AN ANALYSIS OF THE AMERICAN BAIL SYSTEM

by

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TABLE OF CONTENTS

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CHAPTER I

THE ORIGIN AND HISTORY OF BAIL

> Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.
>
> -Mr. Chief Justice Vinson

Introduction

The purpose of this research project is to explain, examine, and evaluate the American bail system. Main emphasis will be placed on: the origin and history of bail; a survey of procedure and bail practices in Manhattan, Kansas; constitutional and statutory provisions concerning the right to bail and the constitutional guarantee against abuses in the bail bond system; "excessive bail;" judicial and extrajudicial alternatives to the problems imposed by bail and the movement to change the present bail system. Preventive and pretrial detentions as aspects of the problem will also be discussed. The first chapters will deal with the origin and history of the American bail system; the latter chapters will be concerned with bail in more recent times and the present bail system. A variety of historical material including Biblical oaths

and Roman law will be used for comparative and informative reasons. The American bail system, however, will be shown to have had its origins in medieval Europe via English common law rather than in Biblical times and Roman law.

This research involves the use of a broad range of data: historical, sociological, quantitative and legal.

The various sources utilized in this research study are designed to furnish support to the central idea of this thesis that: Although improvements have been made, the present bail system, in many cases, discriminates against indigents and Black Americans, needlessly detains hundreds of people, and raises a number of constitutional questions about some aspects of its usage.

The Nature of Bail

The first order of business is a discussion of the nature and purposes of bail. Bail serves both general and specific purposes. Various connotations are given the term. The following will aid in a clarification of the term. For the most part:

> The effect of bail is to release the principal from the custody of the law and to place him in custody of keepers of his own selection, and the purpose of bail is to assure the presence of the principal in court to be amenable to process and secure the payment of a debt or other civil duty.[1]

According to the Corpus Juris Secundum, "The word 'bail' has various connotations, and as a verb it means to deliver an arrested person to his sureties, on their giving the requisite obligation or security for his appearance."[2] Also according to Black's Law Dictionary:

> Bail, v. To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court.
>
> Bail, n. The surety who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated. Those persons who become sureties for the appearance of the defendant in court.[3]
>
> Bail bond
> [T]he obligation given under regulatory statutes to secure the defendant's appearance.[4]

Thomas Cowan defines bail as "the money or property that an arrested person puts up inorder that he may go free until his trial."[5] Bail is defined in the Dictionary of Criminology as follows:

> [B]ail is the method whereby an arrested person is released by virtue of his having placed certain securities as assurance of reappearing on a prescribed date or time for the courts action.[6]

There are two methods of meeting bail: By bond as defined above in the form of money, property or other security, and by recognizance. Recognizance is an

obligation or promise (written or oral) of the performance of some act; such as appearance, and constitutes a direct obligation to the creditor. Samuel Kling defines the term as:

> An obligation entered into before a court or officer, duly authorized to receive the same, with condition to do some act or pay some money therein specified as required by law. It is kept as a matter of record. In some cases it is signed and executed by the parties; in proper authority and making acknowledgement of the obligation, which is noted on the record without being signed by the party or parties bound.[7]

Historical Roots Of Bail

Long before the use of money, or property as bail, the system of bail was more concerned with oaths taken as obligations. These oaths were considered binding until performance. Oaths have been, and still are, an important part of our legal system. They have been in existence almost, if not as long as man has. The Bible has several examples of oaths. Job made some sixteen oaths to God covering various aspects of religious and moral misdeeds.[8]

Other Biblical examples of oaths are as follow in Genesis and Joshua respectively. Example 1:

> And Abraham said to his servant, the oldest of his house, who had charge of all that he had, "Put your hand under my thigh, and I will make you swear by the Lord, the God of heaven and of earth, that you will not take a wife for my son from the daughters of the Cannaanites, among whom I

> dwell, but will go to my country and to my kindred, and take a wife for my son Isaac....But if the women is not willing to follow you, then you will be free from this oath of mine; only you must not take my son back there." So the servant put his hand under the thigh of Abraham his Master, and swore to him concerning this matter.[9]

Example 2:

> But all the leaders said to all the congregation, "We have sworn to them by the Lord, the God of Israel, and now we may not touch them. This we will do to them, lest wrath be upon us, because of the oath which we swore to them.[10]

From these Biblical oaths one can easily see the obligations involved therein. The term "recognizance," as defined previously, may be classified as a form of oath or swearing. That is, a defendant takes an oath agreeing to appear for trial or perform some other specified act.

Roman Law

Roman law did not have as great an effect upon the American legal system as did the English common law. The American bail system had its origin in medieval Europe, and it developed out of the English system of common law.[11] Roman law has influenced our legal system; however, for the most part, the common law has been the system most used and adopted in America. All but one of our fifty states -- Louisiana -- have a system of common law. However, California and Texas have elements of civil law due to their Spanish heritage.[12] Louisiana was influenced to adopt the French civil law system (code law) during the French control of the territory. In fact, Napoleon saw

to it that all territories under his control adopted code law. It should be pointed out that in all American jurisdictions, law is a mixture of both systems.

The purpose of this section on Roman law is to present the reader with information in order that he may see the similarity of the Roman law concerning bail to that of the early Germanic tribes of Europe. Bail during the early Roman period was more implied than spelled out. The English law is more specific.

The Roman laws regarding bail are found, for the most part, implicit in obligations and pledges. These obligations and pledges acted as sureties. David Daube lists three kinds of surety with regard to obligations: "spondere," "fidepromissio," and "fideiussio."[13]

> "Spondere" means to promise, but, in the sources, "sonsor" means, not anyone who promises, but only him who promises for somebody else, a guarantor, a surety.[14]

The connotative origin of "fidepromissio," seems to be uncertain. According to Daube:

> "Fidepromissio" is an unmitigated artefact, not part of the real world in any sense, in any source. The Thesaurus has not got it. It leads a vigorous life in texts reconstructed by modern authorities who lack the insight that the road from verb to action noun tends to be ardous and may never be traversed.[15]

The "fideiussio" was a type of formal promise with no suretyship involved. It can be noted that there is similarity in the use of these three terms. They are all forms of obligations.

> "Fideiussio" may date from around A.D. 200; hardly from long before. Gaius does not

> employ it. It is indeed conceivable that it was coined, or made at home in learned discussion, by Scaevola and his pupil Papinian. It is not in the Codex Theodosian, though the "fideiussor" is.[16]

The Theodosian Code provides for the obligation and pledge. Book XV, Title 14, Section 9 provides for these. For example:

> Every emancipation made in the times of the tyrant* shall remain valid;....the decisions of private judges, chosen by assent of the parties and appointed under penalty of a mutual promise to abide by the award, shall remain valid, since judgements once rendered must not be disturbed;....declarations voluntarily made before any person shall remain valid;....letting and hiring shall retain inviolable effectiveness;....transactions terminated by oath shall remain valid; the obligation of a pledge or a trust shall persist.[17]

Thomas C. Sanders gives the term "fidejussores" some consideration in his work concerning Roman law. He is concerned with the Institutes of Justinian.

LIBER PRIMUS

Tit. XX De Fidejussoribus

> It is customary that other persons, termed "fidemussores," should bind themselves for the promissor, creditors generally requiring that they should do so in order that the security may be greater.[18]

Procedural Roman law has traces of liability, security and obligation. According to W. W. Buckland in his discussion of the Arbital Origin of Roman Procedure:

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*Eugenius

> If a defendant would not take the proper procedural steps after he had been summoned, or if he evaded summons by hiding, the Praetor would order seizure of his goods, "missio inpossessionem." The Arbitrator ("iudex"), a private citizen, must be one chosen by parties in agreement. But if the defendant persisted in rejecting names, without reason, he was probably treated "indefensus," liable to "missio inpossessionem." In some cases security was required for various purposes. A defendant who refused this was "indefensus." These securities were in form of contracts, like our recognisances, and like them, they could be compelled and their content was fixed by the magistrate.[19]

A discussion related and somewhat similar to this is given by Rudolph Sohm. He discusses the use of the depositum, or bailment, the "pignus," or pledge, and the innominate real contracts. All these seem to be related to the surety system. They are as follows:

> Depositum, or Bailment.
>
> Depositum arises where A delivers a movable thing to B for the purpose of gratuitous safe-keeping. Both parties are bound to do all that is required by bonafides. In the first place, and in all cases, the depositary (i.e. the receiver of the depositum) has a duty towards the depositor: he is bound to re-deliver the thing deposited. If he fails in his duty, the depositor has acti depositi directa. It is only in circumstances that the pledgor incurs a liability as against the depositary.[20]
>
> Pignus, or Pledge.
>
> Pignus arises where a thing is delivered by way of a pledge....Like commodatum and depositum, pignus is a bonae fidei negotium.... It is only in certain circumstances that the pledgor incurs a liability as against the pledgee, e.g. to compensate him for expenses incurred in connexion with the pledge.[21]

Innominate Real Contracts.

> The Romans, namely, adopted the principle that, wherever there were mutual performance, the party who had performed his promise, should, on the ground of such performance, be entitled at once to exact counter-performance, from the other. The action, not on consensus coupled with performance (res); in a word, it was based on a real contract.[22]

Germanic

The Germanic tribes of Europe is where our present bail system originated. Elsa DeHaas has written one of the most scholarly and comprehensive works on the origin of bail to the year 1275. She traces it from the Germanic tribes to the Medieval era. According to DeHaas, the Continent of Europe has been conjectured as being the birthplace of the prototype of our modern bail system.[23] The legal history of England was profoundly influenced by the traditions and customs of the Germanic tribes during the pre-Normanic and Normanic periods of Europe.

Elsa DeHaas contends that:

> The study of the origin of bail in English procedure takes one back to the institutions of the Anglo-Saxons in England and to some extent, in connection with other Germanic tribes to the continent of Europe. This legal history of England, in its earlier states, is intimately associated with that of the Continent.[24]

She also acknowledges the fact that the history of bail is very scanty, obscure, and in many cases ambiguous. Hence the history concerning this early period has many gaps.[25] However, to a great extent, the material has been reconstructed so as to provide a substantial frame of

historical reference.

Bail, therefore as we know it, seems to have had its origin in medieval Europe. Its origin is deeply embeded in the "wergeld" pledges.[26] There are some German scholars, however, who hold that the essential nature of bail is found in the hostageship system. That is, suretyship evolved out of the institution of hostageship. As a war tactic, a hostage would be held until another person's promise was fulfilled or some desired consequence achieved. Eventually, the site of the practice shifted from the battlefield to the courtroom.[27]

This represents the two views concerning the origin of bail: The wergeld pledge -- the next of kin was to pay the bail if the accused were unable to do so -- and the institution of hostageship.

Before concluding this section, it should be mentioned that hostageship developed as a system of surety rather than a contract or promise. There were cases in which a third person (a relative, friend, etc.) would give support for a defendant's trustworthiness. He was then released in the custody of the surety. The surety in many cases, however, was the hostage. This hostage was liable and held responsible if the defendant failed to keep his promise to return or whatever. Such were the early Germanic bail practices in Europe.

Anglo-Saxon

The influence of the Germanic tribes upon the history

of English political thought, jurisprudence and common law was great. The traditions and customs of these early tribes are generic in the development of English common law in that customs and traditions molded the common law.

The practice of "wergeld" payments was a traditional carry-over to the Anglo-Saxon laws. According to Elsa DeHaas:

> The first mention of the practice of wergeld payment in the Anglo-Saxon laws that have come down to us is found in those of Aethelberth of Kent (604): "If he slays a smith in the king's service, or a messenger belonging to the king, he shall pay an ordinary wergeld." This was the most acceptable way of redressing an injury. "Buy off the spear or bear it."[28]

Furthermore:

> When reading the laws of the Anglo-Saxon kings, we find not only lists determining the value of the lives of the various classes in the community, the king, of course, leading the social hierarchy, but also long tables fixing the amount to be paid for the loss of various limbs and bodily faculties.[29]

From this one can easily see the customary development of Anglo-Saxon common law in regards to bail.

Tribes played an important part in the development of the bail tradition. The family (kinship), or claim provided the center and foundation on which the bail (wergeld) system was possible to structure itself. This was a mutual arrangement. The kinsmen were not designated as sureties by law, but perhaps a natural conclusion that they would be willing to assume the responsibility of such

a function and accordingly they were appealed to first.

The Anglo-Saxons appear to have fully developed the system of suretyship. In fact, it should be mentioned that the origin of bail shows one of the first appearance of contract in our system of law. Suretyship was strongly emphasized by the Anglo-Saxons. The contract is itself a form of suretyship just as bail. In fact, the German formal contract acted as a form of bail. For example:

> When a man is charged with an offence, and he is compelled to give pledge, and he has not himself aught to give for pledge, then goes another man and gives his pledge for him, as he may be able to arrange.[30]

In other situations, if the debtor could not pay a "Fidjussor" stood in his place, paid the fine for non-observance of demand ("borhbryce"), and suffered execution.[31] This practice is somewhat similar to the hostageship system.

Normanic

English political history and jurisprudence was also influenced by the Norman invasion. Although the Normans did not bring written laws with them, they did not leave their customs and traditions behind. Therefore, some innovations and assimilations resulted subsequent to their invasion.

Around 1078, the English accepted dueling as a form of proof or surety. This innovation was initiated by William I. Thus, the wergeld pledge was substituted with

afflictive punishments. The duel, as the wergeld pledge, called for sureties to present the parties involved before performance was possible.[32]

According to the Leges Henrici Primi:[33]

> Whoever is impleaded, at the suit of the king, by one of his judgesm must give vadium recti security that he will answer the charge, and make good the damage, that may be awarded against him....If he refuses to give the security required, after it has been three times demanded, he is guilty of overseunessae, and may be detained in custody till he finds bail or gives satisfaction.

