are arrested. It would detain only those who could not adequately assure the court that they would not flee to escape being tried. This is supposedly the policy underlying our present bail system, yet in practice, bail affects the release of only a small portion of those who might safely be allowed pretrial freedom.<sup>16</sup> Whether or not one agrees that a pretrial release system is mandatory, there should be little opposition to the proposition that some form of pretrial release is advisable. By freeing most of those arrested, a vast amount of custodial expense could be saved. Pretrial release also makes the administration of criminal justice more palatable to the innocent accused. Indirectly, pretrial release lowers the expenses of certain welfare agencies. An important consideration is that it seems fair not to subject one to incarceration if he has not been tried and convicted of his crime. Lastly, if there were no pretrial release, and the mere allegation that a person had committed a crime would put him in jail, the abuse that would flow from such a procedure could be enormous indeed.<sup>17</sup>

It has been suggested that the bail system does not fulfill its policy of releasing all who can adequately assure the court that they will appear at their trials. This is a harsh indictment of our bail system, but it is true. The reasons for the failure of bail to live up to its underlying policy are many. For one, the amount of bail one must pay to obtain his release is generally set solely by the nature of the offense.<sup>18</sup> The court has a standard rate for each classification of offense which it applies, in most cases, to determine the amount at which bail is to be set. Bail so set is said not to be excessive,

- f) he changes his plea to guilty to obtain a speedy disposition of his case.

FREED & WALD, *supra* n. 1 at 38; McCarthy and Wahl, *The District of Columbia Bail Project*, 53 GEO. L. REV. 685, 699-700 (1965); Note, *The Development Of Release On Recognizance And The Dane County Bail Study*, 1965 WIS. L. REV. 161-68; Wald & Rankin, *Pretrial Freedom And Ultimate Freedom*, 39 N.Y.U.L. REV. 641 (1964); *N.Y. Bail Study* 726-29.

However, it is possible that causes other than incarceration produce the enumerated effects.

<sup>16</sup> See n. 40, *infra*.

<sup>17</sup> In effect, the bail system as it is now administered does incarcerate the poor upon the mere allegation that a crime was committed.

<sup>18</sup> See *ATT'Y GEN. REP.* 62; Comment, *supra* n. 6 at 363-71; *N.Y. Bail Study* 712-15; Note, *Compelling Appearance In Court: Administration Of Bail In Philadelphia*, 102 U. PA. L. REV. 1043 (1954) (hereafter called *Phil. Bail Study*).

even though the defendant can not obtain the amount needed to affect his release.

It is true that there is some relation between the offense committed and the probability that the offender will flee to avoid prosecution. However, the relationship is slight,<sup>19</sup> and there are many other indicia which more accurately gauge the possibility that an offender will flee.<sup>20</sup> The theory of bail is that the accused has given over enough money to the court to satisfy the judge that the accused will attend his trial rather than suffer a forfeiture.<sup>21</sup> Then certainly the amount at which bail is set should depend, at least in part, upon the financial status of the individual, since the wealth of the accused to some extent determines what amount of money is the amount which he would not wish to lose by not appearing at his trial.<sup>22</sup> When bail is set solely with regard to the nature of the offense, many who offer little risk of non-appearance are kept in jail because they can not tender to the court the security demanded.<sup>23</sup> Hence, the bail system as administered today is unfair to the poor person.

