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PREVENTIVE DETENTION: A COMPARISON OF BAIL REFUSAL PRACTICES IN THE UNITED STATES, ENGLAND, CANADA AND OTHER COMMON LAW NATIONS

Kurt X. Metzmeier†

I. INTRODUCTION

With origins obscured in the mists of Anglo-Saxon history, bail as an institution still unites the criminal law systems of England, the United States, Canada and many nations of the former British empire. However, conscious cross-comparison by modern English-speaking legal reformers, rather than blind adherence to ancient precedent, has caused many similarities in the countries' legal practices. Examining each others' legal systems, critical articles and treatises, and law reforms, reformers have carried on a debate on bail across national lines that has been written into the law of nations from Canada to New Zealand. The United States, while not completely part of this discussion, has both contributed to and benefitted from this debate.

Preventive detention,¹ has been an important subject of this transnational dialogue. As old as bail itself, preventive detention pits the fundamental common law principle of the presumption of innocence against the desire by police and judges to protect the public from purportedly dangerous defendants. Although there has been a great deal of divergence in how the

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¹ See discussion *infra* part II. Preventive detention is the refusal of bail for the purpose of preventing future crimes or obstruction of the judicial process. As opposed to a more narrow meaning of this word used in the third world to describe legal procedures where political prisoners are held without charge for fixed, but usually renewable, periods of times.

issue has been resolved in individual nations, this conflict is at the core of all the major bail reforms in the latter half of the 20th century.

The purpose of this article is to examine the treatment of preventive detention in the laws and criminal procedures of the major common law nations with a view toward developing some principles universal to a model preventive detention law. This article will focus on a number of common themes. First, it will briefly outline the history of bail and bail reform in each surveyed country. Second, it will examine the current law of bail and preventive detention, focusing particularly on the factors used to justify the denial of bail and which party has the burden of proving these factors. Third, this article will examine whether the practical effect of the bail law is just. Finally, when appropriate, it will examine how a nation's fundamental laws or charter of rights offers protection of a defendants' presumption of innocence and right to liberty that transcends the legislative scheme.

In its conclusion, this survey will compare both positive and negative features of the preventive detention laws of the surveyed nations. Thus, this article will derive, based on the best features of the bail laws surveyed, a model preventive detention statute that meets society's conflicting interest in justice and the prevention of crime.² The touchstones of this discussion will be the high value placed by the common law tradition on both the presumption of innocence of persons accused of crimes and the right to liberty from unjust seizures. These are fundamental human rights that should only be abridged upon proof of a clear and particularized public interest.³

² See Model Pre-Trial Release and Detention Statute *infra* Appendix.

³ International conventions recognizing the right to bail as a fundamental right include the International Covenant on Civil and Political Rights, December 16, 1966, Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, Part III, Art. 9, § 3:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer . . . and shall be entitled to trial within a reasonable time or release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . .

and the European Convention for The Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, Art. 5, §§ 1(c), 3:

II. BAIL AND PREVENTIVE DETENTION IN THE ANGLO-SAXON LEGAL TRADITION

The roots of bail trace back to the laws of the Anglo-Saxon kings Hlothaere (673-685 A.D.) and Eadric (685-687)⁴ whose laws provided that persons accused of a crime pay *bohr*, a from of blood price, to the family of the victim, with the money being returned if the accused was proven innocent.⁵ Modern bail began sometime in the 9th or 10th century and evolved out of inefficiencies of the early English court system.⁶ Under that system the sheriff was required to arrest the suspect and hold him for trial.⁷ An accused party was likely to wait years to be tried, because of the large and haphazard judicial districts assigned to the traveling medieval magistrates, as well as the general political turmoil of the early middle ages.⁸ This was not only unjust, it was also very impractical. Often the only lodging for defendants was the sheriff's own home.⁹ To avoid this, defendants were allowed to either pay a money bail or have friends and relatives swear surety that the accused would appear for trial.¹⁰ Thus, bail began as an effort to preserve the liberty of Englishmen while ensuring the accused's presence at trial.

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty in the following cases and in accordance with a procedure prescribed by law: . . .

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offense or when it is reasonably considered necessary to preventing his committing an offense or fleeing after having done so; . . .

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to within a reasonable time or release pending trial. Release may be conditioned by guarantees to appear to trial.

⁴ THE LAWS OF THE EARLIEST ENGLISH KINGS 18-23 (F.L. Attenborough trans., 1922).

⁵ PAUL E. DOW, DISCRETIONARY JUSTICE 59 (1981). See generally ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275 (1940).

⁶ JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1883).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

William I, using a common sense approach, adopted this bail system after the Norman conquest in 1066.¹¹ In 1275, Edward I attempted to reform bail practice.¹² He was particularly concerned that corrupt sheriffs were taking bribes to release felons while denying bail to deserving persons who could not pay both the bribe and the surety.¹³ The First Statute of Westminster¹⁴ codified the bail procedure and formally listed bailable and nonbailable offenses. The list of crimes for which bail was denied included murder, treason, jail-breaking and any crime where the accused had confessed or effectively done so by fleeing—all circumstances fitting within the purpose of preventing flight before trial.¹⁵ Additionally, bail was denied to counterfeiters, forgers, poachers, “outlaws,” and “thieves openly defamed.”¹⁶ The likely justification for the inclusion of these crimes was the prevention of future crimes and flight.

The concept of bail as an individual right arose from the struggle in the 17th century between the barons of Parliament and the King.¹⁷ The acceptance of the Petition of Rights in 1627 required that cause be shown before a person could be jailed.¹⁸ The Habeas Corpus Act of 1679¹⁹ established a right to bail

¹¹ Dow, *supra* note 5.

¹² Curing general corruption in the English justice system was a central concern addressed by Edward's First Statute of Westminster, but the King was particularly concerned that corrupt sheriffs were allowing well-placed felons to flee and using their powers to oppress innocent citizens. L.F. SALZMAN, EDWARD I 199-200 (1968); T.F. TOUT, EDWARD THE FIRST 124-25 (1893); WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 457 (4th ed. 1936). The preface to the bail provision stated Edward I's particular concern with abuse of bail, noting that:

forasmuch as Sheriff's, and other, which have taken and kept in prison, Persons detected of Felony and incontinent, have let out by Replevin [bail] such as were not replevisable, and have kept in Prison such as were replevisable, because they would gain of the one party, and grieve the other

... and because “before this Time it was not determined which Persons were replevisable, and which not,” the King believed it necessary to precisely define the law of bail. 3 Edw. I, ch. 12, (1275)(Eng.). JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 234-35 (1883). See generally T.F.T. PLUNKNETT, EDWARD I AND CRIMINAL LAW (1960).

¹³ STEPHEN, *supra* note 12, at 234-235.

¹⁴ 3 Edw. I, ch. 12, (1275)(Eng.).

¹⁵ STEPHEN, *supra* note 12, at 235.

¹⁶ 3 Edw. I, ch. 12, (1275)(Eng.).

¹⁷ SALZMAN, *supra* note 12, at 201-202.

¹⁸ 3 Car. I, ch. 1, (1627)(Eng.).

¹⁹ 31 Car. 2, ch. 2, (1679)(Eng.).

under certain circumstances and outlined a procedure to ensure a bail hearing.²⁰ The Bill of Rights of 1688,²¹ the crowning jewel of the Glorious Revolution, outlawed excessive bail.²² Yet none of these reforms (which essentially wrested prerogatives from the king for the benefit of the parliament) affected the burgeoning number of crimes for which bail was denied.²³ In a manner not unfamiliar to modern critics, the newly emboldened parliament attempted to deal with increasing crime by denying bail to additional capital crimes and offenses. By the time Michael Dalton's popular manual for justices of the peace was published in 1622, over 150 crimes were nonbailable.²⁴

III. UNITED STATES

As in many areas of English law, a simplified law of bail was transplanted to colonial America. Early Americans valued liberty and the presumption of innocence. Thus, the right to bail was included in many colonial charters.²⁵ However, the grounds for rejecting bail were largely reduced to situations involving a risk of flight.²⁶

The founders of the American republic counted the right to a just bail among the essential liberties. The Eighth Amendment to the United States Constitution guarantees against "excessive bail."²⁷ A stronger expression of the contemporary

²⁰ 31 Car. II, ch.2, (1679)(Eng.). See also 4 WILLIAM BLACKSTONE, COMMENTARIES *297.

²¹ Bill of Rights, 1 W. & M. (2d. Sess.), ch. 2, § 10 (1688)(Eng.).

²² "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bill of Rights, 1 W. & M. (2d. Sess.), ch. 2, § 10 (1688)(Eng.).

²³ *Id.*

²⁴ MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 278-97 (1622).

²⁵ BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 32-33, 61 (1983). Historian Chapin counts the right to bail among the rights common to all colonial charters.

Typical of these early bail provisions was that incorporated in the 1683 New York Charter of Liberties: "That in all Cases whatsoever Bayle by sufficient Suretyes shall be allowed and taken unless for treason or felony plainly and specially Expressed and menconed in the Warrant of Commitment." AMERICAN LEGAL HISTORY: CASES AND MATERIALS 21 (Kermit L. Hall et al. eds., 1990).

²⁶ CHAPIN, *supra* note 25, at 32-33. The number of capital offenses in early America were far fewer than in England.

²⁷ "Excessive bail shall not be imposed, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This provision is

feeling about bail is found in the Northwest Ordinance of 1787, which declared that "all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great."²⁸

usually agreed to have been based on Section 9 of the Virginia Bill of Rights: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." VA. CONST. of 1776, § 9. However, this language (drawn from the English Bill of Rights, 1 W. & M. (2d. Sess.), ch. 2, § 10 (1688)(Eng.)). See THOMAS, *infra* note 35) was part of several contemporaneous state constitutions. DEL. CONST. of 1776, DECLARATION OF RIGHTS § 16; GA. CONST. of 1777, § LX; MD. CONST. of 1776, DECLARATION OF RIGHTS, § 22; MASS. CONST. of 1780, BILL OF RIGHTS, § 26; N.C. CONST. of 1776, DECLARATION OF RIGHTS, § 10; PA. CONST. of 1776, § 29.