A great many years after the invasion of the Normans, there was a system from which the king gained all the benefits. This involved a royal proceeding. The injured party took very little part in the proceeding. According to T. F. T. Plucknett:

> He was not called upon to fight; neither did he get back the stolen goods. There is no doubt what happened to them -- they went to the king. The convicted theif forfeited all he had, as well. Since he forfeited the stolen goods, the law was led in the course of time to the curious conclusion that a thief had acquired property in them (sic) by his crime.[34]

Another important Normanic contribution is the "frankpledge" system.[35] The frankpledge system's primary purpose was to maintain order. Its purpose was not to act as bail; however, it performed the duties of bail in securing the accused's appearance at trial. The frankpledge system evolved out of the Anglo-Saxon suretyship arrangement. Unlike bail the frankpledge was a general surety system.

This system operated continuously as a tool for the keeping of law and order.

Development of Bail in England

Because of its origin and development, bail is an inherent part of English history and tradition. This is where customs and traditions come to play a great part in the development of jurisprudence and political theory. These traditions and customs were later to be formulated into the common law and greatly influence its growth. Such was the case with bail too.

Magna Carta

The Magna Carta, or Great Charter, had a profound effect upon the legal and political history of England. The barons assembled at Runnymede in June, 1215, provided a force that is still alive some 750 years later. The Magna Carta represents a great document in our legal and political history. It was this document that was to greatly influence Sir Edward Coke, "the oracle of our law," some one hundred years later.

The barons drew up the Magna Carta to restrict the king. In doing so, they provided protection concerning bail and fines. Chapter 29 of the Article of the Barons provided that:

> (9) A freeman shall be amerced for a slight offense in accordance with the magnitude of the offense, saving his contentment; and a villein shall be amerced the same way, saving his wainage; and a merchant in the same way

> saving his merchandise, by oath of honest men of the neighborhood.[36]

And Chapter 39 of Magna Carta, which gives implication of the origin of "due process", provides that:

> No freemen shall be taken or [and] imprisoned or disseissed or exiled or in any way destroyed, nor will we go up on him or send him, except by the lawful judgment of his peers or [and] by the law of the land.[37]

It should also be mentioned that the roots of the revered right to habeas corpus have been traced to the forementioned Chapter 39 of Magna Carta.

As history proceeded there were many abuses that erupted from the personal discretions of the sheriffs, who admitted the accused to bail at this time. These abuses were more apt to erupt now than before because money bail had replaced hostageship and pledges.

The Statute of Westminister I attempted to secure uniformity, standardization, and to correct the abuses that had erupted into the system. This statute grew out of an extensive inquest in 1275 that revealed fraudulent bail practices. The Statute of Westminister I established which crimes were bailable on the presentation of sufficient sureties and which were not.[38] The statute enumerated those persons who were not to be bailed by the sheriffs. The list provided that:

> [1] Such Prisoners as before were outlawed and,
>
> [2] those which have abjured the Realm
>
> [3] Provers, and

[4] such as be taken with the Manor, and

[5] those which have broken the King's Prison,

[6] Thieves openly defamed and known, and

[7] such as be appealed by Provers, so long as the Provers be living, if they be not of good name, and

[8] such as be taken for House-burning feloniously done, or

[9] for false Money, or

[10] counterfeiting the King's Seal or

[11] Persons excommunicated, taken at request of the Bishop, or

[12] for manifest Offences, or

[13] for Treason touching the king himself.[39]

Darnel's Case

Darnel's Case used the Magna Carta, Chapter 39, as its precedent in declaring that the deprivation of liberty of the subjects is in violation of said chapter if it is done without due process of law. Another argument was that the refusal of bail could possibly result in the perpetual imprisonment of the defendants.

To provide a better understanding of the facts of the case and how it led to the drafting of the Petition of Right of 1628, Richard Perry states:

> A number of persons refused to pay the forced loan, and were imprisoned by order of the king. Among these were five men of ancient families and great influence. They brought the question of the legality of their imprisonment before the King's Bench on a writ of habeas corpus. The Court returned the prisoners to jail, and

> the case became a cause ce le' bre which focused public attention upon the right of personal freedom and led directly to the Petition of Right.[40]

Petition of Right

As time went by the English people became more enlighened and more concerned about personal liberty. They had witnessed a history that had encompassed the preventions of trials, abuses of personal liberties, and long imprisonments which were made possible by "excessive bail and fines." Even as far back as the reign of Henry VI (1444), Parliament had provided for the release of prisoners "upon reasonable sureties of sufficient persons." Many of the monarchs disrespected the personal rights and liberties of their subjects. They were divine right leaders and their leadership were not to be questioned. Therefore they sought to usurp what freedoms the subjects did have. During his reign, Charles I provided for the committing of many prisoners. The Petition of Right provided that prisoners committed at the king's command should be released on bail before trial.[41] The Petition of Right thus contributed much in the establishment of some of the essential liberties of the subjects.[42]

Bill of Rights of 1689

Some sixty years after the Petition of Right Parliament passed the Bill of Rights of December 16, 1689. This bill marked the beginning of Parliamentary supremacy. It further provided for, and spelled out, those liberties

long-desired but usurped by the monarchs. This particular legislation provided in statutory form, provisions passed by Parliament on February 12, 1689 -- the Declaration of Rights. The Bill of Rights of 1689 was presented to William and Mary when they ascended to the throne as king and queen of England.

The provision banning excessive bail was incorporated into the English document to remedy one of the defects of the Habeas corpus Act of 1679, which had been enacted some ten years previously. As Perry states:

> The prohibition of excessive bail was designed to correct a defect of the Habeas Corpus Act of 1679. Although the statute did much to improve the effectiveness of the writ of habeas corpus in protecting personal liberty, the king's judges found a way to keep persons in prison for long periods of time without being brought to trial....They set bail in amounts greater than the prisoners could possibly hope to raise, and thereby frustrated the safeguards of the Habeas Corpus Act. The Bill of Rights corrected this abuse.[43]

Despite this correction there were several defects in the Habeas Corpus Act other than the excessive bail problem. For example:

> [T]he court had no power to examine the truth of any return made by the jailer, and the statute did not apply to any detention not on a criminal charge. These defects were remedied by a statute adopted in 1816. Furthermore, under the 1679 act only the prisoner himself could apply for the writ.[44]

It was not until 1704 that one's agent or friends could apply for him to get the writ. This proves to be very important in that "the prisoner may be sick, or mentally

incompetent, or incommunicado."[45] Even so, the Habeas Corpus was important. According to Sir Ivor Jennings:

> The writ of habeas corpus keeps rising in English history because it was and still is the ultimate legal remedy to protect the liberty of the subject. The right to freedom of the person is useless if there is no court to enforce it or no remedy which the court can use.[46]

Titus Oates Case

The Titus Oates Case is significant because of its ruling on the matter of "excessive bail and fines." This case involved several charges of perjury against Titus Oates. Oates was convicted on the perjury charges and the jury awarded the full amount of damages claimed, which amounted to 100,000 pounds. He was sentenced to prison until the amount be paid. According to Irving Brant:

> In effect he was given two sentences of life imprisonment; the first for inability to pay the judgement of 100,000 pounds for slandering the Duke of York; the second imposed directly for the perjuries. In addition he was fined 2,000 marks, ordered to be pillored twice and to be whipped from Algate to Newgate and later from Newgate to Tyburn. After that, he was to stand an hour in the pillory as "annual commorations" of his five worst offenses.[47]

These sentences remained enforced for the sum of fourteen years. After the unseating of King James by the revolution of 1688 ("Glorious Revolution"), nine judges protested the Oates convictions. They declared that they were "contrary to law and ancient practice." They violated the rights of the recently adopted Bill of Rights "that excessive bail ought not to be required, nor excessive fines

imposed, nor cruel or unusual punishments inflicted."[48] Hence the libel judgement was reversed, freeing Oates from one of the life imprisonment sentences. His annual appearance in the pillory and his prison sentence were pardoned by the new king.

Growth of the Common Law

The English people had been deprived of their fundamental rights and personal liberties through the centuries by several monarchs; especially the Stuarts. They had witnessed the abuses of liberty by the use of high bail that resulted pretrial detention for long periods of time. They had witnessed a judicial system subservient to the monarchs. As a result, many British subjects lanquished in jail.

According to Sir Frederick Pollock:

> The Bill of Rights was the declaration of a people whose long-suffering was exhausted that these things and such as these should no longer be. It was an exercise of political power to ensure that the legal securities for freedom and good government should be fully, fairly, and actively maintained in force.[49]

The British also suffered from the system of justice used in England during this time. It usually took several years for judges to travel around the country to decide cases. Prisoners, therefore, had to stay in jail until the judges could try their cases. This system was known as the system of "traveling judges" (e.g., Blackstone, Coke, Livingston, Glanville, Bracton and others). This system

was also a part of the development of "common law" in England. Common law may be called "judge-made law." The judges made decisions in cases according to the local customs. "Stare decisis" also had its origin and growth during this time. That is, in order to avoid multi-interpretations and rulings, the "traveling judges" ruled according to previous decisions (decisions established by previous judges in similar cases). Thus came great principles of the common law out of a common tradition and experience.

The monarchs for some time easily controlled the judicial branch. Due process of law was unlikely to be protected if the accused had disturbed the monarch. Several judges were dismissed when they ruled against the monarch's wishes. According to Irving Brant:

> On account of decisions unfavorable to the crown, or because judges would not agree in advance to decide as the monarch wished, Charles I removed three judges, Charles II removed ten, and James II got rid of thirteen during the three short years before his manifold follies caused the British people to drive him from the throne.[50]

These actions eventually led to the thought of judicial independence. The traditional rights of the subjects were usurped as a result of the monarch's power over the judiciary. According to Pollock: "The Bill of Rights, Petition of Right, and the Great Charter itself, all purport to do no more than make a solemn affirmation of rights already allowed."[51]

Regarding the experience of the British people and the

effect of their experience, Pollock wrote:

> It was the determination of England that the laws which guarded the liberties of Englishmen should thenceforth wake and not sleep. To a great extent they had slept under the Tudors; they might have slept for generations instead of a perverse pendant; even after the Commonwealth they might have again fallen into lethargy if Charles II had learnt any lesson of statesmanship from his misfortunes, or James II had been possessed of common prudence. Happily for the nation the accumulated follies of the Stuarts made this impossible. The Bill of Rights takes up the interrupted note of the Petition of Right, and is the last word of a nation who had trusted and had been deceived till they could trust no more. Legally there is nothing new, or hardly anything; politically there is the difference between taking a man's word and taking security.[52]

Summary

All of this was a part of the English experience; the laws were a result of these experiences. The abuses, and later the prohibition, of "excessive bail and fines" were a part of the English tradition and legal history. English history is marked with deprivations and usurpations of freedoms and rights. Hence came the Magna Carta of 1215, the Statute of Westminister I of 1275, the Petition of Right of 1628, the Habeas Corpus Act of 1679, the Glorious Revolution of 1688 (marking the beginning of Parliamentary supremacy), and the Bill of Rights of 1689 prohibiting "excessive bail and fines."

As a result of these experiences the English protection against pretrial detention encompassed three separate but important elements:

(1) The determination of whether defendants had the right to release on bail;

(2) the habeas corpus procedure developed to implement defendant's rights; and

(3) the excessive bail clause of the 1689 Bill of Rights.[53]

CHAPTER I: FOOTNOTES

1. 8 C.J.S. "Bail" Sec. 4 (1964).

2. Id. Sec. 4 at 7.

3. Black's Law Dictionary 177 (4th ed. 1951).

4. Id. at 154.

5. World Book Encyclopedia "Bail" 1027 (1964).

6. R. Nice, Dictionary of Criminology 17 (1965).

7. S. Kling, The Legal Encyclopedia and Dictionary 425 (1970).

8. Job 31. 1-40 (Oxford Eng. ed.).

9. Genesis 24. 2-10.

10. Joshua 9. 19-20.

11. Biblical and Roman material is used to show the similarity and the history of the oaths and pledges. The American bail system had its origin in medieval Europe.

12. Am. B. Found., The Legal Profession in the United States 6 (1966).

13. D. Daube, Roman Law 24 (1969).

14. Id. at 4.

15. Id. at 26.

16. Id. at 27.

17. C. Pharr, The Theodosian Code 438 (1952).

18. T. Sanders, The Institutes of Justinian 353 (1970).

19. W. Buckland, Roman Law and Common Law 400-401 (1965).

20. S. Sohm, The Institutes 376-377 (1970).

21. Id. at 378.

22. Id. at 378-379.

23. E. DeHaas, Antiquities of Bail 3 (1940). This work presents a scholarly and concise study on the origin of bail system to the year 1275. DeHaas relied upon the works

of various German scholars for her material. This paper has relied heavily upon her; especially for material concerning the Germanic, Anglo-Saxons, and Normanic influences on the origin and development of bail.

24. Id.

25. Id.

26. Wergeld is a designated monetary value of a person. It simply means "man money." Some scholars believe this system to be the prototype of our American bail system.

27. Law and Order Reconsidered 455-456 (1969) Hereinafter cited as Law and Order. This report was prepared as a staff report to the National Commission on the Causes and Prevention of Violence. It was prepared by James S. Campbell, Joseph R. Sahid, and David P. Stang. This report is very useful in its information on bail.

