

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 50-1995)

REPORT ON
AN EXAMINATION OF
THE LAW OF BAIL

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

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NOTE

This Report was submitted on 17 August 1995 to the Attorney General, Mr. Dermot Gleeson, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination of and research into the law of Bail which was carried out by the Commission at the request of the former Attorney General, Mr. Harold A. Whelehan, S.C. The request did not extend to the formulation of proposals for reform.

While this Report is being considered in the relevant Government Departments the Attorney General has requested the Commission to make it available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject to the said relevant Government Department.

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INTRODUCTION

On the 1st day of February, 1994 the then Attorney General asked the Commission to undertake an examination of and conduct research in relation to the law of bail. The Commission was not asked to formulate and submit proposals for reform.

In referring the matter of bail to the Commission, the Attorney General drew the Commission's attention to a statement from the then Minister for Justice on the subject. In the course of the statement the following views were expressed:

- (a) The present situation in relation to bail is widely considered to be unsatisfactory. Serious offenders facing the likelihood of a long period of imprisonment on other charges are tempted to - and frequently do - use their time on bail to commit further offences.
- (b) Despite an improvement effected by the *Criminal Justice Act, 1984*, which provided that a sentence of imprisonment for an offence committed on bail *must* be consecutive on any sentence passed for other offences, it is still far from satisfactory that a person who is free, but fully expecting a long imprisonment term on an existing charge, should have the opportunity of causing further distress to the community while on bail.
- (c) However, there were considerations which argue against change in this area. It would be equally unsatisfactory, in terms of principle, to bring about a situation where, irrespective of the seriousness of offences likely to be committed, a general presumption would exist against the granting of bail. This would result in the incarceration of a large number of

unconvicted persons, many of whom might subsequently be found not guilty. Other European countries have been endeavouring to *reduce* the number of unconvicted persons in custody - on human rights grounds.

- (d) Apart from considerations of principle, there were sizeable practical difficulties associated with the idea of changing the bail laws. It had been estimated, for example, that if a very stringent bail regime were put in place it could necessitate the provision of upwards of 600 additional prison places (at a capital cost of about £80m and annual running costs of £20m). Even if half that number of additional places were required, the cost would still be quite significant.

Chapter 1 briefly summarises the law relating to bail in Ireland and related legal matters, such as the status of preventive detention generally in the Irish criminal justice system. Chapter 2 examines the empirical evidence concerning the extent of the problem of bail offending, and discusses a number of methodological difficulties associated with studies of bail offending. Chapter 3 examines a number of prediction studies, that is to say, studies which attempt to predict future criminal behaviour among charged or convicted individuals. Chapter 4 examines the law relating to bail under the United States Federal Bail Reform Act 1984, the Canadian Criminal Code, the law in Scotland, England and Wales and a number of Australian jurisdictions. There is also a brief examination of the case-law under the European Convention on Human Rights and Fundamental Freedoms, and of the law in some Continental European jurisdictions. The criteria upon which bail decisions are made in those jurisdictions are given primary emphasis. Chapter 5 draws together much of the material from previous chapters relating to pre-trial preventive detention and concludes by setting out an alternative approach to the present position in Irish law, which emerges from the examination and research into the law here and in other jurisdictions. Finally, Chapter 6 examines methods of addressing bail offending other than pre-trial preventive detention. Research for this Paper was carried out by Úna Ní Raifeartaigh, Reid Professor of Criminal Law, Trinity College, Dublin.

CHAPTER 1: THE LAW RELATING TO BAIL IN IRELAND

General

1.1 Irish law is unusual among common law jurisdictions in having failed to introduce comprehensive bail legislation in recent decades. The jurisdiction of the courts to grant bail is governed by the common law, the Constitution, some legislative provisions and the case-law of the Irish courts. Irish law is unusual in having maintained fewer restrictions on the granting of bail than obtain in other jurisdictions. Other jurisdictions, as we shall see, have considerably widened the grounds on which bail may be refused. On two occasions, an attempt has been made to persuade the Irish Supreme Court to widen the criteria for refusal of bail, but on both occasions the Court rejected the proposed extension, which would have permitted the courts to refuse bail on the ground that the accused might commit further offences. However, the question of offending on bail has regularly been a source of public anxiety, and in 1984 the Oireachtas introduced provisions for mandatory consecutive sentences in respect of offences committed while on bail. This does not appear to have allayed public anxieties, however, and certain sectors have more recently called for the introduction of pre-trial preventive detention, through the medium of a Constitutional amendment if necessary. Ireland has not witnessed developments such as the introduction of bail information schemes or bail hostels. This may be due to the fact that, by international standards, Ireland remands few persons in custody pending trial, relying instead on sureties or, very occasionally, on cash deposits.¹ In this chapter, we summarise the law in Ireland concerning the matter of bail.

¹ See below, Chapter 2.

Jurisdiction To Grant Bail

The Garda Siochana

1.2 Members of the Garda Siochana have the power to release the accused on recognisance before appearance in court following arrest. Section 31 of the *Criminal Procedure Act, 1967* provides that whenever a person is brought in custody to a Garda station by a member of the Garda Siochana, the sergeant or other member in charge of the station may "if he considers it prudent to do so and no warrant directing the detention of that person is in force, release him on bail and for that purpose take from him a recognisance, with or without sureties, for his due appearance before the District Court at the appropriate time and place."

1.3 This is usually referred to as "station bail". A sum of money may be accepted in lieu of a surety or sureties.² The money is deposited by the member of the Garda Siochana with the District Court Clerk in the relevant area. The recognisance may be estreated in the same manner as a recognisance entered into before a justice, if the accused fails to appear.³

1.4 Where a District Justice issues a warrant directing the arrest of any person and the warrant contains an endorsement that the person named therein is to be released on bail upon his entry into a recognisance, the Garda in charge of the station must admit the person to bail in accordance with the endorsement.⁴

1.5 The District Court Rules of 1948 originally provided that the recognisance for station bail had to provide for an appearance at the next sitting of the District Court for the court area in which the arrest had taken place. The *District Court (Criminal Procedure Act, 1967) Rules 1985* altered this rule to provide that the recognisance might be conditioned for his appearance at the next sitting of the Court or any subsequent sitting to be held not later than 30 days after such sitting. This rule was struck down in *The State (Lynch) v. Ballagh*.⁵ In this case, the accused was arrested and taken to a Garda station where he was charged with a summary offence. He was released on station bail and the station sergeant made the recognisance returnable to the 6th March, although the next sitting of the relevant District Court was the 4th March. When the prosecutor appeared before the District Court, his solicitor objected to the jurisdiction of the court on the ground that he had not been brought before the court at the earliest possible sitting. The case was adjourned and the prosecutor obtained an absolute order of *certiorari* in the High Court on the ground that the 1985 Rules were *ultra vires* the District Court Rules Committee, in that they dealt with a function of the Garda Siochana rather than with the practice and procedure of the District Court. A majority of the Supreme Court held that the

2 Section 31(3) of the *Criminal Procedure Act, 1967*.

3 *Ibid.*

4 Section 30(2) of the *Criminal Procedure Act, 1967*.

5 [1986] I.R. 203.

Rules were *ultra vires* the Rules Committee for that reason. However, the Supreme Court allowed the appeal and discharged the order on the basis that the fact that the accused had appeared before the District Court on the 6th March was sufficient to give jurisdiction to the District Judge. In *The State (D.P.P.) v. Ruane*,⁶ Blayney J. held that s.15 of the *Criminal Justice Act, 1951* (as inserted by s.26 of the *Criminal Justice Act, 1984*), which provides that the accused must be brought promptly before the court if in custody, applies only where station bail has been refused.

1.6 Formerly, bail could be granted by a peace commissioner. In *State (Lynch) v. Ballagh*,⁷ Walsh J. took the view that the functions purportedly conferred on peace commissioners with respect to bail were judicial functions and their constitutionality was therefore in doubt. In *O'Mahony v. Melia*,⁸ Keane J. held that the power of a peace commissioner to grant bail under s.15 of the *Criminal Justice Act, 1951*, as inserted by s.26 of the *Criminal Justice Act, 1984*, was unconstitutional because the power to grant bail was an aspect of the administration of justice and could only be exercised by members of the judiciary.

The District Court

1.7 Bail applications are more numerous in the District Court than any other court, because all cases begin there, unless directed to the Special Criminal Court. Jurisdiction to grant bail is conferred on the District Court by section 22 of the *Criminal Procedure Act, 1967* which provides that where a District Court remands a person or sends him forward for trial or sentence, the Court may (a) commit him to prison or other lawful custody, or (b) release him conditionally on his entering into a recognisance, with or without sureties. Section 28 deals with remand periods. Where the Court remands a person on bail, it may remand him for a longer period than eight days if he and the prosecutor consent, but where the Court remands a person in custody on an occasion other than his first appearance in court, it may remand him for a period exceeding eight days but not exceeding thirty days if he and the prosecutor consent. On his first appearance, the Court may not remand him for a period exceeding eight days.

1.8 If the accused has entered into a recognisance to appear at every time and place to which the hearing will be adjourned, he will be on continuing bail and need not enter into fresh recognisances after every District court appearance. However, if the accused is returned for trial, both he and his sureties must enter into fresh recognisances for the appearance of the accused before the trial court. Where the accused has been returned for trial in custody, the District Judge may admit him to bail at any time before the first day of the sitting of the court to which he has been returned.

1.9 Section 28 of the Act provides that a District Justice shall admit to bail

⁶ High Court, 6th February 1987.

⁷ *Supra* footnote 5.

⁸ [1989] I.R. 335.

a person charged before him with an offence, other than an offence to which section 29 applies, if it appears to him to be a case in which bail ought to be allowed. Section 26 of the same Act provides that a District Judge may direct that a sum of money equivalent to the amount of bail be accepted in lieu of a surety or sureties. Subsection 28(2) provides that refusal of bail at a particular appearance before the District Court shall not prevent a renewal of the application for bail at a subsequent appearance or while the accused is in custody awaiting trial.

1.10 The offences in respect of which the District Court has no jurisdiction under s.29 of the Act are treason, an offence under sections 2 or 3 of the *Treason Act, 1939*, an offence under sections 6, 7 or 8 of the *Offences Against the State Act, 1939*, a grave breach such as is referred to in s.3.1.i of the *Geneva Conventions Act, 1962*, genocide (added by the *Genocide Act, 1973*, s.7), an offence under s.9 of the *Official Secrets Act, 1963* or an offence prejudicial to the safety or preservation of the State, murder, attempted murder, conspiracy to murder, or piracy. An application for bail in respect of such offences must be made to the High Court. Where a District Judge returns an accused to the Special Criminal Court for trial, he may not be admitted to bail by the District Judge without the consent of the Director of Public Prosecutions.

Courts of trial

1.11 A court of trial has jurisdiction to grant bail to persons being tried before it, after the accused has been arraigned or during the course of trial. The Special Criminal Court has jurisdiction to grant bail to a person charged before it or sent for trial before it by a District Judge, or transferred to it for trial from an ordinary court, pending trial or during trial, but not after conviction.⁹

The High Court

1.12 The Constitution vests the High Court with full original jurisdiction in all matters whether of law or fact, civil or criminal. The High Court has the power to grant bail prior to trial for any offence, even if the District Court or any other court has already dealt with the question of bail. Under section 28(3) of the *Criminal Procedure Act*, a bail applicant has a right of appeal from the District Court to the High Court against a refusal of bail or on the basis of the amount of bail required or the conditions imposed. The High Court will also hear bail applications in cases where statute precludes the District Court from admitting persons to bail, e.g. s.29 of the *Criminal Procedure Act, 1967*. It may also admit an appellant to bail where the District Court has failed to fix recognisances for appeal to the Circuit Court from the District Court. The High Court may also grant bail where a person convicted in the District, Circuit or Special Criminal Court is seeking *certiorari*, *habeas corpus* or prohibition, pending the making absolute of any such order.¹⁰ The High Court

⁹ Section 43(1)(c) of the *Offences Against the State Act, 1939*.
¹⁰ *The State (McKenna) v. Durcan* 87 I.L.T.R. 62.

would appear to retain jurisdiction to grant bail following conviction on indictment, although the point is at present before the Supreme Court in the case of *Vincent Connell*.¹¹

1.13 The High Court has a discretion to grant bail in all cases except misdemeanour cases falling within section 2 of the *Habeas Corpus Act, 1781*, in which case a High Court Judge must grant bail if he is satisfied with regard to the sufficiency of the bail.

1.14 Applications to the High Court for bail may be renewed on an indefinite number of occasions, although of course, in practical terms, subsequent applications are unlikely to succeed unless there are new grounds. Any applicant dissatisfied with a High Court decision on bail may appeal to the Supreme Court.¹²

Non-Custodial Bail

1.15 Admission to bail in Ireland usually involves the accused and others (his sureties) acknowledging that they will be liable to forfeit a sum of money should the accused disobey the conditions of his bail. The principle that bail should not be excessive was part of the common law and was enshrined in the 1688 Bill of Rights and the Eighth Amendment to the United State Constitution. That bail should not be excessive was acknowledged by the Irish Supreme Court in *Attorney General v. O'Callaghan*.¹³ In fixing the amount of bail, the courts have regard to the gravity of the offences as well as the circumstances of the accused.

1.16 The judge granting bail must satisfy himself as to the sufficiency of the bailsmen.¹⁴ Bailsmen are usually drawn from the friends or family of the accused and professional bondsmen are not found in Ireland.

11 See *People (Attorney General) v. O'Callaghan* [1966] I.R. 501 at 512.

12 In a High Court judgment on a motion in a bankruptcy matter, *In Re McAllister* [1973] I.R. 238, Kenny J. held that s.385 of the *Irish Bankruptcy and Insolvency Act, 1857* was unconstitutional to the extent that it purported to exclude from the Court the power to grant bail, where a person was committed to prison for a refusal to answer a question. The decision has been criticised in Kelly, *The Irish Constitution* (3rd ed.) 414:

"The correctness of this proposition seems dubious. Apart from the personal liberty dimension of bail, and from the presumption of innocence of an unconvicted person, which is part of the notion of 'due course of law' in Article 38.1 - values which must inhibit its exclusion by statute - it does not seem obvious that the exclusion of bail in certain cases entrenches on either the general area of judicial independence or the particular jurisdiction of the High Court, any more than does the prescribing of a mandatory sentence or an automatic consequence on conviction. If Kenny J's view is correct, it would mean that a wide variety of statutory provisions might be rendered unconstitutional on this account. In fact, the difficulty with *McAllister's* case is that it tends to collapse the distinction between the investiture of jurisdiction in the High Court on the one hand and statutory restrictions on the availability of certain remedies on the other. It is certainly true that, if the *Oireachtas* were unfairly to restrict or even exclude the availability of certain remedies, this might be unconstitutional, but on the ground that it would offend against Article 40.3 rather than Article 34.3.1." (footnote reference omitted).

13 [1966] I.R. 501.

14 Section 27 of the *Criminal Procedure Act, 1967*.

Non-Monetary Conditions Of Bail

1.17 Irish courts often attach conditions when granting bail, such as reporting to a Garda station daily or surrendering one's passport.¹⁵ However, no statutory authority sets out the precise conditions which may be imposed or the purposes for which conditions may be imposed. Moreover, unlike other jurisdictions, there is no direction to the courts that they must impose the least restrictive form of release possible to ensure the accused's attendance at trial, and that bail shall only be refused where no form of conditional release shall secure the attendance of the accused at trial.

Criteria To Be Considered When Deciding Whether Or Not To Admit To Bail

1.18 Irish law is unusually restrictive in respect of matters which may constitute grounds for refusing to grant bail. It may be noted that the criteria are the same in the case of a person detained in custody for extradition purposes as a person detained in custody for trial.¹⁶ No criteria are set out in the *Criminal Procedure Act, 1967*. The criteria employed by the courts prior to the *Attorney General v. O'Callaghan*¹⁷ were listed by Hanna J. in *State v. Purcell*.¹⁸ He said that the fundamental test was whether the accused would stand trial, and the matters a court could take into account in forming a view on the probability of his evading justice were:

- (1) the seriousness of the crime charged;
- (2) the severity of the punishment provided for by law for the offence;
- (3) the strength of the case against the accused;
- (4) the prospect of a reasonably speedy trial; and
- (5) the opposition of the Attorney General.

1.19 In *Attorney General v. Duffy*,¹⁹ he added a further criterion to the list, namely, whether the accused was likely to interfere with the course of justice. In *People (Attorney General) v. Crosbie*,²⁰ O'Dalaigh C.J. made it clear that the only consideration for the court was whether the accused would abscond before his trial or interfere with witnesses. The power to refuse bail on the ground that the accused might commit further offences was not included.

1.20 In *People (Attorney General) v. O'Callaghan*,²¹ the defendant had been

15 It appears that some judges in Dublin impose the condition that the accused attend a training programme run by the St. Vincent's Trust, Henrietta Street.

16 This is essentially a form of supervised bail release, although it has no basis in statute law. *People (Attorney General) v. Gilliland* [1985] I.R. 643 (Supreme Court).

17 [1966] I.R. 501.

18 [1926] I.R. 207.

19 [1942] I.R. 529.

20 [1966] I.R. 426.

21 [1966] I.R. 501.

returned for trial on charges of larceny, breaking and entering, malicious damage, receiving, resisting arrest and assault, which were alleged to have been committed while he was on bail in respect of other charges. His application for bail was refused first by the District Court and then in the High Court by Murnaghan J.. In the course of his judgment, Murnaghan J. listed the factors which he thought to be relevant in a bail application:

- (1) The nature of the accusation or the seriousness of the charge;
- (2) The nature of the evidence in support of the charge;
- (3) The likely sentence to be imposed upon conviction;
- (4) The likelihood of the commission of further offences while on bail;
- (5) The possibility of the disposal of illegally acquired property;
- (6) The possibility of interference with witnesses and jurors;
- (7) The prisoner's failure to answer bail on a previous occasion;
- (8) The fact that the prisoner was caught redhanded;
- (9) The objection of the Attorney General or the police authorities;
- (10) The substance and reliability of the bailsmen offered;
- (11) The possibility of speedy trial;
- (12) The likelihood of personal danger to the prisoner.

1.21 Murnaghan J. gave three reasons for refusing to grant bail in this particular case. First, the superintendent in charge of the case had told him the applicant was an aggressive type and that he was of the opinion that he would interfere with witnesses if admitted to bail; second, that the offences were committed while the applicant was on bail in respect of earlier charges and there was a serious risk that the applicant would commit further offences if he were granted bail; and third, that because of the applicant's record, he would be facing a substantial sentence. The defendant appealed against the refusal of bail to the Supreme Court and the Supreme Court granted bail. Judgments were delivered by O'Dalaigh C.J. and Walsh J..

1.22 O'Dalaigh C.J. observed that counsel for the Attorney maintained that the applicant, whom he conceded was likely to stand trial, should be refused bail because the offences in respect of which he was seeking bail were alleged to have been committed while he was on bail in respect of earlier charges. The Chief Justice characterised this as a suggestion that the applicant should be held as a preventive measure because if granted bail, it was feared that he might commit

further offences. In response to this argument, the Chief Justice said:

"The reasoning underlying this submission, is in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say 'punish' for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon."²²

1.23 He emphasised that the single question in all bail applications is whether the applicant is likely to stand trial.

"The Court has granted bail to applicants charged with non-capital murder when it was likely that they would stand their trial. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty."²³

1.24 The Chief Justice then referred to Part II of the *Offences Against the State (Amendment) Act, 1940*, which permits a Minister of State to order the detention of a person without trial, and observed that a number of conditions have to be satisfied before the provisions of this Act can be operated:

- (1) there must be a Government Proclamation declaring that the powers conferred by Part II of the Act are necessary to secure the preservation of public peace and order and,
- (2) the Minister is empowered to detain a person only if he is of opinion that he "is engaged" in activities which are prejudicial to the conservation of the public peace and order, not that he "will engage" in such activities. The Chief Justice cited these provisions, he said, to contrast them with the power contended for, which exist neither under the law nor the Constitution.

1.25 Walsh J. also emphasised that the sole purpose of bail was to secure the attendance of the accused at his trial:

"In bail applications generally it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive nor preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as

22 At 508-9.

23 At 509.

possible who may safely be released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases 'necessity' is the operative test. The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial."²⁴

1.26 He also rejected the likelihood of committing further offences as a reason for refusing bail, saying:

"This is a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of bail. ... In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that.

The accepted method of preventing the commission of future offences is the threat of conviction and punishment. Apart from any of the fundamental considerations already referred to, even if one were to assume that the accused is guilty of the offence charged that fact does not in any way establish the likelihood of the commission of another offence in the relatively short interval before his trial. In the vast majority of cases, even of persons with known criminal records, an attempt to predict who is likely to commit an offence while awaiting trial on bail can never be more than speculative.

It would also be an attempt to impose a system of preventative justice to take into account the fact that the accused person committed offences while on bail on previous occasions and such a course is open to all the objections which I have already referred to in relation to taking into account the possibility of the commission of offences while on bail.

Apart from the question of prevention being the object of a refusal of bail one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted of it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."²⁵

24 At 513.
25 At 516-7.

1.27 Walsh J. noted that over the years, the likelihood that the accused would interfere with witnesses or jurors or destroy evidence had been added to the grounds for refusing bail, but said that this was because they were all "different aspects of the evasion of justice already referred to."²⁶ He said that this should be a ground for refusal of bail only where it was reasonably probable that such interference would occur. He rejected the notion of protective custody for the accused on the basis that if an accused wanted protective custody he would not ask for bail and that a bail motion "cannot be used a vehicle to import into the law the concept of protective custody for an unwilling recipient."²⁷ He also commented on ground (9) of Murnaghan J's list, saying that while a court should pay attention to the objections of the Attorney General or the police authorities, the fact that these authorities object was not itself a ground for refusing bail. He also said, with regard to ground (11), that the possibility of a speedy trial was only relevant in the sense that if there was no prospect of a speedy trial the court may very well allow bail where it might not otherwise have done so, but that the prospect of a speedy trial is not a ground for refusing bail where it ought otherwise to be granted. Regarding the substance of bailsmen, he referred to the common law principle that the amount of bail must not be so high as to be effectively unprocurable for this particular defendant.

1.28 Some difference of opinion emerged between the two judges concerning the issue of previous convictions. O'Dalaigh C.J. thought that these should never emerge in court until they became relevant to the imposition of punishment after conviction. However, Walsh J. felt that although it was undesirable to mention previous record, it might sometimes be relevant to the likely sentence, which in turn affected the likelihood of the accused absconding. However, he thought that it was most undesirable that the tribunal hearing such information would be the same tribunal to try the accused.

1.29 A second opportunity to rule on the likelihood of further offences as a ground for refusing bail arose in *Ryan v. D.P.P.*²⁸ The applicant had sought bail pending trial on a charge of burglary. He was brought to the District Court and remanded in custody on the ground that he might commit further offences. His application for bail in the High Court was opposed by the Director of Public Prosecutions on this ground. As there were no grounds for believing that the applicant would not turn up for trial if granted bail, the President of the High Court, Hamilton P., granted bail and refused to rely on the ground that the applicant might commit further offences. The applicant brought a further application in the High Court seeking a reduction in the amount of bail fixed by the District Court granting him bail on another set of charges, involving other offences under the *Larceny Act, 1916*. Barron J. ordered a reduction in the amount of bail. The Director of Public Prosecutions appealed against both High Court orders to the Supreme Court. The Supreme Court dismissed the appeal.

26

At 514.

27

See, however, *Re Dolan*, unreported, 5th November 1973, which appears to suggest that where a threat to the accused might result in his not appearing for trial, bail could be refused.

28

[1989] I.R. 399.

1.30 Finlay C.J. delivered a judgment with which Walsh, Griffin and Hederman JJ. agreed. He said that the sole issue in the case was whether the decision of the Supreme Court in *People (Attorney General) v. O'Callaghan*²⁹ was correct in deciding that the probability that a person awaiting trial would, if released, commit crime could never be a ground for refusing bail. The respondents argued, first, that the common law recognised a discretion to refuse bail on this ground, and second, that the constitutionally protected rights to life, bodily integrity, and property which would be affected by the commission of crime confers a right and duty on the Court to avail of its discretion to prevent the commission of crime. The Chief Justice rejected the constitutional argument, quoting extensively from the judgments of O'Dalaigh C.J. and Walsh J. in *O'Callaghan* with approval. Moreover, he said that pre-1922 Irish and English decisions did not lay down likelihood of future crime as a criterion for refusing bail; on the contrary, they established that attendance at trial was the sole criterion. He referred to the English decision in *R. v. Phillips*³⁰ as extremely unsatisfactory, being clearly *obiter* as part of a judgment in an appeal against severity of sentence, in which counsel did not appear. Although followed by an Irish court in *Attorney General v. McCann*,³¹ which was followed in *Attorney General v. McEvoy*,³² the decision must be taken to have been overruled by *Attorney General v. O'Callaghan*.