Whether the founders intended to create a right to bail with this sparse language has long been a question of debate. See John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1224-1231 (1969) (arguing against a right to bail). *Contra* Lawrence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 396-402 (1970) (arguing for the right to bail). There is little direct evidence from either the Constitutional debates or the campaign for ratification. See Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1140, 1190-1191 (1972). Nonetheless, other evidence indicates that several of the parties to the constitution valued the right to bail. As its last act, the Continental Congress passed the Northwest Ordinance, which incorporated a strong right to bail. See sources cited *infra* note 28. In addition, one of the first acts passed by Congress was the Judiciary Act of 1789 which provided that "[u]pon all arrests in criminal cases, bail should be admitted, except where the punishment may be death." 1 Stat. 91, ch. 20 (repealed by 18 U.S.C.A. §§ 3141-3151 (1995)).

²⁸ The source of the language of this bail provision, which was later incorporated into the constitutions of many U.S. states, has not been satisfactorily explained. The text of what became the Northwest Ordinance of 1787 "reflects its gradual and uneven development through successive committee drafts." PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 59 (1987). After a 1784 draft by Thomas Jefferson failed to get the assent of the Continental Congress, two successive committees worked on a new draft which, after revisions by Nathan Dane of Massachusetts (and perhaps Ohio Company agent Manasseh Cutler), it was passed on July 13, 1787. *Id.* at 58; JAY A. BARRETT, *THE FIRST AMERICAN FRONTIER: EVOLUTION OF THE ORDINANCE OF 1787* 49-53 (1888); *THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK* 18-19 (Robert M. Taylor, Jr. ed., 1987). It was during this last revision that the right to bail was drafted. *Id.* at 62. Barrett believes that Dane was the major architect of the rights section and that he based the bail provision on the Massachusetts constitution's excessive bail provision. See CHAPIN, *supra* note 25. More plausible is J. M. Merriam's argument that the provision was based on Part 4 of the 1776 Constitution of Connecticut: "And that no man's person shall be restrained or imprisoned by any authority whatsoever, before the law has sentenced him thereunto, if he can and will give sufficient Security, Bail, or Mainprise, for his Appearance and Good Behavior in the meantime, unless it be for Capital Crimes . . ." *LEGISLATIVE HISTORY OF THE ORDINANCE OF 1787* 30 (1888). Unlike the excessive bail provision found in many early state constitutions, this provision actually creates a right to bail in

By the mid 19th century most state constitutions included some sort of right to bail, often directly borrowing the language of the Northwest Ordinance.²⁹ Typical of these provisions is that of Alabama: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where proof is evident, or presumption great."³⁰

non-capital cases. Perhaps Dane (or Cutler) refined this idea into the final language of the act.

The intended interpretation of the language, which has rarely been judicially interpreted, is also somewhat murky. In oral arguments in the case of *Murphy v. Hunt*, 455 U.S. 478 (1982), Justice Brennan asked the Assistant Attorney General of Nebraska what the phrase "proof is evident and presumption great" meant in the Kansas constitution. The Assistant Attorney General responded that he believed it to mean that "there is clear and convincing evidence that the defendant will be convicted." The opposing public defender was more analytical:

Practically every state uses this language. . . . There seems to be three different interpretations. . . . One is "that you can't even put on evidence because the language creates an irrebuttable presumption." Another is that the burden is upon the accused to show that proof isn't evident or the presumption great that he will be convicted. The third is that the state bears the burden of showing a high probability of guilt. 30 CRIM. L. REP 4189, 4190-4191 (1982), *quoted in* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 7 n.26 (1985).

²⁹ *Ex parte Foster*, 5 Tex. App. 625 (1879); *Ex parte McAnally*, 53 Ala. 495 (1875); *People v. Tinder*, 19 Cal. 539 (1862); *Ex parte Goans*, 99 Mo. 193 (1889); *Ex parte Wray*, 30 Miss. 673 (1853). See I JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 261 (2d. 1866).

³⁰ *McAnally*, 53 Ala. at 497. Today, 35 state constitutions state the right to bail in almost these exact terms. ALA. CONST. art. I, § 16; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. (BILL OF RIGHTS) § 9; KY. CONST. (BILL OF RIGHTS) § 16; LA. CONST. art. I, § 18; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEV. CONST. art. I, § 7; N.J. CONST. art. I, pt. 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; WASH. CONST. art. I, § 20.

However, several of these charters have been amended recently either to allow preventive detention (Arizona, California, Colorado, Florida, Illinois, Michigan, Mississippi, Oklahoma, Texas and Utah) or to apply the "proof is evident or presumption great" standard to non-capital crimes (the above mentioned states and Rhode Island). Puerto Rico uses completely different language to guarantee the right to bail (P.R. CONST. art. II, § 11), while Maine's constitution turns the "proof or presumption" language on its head to create a presumption against bail for certain felonies: "No person before conviction shall be bailable for any of the crimes

Such provisions were interpreted to make risk of flight the only legitimate factor to consider in denying bail in non-capital cases. In capital cases, the court weighed the evidence against the accused to determine the party's likelihood of conviction. However, this infringement of the presumption of innocence was also justified on flight risk grounds: "When felony was punishable . . . by death, if there was reason to believe the party seeking bail was guilty, no bail could be accepted for him; because, in the language of the scriptures, 'all that a man hath, he will give for his life.'" ³¹

The Supreme Court, in *Stack v. Boyle*,³² later affirmed the American doctrine that risk of flight was the sole legitimate purpose for bail. The court noted that "unless the right to bail is preserved, the presumption of innocence, secured after centuries of struggle, would lose its meaning."³³ The court determined that the purpose of bail is to "serve . . . as assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment."³⁴

By the 20th century, despite the strong presumption towards bail and the establishment of risk of flight as the only proper grounds for denial of bail, a form of quasi-preventive detention flourished in the United States. The cause of this was the development of the bail bond system and the use of high bail.³⁵

As the nation grew and urbanized in the late 19th and early 20th centuries, gross inequities developed in the bail system. Corruption in the criminal justice system ensured that wealthy and politically connected defendants were released, while the poor often spent as much time in jail awaiting trial as they were likely to have to serve if convicted.³⁶ In the South, the bail sys-

which are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be." ME. CONST. art. I, § 10.

³¹ 53 Ala. 495, 497 (quoting 1 BISHOP, *supra* note 29, at § 255).

³² 342 U.S. 1 (1951).

³³ *Id.* at 4.

³⁴ *Id.* at 5.

³⁵ WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 4 (1976).

³⁶ *Id.*

tem became just one part of the systematic denial of civil rights of African Americans.³⁷

The most visible embodiment of this corruption of the right to bail was the bail-bondsmen, who stalked the corridors of city police courts and county houses.³⁸ These unofficial adjuncts to the criminal justice system supplanted the judges as true arbiters of who would go free or not. Unbound by any law, they set bail based on experience, gut instincts and long-developed prejudices.³⁹

Although this system had been criticized as early as 1922 by Roscoe Pound and Felix Frankfurter,⁴⁰ it was not until the 1960's that the American bail system was seriously challenged. In 1961, philanthropist Louis Schweitzer visited a jail in Brooklyn, New York and was "appalled" to find that detainees awaiting trial were treated like convicts. He was even more concerned to find that many were acquitted or given non-jail sentences after an average wait of over a month.⁴¹ As a result, he created the Vera Foundation which instituted the Manhattan Bail Project. Working with New York University Law School, the Vera Foundation posted bail for defendants with strong community ties and tracked whether they made their court appearance. The experiment proved that defendants released on their own recognizance had a lower non-appearance rate than those under the old money bail system.⁴²

The Manhattan Bail Project caught the eye of President John F. Kennedy. President Kennedy invited the Vera Foundation to join with his Justice Department to co-sponsor a National Conference on Bail & Criminal Justice (NCBCJ) in 1964 and 1965.⁴³ The NCBCJ's study of bail eventually concluded with recommendations favoring the expansion of own-recogni-

³⁷ Gilbert Ware, *Criminal Justice and Blacks*, in FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE 82-83 (G. Ware, ed., 1976).

³⁸ PAUL B. WICE, FREEDOM FOR SALE (1974).

³⁹ *Id.*

⁴⁰ CHRIS W. ESKRIDGE, PRETRIAL RELEASE PROGRAMMING: ISSUES AND TRENDS 23-27 (1983).

⁴¹ THOMAS, *supra* note 35, at 4.

⁴² ESKRIDGE, *supra* note 40, at 25-26.

⁴³ National Conference on Bail and Criminal Justice, Proceedings of May 27-29, 1964 and Interim Report, May 1964-April 1965 (1965) (hereinafter NCBCJ); see NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (Robert M. Fogelson ed., 1974).

zance bonds, that were ultimately adopted in the federal Bail Reform Act of 1966.⁴⁴ The 1966 law created a presumption in favor of own-recognizance release and set forth model conditions to structure pretrial release.⁴⁵

The NCBCJ also examined the setting of high bail as a method of preventive detention. During the conference, several judges and prosecutors frankly discussed the use of high bail to preventively detain defendants deemed dangerous to the community.⁴⁶ Many justified this use by saying that a determination of dangerousness to the community was indivisibly mixed into the weighing of risk of flight.⁴⁷

Unmentioned in the discussion of high bail was a frank appraisal of an open prevention detention provision. The committee discussion divided, predictably, between those for whom any form of preventive detention was an unconstitutional assault on liberty and those for whom it was one element of a reasonable setting of bail. Left untouched was any suggestion that an open, regulated system of preventive detention could be more

⁴⁴ THOMAS, *supra* note 35, at 7.