28. DeHaas, supra note 22, at 10.

29. Id. at 10-11.

30. C. Elliot, Anglo-Saxon Law 191 (1876).

31. Id.

32. DeHaas, supra note 22, at 24.

33. Id. at 25.

34. T. Plucknett, Edward I and Criminal Law 81 (1960).

35. DeHaas, supra note 22, at 30. The frankpledge developed out of the suretyship system. This (the frankpledge) was general group surety and its function was unlike that of the wergeld. The frankpledge was to maintain law and order in society.

36. S. Thorne, et al., The Great Charter 102 (1966).

37. Id. at 127.

38. Law and Order, supra note 26, at 456.

39. DeHaas, supra note 22, at 96-97.

40. R. Perry, Sources of Our Liberties 66-67 (1964).

41. Id. at 62.

42. Id. at 71.

43. Id. at 235-236.

44. D. Fellman, The Defendant's Rights 66-67 (1957).

45. Id. at 67.

46. I. Jennings, The Queen's Government 151 (1967).

47. I. Brant, The Bill of Rights 152 (1962).

48. Id. at 154.

49. F. Pollock, Jurisprudence and Legal Essays 207 (1961). During his life, Sir Edward Pollock was one of the world's greatest lawyers and scholars of English jurisprudence. He was held in high repute for his jurisprudential writings. Pollock has written some of the greatest English jurisprudential works on English law.

50. Brant, supra note 47, at 16.

51. Pollock, supra note 49, at 206.

52. Id. at 207.

53. Law and Order, supra note 26, at 457.

CHAPTER II

BAIL IN AMERICA

> In every government there are three sources of power: the legislative, the executive and the judiciary power....When the legislative and executive powers are united in the same person, or in some body of magistrates, there can be no liberty.... Again, there is not liberty if the judiciary be not separated from the legislative and executive.
>
> -- Montesquieu

The colonists had had their share of oppressions. They suffered while in England, and they wanted to see that they would not have to endure it again. With this in mind, the colonists sought to incorporate the philosophy of Montesqieu's The Spirit of the Laws into their own philsophy and hence avoid the possibility of an overwhelming amount of power being situated in one body- a king or monarch.

Despite the oppression and deprivation of rights; historically, the foundation of the American legal system is the English common law. As noted in the previous chapter, the common law is a body of legal principles, precedents, customs and procedures that emerged first as court rulings interpreting and applying the writs (orders) issued by the medieval English kings.

By the period of the post-Renaissance, the American

colonies had united the common law with English local customary law to form the general corpus of law and procedure. As such it was a part of the American cultural inheritance, received in the colonies, and absorbed to apply and deal with the colonial situation.

The situation in the colonies, at best, provided for vigilance on the part of the colonists. It has been shown that the American colonists were vigilant of their rights and sought to provide protection from the encroachments of executive or legislative powers. They had been denied the right to bail and, "excessive bail and fines" had been imposed in the past.

As a result, many of the American colonies provided articles in their constitutions banning the imposition of "excessive bail and fines". They also provided for habeas corpus and due process of law.

Bail in America is different from bail in early medieval England. In England release was conditional upon the accused, or the accused and someone else to act as sureties, furnishing a personal recognizance or contract, under which they agree to forfeit a stated sum. The sum being the amount set for bail. This amount is forfeited for failure to appear in court. There is no posting of money, real estate, or deeds of any kind with the court.

As Professor Monrad G. Paulsen has noted:

> Historically, the accused would only be released to an individual who, as bail, had the right to prisoner's custody until trial. It was the duty of the bail to produce the accused at that time. Later, money or property could be pledged to provide assurance that the bail would perform this duty. The entire idea of cash deposit by the defendant in lieu of bail was late in developing.[1]

Yet, however, provisions were made to protect against the previously experienced abuses imposed by excessive bail.

Early Constitutional Provisions

The right to bail was incorporated into the constitutions of several colonies. The Massachusetts Body of Liberties, adopted December 10, 1641, provided for bail in some cases except capital crimes -- crimes punishable by death -- and others.

Under the "Rites, Rules and Liberties Concerning Judicial Proceedings" it was provided that:

> No person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentence him thereto. If he can put sufficient securities, bayle or mainprase, for his appearance, and good behavior in the meantime, unless it be in Crimes, Capital, and Contempts in open Court, and in such cases where some express act of Court doth allow it.[2]

There are also implications of due process of law in this article.

In Pennsylvania, William Penn was the great influence on its "Frame of Government." The Frame of Government was drawn up in 1862 by Penn. This was the fundamental

law of the province. This frame of government encompassed the Quakers idea of government. It provided a consciousness for the colonists of their English heritage and customs. And too, it reminded them of the need to prevent another Stuart-type dynasty.

Richard Perry writing about the "Frame of Government of Pennsylvania" noted:

> Among its significant provisions are those providing for admission of new freemen, prohibiting taxation by the executive, guaranteeing the right to trial by jury, granting humane conditions to prisoners, granting the right to bail, promoting education, guaranteeing religious liberty.[3]

The Constitution of Virginia of June 12, 1776 prohibited excessive bail and fines. It also adopted the principle of prohibiting cruel and unusual punishments. Section Nine of the Virginia Constitution provided:

> Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.[4]

Excessive bail and fines were also prohibited in the Constitution of Delaware of 1776. The Delaware Declaration of Rights of September 11, 1776 read:

> Sec. 16. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.[5]

The 1776 Constitution of North Carolina also provided a right to bail. Section Nine provided the right to bail. It gave this right to all prisoners, except in capital cases, when the proof is evident, or the presumption great. Section Ten prohibited excessive bail and fines.[6]

The Constitution of Maryland of November 3, 1776 provided:

> XXII. That excessive bail ought not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of law.[7]

The 1777 Constitution of Georgia not only prohibited excessive bail and fines, but adopted the principles of the writ of habeas corpus too. The Constitution of Vermont of July 8, 1777 provided that excessive should not be exacted for bailable offenses and that all fines should moderate.[8]

The Constitution of New Hampshire of June 2, 1784 provided that:

> XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.[9]

Statutory Provisions

Between 1780 and 1801 eleven of the thirteen original states enacted bail statutes.[10] Several states denied bail automatically in capital cases.

Bail Statutes: 1780-1801[11]

Jurisdiction	Best Possible in all cases except:	Other Limitations:
Conn. (1786)	no exceptions	bail allowed in high treason cases only by court having jurisdiction
Del. (1797)	"felonies of death"	none
Ga. (1801)	horse theft (felony punished by death)	none

Md. (1692-1839)	felony or treason	none
Mass. (1780-1807)	no exceptions	bail allowed only by Judges of Supreme Judicial Court
N.J. (1780-1807)	treason or "felony of death"	none
N.Y. (1792)	no exceptions	Justices must investigate whether party committed the felony before release on bail
N.C. (1792)	There are some nonbailable offenses; one statute refers to English law for these. Murder and felonies are bailable only by two judges in open session after investigating whether defendant committed the crime. No bail for capital offenses in 1801.	
Pa. (1781-90)	treason or felony	bail allowed for robbery, burglary, sodomy and buggery only by Supreme Court judge
S.C. (1790)	treason or felony (unless defendant is not indicated within 1 term of the Court)	none
Va. (1792-95)	no exceptions	none

Bail and the Federal Convention

The preceding table of bail statutes represents a showing of the influence of English oppressions on the Colonies as individual sovereigns prior to and after the establishing of the federal union -- United States of America.

It is noteworthy that most of the thirteen original colonies also wanted the security against excessive bail to have a greater influence. By their statutes the people

provided for a right to bail and banned its excessiveness. Now that they were about to establish a more powerful form of government, they wanted its Constitution to have a similar safeguard in its provisions. Realizing the importance of the provision, there seems to have been little opposition.

After discussing and adopting unanimously the "double jeopardy" provision of the Constitution, the committee then proceeded to the sixth clause of the fourth proposition: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[12]

According to the Annals of Congress,[13] the debates concerning the proposition were brief. Mr. Smith and Mr. Livermore were the only two who, according to the records, participated in the debates over the proposition.

> Mr. Smith, of South Carolina, objected to the words "nor cruel and unusual punishment;" the import of them being too indefinite.
>
> Mr. Livermore. -- The clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it. I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine.
>
> The question was put on the clause, and it was agreed to by a considerable majority.[14]

The Northwest Ordinance

During the constitutional convention there were people migrating west of the Missouri. These people settled in the northwestern portion of the continent around present-

day Ohio, and Congress passed the Northwest Ordinance for their government.

In the summer of 1787 the organic law for Northwestern territory provided the right to bail and banned its excessiveness. According to Richard Perry:

> Article two of the Northwest Ordinance provides that: All persons shall be bailable, unless for capital offenses where the proof shall be evident, or presumption great. All fines shall be moderate; and no cruel and unusual punishment shall be inflicted.[15]

Other State Provisions 1777-1903

Alabama (1901)

> That excessive fines shall not be imposed nor cruel or unusual punishment inflicted.
>
> That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when proof is evident or presumption great; and that excessive bail shall not in any case be required.[16]

Arkansas (1868)

> Sec. 9. Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel or unusual punishments be inflicted, nor witnesses be unreasonably detained.[17]

California (1879)

> Sec. 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonable detained, nor confined in any room where criminals are actually imprisoned.[18]

Colorado (1876)

> Sec. 20. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[19]

Connecticut (1818)

> Sec. 13. Excessive bail shall not be required, nor excessive fines imposed.
>
> Sec. 14. All prisoners shall, before convictions be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great; and the privileges of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature.[20]

Delaware (1897)

> Section 11. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners.
>
> Section 12. All prisoners shall be bailable by sufficient sureties, unlesss for capital offenses when the proof is positive or the presumption great; and when persons are confined on accusation for such offences their friends and counsel may at proper seasons have access to them.[21]

Florida (1885)

> Sec. 8. Excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment or indefinite imprisonment be allowed, nor shall witnesses be unreasonably detained.[22]

Georgia (1877)

> Par. IX. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest or in prison.[23]

Illinois (1870)

> Sec. 7. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and the priviledge of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.[24]

Indiana (1851)

> Sec. 16. Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense.[25]

Iowa (1857)

> Sec. 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.[26]

Kansas (1859)

> Sec. 9. All persons shall be bailable by sufficient sureties, except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be at all required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.[27]

Kentucky (1850)

> Sec. 17. That excessive bail shall not be required, nor excessive fines imposed, nor cruel fines imposed, nor cruel punishment inflicted.[28]

Louisiana (1898)

> Excessive bail shall not be required, nor excessive fines imposed...All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great, or unless conviction for any crime or offense punishable by death or imprisonment at hard labor.[29]

Maine (1819)

> Sec. 9. Sanquinary laws shall not be passed; all penalties and punishment shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed nor cruel or unusual punishment inflicted.[30]

Maryland (1867)

> Art. 25. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the Courts of Law.[31]

Massachusetts (1780)

> XXVI. No magnistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.[32]

Michigan (1850)

> Excessive bail shall not be required; excessive fines shall not be inflicted, nor shall witnesses be unreasonably detained.[33]

Minnesota (1857)

> Sec. 5. Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted.[34]

Mississippi Art. 3 (1890)

> Sec. 29. Excessive bail shall not be required; and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.[35]

Missouri Art. 2 (1875)

> Sec. 25. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.[36]

Montana Art. 3 (1889)

> Sec. 20. Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.[37]

Nebraska (1875)

> Sec. 9. All persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishment inflicted.[38]

Nevada (1864)

> Sec. 6. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted; nor shall witnesses be unreasonably detained.[39]

New Hampshire (1902)

> Art. 33. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines or inflict cruel or unusual punishments.[40]

New Jersey (1844)

> Sec. 15. Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.[41]

New York (1894)

> Sec. 5. Excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicts, nor shall witnesses be unreasonably detained.[42]

North Carolina (1876)

> Sec. 14. Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.[43]

North Dakota (1889)

> Sec. 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident, or the presumption great. Ex. Bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.[44]

Ohio (1851)

> Sec. 9. All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted.[45]

Oregon (1857)

> Sec. 16. Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offence.[46]

Pennsylvania (1873)

> Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.[47]

Rhode Island (1842)

> Sec. 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offence.[48]

South Carolina (1895)

> Sec. 19. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained.[49]

South Dakota Art. VI (1889)

> Sec. 23. Excessive bail shall not be required, excessive fines imposed, nor cruel punishments inflicted.[50]

Tennessee (1870)

> Sec. 16. Excessive bail, fines, etc. -- That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[51]

Texas (1876)

> Sec. 13. Excessive bail shall not be required, nor cruel or unusual punishment inflicted.[52]

Utah (1895)

> Sec. 9. Excessive bail shall not be required, excessive fines shall not be imposed; nor cruel and unusual punishment inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.[53]

Vermont (1777)

> Sec. XXVI. Excessive bail shall not be exacted for bailable offences; and all fines shall be moderate.[54]

Washington (1889)

> Sec. 14. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.[55]

West Virginia Art. III (1872)

> Section 5. Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishment inflicted.[56]

Wisconsin (1848)

> Section 6. Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishment inflicted.[57]

Wyoming (1889)

> Section 14. All persons shall be bailable by sufficient sureties, except for capital offences when the proof is evdient; or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishment be inflicted.[58]

Virginia (1902)

> Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[59]

Summary

As has been noted, English history is marked with deprivations and usurpations of freedoms and rights. The abuses, and later the prohibition, of "excessive bail and fines" were a part of the English tradition and legal history. Many of the colonists were native Englishmen who left Europe to escape the then common monarchial oppressions.