1.31 Finlay C.J. went on to say that quite apart from the constitutional objection to any form of preventive detention, there were a number of other reasons for refusing to permit it. Given the purpose of bail, an attempt to refuse bail on the suggested ground would be an abuse of power, namely, an exercise of it for a purpose which was outside its scope. He pointed out that an intention to commit a crime is not itself a crime unless it is furthered by overt acts of preparation or converted by agreement with others into a conspiracy. As the courts could not create offences, they would certainly not detain a person on suspicion of an intention, which even in a full trial could not lead to his punishment. Moreover, if such a power could be exercised, he asked, why should it be confined to cases where the person is an applicant for bail? He referred to certain practical problems. How should such an intention be proved and by what standard of proof? Would the accused require notice of the evidence against him and an opportunity to contest the charges being brought against him, as would be the case in a criminal trial? Would every bail application in which this ground was advanced take on the requisites of a criminal trial? He said that these queries "not only indicate practical problems but more importantly highlight the nature of the jurisdiction which it is sought to invoke without legislation."³³ He continued:

"The criminalising of mere intention has been usually a badge of an oppressive or unjust system. The proper methods of preventing crime

29 *Supra* footnote 21.

30 (1947) 32 Cr. App. R. 47.

31 [1955] I.R. 163.

32 (1959) 25 Ir. Jur. Rep. 44.

33 [1989] I.R. 399 at 407.

are long-established combination of police surveillance, speedy trial and deterrent sentences. Section 11 of the *Criminal Justice Act, 1984*, which provides mandatory consecutive sentences for offences committed while on bail constitutes a good example of such a deterrent."³⁴

1.32 He added that the fact that the Oireachtas had so relatively recently availed of this method to curb the mischief of crimes on bail confirmed his view that it could not be appropriate for the Court to assume the jurisdiction argued for. He concluded by saying that references to the legal position of other jurisdictions were of no value as the fundamental objections to the jurisdiction contended for derived from the Constitution, although he intimated that the decision in *U.S. v. Salerno*³⁵ would be of assistance if the court were ever called upon to decide upon the constitutional validity of legislation which dealt with the sort of extraordinary circumstances mentioned by Walsh J. in *O'Callaghan*.

1.33 McCarthy J. delivered a judgment with which Walsh J. also agreed. He agreed that the cases cited fell far short of establishing the existence of any common law principle supporting the jurisdiction contended, and whatever support there may be found for a court in England holding that such a principle forms part of the English common law, there was no authority to suggest it was part of the common law in 1922. It offended the fundamental principle of the presumption of innocence. McCarthy J. referred to three other legislative bases for preventive detention: the *Prevention of Crimes Act, 1908*, the *Mental Treatment Acts*, and the *Offences Against the State (Amendment) Act, 1940*. He pointed out that under the 1940 Act, the Minister had to be satisfied that the person concerned "is engaged" in the relevant activities, not that he "will engage" in such activities. However, he did not make any other comment regarding these Acts, save to comment in passing that the Mental Treatment Acts concerned a "different context." He went on to say that if a person were to be denied his liberty because of a well founded suspicion, there was:

"no logical reason why any other citizen, not so charged, might not be detained upon a similar contention supported by similarly impressive evidence. The pointing finger of accusation, not of crime done, but of crime feared, would become the test. Such appears to me to be far from a balancing of constitutional rights; it is a recalibration of the scales of justice."³⁶

1.34 The judgments in *O'Callaghan* and *Ryan* emphatically reject the notion of preventive detention in the context argued for. However, it may be worth briefly pausing to disentangle the various elements and arguments employed, in particular to identify which of these are anchored in the Constitution and which are not. We will return to a full discussion of the arguments in this area in Chapter 5.

34 *Ibid.*

35 481 U.S. 697 (1987).

36 [1989] I.R. 399 at 410.

1.35 Both judges in *O'Callaghan* characterised pre-trial detention to prevent offending as a punishment.³⁷ They either stated or proceeded on the assumption that the presumption of innocence applies before trial and said that the true purpose of bail was to ensure that the accused would stand trial. Pre-trial detention to prevent offending violated the presumption of innocence. None of the judges discussed the issue of whether such violation of the presumption of innocence could be justified in any circumstances except Walsh J. who mentioned that liberty might be restricted before conviction in extraordinary and highly limited circumstances. However, some of the arguments did not appear to derive from Constitutional values. In *Ryan*, Finlay C.J.'s reference to certain practical problems does not appear to raise a constitutional matter and might be capable of being addressed by legislation providing for procedural safeguards, and his argument concerning the absence of a crime based on intention was fundamentally an argument about the inability of the Courts to legislate. We may note that Walsh J. expressed serious scepticism about the ability to predict future offending from either past bail record or current charge. We may also note that both judges in *Ryan* suggested that this form of detention would open the way for preventive detention more generally. Finally, we may note that Walsh J. in *O'Callaghan* and both judges in *Ryan* said that the accepted method of dealing with offences was based on deterrence rather than prevention.

Sentencing In Respect Of Bail Offences

1.36 Prior to the coming into force of the *Criminal Justice Act, 1984*, a judge sentencing an accused in respect of several offences, some of which were committed while on bail, was entitled to exercise his discretion as to what penalties were appropriate. Section 11 of the *Criminal Justice Act, 1984* attempts to curb this discretion significantly by requiring a judge to make a sentence of imprisonment in respect of an offence committed on bail consecutive to any other sentence. We may contrast this section, for example, with the equivalent English provision which requires the court to treat the fact that the offence was committed on bail as an aggravating factor, but does not require sentence to be consecutive.³⁸ The wording of section 11 is as follows:

"Any sentence of imprisonment passed on a person for an offence committed after the commencement of this section while he was on bail shall be consecutive on any sentence passed on him for a previous offence, or, if he is sentenced in respect of two or more previous offences, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment in respect of those consecutive sentences shall not exceed two years."

37 We may contrast this with the finding of the Supreme Court in *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] I.R. 470, where the view was taken that detention without trial was purely a precautionary or preventive measure.

38 Section 29(2) of the English *Criminal Justice Act, 1991* as inserted by s.66(6) of the *Criminal Justice Act, 1993*.

1.37 The two year limit to the jurisdiction of the District Court is an exception to the normal one year limit. Section 12(1) of the *Criminal Justice Act, 1984* amends section 5 of the *Criminal Justice Act, 1951*, so that where two or more sentences passed by the District Court are ordered to run consecutively, the aggregate term of imprisonment shall not exceed two years. It may be noted that the offence of "failure to answer bail" created by s.13 of the 1984 Act is to be treated as an offence committed while on bail for the purposes of s.11.³⁹

1.38 It is arguable that the Legislature might have been surprised by the judicial interpretation of their intentions in section 11, first, by means of the so-called totality principle, and second, in that one of the consecutive sentences may be suspended. This was perhaps inevitable given the Irish tradition of judicial sentencing discretion and hostility to any diminution of such discretion. In *People (D.P.P.) v. Noel Healy*,⁴⁰ the applicant was charged in Limerick Circuit Court with a series of offences arising out of a conspiracy to commit false imprisonment and conspiracy to rob and was sentenced to concurrent terms of eight years imprisonment on each count. The applicant was on bail when these offences were committed. When sentencing, the President of the Circuit Court took into account the total number of years that would be served by the applicant and adjusted the sentence downwards. The applicant appealed against severity of sentence on the basis that he had received a considerably greater sentence than his co-accused. In the course of the appeal, counsel for the Director of Public Prosecutions submitted that a sentencing judge should disregard the duration of the sentence imposed for a previous offence and fix a sentence appropriate to the second crime, and should not follow the English practice of taking into account the total number of years to be served for all offences. The Court of Criminal Appeal dismissed the application holding that the sentence imposed on the applicant was not excessive or founded on any error of principle, and a comparison with the sentences imposed on the other accused was inappropriate. McCarthy J., delivering the judgment of the Court, also took the opportunity to comment that the sentences imposed on the other accused were based on a misconstruction of the 1984 Act, and that the sentencing Court should determine the sentence appropriate to the offence without having regard to the fact that it must be consecutive under s.11 on any sentence for a previous offence. However, in the case of grave offences, the Court should adjust the sentence downwards where not to do so would impose a manifestly unjust punishment on the accused.

1.39 The obligation to consider the sentence in its entirety arguably dilutes any punitive intent of the Legislature in enacting s.11. As against that, the legislation has not been amended.

1.40 The question of suspending one of the consecutive sentences was addressed in *People (D.P.P.) v. Thomas Dennigan*.⁴¹ The applicant pleaded guilty to a series of offences contained on two bills of indictment. The second

39 Section 13(3) of the *Criminal Justice Act, 1984*.

40 (1989) 3 Frewen 188.

41 (1980) 3 Frewen 253.

series of offences were committed while on bail in respect of the first. With respect to the first series of offences, he was sentenced to concurrent terms of imprisonment, the longest being four years. He was given a five year sentence for the second series, to run concurrently with the other sentences imposed. Counsel for the applicant pleaded for leniency on the basis of the personal circumstances of the accused, and argued that the Court was entitled to suspend one of the sentences as this had not been expressly prohibited by s.11 of the 1984 Act. The Court held that it did have power to suspend a consecutive sentence in appropriate circumstances, although the instant case was too serious to warrant such suspension. However, it reduced each of the sentences on the basis that insufficient attention had been paid to the accused's circumstances. The Court exercised its power to suspend a sentence in *People (D.P.P.) v. Michael Farrell*.⁴² The applicant had been sentenced to two terms of two years detention to run concurrently on various charges relating to larceny and burglary, to which he had pleaded guilty. One of the sentences related to an offence committed while on bail. The applicant applied for leave to appeal against severity of sentence. It was held by the Court of Criminal Appeal that s.11 was a mandatory direction to the Court to pass a consecutive sentence in respect of any sentence committed while on bail, but it said that it would suspend the first sentence of two years in respect of the offence which was not committed while on bail.

1.41 Although the suspended sentence is in theory, a significant penalty, it is often viewed as no sentence at all, because the offender is not required to suffer any immediate hardship. Although, in theory, the suspended sentence may be re-activated upon future misconduct, in practice, it appears that this rarely, if ever, occurs.

Failure To Appear And Forfeiture

1.42 The traditional remedy for breach of a bail order by failure to appear was estreatment or forfeiture of the money secured by the recognisance of the accused or his surety. This power of entreatment continues to operate,⁴³ although it is relatively rarely enforced. Often, even when the power is invoked by the Director of Public Prosecutions, the court will be reluctant to estreat all of the money, particularly if the surety is a financially hard-pressed spouse struggling to make ends meet in the absence of the criminal spouse.

1.43 Section 13 of the *Criminal Justice Act, 1984* created the offence of failing to answer bail. Subsection (1) provides that if a person who has been released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance, he is guilty of an offence carrying a maximum penalty on summary conviction of £1,000 or imprisonment of twelve months or both. Subsection (2) provides that it is a defence for the accused to show that he had

42 (1988) 3 Frewen 257.

43 Section 32 of the *Criminal Procedure Act, 1967* provides that where a person has failed to appear before a court in accordance with his recognisance, any proceedings to estreat shall be taken in that court.

a reasonable excuse for not so appearing. Subsection (4) confers a power of arrest without warrant upon the Garda Síochána in respect of a person who has failed to appear in answer to his bail, where the court has issued a warrant by reason of such failure to appear. The Garda must produce and serve the warrant on the arrestee as soon as practicable.⁴⁴ Under s.33 of the *Criminal Procedure Act, 1967*, where a person has been admitted to bail, a District Judge may issue a warrant for the arrest of the accused upon the application of the surety or any of the sureties or of a Garda and upon information in writing, that the accused is about to abscond for the purposes of evading justice. Upon being brought before the court, the court may commit the accused to prison to await his trial or until he enters into a fresh recognisance or, if he is on remand, remand him.

Confiscation Orders

1.44 Proponents of pre-trial detention to prevent future offences often refer to the phenomenon of career criminals who, when facing trial and conviction in respect of a set of charges, make use of their period on bail to re-offend and develop a financial fund to await them upon their release from the potential prison sentence they face. If this be the case, it may be partly addressed by the recently introduced legislation providing for the confiscation of the proceeds of crime, namely the *Criminal Justice Act, 1994*.

Related Issues: The Status Of Preventive Detention In Irish Law And Prediction

Preventive detention

1.45 Preventive detention before trial is the main issue in this Paper, but the issue of preventive detention after conviction is a closely related concept. The proponents and opponents of each rely on similar arguments. It may be noted that many of the jurisdictions which, as we shall see, permit pre-trial preventive detention also permit post-conviction preventive detention. Irish law has kept the use of preventive detention to a minimum. One example of a preventive detention provision in the criminal context is contained in the *Prevention of Crime Act, 1908*, which provided for a double-track sentence for convicted persons found to be "habitual offenders"; the first part of the sentence was to be proportional to the offence, and the second part merely to prevent future offences. The offender was to serve the second portion of his sentence in a non-punitive but secure regime.⁴⁵ This legislation was implemented in England, but it is not clear that it was ever put to use in this jurisdiction. Certainly, it is not currently employed by the courts and no facilities exist in which an accused could serve the second part of his sentence. In England, similar types of legislation

44 Section 13(5) *Criminal Justice Act, 1984*.

45 For an interesting discussion of this Act, the background to its passage and its implementation in England, see D. Garland, *Punishment and Welfare*.

have been enacted at different points throughout the century,⁴⁶ but this example has not been followed in this country.

1.46 More recently, the Court of Criminal Appeal has, at least on two occasions, rejected the use of selective incapacitation as a valid method of sentencing. In *The People (D.P.P.) v. Carmody*,⁴⁷ one of the applicants had a list of convictions stretching back to 1968 and the other had 120 convictions. Both had served a series of prison sentences. They were sentenced to six years' imprisonment in respect of burglary and malicious damage. The trial judge said that they were not amenable to the ordinary constrictions of society and that he had a duty to protect the public. On appeal to the Court of Criminal Appeal, McCarthy J. quoted from the *O'Callaghan* case on the constitutional prohibition on the refusal of bail because of the likelihood of future offending. He referred to the *Prevention of Crimes Act, 1908*, noting that there were no facilities in the State for such sentences. He said that the radical departure from the previous measures of imprisonment in this case was an attempt to secure reforms by prevention, but that in the absence of appropriate statutory provisions, this was not an acceptable basis for sentencing. In this brief judgment, it is not made clear whether a statute could render such sentencing valid, or whether, which is more likely, any such legislative provision would run into constitutional difficulty. In *The People (D.P.P.) v. Jackson*,⁴⁸ the trial judge imposed life sentences in respect of two rapes, saying that he did so to protect women against the accused until such time as in the judgment of the authorities he was fit to be released. On appeal to the Court of Criminal Appeal, Hederman J. said that preventive detention was not known to our judicial system, and the court reduced the sentences to fifteen years and eighteen years respectively.

1.47 Internment provisions also represent legislative provision for pre-trial detention.⁴⁹ Internment has been permitted in Ireland by successive legislative enactments: the *Public Safety (Emergency Powers) (No. 2) Act, 1923*,⁵⁰ the *Public Safety (Powers of Arrest and Detention) Temporary Act, 1924*,⁵¹ the *Public Safety (Emergency Powers) Act, 1926*, the *Offences Against the State Act, 1939*, the *Offences Against the State (Amendment) Act, 1940*, the *Emergency Powers Act, 1939*, and the *Emergency Powers (Amendment) Act, 1940*. Part VI of the *Offences Against the State Act, 1939* provided for the power of internment, and to bring this Part into effect it was necessary for the Government to publish a proclamation to the effect that the powers conferred by Part VI were necessary to secure the preservation of public peace and order. In *The State (Burke) v. Lennon*,⁵² Gavan Duffy J. heard a *habeas corpus* application in which the

46 The *Criminal Justice Act, 1948*, the *Criminal Justice Act, 1967*. Currently, under s.2(2)(b) of the *Criminal Justice Act, 1997*, the court imposing a sentence of imprisonment on an offender over twenty one years of age for a violent or sexual offence may select a term of such length as is necessary to protect the public from serious harm from the offender.

47 [1988] I.L.R.M. 370.

48 Court of Criminal Appeal, 26th April 1993, Judgment delivered by Hederman J.

49 See generally, Kelly, *The Irish Constitution*, 3rd ed. (1994), at pp.861-7.

50 This Act had a built-in expiry date of six months.

51 The Act had a one-year expiry date. Section 4 of this Act was upheld in *R. v. (O'Connell) v. Military Governor of Hare Park Camp* [1924] 2 I.R. 104.

52 [1940] I.R. 136.

central issue was whether the Minister who had signed a warrant ordering the applicant's arrest and detention was purporting to administer justice. Gavan Duffy J. in allowing the application, cast doubt on the constitutionality of Part VI of the 1939 Act. The Supreme Court refused to hear an appeal by the State against the granting of *habeas corpus* by the High Court.

1.48 The Oireachtas then passed the *Offences Against the State (Amendment) Bill, 1940*, which was referred to the Supreme Court by the President under Article 26 of the Constitution, thus enabling the Supreme Court to give its opinion on internment, since the new Act was similar to the 1939 Act. The Supreme Court upheld the constitutionality of the Bill.⁵³ Sullivan C.J. laid emphasis on the fact that several pre-1937 Acts provided for internment and the Constitution did not expressly prohibit it. He characterised internment as a "precautionary measure taken for the purpose of preserving the public peace and order and the security of the State." This decision granted immunity to the Act from further constitutional challenge, and a challenge to the Act on the ground that it was repugnant to the Convention for the Protection of Human Rights and Fundamental Freedoms was rejected in *In Re O'Laighleis*.⁵⁴ While it might be argued that these internment provisions represent a significant precedent for preventive detention in Irish criminal law, it must be noted that these concern political offences in emergency situations. They were never extended to mainstream criminal law. Moreover, most if not all of these powers were dependant upon the relevant Minister forming the opinion that the individual was *already* engaged in certain types of behaviour.⁵⁵ Finally, it may be noted that what was primarily at issue in *In Re Article 26 and the Offences Against the State (Amendment) Bill*, was whether the Minister was purporting to exercise justice, not whether preventive detention breached the presumption of innocence. We will return to these matters below.

1.49 It is clear, therefore, that preventive detention is not unknown in Irish criminal law.

Prediction

1.50 In all criminal justice systems, prediction of future behaviour plays a role, but again its presence is limited in the Irish judicial arena. It is seen primarily in the context of bail decisions, when a judge must take a view on whether an accused is likely to abscond, interfere with witnesses or tamper with evidence. It also plays a role when a sentencing judge is choosing between, for example, a

53 *Re Article 26 and the Offences Against the State (Amendment) Bill*, [1940] I.R. 470.

54 [1960] I.R. 83. In *Lawless v. Ireland* (1961) 1 E.H.R.R. 15, the European Court of Human Rights held that, while the applicant's detention violated Article 5(1)(c) of the Convention, Ireland was entitled to derogate from its Convention obligations on the basis of public emergency under Article 15.

55 E.g. s.1 of the 1924 Act provided that an Executive Minister might cause the arrest and order the detention of any person in respect of whom such Minister 'shall certify in writing that he is satisfied that there is reasonable ground for suspecting such person of *being or having been engaged or concerned* in the commission of any of the offences mentioned in the schedule to this Act.' Under s.55(1) of the *Offences Against the State Act, 1939*, the Minister of State had to be satisfied that 'any particular person *is engaged* in activities calculated to prejudice the preservation of the peace, order, or security of the State ...' and the equivalent provision in the 1940 amending Act merely replaced the word 'satisfied' with 'of the opinion'. (Emphasis added).

custodial sentence and community service or some other method of disposal. It is also employed by non-judicial persons in relation to imprisoned persons, when deciding whether a prisoner is suitable for temporary release. In other systems, prediction is employed in a range of additional contexts. For example, prediction of future behaviour is crucial to a parole decision and attempts to employ scientific methods of predicting parole risks have long been in operation in the United States. Again, many jurisdictions in the United States require predictions regarding future dangerousness to be made prior to the imposition of a capital sentence. Many jurisdictions permit preventive sentencing in respect of terms of imprisonment based on predictions about future dangerousness. Moreover, in the civil context, commitment of mentally ill persons often requires prediction of future behaviour. Again Ireland is unlike many other jurisdictions in its greatly limited scope for prediction and in its failure to employ any scientific methods of prediction in the limited areas to which it operates.

Criteria For The Grant Of Bail To Young Persons And Children

(i) Station bail

1.51 For the purposes of the law of bail, remand and detention, "young person" and "child" are defined as follows in the *Children Act, 1908*:⁵⁶

Young Person: A person who is fifteen years of age or upwards and under the age of seventeen.⁵⁷

Child: A person under the age of fifteen years.⁵⁸

In effect, however, the law of bail applies only to children above the age of criminal responsibility, i.e. those aged between 7 and 14.⁵⁹

1.52 Section 94 of the *Children Act, 1908* as amended, sets out the law as it applies to the grant of station bail to children and young persons:

"Where a person apparently under the age of [seventeen]⁶⁰ years is apprehended with or without warrant, and cannot be brought before a

56 For other purposes, a child is defined as "a person under the age of eighteen years other than a person who is or has been married": *Child Care Act, 1991*, section 2(1).

57 Section 131 of the *Children Act, 1908* as amended by section 29(1) of the *Children Act, 1941*.

58 Section 131 of the *Children Act, 1908* as amended by section 29(2) of the *Children Act, 1941*.

59 The term "juvenile offender", does not appear to have any legal definition. Where found in legislation, it embraces both the terms "young person" and "child". Thus, for example, Part V of the *Children Act, 1908*, as amended by the *Children Act, 1941* is entitled "Juvenile Offenders" and governs such matters as the bail, custody and sentencing of young persons and children. Equally the Rules for the Government of Prisons, 1947 (S.R. & O. No. 320 of 1947) uses the term "juvenile in respect of those under 17": see Rules 214 to 229. There are also special rules for those aged between 17 and 21: see Rules 230 to 236. However, the Department of Justice applies the term to those who may be placed in custody in Saint Patrick's Institution, i.e. those between 16 and 21. Denis Mitchell in *A Report on the Law and Procedure Regarding the Prosecution and Disposal of Young Offenders* (1979) uses the term "juvenile" in respect of those aged between 17 and 21. Whichever definition is adopted, the law of "station bail" as set out in the *Criminal Procedure Act, 1967* applies to those of 17 or more years of age.

60 Section 29(1) of the *Children Act, 1941* extended the definition of young persons to those under 17: previously, definition extended to those under 16: section 131 of the *Children Act, 1908*.

court of summary jurisdiction, a superintendent or inspector of police, or other officer of police of equal or superior rank, or the officer in charge of the police station to which such person is brought, shall inquire into the case and may in any case, and shall-

- (a) unless the charge is one of homicide or other grave crime; or
- (b) unless it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute; or
- (c) unless the officer has reason to believe that the release of such person would defeat the ends of justice,

release such person on a recognisance, with or without sureties, for such an amount as will, in the opinion of the officer, secure the attendance of such person upon the hearing of the charge, being entered into by him or by his parent or guardian."

1.53 The *Criminal Procedure Act, 1967* deals with the law of remand of "persons", a term which clearly includes children and young persons. Thus many of the provisions of this Act apply to children and young persons on remand. In the event, however, of conflict between the terms of the Acts of 1908 and of 1967, the rules of statutory interpretation require that the terms of the former, being a "specific" Act, takes precedence over those of the latter "general" enactment. Thus the authority which section 31(1) of the Act of 1967 grants to a sergeant or other member in charge of the station to release a person brought in custody to a Garda Síochána station, and in respect of whom no warrant ordering his detention exists, *whenever he or she considers it prudent to do so*, is inapplicable in the case of children and young persons.

1.54 However, the obligation to detain or remand which section 94 of the *Children Act, 1908* imposes upon a superintendent or inspector of police or officer of equal or superior rank, applies whether the young person or child is detained *with or without warrant*. This provision may, therefore, and unlike its counterpart in the case of detention on remand of those of 17 years of age or more, permit a superintendent or inspector of police or officer of equal or superior rank to superimpose his or her decision to detain over that of the District Justice.⁶¹ A District Justice, when issuing a warrant, may only insert a provision ordering detention in custody if the facts of the case meet the *O'Callaghan* criteria. Thus, if he or she is satisfied that the release on bail of the person to be arrested would not interfere with the course of justice, a warrant of arrest may not contain any restriction: a member of the Gardaí of appropriate rank may nonetheless be obliged to remand the young person/child in custody if the charge is one of homicide or other grave charge or if it is necessary in the interest of such person to remove him or her from association with any reputed criminal or prostitute. Similarly, it is arguable that the terms of a warrant which

⁶¹ Section 30(2) of the *Criminal Procedure Act, 1967* provides that where there is an endorsement on a warrant as to release on bail, the sergeant or other member in charge of the Garda station shall discharge the arrested person with or without sureties in accordance with the endorsement.

orders the release on bail of a child or young person may be altered by a superintendent or equivalent, for he or she is empowered by section 94 to release "with or without sureties, for such an amount as will, in the opinion of the officer, secure the attendance of such person upon the hearing of the charge, being entered into by him or his parent or guardian."

1.55 The constitutionality of the powers granted by section 94 of the *Children Act, 1908* to Gardaí of the requisite rank to disregard the order of a District Justice as found in a warrant to arrest must surely be open to debate.