⁴⁵ THOMAS, *supra* note 35, at 7. The 1966 Act led to parallel reforms of bail in the states. Twenty states created a presumption toward release on recognizance in bailable categories. ALASKA STAT. § 12.30.020 (1985); ARIZ. RULES CRIM. PROC. 7.2(a); DEL. CODE ANN. tit. 11, § 1205 (1987); D.C. CODE ANN. § 23-1321 (1981 & Supp. 1994); IOWA CODE § 811.2 (1994); KY. REV. STAT. § 431.520 (1985); ME. REV. STAT. ANN. tit. 15, § 1026 (Supp. 1994); MD. RULES 4-216; MINN. RULES CRIM. PROC. 6.02; NEB. REV. STAT. § 29:901 (1989 & Supp. 1992); N.M. RULES CRIM. PROC. 4.02; N.C. GEN. STAT. § 15A-534(a),(b) (1994); N.D. RULES CRIM. PROC. 46(a); OR. REV. STAT. § 135.245(3) (1993); S.C. CODE ANN. § 17-15-10 (Law. Co-Op 1985); S.D. COMP. LAWS ANN. § 23A-43-2 (1988); TENN. CODE ANN. §§ 40-11-115, -116 (1990); VT. STAT. ANN. tit. 13 § 1554 (1974); WASH. SUPERIOR CT. CRIM. RULES 3.2; WIS. STAT. §§ 969.01, .02 (1985 & Supp. 1994); WYO. RULES CRIM. PROC. 8(c)(1). Most others allow own-recognizance bonds in more limited circumstances. Goldkamp, *supra* note 28, at 11 nn.38-39. As the use of own-recognizance bonds became widespread, bail-bondsmen began to be more closely regulated. In 1978, Kentucky completely abolished bail-bondsmen. The statute was upheld in *Benboe v. Carroll*, 625 F.2d 737 (6th Cir. 1980). See Vitauts M. Gulbis, Annotation, *Validity of Statute Abolishing Commercial Bail Bond Business*, 19 A.L.R.4th 355 (1983). Where they have not been banned outright, bail-bondsmen have been largely displaced by laws allowing deposit bail. See Goldkamp, *supra* note 28, at 13 n.47.

⁴⁶ NCBCJ, *supra* note 43, at 149-219.

⁴⁷ NCBCJ, *supra* note 42, 200-202. The nearly 300 U.S. police, court officials and judges surveyed by Paul B. Wice in 1971 were more candid. Nearly 48% agreed that judges set bail higher than a defendant could afford in order to preventively detain persons identified by police as "dangerous." Paul B. Wice, *Bail Reform in American Cities*, 9 CRIM. LAW BULL. 787 (Nov. 1973); See also PAUL B. WICE, *FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE* (1974).

fair and just than a system where unstated preventive factors were hidden within unwritten bail decisions.

Despite the NCBCJ's discussion of preventive detention, Congress decided not to deal with this "problem" in the 1966 Act. However, the House Judiciary Committee averred that "pretrial bail may not be used as a device to protect society from the possible committing of additional crimes by the accused."⁴⁸

The first move toward a system of explicit preventive detention occurred in 1970 when Congress enacted a preventive detention statute for the District of Columbia.⁴⁹ The experience of the D.C. law provided the background to the Bail Reform Act of 1984.⁵⁰

The legislative history of the 1984 Bail Reform Act reveals two major concerns.⁵¹ First, Congress was concerned that crimes were being committed by accused felons out on bail.⁵² Second, Congress recognized that, rather than releasing defendants they deemed dangerous, some judges were setting excessive release conditions and high money bail.⁵³ The Senate Judiciary Committee, in its report, expressed the belief that the Act would "promise fairness, and effectiveness for society, the victims of crime—and the defendant as well."⁵⁴ Despite these considerations, the language of the act itself suggests that concerns over drug trafficking were also a major impetus for the law.⁵⁵

Under the Bail Reform Act a federal judge "shall order the detention" of a person accused of a federal crime if he or she finds that "no conditions or combination of conditions will reasonably assure the appearance of the [defendant] as required *and* the safety of any other person . . . before trial" (emphasis added).⁵⁶

⁴⁸ H.R. REP. NO. 1541, 98th Cong., 1st Sess. (1983), *quoted in* Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 CINC. L. REV. 153, 159 (1986).

⁴⁹ D.C. CODE ANN. § 23-1322 (1981).

⁵⁰ Overbeck, *supra* note 48, at 160.

⁵¹ S. REP. NO. 225, 98th Cong., 1st Sess. 5 (1983). *See generally* Overbeck, *supra* note 48, at 155-160.

⁵² S. REP. NO. 225, 98th Cong., 1st Sess. 5 (1983).

⁵³ *Id.*

⁵⁴ *Id.* at 11.

⁵⁵ 18 U.S.C. § 3141(e),(f) (1984).

⁵⁶ 18 U.S.C. § 3142(e) (1984).

A rebuttable presumption for preventive detention arises if a defendant has:

- (1) been convicted of a Federal crime involving violence, a crime involving a life sentence or the death penalty, drug trafficking with possible sentence of over 10 years or two of the above described offenses; and
- (2) the current crime occurred while the defendant was on bail awaiting trial; and
- (3) the defendant committed the current crime less than five years after release from jail for any crime described above.⁵⁷

The federal prosecutor can move for a detention hearing if the case involves any of the above listed crimes or if they believe there is:

1. serious risk of flight,
2. a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.⁵⁸

In determining a preventive detention motion, the judge must determine whether there are conditions of release that would "reasonably assure the appearance of the person . . . and the safety of any other person and the community."⁵⁹ In assessing this, the judge "shall take into account" the following factors:

1. nature of crime; whether it involves violence or drugs;
2. "weight of the evidence;"
3. person's history, including character, physical & mental condition, job, finances, length of residence, community ties, drug abuse history, prior criminal & bail appearance record; and
4. nature and seriousness of the danger to any person or the community that would be posed by the person's release.⁶⁰

The defendant or prosecutor can appeal a decision of a magistrate, judge or any other person other than the judge of the court of original jurisdiction to revoke bail. If this option did not

⁵⁷ *Id.*

⁵⁸ *Id.* § 3142(f)(2)(B).

⁵⁹ *Id.* § 3142(f).

⁶⁰ *Id.* § 3142(g).

exist, only the person subject to detention may appeal the court's decision.⁶¹

Beyond the general criticism of preventive detention in principle,⁶² there is much room for criticism of the Bail Reform Act. First, the Act gives a great deal of discretion to judges. Although they are given a list of factors to consider, they need only "take [them] into account" in ruling.⁶³ There are British and Canadian cases that illustrate the dangers of conferring too much judicial discretion regarding preventive detention.⁶⁴ Second, the factors themselves appear arbitrary; why should a non-violent drug charge be grounds for detention? Finally, the scheme itself is confusing. The same factors are used to evaluate a risk to the public safety that are used to evaluate a risk of flight. There are two criticisms: First, the interests implicated by detention based on risk of flight are of a different nature than those implicated by preventive detention. In a flight risk determination, the state has a strong, narrowly defined interest in assuring the accused's attendance at trial. The defendant's right to liberty is constrained by such detention. However, his or her presumption of innocence is not (or should not) be directly impaired. In contrast, determining whether to preventively detain a defendant, the state asserts a broader, more speculative interest in preventing future crimes. The defendant is forced to defend his or her right to liberty and the presumption that they are innocent—because the underlying message of preventive detention presumes that the defendant is guilty of the crime charged and seeks to prevent the repetition of that crime.⁶⁵

⁶¹ 18 U.S.C. § 3145(b),(c) (1984); 18 U.S.C. § 3731 (1970).

⁶² See Lawrence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970).

⁶³ 18 U.S.C. § 3142(g) (1984).

⁶⁴ See discussion *infra* part V. *R. v. Phillips*, 32 Crim. App. 47 (1947)(Eng.); *R. v. Demyen*, [1975] 26 C.C.C. (2d) 324 (Sask. C.A.), per Culliton, C.J.S.; *R. v. Powers*, [1972] 9 C.C.C. (2d) 533 (*sub nom Powers v. R.*) (Ont. H.C.).

⁶⁵ Because of these inherent differences, separate tests should be employed to assess risk of flight and risk of harm to the public. The factors used to justify these two types of detention should be narrowly tailored to protect the interests involved. Flight risk should be assessed by the traditional means: community ties, prior bail appearance record, opportunity for flight, etc. The factors used to justify preventive detention should narrowly focus on evidence that tends to increase the likelihood that the defendant would harm someone while on bail: whether the crime charged involves violence; defendant's prior history of violence; prior history

The constitutionality of the Bail Reform Act was determined by the Supreme Court in *United States v. Salerno*.⁶⁶ *Salerno* involved two defendants indicted for twenty nine counts of racketeering and denied bail under 18 U.S.C. § 3142(g). The court examined two constitutional challenges to the Act: substantive due process and the Eighth Amendment right to be free from excessive bail. In evaluating the due process claim, the court determined that preventive detention was regulatory, not punitive.⁶⁷ Furthermore, the "incidents of pretrial detention" were not "excessive" in relation to the regulatory goals sought by Congress. The Court argued that the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes."⁶⁸

Turning to the Eighth Amendment claim, the Court rejected the argument that *Stack v. Boyle*⁶⁹ applied to the case. The Court found *Stack* (which dealt specifically with the dollar amount of the bail) was irrelevant because the lower court in that case had no occasion to consider whether bail could be preventively denied.⁷⁰ The Court, in *Stack*, further noted that the right to bail had never been considered absolute and that persons accused of capital crimes and risk of flight had long been subject to bail restrictions.⁷¹ The Court upheld § 3142(g), determining that "nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight."⁷²

The United States is unique among common law nations in the primacy it still places on appearance at trial as the basis of bail. In the 1960's, reforms restored the traditional American presumption towards bail. Although a judicially regulated and open form of preventive detention appears preferable to one that is unregulated and covert, there are problems with the lan-

of violence while on bond; membership in a gang or criminal syndicate; whether the crime charged involves domestic violence and the defendant has a history of domestic violence; whether defendant has ever threatened witnesses in this or other trials; etc.

⁶⁶ 481 U.S. 739 (1987).

⁶⁷ *Id.* at 746-47.

⁶⁸ *Id.* at 747.

⁶⁹ 342 U.S. 1 (1951).

⁷⁰ *Salerno*, 481 U.S. at 753.

⁷¹ *Id.* at 754.

⁷² *Id.*

guage of the Act. The 1984 Bail Reform Act, and state preventive detention laws inspired by it,⁷³ have been criticized for diverging from this tradition. Perhaps the worst possible criticism of the federal preventive detentive law is that, in practice, it is still infrequently used by federal judges, who still feel more comfortable reaching the same goal by setting excessive bail, but are careful not to offend the Eighth Amendment.