The colonists without doubt had had their share of oppresions in the past. They suffered while in England, and they wanted to see that they would not have to endure it again. The colonists took special heed from Montesqieu in noting that there could be no liberty if the judiciary was not separated from the legislative and executive branches of the government.

As early as 1641, the Massachusetts Body of Liberties provided for bail in all but capital crimes. Even before the Constitutional Conventions many colonies had provisions in their constitutions providing the right to bail and prohibited its excessiveness. They had gone a step further than they were to in writing the United States Constitution some time later. They explicitly provided a <u>right</u> to bail as well as prohibited its excessiveness.

The United States Constitution only provided against its excessiveness. Even the Northwest Ordinance provided the right to bail and banned its excessiveness.

In reading the constitutions of the various states one can easily see that the framers thought it was important to include bail provisions. Even Constitutions adopted as late as the 1900's found it necessary to include the ancient provision: "That excessive bail ought not to be required."

CHAPTER II: FOOTNOTES

1. M. Paulsen, Criminal Law and its Processes 924 (1962).

2. R. Perry, Sources of Our Liberties 155 (1964).

3. Id. at 207.

4. Id. at 312.

5. Id. at 339.

6. Id. at 354-355.

7. Id. at 365.

8. Id. at 311.

9. Id. at 385.

10. J. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1226 (1969).

11. Id.

12. Later to become the Eighth Amendment to the United States Constitution.

13. I Annal of Cong. 753-754 (1789) [1789-1824].

14. Id. at 754.

15. R. Perry, supra note 2, at 395.

16. F. Thorpe, 1-4 American Charters, Constitutions and Organic Laws 1492-1902 (1909). 184 Note: The following citations were taken from Volumes 1-4. They are included to show some of the constitutional provisions of the various states, and how they relate to the development of bail in America. These provisions are merely a selection and do not purport to be conclusive as to all states having such provisions from the late 1700's to the early 1900's.

17. Id. at 335.

18. Id. at 413.

19. Id. at 477.

20. Id. at 538.

21. Id. at 602.

22. Id. at 733.

23. Id. at 843.

24. Id. at 1014.

25. Id. at 1075.

26. Id. at 1138.

27. Id. at 1242.

28. Id. at 1313.

29. Id. at 1528.

30. Id. at 1647-1648.

31. Id. at 1781.

32. Id. at 1892.

33. Id. at 1956.

34. Id. at 1992.

35. Id. at 2093.

36. Id. at 2232.

37. Id. at 2303.

38. Id. at 2362.

39. Id. at 2403.

40. Id. at 2497.

41. Id. at 2600.

42. Id. at 2694.

43. Id. at 2823.

44. Id. at 2854-2855.

45. Id. at 2914.

46. Id. at 2999.

47. Id. at 3122.

48. Id. at 3223.

49. Id. at 3308.

50. Id. at 3371.

51. Id. at 3450.

52. Id. at 3622.

53. Id. at 3703.

54. Id. at 3746.

55. Id. at 3974.

56. Id. at 4035.

57. Id. at 4077.

58. Id. at 4118.

59. Id. at 3906.

CHAPTER III

THE COURTS, THE CONSTITUTION, AND BAIL

The Eighth Amendment provides that "excessive bail shall not be required,"[1] but the standards for determining what constitutes "excessive bail" have not been fully developed by the Supreme Court.[2]

Stack v. Boyle

In Stack v. Boyle,[3] the Court gave some indication as to how the amount of bail may be determined to be excessive or not. In defining "excessive bail" the Court stated:

> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Bail set at a figure higher than an amount reasonable calculated to fulfill this purpose is "excessive" under the Eighth Amendment.[4]*

The Stack opinion notes that the traditional standards are applied in determining the amount of bail. The traditional standards require a careful consideration of individaul factors in determining the amount of bail.

Many courts impose a standard bail based solely on the seriousness of the offence charged. Such a determination raises a serious question as to the constitutionality of the practice.

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* Emphasis provided by author.

Bandy v. United States

The Stack decision leaves open to question the imposition of bail in excess of the defendant's capacity to pay. There has been some argument among some scholars that perhaps the Griffin v. Illinois,[5] decision should be extended to apply in cases involving indigents too poor to pay what might be considered reasonable bail. The Griffin case held that the appelate court was to furnish the defendant with transcript on appeal because he was to poor to pay the cost himself. This type of argument would definitely raise an "equal protection" argument under the Fourteenth Amendment to the Constitution.[6]

Professor Caleb Foote agrees that an extension of the rule in the Griffin case is particularly appropriate, and that pretrial detention of an accused who would go free but for differences in financial circumstances is a violation of the equal protection clause.[7]

In an individual opinion, Bandy v. United States,[8] Mr. Justice Douglas has suggested that a defendant who cannot afford to post bail must be released on his own recognizance where other relevant factors indicate that he will comply with the conditions of his release. He also observed that in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release or freedom.[9]

Furthermore, according to Mr. Justice Douglas --

> The wrong done by denying release is not limited to the denial of freedom alone.

> That denial may have other consequences. In case of reversal, he will have served all or part of sentence unless an erroneous judgement.[10]

The consequences or other problems that may face the defendant are; for example: a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn money that is still necessary for the fullest use of his right to appeal.[11]

Judge's Discretion

Because the issues in bail cases may have become moot, the appellate court decisions are more appropriate to study to determine the trend of the law concerning bail.

The Supreme Court seems to agree with the various lower federal and state court that the judge must exercise his discretion in setting bail by taking into account certain factors. These factors according to Lobell v. McDonnell,[12] are:

> The nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction.[13]

Also in determining whether or not a defendant should be released on his own recognizance, a judge would take into consideration the same factors which are applied in a financially oriented bail system.[14]

The Amount of Bail

As noted previously, the judge's discretion plays an important part in determining whether the amount is excessive or reasonable. The following lower federal court decisions will explain, by dicta, some other important factors in setting the amount of bail.

United States v. Lawrence

The lower federal courts have set what amount of bail is appropriate in federal criminal cases. According to United States v. Lawrence:[15]

> The amount of bail in a criminal case should be determined by a consideration of the ability of the prisoner to give bail and the actrocity of the offense, and fixing it at an amount greater than the accused can give is practically to refuse bail.[16]

Carlisle v. Landon

In Carlisle v. Landon,[17] there was a similar dicta. It provided that:

> [B]ail must not be in a prohibitory amount, that is more than the accused can reasonably be expected under the circumstances to give, for if so, it is substantially a denial of bail within the constitutional provision.[18]

The amount of bail is reasonable if it is calculated with the consideration of the ability of the defendant to pay. The amount necessary to insure the appearance of the defendant at trial is considered reasonable.

The reasonableness of the amount of bail is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom

from unnecessary restraint before conviction under the circumstances surrounding each particular accused.

Summary

Many state laws, as shown in Chapter II, presently guarantee a right to release on bail in almost all cases. The Court has never been forced to determine whether the Eighth Amendment prohibition against excessive bail is also designed to encompass a basic right to release on bail.[19] Some scholars have suggested that there is an implied right to bail.

Perhaps the Court would have determined the question sooner but an appeal to the supreme court takes years in many cases, and bail issues have usually become moot and the defendant has been convicted and is serving his time.

The Stack opinion is still the basic guideline used by the Supreme Court in dealing with the bail issue today. Justice Vinson felt certain that the threat of forfeiture would assure the defendant's appearance.

> [T]he modern practice of requiring a bail or the deposit of a sum of money subject to the forfeiture serves as additional assurance of the presence of an accused.[20]

Bail set at a figure higher than an amount reasonable calculated to fulfill this purpose is "excessive" under the Eighth Amendment. And also, bail fixed would become "excessive" if it is used to serve a purpose for which bail was not intended. The Courts, both state and federal, have generally agreed that the purpose of bail is to insure

the defendant's appearance and submission to the judgment of the court. It is not to be used for the purpose of punishment. When this is considered by all the courts -- federal, state, and local -- in determining the amount of bail, perhaps there will be a more efficient bail system at these levels; and allow for less discrimination and abuses.

CHAPTER III: FOOTNOTES

1. U.S. Const., Amend. VIII.

2. S. Kadish, Constitutional Criminal Procedures In A Nutshell at 36 (1971).

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

4. Id. at 2.

5. Griffin v. Illinois, 351 U.S. 12 (1956).

6. The Fourteenth Amendment to the Constitution provides in part: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., Amend. XIV.

7. C. Foote, "The Coming Constitutional Crisis in Bail," 113 U. Pa. L. Rev. 1135 (1965).

8. Bandy v. United States, 80 sct. 197 (1960).

9. Id.

10. Id.

11. Id. at 198.

12. Lobell v. McDonnell, 296 N.Y. 109 (1945).

13. Id.

14. Gonzalez v. Warden, Brooklyn House of Detention, 21 N.Y. 2d at 19 (1967).

15. United States v. Lawrence

16. Id.

17. Carlisle v. Landon, 73 Sct. 1179 (1952).

18. Id. at 1180.

19. See Shapiro v. Keeper of City Prison, 290 N.Y. 393 (1943), and Siegal v. Follette, 290 F Supp. 632 (1968).

20. Stack, supra at 2.

CHAPTER IV

PRETRIAL AND PREVENTIVE DETENTION

> Detention for a substantial period of time without a definite guarantee of prompt trial contains the seeds of discrimination against the defendants from the poor and ghetto neighborhoods.
>
> -- Prof. Thomas B. Allington
> School of Law
> Indiana University

Perhaps the first question that comes to one's mind is: What have pretrial and preventive detention to do with bail?

This question, along with a distinction or explanation of the two, are important if one is to fully understand the implications of pretrial and preventive detention. First of all, it is virtually, if not completely, impossible to discuss bail without discussing pretrial and preventive detention. In fact, both pretrial and preventive detention are, in many cases, the result of high bail. Pretrial and preventive detention, however, are the major concern here.

Definitions

Pretrial Detention

As already mentioned, pretrial detention, in many cases, is the result of high bail. In some cases pretrial detention is not the unintended result of the bail system. Pretrial detention, for the most part, involves the defendant who cannot make his bail because of his indigency

or the excessiveness of the amount of bail. Hence, he must stay in jail until his trial.

Preventive Detention

Preventive detention, on the other hand, is quite different from pretrial detention. In the cases of preventive detention the detained person is not in jail because of his inability to make bail. Because he may be able to do so. Preventive detention then involves the detaining of those persons charged with criminal offences on the presumption that their freedom would allow them to commit more criminal offences; and therefore, become a menance to the judicial system and present a clear danger to the community as a whole. Preventive detention is an attempt to rid society of its high number of "recidivists."[1] Also, it is an attempt to protect society from those considered "uncontrollably dangerous" by incarcerating them in jail.[2]

Pretrial Detention: Pro and Con

Arguments For Pretrial Detention

Now that pretrial and preventive detention have been explained, perhaps arguments for and against them should be considered.

Probably one of the foremost arguments for pretrial detention is appearance. That is, if the accused is released he will fail to appear in court. As a result, he should be kept in jail. There is also the belief that

the accused may be able to evade conviction and should, therefore, be confined until acquittal requires his release. Furthermore, reliease would allow him to tamper with evidence and witnesses. And also, pretrial detention protects the community against extra-ordinary risks of the accused's future crimes.

Arguments Against Pretrial Detention

Those opposed to pretrial detention contend that the right to release before trial has been a traditional right. Pretrial release is considered essential for a fair trial. This was the belief held by criminal lawyers in the District of Columbia.

The overwhelming majority felt pretrial release was essential for a fair trial listing the following reasons:[3]

> 1. The accused is not free to assist in the location of witnesses.
>
> 2. The conditions for preparing your client for trial are not satisfactory.
>
> 3. In the Court of General Sessions the accused will waive his right to trial by jury to obtain a more prompt hearing.
>
> 4. In the Court of General Sessions the accused does not have the proper opportunity to choose his own lawyer.
>
> 5. The accused is exposed to bad jailhouse advice.
>
> 6. There is an adverse effect on the personality and morale of the accused as a result of "jailhouse depression."
>
> 7. There is an appearance of guilt that attaches to the accused's entry into the courtroom from the cellblock with marshalls and usually in attire not suitable to the occasion.[4]

Indeed, pretrial detention is punishment before trial. It is unjust punishment. It is unjust because there is a departure from the tradition that a person is innocent until proved guilty. In this situation, the accused is guilty until proven innocent. All this has a drastic effect on the right of the accused. In addition to its violation of the traditional right to freedom before trial; there are legal arguments to assert that pretrial detention, in many cases, poses a violation of due process.

Justice demands that the accused have his freedom until he has been proved guilty beyond a reasonable doubt. Professor Laurence H. Tribe has remarked concerning the possible error in the pretrial detention decision:

> Actually there are two areas of possible error in the pretrial detention decision. First, there is the question whether the defendant is actually guilty of the charge against him. If he is not, then an innocent person will be deprived of his liberty and will probably suffer other harms as a result of his detention. Secondly, there is the question whether the defendant is dangerous enough to warrant denying pretrial release.[5]

Preventive Detention: Pro and Con

Arguments For Preventive Detention

The constitutionality as well as the morality of preventive detention is a controversial matter. There are some who believe that preventive detention is useful for the purpose of safety and the maintenance of law and order. As mentioned previously, preventive detention is to protect society from those detained on the presumption that their

release would allow them to commit more crimes. Primarily, it protects society from recidivism, and the uncontrollably dangerous.

Senator Robert Byrd has remarked: "Unless we have a safe society we are not going to have a free society."[6] In fact, from eight to forty-five per cent of those released have become repeaters even before coming to trial.[7] Furthermore, in the District of Columbia area 7.5 per cent of the defendants released in a year were later charged with crimes of actual or potential violence.