A digression seems appropriate at this juncture to point out a rather startling fact. The American bail system generally does not deter any person it releases from flight, because the defendant who jumps bail forfeits nothing. This anomaly arises because the commercial bondsman charges the prisoner a nonreturnable premium. Thus, when the freed defendant fails to appear at trial, only the bondsman loses anything.<sup>24</sup> To combat this situation the bondsman, in some cases, demands collateral in the amount of the bond. Thus, he, in effect, forces the prisoner to be his own surety, and a mere matter of liquidability forces the defendant to pay the bondsman a premium for the bondsman's service. And since he may demand collateral, or refuse his services, the bondsman may decide who is to go free and who is to stay in jail. Hence, the bondsman, and not the judge, really determines

who obtains pretrial release, and then by a non-judicial process.<sup>25</sup>

Another reason why the bail system fails to release many who are theoretically eligible is because the system is used by some judges to keep people in jail.<sup>26</sup> This is done in two ways. Some judges, although they realize that it is not necessary to assure the accused's presence at his impending trial, will set bail at the amount usually set for the offense. A less subtle method, but equally effective, is to set the bail in an excessive amount.<sup>27</sup> The latter method works because usually by the time the prisoner has received a hearing by an appellate body on his claim that the amount of his bail is excessive, his trial has already ended. If the prisoner was found not guilty, then the question is moot. If he was convicted, he faces the difficult task of proving that the detention was prejudicial to the outcome of his case. In the event the prisoner is granted a hearing prior to his trial, he still stands little chance of getting released. This is due to the rule in most jurisdictions that the order of the bail-setting official will not be overturned unless the accused can demonstrate a flagrant abuse of discretion. But, even if he adequately proves his point, there is no guarantee that the appellate court will reset the bail at an amount within the defendant's financial capabilities.<sup>28</sup>

If one were to look for the intrinsic fault in our present system of pretrial release, from which all the above evils flow, he would find it to be that the bail system demands money be paid for one's release. The monetary element of the system discriminates against the indigent; and the indigent or nearly indigent comprise about one-half of all those in the United States who are accused of crimes.<sup>29</sup> The bail system subjects this segment of the population to incarceration, and frees the

<sup>25</sup> See text at nn. 5-6, *supra*. A New York bondsman declared, "If a person comes in and I don't know him or his lawyer we look for collateral; if they don't have it, we don't bother with them." FREED & WALD, *supra* n. 1 at 27.

<sup>26</sup> ATT'Y GEN. REP. 60; *Phil. Bail Study* 1038-41; Note, *supra* n. 6 at 1493.

<sup>27</sup> Myriad examples are given in GOLDFARB, *supra* n. 4 at 32-91.

<sup>28</sup> See, e.g., *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966); GOLDFARB, *supra* n. 4 at 73; Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. PA. L. REV. 1125, 1131-32 (1965). But see n. 15, *supra*.

<sup>29</sup> GOLDFARB, *supra* n. 4 at 32; WALD, LAW AND POVERTY 6 (1965); Packer, *Two Models Of The Criminal Process*, 113 U. PA. L. REV. 45 (1964); N.Y. *Bail Study*, table II at 707; *Phil. Bail Study* 1032-33.

<sup>19</sup> McCarthy & Wahl, *supra* n. 15 at 712-14.

<sup>20</sup> See text at nn. 53-54, *infra*.

<sup>21</sup> See text at n. 3, *supra*.

<sup>22</sup> Statutes usually provide that the character and financial ability of the defendant be considered as well as the evidence and nature of the crime, but the courts ignore these factors, probably because they can not obtain adequate factual information.

<sup>23</sup> ATT'Y GEN. REP. 66-68; McCarthy & Wahl, *supra* n. 15 at 679; Ares, Rankin & Sturz, *The Manhattan Bail Project*, 38 N.Y.U.L. REV. 80 (1963); N.Y. *Bail Study* 712-15; *Phil. Bail Study* 1032-33.

<sup>24</sup> Comment, *supra* n. 6 at 372; *Phil. Bail Study* 1060.

wealthy. This violates the principle of equal protection under the law, as the Supreme Court expounded it, because the poor are entitled to the same rights and privileges under the law as are the wealthy.<sup>30</sup>

The Supreme Court has not yet faced the question of whether the bail system, as practiced today, is a denial of equal protection. But if it does, it will probably answer the question affirmatively. The recent expansion of the concept of equal protection, that money should not determine the quality of justice an accused receives, draws one to this conclusion. Even if bail is only a statutory right of the defendant, granting such a right only to the rich is a denial of equal protection.<sup>31</sup>

If the judicial branch has been slow in acting on the monetary bail problem, some legislatures, law-enforcement agencies and private groups have not.