IV. UNITED KINGDOM

English magistrates, from the Statute of Westminster in 1275 until the Bail Act of 1826, used the same primary factors to decide whether bail should be granted remained the same. Three principles, derived from the lists of bailable and non-bailable crimes,⁷⁴ controlled bail decisions: the seriousness of the offense; the likelihood of the accused's conviction and the "out-lawed" status of the offender.⁷⁵

The 1826 Act abolished the Westminster Act and its successors.⁷⁶ Later, an 1835 act authorized bail for any offense, so long as granting bail did not "endanger the appearance of [the accused at trial]" even if "the circumstances are such to raise a presumption of guilt."⁷⁷ The primacy of appearance at trial as the central purpose of bail was crystallized by Justice J. Coleridge in two mid-19th century cases. In *R. v. Scaife*,⁷⁸ a forgery case, he opined: "I conceive that the principle on which persons are committed to prison . . . previous to trial, is for the purpose of ensuring the certainty of their appearing at trial."⁷⁹ In *R. v. Robinson*,⁸⁰ Coleridge set out three "general questions" to assist in determining whether the accused would likely appear. First,

⁷³ In the last two decades, eleven states have amended their Constitutions to permit the denial of bail in order to protect public safety: ARIZ. CONST. art. II, § 22(3); CAL. CONST. art. I, § 12(b); COLO. CONST. art. II, § 19(b); FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 19; MICH. CONST. art. I, § 15(c); MISS. CONST. art. III, § 29; OKLA. CONST. art. II, § 8; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; WIS. CONST. art. I, § 8.

⁷⁴ 3 Edw. I, ch. 12. For discussion, see *supra*, sec. II.

⁷⁵ A.K. Bottomley, *The Granting of Bail Principles and Practice*, 31 MOD. L. REV. 40, 45 (1968).

⁷⁶ 7 Geo. IV, ch. 64 (1826)(Eng.).

⁷⁷ 5 & 6 Will. IV, ch. 33 (1835)(Eng.).

⁷⁸ 10 L.J.M.C. 144 (1841).

⁷⁹ *Id.* at 145.

⁸⁰ 23 L.J.Q.B. 286 (1854).

"what is the nature of the crime, is it grave or trifling?"⁸¹ Second, "what is the probability of a conviction?"⁸² Finally, "what is the probable punishment in the event of conviction?"⁸³ The three *Robinson* factors remained the text-book test for bail determinations until the 1976 bail reform.⁸⁴

The 1835 Act and its predecessors only gave judges the discretion to release defendants on bail, and did not create a right to bail. Thus, neither the British statutes nor the precedent of *Robinson* prevented judges from denying bail to protect the public. In *R. v. Phillips*,⁸⁵ the Court of Criminal Appeal denied bail to a repeated burglar and noted that if a court determines a persistent felon is likely to commit future crimes while on bail, bail should be denied. The *Phillips* opinion spawned a shift toward preventive detention in the 1950's and early 1960's. In *R. v. Wharton*,⁸⁶ Chief Justice Lord Goddard chastised a previous court for bailing a robber who later committed the same crime while on bail: "It is surprising to find that the magistrates admitted him to bail considering his past record, because he had been convicted over and over again This is what comes of granting bail to these men with long records."⁸⁷ The British Home Office subsequently circulated a transcript of these remarks to all magistrates.⁸⁸ The point was further articulated in *R. v. Armstrong*:⁸⁹ "It is clear that it is the duty of the justices to inquire into the [criminal record of the accused] and if they find he has a bad record . . . that is a matter which they *must* consider before granting bail" (emphasis added). By the 1960's it was clear that preventive detention for even minor crimes was the policy of the Court of Criminal Appeals.⁹⁰

Given the power of the courts to preventively detain even non-violent offenders, it is not surprising that when reformers

⁸¹ *Id.* at 287.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ ARCHBOLD, PLEADING EVIDENCE & PRACTICE IN CRIMINAL CASES § 203 (36th ed. 1966).

⁸⁵ 32 Crim. App. 47 (1947)(Eng.).

⁸⁶ Henry Palmer, *Bail — Prisoner with a Bad Criminal Record*, [1955] CRIM. L. REV. 565.

⁸⁷ *Id.*

⁸⁸ Bottomley, *supra* note 75, at 52.

⁸⁹ [1951] 2 All E.R. 219.

⁹⁰ Bottomley, *supra* note 75, at 52.

examined the British bail system in the 1960's, they found it rife with inequities. A 1967 study found that 36.5% of persons scheduled for trial were in detention.⁹¹ The majority remained in jail from the arrest to the trial. The arrest stay averaged 31 days (about the same as the Manhattan Project found in Brooklyn, New York). Furthermore, 20% of those convicted after being detained received non-jail sentences.⁹²

Drawing on the efforts of American and Canadian reformers, as well as studies by British groups,⁹³ the Home Office began to seriously consider reforming the bail system. A Working Party was created⁹⁴ and later the Bail Act of 1976 was introduced.⁹⁵ One primary goal of the Working Party was to create a law outlining "generally accepted criteria" and "uniform procedures" for the granting or denying of bail.⁹⁶ The group outlined five considerations for bail determination: 1) appearance at trial (the primary consideration); 2) likelihood of further offenses; 3) further police inquiries; 4) interference with witnesses and 5) protection of the defendant.⁹⁷

The 1976 Bail Act⁹⁸ met most of the Working Party's goals. It set out rational criteria for bail decisions and uniform procedures. Significantly, it required judges to set out their reasons for denying bail. Finally, it set a strong presumption towards the grant of bail.

The structure of the Act emphasizes this presumption towards bail. Section 4 commands that bail shall be granted except as provided by Schedule 1 to this Act.⁹⁹ Schedule 1 contains the only justifications for denial of bail. Part II of the schedule states that persons accused on non-imprisonable offenses can only be denied bail if they have previously broken

⁹¹ Michael Zander, *Bail: A Re-Appraisal* [1967] CRIM. L. REV. 25.

⁹² *Id.* at 31.

⁹³ MICHAEL KING, *BAIL OR CUSTODY* (1973).

⁹⁴ Denis Galligan, *Working Paper on Bail*, 38 MOD. L. REV. 59 (1975). See Michael King, *Bail Reform: The Working Party and the Ideal Bail System*, [1974] CRIM L. REV. 451; Martin Wright, *Bail Recognition of the Need for Reform*, [1974] CRIM. L. REV. 457.

⁹⁵ Bail Act, 1976, ch. 63 (Eng.).

⁹⁶ Galligan, *supra* note 94, at 60 (quoting BAIL PROCEDURES IN MAGISTRATES COURTS (H.M.S.O. Working Paper, para. 53, 1974)).

⁹⁷ Galligan, *supra* note 94, at 60.

⁹⁸ Bail Act, 1976, ch. 63 (Eng.).

⁹⁹ Bail Act, 1976, ch. 44, § 4(1) (Eng.).

bail. Part I, Paragraph 2 lays out the exceptions to the right to bail for those accused of imprisonable offenses. The court need not grant bail "if the court is satisfied that there are substantial grounds for believing" that if bail is granted the defendant would:

- (a) fail to surrender to custody
- (b) commit an offense while on bail, or
- (c) interfere with witnesses or otherwise obstruct the course of justice.¹⁰⁰

Paragraph 9 indicates that in making a paragraph 2 decision, the court "shall have regard to such of the following considerations as appear to it to be relevant."¹⁰¹

- (a) the nature and seriousness of the offense
- (b) the character, antecedents [i.e. criminal record], associations and community ties of the defendant
- (c) the defendant's prior bail record
- (d) the strength of the evidence.

Furthermore, the magistrate may regard "any other [factors] which appear relevant."

There have been few judicial interpretations of the Bail Act. This suggests that it is successful. One issue of note is the interpretation of the requirement that the judge "be satisfied that there are substantial grounds for believing" one of the factors in paragraph 2.¹⁰² In *R. v. Slough JJ ex p. Duncan*,¹⁰³ the court held that the judge's subjective belief that the grounds existed, rather than a post hoc objective assessment. Although the relevance of *Duncan* primarily relates to appeals and the scope of judicial review, it is not hard to see its potential for expanding judicial discretion.

A number of criticisms of the 1976 Bail Act's provisions for denying bail exist. The primary concern is that persons in circumstances where there is little likelihood that they would face imprisonment upon conviction are being denied bail under one

¹⁰⁰ ARCHBOLD, *supra* note 84, at 221, (citing Bail Act, 1976, ch. 23, Sched. I, Pt. I, para. 2 (Eng.)).

¹⁰¹ ARCHBOLD, *supra* note 84, at 222, (citing Bail Act, 1976, ch. 23, Sched. I, Pt. I, para. 9 (Eng.)).

¹⁰² ARCHBOLD, *supra* note 84, at 214.

¹⁰³ 75 Crim. App. 384 (1982)(Eng.).

of the three permitted reasons for detention.¹⁰⁴ In a controversial 1992 paper, *Legislation on Bail: What Should Be Done?*, the advocacy group NACRO called for a new provision to require courts refusing bail to certify that a custodial sentence would be likely if the accused is convicted.¹⁰⁵

Furthermore, the Canadian high court's decision in *R. v. Morales*,¹⁰⁶ has led some to urge that the British law to be amended so that judges be required to find a more particularized threat that the accused was likely to flee, commit future crimes or interfere with witnesses.¹⁰⁷

Recently, however, Parliament has enacted laws limiting the ancient right of a defendant to remain silent. They have expanded the rights of police to stop and search persons suspected of preparing a "rave" (i.e. a dance party held on property not owned by the parties).¹⁰⁸ Given these efforts by Parliament to chip away at civil liberties, further bail reform is not likely until the Labour party returns to power.

V. CANADA

Before the British North America Act created the Canadian Confederation in 1867, British legal precedents formed the basis of Canadian law.¹⁰⁹ That is, bail was a matter of right for misdemeanor crimes and discretionary for felonies.¹¹⁰ Part of Canada's first criminal legislation gave magistrates the discretion to grant bail for all crimes.¹¹¹ At first, Canadian courts rec-

¹⁰⁴ Andrew Ashworth, *Liberty Before Trial*, [1993] CRIM. L. REV. 1.

¹⁰⁵ Nicola Padfield, *The Right to Bail: A Canadian Perspective*, [1993] CRIM. L. REV. 510.

¹⁰⁶ [1993] 77 C.C.C. (3d) 91; 17 W.C.B. (2d) 580

¹⁰⁷ Ashworth, *supra* note 104 at 2. The current government has taken an opposite direction, promoting legislation creating presumptions against bail for previous bail-jumpers and persons who once were convicted of serious offenses. Andrew Ashworth, *Coping with the Criminal Justice and Public Order Act*, [1995] CRIM. L. REV. 1, 2.