Consider the following data on persons indicted for offenses allegedly committed while out on bail in the District of Columbia in 1968 in the following table.

Arguments Against Preventive Detention

In 1969, the Nixon Administrative proposed legislation to amend the Bail Reform Act of 1966. The purpose of this legislation was to allow for preventive detention of certain accused's considered dangerous to the community. This legislation, also known as the D.C. Crime Bill, pertained to the Washington, D.C. area. Some of its provisions, however, are being adopted by other jurisdictions.

The D.C. Crime Bill has received much criticism, especially concerning preventive detention. Speaking of the Nixon Administration's proposed legislation, Professor Laurence H. Tribe remarked:

> The proposed bill violates the basic principle that an accusation of crime should not subject any man to imprisonment unless

DATA ON PERSONS INDICTED FOR OFFENSES ALLEGEDLY COMMITTED WHILE ON BAIL IN THE DISTRICT OF COLUMBIA, 1968

Month	Allegedly committed current offense while on bail for a felony in the District of Columbia [1]												
	Persons involved			Bail status after 2d indictment			Time within which the 2d offense was committed (days)						
	Number of bail offenders	Number indicted	Percent of total indicted	Released	Detained	Fugitive	None to 30	31 to 60	61 to 90	91 to 120	121 to 210	211 and over	Offense most frequently repeated
January	7	122	5.7	1	6	0	1	1	1	2	1	1	H. and L. robbery.
February	12	111	10.8	5	7	0	2	3	0	2	1	4	Housebreaking.
March	12	122	9.8	4	8	0	5	1	1	0	4	1	CDW/robbery.
April	16	165	9.7	6	10	0	3	2	4	3	3	1	Robbery.
May	10	252	4.0	7	3	0	4	1	2	0	2	1	Narcotics/burglary II.
June	10	416	2.4	4	6	0	2	1	1	1	1	4	Burglary II.
July	17	255	6.7	4	13	0	4	3	5	1	1	3	Robbery.
August	13	263	4.9	4	9	0	6	3	1	0	1	2	Buglary II.
September	18	189	9.5	5	13	0	3	3	2	4	2	4	Robbery.
October	15	224	6.7	7	8	0	5	1	1	3	5	0	Robbery/narcotics.
November	12	200	6.0	4	8	0	2	1	2	1	3	3	Narcotics.
December	11	238	4.6	4	7	0	3	1	0	0	4	3	Robbery.
Total	153	2,557	6.0	55	98	0	40	21	20	17	28	27	
Total excluding riot matters [2]	147	2,098	7.0	52	95	0	40	20	19	17	27	24	

[1] Retrospective data analysis based on past history of each person indicted.

[2] These totals exclude 459 defendants who were indicted between May and August for burglary II and/or riot airising out of offenses committed between Apr. 4 and 11, 1968. Among this group, there were 6 bail offenders.

Source: Dockets and criminal case files of the U.S. District Court for the District of Columbia.

> the government's need to prosecute him compels incarceration....Perplexed by the accusations this bill authorizes, a suspect can never fully prove them false.... At every state of its growth, its calculation sacrifice of innocent defendants would be intolerable even if it could promise a significant reduction in crime.[9]

Like pretrial detention, preventive detention has been questioned regarding due process. According to Janet R. Altman:

> [I]t is asserted that depriving a person of his liberty, not because of an act already committed, but because of some act he may do in the future, constitutes a violation of due process.[10]

The detaining of a person on "presumption" raises important questions. This allows the judge to consider himself as virtually omnipresent in predicting what a person would do if released. Along this line, Professor Alan M. Dershowitz has remarked:

> Indeed, all the experience with predicting violent conduct suggests that in order to spot a significant porportion of future violent criminals, we would have to reverse the traditional maxim of criminal law and adopt the philosophy that it is "better to confine 10 people who would not commit predicted crimes, than to release one who would."[11]

Taking a very broad civil libertarian view of preventive detention, Professor Lionel H. Frankel has somewhat equated personal freedom with the taking of private property by eminent domain. As a result, those detained should be paid for their freedom. Professor Frankel states:

> I have proposed elsewhere that one way of giving recognition to the personal status of people we detain because they are dangerous is to pay them for their freedom....

> The compensation could also serve to give the inmate greater economic and therefore personal autonomy over some of the conditions of his detention. But more important, such compensation would serve a symbolic and ideological function. Just as compensation for the taking of private property (in an earlier time we used to say private property is sacred), so compensation for liberty may be a way of vindicating the value of personal liberty....It is time we realize that even the dangerous person's liberty is invaluable.[12]

Furthermore, with regards to the importance of the liberty of the detained, Professor Frankel suggests that:

> A first step to achieve this seems to me to require the government to compensate for it....If paying inmates for their liberty can help make freedom as important in our society as property we will be well rewarded for our expense....It is a symbol we need not personal security, but, for survival as a society.[13]

Detention And The "Uncontrollably Dangerous"

It has been stated that preventive detention acts as a means of protecting society against the uncontrollably dangerous. The uncontrollably dangerous are by hypothesis undeterrable and should not be considered as criminals in this sense.[14] This group pertains to the mentally ill, the sex psychopath, drug addicts and others. Being mentally ill, these persons belong in mental institutions and not in jail. Even if they are a threat to the community, preventive detention is not the answer. Nor is it the answer for the mentally stable persons of our society who commit crimes and are dangerous. The criminal as well as the non-criminal has rights that must be respected. As Professor Thomas B. Allington has stated:

> Perhaps the necessity for reducing the number of dangerous crimes is so overwhelming that this encroachment on individual freedom is justified; on the basis of the evidence, however, it would appear to be wiser to refrain from preventive detention of the accused, at least in the absence of more reliable criteria for predicting future dangerous conduct.[15]

Moreover, preventive detention of the mentally ill and sexual psychopath is generally predicted in theory on indentifiable mental or emotional condition rendering such persons unresponsive to the deterrent effect of criminal sanctions.[16]

As Professor Lon L. Fuller has remarked:

> One thing is perfectly clear, and that is that no civilized system of criminal law could take its "exclusive" aim that of deterrence. This would mean that when an individual was found to have committed a criminal act, what would happen to him would have no relation to his deserts, but would be judged solely on the effect of others....No one could seriously recommend that when something goes wrong, and we cannot identify the culprit, we revert to the old practice of executing every tenth man.[17]

The Cost of Detention

Aside from the arguments for and against pretrial and preventive detention, there is the cost of detention that needs to be discussed. Detention as a whole is a costly business. There is a need for facilities, personal, and equipment. All of this, along with supervision cost heavily.

> To provide continuous round-the-clock supervision of prisoners by a correctional officer requires approximately five full-time men working 40-hour weeks. Such supervision would require an annual outlay of at least

> $30,000, if the salary and fringe benefits of each officer amount to $6,000 per year.[18]

Though the cost of detention is high, it is not one of the most publicized facts.[19] As a result, pretrial release would be much cheaper on public expenditures.

> Pretrial release amounts to a considerable saving in public expenditures. The most obvious cost to the community in keeping a man in jail before his trial is that of detention. In some communities the average daily pre-prisoner cost may be as high as $7.00 for men and $11,00 for women.[20]

For fiscal 1963, the total cost of maintaining and operating the District of Columbia jail was $1,652,629.67.[21] It is significant also that, "Of the total number of persons housed in jail in 1962, 31.7 per cent were eligible for release on bond though not all were in the pretiral period."[22] Therefore, the release many of those persons needlessly detained would save the public many dollars in expenditures now being used for the maintenace of detention.

Recidivism and Blacks

It has already been mentioned that a recidivist is a person who reverts to criminal activity.[23] Recidivism needs discussion because, as also mentioned, one of the purposes of preventive detention is to diminish the number of recidivists.

For the most part, Blacks and indigents have been shown to have a high recidivist rate. As a result, they are effected by preventive detention moreso than others. The ghetto areas of the large metropolitan centers tend to breed rather high crime rates.[24] Preventive detention, in

effect, has what Professor Allington termed "the seeds of discrimination." Since the ghetto breeds a high crime rate indigents and Blacks constitutes the high tallies of the statistics. Even so, there are some sociologists and criminologists who will argue that preventive detention is not the answer to the problem of recidivism. They would argue that the problem is caused by unemployment, poverty, and other factors.

Blacks are charged with a greater number of separate crimes than are whites. The following tables will suffice to illustrate this evidence as it is related to the Black crime rate and recidivism.

Crime Rates Per 100,000 Pop. by Race and Sex, Stanford, Conn., 1959-1961[25]

Crime Rate Type	White		Negro	
	Male	Female	Male	Female
Separate Indivi.	1829	175	10696	1666
Total Arrest	2554	201	16865	2218
Separate Offense	2925	222	20105	2605
Conviction	1746	114	14177	1607
Inst. Sentence	954	56	8517	1021
Actual Inst.	499	22	4867	305

Again, the Blacks and indigents obviously must be the ones that would suffer the penalty imposed by preventive detention. This penalty is punishment without due cause and it is, therefore, unjust. The detaining of a person for crimes he may commit in the future is prejudicial.

Ratio of Negro to White Crime Rates.[26]

Crime Rate Type	Male	Female
Separate Individual	5.8	9.5
Total Arrest	6.6	11.0
Separate Offense	6.9	11.7
Conviction	8.1	14.1
Instit. Sentence	8.9	18.2
Actual Inst.	9.8	13.9

Professor Allington suggests that:

> [T]he arrest-to-release timetable must be accelerated so that truly guilty defendants will not have as much time to get into further trouble. In addition, efforts to improve the rehabilitiative function of the correctional process would aid in reducing recidivistic crime. Governmental resources would be better spent in these endeavers than in a system of preventive detention of the accused before trial.[27]

Summary

Pretrial and preventive detentions are both debatable issues as to their utility, morality and constitutionality. There are valid and strong arguments given on the pro and con sides. Those on the pro side argue that pretrial detention is important to assure the appearance of the accused. It prevents him from tampering with evidence and witnesses. Those on the other side argue that pretrial release is essential for a fair trial, and that the right to freedom

before trial is a traditional right.

Preventive detention has been argued as being important because it protects society against the uncontrollably dangerous and the recidivists. Those opposing preventive detention argue that it is a violation of due process. That is, it is unconstitutional to detain a person on the presumption that he may commit a crime in the future on the basis of his past record.

The cost of pretrial and preventive detention is exorbitant. It would be cheaper to practice pretrial release more often, and thereby save public expenditures which may be used for other purposes. Such expenditures could be used toward fighting poverty, unemployment, and other problems.

It has also been shown that Blacks and indigents will suffer as a result of pretrial and preventive detention stipulations. This is discriminatory in practice and theory. Pretrial and preventive detention are not the solutions to crimes committed by Blacks and indigents. The crime rate of the Blacks and indigents will disappear along with the social and economic problems they have.

CHAPTER IV: FOOTNOTES

1. A "recidivist," as defined by S. Kling in his The Legal Encyclopedia and Dictionary 425, is: "A person who reverts to criminal activity." This is the same connotation in which the author of this thesis uses the term.

2. For more information on "uncontrollably dangerous" see "Bail Reform And The Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1223-1242 (1969).

3. As cited in Hearings on Amendments to the Bail Reform Act of 1966 Before Subcomm. on Con. Rights of the Senate Comm. On the Judiciary 91st Cong., 1st Sess. 795 (1969) [hereinafter cited as 1969 Hearings].

4. Id.

5. L. Tribe, "An Ounce of Detention: Preventive Justice in The World of John Mitchell," 18 Va. L. Rev. 114 (1970).

6. 1969 Hearings, supra note 3, at 821.

7. Id.

8. Id. at 698.

9. L. Tribe, supra note 5, at 407.

10. 1969 Hearings, supra note 3, at 794.

11. A. Dershowitz, "Comments on Preventive Detention," 23 J. Legal Ed. 32 (1971).

12. Id. at 55-56.

13. Id.

14. L. Tribe, supra note 5, at 114.

15. T. Allington, "Preventive Detention of the Accused Before Trial," 19 U. Kan. L. Rev. 122-123 (1970).

16. L. Tribe, supra note 5, at 115.

17. L. Fuller, Anatomy of The Law 58-59 (1968).

18. The President's Commission on Law Enforcement And The Administration of Justice, Task Force Report: The Courts 88 (1967).

19. Hearings on Federal Bail Procedure Before Subcomm. on Con. Rights and Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on The Judiciary 89th Cong., 1st Sess. 264 (1965) [hereinafter cited as Hearings on Bail].

20. Supra note 18, at 264.

21. Hearings on Bail, supra note 24, at 266.

22. Id.

23. S. Kling, supra note 1, at 425.

24. M. Forslund, "A Comparison of Negro and White Crime Rates," 61 J. Crim. L. C. & P. S. 215 (1970).

25. Id.

26. Id. at 217.

27. T. Allington, supra note 5, at 122-123.

CHAPTER V

EXTRA-JUDICIAL SOLUTIONS

> Don't I think a poor man has a chanst in court? Iv coorse he has. He has the same chanst there that he has outside. He has a splendid poor man's chanst.
>
> -- Mr. Dooley

The writ of habeas corpus and other judicial remedies may be sought by the accused in hopes of avoiding the problem of "excessive bail." Also, there are extra-judicial solutions for solving the problems imposed by high bail. They also provide a solution where bail is reasonable but the accused is too poor to pay it. These are the methods especially to be sought and taken advantage of by the many indigents who are unable to make their own bail.