The pioneer among the private groups is the Vera Foundation. This eleemosynary organization instituted the Manhattan Bail Project, a release on personal recognizance experiment.<sup>32</sup> The purpose of the Project was to develop and test procedures and standards which would effectively enable one to estimate the probability that an accused, if released, would appear at his trial. Once these were established, prisoners who met the criteria<sup>33</sup> were recommended for release. The only security required of these prisoners to obtain their release was a promise that they would present themselves at their respective trials. Law students were used to interview the prisoners and verify the information.<sup>34</sup> Another Vera Foundation experiment,

<sup>30</sup> *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>31</sup> *Id.*

<sup>32</sup> The Project's basic premise is that financial deterrents to flight are overrated, and the bail requirement is unnecessary. The Project leaders felt that the defendant's ties with the community were the true guarantors of his appearance at trial. Botein, *The Manhattan Bail Project: Its Impact On Criminology And The Criminal Law Process*, 43 TEXAS L. REV. 326 (1965).

<sup>33</sup> The factors, which were weighted, were: employment record; family; references; length of local residence; current charge; previous record; special factors. FREED & WALD, *supra* n. 1 at 60-61.

<sup>34</sup> The theory was that bail was usually set by the nature of the offense because the bail setter had no way of obtaining verified background information upon which to base an individualized determination of the possibility of release on recognizance or the necessary amount of money required to deter flight. Botein, *supra* n. 32 at 326-27.

complementary to the Manhattan Bail Project, was the Manhattan Summons Project. This experiment took place at the station houses rather than the jails. When a suspect was brought to the station he was interviewed, and, if he qualified, a recommendation was made to the desk officer to issue a summons to him rather than arrest him.<sup>35</sup>

The Illinois legislature recently enacted a noteworthy innovation. Under the new practice an accused can secure his release by depositing with the court security worth ten percent of the amount of his bail. The security may take the form of cash, personal or real property. If he appears at the subsequent trial, ninety percent of the security is returned to him.<sup>36</sup>

These and other new devices, praiseworthy as they may be, are not enough. The cash bail plan, while injecting some real financial deterrent into the bail system, still discriminates against the poor. The Vera projects only aid those who offer virtually no risk of non-appearance at trial.<sup>37</sup> Moreover, the interviewers can only recommend, and the official who sets bail is free to ignore the recommendation.<sup>38</sup> Also, neither the Vera projects nor their progeny included all classes of offenses. The pilot program excluded recidivists and those thought to be unsafe to release on recognizance.<sup>39</sup> Probably the bail system, based as it is on financial status, can not be adjusted within its traditional confines to alleviate its evils.<sup>40</sup> This is because the basic flaw, money, is inherent in such a system. Thus, our legislatures must develop a new pretrial release process. Something other than a financial deterrent method should be adopted.

The Vera Foundation has, to some degree, solved the legislatures' problems of what type of a system should replace the present bail system. The projects have shown that many of those accused of crimes may be released on their word, because there

<sup>35</sup> U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE AND INTERIM REPORT ON BAIL AND CRIMINAL JUSTICE XXII-XIV (1965) (hereafter called INTERIM REPORT).

<sup>36</sup> ILL. STAT. 38 § 110-12. See generally, address by Professor Bowman to the Illinois Conference on Bail and Indigency, 1965 U. ILL. L.F. 35-41.

<sup>37</sup> One problem the Vera Projects faced was that the bail setting officer often took the failure to recommend the prisoner for release as a negative recommendation. INTERIM REPORT XXVII.

<sup>38</sup> FREED & WALD, *supra* n. 1 at 62-63.