¹⁰⁸ Andrew Ashworth, *Coping with the Criminal Justice and Public Order Act*, [1995] CRIM. L. REV. 1-3. Large sections of the British legal community have opposed these measures, which appear to violate elements of the European Convention of Human Rights. *Id.* at 3. The Labour party (which has been leading the Conservatives in polls by margins of three-to-one) has pledged to reverse many of the more controversial aspects of recent Criminal Justice Acts.

¹⁰⁹ GARY T. TROTTER, *THE LAW OF BAIL IN CANADA* (1992).

¹¹⁰ *Id.* at 2.

¹¹¹ Act Respecting the Duties of Justices of the Peace, S.C. ch. 30 (1969)(Can.).

ognized English precedents like *Robinson* which made the accused's appearance at trial the primary purpose of bail.¹¹² The factors courts used to determine the risk of non-appearance were also similar to those used in England: seriousness of the offense; strength of the evidence; the accused's character and standing in the community.¹¹³ A recent commentator has noted that Canadian courts placed significant emphasis on the seriousness factor and that "may have reflected an implicit regard for factors other than the likelihood of the accused's attendance at trial."¹¹⁴

The 1947 English decision *R. v. Phillips*,¹¹⁵ which explicitly set forth preventive detention as a legitimate purpose of bail determination had a ripple effect in Canada. At first, the English precedent was rejected. In *R. v. Samuelson*,¹¹⁶ (like *Phillips*, a case of a persistent house burglar) the Supreme Court rejected *Phillips* noting that it found "disturbing. . . that [*Phillips*] strikes a new note and suggests a meaning and purpose in the whole process of arrest and bail which were not there before or to be found in any previous authority—the purpose, that is, of prevention."¹¹⁷ Nevertheless, the *Phillips* court's concept of preventive detention as an important purpose of bail was eventually adopted by Canadian courts in a variety of situations.¹¹⁸ Courts justified the assertion of preventive detention, as a purpose of bail, as deriving from the "entirely discretionary" powers to admit bail conferred by the Canadian Code.¹¹⁹

The work of the Manhattan Bail Project in the U.S. inspired a Canadian reformer, Martin Friedland, to study bail

¹¹² *R. v. Stewart*, [1900] 4 C.C.C. 131 (Man. Q.B.); *R. v. Gottfried*, [1906] 10 C.C.C. 239 (B.C. Co. Ct.); *R. v. Fortier*, [1902] 6 C.C.C. 191 (Que. K.B.).

¹¹³ See *R. v. Gottfried*, [1906] 10 C.C.C. 239 (B.C. Co. Ct.); *R. v. Fortier*, [1902] 6 C.C.C. 191 (Que. K.B.).

¹¹⁴ TROTTER, *supra* note 109, at 8.

¹¹⁵ 32 Crim. App. 47 (1947)(Eng.).

¹¹⁶ [1953] 109 C.C.C. 253 (Nfld. T.D.).

¹¹⁷ *Id.* at 256.

¹¹⁸ See *Rodway v. R.*, [1964] 44 C.R. 327 (Man. Q.B.) (burglary); *R. v. Travers*, [1963] 42 C.R. 32 (Que. Q.B.) (assault); *R. v. Black*, [1969] 1 C.C.C. 82 (B.C. S.C.) (threat to witnesses). See TROTTER, *supra* note 109, at 9-10.

¹¹⁹ *Rodway*, 44 C.R. at 329. Prior to the Bail Reform Act, the Criminal Code said that in considering bail "[t]he judge or magistrate may, upon the production of any material that he considers necessary upon the application, order that the accused be admitted to bail." Criminal Code, ch. 51, 1953-1954 S.C. § 463(3)(Can.). See TROTTER, *supra* note 109, at 10.

practices in the Toronto Magistrates Court.¹²⁰ Friedland determined that the existing bail procedures caused many defendants to be jailed when there were less onerous ways of ensuring their appearance at trial.¹²¹ Furthermore, he found widespread evidence of inequities in the application of the laws based on economic status.¹²² Finally, he was disturbed to find that persons detained before trial received higher sentences than similarly situated defendants on bail, which he theorized was due to the fact that jailed defendants had less opportunity to assist in their own defense.¹²³

The combination of Friedland's study and the generally more rights oriented atmosphere of the 1960's led to the appointment of a Royal Commission¹²⁴ and subsequently the Canadian Committee on Corrections (CCC)¹²⁵ to examine bail practices and to recommend reforms. The CCC report recommended sweeping suggestions: the enlargement of the right of police to bail;¹²⁶ the establishment of explicit criteria for bail determination;¹²⁷ the limitation of money bail and the expansion of release;¹²⁸ the requirement that a judge show cause in writing for a denial of bail and that the prosecution have the burden of proof as to denial of bail.¹²⁹ Most of the CCC's recommendations were incorporated into the Bail Reform Act of 1972, and were subsequently codified into §§ 515-526 of the Criminal Code. However, despite the "rights protecting ethos" of the Bail Reform Act, the Act incorporated preventive detention as a legitimate reason for the denial of bail.¹³⁰

¹²⁰ M.L. FRIEDLAND, *DETENTION BEFORE TRIAL: A STUDY OF CASES TRIED IN THE TORONTO MAGISTRATES COURTS* (1965).

¹²¹ *Id.* at 43-44.

¹²² *Id.* at 182-184.

¹²³ *Id.*

¹²⁴ Royal Commission (Ontario) *Inquiry into Civil Rights* (1968).

¹²⁵ CANADIAN COMMITTEE ON CORRECTIONS, *TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS* (1969) [hereinafter CCC Report].

¹²⁶ *Id.* at 114-115.

¹²⁷ *Id.* at 108-109.

¹²⁸ *Id.* at 107.

¹²⁹ *Id.* at 99.

¹³⁰ Criminal Code, ch. 51, 1953-1954 S.C. § 515(10)(6) (Can.). See Daniel Kiselbach, *Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence*, 33 CRIM L. Q. 168-194.

Section 515(10) sets out the only two grounds justifying the detention of an accused in custody:¹³¹

- (a) on the primary ground that his detention is necessary to ensure his attendance in court . . . ; and
- (b) on the secondary ground (the applicability of which shall be determined only in the event that his detention is not justified [under] (a), that his detention is necessary in the *public interest* or for the *safety of the public*, having regard to all the circumstances including any *substantial likelihood* that the accused will, if he is released from custody, *commit a criminal offense or interfere* with the administration of justice. (emphasis added).¹³²

The broad language of § 515(10)(b) has been widely criticized, particularly the phrase "public interest." Professor Trotter¹³³ has called it a "broad and nebulous concept"; Daniel Kiselbach avers that it "provides an especially nebulous ground for preventive detention."¹³⁴ Early court decisions bore out this concern. In *Re Powers and R*,¹³⁵ Justice Lerner recognized the duality between "public interest" and "safety of the public." He also determined that even when the "safety of the public" did not justify the detention of a defendant, the public's right to feel safe and secure justified the refusal of bail.¹³⁶

The opinion of Culliton, CJS in *R. v. Demyen*¹³⁷ is reflective of how judges saw the "public interest" language as a broad grant of discretionary power: "In my opinion, in the determination of what may constitute public interest, Parliament intended to give the judge a wide and unfettered discretion."¹³⁸ Professor Trotter persuasively disputes the judge's reading of the legislative history of the Criminal Code. He concluded that far from granting wide discretion to judges, the Parliament

¹³¹ See also *R. v. Quinn*, [1977] 34 C.C.C. (2d) 473 (N.S. Co. Ct.); *R. v. Batson, Webb and Conrad*, [1977] 21 N.B.R. (2d) 275 (C.A.) (establishing that there is no residual authority to refuse bail outside § 515(10)). See Kiselbach, *supra* note 130, at 172.

¹³² *Quinn*, 34 C.C.C. (2d) at 473; *Batson*, 21 (C.A.).

¹³³ TROTTER, *supra* note 109, at 88-89.

¹³⁴ KISELBACH, *supra* note 130, at 173.

¹³⁵ [1972] 9 C.C.C. (2d) 533 (subnom *Powers v. R*) (Ont.H.C.) (*Powers* was a repeat burglar).

¹³⁶ *Id.* at 544-545.

¹³⁷ [1975] 26 C.C.C. (2d) 324 (Sask. C.A.).

¹³⁸ *Id.* at 326. Followed in *R. v. Kingwatsiak*, [1976] 31 C.C.C. (2d) 213 (N.W.T.S.C.); *R. v. Morenstein*, [1977] 40 C.C.C. (2d) 131, 133 (Ont. C.A.).

wished to contain it. The "public interest" language was meant as nothing more than a foundational expression of the general goal of the law.¹³⁹ Nonetheless, it gave judges seeking to recapture their formerly broad powers of discretion just the means to do so.¹⁴⁰

The Bail Reform Act of 1972¹⁴¹ was only one part of a rights revolution in Canada which culminated in the adoption of a Charter of Rights in 1981.¹⁴² Inspired by the United States Bill of Rights,¹⁴³ reformers believed that until a fundamental law protecting individual liberties was enacted, the rights of Canadians would not be safe. The adoption of the Charter provided a set of legal principles that transcended the ordinary enactments of Parliament.

Section 11(e)¹⁴⁴ of the Charter guarantees that "[a]ny person charged with an offense has a right not to be denied bail without just cause." Furthermore, Section 11(d) guarantees the "right to be presumed innocent until proven guilty."¹⁴⁵ Finally, Section 7 assures "the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁴⁶

It was inevitable that these three interrelated rights would collide with judicial precedents that allowed persons to be preventively detained in furtherance of some nebulously defined concept of the "public interest." That challenge came in *R. v. Morales*.¹⁴⁷ *Morales* concerned an accused cocaine trafficker believed to be associated with a Colombian drug cartel. He was denied bail under the preventive detention provisions in § 515(10)(b) of the Criminal Code. The question certified for ap-

¹³⁹ TROTTER, *supra* note 109, at 88-90.

¹⁴⁰ *Id.* at 90.

¹⁴¹ Bail Reform Act, S.C. (1972)(Can.).

¹⁴² CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

¹⁴³ U.S. CONST. amend. I-X.

¹⁴⁴ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(e).

¹⁴⁵ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d).