The Manhattan Bail Project of New York (also known as the Vera Institute of Justice), the Legal Aid Warranty Fund of California (better known as the LAW Fund), the D.C. Bail Project, and other bail project organizations are such remedies available to those who cannot make their own bail because of financial inability to do so.

The Vera Institute of Justice

The Vera Institute of Justice was founded by a millionaire-philanthropist named Louis Schweitzer who was dissatisfied with the legal system of detaining accuseds that are unable to make their own bail.

After talking to various legal authorities, including Supreme Court Justice William O. Douglas, Schweitzer started to work on his idea. Along with several law students from New York University School of Law working part time, he worked out a solution to the problem imposed upon indigents by the bail system.

Plan of Organization

The organization's plan was for the law students to interview those prisoners awaiting arraignment. This procedure was taken to find information concerning their past criminal record, their family, whether they hold jobs or not; and how long they had been living at their present address. The information received was checked to be sure that they were giving accurate information.

After doing this, the students gave the prisoners ratings that were based upon the information given them. Five points out of a possible thirteen were enough to recommend "release on recognizance". That is, the prisoner's promise to return to trial at the specified time and date. This is done in lieu of bail. Recognizance requirements, as stated, were based on points. Points were given according to positive factors. For each positive factor three points were given.[1]

To give the reader an understanding of how the process was scored and conducted, a sample copy of the New Orleans Release on Recognizance Interview Record form follows.[2]

NEW ORLEANS RELEASE ON RECOGNIZANCE PROGRAM
INTERVIEW RECORD

(A total of six points is required for recommendation.)

Interviewee _____ Age _____ N W M F Magistrate _____
Interviewer _____ Date _____ Charge(s) Bond(s)
Total pts. _____ Qualified () Disqualified() ___ ___
Recommended( ) Not recommended ( ) ___ ___
Recommendation approved ( ) Rejected ( ) ___ ___
Release by ROR ( ) Bond ( ) Remarks _____

	VFD	PTS	
Criminal history: (all felony & state misdemeanor convictions within the previous 10 yrs; & any outstanding affidavits within the previous 5) B of I Available () Not available() Charge(s) Date(s) Disposition(s) _____ _____ _____ _____ _____ _____		*	Criminal History: 2 fel convs= immed. disqual
		2	No convictions
		1	1 mis conv. or 2 juv detent
		0	2 mis vonc. or 2 juv det. or 1 fel conv
		-1	3 or more mis conv.
Residence(s) (location & length of time) Current addr. _____ Tel _____ With _____ For _____ Previous addr. _____ With _____ For _____ Resident of area for _____ If no home phone, tele. for reliable contact _____ Marital status _____ For _____ Living together. yes no # Children Health information _____ Attorney _____ References: (relatives, friends, & neighbors seen frequently, who may be called to verify background info.) () Name _____ Rel. ____ Addr. _____ Tel. _____ Seen ____ Name _____ Rel. ____ Addr. _____ Tel. _____ Seen ____			Residence (in area):
		*	No lcl. addr. = immed. disqual
		3	Curr. addr. 1 yr.
	()	2	Curr. addr. 6 mos. or curr. & prior 1 yr.
		1	Curr. addr. 4 mos. or curr. & prior 6 mos.
		0	Curr. addr. less 4 mos. & curr. addr. less than 6
			EXTRA:
		1	Res. of area 10 yrs.
		*	No tel for reliable contact = disqual.
			Family Ties:
		3	Lives w/family & see other members
		2	Lives w/family or has wk. contact
		1	Lives with non-fam.
		0	Lives alone
Employment: Employed () Unemployed () Welfare () Last employer _____ Addr. _____ Employed ____ Til ___ Position _____ Previous Employer _____ Addr. _____ Employed ____ Til ___ Position _____ Union Membership _____			Discretionary:
		1	Pregnancy, old age, school attendance, poor health.
	()	3	Current job or union memb. 1 yr.
		2	Current job 4 mos. or curr./prior 6 mos.
		1	Evidence of emp. in past 2 mos.
		0	No emp. 2 mos.

I permit the ROR Program to verify this information. _____
(Signature)

Vera Appraised

The Vera Institute's Manhattan Bail Project has received praise for its leadership in changing the present bail practices. It has provided leadership in about 100 communities in more than twenty-five of the fifty states. Many other communities are contemplating about starting similar projects. The organization has been very successful in its role in preventive and pretrial detention. A report to the National Conference on Bail and Criminal Justice noted:

> During the three-year pilot project, 3505 accused persons were released on recognizance on the recommendations of its staff. Of these, 98.4% returned to court when required. Only 56 persons -- 1.6% -- wilfully failed to appear. In contrast, the forfeiture rate on bail bonds during the same period was 3%.[3]

As Junius Allison wrote and predicted in 1964:

> This New York experiment is a very positive approach to a serious problem that exists in every criminal court. It is encouraging to know that the project will continue: It has just received a grant of $115,000 from the Ford Foundation. I feel certain that we are to hear much more about this innovation in the somewhat sick bail system that now exists to sustain the professional bonds men and penalize the poor.[4]

The Vera Project is a positive move; and the appraisal it has received attests to this. Vera has sought to give the poor man a chance; a real chance, and not just "a splendid poor man's chanst."

Vera has proved that pretrial release not only eliminates the discrimination and injustice of the old bail system, but works even better. And as in the past, Vera still receives worthy praise for its contributions to the American system

of Justice. As a pioneer it has helped both the poor and the courts.

Manhattan Summons Project

Summons is the norm in petty theft, minor assault, and municipal ordinance cases. In this process, the arresting officer decides upon summons release and checks with headquarters through the Police Intelligence Network System. Where there has been an arrest, stationhouse release has been a most promising development in terms of heightening the fight against pretrial detention.

The Manhattan Summons Project was pioneered by the New York City Police Department. Starting in 1964 with the assistance of the Vera Institute of Justice, this program has inaugurated police release procedures in cases involving minor offenses such as petty larceny, simple assault, and malicious mischief.[5]

It has been recognized by stationhouse programs that arrest is necessary in many cases; that identification, booking, searching, questioning, photographing, and fingerprinting may also be required. However, there is the belief that continued detention should be avoided whenever possible.

It is also very true that many arrests are made unnecessarily and without due cause. According to Martin Mayer:

> Herbert Sturz of the Vera Institute has ridden the paddy wagons on the Bowery as the cops picked up drunks and estimates that half of those arrested (and subsequently lined up in criminal court) were merely beaten and weary old men, who might have planned to get drunk if they could cadge the price of it but were

sober as the judge at the moment of arrest.[6]

The Legal Aid Warranty Fund

The Legal Aid Warranty Fund, as Vera, was started out of discontentment with the bail system. The Legal Aid Warranty Fund is an organization created to get people out of jail fast. It is a speedy release organization.

Louis Mulvey, an engineer, thought up the idea of "jail insurance" while serving sixty days in a California county jail on an assult charge in 1966. While in jail Mulvey started writing the charter for the organization. HOwever, at first, he was unable to find any civil libertarians to aid him in his project. Fortunatley, three years later, he went to see Wally Davis, a Mexican-American attorney in Santa Ana. Concurring that there are too many innocent men in jail because of inability to make bail, Davis became Mulvey's first attorney.

Within thirty days Mulvey had mustered up six attorneys and sold twenty memberships in the fund. Presently, there are about fifty-five attorneys on file, five bail bondsmen and 737 members.[7]

The LAW Fund operated in a less complex manner than does the Vera Institute. Members of LAW are provided with two wallet size cards. One card has the member's photograph, the other card contains a twenty-four hour phone number and two dimes pasted on the back. Upon arrest the dimes are used to call LAW to announce arrest and wait for release on bond. The LAW Fund is an insurance -- "jail insurance" --

and operates by payments.

> For $12 a year ($10 for students), a member receives the LAW Fund ID card and fills out a form containing all the information needed upon arrest, which is filed in LAW's central office. After an arrested member alerts LAW, the fund contacts a cooperating lawyer, who makes the plea for release or either recognizance or on bail. It also provides free the first visit to a Fund lawyer after release.[8]

District of Columbia Bail Project

The District of Columbia Bail Project is similar to the Manhattan Bail Project of New York. The D.C. Bail Project was organized similarly to the Manhattan Project.

The project began subsequent to a grant of funds by the Ford Foundation to Georgetown University. Law students from Georgetown help operate the project. The organization started in 1963 as a three year experimental program. At first only felony cases were covered; then coverage was extended to include fact investigation in cases pending appeal.

Just as the Manhattan Bail Project, this project has been very successful in its operation. The program proved successful from its beginning.

Also, this experiment has been very favorable to pretrial release, and has emphasized its importance. The cost of pretrial detention was also studied and found to be very high. For the most part, the project recommends pretrial release whether by bond or recognizance.

In its final report, the D.C. Bail Project noted:

> In the two and one half years of its operation, the Bail Project interviewed 5144 defendants and recommended 2528 (49%) for release on personal recognizance. The courts released 2166

> (85%) of the recommended defendants and only 65 (3%) of the releasees failed to make required court appearances. Hence 97% of the released population honored the promise to return to court.[9]

Other Bail Projects

The success of these organizations has led to the organizing of other bail projects throughout the United States. There is a new system in Detroit for releasing inmates awaiting trial without bail. This system is aimed at easing congested conditions at Detroit's Wayne County Jail.[10]

A federal grant of $50,000 and another $50,000 from other sources aid the project financially. The purpose of the project is to evaluate prisoners for release without bail following arraignment.[11] This project is similar to the Vera and D.C. Bail Projects. All are directed at the prevention of injustice against the poor.

Other Cities and Counties With Pretrial Release Projects

Pretrial release projects are reported to be operating in the following cities and counties:[13]

Anaheim, California	West Covina, California
Berkeley, California	Denver, Colorado
Contra Costa County, California	District of Columbia
Los Angeles, California	Hartford, Connecticut
Oakland, California	Atlanta, Georgia
San Francisco, California	Chicago, Illinois

Gary, Indiana
Des Moines, Iowa
Lexington, Kentucky
Louisville, Kentucky
Montgomery County, Maryland
Prince Georges County, Maryland
Boston, Massachusetts
Lansing, Michigan
Kansas City, Missouri
Burlington County, New Jersey
Camden County, New Jersey
Gloucester County, New Jersey
Hackensack, New Jersey
Alburquerque, New Mexico
Naussau County, New York
New York City, New York
Plattsburgh, New York
Cleveland, Ohio
Toledo, Ohio
Tulsa, Oklahoma
Bucks County, Pennsylvania
Westmoreland County Penn.
Providence, Rhode Island
Bountiful, Utah
Charleston, Virginia
Huntington, Virginia
Madison, Wisconsin
Milwaukee, Wisconsin

* There are some fifty other cities with projects like these on their drawing boards. Included among these are the following cities:[13]

Miami, Florida
Manhattan, Kansas
New Orleans, Louisiana
Detroit, Michigan
Durham, NOrth Carolina
Akron, Ohio
Portland, Oregon
Austin, Texas
Dallas, Texas
Houston, Texas
Salt Lake City, Utah

*These figures represent 1966 statistics only.

Summary

Other than seeking a writ of habeas corpus or other judicial remedies -- an appeal for decrease in bail, for example -- there are extra judicial solutions for solving the problems imposed by high bail, or reasonable bail where the accused is an indigent.

The Manhattan Bail Project of New York, the Legal Aid Warranty Fund of California, and other private organizations are involved in projects of having indigents released from jail on their own recognizance when they meet certain guidelines making them eligible for such release according to the number of positive factors he has concerning his past record, family, employment, etc.

Such organizations have begun to spring up throughout the United States. They help avoid the long lists of indigents detained merely because of indigency rather than guilt. Such projects represents a positive move, and gives the poor man a chance.

The Manhattan Bail Project, along with other organizations across the country have proved that pretrial release not only eliminates the discrimination and unjustice of the old bail system, but works even better. Such organizations, no doubt, deserve praise for their contributions to the American system of justice. As pioneers, they have helped both the poor and the courts.

CHAPTER V: FOOTNOTES

1. M. Mayer, The Lawyers 203 (1966).

2. This sample copy of the "New Orleans Release on Recognizance Program Interview Record" was given to the author by Mr. Thomas J. Andre, Associate Professor of Law, Tulane University, New Orleans, Louisiana.

3. National Conference on Bail and Criminal Justice (interim report May 1964 - April 1965) xxii (1965) [hereinafter cited as Con. on Bail].

4. Comment, "Poverty and the Administration of Justice in the Criminal Courts," 55 J. Crim. L.C. & P.S. 243 (1964).

5. Con. on Bail, supra note 3, at xxiii.

6. M. Mayer, supra note 1, at 169.

7. Newsweek, Jan. 11, 1971, (Magazine), at 61.

8. Id.

9. D.C. Bail Project, Bail Reform in the Nation's Capital (final report) 31 (1966).

10. Jet, Dec. 17, 1970 (Magazine), at 4.

11. Id.

12. Con. on Bail, supra note 3, at xviii.

13. Id. at xviii-xix.

CHAPTER VI

A SURVEY OF MANHATTAN, KANSAS LAWYERS

Attorneys Survey

The survey represented several interviews taken by the author by means of personal interviews during the spring of 1971.

Sampling Frame

The population of interest in Manhattan, Kansas consisted of all attorneys who practiced in the Manhattan area (a total of 21 then). Some attorneys were not interviewed because of their specialization in unrelated area; taxation, for example. Thirteen attorneys were interviewed altogether. Of those interviewed, all have court or trial experience.

Research Design

All of the questions included in this survey have already been explored in other chapters of this thesis. Many of the questions were drawn from other studies and findings, as well as the opinions of other authorities.