(ii) Court bail

1.56 The *Children Act, 1908* does not specify the conditions under which a court may grant or refuse to grant bail to a young person or child. In those circumstances, the "general law" criteria as set out by the Supreme Court in *O'Callaghan* for the grant or refusal of court bail appear to apply. It may, however, be arguable that the matter of the welfare of the child or young person is a factor which must also be taken into account by the court in determining whether bail should or should not be granted. This suggestion arises from a literal interpretation of section 3 of the *Guardianship of Infants Act, 1964* which states that:

"Where in *any* proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding the question, shall regard the welfare of the infant as the first and paramount consideration." (*italics inserted*)

1.57 "Infant" is defined as a person under eighteen years of age other than a person who is or has been married.⁶²

1.58 Arguably, those "proceedings" to which the section relates and the term "custody" itself may be limited by reference to the context in which those words are found. On the other hand, the section clearly refers to any proceedings in which custody is in issue, a category into which a bail application falls. If, indeed, the welfare of the child or young person must be considered, then there may clearly be situations in which he or she may be detained by the courts even though no question of interference with the administration of justice is at issue.⁶³

62 Section 2 of the *Guardianship of Infants Act, 1964* as amended by section 2(2) of the *Age of Majority Act, 1985*. Thus, the possible grafting of the welfare principle on to the law of bail as awarded by the courts is of interest, if at all, to the case of children, young persons and 17 year olds who are not or have never been married.

63 The paramount emphasis on the welfare of the child is found in certain provisions of the *Children Act, 1908*: see, for example, section 94 which permits a superintendent or officer of equal or superior rank to refuse to release a child or young person on bail because it is in the interest of such person to remove him from association with any reputed criminal or prostitute.

1.59 The common-law power traditionally enjoyed by the courts to determine the terms on which an accused may be released on bail -and affirmed in the *Criminal Law (Bail) Bill, 1995* - applies in the case of children and young persons also. The question of "welfare" may also be of relevance in this regard.

1.60 The various provisions of section 24 of the *Criminal Procedure Act, 1967* dealing with the length of detention on remand also apply,⁶⁴ in the absence of more specific provisions relating to children and young persons.

PLACES AND CONDITIONS OF DETENTION OF YOUNG PERSONS AND CHILDREN

(i) Places of detention

1.61 The law provides for the detention of young persons and children outside of the main-stream adult prison system; only in every extreme circumstances - to be discussed below - may a young person be detained in an adult prison. In no circumstances may a child be so detained.

1.62 Section 95 of the *Children Act, 1908*, as amended,⁶⁵ provides that a child or young person who is not released on recognisance by a superintendent or officer of equivalent or superior rank shall be detained in a *place of detention* as provided under the Act, until he or she can be brought before a court of summary jurisdiction. Section 97 of the Act provides that a court of summary jurisdiction, on remanding a person who is not released on bail, shall also commit him or her to custody in a place of detention, for the period of his or her remand. The Act does not set out or define "places of detention."

1.63 The *Prevention of Crime Act, 1908* established a Borstal system for males aged between sixteen and twenty-one years. Following the enactment of the *Criminal Justice Act, 1960*, the term "Borstal" was discontinued and that age group was subsequently detained in St. Patrick's Institution.⁶⁶ The *Criminal Justice Act, 1960* provides for the detention in St. Patrick's of males aged between seventeen⁶⁷ and twenty-one years and, if the court considers that none of the other methods by which the case may be dealt with are suitable, of sixteen year olds. Thus it is possible to detain a sixteen year old under the *Children Act, 1908* system or under the system established in 1960. As an almost invariable rule, however, sixteen year olds are detained in St. Patrick's.

1.64 Section 9 of the Act of 1960 provides that a power to remand in custody a person between the ages of sixteen and twenty-one shall include a power to

64 Section 24(1) provides that a court shall not remand a person on bail for longer than eight days unless that person and the prosecutor consent and provided it is not the first occasion on which that person appears before the court.

65 See footnotes 56 and 57 *supra*.

66 Simply introduced in its parent Act as the institution called and known as "Saint Patrick's" and situate at North Circular Road, Dublin.

67 Alternatively, at seventeen, a person may be detained in prison.

remand to a *remand institution*. No such remand institutions have, however, been established.

1.65 **List of Places of detention:** At the moment, there are 4 centres in operation which have been certified, pursuant to the Act of 1908, as places of detention for the purposes of the remand of children and young persons.

- St. Michael's Assessment Centre:⁶⁸ St. Michael's Centre can provide remand accommodation for 20 boys under the age of 16 years. It receives offenders on "straight" remand - i.e. those who have been refused bail in the courts, and those who did not apply for bail, and also receives "remands on assessment",⁶⁹ i.e. of those who, having been convicted, are sent by the courts to St. Michael's to undergo educational, medical, social, psychological and psychiatric assessment.

In 1989, 65 persons were detained on "straight" remand in St Michael's and 177 were transferred voluntarily or by the courts for assessment. In 1994, this figure had risen in the case of "straight" remand to 149 and fallen in the case of those transferred voluntarily or by the courts for assessment to 150.

- Oberstown Girls Centre:⁷⁰ This centre comprises two units -a remand and assessment unit for girls and a long stay unit - which are the only residential institutions for girls of sixteen years of age and under. The remands and assessment unit is certified as a place of detention. It can provide accommodation for eight girls.
- Oberstown Boys Centre: Certified both as a reformatory school for the detention of boys who have been convicted and as a place of detention for boys on remand, this centre can accommodate 20 boys on long stay and 10 for remand purposes.
- Trinity House:⁷¹ This centre is certified as both a reformatory school and a place of detention. Its main emphasis is, however, upon the accommodation of convicted male children and male fifteen year olds; only two beds are designated to those on remand. Of those that are assigned to Trinity House on remand, the vast majority are those on "straight remand" - only on very rare occasions will the courts assign a child to Trinity house for assessment on remand.

1.66 The enactment of the *Children Act, 1908* led to the establishment of all

68 This centre, together with St. Laurence's Special School, which is certified pursuant to the Act of 1908, as an Industrial School, constitutes Finglas Children's Centre.

69 The practice of 'remanding on assessment' does not have any statutory basis but appears to have grown from a recommendation contained in *The Reformatory and Industrial Schools System Report (1970) - The Kennedy Report*.

70 Lusk, Co. Dublin.

71 Lusk, Co. Dublin.

of the above centres and they are now under the auspices of the Department of Education. The philosophy underpinning these centres is one of minimum-intrusiveness, permitting to the greatest extent feasible, the continuation of enjoyment of civilian life. The law does, however, permit the detention of a young person⁷² in prison on remand.

1.67 Section 97 of the *Children Act, 1908*, which states that a court shall, if it remands or commits for trial a young person, commit him to custody *in a place of detention*, adds that:

"it shall not be obligatory on the court so to commit him if the court certifies that he is of so unruly a character that he cannot be safely so committed, or that he is of so depraved a character that he is not a fit person to be so detained."

1.68 "Certificates of character" resulting in transmission to prison are issued only in respect of young persons detained in accordance with the provisions of the *Children Act, 1908*. Thus, sixteen year olds detained on remand in St. Patrick's may not be transferred to prison under the terms of this provision.⁷³

1.69 Section 25(1) of the *Criminal Procedure Act, 1967* provides that a person may be remanded by the courts into the custody of a member of the Garda Síochána for a period not exceeding four days.⁷⁴ It has been judicially accepted, however, in a number of unreported judgments that as the *Children Act, 1908* specifically provides that a child or young person shall be detained in a place of detention certified under that Act, no child or young person may be remanded in a Garda station unless such station is certified as a place of detention in accordance with the Act of 1908.⁷⁵

1.70 **St. Patrick's Institution:** St. Patrick's Institution offers, as we saw, accommodation to sixteen to twenty-one year olds, whether on remand or already convicted. Its maximum capacity in 1992, the latest year for which figures are available, was purportedly in the region of 120 people, although the average number detained on any given day in that year was 145.⁷⁶ There are no statistics available as to the numbers remanded in custody in St. Patrick's Institution nor as to the length of time spent by remand prisoners therein. However, the Governor has stated that a period of one to two weeks remand in custody would not be so unusual.

72 Section 97 does not extend to children.

73 Official statistics relating to the prison population do not indicate the numbers transferred to prisons under this statutory provision. However, records in Mountjoy Prison show that very limited numbers - usually less than 5 - are detained thereunder *per annum*.

74 Section 25(2) of the Act adds that outside of the Dublin Metropolitan Police District, a court shall, before so remanding a person, satisfy itself that suitable facilities are available for the custody of such person.

75 See *State (Ward and Others) v. Superintendent of Bridewell Garda Station*, unreported, Irish Times, 24th and 25th January 1975; *State (15 year old girls) v. Deputy Governor of Mountjoy Prison*, unreported, Irish Times, 27th February 1995.

76 *Annual Report on Prisons and Places of Detention for the Year 1992*, Department of Justice, 1994, p.92.

1.71 Section 7 of the *Prevention of Crime Act, 1908*, as amended, empowers the Minister for Justice to transfer a prisoner detained in St. Patrick's Institution to a prison where the Visiting Committee certifies such person as incorrigible or declares that the prisoner in question is exercising a bad influence over the other inmates of the Institution. This provision has not been used in recent years.

(ii) **Conditions of detention**

1.72 The *Children Act, 1908* was seen as "a great and fundamental step in child protection"⁷⁷ which showed, for its time "an enlightened approach to juvenile offenders and their treatment by the courts".⁷⁸ The welfare approach encompassed in the Act is reflected in the form of care afforded to young offenders detained in centres established in accordance with its provisions. The centres aim to ensure for the young people and children detained, as far as is practicable, the continuance of a "normal" family, educational, recreational and social life. When applying this philosophy, no distinctions are drawn between young persons/children on remand and those already convicted other than those necessitated by the very nature of remand detention. The families and adult friends of both categories of detainee, for example, have unlimited visitation access. The centres are very clearly concentrated in the Dublin region; consequently, and in order to make these unlimited visiting rights a reality, travel vouchers are available to the families from beyond this catchment area to cover expenses incurred. No distinction is drawn between the families of different categories in the allocation of these vouchers. On the other hand, young persons/children from the Dublin area who have been remanded by the courts for assessment, may avail of weekend home-leave thereby continuing contact with the family and, in the case of remand assessment, involving families in the assessment process; home-leave, however, may not be afforded to those on straight remand. In all other respects, children and young persons on remand may avail of the facilities and services provided in these centres.

1.73 In Trinity House and in Oberstown Boys Unit there is no physical separation between those who are convicted and those who are on remand. The other two places listed above contain only young persons and children on remand - there is no physical segregation in those centres between children and young persons on "straight" remand and those who are remanded by the courts for assessment.

1.74 St. Patrick's Institution is, as previously noted, outside the scheme for detention of young offenders established by the *Children Act, 1908*. Its regime is, consequently, more akin to that which exists in adult prisons, involving a stricter and more regimented regime than is found in a "Children Act centre."

77 Heyward, *Children in Care: the Development of Services for the Deprived Child* (3rd ed.), Routledge and Kegan Paul, London, 1978, pp.108-109. See Powell, "Deconstructing Juvenile Justice: A Post-Modern Dilemma", 43 (1995) *Journal of the Institute of Public Administration of Ireland* 36 at 40.

78 In more recent years, however, there have been numerous calls for the introduction of another Act to cater for contemporary circumstances: see, for example, *Report of Task Forces on Child Care Services, 1980*, and the *Child Care Act, 1991* which responded to this call in a limited number of respects.

In 1985, the *Whitaker Report* stated that the accommodation provided therein was so unsuitable as to require immediate replacement.⁷⁹

1.75 The Institution, along with all of the prisons⁸⁰ in the State, is governed by the *Rules for the Government of Prisons, 1947*. Draft Prison Rules to replace the Rules of 1947 have been prepared by the Minister for Justice and were published in June 1994.⁸¹ The 1947 Rules contain a number of special provisions governing the regime of unconvicted prisoners under the age of 17⁸² and further provisions in respect of those aged 17-21. A distinction is drawn in the rules relating to those under 17 between (a) those unconvicted prisoners who have not been in prison before and those who are well-conducted in prison and (b) convicted prisoners who have been in prison before and those who misbehave in prison. The Rules envisage that remand prisoners shall be kept apart from those who have been convicted and they provide for a further segregation between those remand prisoners under 17 who fall into category (a) above and those who fall into category (b).⁸³ The authorities in St. Patrick's confirm that the remand prisoners are, where possible, detained in separate sections of the Institution but concede that in circumstances of extreme overcrowding, "mixed accommodation" cannot be avoided. Overcrowding can on occasion also result in the integration of remand and convicted prisoners when engaging in recreational, exercise, educational and training activities although, again where possible, segregation is maintained. The authorities in St. Patrick's add that, in reality, no distinction is drawn on any occasion between remand prisoners under 17 years of age of class (a) or (b).

1.76 Those facilities - educational and training, recreational and exercise - which are available to young convicted prisoners are also available to unconvicted young persons, albeit separately.⁸⁴ Unconvicted persons are entitled to receive visits from not more than three persons at one time for a quarter of an hour every day except Sunday; this entitlement compares with a right on the part of convicted prisoners to receive such visitors for thirty minutes once a week.⁸⁵

THE LAW GOVERNING THE HOLDING OF UNCONVICTED PRISONERS ON REMAND

1.77 In accordance with the legislative code governing prisons,⁸⁶ male remand prisoners may be committed by the courts to Mountjoy, Cork or

79 *Report of the Committee of Inquiry into the Penal System* (1985), Pt. 3391.

80 Places of detention - in the sense in which that term is used in relation to adults - are also governed by the Rules of 1947. *The Prisons Act, 1970*, introduced the concept of places of detention - usually termed 'open prisons' - in the context of the detention of adults.

81 See Department of Justice, *Management of Offenders*, pp.109-140.

82 The term 'juvenile' is used in the Rules of 1947 in respect of those under seventeen years of age: see Rules 214-221.

83 Rule VII, 2(a) in conjunction with VIII, 2(a): see, *Management of Offenders*, p.119.

84 The Draft Prison Rules recommend that arrangements for enhanced education and training facilities should be made for all young offenders.

85 See Rule 226, 1947.

86 Comprising the *Prisons (Ireland) Acts, 1826 to 1907*, the *Penal Servitude Act, 1891*, the *Prisons Act, 1898*, the *Criminal Justice Administrative Act, 1914*, the *Criminal Justice Act, 1960*, the *Prisons Act, 1970*.

Limerick Prisons. Remanded females may be committed to Mountjoy and Limerick Prisons. Those of 17 years of age or more may be detained therein. Seventeen to twenty-one year olds may also be remanded in St. Patrick's Institution.⁸⁷

1.78 Only a limited number of official statistics are available in respect of the remand prison population. Statistics from the Department of Justice show that the numbers remanded, at some point in the criminal process, in St. Patrick's Institution more than doubled from the figure of 2,257 in 1984 to 5,628 in 1992. Of that 2,257, 234 were remanded in custody for trial in 1984 and 550, likewise, in 1994. During the same period, there was an increase of 50% in the entire prison population, growing from 6,462 in 1984 to 11,485 in 1992.⁸⁸ As of 31st December 1992, the total capacity of the three committal prisons was 921 whilst the greatest number detained during that year in all three prisons was 1,053. The authorities in the three prisons speak of increasing administrative difficulties posed by the increase in numbers and concede that many convicted persons are being released in order to provide space for newly-convicted prisoners and remand prisoners. It is acknowledged that no methodical approach is used in determining which convicted prisoners ought to be released to accommodate new prisoners, and the situation is governed purely by the "science of space."

1.79 No official figures can be obtained relating to the length of time spent by prisoners on remand. The Governors of the three prisons stated that it is usual to be remanded in detention for a period of one to three weeks. In extreme circumstances, however, detention or remand may persist for three to six months.

1.80 Adult prison life is regulated by the *Rules for the Government of Prisons, 1947*. Part III thereof contains special rules for particular classes of prisoners: one such class are prisoners on remand. The Draft Prison Rules published in 1994 also make special provision for unconvicted prisoners.

1.81 The rules state that prisoners awaiting trial shall be kept apart from unconvicted prisoners and "while attending church and at other times shall, if possible, be placed so that they may not be in view of the convicted prisoners."⁸⁹ The 1994 Draft Prison Rules also envisage, where possible, the separate accommodation of remand prisoners from those who have been convicted.⁹⁰

1.82 At the end of 1992, the latest date for which statistics are available, Mountjoy Prison, the largest prison in the State, could officially provide accommodation for 551 prisoners - both male and female -,⁹¹ although its prisoner population often reaches close to 700. The remand population ranges,

87 As we saw, young persons certified as unruly and depraved under the *Children Act, 1908* may also be detained in prisons.

88 See *Management of Offenders*, p.159.

89 Rule 192.

90 VIII 2(a): see *Management of Offenders*, p.120.

91 1992 *Report on Prisons and Places of Detention*, Department of Justice, p.92.

on average, from 70-100, although it may reach 140. The female remand population has fluctuated from 3 to a maximum of 20 prisoners. As a matter of course, male remand prisoners are kept separate from those who are convicted, but when numbers swell to the numbers indicated above, total segregation is not possible. In that event, remand and convicted prisoners may indeed share a cell. A similar situation exists in Cork Prison but in Limerick, "mixed accommodation" is the norm, due to lack of facilities. There is no segregation in Mountjoy or in Limerick, between female remand prisoners and females who have been convicted.

1.83 In Mountjoy and Cork Prisons, segregation is maintained, where possible, when unconvicted prisoners are undertaking physical exercise and recreational activities. This physical separation of the convicted and unconvicted also exists in Cork Prison in relation to educational courses, at which all categories of prisoners may attend. In Limerick Prison, again due to lack of facilities, educational courses are mixed. In Mountjoy Prison, those on remand may not avail of the educational courses on offer to convicted prisoners. The reasons offered are lack of facilities and resources, and the fact that the high "turnover" of remand prisoners, obviously, means that little benefit may be obtained from educational courses in the course of their short period of detention, particularly when weighed against the sizeable amount of administrative work which apparently must be undertaken in order to facilitate attendance at courses.

1.84 A remand prisoner, unlike a convicted prisoner, is not obliged by the 1947 Rules⁹² to perform any labour. It is, however, an option and one which, according to the Governors of the three prisons, is often availed of. This provision is repeated in the Draft Prison Rules.⁹³

1.85 Like their counterparts under the age of 17, unconvicted adult prisoners may receive a fifteen minute visit from no more than three visitors every day except Sunday, an entitlement which compares favourably with the right of convicted prisoners to weekly visits of 30 minutes.

1.86 Visits are supervised in the same manner as those involving convicted prisoners and no physical contact may be maintained between visitor and prisoner.⁹⁴ The Rules provide that a prisoner awaiting trial shall be allowed to see his or her legal adviser on any day except Sunday at any reasonable hour within the sight but out of earshot of a prison officer.⁹⁵ Such visits are allowed under similar conditions from a medical practitioner appointed by friends or a legal adviser where such visits are necessary for the purposes of a defence.⁹⁶ A prisoner who is in prison in default of bail shall be permitted to see any person at any reasonable hour, Monday to Saturday inclusive, for the *bona fide* purpose

92 Rule 205.

93 Rule VIII 2(e): see *Management of Offenders*, p.120.

94 Intimate physical relationships - prohibited in the case of convicted prisoners - are equally impermissible for remand prisoners.

95 Rule 210(1).

96 Rule 210(2).

of securing bail.⁹⁷ Written communications between unconvicted persons and others are "inspected" but not read, as in the case of convicted persons.

1.87 A number of other provisions of the Rules of 1947 emphasise the fact that remand prisoners by the very nature of their status as unconvicted persons shall not be treated as fully integrated into the prison regime. Matters such as the right to wear one's own clothes, or to wear clothes specifically for remand prisoners⁹⁸ and freedom from compulsion to obtain a standard hair-cut,⁹⁹ as set out in the Rules of 1947, maintain distinctions between the unconvicted and convicted. There is also a right to daily access to one's money which is maintained in the hands of the Governor.¹⁰⁰

1.88 Limited provision is also made for the detention of adults outside of the committal prison system: section 25(1) of the *Criminal Procedure Act, 1967* provides that a court may, when it remands a person in custody for a period not exceeding four days, commit him or her to the custody of a member of the Garda Síochána. The detention of a person so detained must be in accordance with the terms of the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*.¹⁰¹ In addition to setting down standards in relation to the conduct of interviews, maintenance of custody records and records of arrest and detention, the regulations require a member of the Garda Síochána to inform the detained person of his or her right to notify another person reasonably named by him or her of the fact of his or her custody¹⁰² and of the entitlement to consult a solicitor.¹⁰³ They also permit a visit from a relative, friend or other person with an interest in his or her welfare,¹⁰⁴ and also from a solicitor. Consultation with a solicitor may take place in sight but out of earshot of a member of the Garda Síochána.

Treatment of untried prisoners: international standards

1.89 There is only one directly relevant international treaty provision, Art. 10(2) of the International Covenant on Civil and Political Rights. When Ireland became a party to this treaty, it entered a reservation to this provision. There is however another treaty to which Ireland is party and which is of general relevance although it contains no specific provision regarding the treatment of untried prisoners. This is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which entered into force on 1st February 1989. There has been established under this treaty a European Committee for the Prevention of Torture and Inhuman or Degrading

97 Rule 211.

98 Rule 197.

99 Rule 201.

100 Rule 196 grants an unconvicted prisoner the right to procure or receive food etc. 'at proper hours'. In the three prisons in which persons are held on remand, there is in fact a daily right of access to his or her personal account in order to purchase goods from the prison retail outlets.

101 S.I. 119 of 1987.

102 See Rule 8(c)(i).

103 See Rule 8(1)(b).

104 See Rule 11(4).

Treatment or Punishment, and it is the role of the Committee "by means of visits, [to] examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment" (Article 1 of the Convention). The Committee visits a number of places of detention in States Parties each year and draws up a report on the treatment of detainees in the places it visits in each State (Article 10(1)). It visited Ireland in the autumn of 1993. Publication of a report is not automatic and, under the Convention, only follows upon a request by the State Party concerned to this effect (Article 11(2)). While it is, therefore, possible for Ireland legally to block publication of the Committee's report on its visit to Ireland, it has not been unusual to date for such reports to be published. The Committee may include in its report "any recommendations it considers necessary" (*ibid.*) and "may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty" (*ibid.*). Although the Committee's recommendations are not legally binding, the Convention states:

"If the party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter." (Article 10(2)).

1.90 Apart from these treaty provisions, there are two other international texts dealing with the treatment of prisoners, and both of them contain specific provisions on the treatment of untried prisoners. There are the U.N. Standard Minimum Rules on the Treatment of Prisoners and the European Prison Rules. Both were adopted within the context of intergovernmental organisations of which Ireland is a member, in the former case, the United Nations, in the latter, the Council of Europe. They have the status of recommendations and are not therefore legally binding as such but may be taken into account in diplomatic correspondence and by international bodies such as the European Human Rights Commission in interpreting the standards laid down in other international texts which are legally binding.

1.91 In addition to the international provisions specifically dealing with the treatment of untried prisoners, it should be remembered that the international human rights standards also apply in general to such persons even if their enjoyment of these rights may be curtailed somewhat owing to their detention.

1.92 The Prison Rules of 1947 are in the process of being changed and the current draft of the new Rules contains the following provision:

"Prisons shall be operated, as far as practicable, in accordance with the principles of the European Prison Rules (Strasbourg 1987) as adopted by the Committee of Ministers of the Council of Europe on 12 February, 1987, and the principles of any international instrument for the promotion of human rights to which the State is a party." (see

Department of Justice, *The Management of Offenders: A Five Year Plan*, 1994, p.111).

1.93 The relevant provisions of the International Covenant on Civil and Political Rights, the U.N. Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules are to be found in the Appendix.

CHAPTER 2: OFFENDING ON BAIL - THE EXTENT OF THE PROBLEM

Introduction

2.1 In recent decades, most if not all common law jurisdictions have experienced anxiety about the phenomenon of bail offending, that is to say, the commission of offences by a person who is, at the time of offending, on bail in respect of other offences. Irish law deals with this problem through the method of sanction, as we saw in Chapter 1, whereas many other jurisdictions, as we shall see in Chapter 4, have also chosen to employ pre-trial detention as a device. This Chapter examines the empirical evidence concerning the extent of the problem of bail offending, and various problems associated with drawing conclusions from the available statistics. We will look at a number of studies of the problem conducted in England and Scotland, primarily with a view to highlighting the different picture which emerges depending on the methodology adopted. Finally, we will examine a number of figures bearing on the position of pre-trial detainees more generally.

2.2 It is of interest to note that at different times and in different places, the problem of offending on bail, or at least of what category of offenders are perceived to be a problem, has varied. Recent Gardai statements appear to target the recidivist burglar who commits offences on bail to build up a "nest egg" for his or her release from imprisonment, secure in the knowledge that even if detected and convicted, these offences will not add substantially or at all to his or her sentence. In Australia, a number of jurisdictions have voiced concern about the granting of bail to perpetrators of domestic violence who may return to the home and abuse the complainant. Several Australian jurisdictions have also reacted legislatively to concerns about granting bail to drug offenders. At various times, concerns have been raised about the granting of bail to persons accused of highly violent behaviour, on the basis that in the case of such a serious crime, their right to liberty should cede to the higher public interest in preventing such behaviour in the future. Accordingly, the phenomenon of bail offending or

"bail bandits" is often used as a generic term, which may conceal the fact that different concerns lie underneath the surface.