¹⁴⁶ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

¹⁴⁷ 77 C.C.C. (3d) at 91. *Morales* was decided by the Supreme Court of Canada, the body charged with interpreting the Charter of Rights.

peal was whether § 515(10)(b) violated Morales' fundamental rights under § 7 of the Charter and his right not to be denied bail without just cause under § 11(e) of the Charter.

The court noted § 515(10)(b) allowed detention under two grounds "public interest" and "protection or safety of the public."¹⁴⁸ The court first examined the "public interest" issue. While noting that it primarily was evaluating the law under § 11(e) of the Charter, the court admitted that its analysis would "draw considerable support from the constitutional doctrine of vagueness which has been articulated as a principle of fundamental justice."¹⁴⁹ The court also found that the "public interest" grounds for preventive detention violated fundamental justice under § 7. The court noted that a law "does not violate the doctrine of vagueness simply because it is subject to interpretation."¹⁵⁰ Rather, it does so only when it is "[in]capable of being given a constant and settled meaning."¹⁵¹ The court further held that the broad interpretation of "public interest" provided in *Demyen* and *Powers* demonstrated that the term provided "no guidance for legal debate" and, in fact, "authorize[d] a standardless sweep, as the court could order imprisonment whenever it [saw] fit."¹⁵²

After declaring the public interest grounds "void for vagueness," in American parlance, the Court went on to uphold the "public safety" component.¹⁵³ The court determined that the "scope of the public safety component . . . [was] sufficiently narrow to satisfy [the "just cause"] provisions of § 11(e)."¹⁵⁴ It noted that bail was only denied to those who posed a "substantial likelihood" of committing a future offense and only when this substantial likelihood endangered the "protection or safety of the public." Furthermore, it justified denial of bail only when

¹⁴⁸ *Id.* at 98.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 101.

¹⁵¹ *Id.* at 102.

¹⁵² 77 C.C.C. (3d) at 103. (tenses changed.)

¹⁵³ *Id.* at 105.

¹⁵⁴ *Id.* at 106-107.

it was "necessary" for public safety not "merely . . . convenient or advantageous."¹⁵⁵

At first glance, *Morales* represents a step forward for the rights of defendants to bail. Certainly, it wiped away judicial precedents indicating that magistrates could deny bail to an accused burglar for the sole purpose of allowing property owners to feel safer. Nonetheless, the Supreme Court's affirmation of the public safety provision ensures that preventive detention will remain a part of Canadian bail law for years to come.

VI. OTHER COMMON LAW NATIONS

A. Introduction

The succeeding waves of agitation for bail reforms, new bail legislation, constitutional changes and the judicial reactions to these innovations in the major English-speaking nations could not be ignored by the smaller tier of common law nations. Many of these nations still commonly cite English and Canadian precedents and use law treatises from North America and the United Kingdom.

Many common law nations underwent their own bail reform movements, often inspired by U.S. and British examples. Typically, when local social critics attempted to replicate the experiments of the Vera Foundation and Martin Friedland they found similar problems. However, local conditions and legal histories shaped the result of the reforms, especially as to preventive detention.

B. Australia: New South Wales

Like the United States (and unlike Canada and the U.K.), Australia has a federal system whereby criminal law is controlled by the individual state governments. Federal criminal procedure only affects a small number of federal offenses. Therefore, when bail reform came to Australia, it took the form of local movements in each of the states. Throughout the late 1970's and early 1980's, several Australian states adopted new bail laws (Victoria, 1977; New South Wales, 1978; Western Aus-

¹⁵⁵ *Id.* at 107. The court went on to declare that the unconstitutional "public interest" language could be severed from § 515(10)(b), this avoiding striking down the entire preventive detention provisions of the Criminal Code. *Id.* at 110-111.

tralia, 1982; Northern Territory, 1982 and South Australia, 1985). The most extensively documented of these movements is that of New South Wales.

Until amended, the Australian Courts Act of 1928¹⁵⁶ provided that all the precedents and acts in force in England form the basis of criminal law in New South Wales.¹⁵⁷ The first New South Wales case to set out the grounds for refusing bail was *R. v. Campbell*.¹⁵⁸ The *Campbell* court affirmed that the primary factor in bail determinations was the likelihood that the accused would appear at trial. To assess this issue, the court applied a version of the *Robinson* test analyzing the nature of the crime, the probability of conviction and the severity of the punishment sought.¹⁵⁹

However, the interest in preventive detention was highlighted in a case decided in 1966, *R. v. Appleby*.¹⁶⁰ In *Appleby*, the court held that in considering bail for a persistent offender, a court should not only examine the accused's likelihood of appearing at trial, but also the "public interest," including the desirability of curbing future offenses by the defendant. The court proposed that this public interest be weighed against the possibility of prejudice to the accused of being detained before trial.¹⁶¹

In 1976, the New South Wales government appointed committees to examine possible bail reform and to review criminal procedure in the state. The results of these two panels were then incorporated into a 1977 report of the Criminal Law Review Division of the Office of the Attorney General.¹⁶² The Division's report was considered by the cabinet and formed the basis

¹⁵⁶ Australian Courts Act, 9 Geo. IV, ch. 83 (1928)(Austl.).

¹⁵⁷ Imperial Acts Application Act, 1969, ch. 2 (Eng.). This modified the Australian Courts Act of 1928, setting out the specific British acts that apply in New South Wales.

¹⁵⁸ *R. v. Campbell*, *Sydney Morning Herald*, April 29, 1850. *R. v. Fraser*, 13 N.S.W.L.R. 150 (1892) (Austl.).

¹⁵⁹ *Id.*

¹⁶⁰ 1 N.S.W.R. 35 (1966) (Austl.).

¹⁶¹ This logic was followed in *R. v. Wakefield*, 98 N.S.W.W.N. (Pt. I) 325 (1969) (Austl.).

¹⁶² B.H.K. DONOVAN, *THE LAW OF BAIL: PRACTICE, PROCEDURE AND PRINCIPLES* 3-5 (1981). The report incorporated suggestions from police, corrections officials, judges, members of the defense bar and prosecutors office, social workers and members of the Institute of Criminology of the Sydney University Law School. *Id.* at 4.

of the Bail Act 1978.¹⁶³ Although the report was not released, the primary concerns of the reformers were to make bail more equitable to the poor, establish clear procedures for bail applications and to "[downgrade the means of getting bail] as a relevant factor and money or surety as a bail condition."¹⁶⁴

One primary result of the Bail Act 1978¹⁶⁵ was to create a rebuttable presumption in favor of bail for all offenses, except bail absconding¹⁶⁶ and armed robbery.¹⁶⁷ Persons accused of murder and rape benefit from the presumption.¹⁶⁸ For crimes not punishable by imprisonment, bail is an absolute right unless the accused has previously jumped bail.¹⁶⁹ The burden of proof placed on the court or officer granting bail is the civil standard, preponderance of the evidence.¹⁷⁰

Section 32 outlines the factors to be weighed in determining whether to rebut the presumption towards bail. The court's discretion to deny bail is purposely limited: "In making a determination . . . an authorized officer or court shall take into consideration the following matters . . . and the following matters only." (emphasis added).¹⁷¹ Those matters include:

- (a) the probability of whether or not the person will appear in court;
- (b) the interests of the person;
- (c) the protection and welfare of the community"¹⁷²

In determining whether to deny bail for the protection and welfare of the community, the court may only consider:

- (i) whether the person has failed . . . to observe a bail condition . . . ;

¹⁶³ *Id.*

¹⁶⁴ Adrian Roden, *forward to* B.H.K. DONOVAN, *THE LAW OF BAIL: PRACTICE, PROCEDURE AND PRINCIPLES* at ix (1981).

¹⁶⁵ Bail Act, No. 161 (1978) (Austl.).

¹⁶⁶ *Id.* at § 9(1)(b).

¹⁶⁷ *Id.* at § 9(1)(c).

¹⁶⁸ DONOVAN, *supra* note 162. However, persons accused of these crimes are usually denied bail as flight risks or under the preventive detention provisions of the Act. *Id.* at 72-73.

¹⁶⁹ *Id.* at § 8.

¹⁷⁰ Bail Act, No. 161, § 59.

¹⁷¹ *Id.* § 32.

¹⁷² *Id.* § 32(1).

- (ii) the likelihood of the person interfering with evidence, witnesses or jurors;
- (iii) the likelihood that the person will or will not commit an offense while at liberty on bail.¹⁷³

Furthermore, if a magistrate seeks to deny bail under § 32(c)(iii), the requirements of § 32(2) must be satisfied:

the authorized officer or court may *only* have regard to the likelihood that the person will commit such an offense . . . if the officer or court is:

- (a) satisfied the person is *likely* to commit it;
- (b) satisfied that it is likely to *involve violence* or otherwise be serious by reason of its likely consequences; AND
- (c) satisfied that the *likelihood* that the person will commit it, together with the likely consequences, *outweigh's the person's general right to be at liberty.*" (emphasis added).¹⁷⁴

Section 32 seems to balance the interests involved in a preventive detention law and places the burden on the court to justify the denial of bail. It requires a showing of a strong, particularized danger to the public interest that outweighs the accused's right to liberty before trial. Finally, they make clear that only a danger to persons, not property, justifies such an imposition on the defendant's rights.

The Bail Act did not end the debate over bail in New South Wales. Reflecting the ebbs and flows of opinion on crime and the criminal justice system, typical throughout the English speaking world, the application of the Act has been criticized from both the political right and left. In 1987, a study was published by two University of Sydney professors that indicated the state held a higher proportion of prisoners than any other Australian state.¹⁷⁵ The professors blamed this on the fact that judges were too likely to approve the denial of bail by police, who in turn were refusing bail far more often than necessary. They noted that when police were forced to offer bail more freely during a recent corrections strike, there was no appreciable increase in failure to appear at trial.

¹⁷³ *Id.* § 32(1)(c).

¹⁷⁴ *Id.* § 32(2)

¹⁷⁵ Jenny David & Paul Ward, *Police Discretion in the Granting of Bail*, 11 CRIM. L. J. 325 (1987).