<sup>39</sup> Narcotics offenses, sex crimes and homicides are generally excluded. These crimes compose about 20% of all defendants. INTERIM REPORT 75-85.

<sup>40</sup> Foote, *Forward: Comment On The New York Bail Study*, 106 U. PA. L. REV. 689-90 (1958).

are environmental deterrents inherent in our society strong enough to stay them from flight. These projects show that when a person has his family, friends and job all in one locale, he will rarely break such ties to avoid prosecution.<sup>41</sup>

It is true that many can not qualify for release under the Manhattan standards, but this does not mean that the basic theory behind the projects is not applicable to the American system of criminal justice. The basic theory of the Vera projects was that non-monetary deterrents to flight will be more effective than the present financial deterrent system.<sup>42</sup> Hence, by incorporating other deterrents, in addition to the environmental ones, into the system many more persons could be released upon their own recognizance. The most utilitarian deterrent which comes to mind is the criminal sanction. That is, a recognizance jumper would be subjected to criminal penalties.<sup>43</sup> Non-financial conditions could be imposed upon the defendant to accommodate some portion of accused criminals to whom release on personal recognizance can not be made available. These conditional releases could, for example, take the form of release in the custody of a third party, release only during the day time, or release restricting the defendant's freedom to a certain locality or place of residence.<sup>44</sup> Conditional releases are actually just other forms of non-financial deterrents to flight.

The foregoing demonstrates that the bail system can not continue to co-exist with other, more deep-seated, principles of our legal system, and that there are reasonable alternatives available. The next few years will see great changes in this area. The remainder of this Comment is devoted to suggesting the form the changes should take.

There is no need for pretrial release if one is not arrested. It is not necessary to arrest a person to compel him to appear in court to answer charges against him. The issuance of a summons or a citation can serve the same purpose. A police officer could be empowered to give a citation to any

<sup>41</sup> The Vera program recommended 40% of the 10,000 prisoners they interviewed between October of 1961 and April of 1964. In the first three and one-half months of its existence, the District of Columbia Bail Project freed about 17% of its interviewees. The default rate, in both programs, was negligible. FREED & WALD, *supra* n. 1 at 63-70.

<sup>42</sup> See n. 32, *supra*.

<sup>43</sup> California has recently initiated criminal sanctions. CAL. PENAL CODE §§ 1319.4, 1319.6. The Bail Reform Act of 1966 has made it a federal crime to fail to appear at trial when one is released on recognizance. 18 U.S.C. 3150.

<sup>44</sup> See 18 U.S.C. 3146(a) 1,2,5.

person whom the officer feels is releasable on his own recognizance.<sup>45</sup> Such a device has many advantages. The officer, and the accused, would not have to spend the time involved in traveling to the station, and the ensuing booking, printing, and the various reports that are required when a person is arrested. Also, there would be no need for a bail-setting hearing. The citation method would promote better feelings in the public mind about the police, since the minor violators will not be dragged off to jail as is now the practice. On a practical level, it would save custodial costs, and the savings could be diverted to other areas of law enforcement.

There could be some disadvantages in the system. For one thing, the law officer will not be able to determine if the person is wanted in connection with another crime. The other patent disadvantage in the citation system is that the officer can not adequately verify the information he must elicit from the accused upon which to base his determination of whether he will arrest the accused or issue a citation.<sup>46</sup> These inherent disadvantages can be offset, at least in part, by the intelligent use of discretion on the part of the officer. If he feels the accused is lying as to his past record or personal data, he should bring the defendant to the station house.