Rates Of Offending On Bail In Ireland

2.3 A number of studies have been conducted in various countries to estimate the rate of bail crime in particular areas. These studies employ a number of different methodologies and we may note some of the relevant differences at this point. First, some count the number of *persons* who commit bail crimes, while others count the number of *offences* committed during the bail period. So, if a small number of persons are committing a high number of offences, the respective figures produced will be quite different. Second, and most importantly, some studies count the number of persons who are on bail at the time of *arrest* (or offences in respect of which persons were *arrested* while on bail), while other studies count the number of persons *convicted* of offences who were on bail at the time of the offences. This will be discussed further below. Third, some studies concern *court bail* only, while others are concerned with *court and police bail*. Fourth, in some studies, the fact that a person was on bail when charged with an offence is taken as meaning that he committed that offence while he was on bail, although he could have committed both offences prior to bail. It is crucial to know the kind of study one is dealing with when quoting the figures.

2.4 The figures used in this Paper for Ireland are based on Garda Siochana Statistics.¹ These figures indicate the percentage of offences in respect of which persons were "detected" while on court bail.² The figures do not include summary offences.

2.5 The figures are reproduced in two tables. Table A lists for the years 1988 to 1993 offences detected as having been committed in a particular year by a person on bail and the number of convictions *ultimately* recorded for those offences, not necessarily in the year the offence was committed, because of delays inherent in the system. Table B consists of a more detailed breakdown of detected offences for the years 1992 and 1993.

2.6 In these tables, a "detected" offence means an offence which the Gardai were satisfied was committed by a person on bail for which that person was arrested while still on bail. There is an obvious discrepancy between figures for detection and conviction. The discrepancy arises for many different reasons, including:

- (1) Case dismissed or information refused;

1 We wish to thank Sergeant Christopher Gordon of the Garda Research Unit in Templemore, Superintendent N.E. O'Sullivan and Sergeant Christopher Sheridan, both of the Crime Branch at Garda Headquarters, for their assistance in obtaining and interpreting these figures.

2 The figures are derived from completed G2 forms, completed by investigating Gardai, which note whether the offender committed the alleged crime while on bail.

- (2) Evidence insufficient for prosecution by the D.P.P.;
- (3) Case awaiting trial;
- (4) Caution administered under the Juvenile Liaison scheme;
- (5) Charge withdrawn or a *nolle prosequi* entered in the context of a plea agreement;
- (6) Offence taken into account on conviction for other offences, e.g. the offence in respect of which he was granted bail.

2.7 Every person is presumed innocent until proven guilty. So a conviction for the relevant offence is the only absolute proof that it was committed by a person on bail. However, a "detection" in this context while, obviously, not a conviction can be said to be a more significant item than a simple arrest on suspicion. When an offence is "detected" in this context, the case is concluded, as far as the Gardai are concerned. The crime is solved and no further Garda investigation takes place. While the Gardai may be unable to *prove* the offence, the reality is that they know who committed it and for their internal administrative purposes, they re-direct their resources to unsolved cases.

2.8 Rather than advance this detection rate as an unshakeable platform for law reform, we would simply remark that one relies on the Gardai to apply their own criteria in keeping the peace as best they can on a day to day basis. They are the only professional investigators of crime in the State.

2.9 The average clearance rate is approximately 33% in respect of reported crimes. Accordingly, one might argue that if a certain number of persons are detected offending while on bail, this represents only a third of bail offenders, the other two thirds not being solved. This would seem to suggest that the detection figures *understate* the rate of bail crime.

2.10 This argument assumes that the average rate of clearance for crime may be applied to bail offenders. There are a number of reasons why this may not be appropriate. First, it is possible that there are some offenders who are more likely to be detected than others; thus, if detected once, they are more likely to be detected a second time while on bail. Moreover, it is possible that a person who is on bail and who is known to the police is more likely to be arrested for a subsequent crime either because of his high visibility or because his methods of operation are known to the police. It seems likely, therefore, that while the detection rate does understate the amount of bail crime because not all bail crime is either reported to or solved by the police, one cannot assume that the relevant proportion is 33%. It is not possible to know.

2.11 Just as not all persons charged with an offence allegedly committed on bail will be convicted of that offence, not all persons will be convicted of the original offence for which they were granted bail. In a case where the offender

is ultimately convicted of the offence during the bail period but not of the original offence, it is true to say that the second offence was *on bail*, but it is not possible in law to say that he *re-offended*. Accordingly, one should bear in mind that one should not equate the rate of offending during the bail period with the rate of re-offending.

2.12 Despite all the caveats entered above, it will be seen that the Irish figures on offending on bail are lower than the English figures, despite the fact that in England, courts may refuse bail on the ground of possible commission of further offences. This would be expected to remove from circulation at least a proportion of those likely to do so. This suggests either (1) that the English rate of offending on bail is much higher than that in Ireland or (2) both that the English rate of offending on bail is higher than that in Ireland and that the court's power to refuse bail on this ground is ineffective in selecting the offenders who would commit offences while on bail.

2.13 Table A lists, for the years 1988 to 1993, the total number of *indictable* offences recorded, detected, detected as having been committed by persons on bail and convictions for the latter offences recorded to date.

TABLE A

| Year | Recorded | Detected | Detected as bail offences to date | Convictions for bail offences |
|-------------|-----------------|-----------------|--|--|
| 1988 | 89,544 | 29,685 | 2,947 | 1,490 |
| 1989 | 86,792 | 28,781 | 2,647 | 1,667 |
| 1990 | 87,658 | 28,985 | 2,494 | 1,558 |
| 1991 | 94,406 | 31,653 | 2,690 | 673 |
| 1992 | 95,365 | 32,838 | 2,848 | 1,598 |
| 1993 | 98,772 | 35,812 | 3,201 | 1,409 |

2.14 Table B consists of a breakdown by offence of some of the figures for 1992 and 1993.

TABLE B

1992

| Category | Reported offences | Number detected by Gardai | Number of offences in respect of which persons on bail at time of arrest | Percentage of offences in respect of which persons on bail at time of arrest |
|------------------------|-------------------|---------------------------|--|--|
| Burglary | 32,151 | 9,330 (29%) ³ | 1,099 | 12% |
| Armed Robbery | 85 | 17 (20%) | 3 | 18% |
| Robbery | 2,470 | 581 (23.5%) | 106 | 18% |
| Larceny (Pickpockets) | 2,775 | 343 (12%) | 79 | 23% |
| Larceny (Mugging) | 2,918 | 502 (17%) | 112 | 22% |
| Rape | 106 | 85 (80%) | 1 | 1% |
| Assaults | 481 | 366 (74.5%) | 1 | 1% |
| Larceny (Cash) | 1,779 | 777 (44%) | 21 | 3% |
| Other Larcenies | 11,628 | 2,344 (20%) | 147 | 6% |
| Larceny MPV | 15,817 | 3,023 (19%) | 430 | 14% |
| Larceny (Shop/Stalls) | 6,926 | 5,627 (81.5%) | 248 | 4% |
| Larceny (Pedal Cycles) | 831 | 378 (45%) | 11 | 3% |
| Drugs | 77 | 77 (100%) | 12 | 16% |
| Other | 17,311 | 9,368 (54%) | 570 | 6% |
| Total | 95,365 | 32,838 (34%) | 2,848 | 9% |
| Larcenies | 42,674 | 13,014 (30%) | 1,048 | 8% ⁴ |

1993

| | | | | |
|------------------------|--------|---------------|-------|-----|
| Burglary | 32,695 | 9,710 (30%) | 1,170 | 12% |
| Armed Robbery | 128 | 30 (23%) | 8 | 27% |
| Robbery | 2,274 | 715 (31%) | 170 | 24% |
| Larceny (Pickpocket) | 2,914 | 514 (18%) | 130 | 25% |
| Larceny (Mugging) | 3,661 | 644 (17.5%) | 155 | 24% |
| Rape | 141 | 109 (77%) | 2 | 2% |
| Assaults | 473 | 354 (75%) | 5 | 1% |
| Larceny (Cash) | 1,632 | 760 (46.5%) | 17 | 2% |
| Other Larcenies | 11,470 | 2,627 (23%) | 170 | 6% |
| Larceny MPV | 15,909 | 3,206 (20%) | 448 | 14% |
| Larceny (Shop/Stalls) | 7,728 | 6,494 (84%) | 299 | 5% |
| Larceny (Pedal Cycles) | 736 | 366 (54%) | 15 | 4% |
| Drugs | 113 | 113 (100%) | 9 | 4% |
| Other | 18,898 | 10,140 (54%) | 605 | 6% |
| Total | 98,772 | 35,812 (36%) | 3,201 | 9% |
| Larcenies | 44,050 | 14,641 (33%) | 1,232 | 8% |

Comments

- (i) Average rate - In the two years 1992-93, the average rate of offences for which persons were arrested during the bail period did not vary and stood at 9%.
- (ii) Highest rates - In 1992, the highest rates are for larceny (pickpockets)

³ The percentages of detected offences were calculated by the author, not the Gardai.

⁴ Calculated by the author.

and larceny (mugging) (22-23%), followed by robbery and armed robbery (18%); but in 1993, the highest rates are for armed robbery (27%), larceny (pickpocket) (25%), robbery (24%) and larceny (mugging) (24%).

- (iii) Larcenies - although certain types of larceny featured in the high rate categories, the average rates for all larcenies was 8% in 1992 and in 1993, less than the total average in respect of all offences (9%).
- (iv) Lowest rates - The lowest rates in 1992 were for rape (1%), assaults (1%), larceny (cash) (3%) and larceny (pedal cycles) (3%); the lowest rates for 1993 were assaults (1%), rape (2%), drugs (4%) and larceny (pedal cycles) (4%).
- (v) Increases - there was a significant increase in armed robbery which rose from 18% to 27% from 1992-1993 and in robbery which rose from 18% to 24%.
- (vi) Decreases - there was a significant drop in "drugs" from 16% to 4%. In fact, the drugs figures are rather curious. There is a 100% detection rate. This seems to suggest that no cases of drug offending were brought to the attention of the police which they were unable to resolve. Moreover, the low rate of bail offending (4%) in 1993 is difficult to reconcile with the fact that at least some of the offenders must be addicts who would not cease drug use pending trial. It would be interesting to know what percentage of drug offenders are given bail. It would also be interesting to know if these figures suggest that once the Gardai have set the criminal process in motion regarding a drug offender, they do not bother to re-arrest that person, perhaps because these offences are seen as victimless crimes.
- (vii) Variation in respect of different offences - The reason for the variation in rates between different offences is no doubt due in large part to the particular type of crime involved. For example, it might be expected that crimes on which a person depends for income would continue throughout the bail period, although it is interesting that drug re-arrests were very low, despite the fact that one would expect a substantial number of the persons involved to be addicts whose addiction would not cease. However, another factor which might affect different rates of offending on bail would be the extent to which the courts are willing to grant bail in respect of particular offences. For example, if courts are more reluctant to grant bail in respect of rape than assault, there are fewer of them out on the streets with the potential to re-offend.
- (viii) Relation between re-arrest and detection rates - It is also interesting to note that re-arrest rates and rates of detection in respect of particular offences do not increase or decrease together. Sometimes, in fact they go in opposite directions. For example, in 1992, the rate for larceny

(pickpocket) was high at 23% but the detection rate was the lowest at 12%; the rate in respect of larceny (mugging) was high at 22% but again the detection rate was low at 17%, the second lowest; the rate for robbery was 18% and the detection rate was 23.5%, the fourth lowest; and the rate for armed robbery was high at 18% but the detection rate was 20%, the third lowest.

2.15 Conversely, in 1992, the rate for rape was low at 1% while the detection rate was 80%, the second highest; the rate for assaults was low at 2% while the detection rate was 74.5%, the third highest; the larceny rate for cash was low at 3% and the detection rate was 44%; the larceny rate for larceny (pedal cycles) was 3% and the detection rate was 45%. Similarly, in 1993, the highest rates were for armed robbery at 27% while the detection rate was 23%; robbery at 24% while the detection rate was 31%; larceny (pickpocket) at 25% while the detection rate was 18%; and larceny (mugging) 24% while the detection rate was 17.5%. In 1993, assaults were at 1% while the detection rate was 75%; rape was at 2% while the detection rate was 77%; larceny (pedal cycles) was at 4% while the detection rate was 54%; and larceny (shop stalls) was at 5% while the detection rate was 84%.

2.16 Finally, we may note that the rates for homicides are not separated out from the category of "other offences" nor are sexual assaults falling short of rape. Moreover, it is not possible to distinguish the gravity of assaults within the "assault" category. Accordingly, it is not possible to estimate the rates for serious violent offences.

Rates Of Offending On Bail In England

2.17 It should be noted at this point that English courts already have the power to refuse bail on the ground that the offender might commit offences if released on bail.⁵ Nonetheless, the issue of bail offending or "bail bandits", as such offenders have been dubbed, has been and is a source of substantial controversy in recent years as a result of a number of studies conducted by the police and the Home Office. These studies employ a range of the methodologies outlined at the outset of this section and were recently summarised in a 1992 Home Office Report by Morgan.⁶ Morgan argues that the rate of bail abuse is largely dependent upon the methodology adopted, and advocates a common methodology to allow reliable estimates of the extent of offending on bail. We discuss this study partly out of comparative interest, but also to illustrate the dramatic differences in figures which result from employing different methodologies.

2.18 The following studies were examined by Morgan:

5 See below, Chapter 4.

6 P.M. Morgan, *Offending while on bail: A survey of recent studies*, Home Office, Research and Planning Unit, Paper 65 (1992).

(i) *Home Office Study 1978*⁷

This involved a study of 7,400 *defendants* given bail by the magistrates' courts in England and Wales over the first six months of operation of the *Bail Act, 1976*. Their records were checked with the National Identification Bureau at Scotland Yard to see if they were subsequently *convicted* of offences committed during that period of bail. Convictions were defined to include offences taken into consideration and cautions. It was found that 9% of the defendants outside London were convicted of offences committed while on bail, and 12% of defendants in London were so convicted.

(ii) *Home Office Research and Planning Unit (R.P.U.) studies 1986 and 1988*⁸

2.19 This was a study of bailed defendants charged with violence, burglary, fraud, forgery, theft, and handling at Brighton magistrates' courts in 1988, Birmingham magistrates' court in 1986, and Bristol magistrates' courts over a period of six months in 1986. It was found that 10% were convicted of an offence committed while on bail.

(iii) *Metropolitan Police*⁹

2.20 This was a study of persons arrested and charged with certain offences during the first quarter of 1988 and then granted bail. Convictions did not include offences taken into consideration or cautions. It was found that 16% were on court bail when *charged*, and 12% were *convicted* of an offence committed while on bail.

(iv) *Northumbria Police study*¹⁰

2.21 This study examined the number of persons arrested for bail crime and the number of convictions for bail crime, including cautions and offences taken into consideration. The study also examined the volume of crime accounted for by the police (by charge, summons, offences taken into consideration, caution, or prison admission) and related this to bail. It was found that:

- 23% of all arrestees were on police or court bail;
- about three quarters of these were convicted, cautioned or had offences taken into consideration resulting in a figure of 17% of persons on court bail who were found guilty of offences committed while on bail;
- the percentage of crime attributed to persons on bail was an average 40% (31% of those charged/summoned; 39% of those taken into consideration; 7% of those cautioned; complainant declined to

7 Home Office Statistical Bulletin No. 22/81, *Estimates of offending by those on bail*, 1981.

8 P. Henderson and T. Nicholls, *Offending while on bail*, Home Office Research Bulletin No. 32, 1992.

9 J. Ennis and T. Nicholls, *Offending on bail*, Metropolitan Police Directorate of Management Services Report No. 16/90, Metropolitan Police.

10 *Bail and multiple offending*, Northumbria Police, 1991.

prosecute 10%; admission in prison 57%; other means 36%).

(v) *Avon and Somerset Constabulary*¹¹

2.22 This was a study of persons charged and arrested and it was found that 23%-34% of defendants were on police or court bail when arrested, and 28% of people who were charged were on police or court bail at the time.

(vi) *Greater Manchester Police*

2.23 This study reported that 26-29% of offenders charged were on police or court bail when charged.

2.24 The Metropolitan and R.P.U. studies counted the number of separate occasions on which a defendant was found guilty of at least one offence committed while on bail and found 1.3 occasions on average. The 1978 Home Office study had showed a 1.5 average.

2.25 Morgan, having reviewed these studies in the 1992 Home Office Report, commented on the difficulties of comparing studies measuring different things and recommended that in the future, only persons convicted should be measured. However, she reached the following conclusions:

- That the percentage of persons given bail by the courts who were *convicted* of an offence committed while they were on bail varied little between 1978 and 1988 and was approximately 10-12%. The proportion of persons given bail who commit offences while on bail in three areas outside London in 1986 and 1988 was 10%, in London in 1988 it was 12%; and while it was 17% in Northumbria in 1989, the difference is attributable to the fact that account was taken of those whose offences were taken into consideration by the courts and those dealt with by formal caution. In 1978, the Home Office study had shown that the results were 12% in London and 9% nationally;
- That the proportion of people on bail when *charged* appears to be 23-29%;
- That the rate of offending on bail is lower when minor offences are excluded and higher when minor offences are included;
- That the highest rates in recent studies are in respect of persons charged with theft of or from a vehicle (23% London); and burglary (20% London, 16% outside);
- That the lowest rates are in respect of persons charged with violent

11 S. Brookes, *The Effect of re-offending on bail on crime in Avon and Somerset*, Avon and Somerset Constabulary, 1991.

offences (6-8%);

- That the rates of bail offending are highest in the 17-20 age group (19% in London, 13% in Brighton, Birmingham and Bristol areas) and lowest in the over 30 age group (6% in London, 8% in the other three);
- That the rates of bail offending are higher for males (13% London, 11% in other three areas), females (8% London, 4% other three areas);
- That the rates of bail offending are higher for defendants with previous convictions (15% London, 13% other three areas) and lower for those with no previous convictions (4% London, 5% other three areas).

2.26 A Scottish study published in 1994 examined bail decisions in three court areas (Doon, Braid and Tweed) in 1991-92 over a 36 week period.¹² A census of bail decisions was conducted in the study courts, and a detailed examination was made of a sample from all arrests where police made a decision to detain people in custody or release them on an undertaking to appear in the sheriff court. There were significant variations in bail practice in the different areas, not related to the seriousness of cases. Police in Doon had a high use of custody and release on undertaking, and the court had a high use of bail and low use of ordain (unconditional release) or remand. Police at Braid had the lowest use of custody and undertakings and tended to release most people for summons, and the court had a high use of remand. It was found that one in four accused in Doon was ultimately not convicted, whereas in Braid, one in ten was not convicted.

2.27 The study came to the conclusion that the disparity in the rates of bail offending between the different areas had less to do with real differences in recidivism and more to do with the criminal justice culture of a particular area. If the police use the summons procedure more than release on undertaking or custody, a summonsed accused will not have been on bail prior to trial, so that subsequent offences will not be recorded as bail offences; whereas in another area, a similar offender would be released on undertaking, the court might then grant bail, and his subsequent offending would show up as bail offending. Accordingly, a high level of recorded bail abuse was associated with a high use of bail by the court, but was not necessarily indicative of higher rates of recidivism. The study found that accused in an area with a lower use of bail were just as likely to have cases pending as were accused in an area with a high use of bail. The study also pointed out that figures based on arrests for alleged offences committed on bail overstated the true figures of bail offending because not all persons arrested would be convicted. When these two points were combined, it was found that there was no evidence to suggest that the public were being placed at increased risk from large scale serious further offending in the areas with a high use of bail. The study also pointed out that even proven

12 F. Peterson and C. Whittaker, *Operating Bail: Decision Making under the Bail etc. (Scotland) Act 1980*, Scottish Office Central Research Unit, 1994.

bail offending may not be directly equated with recidivism, because there will not always be a conviction in respect of the original offence in respect of which the person was on bail.

Irish Figures Concerning Persons Remanded In Custody

2.28 It is worth noting that the number of persons remanded in custody prior to trial in Ireland is extremely low by international standards. A greater proportion are remanded in custody after a plea of guilty or conviction to await sentence. But even the combined total of untried and unsentenced remandees is still low.

2.29 The Council of Europe Prison Information Bulletins collect statistics from member states every six months, including information on the percentage of unconvicted prisoners in the total prison population and the rate of unconvicted prisoners to the total population of the member state, expressed as a rate per 100,000. "Unconvicted prisoners" include prisoners who have not yet received a final sentence. The figures show that Ireland has low rates of pre-trial detention, on both measures, relative to other countries.

2.30 The following two tables illustrate Ireland's position in relation to other Council of Europe countries as of 1/9/1988, 1/9/1990 and 1/9/1991 in respect of the two matters referred to above, i.e. percentage of remand prisoners in total prison population, and rate of detention per 100,000.

TABLE C

1988 and 1990

| Country | Rate of unconvicted prisoners (%) | | Rate of detention pending trial per 100,000 | |
|--------------------------------|---|--------|--|--------|
| | 1.9.88 | 1.9.90 | 1.9.88 | 1.9.90 |
| Austria | 23.5 | 31.5 | 18.1 | 25.8 |
| Belgium | 50.7 | 46.8 | 33.2 | 30.9 |
| Cyprus | 7.8 | 10.1 | 3.1 | 3.8 |
| Denmark | 25.2 | 26.5 | 17.1 | 16.7 |
| Finland | 12.2 | 11.8 | 8.9 | 7.2 |
| France | 44.3 | 40.7 | 35.9 | 33.4 |
| Federal Republic of Germany | 22.4 | 26.4 | 19.0 | 20.6 |
| Greece | 27.5 | .... | 12.1 | .... |
| Iceland | 7.9 | 3.8 | 2.8 | 1.6 |
| Ireland | 5.3 | .... | 2.9 | .... |
| Italy | 49.3 | 40.6 | 29.8 | 23.0 |
| Luxembourg | 32.9 | 26.1 | 28.9 | 24.6 |
| Malta | 68.8 | .... | 46.1 | .... |
| Netherlands | 39.6 | 38.8 | 15.9 | 17.2 |
| Norway | 23.0 | 20.5 | 11.1 | 11.6 |
| Portugal | 33.5 | 32.2 | 27.8 | 28.2 |
| Spain | 43.7 | 39.5 | 33.2 | 33.8 |
| Sweden | 19.9 | 20.2 | 11.2 | 11.7 |
| Switzerland | 32.5 | 38.9 | 23.8 | 29.9 |
| Turkey | 38.1 | 37.4 | 36.4 | 30.7 |
| United Kingdom | 20.5 | .... | 20.0 | .... |
| England & Wales | 21.1 | .... | 20.4 | .... |
| Scotland | 16.7 | .... | 16.6 | .... |
| Northern Ireland | 16.2 | 22.9 | 18.5 | 25.1 |

TABLE D

1.9.91

| Country | Rate of unconvicted prisoners (%) | Rate of detention pending trial per 100,000 |
|------------------|--|--|
| Austria | 32.8 | 628.7 |
| Belgium | 51.6 | 31.2 |
| Bulgaria | 23.8 | 16.2 |
| Czechoslovakia | 44.4 | 33.5 |
| Finland | 9.2 | 5.8 |
| France | 41.5 | 34.8 |
| Germany | 30.5 | 24.1 |
| Greece | 34.8 | 17.2 |
| Hungary | 30.2 | 44.2 |
| Iceland | 5.9 | 2.3 |
| <i>Ireland</i> | 6.5 | 3.9 |
| Italy | 52.9 | 29.6 |
| Luxembourg | 20.1 | 18.2 |
| Norway | 20.3 | 12.0 |
| Portugal | 35.5 | 29.1 |
| Spain | 35.3 | 32.4 |
| Sweden | 21.9 | 12.1 |
| Switzerland | 44.7 | 37.9 |
| Turkey | 60.6 | 26.7 |
| United Kingdom | 21.9 | 20.2 |
| England & Wales | 22.5 | 20.5 |
| Scotland | 16.2 | 15.4 |
| Northern Ireland | 22.2 | 23.4 |

2.31 The following tables illustrates Ireland's trend on these two indicators since 1983.

TABLE E

| Date | Rate of pre-trial detention per 100,000 | Percentage of unconvicted prisoners |
|--|---|---|
| 1.2.83 | 4.2 | - |
| 1.9.83 | 3.8 | 9.0 |
| 1.2.84 | 3.7 | 7.8 |
| 1.9.84 | 3.1 | 7.0 |
| 1.2.85 | 3.0 | 6.3 |
| 1.9.85 | 4.0 | 7.3 |
| 1.2.86 | 3.3 | 6.3 |
| 1.9.86 | 2.9 | 5.6 |
| 1.2.87 | 3.1 | 5.6 |
| 1.9.87 | 3.1 | 5.6 ¹³ |
| 1.2.88 | 4.2 | 7.6 |
| 1.9.88 | 2.9 | 5.3 |
| 1.2.89 | 3.6 | 6.4 |
| 1.8.89 | 3.2 | 5.7 |
| 1.2.90 | 3.8 | 6.8 |
| (Ireland does not seem to have submitted any figures for 1.9.90) | | |
| 1.9.91 | 3.9 | 6.5 |

Disposition Of Persons Remanded In Custody

2.32 An interesting issue is the number of persons detained in custody before trial or sentence who subsequently do not receive a custodial disposition. Some writers and law reform bodies have taken the view that a person who does not ultimately face a custodial sentence should not be detained prior to trial.¹⁴ However, it might be argued that as the purpose of pre-trial detention is to ensure attendance at trial, whether or not a custodial sentence would later be

¹³ In Prison Information Bulletin 10, this table is described as 1.2.87, but as the chapter is headed 1.9.87, we assume this is an error and the figures are for 1.9.87.