Conversely, the New South Wales parliament, as part of domestic violence legislation, recently removed the presumption for bail when a person was charged with murder or a "domestic violence offense" when the accused had a history of violence.¹⁷⁶

Because Australia and New South Wales have no Bill of Rights or constitutional provisions ensuring individual rights, that aspect of the bail question has not been judicially explored. However, recently Australian legal scholars have begun to discuss the possibility that certain liberties are implicitly protected in a free society. Justice Murphy of the Australian Supreme Court has postulated that there are "freedoms so elementary that it was not necessary to mention them in the Constitution The Freedoms are not absolute, but nearly so The freedoms may not be restricted by the Parliament or state Parliaments except for compelling reasons."¹⁷⁷ Justice Murphy has not enumerated these fundamental rights, but they are presumed to include the right to due process of law.¹⁷⁸ Furthermore, there is also a strong movement for the adoption of an Australian charter of rights.¹⁷⁹ These ideas are still developing, but it is possible to imagine that bail provisions could some day be reviewed under a fundamental rights analysis.

C. *New Zealand*

Because New Zealand has no formal bail statute, one must look to judicial precedent to determine the outline of the law.¹⁸⁰ The history of the nation's bail law begins with the New Zealand Supreme Court's adoption of Justice Coleridge's three-part *Robinson* test in *R. v. Valli*.¹⁸¹ By doing so, the Court accepted appearance at trial as the primary purpose of bail. However, in

¹⁷⁶ Bail Act of 1993, § 4 (Austl.). Under § 4, the presumption in favor of bail is removed in cases where the accused is charged with murder or a domestic violence offense involving violence or intimidation if the accused has a history of violence. See *Review of Australian Criminal Legislation*, 1993, 18 CRIM. L. J. 156 (1994).

¹⁷⁷ *Ansett Transport Industries Pty. Ltd. v. Commonwealth*, 139 C.L.R. 54, 88 (1977) (Austl.) (Aickin, J., dictum).

¹⁷⁸ Leslie Zines, *A Judicially Created Bill of Rights?*, 16 SYDNEY L. REV. 166, 180-184 (1994).

¹⁷⁹ MURRAY B. WILCOX, *AN AUSTRALIAN CHARTER OF RIGHTS* (1993).

¹⁸⁰ Steven Zindel, *A Principled Approach to Bail*, [1993] N.Z.L.J. 49. See CRIMINAL LAW REFORM COMMITTEE, *REPORT ON BAIL* (1982).

¹⁸¹ 23 N.Z.L.R. 27 (1903) (citing *R. v. Robinson*, 23 L.J.Q.B. 286 (1854)).

R. v. Vincent,¹⁸² the Supreme Court adopted the logic of the *Phillips* court and denied bail to a persistent burglar on the grounds that he was likely to commit crimes while on bail. Since *Vincent*, an increasingly broad view of "public interest" has been invoked to preventively detain New Zealand defendants.

In *Hubbard v. Police*,¹⁸³ the court denied bail to an alleged rapist with prior assault convictions on the grounds that he might rape again. The court held that "two main tests" have to be considered before granting bail. First, the court must be satisfied that the defendant will appear at trial. Second, the court must weigh the "public interest."¹⁸⁴ The *Hubbard* court listed five public interest criteria:

- (i) How speedy or how delayed is the trial of the defendant likely to be;
- (ii) Whether there is a risk of the defendant tampering with witnesses;
- (iii) Whether there is a risk the defendant will re-offend while on bail;
- (iv) The possibility of prejudice to the defense in the preparation of their defense;
- (v) Any other special matter that is relevant in the particular circumstances to the public interest.¹⁸⁵

Whereas criteria (i) and (iv) attempt to weigh the defendant's liberty interest, the other factors give the bail magistrate considerable discretion, criteria (v) in particular.

Hubbard was followed by *Simeon v. Police*.¹⁸⁶ *Simeon* concerned an 18-year-old charged with assault. In ruling to deny bail, Justice Robertson averred that although the presumption of innocence was a "crucial element of New Zealand's criminal justice system,"¹⁸⁷ it should be weighed against the evidence presented by the police. Although the court determined that there was little or no risk that the accused youth would not appear at trial, and it found no particular evidence that he was

¹⁸² [1950] N.Z.L.R. 653 (citing *R. v. Phillips*, 32 Crim. App. 47 (1947)(Eng.)).

¹⁸³ 2 N.Z.L.R. 738 (1986).

¹⁸⁴ *Id.* at 739.

¹⁸⁵ *Id.*

¹⁸⁶ 2 N.Z.L.R. 116 (1990).

¹⁸⁷ *Id.*

likely to commit future offenses, the court held it was "contrary to the public interest to leave Simeon free in the community when there was a virtual inevitability of conviction."¹⁸⁸ Thus, while ostensibly affirming the importance of the presumption of innocence, the court decided that a person could be detained before trial if the court decided—without a trial—that conviction was "inevitable."¹⁸⁹

The Orwellian reasoning found in *Simeon* may soon face the scrutiny of a fundamental rights analysis. In 1990, the New Zealand parliament enacted the Bill of Rights Act.¹⁹⁰ Section 24(b) of the Bill of Rights guarantees that persons charged with an offense be released on "reasonable terms and condition unless there is just cause for continued detention."¹⁹¹ Section 25(e) recognizes the right to be presumed innocent until proved guilty.¹⁹² Although there is yet no judicial treatment of these provisions, the language appears to give support to overruling the *Hubbard* line of cases.¹⁹³

Particularly relevant to this topic was the Court of Appeals decision in *R. Crime Appeals*.¹⁹⁴ In that case, which concerned the right to counsel provisions, the majority of the court took an expansive view of the Bill of Rights. What is most significant for the interpretation of sections 24(b) and 25(e) is that the Bill of Rights was consciously modeled on the Canadian Charter of Rights.¹⁹⁵ One commentator¹⁹⁶ has already suggested that the Canadian Supreme Court's rulings concerning the Charter be used to interpret the bail provisions of the Bill of Rights, and he did so *before* the *Morales* case was decided.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Bill of Rights Act (1990) (N.Z.). See J. Elkind, *Interpreting the Bill of Rights*, [1991] N.Z.L.J. 15-16.

¹⁹¹ Zindel, *supra* note 180, at 50.

¹⁹² Zindel, *supra* note 180, at 50.

¹⁹³ Zindel, *supra* note 180, at 53.

¹⁹⁴ 227/91, 228/91 (N.Z.C.A.) (1991), (discussed in Anthony Shaw & Andrew S. Butler, *The New Zealand Bill of Rights Comes Alive (I)*, [1991] N.Z.L.J. 400). See Mark Corlett, *The New Zealand Bill of Rights Act 1990 and the Right to Counsel*, 7 AUCKLAND U.L. REV. 579 (1994).

¹⁹⁵ Janet November, *Detention and the Right to Counsel: Canadian and New Zealand Jurisprudence*, [1994] N.Z.L.J. 227. See discussion of Canadian Charter of Rights *supra* part V.

¹⁹⁶ Zindel, *supra* note 180, at 50-51.

D. *South Africa*

1. *Apartheid Era*

The Criminal Procedure Act 51 of 1977¹⁹⁷ set out the South African bail procedure. Similar to England's Bail Act 1976,¹⁹⁸ the three ordinary grounds for refusing bail are risk of flight, the possibility of further criminal acts and the possibility of interference with the course of justice. In "ordinary" situations, South African courts have traditionally been reluctant to deny bail to prevent future crimes.¹⁹⁹ However, § 61 of the Criminal Procedure Act gave the Attorney General the power to prevent the granting of bail in cases of arson, murder, kidnapping, robbery, housebreaking and any conspiracy, incitement or attempt to commit the above offenses. In addition, even greater powers to deter bail were granted under the Internal Security Act.²⁰⁰ Furthermore, courts under the apartheid regime had no compunction against denying bail if public security was implicated.²⁰¹

2. *Post-apartheid South Africa*

The African National Congress inherited the reins of South Africa with much of the security and judicial systems in place. Although some of the hated security laws have been repealed, the ever-present threat of a white minority rebellion, a Zulu-Xhosi ethnic war or merely continuing hooliganism by "township boys," is likely to delay any serious legislative reform of the system for the time being. In 1992, a Commonwealth Observer Mission to South Africa (COMSA) visited the country to provide practical assistance to the nation in dealing with the ongoing violence. COMSA's second report,²⁰² issued in 1993, described its study of the South African criminal justice system, with an

¹⁹⁷ Criminal Procedure Act, No. 51, (1977) (S. Afr.).

¹⁹⁸ Bail Act, 1976, ch. 63 (Eng.).

¹⁹⁹ *McCarthy v. R.*, [1906] T.S. 657; *S. v. Fourie*, [1973] 1 S.A. 100 (Durban). *Contra S. v. Patel*, [1970] 3 S.A. 565 (Witwatersrand).

²⁰⁰ Internal Security Act, No. 44 § 12B (1950) (S. Afr.).

²⁰¹ *S. v. Mhlawai*, [1963] 3 S.A. 795; *S. v. Baker*, [1965] 1 S.A. 821, 827 (Witwatersrand); *S. v. Nangutuuala* [1973] 4 S.A. 640,643 (South West Africa). See J. DUGARD, HUMAN RIGHTS & THE SOUTH AFRICAN LEGAL ORDER 250-257 (1978).

²⁰² THE SOCIETY FOR THE REFORM OF CRIMINAL LAW AND RUTGERS UNIVERSITY SCHOOL OF LAW, COMMONWEALTH OBSERVER MISSION TO SOUTH AFRICA, PHASE II REPORT (1993).

emphasis on bail, witness protection and prisons, and issued recommendations for criminal justice reform.²⁰³

Act 200 of the 1993 Constitution²⁰⁴ took the first step toward reforming the law of bail in South Africa. Section 25(1) of the Act gives detainees the right to be informed, in their own language, of the charge for which they are detained; the right to consult an attorney (at state cost, if necessary); the right to receive visitors; the right to adequate food and medical attention and the right to challenge the lawfulness of their detention. Section 25(2) provides the right to remain silent.²⁰⁵

Section 25(2)(b) establishes as a right that "as soon as reasonably possible," but not later than 48 hours, the accused must "be brought before an ordinary court of law and charged or be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released." Subsection (d) creates the right "to be released from detention with or without bail, unless the interests of justice require otherwise." Although one might argue that broad language like "interests of justice" in subsection (d) gives the South African legislature fairly wide latitude in framing a reformed bail law, it is clear that the rights created in the 1993 Constitution are quite dramatic given the history of the nation. These provisions have already been invoked to judicially challenge the old bail laws.²⁰⁶ Although that effort failed on technical grounds, the new constitution provides a good foundation for future bail reform.