One might object that the police officer will not be able to intelligently determine whom he should arrest and whom he should cite. This objection is unfounded for two reasons. First, the police officer makes difficult decisions every day. There is no reason to suspect that he can not learn to apply the release standards appropriately. Secondly, the officer, at present, decides, largely on subjective grounds, whether to arrest or to release a suspect. The injection of a middle ground, issuance of a citation, between the poles of arrest and release, does not seem too burdensome or difficult a duty to impose on the police officer. There may be some concern as to the constitutionality of allowing an officer such wide discretion in denying a person his freedom on subjective grounds. Yet, he does the same thing when he arrests someone. When he performs this function he decides whether one will keep his freedom or not. Both of the above objections seem to take on a less bright hue when one

<sup>45</sup> ILL. REV. STAT., CH. 38 § 107-12 (1965).

<sup>46</sup> The citation interview should be limited to community ties. These questions are innocuous, and are speedily asked and answered, and least pry into the private life of the individual.

recalls that a form of the citation system has been in effect in the area of traffic violations for some time.

There is a danger that the police officer will be reluctant to use the citation method due to an antipathy to change or personal perverseness, preferring to arrest the wrongdoers. To combat this situation, the legislature could expressly state in the act the policy that the citation method is to be used to its fullest extent.

Another solution is to have the officer file a written report explaining why he arrested a suspect rather than issuing him a citation. The most drastic move would be to make it mandatory that the officer issue citations in certain instances. For example, the statute could dictate that the officer release all those accused of a crime whose maximum penalty is less than the maximum penalty for the failure to appear in compliance with a citation. Exceptional circumstances, which justify the officer arresting an individual, should be enumerated in the statute. Thus, the defendant who is intransigent, belligerent, clearly unqualified for release, or whom the officer feels is lying about his background should come under the ambit of exceptions.<sup>47</sup>

Let us assume that the officer decides to arrest an individual, rather than issue a citation to him, and brings the defendant to the station. At this point a precinct summons system, similar to the Manhattan Summons Project,<sup>48</sup> should be made available to the defendant. The advantages of the system are similar to the advantages of the citation system; it saves costs and promotes good public relations.<sup>49</sup>

One may wonder why the station house summons is needed if there is a citation system in effect. One reason is that the station house summons device is more sophisticated than the citation plan. The interviewer can make a much more complete survey of the defendant's background than can the police officer, and can quickly verify the information. Hence, the desk officer who decides whether to book the accused or issue a summons to him can make a better informed determination of the releasability of the defendant than can the officer on the beat. Another reason that a station house summons program is advisable is that both the interviews and release decisions are performed by persons not involved in the events leading up to the

appearance of the defendant in the station house. Hence, a dispassionate judgment as to the releasability of the accused may be obtained by using the station house summons system. Finally, the interviewer and the desk officer will accrue a certain expertise in these matters not found in the ordinary police officer. Since the release decision can be made prior to incarceration, this second pre-arrest hearing is not a duplication, but a much needed implementation of the police officer's release decision.

One aspect of the summons plan which merits close consideration is how one keeps the interview from being used as an interrogatory device. When one considers the zeal of some law enforcement officials and prosecutors, it seems wise to exclude them from participating in the interview process.<sup>50</sup> The safest course would be to make the interview and its fruits inadmissible in any judicial proceeding except the bail hearing and any appeal therefrom. This would eliminate the possibility of using the interview to elicit incriminating evidence. Also, it would not subject the accused to the necessity of foregoing the interview and possible release if he wishes to assert his privilege against self-incrimination.

To insure full utilization of the summons system, incentives similar to those enumerated in relation to the sidewalk citation system may be adopted.<sup>51</sup>

If the desk officer determines that the defendant is not eligible for release, then the individual will be jailed. Thereafter, as soon as possible, the prisoner should be given a hearing before a judicial official to determine whether he is available for pretrial release.<sup>52</sup> One may question whether such a third stage is necessary, since the defendant has already had two chances to be released. The reason for this third step is, at base, that it would be imprudent to not have, at some point in the system, a judicial *determination* of the releasability of the defendant. The fear of misuse and abuse of a process so dependent upon discretion and subjectivity draws one to the conclusion that the judiciary should have a place in the system. A secondary reason for a judicial hearing, after arrest, is that it is the

<sup>47</sup> See n. 45, *supra*.  
<sup>48</sup> See text at n. 35, *supra*.  
<sup>49</sup> See INTERIM REPORT 70-71.  
<sup>50</sup> Apparently, some of the programs patterned on the Manhattan Bail Project have been guilty of preventing the interview. INTERIM REPORT XXVII, 108. Such uninvolved interviewers might increase the cost of the programs, but not necessarily. The Manhattan Projects used law students who donated their services. For a good discussion of the types of interviewers that could be used *see id.* at 85-99.