¹⁴ Law Reform Commission of Queensland, see below at p.122, and A. Ashworth, *The Criminal Process: an Evaluative Study*, at p.224.

appropriate is irrelevant. A person's offence might not warrant a custodial sentence, but the fact that he might abscond before trial for that offence warrants his custody before the trial. Also, it seems likely that in many cases the fact that a person spent time in custody before trial is an important reason why he ultimately received a non-custodial sentence. In England, where protection of the public is a ground for remanding in custody, it has been argued that it is particularly inappropriate for a person to be remanded in custody supposedly to protect the public when his subsequent non-custodial disposition shows this not to have been necessary. Moreover, it has been said that it is objectionable that the criteria for imposing custodial sentences under the *Criminal Justice Act, 1971* and 1993 are narrower than the criteria for imposing pre-trial custody under the *Bail Act, 1976*.

2.33 According to the 1991 *Annual Report on Prisons and Places of Detention*, 65 persons were in custody on remand on 1st January 1991 and 3,517 were committed on remand during that year, yielding a total of 3,582. Out of this total, 1,435 were "brought up and not recommitted". Thus it seems that well over half the persons held in custody prior to final disposition were ultimately released, either because they were acquitted, the case was not proceeded with, or they received a non-custodial disposition.

2.34 In England a figure of 60% has been given for detainees who do not ultimately receive a custodial sentence. NACRO (The National Association for the Care and Resettlement of Offenders) examined the figures for 1990, and say that of the 59,620 remanded in custody before trial or sentence for which outcome is recorded, 25% received a non-custodial sentence, 3% were found not guilty or not proceeded against, and 72% received a custodial sentence, i.e. 28% of defendants for whom the outcome was recorded did not receive a custodial sentence. However, they say that this probably significantly understates the proportion of acquittals and non-custodial sentences. The "outcome not recorded" group comprised 27,215 persons who probably were not sentenced to custody, because if they had been so sentenced, the prison service would have had records of them. On recalculation NACRO say that about 60% of male defendants, 77% of female defendants, and 6% of all defendants did not receive a custodial sentence although they were remanded in custody.¹⁵ Cavadino and Gibson examined the figures for 1991, which show that 62,604 people were remanded in custody before trial or sentence. The outcome was not recorded in 23,937 cases, but of the remainder 6% were found not guilty, or the case was not proceeded with, 30% received a non-custodial sentence, and 64% received a custodial sentence. 36% of all defendants remanded in custody in respect of whom the outcome was recorded did not subsequently receive a custodial sentence. Again, the authors say that this figure understates the proportion of acquittals and non-custodial sentences because those in the "outcome not recorded" group are not likely to have been sentenced to custody because that would have been recorded by the Prison Service. The authors say

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NACRO, *Legislation on Bail: What Should be Done?* (1992).

that a recalculated more accurate percentage of all defendants who did not receive a custodial sentence would be 60%.¹⁶

Average Length Of Custody

2.35 It has not been possible to obtain figures from the Department of Justice in respect of the average length of time spent in custody on remand nor the average length of time awaiting trial while on bail.

Conclusion

2.36 An examination of the Garda figures for the years 1992-93 shows that the recorded level of detections of bail offences is an average 9%. There is considerable variation in respect of different offences, however. In 1993 the highest rates were for armed robbery 27%, larceny (pickpocket) 25%, robbery 24% and larceny (mugging) 24%. The lowest rates in 1993 were assaults 1%, rape 2%, drugs 4% and larceny (pedal cycles) 4%. Even in respect of the highest rates, about three-quarters of the detections were not ultimately translated into convictions. All bail offending figures suffer inevitably from the fact that the majority of crimes are undetected by the police. In addition, the Garda figures quoted suffer from the fact that what is recorded is the number of detections which is invariably greater than the number of convictions for bail offences. Moreover, there will not always be convictions in respect of the original offences in respect of which the offender was charged.

2.37 The argument can be made that statistical evidence should never form the basis for a refusal of bail in that a refusal could only be based on the individual characteristics of a particular accused.

CHAPTER 3: PREDICTION STUDIES

3.1 In Chapter 2, we examined figures in an attempt to estimate the number of detected offences which were committed on bail. If one had determined, albeit in a rough way, the level of offending on bail, a further question would then arise. This question concerns not *how many* offences are committed on bail, but whether and to what extent we can identify *which* offenders given bail will commit crimes during that period. For example, assuming that a particular percentage, e.g. 9% of detected offences are committed by an offender who is on bail, how accurately can we predict whether a particular offender given bail will be one of those bail recidivists? This question has been addressed through the medium of prediction studies.

3.2 Prediction plays a role in a number of areas of the criminal justice system, particularly in countries other than Ireland. For example, parole decisions are based on predicting how a person will behave upon release, and the sentencing of "dangerous" persons, as provided for in some countries, involves assessing their likely future behaviour. In the United States, decisions about the use of the death penalty may depend upon assessments of persons as dangerous. In Ireland, for example, prediction plays a role in bail decisions when the court assesses whether an offender might abscond before trial. Traditionally, the predictions involved in such decisions have been made on the basis of common sense, taking into account factors which would seem to be obviously correlated with the behaviour being predicted. However, since the 1920s, attempts have been made to predict certain types of behaviour in certain populations in a more scientific way, by conducting research to discover which factors are in fact correlated to those behaviours and then applying the results of that research in the decision-making process. We will examine some of the leading prediction studies below. However, it should be noted that most studies have concentrated on the prediction of serious violent behaviour rather than re-offending generally, and most have concerned violent re-offending over a number of years rather than

in a lesser period which would correspond to a pre-trial period.

Methods Of Prediction

3.3 A distinction is usually drawn between two different methods of prediction, the *actuarial or statistical method*, on the one hand and the *clinical method*, on the other. According to the statistical method, the data relied on to make the prediction are set out explicitly, usually in tables, and the method tends to involve reasonably simple concepts such as age, number of previous convictions, offence charged and so on. The information is then converted into a prediction using an automatic or mechanistic set of rules. Under the clinical method, the choice of data relied on may vary somewhat with the individual case and is not so rigidly determined. For example, the clinician might decide that the offender's place in the family is not relevant in one case although it is in another. The categories of data can also be more abstract; for example, the concept of "ego strength" might be used. Also, the method of converting the data into a prediction tends to be intuitive rather than mechanistic, and involves the clinician relying on a subjective combination of factors deemed by him to be relevant.¹

3.4 It is said that studies show that actuarial tables are more accurate than clinical predictions in predicting the same events.² Despite this, legal systems have generally preferred to employ clinicians to make predictions about offenders than to rely on statistical surveys. This preference appears to be based on a number of factors:

- (i) the view that legal decisions should be individualised;
- (ii) the fact that statistical studies explicitly acknowledge that a given rate of error will occur (even though that rate of error may be lower);
- (iii) the view that statistical studies, because they are standardised, can sometimes overlook a crucial factor which is not important in most cases but is highly relevant in the case of a particular offender; and
- (iv) the fact that statistical evidence is rarely available to persons making decisions in the criminal justice system.

3.5 The preference for the clinical method of prediction was explicitly articulated by the authors of the 1981 English Floud Report.³ They discussed the two methods of predicting dangerousness, and said that while the actuarial method was relatively cheap and involved less errors, it was objectionable because it derived the risk attaching to an individual from the fact of his being a member of a class, which was not acceptable in the administration of justice. The case study prediction method, they said, has the advantage that it predicts

¹ J. Monahan, *Predicting Violent Behaviour: An Assessment of Clinical Techniques* (1981), chapter 4.
² *Ibid.*, at p.97; and see Floud and Young, *Dangerousness and Criminal Justice* (1981), at pp.186-7.
³ Floud and Young, *op cit.*, at pp.186-7.

on the basis of understanding and can take into account every possible item of relevant information, even though it may be less exact than the actuarial method. The Report's authors assessed that there was an important difference between:

"applying preventive measures in individual cases on the basis of predictive judgments, even if we know that some of them, despite all precautions, are bound to be mistaken; and deliberately incurring mistakes, to an extent calculable in advance, by applying preventive measures indiscriminately to all of a group of offenders at risk so as to be sure of capturing a certain number known statistically to be hidden within it who will commit further harm. This distinction is between necessarily imperfect justice and necessarily rough justice."⁴

3.6 In contrast, Monahan, who published a leading text on predictions of dangerousness in 1981, suggests that better prediction would involve a combination of clinical and actuarial expertise. For example, he says that clinical studies should direct their attention to base rates⁵ and should confine themselves to predicting dangerous behaviour in high base rate populations, that they should ensure that the base rate population is as specific and relevant as possible,⁶ and that clinicians should always search for factors which decrease the propensity for violent behaviour as well as factors which *increase* that propensity.

The base rate

3.7 The base rate is the statistical prevalence of the behaviour under study (e.g. violent behaviour) in a given group over a given period of time, usually one year. The group under study will vary, e.g. the population generally, persons charged with criminal offences, offenders on bail, persons convicted of crimes. The accuracy of the possibilities of prediction will vary with the base rate of the behaviour in the group under study. More specifically, the lower the base rate, the lower the rate of accuracy. It has been said that the best population on which to apply clinical predictions of violence is one with a base rate of 50%.⁷ As the base rate differs substantially from 50%, clinical differentiation becomes more difficult. If 90% of the group is non-violent, the best prediction in the

4 *Ibid.*, at p.27. See also p.188:

"It will not do to sentence an offender solely on the ground that he belongs to a statistical risk-group, if only from the fact that, say, 55% of a group are likely to reoffend, it does not follow that each individual member is 55% likely to do so."

5 See next section.

6 For example, the base rate of violent behaviour for a person brought to a mental health centre by the police is the rate of violent acts committed by other people who have been referred by the police as dangerous, not that of the general population, or even sex- and age- adjusted base rates of violence in the general population.

7 See Floud and Young, *op cit.*, at p.180:

"The prime obstacle in the attempt to distinguish high-risk from other serious offenders is the infrequency with which serious offenders in general repeat their offences. If the chance or random probability of their doing so is less than 50%, assessors are statistically more likely to be wrong than right in their judgments of individual offenders as dangerous, no matter what method is used or how skilfully."

individual case is to predict them all non-violent. If another group has a base rate of 90% for violent behaviour, the most accurate prediction would be to predict all of them violent. It is often pointed out that dangerousness predictions studies are at a significant disadvantage because of the low base rate of dangerous or violent behaviour, even among small sub-groups of offenders.

The prediction process

3.8 The prediction process requires that a person be assessed at two stages. At a particular stage, data are collected about him in respect of items that are believed to relate to the behaviour one is interested in predicting, e.g. number of convictions for violence, age, present charge and so on. These are prediction variables. Some studies select items that research has already designated as important, while others employ a vast range of potentially relevant items and later identify which were the important variables after having allowed a certain period to elapse and having seen how the offenders in fact behaved. Some of the studies discussed below collected data from a variety of sources about the person, sometimes on hundreds of items. Using the information collected, the offender will be placed into a category, e.g. dangerous, non-dangerous, or into one of several categories of high to low risk, or as in the Harvard study discussed below, will be assigned a score on a "dangerousness" scale. This classification represents the prediction, based on information known about the individual. In some studies, the researchers themselves do not gather the information nor make the prediction, but examine the diagnosis made by someone else, such as a psychiatrist.

3.9 At a later stage, an assessment will be made to see if the prediction was validated. This may be based on a conviction, an arrest, or some other factor, which were referred to as criterion variables. If it was predicted that certain behaviour would occur, and it did occur, the outcome is referred to as a *true positive*, and if it was predicted that certain behaviour would not occur, and it did not, the outcome is a *true negative*. A *false positive* refers to a person who was predicted to engage in certain behaviour who did not so engage and a *false negative* is a person who was predicted not to engage in certain behaviour who did so engage. The overall rate of prediction success would be measured by looking at all outcomes.⁸ However, in the criminal justice system, there is particular concern about "false positives" because these are persons who would have been incarcerated for potential risk, who have since been shown not to pose that risk. Most studies concentrate on the false positive rate rather than the overall prediction success rate.

3.10 The importance of the false positive rate is illustrated by the following example:

⁸ One writer points out that the overall prediction success rate is often confused with the false positive rate: A.W. Alschuler, 'Preventive Pretrial Detention and the failure of interest balancing approaches to due process', (1986) 85 Mich. L. Rev. 510-69.

Assume that one person out of a thousand will kill. Assume that an exceptional test is created which differentiates with 95% accuracy those who will kill from those who will not. If 100,000 people are tested, out of the 100 who would kill, 95 would be isolated. But out of the 99,900 who would not kill, 4,995 would be isolated as potential killers.

Prediction Studies

3.11 As we shall see in Chapter 4, some jurisdictions permit pre-trial detention of offenders who might commit further offences of any kind, while other jurisdictions only permit pre-trial detention of offenders who might commit further offences of a particular kind, e.g. serious or violent offences. The prediction studies discussed here are divided into two categories. First, studies which specifically attempted to predict bail offending are discussed. Second, studies which attempted to predict further serious violent or "dangerous" behaviour are examined. The first category is of course most relevant to the purpose of this Paper, but unfortunately, less studies of this kind appear to have been conducted. Certainly none appear ever to have been conducted in Ireland. The second category of study is primarily of relevance to a consideration of the introduction of pre-trial preventive detention concerning violent offences. However, even then, the studies conducted have certain limitations for our purposes, which will be discussed below.

1. Prediction studies concerning offending on bail

Harvard Study

3.12 In 1970, the District of Columbia in the United States introduced a statute authorising pre-trial detention for 60 days in respect of persons who might commit certain *dangerous crimes* while on bail awaiting trial. An empirical study was carried out by a team from Harvard University to examine the problem of bail offending and to see whether the application of the Act would make any difference to that problem.⁹ The Harvard team conducted a study of persons arrested in Boston during six months in 1968. They identified 427 persons arrested for violent or dangerous crimes who would have qualified for preventive detention had the Act been in force at the time of their arrest. The average pre-trial period for these defendants was 112 days. Under the Act, as noted, detention could only be ordered for up to 60 days. Of these 427 persons, they found that:

- 14.5% were arrested for crimes committed during the pretrial period;¹⁰
- 64% of those arrested, i.e. 9.6% of the 427 released, were ultimately

9 Angel, Green, Kaufman and Von Loon, "Preventive Detention: An Empirical Analysis", (1971) 6 *Harvard Civil Rights Civil Liberties Law Review* 303.

10 They discussed the problems connected with measuring bail crime by re-arrest, referring to many of the arguments referred to in Chapter 2 of this Paper.

convicted of those crimes; and

- 5.2% of the sample were convicted of violent or dangerous crimes during that period.

3.13 However, since the Act's period of detention was 60 days, many of the offences would not have been caught because they occurred outside that period. Only 30% of the definite, identifiable bail crimes occurred during the period provided for by the Act. The Act would not, for example, have protected against a murder or any of the rapes or robberies committed.

3.14 We may note in passing that, regarding the overall effect on crime, the researchers concluded that had preventive detention been applied to all of the defendants studied, 10% would have been prevented from committing crimes for which they were later convicted, which represented approximately 0.75% of the total number of persons arrested for violent or dangerous crimes in Boston during 1968, and 2.5% of those convicted for those offences. The team concluded:

"Little crime, by absolute or relative measure, can be attributed with certainty to defendants awaiting trial, and half of the attributed crimes are petty rather than heinous crimes. Preventive detention, even if absolutely effective, would have little impact on overall crime levels."¹¹

3.15 The research team then proceeded to the prediction aspect of their research. As the Act directs certain factors to be taken into account before pre-trial detention is imposed,¹² the team collected information relating to those factors, consisting of twenty-six items of personal data in all.¹³ They then used a number of methods to determine how accurate prediction of dangerous offending based on those items could be.

3.16 *First*, the research team assessed how *individual variables* correlated with violent recidivism during the bail period. The conclusions showed that the individual criteria were very poor predictors. For example, the initial charge, which is often considered to be one of the most important factors in setting bail, proved "little better than a random indicator of recidivism".¹⁴ They also found that the "variables used for predicting default are of little value in predicting recidivism. None of the variables investigated had a correlation with conviction of bail crime higher than .229. For most, it was considerably lower."¹⁵ They

11 *Supra* footnote 9.

12 The nature and circumstances of the offence charge, the weight of the evidence, his family ties, employment, financial resources, character and mental condition, past conduct, length of residence in the community, previous convictions, record of appearances and court proceedings, flight to avoid prosecution or failure to appear at court proceedings.

13 For example, for the factor "circumstances of the offence", they measured whether he was armed during the offence, whether violence was employed, whether he acted alone or with an accomplice and the number of charges.

14 Angel *et al*, *op cit*, at p.311.

15 *Ibid*, at p.325.

concluded that the unweighted criteria did not have the potential predictive power of combined data items, using multivariate statistical analysis, to which they then turned.

3.17 In order to test the predictive power of combined variables, the research team created two "scales" of dangerousness. The first scale was created by assigning points to each of the 26 data items on the basis of the researchers' subjective views of the respective importance to be given to each item. They called this scale DS-1. This would be similar to the way in which a judge subjectively assigns weight to items of information about the defendant. The second scale was created by assigning weight to each of the factors, but this time according to correlations between recidivism and certain factors established by research. This they called DS-2. As DS-2 was based on objectively tested correlates of recidivism rather than intuition, one would expect it to have a better success in predicting. The purpose was to identify a *cut-off point* on each scale, above which everyone would be detained and below which everyone would be released, and in doing so, to maximise the number of recidivists while minimising the number of non-recidivists. Each offender was then given a score on each scale by totalling his points on each of the twenty-six data items. The researchers then looked at the results to see the predictive success of each scale, by comparing the predictions on each scale with the actual behaviour of the offenders in question.

3.18 If either scale were a perfect predictor, one would find a certain cut-off point such that all offenders with a score above it did in fact violently recidivate, while none of those below it would have violently recidivated. However, as it emerged, both of the scales were somewhere between perfection and complete randomness. The scale DS-2 was more accurate than DS-1, as expected. However, no matter which cut-off point was adopted on either scale, the non-recidivists were always in the majority. For example, to detain all recidivists, the cut-off score would have had to be set so low, that the false positive rates would have been 88.5% on DS-1 and 84.2% on DS-2. The most promising cut-off score would have yielded false positive rates of 74.3% (DS-1) and 58.7% (DS-1). Non-recidivists were distributed both above and below the cut-off point. Moreover, many of the more serious offences were committed by defendants with a score below that cut-off point, and the five highest DS-2 scores proved to be non-recidivists. The authors of the study commented:

"Both scales indicate again that it is not as difficult to identify good risks as it is bad ones, but that only a relatively small fraction of the sample are obviously good risks."¹⁶

3.19 The chart overleaf illustrates the full results of the Harvard study by showing the number of defendants who must be detained to prevent a given number of recidivist crimes according to:

16

ibid., at p.328.

- (a) a random predictor;
- (b) a perfect predictor;
- (c) DS-1; and
- (d) DS-2.

3.20 Importantly, the authors also commented that judicial bail decision-making would be even less accurate than these scales for a number of reasons:

"Several factors unique to pre-trial judicial decision-making suggest that hearing officers under the District of Columbia Act are unlikely to attain in actual application even the limited accuracy of DS-1. First, it is unlikely that judges will readily substitute a numerical scale for their own personal intuition developed over years on the bench. Intuition based on bail experience is often inaccurate, and the tendency to rely on single criteria compounds the inaccuracy. Second, as the criminal process presently operates, much of the information necessary for accurate prediction is unavailable immediately following arrest. ... The flow of information necessary to refine clinical judgments in practice is limited further both by the fact of incarceration and by the isolation of the hearing officer from adequate post-prediction feedback."¹⁷

3.21 The authors concluded that preventive detention inevitably suffers from both under-inclusion (of recidivists) and over-inclusion (of non-recidivists).

¹⁷ *Ibid.*, at p.329.

FIGURE 1
DS-I SCORES OF SAMPLE DEFENDANTS

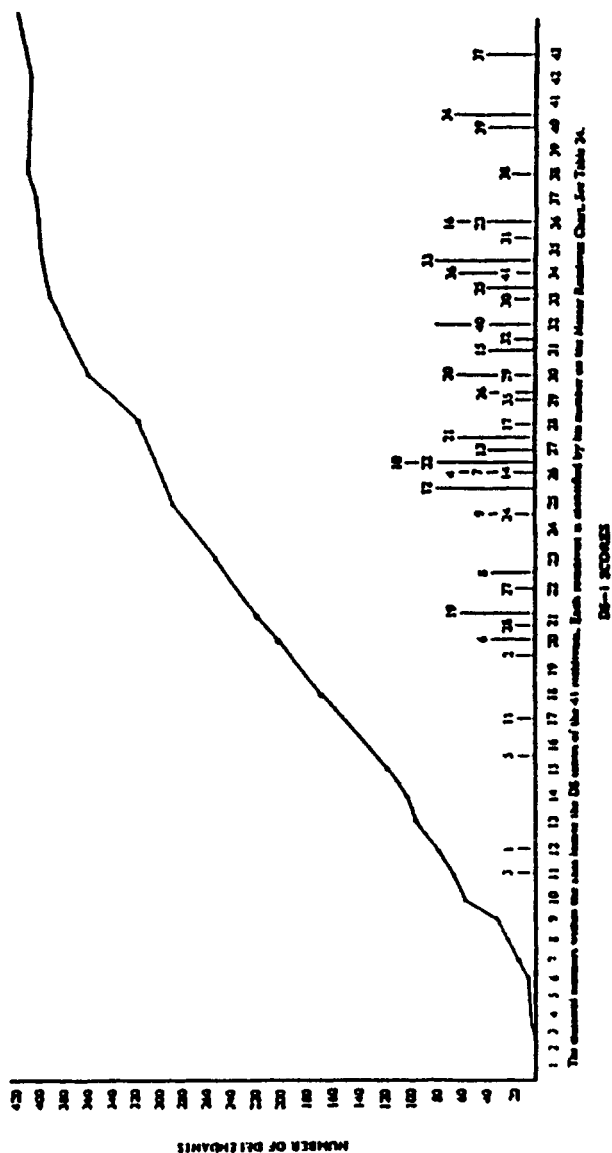
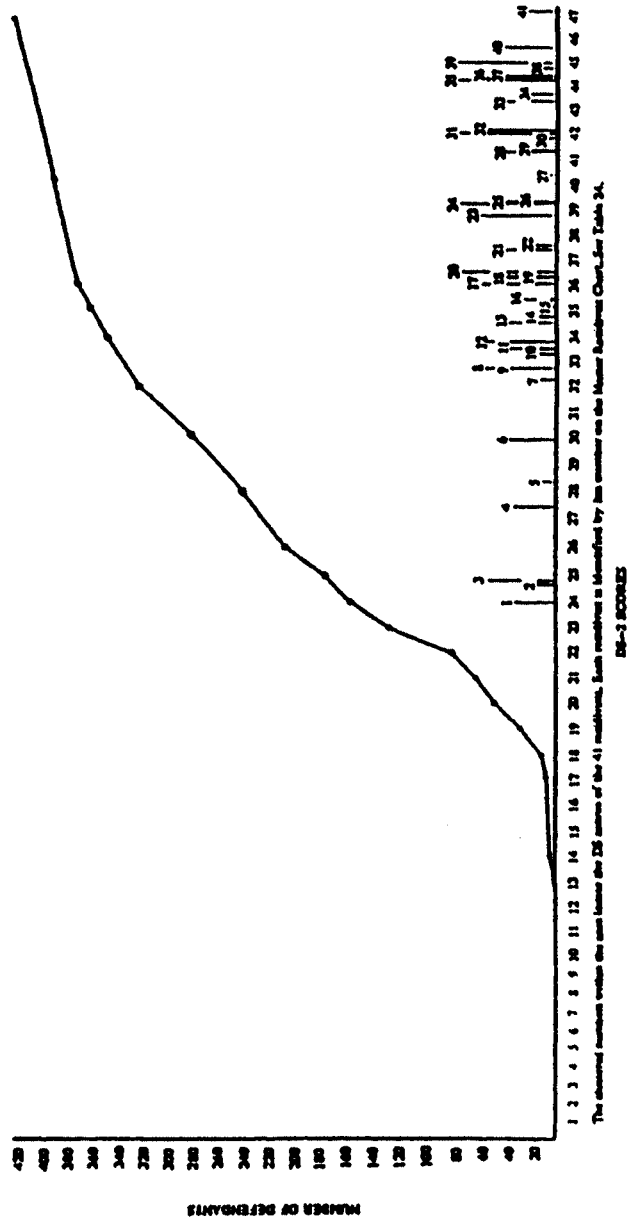


FIGURE 3

US-2 SCORES OF SAMPLE DEFENDANTS



The Melvin and Didcott Study

3.22 In a Scottish study published in 1976,¹⁸ the researchers examined a total of 10,500 bail decisions in 1972-3. Of those released on bail, 6% failed to answer bail, while 3% were recorded as having re-offended on bail, although the authors of the study estimated that the true rate might be around 8%, based on rates in less busy rural areas. Some individuals had abused bail in both ways and therefore appeared in both categories (i.e., 29 out of each group). The authors examined the characteristics of each group. Regarding those who absconded only, they found that there was less to distinguish between the absconders and the people who did not abuse bail than between persons granted and refused bail. The characteristics most closely associated with absconding were bad criminal record, especially one involving custodial penalties, no fixed abode, and unemployment. They found a slightly increased risk of absconding where the charge was theft. None of the other factors seemed to be related to absconding. The four factors identified were combined, but it was found that even the group with the highest absconding rate had an absconding rate of only 15%.