²⁰³ Christopher Munnion, *S. African Justice "Flawed"*, DAILY TELEGRAPH (London), Dec. 18, 1992, at 12; *South Africa: Commonwealth Observer Mission Leaves*, BBC SUMMARY OF WORLD BROADCASTS, June 1, 1993.

²⁰⁴ CONST. S. AFR. 1993 (Act No. 200).

²⁰⁵ § 25(2)(a),(c).

²⁰⁶ *De Kock v. Prokureur-Generaal*, [1994] 3 S.A. 785 (Transvaal). Unfortunately, the challenge arose in the wrong court, the Supreme Court. Reading § 101(3) with § 98(2)(c),(3) of the 1993 Constitution, the Supreme Court held that determining the constitutional validity of the bail law was the sole jurisdiction of the new Constitutional Court. Criminal Procedure Act, No. 51, § 61 (1977) (S. Afr.).

VII. MODEL PRINCIPLES DRAWN FROM COMPARATIVE ANALYSIS

- A. *Preventive detention by openly stated legislative policy is inherently better than preventive detention by subterfuge.*

Persons may differ on whether preventive detention is such a significant imposition on liberty as to seriously impair the presumption of innocence. Indeed, it is clear that when abused, rules allowing preventive detention can lead to oppressive results. The New Zealand cases of *Hubbard* and *Simeon* make that clear. However, the impact of the use of high money bail as a subterranean form of preventive detention is likely to never be fully assessed, because it is hidden and not subject to judicial review. Yet, studies in the U.S. indicate it is widespread there. It seems clear that at least some common law judges in all of the surveyed countries would find a way to detain persons they deem dangerous, whether or not there was a preventive detention law. It appears that tightly conceived preventive detention measures may be the best way to ensure fairness and equity in this decision-making process.

- B. *Provisions for preventive detention must be narrowly crafted as to not detract from a fundamental presumption toward the granting of bail.*

Because the presumption of innocence is a fundamental human right, persons should not suffer deprivation of liberty without a strong showing by the state that such a deprivation serves a specific and very strong public interest. This places the burden of proving the need to preventively detain on the state. Laws like the U.S. Bail Reform Act that shift the burden to the defendant in certain circumstances are troubling.

- C. *There must be legislatively determined grounds for bail refusal but, these grounds must incorporate only two interests: the defendant's right to liberty and to be presumed innocent and the state's interest in protecting public safety and integrity of the judicial process.*

Because the deprivation of a person's liberty before trial is such a grave matter, it must only be undertaken under the most

narrowly proscribed manner. The law setting out the bail procedures must require the judge to certify that a concrete probability of danger to the public or judicial process must exist before a person is preventively detained. The factors used to make the determination must balance the accused's strong liberty rights. An example of a well-constructed bail act is that of New South Wales.

- D. *Judges must have some discretion in application of these rules, but must be specific in assigning grounds for refusal of bail.*

Although the operation of any statutory bail scheme requires judicial discretion, the language of the bail act must not leave room for too much discretion. The broad interpretation of the "public interest" provision of the Canadian bail law by the *Powers* and *Demyen* courts indicates the danger of allowing judges to frame policy. The fine-tuned balancing of public interest and private liberties incorporated into a bail law should not be set awry by the whims of a judge. In order to insure this does not occur, judges should be required to set out in writing the reasons for any preventive detention determination.

- E. *Any denial of bail based on the public interest must be grounded on a concrete and particularized threat to the public safety or judicial process.*

The prosecutor should not be allowed to allege that some general threat to the public interest is implicated. Moreover, they should not be able to allege, as the *Powers* court did, that the public's right to "feel safe" is implicated. Thus, they must be required to point to a specific danger posed by the particular person being detained.

- F. *Any denial of bail based on the public safety must be based on a threat to the safety of persons, not property.*

The right to liberty and the presumption of innocence is too valuable to be denied on the assertion of the state's right to protect property, despite the opinion of the *Phillips* court. The New South Wales bail act is correct to make violent crimes against persons the exclusive public interest protected.

- G. *There should be a right to appeal a preventive detention determination.*

As a further check on the abuse of judicial discretion, a defendant should be allowed to appeal a refusal of bail expeditiously, even without showing new circumstances. If the appellate court believes that the presiding judge abused his discretion, the prosecution should be allowed to appeal bail release. However, the defendant should be allowed to remain on bail until the appeal is determined. The primary purpose of such a right to appeal would be to ensure that trial judges are held accountable and adhere to the guidelines, not to ensure that every detainee gets two bail hearings. Therefore, there should be latitude in creating an efficient means of handling bail appeals.

- H. *The right to fair bail, the right to be presumed innocent, and the right not to be subjected to imprisonment without due process of law are fundamental rights and should be protected by a Bill or Charter of Rights.*

Throughout this survey, it has been apparent that the existence of a fundamental law protecting personal liberties has been valuable in ensuring that legislative responses to the problem of crime did not infringe on basic rights. It is also clear that such a fundamental law does not prevent the legislature from passing statutes allowing courts to preventively detain defendants who meet ascertainable requirements. Because liberty is so precious and the pressing need to combat crime is often so great, such a body of fundamental law is vital to the just functioning of preventive detention within the ancient institution of bail.

APPENDIX: MODEL PRE-TRIAL RELEASE AND
DETENTION STATUTE

§ 1. *Pre-Trial Release and Detention: General Principles*

Persons are entitled as a matter of right to be released before trial. This right is closely associated with the right to personal liberty, the right to be presumed innocent until proven guilty and the right to assist in one's own defense. The right to pre-trial release is subject, however, to the state's strong interest in protecting the effectiveness and efficiency of the judicial process, and in protecting its citizens from preventable harm. In order to assert this interest to abridge the right of a person accused of a crime to be released pending trial, the state must show a clear and particularized purpose for the abridgement, and must narrowly tailor any conditions, including denial of release, to this identified purpose. The legislature enjoins the courts to apply this Statute in a manner consistent with the principles of this section.

§ 2. *Pre-Trial Release: Misdemeanor Offenses*

- a. Any person charged with a misdemeanor offense shall be entitled to pre-trial release on his or her own recognizance under only such conditions as to ensure his or her presence at trial.
- b. If a judge determines that conditions would ensure the person's attendance at trial, that judge may order that the person be detained prior to trial under the provisions of (c) of this section.
- c. A judicial determination that a person shall be denied pre-trial release on the grounds that there is no other reasonable method of ensuring the person's appearance at trial shall be set out in a written decision that is based on the factors listed in § 3 of this chapter.
- d. Conditions employed to ensure a persons presence at trial may include restrictions of travel, the deposit of a sum of money, or any financial sureties narrowly tailored to prevent flight from the jurisdiction.
- e. The burden of proving the reasonableness of conditions of release or denial of release is on the prosecution and must be proved by a preponderance of the evidence.

§ 3. *Factors Used to Determine Risk of Non-Appearance*

a. In making a determination that denial of pre-trial release is necessary to ensure a person's presence at trial, the judge or magistrate shall make reference only to the following factors: [list would include normal community ties, prior bail history, etc.]

§ 4. *Pretrial Release and Detention: Felony Offenses; Preventive Detention*

a. Any person charged with a felony offense shall be entitled to pre-trial release on his or her own recognizance under only such conditions as to:

- (i) ensure his or her presence at trial, or
- (ii) ensure that person does not harm himself or any other person.

b. If a judge determines that no conditions would ensure the person's attendance at trial, that judge may order that person detained prior to trial under the provisions of § 2(c) and § 3 of this chapter.

c. If a judge determines that no conditions would ensure that the person would not harm himself or herself, or any other person, that judge may order that person detained prior to trial under the provisions of (d) of this section.

d. A judicial determination that a person shall be denied pre-trial release on the grounds that there is no other reasonable method of ensuring that the person would not harm himself or herself, or any other person shall be set out in a written decision that is based on the factors listed in § 5 of this chapter.

e. Conditions employed to ensure a person's presence at trial may include restrictions of travel, the deposit of a sum of money, or any financial sureties narrowly tailored to prevent flight from jurisdiction.

f. The burden of proving the reasonableness of conditions of release or denial of release is on the prosecution and must be proved by a preponderance of the evidence.

§ 5. *Factors Justifying Preventive Detention*

a. In making a determination that a person be detained prior to trial on the grounds that they may harm himself or herself, the

judge shall require a certification of the person's mental condition by means of a psychological evaluation.

b. In making a determination that pre-trial release be denied to a person on the grounds that such denial is necessary to prevent the detainee from harming a person, or persons, or the public in general, the judge shall evaluate only the following factors:

- (i) whether the offense involved violence or serious threat of violence;
- (ii) whether the element of the offense involving violence is admitted by the defendant [as in a justification defense];
- (iii) whether the element of the offense involving violence is likely to be proved at trial;
- (iv) whether the accused has been previously convicted of an offense involving violence;
- (v) whether the accused has been previously charged with more than one offense involving violence;
- (vi) whether the accused has been previously convicted or charged with an offense involving domestic violence or stalking and one of those two offenses is charged in the instant case;
- (vii) whether the accused violently resisted arrest or acted violently while incarcerated;
- (viii) whether the accused ever committed an offense involving violence while under pre-trial release awaiting trial for other offenses;
- (ix) whether the accused ever committed an offense while under pre-trial release awaiting trial for an offense involving violence;
- (x) any psychological evaluation undertaken in the previous year that indicates that the accused is likely to harm other persons;
- (xi) any sworn testimony by direct witnesses that goes to the issue of the accused's propensity for violence.

§ 6. *Appeal of Denial of Pre-Trial Release by Defendant*

a. Any denial of pre-trial release, on any grounds, may be immediately appealed. The reviewing court shall expeditiously review the trial judge's written decision to determine whether the judge abused his or her discretion or erred in interpreting the Statute. If the appellate court determines that the trial court

erred in its denial of bail, it may either grant pre-trial release through the jurisdiction granted by this section, or remand for a rehearing of the pre-trial release determination.

§ 7. *Appeal of Pre-Trial Release Decision by Prosecutor*

a. A prosecutor may appeal a decision to grant release on the grounds that the trial judge abused his or her discretion or erred in interpreting the Statute. The defendant may remain on pre-trial release while the appellate court considers the issue. The appellate court may also order that the trial go forward pending its decision, to ensure the defendant's right to a speedy trial.