<sup>51</sup> See text at n. 47, *supra*.

<sup>52</sup> See ILL. REV. STAT., CH. 38 § 110-2 (1965).

earliest time that the accused may obtain counsel. Representation of the accused by an attorney could be an aid to the official in making the correct decision. For example, he could bring before the hearing officer, in a professional manner, any facts inadvertently overlooked at the lower level hearings, which might bear upon the releasability of his client.

To assure that the post-arrest hearing official releases all those who could be released, some type of force factor should be introduced into the system. One professional study group draft on proposed standards for pretrial release suggests that all those accused of misdemeanors should be presumed releasable on their own recognizance. It contemplates that there be no investigation by the court of the defendant's background unless the state requests that the accused be denied pre-trial release. There appears to be no valid reason for not expanding the presumption to include all those cases where the accused is charged with a felony whose maximum sentence is less than the maximum sentence imposable for recognizance jumping.

If the state asks that the accused be denied release, what factors should be investigated and brought to the attention of the official? The following have been suggested as guides:

- a) The length of defendant's residence in the community.
- b) The defendant's employment status and history and his financial condition.
- c) The defendant's family ties and relationships.
- d) The defendant's reputation, character and mental condition.
- e) The defendant's prior criminal record, including any record of prior release on recognizance or on bail.
- f) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence.
- g) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

This seems to be a satisfactory list. Especially gratifying to those who adhere to the Vera Foundation theory is the inclusion of an omnibus clause, provision "g", which indicates that the authors of the draft consider the pretrial release program to be based upon the character and background of the individual. Since this policy is recognized, the authors indicate that other factors, which are

out of the ordinary, may be of prime importance in determining the releasability of an individual.

The results of the investigation should be put in written form and presented to the official who is to set bail, along with any recommendation as to the releasability of the accused and any conditions which the interviewer feels are necessary.

The most difficult point in a comprehensive pretrial release system is what is to be done with the prisoner the official feels is not eligible for release. The solution, and apparently the only one, is to allow the accused to be detained pending trial. The present system detains those who can not adequately assure the court they will appear at their trials if released. The problem arises when one ventures into the area of detaining those who present a serious threat to society, and not a threat to the integrity of the judicial process.<sup>53</sup>

Although it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual.<sup>54</sup> That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion. If preventive detention serves a beneficial public interest, then it should be frankly recognized and allowed. However, the rights and interests of the defendant should be adequately protected. Under the present bail system the defendant has virtually no protection.

One objection to pretrial detention is the possible prejudicial effect upon the outcome of the defendant's trial, due to the defendant's inability to prepare his defense as well as the free man.<sup>55</sup> To keep intact the integrity of the guilt-determination process, such a possibility should be minimized. This end could be achieved by establishing a detention facility for those preventively detained or detained to prevent flight which is separate from the jail. Jail is a place to penalize and rehabilitate one convicted of a crime. Pretrial detainees are not being subjected to punishment for a crime, but are detained to insure that they will not injure the judicial process or society. Jail restricts the unconvicted accused to an extent greater than that required to adequately carry into effect the purpose of his detention.<sup>56</sup>

<sup>53</sup> 18 U.S.C.A. 3148 (Bail Reform Act of 1966) allows preventive detention.

<sup>54</sup> See text at nn. 26-27, *supra*.

<sup>55</sup> See n. 15, *supra*.