3.23 The researchers then examined the combined group of absconders and re-offenders (although they did not examine re-offenders separately). Again they found that the facts which distinguished between bail abusers and non-abusers were the greater number of previous convictions, but also lack of fixed abode, unemployment, where the charge was theft, and where there were several charges. The researchers then combined the factors and found that the very worst group had an abuse rate of 31.4%:

"In other words, even people who seemed to be the worst risks were mostly not - as far as was known - bail abusers. To select people for bail and custody simply on the basis of these 'high risk' factors would not therefore be very efficient; one third of the bail abusers were not identifiable in this way, while almost half of the non-abusers would be wrongly identified by using them. Clearly, therefore, it is not easy to identify people who will abscond and/or re-offend on bail. In addition, even among those who seem to be the highest risks (on the basis of the factors found to be related to bail abuse, and used as predictors by the courts) the majority did not abuse their release on bail."¹⁹

*The Philadelphia Research*²⁰

3.24 Voluntary and presumptive guidelines for decision-making have become common in the United States in the areas of parole and sentencing.²¹ In the late 1970s a project was carried out in Philadelphia in order to gather

18 M. Melvin and P.J. Didcott, *Pretrial Bail and Custody in the Scottish Sheriff Courts*, Scottish Office (H.M.S.O. 1976).

19 *Ibid.*, at p.51.

20 *Prediction in Criminal Justice Police Development*, John S. Goldkamp in *Prediction and Classification; Criminal Justice Decision Making*, eds. D.M. Gottfredson and M. Tonry; and *Policy Guidelines for Bail, An Experiment in Court Reform*, J.S. Goldkamp and M.R. Gottfredson (1985).

21 See L.R.C. *Consultation Paper on Sentencing*, Chapter 9.

information about bail decision-making so that bail guidelines might be developed for judges. It was felt that judicial decision-making in the area of bail was conducted under pressure of time with little information about defendants and with little feedback about the correctness of a decision, unless a particular case received negative publicity because a judge had released a person on bail who then offended. These factors tended to foster a conservative and unstructured approach to bail. The purpose of the project was to develop guidelines for judges in bail decisions so that such decisions would be structured, rational, consistent and visible. The purpose of the project was not specifically to predict pre-trial offending with a view to selecting the bad risks, although this matter was addressed in the course of the project.

3.25 The project was carried out by a research team collaborating with a steering committee comprised of judges from the Municipal Court of Philadelphia. The first phase was descriptive and consisted of attempting to uncover the factors judges were currently employing to make bail decisions. Data were collected for more than 200 items of information for each of 4,800 bail decisions between 1977 and 1979, and the factors that were currently influencing judges were identified. However, the research team also conducted research into the factors or combination of factors that were in fact predictive of bail abuse, i.e. failure to appear and pre-trial crime. In the course of its research, the project developed four separate prediction instruments: one for failure to appear, one for rearrest, one for serious rearrest, and one for combination of failure to reappear and rearrest. A scoring system was developed which allocated weight on the various factors found to be predictive of bail abuse. On the basis of these factors, groups could be identified that had greater or lesser probabilities of bail abuse in its various forms. For example, for failure to appear, the research showed the following factors to be related to likelihood of flight - current charge, prior arrest, history of behaviour on pre-trial release, and age. No information is given, unfortunately, about the factors found to be correlated to pre-trial offending. The final prediction instrument developed, which sought to predict pre-trial failure generally (failure to appear and rearrest), was validated on a sample of defendants who secured release. Defendants classified in Group 1 failed on release 12% of the time, Group 2 18% of the time, Group 3 23%, Group 4 38% and Group 5 54%.

3.26 Following discussion of the results with the steering committee, the project moved into its prescriptive phase, i.e. the formulation of guidelines. Guidelines were constructed on the basis of two axes; the first based on a measure of charge severity (15 levels), and the second based on risk of bail abuse (failure to appear or rearrest) (5 levels), leading to a grid of 75 cells. Each cell would have a presumptive bail decision, and as is the case with guidelines, the judge would be free to depart from the presumptive bail decision only in exceptional cases and would have to give reasons for the decision to do so.

3.27 A crucial matter in the formulation of guidelines is whether they are based on current practice or represent a departure from practice. The Philadelphia guidelines were neither drawn up to reflect current practice nor to

introduce a whole new practice (e.g. based on what were identified by the research as good predictors of bail abuse), but rather a hybrid model which combined judges' intuitive ideas about factors which are important and factors identified by the research as predictive of bail abuse. The information necessary for the judge to make a bail decision was presented to the court by the pre-trial service on a complete worksheet. The guidelines system was then tried out on a group of judges making bail decisions in 1981 and 1982, with a control group for the purposes of comparison, and was cautiously deemed to be a success in terms of producing greater uniformity of decision (76% of the guidelines judges' decisions fell within the presumptive guideline ranges, while only 57% of the non-guideline judges did), rationality, visibility and equity. In 1983 the judges moved to adopt the guidelines for use by the full court, and in 1984, the National Institute of Justice founded the Bail Guidelines Project to test the approach in another three jurisdictions.

3.28 However, within 90 days of the first court appearance, 12% of the non-guideline cases had failed to appear and 11% had been arrested for crimes as compared with failure to appear of 13% and alleged further offending of 10% of the experimental cases. These figures are not encouraging about the use of guidelines to reduce bail abuse.

3.29 In a 1983 article,²² Goldkamp, one of the researchers in the Philadelphia bail project, criticises previous bail abuse prediction studies for failing to include *detained* defendants; these studies, he says, are based on defendants who achieved pre-trial release, thus ignoring a sizeable population of defendants, in particular that section of the population most likely to abuse bail. Prediction instruments derived from such a narrow base of defendants, he argues, are inevitably more flawed than those based on all defendants:

"... it is conceivable that these studies have achieved predictive equations for failure among defendants from whom the most likely candidates for failure have already been screened out by detention."²³

3.30 In this article, Goldkamp describes a study carried out by him to determine whether pre-trial detention in Philadelphia was chaotic and arbitrary, as some critics suggested, or appropriately selective. He demonstrated that pre-trial detention in Philadelphia was selective by examining three matters:

- (1) The characteristics of a group of detained defendants who were released following order of the court due to overcrowding in the prisons (the Jackson defendants),²⁴ as compared with the characteristics of a

22 J.S. Goldkamp, 'Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia', (1983) 74 *Journal of Criminal Law & Criminology* 1556.

23 *Ibid.*, at 1562.

24 In *Jackson v. Hendrick* (1971), the court ordered the release of defendants deemed to be relatively low risk from prison in order to relieve prison overcrowding. This provided the opportunity to examine the characteristics and subsequent behaviour of these defendants, who had been selected for detention but were 'artificially' set at liberty. They are referred to as the 'Jackson defendants.'

sample of all Philadelphia defendants. Goldkamp found that the Jackson defendants had committed more serious crimes, had lengthy records of prior arrests and convictions, and histories of flight and rearrest during the bail period several times greater than the average for Philadelphia defendants generally;

- (2) When bail abuse by the Jackson defendants was compared to bail abuse by normally released defendants, the Jackson defendants failed to appear at a rate of 42% and were rearrested at a rate of 18% over 90 days, whereas defendants granted release in the ordinary way failed to appear at a rate of 12% and were rearrested at a rate of 17% over 120 days;
- (3) Risk Groups: Goldkamp found that, applying the predictive instrument developed in the course of the Philadelphia bail project, 47% of the Jackson defendants were in the highest risk category, 32% were in the second highest risk, i.e. 79% would have shown the highest probabilities of failure during a period of pre-trial release. 8% would have been classified as lowest risk, and 4% in each of the remaining two groups. Extending the analysis of the sample of the total population of pre-trial detainees in prison on a risk category, 24% fell into Group 4, i.e. 80% of all detainees were high or very high risk. However, 8% of detainees were lowest risk, and 5% were the next lowest risk group, Group 2, i.e. 13% of the pre-trial population could be said to be unnecessarily detained.

3.31 Goldkamp concluded that the results of this study underscored the need to examine the entire population of defendants seeking bail (and not merely those who obtain bail) when constructing prediction instruments. However, he went on to say that while the study showed that detention was not chaotic and that a large share of the population appeared to be very high risk, this did not dispose of the problem of false positives. A sizeable minority of the detained population did not fall into high risk categories (13% were assessed as very low risk).

3.32 Thus, while Goldkamp believes that prediction rates can be improved if studies examine detainees as well as persons granted bail in order to develop prediction instruments, he accepts that the problem of error remains and urges caution accordingly. He expresses the hope that future predictive efforts would take into account the characteristics of detained defendants, thereby enhancing the strength of predictions.

3.33 The studies cited contain some important lessons. First, those who think that accurate prediction simply involves a common sense evaluation of certain obvious variables such as past record of offending, of bail abuse and of current charge, greatly underestimate the difficulty of accurately predicting bail abuse of any kind, and bail offending in particular. Rates of false positives, which remain hidden when offenders predicted to abuse bail are detained for the pre-trial

period, emerge in significant quantities when studies test predictive accuracy on released defendants. Second, the factors which actually correlate with bail recidivism are not necessarily those thought to be important by judges making bail decisions. Third, sophisticated studies employing statistical techniques have been unable so far to eliminate substantial numbers of false positives. Fourth, judicial bail decision-making is unlikely to reach the prediction rates of the studies because of certain-factors inherent to the bail process (e.g. speed of decision-making, lack of information about the defendant). Fifth, to achieve even the limited predictive accuracy of the studies mentioned, one would need to conduct research in this country to develop prediction instruments which could then be employed by judges in bail decision-making.

3.34 Ashworth has recently commented:

"... it is easy to say that people charged with taking cars are the group most likely to offend on bail, but most of them are not in fact detected in law-breaking while on bail. It is easy to claim that courts should have greater regard to objections to bail advanced by the police, but the vast majority of those to whom the court grants bail in the face of police objections are not detected in law-breaking whilst on bail. As Gottfredson and Goldkamp remark, referring to several pieces of American research, 'the results of these studies cast serious doubt on current abilities to predict with great accuracy the statistically rare events of failure to appear at trial and pre-trial crime'.

None of these observations breaks new ground, and yet their significance for bail has been accorded little attention. Thousands of people are being deprived of their liberty every year on the basis of predictions. These have no statistical foundation, and all the criminological evidence in analogous fields points to the likelihood of considerable over-prediction. Even if it were emphasised that the primary concern is to prevent the commission of serious crimes in the period between arrest and trial, that does not make the problem any easier. Serious crimes are harder to predict than law-breaking in general, and the rate of false positives may well be very high."²⁵

3.35 We may conclude this section by noting some important comments and conclusions by Goldkamp, one of the authors of the Philadelphia experiment,²⁶ writing in 1985. First, regarding the ability of judges to predict pre-trial crime, he says:

²⁵ Andrew Ashworth, *The Criminal Process* (1994), pp.224-5.

²⁶ J.S. Goldkamp, 'Danger and Detention: A Second Generation of Bail Reform', (1985) 76 *Journal of Criminal Law and Criminology*, 1-74.

"... several studies have attempted to predict crime committed by defendants during pretrial release and have had marginal degrees of success. Few of these have studied the predictive efficacy of judicial bail decisions, and only rarely has a predictive scheme developed in such a study been independently validated. Although many jurisdictions collect aggregate statistics describing re-arrest of defendants granted pre-trial release, rarely have judges incorporated actuarial information into their decision-making approaches or developed a means for reviewing the success of their decisions for subsequent modification of their approaches ... in most jurisdictions there is no known 'method' of prediction in bail, much less a test one."²⁷

"The idealistic goal that restrictive bail or 'selective' pre-trial detention practices should be targeted on the greatest risks among all defendants should be weighed against the knowledge that it is exceedingly difficult to know with reasonable accuracy who the greatest risks are and that procedures that screen defendants, whether empirically derived or based on official 'conventional wisdom' will be clumsy and produce sizeable margins of error."²⁸

"Judicial bail practices have suffered because judges have conducted bail in a low-visibility, highly improvisational fashion with little meaningful guidance concerning how to transact bail to realize optimal results. What the United States Supreme Court has recently referred to as 'experienced prediction' in bail practice often amounts to guessing conducted in a vacuum. Judges have not had the opportunity to monitor the results of their individual decisions over time, nor to compare their practices and results with those of their colleagues. The only results most judges learn about are the rare but sensational cases involving defendants whom they have released and who then have committed especially atrocious crimes. Such feedback generates cumulatively more conservative decision-making, out of proportion with former successful bail decisions. Constructive experimentation focusing on pre-trial release and detention decision-making by the judiciary is almost nonexistent."

3.36 Regarding the ability of preventive detention to reduce crime, he continues:

"Pretrial incapacitation rests on a highly questionable assumption that removing certain categories of defendants from society will prevent large amounts of crime. Research findings have seriously questioned this assumption in two ways; persons held on more onerous bail conditions generally may be releasable under lesser options and no worse result, and detention of defendants designated as detainable by statute results

27 *Ibid.*, at 33.
28 *Ibid.*, at 54-55.

in very large amounts of unnecessary detention and is likely to contribute greatly to jail overcrowding but very little to the reduction of crime. ... Although any number of serious crimes represents a grave challenge to the ability of law enforcement to protect the public, their low rates of commission by defendants during pre-trial release make them difficult to reduce through the relatively gross incapacitative device of pre-trial detention."²⁹

2. Prediction studies concerning the identification of dangerous or violent offenders - "Dangerousness Studies"

3.37 Many studies have attempted to predict *violent behaviour in a post-conviction context*. These studies are sometimes cited as examples of our poor ability to make correct predictions. While it is true that these studies illustrate the difficulty of achieving accurate predictions, there are a number of reasons why one should hesitate to assume that the accuracy achieved in these studies would be similar to those which could be achieved in the bail context:

- (1) Follow-up period - The first reason is that these prediction studies employ lengthy follow-up periods, usually of years, to validate the predictions, whereas in the bail context, one wishes to know *how* many offenders will commit offences during the short period that is the bail period, usually months rather than years. Does this suggest that success in predicting bail rates would be greater or lesser? One might expect greater success when predicting the much less ambitious matter of likely offending over a small period than over a long period in the future. On the other hand, the behaviour is less frequent as the period is shorter, with a corresponding diminution in base rates, making predictions more difficult;
- (2) Different population examined - A second difficulty is that the population under study is different, and base rates vary for different populations. The population under examination in the studies which follow usually consists either of persons convicted and detained in mental hospitals or persons convicted and imprisoned in respect of serious violent offences. The population one would really need to examine in order to predict bail offending is that of all persons *charged* with offences;
- (3) Types of behaviour under examination - There is a third difficulty, although this only relates to the relevance of dangerousness studies to pre-trial preventive detention provisions *which apply to offences generally* (and not merely violent offences). This is the obvious point that the dangerousness studies focus on a much narrower range of behaviour than one would need to know about in the bail context. One would

expect the base rates in respect of offending generally to be different, and higher, than base rates in respect of violent offending. Indeed, as general offending is a more common phenomenon than violent offending, one might expect statistical accuracy to increase. Accordingly, this point might suggest that predictions would be better in respect of bail offending generally than specifically in relation to violent offending.

3.38 Dangerousness studies may be sub-divided into those which employed the clinical method and those which employed the statistical method.

(a) *Clinical studies*

3.39 In 1966, the United States Supreme Court held in *Baxstrom v. Herold*³⁰ that an offender detained in a hospital for the criminally insane had been denied equal protection of the law under the Fourteenth Amendment by being detained beyond his three-year sentence in this institution without a new hearing to determine his dangerousness, and held that he must be released or granted a civil commitment hearing at which the State would have to prove his dangerousness. Following this decision, Baxstrom and 966 other patients in the same legal class were transferred from hospitals for the criminally insane to civil mental hospitals for re-evaluation. The majority were eventually released to the community. This provided a rare opportunity for a "natural experiment" in the accuracy of predictions. That the offenders were diagnosed as "dangerous" was presumed from the fact that they had been held in a hospital for the criminally insane, and would have continued to have been so held had it not been for the Supreme Court decision. It was found that only 20% of the patients were assaultive to persons in the civil hospital or the community at any time during the four years following their transfer, and only 3% were sufficiently dangerous to be returned to a hospital for the criminally insane during the four years after the decision. Of 121 patients released into the community during an average two and a half years of freedom, only 8% were convicted of a crime, and only one of those convictions was for a dangerous act.³¹

3.40 However, it must be noted that no psychiatric reports were available for inspection; as noted above, the judgment of "dangerousness" was inferred from their presence in the secure hospital.

3.41 Thornberry and Jacoby (1979)³² studied a group of offenders who had been released following a successful petition for their release in *Dixon v. Pennsylvania* in 1971.³³ Patients at a mental hospital for the criminally insane whose criminal commitments had expired were retained without judicial action under legislative provisions which allowed commitments to be based on two physicians' certificates and only required administrative review of each case. The

30 383 U.S. 107 (1966).

31 See J. Monahan, *Predicting Violent Behaviour*, at pp.74-76.

32 T.P. Thornberry and J.E. Jacoby, *The Criminally Insane* (Chicago 1979).

33 *Dixon v. Attorney General of the Commonwealth of Pennsylvania* 325 F. Supp. 966 (M.D. Pa. 1971).

relevant statutory provisions were held unconstitutional for breach of due process and equal protection (i.e. *vis-à-vis* the civilly committed mentally ill). Some of the patients were civil commitments transferred from mental hospitals because they were disruptive, while some were criminal commitments (a) transferred from prison awaiting trial, (b) transferred from prison while under sentence, or (c) committed after conviction. The immediate outcome of the case was that the patients were transferred to civil mental hospitals where after re-evaluation, decisions concerning their release to the community would be made.

3.42 The hospital staff predicted that a majority of the Dixon patients would be dangerous if released from maximum security confinement. The authors of the study found that this view was based not so much on either clinical or statistical prediction but rather on political prediction, in that the prediction was based on assumed characteristics of the group rather than individual prediction.³⁴ They were predicted to be dangerous by virtue of their status as mentally ill offenders. The authors justified evaluation of these admittedly unscientific predictions on the basis that they are the most common type of prediction used in decisions concerning the release of the criminally insane.

3.43 The characteristics of this group of subjects were described by Thornberry and Jacoby as follows:

"Half the subjects had left school before completing the eighth grade. Half came from broken homes. Two-thirds had police records as juveniles and their average age at first arrest was twenty. By the time the typical subject had arrived at Farview at age thirty-two, he had failed to learn a marketable job skill, had been arrested five times, served two prison sentences, and had been a patient in a civil mental hospital."

3.44 Upon examination of the career of these patients in the civil mental hospitals, the researchers found that 65% were released into the community. Thus the psychiatrists at the transfer hospitals did not agree with the earlier view that the majority of them required maximum security or even institutionalised care.

3.45 Upon examination of the patients after transfer to the civil mental hospitals, it was found that only 19% of the subjects were involved in serious violence; only 5% were involved as initiators or victims of more than two violent incidents and fewer than 3% were so frequently involved in violence as to be considered persistently violent.³⁵ The follow-up period was, however, only an average of one year at the hospital.

34 The authors accepted that the hospital did not make rigorous clinical or statistical predictions about the future behaviour of the Dixon patients. They labelled the group prediction used as "political prediction" because such prediction is intimately linked to the general political and social setting within which maximum security mental hospitals operate. Political pressure demands that if errors are made, they are made in the direction of overprediction.

35 Thornberry and Jacoby, *op cit.*, at 96.

3.46 Upon study of those released into the community over an average four-year follow-up period (414 men), they found that only 23.7% were re-arrested for any offence at least once, and only 14.5% could be classified as dangerous after their release, "dangerousness" being illustrated by an arrest for a violent offence or any rehospitalisation for a violent act.

3.47 Moreover, the researchers analysed the variables that might be able to predict membership of the 14.5% who proved dangerous, or the 23.7% who were re-arrested for any offence, e.g. previous sex offences, race, original type of commitment, type of seriousness of offence, and age. However, it was found that while statistically significant differences existed between the dangerous subjects and the non-dangerous subjects, and the re-arrested and the non-arrested group, even in combination, these variables did not provide the basis for accurate statistical predictions.³⁶ Using multivariate analysis with the above-mentioned and other variables, the arrested/not arrested analysis yielded a rate of false positives of 60%; and the dangerousness analysis yielded a false positive rate of 70%:

"... unlike the popular image of these patients as violent offenders, the empirical evidence indicates that only a distinct minority of these offenders are recidivists (23%) and an even smaller minority (14%) are dangerous. Although the dangerous patients differ from the non-dangerous ones in a number of respects, the difference reported here does not provide the basis for accurate predictions of violence or recidivism."³⁷

3.48 Coccozza and Steadman³⁸ conducted a study of indicted felony defendants found incompetent to stand trial, for whom a court psychiatric report on dangerousness was made between September 1971 and August 1972 under the New York Criminal Procedure Law 1971, which made provision for a determination of dangerousness in respect of such defendants. The determination as to dangerousness was based upon the oral and written testimony of two psychiatrists. A court finding of dangerousness permitted placement of the incompetent defendant in a facility run by the Department of Correctional Services, whereas a finding of not dangerous led to commitment in a civil mental hospital run by the Department of Mental Hygiene. The study examined 257 defendants. Of these, 154 (60%) were evaluated as dangerous by the reporting psychiatrists.

3.49 The researchers found that there was very little difference between those evaluated as dangerous and those evaluated as not dangerous according to three sets of variables:

36 *Ibid.*, at 195.

37 *Ibid.*, at 198.

38 "Prediction in Psychiatry: An Example of Misplaced Confidence in Experts", J.J. Coccozza and H.J. Steadman, (1978) 25 *Social Problems* 265-275.

- (i) social characteristics such as age, race, education and marital situation;
- (ii) past criminal behaviour; and
- (iii) past mental hospitalisations.

3.50 The factor which seemed to differentiate significantly between the groups was the current charge. The data revealed that the more serious the crime the defendant was charged with, the more likely was the psychiatrist to reach a finding of dangerousness. More important than the legal category of crimes was the actual or perceived level of violence associated with the crime. The researchers found that with this single piece of information, one could have successfully predicted the findings of the psychiatrists in over 73% of the 108 cases in which the defendant was charged with a violent crime. However, on exploration of the reports written by the psychiatrists, the researchers found that they rarely overtly justified their predictions on the basis of the current charge.

3.51 Legally, the decision with respect to dangerousness rested with the judges, but in 87% of cases, the psychiatrist's recommendation as to the defendant's dangerousness was accepted by the court.

3.52 Although the statute provided for commitment in a civil hospital in respect of the group evaluated as non-dangerous, the Department of Mental Hygiene established a new, high security, civil facility for those patients. The two forms of hospital were therefore almost identical during the first six months of the study. Also, the lengths of hospitalisation prior to their release to the community or return to court were very similar for the two groups.

3.53 By examining hospital files and arrest records, the researchers were able to compare the two groups on the following indicators:

- (i) assaultive during initial incompetency hospitalisation;
- (ii) rehospitalised;
- (iii) rehospitalised for violence;
- (iv) assaultive during rehospitalisation;
- (v) rearrested; and
- (vi) rearrested for a violent offence.

3.54 They found that the patients evaluated as dangerous were no more dangerous than the other group; all of the indicators revealed only slight differences between the two groups and none were statistically significant. Indeed, in respect of one of the most important indicators, the number subsequently arrested for violent crimes, only 14% of the *dangerous* patients released to the community were subsequently rearrested for a violent crime, while 16% of those evaluated as *not dangerous* released to the community were subsequently arrested for a violent crime. The authors concluded:

"... the psychiatric predictions of dangerousness were not at all accurate. There was no significant difference between the two groups on any of

the measures examined. Those defendants evaluated by the psychiatrists as dangerous were not more dangerous than those evaluated as not dangerous. ... The findings presented have seriously questioned the existence of any such special knowledge [on the part of psychiatrists]. As we have seen, the single factor which appears to have most influenced the psychiatrists in their decisions was the seriousness of the charge on which the defendant was arrested - a factor which any profession, indeed, any lay person could easily employ.

Furthermore, the use of this factor is questionable on at least two grounds. First, these are only alleged offences. As incompetent-to-stand-trial defendants, these individuals have not been tried and proven guilty. Second, there is little empirical evidence which supports the use of the seriousness of any single crime as an indicator of future dangerous behaviour. ...