This survey is to present opinions. It shows the opinions of a majority of attorneys in Manhattan, Kansas. Only opinions which may be useful or informative are sought by the survey.

Since the survey itself is merely opinionative, it is

suggested that the entire thesis be considered in conjunction with the survey. Chapter IV is most important. If this is done, more than dry opinions will be obtained from this material.

Following is a copy of the survey form, several plates showing various findings, and a general interpretation following each plate.

Department of Political Science
Manhattan Survey
Spring, 1971

My name is Johnny S. McGary. I am a graduate student in Political Science at Kansas State University. This is a survey of the Manhattan attorneys concerning bail, pretrial detention, and preventive detention.

GENERAL INFORMATION

1. Date _____ 2. What is your age? _____ 3. What type of practice are you in (general, taxation, trial, etc.)? _____. 4. How many years have you practiced in Manhattan? _____ 5. Where did you practice prior to coming to Manhattan? _____
6. Have you had any trial experience? ( ) Yes. ( ) No.

7. Under how many bars are you entitled to practice law? _____

8. What school did you receive your legal education from? _____ In what year? _____ 9. Do you consider yourself as a Democrat, Republican, Independent, etc.? _____.

10. Are you a regular reader of law reviews, legal journals, and legal periodicals? ( ) Yes. ( ) No.

11. Do you subscribe to any law reviews, legal journals, and legal periodicals? ( ) Yes. ( ) No.

12. Please list the titles of such reviews, journals, and periodicals.

1. 4.
2. 5.
3. 6.

13. Please estimate the number of law reviews, legal journals, and legal periodicals that you read per year.

( ) 1 to 3 per year.
( ) 3 to 5 per year.
( ) 5 to 10 per year.

14. Have you read any recent articles on bail? ( ) Yes ( ) No

15. Are you familiar with the state and national bail practices? ( ) Yes. ( ) No.

16. Where did you obtain your knowledge of the operations of Manhattan's bail practices? Explain below.

BAIL

17. The amount of bail should be determined by
( ) the judge's discretion.
( ) a prearranged schedule according to offence.
( ) statute according to offence.

18. "The bail bonding business is, for the most part, marked as a scandalous and racketerring business." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

19. "The bail bondsmen should be abolished." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree
( ) Disagree strongly?

20. "Rather than abolishing bail bondsmen, a Uniform Bail Bondsmen Licensing Act should be adopted placing the activities of the bondsmen under the direction of the state insurance commissioner." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

21. What abuses are you aware of in the National bail practices?
1.
2.
3.

22. What abuses are you aware of in Manhattan's bail practices?
1.
2.
3.

23. Do you consider the bail practices in Manhattan as
( ) Very good?
( ) Good?
( ) Poor?
( ) Very poor?

24. What rules, programs, etc., does the Manhattan Bar Association have concerning bail? Please list below.

25. What changes, if any, would you recommend in the National bail practices?
1.
2.
3.

26. What changes, if any, would you recommend in Manhattan's bail practices?
1.
2.
3.

27. The amount of bail set in Manhattan (to your knowledge) is usually
( ) excessive in the majority of cases.
( ) excessive in some cases.
( ) reasonable in majority of cases.
( ) reasonable in some cases.
( ) too low in majority of cases.
( ) too low in some cases.

28. "If necessary, bail should be set at high amounts to deter the committing of future crimes." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

PRETRIAL DETENTION

29. Some legal scholars believe "that pretrial detention is important to secure the appearance of the accused at trial." Do you
( ) Agree strongly?
( ) Agree
( ) Disagree?
( ) Disagree strongly?

30. "Pretrial detention is important because it prevents the accused from evading conviction by destroying evidence." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

31. A study in the Washington, D.C. area has shown that "the overwhelming majority of lawyers there agree that pre-trial release is essential for a fair trial." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

32. Are you familiar with the use of citations and summons?
( ) Yes. ( ) No.

33. "Citations and summons should be used in lieu of bail in misdemeanor cases." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

34. "The person detained in jail has a greater chance of being convicted than the accused who is freed on bail."
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

35. "An accused with ties in the community is less likely to flee or jump bail." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

36. Are you familiar with the American Bar Association's Minimum Standards For Criminal Justice, Standards Relating To Pretrial Release?
( ) Yes. ( ) No.

37. "Pretrial detention of a person whose guilt has not been determined may result in psychological and economic hardships." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

38. Which of the following are <u>most</u> important to you in determining release on recognizance. Number according to importance.
( ) the nature and circumstances of the crime charged.
( ) his family ties within the community.
( ) his record of convictions.
( ) the weight of evidence against him.
( ) his character and mental condition.
( ) the status of his employment.
( ) permanence in the community.
( ) his record of appearance at court proceedings or flight to avoid prosecution.
( ) financial resources.

39. "The above standards should also be used regarding students and soldiers." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

PREVENTIVE DETENTION

40. "Preventive detention of a person on the presumption that he may commit future crimes and, therefore, present a clear danger to society, is a violation of due process." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

41. "Because of indigency, pretrial and preventive detention, in many cases, discriminate against Blacks." Do you
( ) Agree strongly?
( ) Agree
( ) Disagree?
( ) Disagree strongly?

42. Are you familiar with the Nixon Administration's D. C. Crime Bill which allows for preventive detention of certain accuseds considered dangerous to the community?
( ) Yes. ( ) No.

43. If you are familiar with the D.C. Crime Bill then, how do you feel about its preventive detention provisions? Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

44. "A recidivist is a person who reverts to crime. Blacks tend to have a high rate of recidivism; therefore, they are discriminated against more than others as a result of preventive detention." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

45. "High bail could be the solution to alleviate the high rates of recidivism on the national as well as state and local levels." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

46. "The utility of preventive detention outweighs the right to freedom of those detained for said purpose." Do you
( ) Agree strongly?
( ) Agree?
( ) Disagree?
( ) Disagree strongly?

THANK YOU FOR YOUR TIME AND HELP!

PLATE # 1

QUESTION SEVENTEEN

The amount of bail should be determined by

a. the judge's discretion

b. a prearranged schedule according to offence

c. statute according to offence

	a	b	c
Attorneys	13	0	0

Comment Compendium

1. both the judge's discretion and the statute according to offense are important - 2
2. the judge's discretion is fairer - 2
3. there are some abuses - 1
4. the judge should take into consideration the nature of offense, but discretion should be limited - 6

TOTAL COMMENTS - 6

Plate I - Interpretation

Although the attorneys agree unanimously that the judge's discretion should be the determining factor in reaching the amount of bail, the importance of the question lies in the similarity of the comments. The responses indicate that discretion should not necessarily be the sole criteria as some cases have indicated.

PLATE # 2

QUESTION EIGHTEEN

The bail bonding business is for the most part, marked as a scandalous and racketeering business." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
1	Agree strongly?	1. disagrees, not in Kansas	- 5
1	Agree?	2. Don't like bail bonding system but performs good services	- 2
9	Disagree?		
2	Disagree Strongly?	TOTAL COMMENTS	- 7

Plate II - Interpretation

Question Eighteen is highly opinionative in that it calls for a less than objective response from the attorneys. The question was drawn from recent literature which characterizes the bonding system as such. The subjectiveness of the responses is shown more clearly by their comment on the local bail bonding system. Almost 85% disagree.

PLATE # 3

QUESTION NINETEEN

"The bail bondsmen should be abolished." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
0	Agree strongly?	1. Disagree, is needed	- 2
2	Agree?	2. Agree, present bail bondsmen	- 1
10	Disagree?		
1	Disagree strongly?	3. Disagree, should be more restrictions, are helpful	- 2
		TOTAL COMMENTS	- 5

Plate III - Interpretation

Here again almost 85% of the attorneys disagree that bail bondsmen should be abolished. Question Nineteen is essentially a refinement of question Eighteen.

PLATE # 4

QUESTION TWENTY

"Rather than abolishing bail bondsmen, a Uniform Bail Bondsmen Licensing Act should be adopted placing the activities of the bondsmen under the direction of the state insurance commissioner." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

		Comment Compendium	
3	Agree strongly?	1. Agree strongly, uniform	- 1
9	Agree?	TOTAL COMMENTS	- 1
1	Disagree?		
0	Disagree strongly?		

Plate IV - Interpretation

The question is important because it relates to questions Eighteen and Nineteen which calls for abolishing of the bondsmen altogether. The majority thinks it should be placed under the state insurance commission. Yet, that same majority thought it was a good system under question Eighteen.

PLATE # 5

QUESTION TWENTY-THREE

Do you consider the bail practices in Manhattan as

Very good?

Good?

Poor?

Very poor?

Attorneys

		Comment Compendium
1	Very good?	
11	Good?	0
1	Poor?	
0	Very poor?	

Plate V - Interpretation

Question Twenty-three, being completely opiniative, is presented solely as a item of general interest.

PLATE #6

QUESTION TWENTY-EIGHT

"If necessary, bail should be set at high amounts to deter the committing of future crimes." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
1	Agree strongly?	1. Disagree strongly, don't know if he is guilty	- 1
1	Agree?		
4	Disagree?	2. Agree, not theory of bail, but in practice this is way	- 1
7	Disagree strongly?		
		3. Disagree strongly, bail is to assure appearance	- 2
		TOTAL COMMENTS	- 4

Plate VI - Interpretation

In previous chapters, the purpose of bail was emphasized. There, the sole purpose was found to be to insure his presence at trial, and a figure set otherwise has been considered "excessive". Here, two responses disagree.

PLATE # 7

QUESTION TWENTY-NINE

Some legal scholars believe "that pretrial detention is important to secure the appearance of the accused at trial." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

1	Agree strongly?
4	Agree?
7	Disagree?
1	Disagree strongly?

Comment Compendium

1.	Agree, some cases	- 3
2.	Disagree, based on history	- 1
3.	Disagree strongly, not needed in Kansas	- 2
4.	Disagree, suppose not guilty	- 1
5.	Every case must be looked on at own merit	- 1
	TOTAL COMMENTS	- 8

Plate VII - Interpretation

The responses are interesting. They show that the majority disagree that pretrial detention is essential to secure appearances.

PLATE # 8

QUESTION THIRTY

"Pretrial detention is important because it prevents the accused from evading conviction by destroying evidence." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

		Comment Compendium	
0	Agree strongly?		
0	Agree?	1. Disagree strongly, Kansas	- 1
10	Disagree?	TOTAL COMMENTS	- 1
3	Disagree strongly?		

Plate VIII - Interpretation

Here the responses to this question shows that the attorneys unanimously disagree that this question holds any weight.

PLATE # 9

QUESTION THIRTY-ONE

A study in the Washington, D.C. area has shown that "the overwhelming majority of lawyers there agree that pretrial release is essential for a fair trial." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

1	Agree strongly?
8	Agree?
4	Disagree?
0	Disagree strongly?

Comment Compendium

1.	Agree, most cases	- 1
2.	Disagree, nothing to do with fair trial	- 3
3.	Disagree, attorney should take time to investigate	- 1
	TOTAL COMMENTS	- 5

Plate IX - Interpretation

Questions Twenty-nine through Thirty-one all relate to one central subject -- pretrial detention. Opinions about various aspects of the subject are sought. Almost one fourth of the attorneys disagree with the statement that pretrial release is essential for a fair trial.

PLATE # 10

QUESTION THIRTY-TWO

Are you familiar with the use of citations and summons?

Yes

No

Attorneys		Comment Compendium
13	Yes	0
0	No	

Plate X - Interpretation

An introduction to question thirty-three.

PLATE # 11

QUESTION THIRTY-THREE

"Citations and summons should be used in lieu of bail in misdemeanor cases." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
0	Agree strongly	1. Disagree, differences in misdemeanors; lot of bench warrants will be issued	- 1
12	Agree?		
1	Disagree?	2. Agrees, depends whether defendant is good risk	- 2
0	Disagree strongly?	3. Agree, in lieu of warrant, not bail	- 1
		4. Agree, minor (traffic ticket) etc.	- 2
		TOTAL COMMENTS	- 8

Plate XI - Interpretation

The Manhattan (Vera) Bail Project of New York has found summons and citations to be more efficient and avoids needless pretrial detentions. The overwhelming majority seems to agree.

PLATE # 12

QUESTION THIRTY-FOUR

The person detained in jail has a greater chance of being convicted than the accused who is freed on bail." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
0	Agree strongly?	1. Disagree, plead guilty	- 1
7	Agree?		
6	Disagree?	2. Agree, cannot help locate witnesses	- 1
0	Disagree strongly?	TOTAL COMMENTS	- 2

Plate XII - Interpretation

Almost 50% tend to agree and disagree as to whether or not the defendan't chance of conviction is greater if he is detained over a long period of time until trial.

PLATE # 13

QUESTION THIRTY-FIVE

An accused with ties in the community is less likely to flee or jump bail." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

4	Agree strongly?
8	Agree?
1	Disagree?
0	Disagree strongly?

Comment Compendium

1. Agree - Manhattan	- 1
TOTAL COMMENTS	- 1

Plate XIII - Interpretation

Again, these questions are merely concerned with the pretrial detention aspects. The overwhelming majority think community ties are important in determining a would be bail jumper.

PLATE # 14

QUESTION THIRTY-SIX

Are you familiar with the American Bar Association's Minimum Standards For Criminal Justice, Standards Relating To Pretrial Release?