<sup>56</sup> See FREED & WALD, *supra* n. 1 at 87-88. See generally GOLDFARB, *supra* n. 4 at 247-48.

If the result of the judicial release hearing is that the accused is to be detained, then he should be entitled to a *de novo* hearing before a court of general criminal jurisdiction. Such a hearing is necessary to safeguard all the rights of the accused. Since the contemplated pretrial release scheme is designed to release all but a few, the burden upon the criminal courts should be slight. Such a hearing would be much like the pretrial release hearing. The factors and their weighting should be open to contest by the accused. The procedure should not be adversary, in the sense that a duty should be imposed on both parties to bring all the pertinent facts before the judge, so that he may be aided in his decision-making function.

To alleviate the present problem of the slow appeal, a speedy appeal from the decision of the court of general criminal jurisdiction should be allowed. The present right of the accused to appeal from a bail decision is so slow that it is illusory.<sup>57</sup> An almost immediate appellate process would, of course, be ideal in all criminal cases, but the bail situation should have priority on the appellate calendar. This proposition is made necessary if one agrees that pretrial incarceration influences the outcome of the defendant's trial. If one adheres to the belief that incarceration does not affect the outcome of the trial, then the immediacy of the appeal may not appear to be so strong. However, when one considers the nature of a release hearing as opposed to the nature of a criminal trial, the former still appears to hold its place of priority on appeal. More specifically, the guilty decision in a criminal trial is supposed to be based on evidence beyond a reasonable doubt that the accused committed a crime. The refusal of pretrial release can not be based upon evidence beyond a reasonable doubt. The release hearing must determine that the accused only *probably* committed a crime. But, the court must also decide if the threat that the accused will commit a future crime is so manifest that no form of conditional release will sufficiently insure against the commission of this future crime.<sup>58</sup> Such a decision can not be said to be a moral certainty; it is only a prediction. Hence, should not one denied his freedom by a prediction have priority, on appeal, over one denied his freedom by a decision supposedly beyond a reasonable doubt?

In fact, this latter point illustrates the strongest

<sup>57</sup> See text at nn. 27-28, *supra*.

<sup>58</sup> *United States v. Davis*, 37 F.R.D. 450 (D.C. 1965).

objection to preventive detention. It is probable that a preventive detention plan will wrong some defendants, just as our system of criminal justice wrongly convicts some. But the present system of setting bail, with its almost complete lack of safeguards, in all probability, wrongs many more. The desired objective underlying an overt preventive detention system is to include as many safeguards as possible, to assure that the least number are wronged by the system.

There is a question of what classes of defendants should be preventively detained. A general answer is to hold only those who must be held. Those who pose a thread of immediate physical violence should be detained. Proven recidivists should be detained. Recognizance jumpers should be detained, but only if no conditional release is adequate to assure the court that such defendants will not appear at trial. Those who can not be released under any condition that will be adequate to restrain flight should be detained.

The most difficult case is the defendant who is free pending trial, and is accused of committing another crime while free. No set rule can be stated in these matters. The nature of the second crime and its relation to the original offense could be important. Yet, the mere allegation of a second crime should not be enough to deny release after arrest, unless the circumstances are such that, regardless of the original offense, release would be denied. To allow the first offense to be automatically encompassed in the second release determination would open the system to abuse. It is submitted that the only solution available is that if the state wishes to deny the defendant his freedom, because he has been charged with a second crime while free pending trial for a separate crime, then the state must prove by a preponderance of the evidence before a court of general criminal jurisdiction that the accused committed the first and the second crimes. On first reading, this may appear to be a too strict requirement, but anything less would lack sufficient safeguards for the accused, and allow preventive detention to be used as a method of punitive detention.

It should be stressed that this half-trial of the second crime should take place within a very short time after arrest so there will be no undue incarceration of the defendant. Another important point is that the half-trial should be an adversary proceeding, to insure that the state is actually put to its proof.