... the empirical data from this study and others point to a major gap between the real criteria involved in psychiatric decisions and the ideal ones offered by the psychiatrists themselves for explaining their decisions. Rationales serve not only to hide the importance of non-psychiatric factors and the impact of non-psychiatrists in the decision making process, but also to foster the illusion of the existence of a special psychiatric expertise in such decisions.

Our findings clearly indicate that no such expertise exists and that the attempt to apply this supposed knowledge to predict who will in fact be dangerous results in complete failure. The data suggests that psychiatrists may, in fact, be acting more as seers than as scientists in predicting dangerousness."³⁹

3.55 The Floud Report, however, said that the study provided "better evidence of bad practice than of the state of the art of assessing dangerousness" and that the psychiatric reports were based on "routine and slovenly procedures."⁴⁰

3.56 Kozol *et al* (1972)⁴¹ engaged in a ten year first-hand study involving 592 male offenders, most of whom had been convicted of violent sexual offences. Each offender, legally sane, was referred by the Court to the Massachusetts Centre for the Diagnosis and Treatment of Dangerous Persons where he was examined by at least two psychiatrists, two psychologists, and a social worker and was subjected to clinical examinations, psychological tests and a reconstruction of family history from the offender, family, friends, neighbours, teachers, employers, the court, and the correction and mental hospital record. This was

39 *Ibid.*, at 273-4.

40 Floud and Young, *op cit.*, at p.181.

41 Kozol H.L., Boucher R.J. and Garofalo R, 'The diagnosis and treatment of dangerousness', (1972) 26 *Crime and Delinquency* 279-84.

done under a 1958 Massachusetts law which provided for psychiatric examination of a convicted offender for offences in which sex was an element and under which any person diagnosed as "dangerous" would become subject to life-long detention under a special mental health commitment and would receive treatment.

3.57 Of the 592 admitted for observation, 435 were released. Of these, release had been recommended by the Centre for 386, and release opposed for 49. Of the 386 released with approval, 304 were recommended for release at the initial stage; and of these, 8.6% committed a serious assaultive crime. After treatment for 43 months, a further 82 patients were recommended for release; of these 6.1% committed serious assaultive crimes; i.e. of the 386 recommended at some stage for release, there was a recidivism rate of 8%. Concerning the 49 who were released against recommendation, there was a recidivism rate of 34.7%. This illustrated some predictive ability, although in the group deemed dangerous, there was a false positive rate of 64%. It may be noted that the follow-up period was five years. The authors of the study concluded:

"It appears that dangerousness can be reliably diagnosed and effectively treated. It is clear that we must improve our diagnostic and therapeutic competence to insure that fewer dangerous persons are let out and fewer non-dangerous persons are kept in."

3.58 However, the Floud Report pointed out that no account was taken in this study of the differences in length of time during which the individuals were at liberty. They also point out that while the false positive rate in the "dangerous" group was high, this was only one-fifth of the total group judged dangerous, and it is plausible to assume that as the court ordered their release, they were borderline cases in any event.⁴² The Floud Report also cites a later review of this study by Kozol *et al*,⁴³ in which they took the view that 29 of the 49 cases in question had been misclassified as dangerous, in light of later experience of diagnosis. Had these men been assessed differently with the benefit of experience, the number of disputed cases would have been 35 instead of 49, and the chances of a correct diagnosis of dangerousness would have been 50:50, instead of 2:1 against.

3.59 Another first-hand study, concerning the first ten years of operation of the Patuxent Institution in Maryland, concerned 421 patients, each of whom had received at least three years of treatment. The psychiatric staff opposed the release of 286 patients on grounds of danger who were nonetheless released by the court, i.e. a much greater number than in the above study. The recidivism rate was 39-46% (46% if patients were released directly from the hospital and 39% if a conditional release was imposed). The 135 which the staff had recommended as safe who were released had a recidivism rate of 7%. However,

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See Floud and Young, *op cit.*, at p.192.
H.L. Kozol, R.J. Boucher and R.F. Garofolo, "Dangerousness", (1973) 19 Crime and Delinquency, 554-5 (Letter in reply to Monahan).

it is important to note that recidivism was measured by any new offence during the first three years after release, not merely offences of violence.⁴⁴

3.60 In 1981 having studied a number of the American dangerousness studies, Monahan concluded that:

"... the best clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than *one out of three* predictions of violent behaviour over a several year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill."⁴⁵

3.61 Monahan acknowledged that criticisms had been made of the research for testing things such as bureaucratic inertia rather than prediction accuracy, and pointed out that much violence which occurred on release may have escaped detection.⁴⁶ He concluded that:

"Properly viewed, however, the research appears to weather these criticisms fairly well."

3.62 The authors of the 1981 Floud Report came to a similar conclusion in respect of American and British studies, saying:

"There must be some doubt whether these results are entirely trustworthy, for the investigations were not rigorously designed and executed. ... Nevertheless, it is difficult to avoid the conclusion that even under favourable conditions *the risk of unnecessary detention* imposed on offenders by a protective sentence is likely to be considerable; on the evidence of these first hand studies, with all their weaknesses, *it is at least 50 and may be as much as 66%*, even when the offenders concerned have had records of serious crime accompanied by violence and the assessments of their 'dangerousness' have been carefully and conscientiously made."⁴⁷

Moreover, they added:

"It is a striking factor, however, that the reported ratios of invalid to valid judgments of dangerous seem to be much the same (2:1 at worst, 50/50 at best) whether they be reached by actuarial or case-study

44 See J. Monahan, *op cit.*, at pp.73-74.

45 *Ibid.*, at p.77.

46 For example, Alschuler, *supra* footnote 8, points out that while an arrest or conviction validates a prediction of violence, the absence of arrest does not necessarily invalidate such a prediction because the violence may have occurred without being detected.

47 Floud and Young, *op cit.*, at p.30.

methods).⁴⁸

3.63 In a 1985 article, Ewing reviewed some further studies attempting to predict violence among juveniles.⁴⁹ The first study examined the accuracy of psychiatric consultants' assessments of the potential for violence of 511 wards of the California Youth Authority. Of the 118 youths in this group clinically evaluated as posing a moderate or high potential for violence, only nine (7.6%) recidivated by committing a violent offence during a fifteen month post-release follow-up period, i.e. yielding a false positive rate of over 92%. The second study combined the clinical and research literature regarding violent behaviour among juveniles and isolated thirty factors thought to be predictive of violent behaviour among children and adolescents. In addition, a survey of juvenile court psychiatric clinics yielded an additional sixteen factors said to be predictive of violent behaviour in juveniles. The researcher then examined the court and clinical records of 122 juveniles referred for psychiatric evaluation before the disposition of their case, and followed the juveniles for one year. Only 7 of the 122 committed a violent offence, and the researcher could find no statistically significant relationship between the commission of violent offences and any of the predictor variables.⁵⁰

3.64 Whether or not this is the best that clinical predictions can do continues to be debated. Some say that with better techniques, accuracy could be improved. For example, it is suggested that clinicians should combine their own expertise with actuarial knowledge,⁵¹ and pay attention to situational as well as dispositional factors.⁵² It has also been suggested that much more detailed information should be collected about the persons whose behaviour is being predicted.⁵³ It is unlikely that we have heard the last word on ability to predict violent behaviour. As the authors of one text say:

"Although these studies demonstrate an absence of predictive skills on the part of clinicians, a number of conceptual and methodological problems are inherent in such studies. The selective nature of subject populations mitigates the generalizability of these findings. Furthermore,

48 *Ibid.*, at p.31. Despite the pessimistic conclusions of the Floud Committee concerning the ability to predict repeat dangerousness, they went on to recommend that protective sentences should be introduced for high-risk, dangerous offenders.

49 C.P. Ewing, "Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass", (1985) 34 Buffalo Law Review 173.

50 Schlesinger, "The Prediction of Dangerousness in Juveniles: A Replication", (1978) 24 Crime and Delinq. 40.

51 E.g. Monahan, *supra*. See also, Webster, Ben-Aron and Hucker (eds.), *Dangerousness: probability and prediction, psychiatry and public policy* (1985).

52 Monahan points out that, until now, studies have focused on dispositional variables, e.g. race, age, number of previous convictions. However, offenders interact with their social situation, and he suggests that to improve prediction accuracy it will be important to develop prediction methods which examine environmental and situational factors when predicting behaviour. He suggests that these should include family environment (its role in supporting or discouraging violent behaviour), peer environment, job environment, availability of victims (e.g. spouse murderers, incest), availability of weapons/means to commit crime. Examining situational factors makes prediction more complicated because one must not only examine the relationship between situations and particular behaviour (e.g. violence and drinking in pubs) but also the probability that the individual will encounter that situation. However, Monahan believes that such inclusions would increase prediction accuracy.

53 P.E. Dietz, *Criteria for prediction in criminality*, in Webster, Ben-Aron and Hucker, *supra*, who gives a dazzling list of matters which should be examined.

this research is notably lacking in efforts to analyze the clinical decision-making process, preventing the documentation and measurements of component judgments underlying predictions...With Monahan (1981), we argue that methodological flaws in the current literature belie the conclusory language in which much of the discussion is couched. In a real sense, the jury is still out on the empirical question of prediction-outcome associations.⁵⁴

3.65 Floud and Young said, in similar terms:

"The question, whether clinicians can improve the predictive value of their assessments of dangerousness, surely remains open. Numerous factors may account for the relatively low values so far achieved by clinicians; or of the sample of judgments being validated; routine or slovenly assessment procedures; neglect of situational or other environmental variables affecting behaviour, and the length of time at risk. All of these factors are susceptible to correction or control."⁵⁵

(b) *Actuarial/statistical studies of dangerousness*

3.66 Among the better known statistical studies of predicting violence are three studies reported by Wenk, Robison and Smith (1972) undertaken in the California Department of Corrections.⁵⁶ The first in 1965 attempted to develop a violence prediction scale to aid in parole decision making. The population under observation had a base rate of 5% violent behaviour. The prediction items included the offence for which the person was committed, the number of prior commitments, opiate use and length of imprisonment. The scale was then validated by examining the number of parolees who engaged in violence. They were able to identify a small class of offenders (less than 3% of the total), who were three times more likely than other offenders to commit acts of violence while on parole for fifteen months. However, only 14% of this small group in fact engaged in violence, leaving a false positive rate of 86% even for this group. The second study concerned a group with a lesser base rate of 2.5% violent behaviour. The individuals in a group of 7,712 parolees were assigned to one of six categories of risk for violent behaviour. One in five were assigned to a "potentially aggressive" category, and the rest to a less aggressive category. During a one year follow-up, the rate of conviction and imprisonment for crimes involving violence was 3.1 per thousand for the "potentially aggressive" group, and 2.8 per thousand for the less aggressive group. For every correct identification of a potentially aggressive individual, there were 326 wrong ones and only five of the 1,630 parolees put in the high risk category were convicted of crimes of violence.

54 Menzies *et al*, *Hitting the Sound Barrier*, in Webster, Ben-Aron and Hucker, *op cit.*, at p.118.

55 Floud and Young, *op cit.*, at p.186.

56 Wenk, Robison, and Smith, *Can violence be predicted?* (1972) 18 *Crime and Delinquency* 393-402, discussed by Monahan, *op cit.*, at pp.101-103.

3.67 The third study examined 4,146 California Youth Authority wards with a base rate of 0.3% violent behaviour. The subjects were followed for 15 months after their release from juvenile institutions. Data on 100 variables were analysed retrospectively to see which items predicted a violent act of recidivism. The study concluded that a parole decision-maker who used a history of actual violence as his sole predictor of future violence would have false positives of 19 in every 20 predictions. Several multivariate regression equations were developed from the data, but none achieved a better rate than an eight to one false positive to true positive ratio. After analysing data on 100 variables and using multivariate techniques, the researchers were never able to attain better than 88% rate of false positives. It may be noted that these studies used conviction for violent behaviour as a measure of recidivism.

3.68 In 1978, the Department of Corrections of the State of Michigan undertook a study of a sample with a base rate of 10.5% violent behaviour.⁵⁷ Data on 350 variables was collected for 2,200 male inmates released on parole in 1971 and an actuarial table relating to *arrest for violent crime* while on parole was developed. The study was then validated on a portion of the sample. Persons were classified into categories according to very high risk, high risk, middle risk, low risk, or very low risk. It was found that among those designated as being at very high risk (4.7% of the sample) the rate of violent recidivism during a fourteen month follow-up was 40%. The violent recidivism rates for the high risk and middle risk group were only 20.7% and 11.8% respectively. Michigan replicated the study using a sample of 1,200 inmates released in 1974; with a follow-up period of 14 months parole and a base rate of violent crime of 16%. The recidivism rates were found to be similar to the previous study, namely, 33% for the highest risk category.

3.69 The Floud Report mentioned three British studies, in which it was found that one variable alone (having three or more previous convictions for violence) identified groups of offenders of whom more than 1 in 2 were subsequently re-convicted of violence, including robbery. Walker, Hammond and Steer (1970)⁵⁸ reported studies of two samples. The first involved a study of 264 Scots who incurred their first conviction for violence in 1947. For the 11 with a fourth or subsequent conviction for violence, 55% incurred a further such conviction. The study was cut off at 1958 convictions. The second involved 401 Londoners convicted of indictable violence in 1957. For the 21 who incurred a fourth or subsequent such conviction, 52% incurred another one in the next five years.

3.70 Phillpots and Lancucki⁵⁹ described a sample of adults convicted of a standard list of offences in 1971. Of the 828 men who had been either convicted of an offence with violence or robbery or had at least one such previous conviction, 43 had three or more convictions of the same kind, and of these, 54%

57 See Monahan, *op cit.*, at p.103, and Ewing, *op cit.*

58 N.D. Walker, W. Hammond and D. Steer, *The Violent Offender - Reality of Illusion?*, Oxford University Penal Research Unit, Occasional Paper No. 1 (1970). See Floud and Young, *op cit.*, at p.184.

59 G.J.O. Phillpots and L.B. Lancucki, *Previous Convictions, Sentences and Reconvictions: A Statistical Study of a sample of 5,000 offenders in January 1971*, Home Office Research Study No. 53 (H.M.S.O. 1979).

were re-convicted of further such offences within six years of sentence.

3.71 In 1980, a British Home Office Study was published, the purpose of which had been to see if it were possible to identify a group of dangerous offenders who were said to be disproportionately responsible for dangerous offences.⁶⁰ Details about every one in ten prisoners in the south east of England were collected from a wide variety of sources in 1972. Out of 811 men, the researchers Brody and Tarling identified a group, 38% of the sample, which included "men who specialised in lucrative and successful robberies, burglaries or frauds, who had badly wounded or killed their victims or would have carried out threats to do so, and who had sexually assaulted children or adults. Life sentence prisoners were automatically included in the serious group".⁶¹ From this group they then selected groups of dangerous offenders using categories of "serious danger", "possible danger", "no serious threat", and "not dangerous". They rate 77 (9.5% of the sample) of the prisoners as dangerous. According to the authors:

"... the prisoners were described as 'dangerous' for four main reasons; either their sexual and aggressive instincts were so entangled that (at the worst) sexual desire was expressed sadistically; they were so mentally disturbed as not to be responsible for their actions; they were prone to violent rages in which some neurotic component was clearly visible; or they were simply quite rationally and ruthlessly unscrupulous."⁶²

3.72 Early in 1979, most prisoners in the sample had been released from their original sentence for at least five years. Information was available in respect of 700 out of the original sample. Out of these 700 offenders, 77 were convicted of robbery, physical or sexual assault, and only 18 were re-convicted of "dangerous" offences. Of the 77 re-convictions mentioned, only 13 were committed by the 52 "dangerous" offenders free to re-offend.⁶³ However, dangerous offenders were responsible for about half of the dangerous offences.

3.73 The authors of the study commented:

"...considering how rare these incidents were is not a bad forecast, and one which would almost certainly have been better had all the dangerous prisoners been released. Even though the figures are small, they provide good evidence in favour of careful and detailed consideration of individual cases and individual offences in discussions of dangerousness and of the dangerous offenders. But they still do not encourage any idea of incapacitation policies based on predictive instruments. *Had all the released dangerous prisoners been confined for at least another five years, only nine of them would have been prevented from committing*

60 Brody and Tarling, *Taking Offenders out of circulation*, Home Office Research Study No. 64 (H.M.S.O. 1980).

61 *Ibid.*, at 21.

62 Brody and Tarling, *op cit.*, at 26.

63 Some of the offenders originally classified as 'dangerous' would have been serving life sentences and were not released.

*further dangerous acts, while at least 39 would have been excessively punished for no good purpose. At the same time, an equal number of dangerous offences would have been perpetrated by people who could not easily have been identified as likely to do so.*¹⁶⁴

3.74 The authors concluded:

"...while quite a lot of people may occasionally behave recklessly or violently, the idea of the 'dangerous offender' as a criminal type is something of an illusion. In the first place, there exist neither any satisfactory legal definitions, nor any scientific measures, by which he can be reliably identified. In practice, assessments of dangerousness are no more than subjective expectations about the likelihood of any offender causing serious personal injury in the future. As these expectations naturally rely very heavily on knowledge of past behaviour, it is obviously an advantage to have the fullest possible accounts of offenders' histories and circumstances before coming to any decisions about them, but even so, no one has been able to predict accurately more than half the time, and seldom as often as that. *Most expert' predictions seem to be right for only one out of three individuals.* The number of criminals who are recognised immediately as a 'public danger' and who are promptly put away for an indefinite term is very small indeed, and their prolonged incarceration means that it is years, if ever, before it is possible to test the accuracy of the judgments made about them. But the 52 'dangerous' prisoners in the sample described in this report who have been judged from detailed reports about them, to be capable of wantonly causing death or serious bodily harm fulfilled this prophecy so infrequently that even if all of them had been confined for an extra five years, only nine really serious assaults would have been prevented. And within the same period, an equal number of serious attacks were perpetrated by ex-prisoners who had previously shown no indications at all of dangerous tendencies, and for whom there could have been no justification for prolonged detention."⁶⁵

Prediction And Procedural Safeguards

3.75 As we shall see on our section on the United States, it has been asserted by courts and writers that procedural safeguards at detention hearings can reduce the level of false predictions by courts. In the bail context, among the procedural safeguards suggested are:

- (i) limiting the category of crimes charged (which can attract pretrial detention);
- (ii) requiring a strong *prima facie* case on the evidence;

64 Brody and Tarring, *op cit.*, at 29.

65 Emphasis added.

- (iii) a detailed assessment of the background of the person;
- (iv) limiting the prediction to certain types of recidivism, e.g. violent recidivism; and
- (v) setting a standard of proof according to which the risk of re-offending is measured, e.g. "substantial likelihood", "unacceptable risk".

3.76 Reflection on the above studies will show that it is highly unlikely that such procedural safeguards will reduce the level of false predictions below those on the studies, because these safeguards were already built into the research designs which produced such low levels of prediction success. For example, many of the studies only concerned offenders charged with or convicted of the limited category of serious crimes. Most if not all involved extensive and sometimes exhaustive research into the person's background, usually far more extensive than a court could or would ever engage in. Regarding the suggested "safeguard" of limiting the prediction to certain types of crime, one writer has said:

"Both simple logic and empirical research indicate that it would not [reduce the rate of false positives]. Serious crimes (especially violent crimes) are statistically rare, certainly much rarer than less serious or minor crimes. The rarer an event, the more difficult it is to accurately predict its occurrence. Logically, a judge's predictions of serious or violent crimes are more likely to prove erroneous than those of less serious or minor crimes. The reality of this logic is demonstrated by the empirical research."⁶⁶

3.77 Similarly, the standard of proof "safeguard" will not improve accuracy. As the empirical predictions are more often wrong than right, this would hardly satisfy even the lowest standard of proof. It seems meaningless to ask the risk to be proved as greater than 50% in court, when studies have demonstrated that this kind of precision has never yet been attained. While the absence of procedural safeguards would no doubt make predictive accuracy even worse, it would be foolish to expect procedural safeguards to improve on the figures so far reported.

Conclusion

3.78 This chapter has illustrated the complex nature of studies which test predictive accuracy. It shows the discouraging results which have emerged from such studies about our ability to predict, at least when such studies concentrate on violent crime. However, it would be worth undertaking a study in this country to establish the degree to which one could predict bail offending generally. Such

66 Ewing, *op cit.*, at p.203.

a study could learn from the methodological pitfalls seen above and might concentrate on crime that tends to be serial, i.e. child sexual abuse, burglary, shoplifting, larceny from motor-vehicles, mugging or handbag snatching.

3.79 It is important to realise, however, that the figures provided by prediction studies are the beginning, not the end, of discussion about the acceptability of pre-trial preventive detention. As Monahan has said:⁶⁷

"All a person predicting violence can hope to do is assign a probability figure to the occurrence of violent behaviour by a given individual during a given time period. ... [T]he question remains, 'Is this degree of a relationship sufficiently great to justify preventive intervention?', whether that intervention is in the form of civil commitment, denial of parole releases, or informing a potential victim. 'What represents an acceptable trade-off between the values of public safety and individual liberty?'"⁶⁸

⁶⁷ Monahan, *op cit.*, at p.34.

⁶⁸ Citing Wenk, Robinson and Smith, *op cit.*, at p.402.

CHAPTER 4: THE LAW RELATING TO BAIL IN OTHER JURISDICTIONS

4.1 This Chapter examines the law relating to bail in a number of other common law jurisdictions. The jurisdictions examined are the United States, Canada, England and Wales, Scotland and Australia. Although each jurisdiction has focused to a greater or lesser extent on certain aspects of bail, certain common concerns and themes emerge, as we shall see. The United States and Canada approaches are particularly interesting in that they are countries which have had to forge their bail laws within the constraints of constitutional imperatives. As we shall see, they have interpreted those constitutional constraints in a different manner from the Irish Supreme Court. We also address the European Convention for the Protection of Human Rights and Fundamental Freedoms, and very briefly, a number of Continental European systems.

UNITED STATES

Introduction

4.2 The topic of bail has been on the reform agenda since at least the 1960s in the United States. Different trends at different periods are, however, discernible. The first wave of interest in bail reform concentrated on the perceived inequalities and injustices to defendants, arising in large part out of the dominance of money-based bail, which was felt to discriminate against economically deprived defendants who would be nonetheless good bail risks. It was also felt that unlimited judicial discretion in the area of bail led to arbitrary and irrelevant factors being relied on to refuse bail. These concerns led to, for example, the celebrated Manhattan Bail Project developed by the Vera Institute for Justice which sought to assist judicial decision-making by providing information to the court about the defendant's background, and the *Federal Bail Reform Act, 1966*, which sought to decrease the emphasis on money bail. There have also been developments in relation to the edging out of bail bondsmen, the

introduction of bail deposit schemes, and supervised release programmes. However, from at least the 1970s onwards, interest in the bail topic started to focus on the issue of bail offending and public safety from persons charged with offences who were released pending trial. In 1970, the District of Columbia enacted a statute authorising preventive detention in respect of defendants deemed to be at risk of offending while on bail. This example was followed by most other states in the years between the enactment of this statute and the *Federal Bail Reform Act, 1984* which authorised pre-trial detention for similar reasons and was, indeed, modelled on the District of Columbia Act. The constitutionality of the Federal Act was upheld in 1987 in the Supreme Court decision in *U.S. v. Salerno*,¹ but it would be inaccurate to say that this decision has put to rest concerns about the issue of preventive detention. Numerous writers have criticised the decision in trenchant terms, and there seems to be agreement that the application of the Act in some circumstances will prove unconstitutional. Each of these developments will be discussed in more detail below. For the moment, it will suffice to say that the present climate of opinion regarding the bail issue is marked by the residue left by these two waves of opinion. Two of the leading authors in this area have said:

"The current debate is dominated by two seemingly contradictory perspectives; a view that inefficient bail practices are a major contributor to overcrowding in the nation's jails, and a view that bail practices fail sufficiently to confine 'dangerous' defendants before trial.

The overcrowding concerns are a legacy of the bail reform movement of the 1960s with a pragmatic tint. That movement sought to facilitate the release pending trial of poor defendants who, being charged with non-serious offences and having reasonable ties to the community, posed little risk and thus were needlessly clogging the jails. ...

In juxtaposition is a second belief, linked to the growing public fear about crime, that bail practices fail to protect society from arrested persons who return to the streets before trial to commit additional serious crimes. The debate over preventive detention - pretrial detention of 'dangerous' defendants - can be traced back to the 1950s but has grown stronger in the last decade. ... In fact these critical perspectives may be most usefully understood as two sides of a single concern - that bail decision-making and the resultant use of pretrial detention are insufficiently selective."²

4.3 Goldkamp has also noted the changing political climate providing a backdrop to these concerns:

"The social and historical shift in the recent decades, away from poverty and civil liberty concerns and toward a climate marked more by

¹ 481 U.S. 697 (1987).

² Goldkamp and Gottfredson, *Policy Guidelines for Bail*, 1985, at pp.12-14.

heightened public fear of crime and 'law and order' politics may explain the evolution of the danger-oriented agenda of bail and pretrial detention practices."³

The Bail Reform Act, 1966 And The Manhattan Bail Project

4.4 The *Federal Bail Reform Act, 1966* was introduced on a wave of concern about the discriminatory use of bail and the conditions of bail. Its primary purpose was to reduce reliance on money bail by encouraging release on recognisance rather than using financial bonds. However, the ground upon which restrictive conditions of bail, financial bail, or refusal to grant bail could be decided was the question of whether the accused would appear for trial. The Act did not expressly permit the court to consider the question of whether the accused might pose a danger to the community or commit further offences while on bail. At the time of its enactment, Congress considered the question of preventive detention and refused to endorse it.