Yes

No

Attorneys

8 Yes

5 No

Comment Compendium

1. Have read them - 2
2. Read pros and cons on them - 1

TOTAL COMMENTS - 3

Plate XIV - Interpretation

Only a slight majority of the attorneys were familiar with these standards. They are:

1. Nature and circumstances of crime
2. Family ties in the community
3. Record of convictions
4. Weight of evidence against him
5. His character and mental conditions
6. Status of employment
7. Financial Resources
8. Permanence in community
9. Court appearance record in past

PLATE # 15

QUESTION THIRTY-SEVEN

"Pretrial detention of a person whose guilt has not been determined may result in psychological and economic hardships." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

		Comment Compendium	
6	Agree strongly?		
6	Agree?	1. Agree, some cases, a lot of them detained are not employed	- 1
1	Disagree?		
0	Disagree strongly?	TOTAL COMMENTS	- 1

Plate XV - Interpretation

Here too, the overwhelming majority agrees. Other findings on this subject have reached the same conclusion. See chapter on "Pretrial and Preventive Detention."

PLATE # 16

QUESTION FORTY

"Preventive detention of a person on the presumption that he may commit future crimes and, therefore, present a clear danger to society, is a violation of due process." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys		Comment Compendium	
2	Agree strongly?	1. Agree, if not mental patient	- 1
9	Agree?		
2	Disagree?	2. Agree, according to purpose of bail	- 1
0	Disagree strongly?	TOTAL COMMENTS	- 2

Plate XVI - Interpretation

The Nixon Administration's D.C. Preventive Detention Law deals headon with this issue. It is important to see how these lawyers feel about the issue. Many authorities think the Law is unconstitutional. Note: The following questions would have more meaning if they are studied in conjunction with Chapter IV of this thesis.

PLATE # 17

QUESTION FORTY-ONE

"Because of indigency, pretrial and preventive detention, in many cases, discriminate against Blacks." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

2	Agree?
9	Agree Strongly?
2	Disagree?
0	Disagree strongly?

Comment Compendium

1.	Disagree, in ghetto areas, yes, not in Manhattan	- 2
2.	Agree, the poor, not just Blacks	- 2
3.	Agree, discriminates against indigents	- 1
	TOTAL COMMENTS	- 5

Plate XVII - Interpretation

This question, although somewhat loaded, was intended to be considered along with the findings in Chapter IV of this thesis.

PLATE # 18

QUESTION FORTY-TWO

Are you familiar with the Nixon Administration's D.C. Crime Bill which allows for preventive detention of certain accuseds considered dangerous to the community?

Yes

No

Attorneys		Comment Compendium	
8	Yes	1. Yes, generally	- 4
5	No	TOTAL COMMENTS	- 4

Plate XVIII - Interpretation

Comparing this question to the responses in question forty we can see that an overwhelming majority agreed with question forty. Yet, however, only a slight majority were even familiar with the D. C. Crime Bill (question 42).

PLATE # 19

QUESTION FORTY-THREE

If you are familiar with the D.C. Crime Bill, then how do you feel about its preventive detention provisions? Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

		Comment Compendium	
0	Agree Strongly?		
3	Agree	1. Disagree strongly, with its use nation-wide	- 1
6	Disagree?		
1	Disagree strongly?	2. Disagree, punishment before conviction	- 1
3	Not familiar	TOTAL COMMENTS	- 2

Plate XIX - Interpretation

The response here is interesting to compare to the two previous questions.

PLATE # 20

QUESTION FORTY-FOUR

"A recidivist is a person who reverts to crime. Blacks tend to have a high rate of recidivism; therefore, they are discriminated against more than others as a result of preventive detention." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

1	Agree strongly?
6	Agree?
5	Disagree?
0	Disagree strongly?
1	Not familiar

Comment Compendium

1. Disagree, in Manhattan - 2
2. Agree, economic status - 1

TOTAL COMMENTS - 3

Plate XX - Interpretation

Question Forty-four should especially be studied in conjunction with "Recidivism and Blacks, And Ratio of Black and White Crime Rates" in Chapter IV.

PLATE # 21

QUESTION FORTY-FIVE

"High bail could be the solution to alleviate the high rates of recidivism on the national as well as state and local levels." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

		Comment Compendium	
0	Agree strongly?		
3	Agree?	1. Agree, in some situations	- 2
8	Disagree?	2. Disagree, nothing to do with recidivism	- 2
2	Disagree strongly?	TOTAL COMMENTS	- 4

Plate XXI - Interpretation

Compare these responses to those in question twenty-eight, where we see about 12% agreement. Here there is about 15% agreement.

PLATE # 22

QUESTION FORTY-SIX

"The utility of preventive detention outweighs the right to freedom of those detained for said purposes." Do you

Agree strongly?

Agree?

Disagree?

Disagree strongly?

Attorneys

0	Agree strongly
2	Agree
8	Disagree
2	Disagree strongly
1	Not familiar

Comment Compendium

1. Agree, in some cases	- 1
2. Disagree, don't believe in preventive detention	- 1
TOTAL COMMENTS	- 2

Plate XXII - Interpretation

These responses are very important because they indirectly reflect the attorney's opinions on the Nixon Administration's Preventive Detention Law as mentioned previously.

Summaries of the Opinions of the Attorneys

A. Bail

The conclusion of this survey will best be understood if they are done separately according to subject matter.

Concerning the determination of the amount of bail, the attorneys agreed unanimously that the judge's discretion was best over the prearranged schedule or statutory method. Almost as much as 85% of the attorneys disagreed that the bail bonding business was scandalous, especially in Manhattan. Others stated that they did not like the present system, but must accept it until something better is formed.

A comparatively high percentage felt the bail bondsmen should not be abolished, but instead, placed under the direction of the state insurance commissioner.

An overwhelming majority felt that Manhattan's bail practices are good. They did have recommendations, however:

1. More rlease on recognizes
2. Speedier trials
3. More bondsmen
4. Uniform bond act
5. Closer regulations of bondsmen
6. Investigate those bonded
7. More liberal attitudes in judges

B. Pretrial Detention

The majority of the lawyers interviewed disagreed that pretrial detention is important to secure the accused's appearance at trial. Also, they disagreed as to pretrial detention being important as a preventive for those who might

attempt to evade conviction by destroying evidence.

Almost one-fourth of them disagree with the argument that pretrial release is essential for a fair trial. The overwhelming majority agree that summons and citations should be used in lieu of bail for misdemeanor offenses.

Only 50% tend to agree that the defendant's chance of conviction is greater if he is detained over a long period of time until trial. And also, the overwhelming majority agrees that pretrial detention of a person whose guilt has not been determined may result in economic and psychological hardships for him.

C. Preventive Detention

Recently there has been a lot of literature on the subject of preventive detention. The Nixon Administration's D. C. Crime Law deals headon with this issue. Many scholars think it is unconstitutional. The Court, however, has not had a chance to decide this issue.

The response of the attorneys here shows that they would probably consider it unconstitutional too. And finally, the majority felt that the utility of preventive detention does not outweigh the right to freedom.

CHAPTER VII

SUMMARY AND CONCLUSIONS

Long before the use of money or property as bail, the system of bail was more concerned with oaths taken as obligations. These oaths were binding until performance.

Roman law and Normanic customs did not have as great an influence on the American legal system as did the Anglo-Saxon and Germanic laws of medieval Europe. The American bail system developed out of the English system of common law.

The English Common law is a part of the English heritage and experience. Customs and traditions played a great part in the development of the common law. Such was the case with bail too.

We find the Magna Carta, Petition of Right and Bill of Rights of 1689, all coming into being as a result of the harsh experiences of the English people. They were to protect their sacred freedoms and personal liberties.

In America, we find that the colonists had had their share of oppressions too. They had suffered while in England, and they wanted to see that they would not have to endure them again. The colonists took heed from Montesqieu in noting that there could be no liberty if the judiciary was not separated from the legislature and

executive branches of government.

As early as 1641 the colonists had bail provisions granting the right to bail as well as banning its excessiveness. Even the Northwest Ordinance provided the right to bail and banned its excessiveness. The even more recent state constitutions had provisions too.

Today many state laws, guarantee a right to release on bail in almost all cases. The Supreme Court has never been forced to determine whether the Eighth Amendment prohibition is also designed to encompass a basic right to release on bail.

The "reasonableness" and "excessiveness" of bail are also modern issues. Bail fixed would become "excessive" if it is used to serve a purpose for which it was not intended. The Court, both federal and state, have generally agreed that the purpose of bail is to insure the defendant's presence at trial. It is not to be used as a form of punishment. When this is realized by all courts, perhaps there will be a more efficient bail system at these levels.

More recently, pretrial and preventive detentions, as aspects of bail have been issues the legal scholars have been tackling. Pretrial and preventive detentions are both debatable issues as to their utility, morality, and constitutionality.

The cost of pretrial and preventive detention is exorbitant. It would be cheaper to practice pretrial release more often.

It has been shown that Blacks and indigents will suffer

as a result of pretrial and preventive detentions stipulations. Pretrial and preventive detention are not the solutions to the crimes committed by Blacks and indigents. The crime rate of the Black and the indigent will disappear along with the social and economic problems they have.

There are several organizations expousing this same belief. These organizations provide extra-judicial solutions to the problems imposed by high bail. They also provide a solution where the bail is reasonable but the defendant is too poor to pay it.

The Manhattan Bail Project, along with other organizations across the country have proved that pretrial release not only eliminates the discrimination and injustice of the old bail system, but works even better. As pioneers, these organizations have helped both the poor and the courts.

The main purpose of this project is to explain, examine, and evaluate the American bail system. Main emphasis was placed on the origin and history of bail; constitutional and statutory provisions concerning the right to bail and the constitutional guarantee against abuses in the bail bond system; "excessive bail"; judicial and extra-judicial solutions to the problems imposed by money bail and an opinion survey of Manhattan attorneys.

A broad range of data has been utilized -- historical, sociological, legal, and quantitative. The quantitative

is purely an opinion survey dealing with the thesis as a whole.

In final summary, the various sources utilized in this research study was designed to furnish support to the central idea of this thesis that: Although improvements have been made, the present bail system, in many aspects, discriminates against Black-Americans and indigents, needlessly detains hundreds of people and raises a number of constitutional questions about some aspects of its usage.

True justice and equality under the law can only be attained when those who are similarly situated are similarly treated without regard to either race or wealth.

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AN ANALYSIS OF THE AMERICAN BAIL SYSTEM

by

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During the last decade, a great deal of attention has been focused on the American bail system. Presidential task forces, congressional committees, legal scholars, and private organizations all have contributed significantly to the reassessment and reformation of the institution and practice of bail in the United States. Despite these efforts, however, the laymen knows very little about bail.

This thesis takes on as its primary purpose the task of explaining, examining, and critically evaluating the American bail system. Main areas of emphasis are: the origin and history of bail; constitutional and statutory provisions concerning the right to bail and the constitutional guarantee against abuses in the bail bonding system; "excessive bail" as a legal concept; judicial and extra-judicial solutions to the problems imposed by bail; and a survey taken of thirteen of the twenty-one lawyers in Manhattan, Kansas concerning their opinions on the national and local bail practices. Furthermore, preventive and pretrial detention is given special attention since a large number of legal scholars agree that they are byproducts of the present bail system.

This research involved a broad range of data: historical, sociological, legal, and quantitative; the methodology and approach to utilizing the source material has been equally diverse.

The historical data, including Biblical oaths and Roman law is used for comparative and informative reasons;

it shows that the American bail system had its origin in medieval Europe via the English common law rather than in Biblical times and Roman law.

The quantitative analysis is important because it demonstrates how the majority of lawyers in Manhattan, Kansas, think about certain issues crucial to the concept and practice of bail. Many of the questions in the survey is not meant to be subjective, but on the other hand, more objective, and to reflect and analyze the opinions, rather than label them ambigously as "liberal" or "conservative". If such labeling is to be used, then the reader may do so himself.

The Manhattan survey shows that the attorneys unanimously agree that the amount of bail should be determined by judicial discretion rather than by statute according to the offense, or by a prearranged schedule according to the offences. A great majority of them believe that pretrial detention of a person whose guilt has not been determined may result in psychological and economic hardships. A slight majority also agree that because Blacks tend to have a high rate of lecidiuism, they are discriminated against more than others as a result of preventive detention; and because of indigency, pretrial detention, in many cases discriminate against Blacks.

The author's position on the subject is that: Although improvements have been made, the present money bail system, in many cases, discriminate against indigents and Black-Americans; and needlessly detains thousands of people

regardless of innocence or guilt.

There is a need for total incorporation of the "excessive bail" provision making it applicable to the states despite the fact that many states have their own provisions banning "excessive bail". The court should expand the Griffin v. Illinois rule which applies to an indigent who was denied a court transcript or appeal because he was too poor to pay for it. By applying such a ruling the court would recognize the fact that even "reasonable" bail may be excessive when applied to indigent persons.

Under recent decisions the Supreme Court has begun to scrutinize "wealth" as a suspect classification under the Equal Protection clause of the Fourteenth Amendment. As a result, the poor has been given just treatment as also enjoyed by richer but similarly situated. Therefore, it is the belief of this author that until there is a Supreme Court decision broad enough to have an umbrella effect so as to encompass and solve the problems arising from the present bail system, such doctrines as "innocent until proven guilt," "due process of law," and "equal protection under the law," will have little meaning to the indigents and Black Americans alike. None of this, however, should be interpreted as to belittle the services rendered by the Vera Institute (Manhattan Bail Project) which has done a marvelous job in aiding indigents to be released on their own recognizance. But this does import that the government and court must do more themselves.

The rule of law is surely freedom's best guarantee; however, the legal system must be able to cope with its own problems effectively and efficiently if true justice is to be enjoyed by everyone alike whether rich or poor. True justice and equality under the law can only be attained when those similarly situated are similarly treated without regard to either race or wealth.