4.5 It has been generally accepted that in the years which followed, judges were influenced by the question of public safety and bail offending, and achieved preventive detention *sub rosa* by setting money bail at high levels to prevent an accused meeting it in order to prevent his release where he was felt to be a potential bail offender. Thus preventive detention existed *de facto* although without the legitimacy of supporting legislation. Indeed, one of the reasons offered to support the introduction of the *Federal Bail Reform Act, 1984* was that preventive detention decision-making would be brought out into the open and regulated.

4.6 The purpose of the Manhattan Bail Project, as stated above, was to improve the quality of information reaching the court about the accused in order to enable him to release "good risk" defendants who might otherwise have been detained. The following Table illustrates the point scoring system of the New York Release on Recognizances Project, formerly the Manhattan Bail Project. The project officer collects information on all of these matters and gives scores to the defendant, following which process he is deemed a good or a bad bail risk.

To be recommended the defendant needs:

1. A New York address where he can be reached and
2. A total of five points from the following categories:

3 J.S. Goldkamp, 'Danger and Detention: A Second Generation of Bail Reform', (1985) 76 *Journal of Criminal Law and Criminology* 1 at 16.

| Score | Categories |
|--|--|
| <hr/> | |
| <u>Prior Record</u> | |
| 1 | No convictions |
| 0 | One misdemeanour conviction |
| -1 | Two misdemeanour or one felony conviction |
| -2 | Three or more misdemeanours or two or more felony convictions |
| <hr/> | |
| <u>Family Ties in New York area</u> | |
| 3 | Lives in established family home and visits other family members |
| 2 | Lives in established family home |
| 1 | Visits others of immediate family |
| <hr/> | |
| <u>Employment or School</u> | |
| 3 | Present job one year or more, steadily |
| 2 | Present job four months or present and prior six months |
| 1 | Has present job which is still available or unemployment three months or less and nine months or more steady job or unemployment compensation or welfare |
| 3 | Present in school, attending regularly |
| 2 | Out of school less than six months, but employed/training |
| 1 | Out of school three months or less, unemployed and not in training |
| <hr/> | |
| <u>Residence in New York area steadily</u> | |
| 3 | One year at present residence |
| 2 | One year at present or last prior residence or 6 months at present residence |
| 1 | 6 months at present and last prior residence or in New York five years or more |
| <hr/> | |
| <u>Discretion</u> | |
| 1 | Positive, over 65, attending hospital, appeared on some previous case |
| -1 | Negative, intoxicated, intention to leave jurisdiction |
| <hr/> | |

4.7 A more recent project of this type is the Nassau Bail Project, also sponsored by the Vera Institute. This scheme targets those who have already been refused bail. Again the target population is subject to an investigation process, in the course of which information about community ties, employment, and likely outcome of the case are obtained. There is intensive monitoring of persons released to ensure that they comply with the conditions of bail.

The Introduction Of Preventive Detention Prior To The 1984 Act

4.8 As early as four years after the reforming 1966 Act, the District of Columbia introduced the first Act permitting pre-trial detention of potential bail offenders, the *Court Reform and Criminal Procedures Act, 1970*. It is perhaps of interest to note that the Act was passed in the wake of a National Bureau of Standards study which showed that the amount of serious felony pre-trial crime was about 5%, that there was no correlation between the type of crime for which the first arrest was made and the severity of the second offence, that most bail recidivism did not occur in the immediate post-arrest period, and that prediction rates were low.⁴

4.9 The statute contained certain narrowing provisions included to satisfy what were thought to be constitutional pre-requisites for a preventive detention scheme, namely:

- (1) only three categories of offence for which defendants could be detained;
- (2) a finding of substantial probability that the defendant committed the crime; and
- (3) the period of pre-trial detention was limited to sixty days.

4.10 The District of Columbia Act was challenged in *U.S. v Edwards*⁵ and was held not to be unconstitutional on its face by the District of Columbia Court of Appeals. Following the decision in *U.S. v Edwards*, attention shifted in many quarters from the question of the constitutionality of preventive detention *per se*, to the question of what procedural safeguards would render it constitutional.

4.11 By 1984, thirty-four states had laws addressing danger to the public as an aspect of bail decision-making, and ten states had revised their laws through constitutional amendments.⁶ These statutes, while similar in orientation, differed in detail. They referred variously to the "safety of the community", the "danger to the public" and "danger to any other person or the community". Dangerousness was variously explained; some statutes created categories of defendants charged with particular offences, e.g. felonies, or felonies in particular

4 Locke, Penn, Rick, Bunten and Hare, *National Bureau of Standards; Technical Note 535, Compilation and Use of Criminal Court Data in relation to Pre-trial Release of Defendants; Pilot Study* (1970).

5 455 U.S. 1022 (1982).

6 Goldkamp, *op cit*. This article discusses the statutes introduced during this period and tabulates the differences of detail between them.

circumstances, e.g. on bail, on probation, on parole; others eschewed the categorical approach and provided general phrases, such as whether liberty would constitute an unreasonable danger to the defendant or the public. The eligibility of defendants for pre-trial detention was linked to various factors; the nature of the offence charged, current charge and past record, current charge and whether on probation, parole, or bail, assessments of risk of danger. The current charge was inevitably important, although often combined with other factors.

The Federal Bail Reform Act, 1984

4.12 This development towards the enactment of preventive detention statutes culminated in the enactment of the *Federal Bail Reform Act, 1984*, enacted as *Chapter One of the Comprehensive Crime Control Act of 1984* and replacing the 1966 *Federal Bail Reform Act*. It was similar in many respects to the original District of Columbia Act, although one essential difference was that no time limits on detention were included. The Act retained the emphasis of its predecessor in providing that a judicial officer should impose restraints in an ascending order of necessity, culminating in pre-trial detention only if no condition or combination of conditions would serve to prevent bail abuse. The "ladder" runs through release on recognisance or execution of an unsecured appearance bond, through release on increasingly restrictive conditions, to detention. At each stage, the judicial officer must impose the minimum restraint possible.

4.13 However, the key provision, introducing preventive detention on the hitherto federally unrecognised ground is s.3142(e), which provides as follows:

"If ... the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community*, such judicial officer shall order the detention of the person before trial."⁷

4.14 Subsection (g) lists the factors to be considered in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community as follows:

- the nature and circumstances of the offences charged, including whether the offence is a crime of violence or involves a narcotic drug;
- the weight of evidence;
- the defendant's history and characteristics, including
 - (a) the person's character, physical and mental conditions, family

7 Emphasis added.

- ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
- (b) whether at the time of the current offence or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of sentence; and
- the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

4.15 These factors are to be considered when addressing flight and safety of the community. The Act does not weight them in any way, nor does it indicate that certain factors are more relevant to flight than to safety, and *vice versa*.

The presumptions

4.16 The Act also created two rebuttable presumptions "that no condition or combination of conditions will reasonably assure the safety of any other person and the community". The first is the "previous violator presumption", which applies where the defendant has, while on pre-trial release in the preceding five years, been convicted of certain offences. The second is the "drug and firearm offender" presumption. In practice, the latter is most often relied on. Persons in these categories are presumed to be flight and/or danger risks and the burden of proof is shifted to the defendant to show otherwise. Under the Act, the prosecution can invoke the rebuttable presumption only if the judicial officer finds that "probable cause" exists to believe that the defendant committed the crime charged. It is generally agreed that the potential protection offered by this safeguard has been diluted, if not lost, by the fact that most courts have held that an indictment itself establishes probable cause to believe that the defendant committed the offence charged, and therefore triggers the presumption.

Procedure

4.17 Section 3142(f) provides that the judicial officer shall hold a hearing to determine whether any condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community:

- > upon motion of the attorney for the government, in cases involving
 - a crime of violence;
 - an offence for which the maximum sentence is life imprisonment or death;
 - drugs offences carrying a maximum sentence of ten years or more;

- any felony if the person has been convicted of two or more of the above offences.

> upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves:

- (A) a serious risk that the person will flee; or
- (B) 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.

4.18 S.3142(f) also provides that at the hearing, the person has the right to be represented by counsel, to have counsel appointed if his or her means are inadequate, an opportunity to testify, to present witnesses, to cross-examine witnesses who appear, and to present information by proffer or otherwise. The rules concerning the admissibility of evidence in criminal trials do not apply. The facts used by the judicial officer for a finding in favour of detention "shall be supported by clear and convincing evidence".

4.19 The judicial officer must include in the detention order written findings of fact and a written statement of the reasons for detention. He must direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, "to the extent practicable", from persons awaiting or serving sentences or being held in custody pending appeal and direct that the person be afforded "reasonable" opportunity for private consultation with counsel.

4.20 To meet the concern that use of high money bail to achieve pre-trial detention would circumvent these procedural formalities, the Act states that the judge may not impose a financial condition that results in the pre-trial detention of the person.⁸

Breaches of bail

4.21 A defendant who wilfully fails to appear before a court as required by a condition of his release may be subject to forfeiture of any security given or pledged for his release, and is liable to be guilty of an offence, commonly known as "bail jumping". Under the Federal Act, punishment is geared to the relative seriousness of the offence with which the defendant was charged or convicted. For example, if the original offence is punishable by death, life imprisonment or over fifteen years imprisonment, the appropriate penalty is a maximum ten years imprisonment, whereas if the penalty for the original offence is five or more years imprisonment, the appropriate penalty is a maximum ten years imprisonment. If the penalty for the original offence is five or more years imprisonment, then

the penalty for bail jumping is also five years. It is a defence that uncontrollable circumstances prevented the defendant's appearance and that he did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that he appeared or surrendered as soon as such circumstances ceased to exist. It may be noted that this defence is more restrictive than the Irish equivalent under s.13 of the *Criminal Justice Act, 1984*.⁹

4.22 Under s.3147 of the Act, if a defendant is convicted of an offence committed while on bail under the Federal Act, his punishment may be enhanced by a term of imprisonment of not more than ten years if the offence was a felony, and one year if a misdemeanour, and must be consecutive. If he violates a condition of release, he is subject to a "revocation of release, an order of detention, and a prosecution for contempt of court", under s.3148(a).

Relevant Pre-Salerno Caselaw

4.23 The first significant challenge to the *Bail Reform Act* to reach the Supreme Court was the case of *U.S. v. Salerno*,¹⁰ discussed below. However, it may be useful at this point to draw attention to a number of cases which preceded that decision and were drawn on by the Supreme Court in *Salerno* to reach its conclusions. The main themes in these cases are the distinction between a regulatory and a punitive measure, the validity of predictions of dangerous behaviour, and the constitutionality of preventive detention provisions relating to juveniles.

4.24 In *Kennedy v. Mendoza-Martinez*,¹¹ the Supreme Court addressed a challenge to an immigration law providing for the automatic forfeiture of citizenship upon draft evasion. A majority of the Court held that the measure was unconstitutional because the sanction of deprivation of citizenship had been employed by Congress as a punishment without affording the procedural safeguards of the Fifth and Sixth Amendments.¹² The Court described the test to be employed to determine whether a governmental act serves regulatory or penal purposes. It said that in the absence of an express legislative intent to punish, the courts must consider seven factors in their review of a governmental act:

- whether it involves an affirmative disability or restraint;
- whether it was historically regarded as a punishment;
- whether it comes into play only on a finding of *scienter*;

9 *Supra*, Chapter 1.

10 481 U.S. 697 (1987).

11 372 U.S. 144 (1963).

12 The opinion by Goldberg J. expressed the view of five members of the Court and Brennan J. delivered a concurring opinion. Four members of the Court dissented (Harlan, Clark, Stewart and White JJ.).

- whether its operation will promote retribution and deterrence;
- whether an alternative purpose to which it may rationally be connected is assignable for it;
- whether it appears excessive in relation to the alternative purpose assigned.

4.25 The first factor is congressional intent, and it is only if the congressional intent is non-punitive that the other factors must be examined. In total, therefore, it is an eight-pronged test. The legislative history of a statute is relevant in analysing its character as penal or regulatory. In this particular case, it was clear that the congressional intent had been punitive, and the Court held that loss of citizenship for draft evasion was punishment and therefore required a conviction.

4.26 The distinction between a regulatory and a punitive measure again came under Supreme Court scrutiny in *Bell v. Wolfish*,¹³ where a number of pre-trial detainees challenged certain conditions of their confinement. The majority opinion delivered by Rehnquist C.J. discussed the *Mendoza* test in its entirety, but went on to apply a three-pronged test; in the absence of showing an express intent to punish, the determination of whether a statute is punitive or regulatory turns on whether an alternative purpose to which the restriction may be rationally connected is assignable for it and whether the detention appears excessive in relation to the alternative purpose. This abbreviated test was subsequently to be relied on by the majority in *Salerno*. Another interesting aspect of the *Bell* decision was that the Court held that the presumption of innocence had no application to a determination of the rights of a pre-trial detainee during confinement before the trial has even begun. The Supreme Court in *Salerno* relied on this view, although the *Bell* challenge involved the conditions of confinement rather than the fact of confinement itself.

4.27 The question of predicting dangerousness in adults has arisen on a number of occasions before the Supreme Court. In *Jurek v. Texas*,¹⁴ the defendant was convicted of murder in the course of committing and attempting to commit kidnapping and forcible rape. Under Texas law, a separate pre-sentence hearing was required to be held before the jury, at which one of the questions the jury must answer in the affirmative was whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury answered this question in the affirmative and the defendant was sentenced to death. The only testimony on the defendant's future dangerousness before the court was lay testimony. On *certiorari*, the Supreme Court affirmed. The main question in the case was whether this method of deciding upon a death penalty removed the death penalty from the category of "cruel and unusual punishment" under the Eighth and

13 99 S.Ct. 1861 (1979).
 14 428 U.S. 262 (1976).

Fourteenth Amendments, and a majority of the Court held that it did. However, seven justices of the Court also expressed the opinion that the question with regard to dangerousness was not so vague as to be meaningless merely because of the difficulty of predicting future criminal conduct. Stevens J. said:

"... the petitioner argues that it is impossible to predict future behaviour and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behaviour. The fact that such determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout the criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."¹⁵

4.28 In *Estelle v. Smith*,¹⁶ another Texas defendant was convicted of murder and sentenced to death after a sentencing hearing. At the hearing, a psychiatrist for the State who had conducted an examination of the accused testified that, among other things, the defendant was going to commit other similar criminal acts if given the opportunity to do so. On appeal to the United States District Court for the Northern District of Texas, the Court vacated the death sentence, and on *certiorari*, the Supreme Court affirmed. The reason for the invalidity of the death sentence in this case was that the defendant had not been advised that he had the right to remain silent at the pre-trial psychiatric examination or that any statement he made could be used against him, and thus his Fifth Amendment privilege had been violated. His Sixth Amendment right to the assistance of counsel was also violated since defence counsel were not notified in advance that the examination would encompass the issue of their client's future dangerousness. However, the Court referred with approval to its view of prediction in *Jurek v. Texas* as expressed in the quotation above, and went on to say that they were in "no sense disapproving the use of psychiatric testimony bearing on future dangerousness". It may be noted that the American Psychiatric Association had filed a brief as *amicus curiae* taking the view that clinical predictions relating to future violence are of very low reliability and that psychiatrists had no special qualifications in making such forecasts.

15 428 U.S. 275.

16 451 U.S. 454, 68 L. Ed. 2d 359.

4.29 In *Barefoot v. Estelle*,¹⁷ a defendant was convicted of capital murder in a Texas court and sentenced to death following a sentencing hearing. The jury had found that there was a "probability that the defendant would constitute a continuing threat to society". The State introduced into evidence the defendant's prior convictions and his reputation for lawlessness. The State also called two psychiatrists, who testified that the defendant would probably commit further acts of violence and represent a continuing threat to society, although they had not personally examined the defendant and gave their evidence in response to hypothetical questions. At the sentencing hearing, no evidence was offered by the defendant to contradict the evidence of these witnesses. One of the State's witnesses at trial testified that a psychiatrist could predict the future dangerousness of an individual if given enough background information. On appeal to the Texas Court of Appeals, the defendant argued that the use of psychiatrists in this regard was unconstitutional because psychiatrists are not competent to predict future dangerousness, and that their predictions are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments of the Constitution. He also argued that psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. The Court affirmed the conviction and sentence. A petition for *certiorari* to the Supreme Court was denied, and subsequently he lodged a petition for *habeas corpus* in the District Court for the Western Court of Texas. The District Court rejected the claims put forward by the defendant. It may be noted that at the District Court hearing, the two expert witnesses called by the State agreed that accurate predictions of future dangerousness can be made if enough information is provided. The defendant called two experts, one of whom criticised the diagnosis based on hypothetical questions, while the other said that psychiatric predictions of future dangerousness were wrong two out of three times. The defendant appealed to the Court of Appeals for the Fifth Circuit and then to the Supreme Court. The American Psychiatric Association supported the defendant's arguments in an *amicus* brief. In an opinion by White J., joined by Burger C.J., Powell, Rehnquist and O'Connor JJ., the Supreme Court affirmed the judgment of the District Court, and held that it had not been shown that psychiatric testimony regarding future dangerousness was almost entirely unreliable or that the fact-finder and adversarial system are not competent to test the competence of the testimony's shortcomings. It was proper to base such testimony on hypothetical questions and without the psychiatrists' personal examination of the defendant, and there was no due process violation on the basis that the doctors were permitted to give an opinion on the ultimate issue before the jury. White J. referred with approval to *Jurek v. Texas* and *Estelle v. Smith* and added:

"Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future

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463 U.S. 880 (1983).

behaviour are constantly made."¹⁸

4.30 White J. discussed the testimony given by the various experts in the case, and commenting on Monahan's study and conclusion,¹⁹ he said that although Monahan originally believed that it was impossible to predict violent behaviour, by the time he had finished his text he felt that there may be circumstances in which prediction is both empirically possible and ethically appropriate.

4.31 Blackmun J., joined by Brennan and Marshall JJ., dissented on the ground that psychiatric testimony regarding future dangerousness was too unreliable to be admissible as evidence.

4.32 The question of preventive detention was addressed in relation to juveniles on a number of occasions. At issue in a number of cases was a New York statute permitting pre-trial detention of juveniles on the basis that there was a serious risk that they might commit further offences before their return date. In *People ex rel Wayburn v. Schupf*,²⁰ the New York Court of Appeals rejected a challenge to the statute based on the argument that the statute was unconstitutionally vague because of the inability to predict future criminal behaviour accurately. The Court said that this element was necessarily present in bail, sentencing and parole decisions and any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or administrative body. Judge Fuchsberg, dissenting, agreed that the statute did not violate equal protection (between juveniles and adults), but took the view that the statute violated due process because it offered no criteria for determining which juveniles pose a serious risk of future crime. He said that the absence of such criteria was due to the fact that there are no criteria upon which accurate predictions of future crimes may be made. He concluded that choice among juveniles as to who is at risk and is not are essentially random and inexplicable. The same statute was challenged in the Federal Courts in *U.S. ex. rel Martin v. Strasburg*,²¹ where the United States District Court for the Southern District of New York held that while the statute did not violate equal protection, it violated due process: first, because it lacked guidelines and the judicial decision would be based on each judge's subjective views and bias and was therefore arbitrary, and second, after reviewing the results of a number of empirical studies of the prediction of dangerousness, because predictions could not be made accurately:

"Not only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of over-prediction, that is, to identify persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behaviour."²²

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At 898.

19

J. Monahan, *Predicting Violent Behaviour* (1981), discussed above in Chapter 3.

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39 N.Y. 2d 682.

21

513 F. Supp. 691 (SDNY 1981).

22

At 709.

4.33 In 1982, the Court of Appeals for the Second Circuit affirmed the District Court's decision on the ground that pre-trial detention under the New York statute was primarily "to impose punishment before adjudication of the alleged criminal acts".²³ The Court attached weight to statistics proffered by the juvenile appellants showing that the vast majority of juveniles detained under the statute either had their petitions dismissed before adjudication or were released after adjudication.

4.34 In 1984, however, the U.S. Supreme Court reversed this judgment in *Schall v. Martin*,²⁴ a *habeas corpus* class action challenging the New York statute on the basis of violation of the due process and equal protection clauses of the Fourteenth Amendment. The evidence, as in the previous case, showed that the vast majority of juveniles held under the statute either had their petitions ultimately dismissed or received a non-custodial disposition. The majority judgment, in designating the measure as regulatory, applied a two-prong test, whether the statute served a legitimate State objective and whether the procedural safeguards adequately protected the rights of the detainee. It held that the first prong was satisfied by reference to the State's legitimate interest and *parens patriae* power in both preventing crime and protecting juveniles and society from the consequences of their criminal activities. It also found the procedural safeguards adequate; detention was limited to seventeen days, the juvenile was given full notice of the charges and was given a hearing at which he was informed of his rights, he could be accompanied by a parent or guardian, he could be represented by counsel chosen by him or a law guardian assigned by the court, he could call witnesses and offer evidence, and probable cause had to be established to believe that the juvenile had committed the offence. In response to a claim that it was impossible to predict criminal behaviour, Rehnquist C.J., writing for the majority, said:

"From a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied on by appellees and the district 'that it is impossible to predict future behaviour and that the question is so vague as to be meaningless.'"²⁵

4.35 Marshall J. dissenting, criticised what he saw as a dilution and misapplication of the *Mendoza* test and said that due to 'overwhelming' evidence that even highly trained criminologists cannot accurately predict criminal behaviour, the New York statute did not meet its purpose of preventing crime.

4.36 These cases show a significant degree of divergence among judges on a

23 *Martin v. Strasburg* 689 F 2d 366 (2d Cir 1982).

24 487 U.S. 253 (1984).

25 At 278-9.

number of matters. Widely diverging views are offered on the issue of prediction in particular, some judges asserting that it is impossible to do accurately, others that prediction is a legitimate exercise. As to the *Federal Bail Reform Act, 1984* itself, although the Court of Appeals for the Second Circuit found s.3142(e) unconstitutional in *Salerno*, every other Court of Appeals that had considered it had upheld its constitutionality prior to the Supreme Court decision in *Salerno*.²⁶

*U.S. v. Salerno*²⁷

4.37 Salerno and Cafaro were arrested in 1986 after being charged in an indictment alleging various violations of the *Racketeer Influenced and Corrupt Organizations Act*, mail and wire fraud offences, extortion, and a number of criminal gambling violations. The RICO counts included fraud, extortion, gambling, and conspiracy to commit murder. At the detention hearing, the Government case was that Salerno was the boss of the Genovese Crime Family of La Cosa Nostra and that Cafaro was a captain in the family. According to the government's proffer, which was based in large part on conversations intercepted by a court-ordered wiretap, they had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses and offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterised the wiretap conversations as merely "tough talk".

4.38 Their detention was ordered by the District Court, and they appealed to the Court of Appeals for the Second Circuit, which vacated the order of the District Court and remanded the case for setting conditions of bail, holding that the Act violated the due process clause of the Fifth Amendment. On appeal to the Supreme Court, the Supreme Court granted the Government's petition for a writ of *certiorari* and reversed the judgment of the Court of Appeals. In an opinion by Rehnquist C.J. joined by White, Blackmun, Powell, O'Connor and Scalia JJ., a majority of the Court held that the contested provisions of the Bail Reform Act did not on their face violate substantive due process under the Fifth Amendment, procedural due process under the Fifth Amendment or the Eighth Amendment guarantee against excessive bail.

4.39 Rehnquist C.J. commenced by observing that a facial challenge to an Act is the most difficult challenge to mount successfully, because it must show that there are no circumstances in which the Act could be constitutional. In response

²⁶ *United States v. Walker* 805 F.2d 1042 (11th Cir. 1986); *United States v. Rodriguez* 803 F.2d 1102 (11th Cir. 1986); *United States v. Simpkins* 801 F.2d 520 (D.C. Cir. 1986); *United States v. Zannino* 798 F.2d 544 (1st Cir. 1986); *United States v. Perry* 788 F.2d 100 (3d Cir. 1986); *United States v. Portes* 786 F.2d 758 (7th Cir. 1985); *United States v. Hazzard* 598 F.Supp. 1442 (N.D. Ill. 1984).

²⁷ 481 U.S. 697 (1987).

to the respondent's argument that the Act imposed punishment before trial and therefore violated the due process guarantee, he acknowledged that substantive due process prevents the Government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. However, he held that the Act in question was regulatory and not punitive. The test of whether a restriction on liberty constitutes impermissible punishment or permissible regulation involves looking, first, to legislative intent, and thereafter, to:

"... whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it."

4.40 He continued:

"We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. ... Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. ... There is no doubt that preventing danger to the community is a legitimate regulatory goal. ... Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. ... The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. ... Moreover ... the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government. ... As in *Schall*, the statute at issue here requires that detainees be housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal'. We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."²⁸

4.41 The Chief Justice went on to say that the Court had repeatedly held that the government's interest in community safety can outweigh the individual's liberty interest in appropriate cases. He gave examples, including the detention of individuals believed to be dangerous in times of war or insurrection, the detention of dangerous aliens pending deportation proceedings, the detention of mentally unstable individuals who present a danger to the public, the detention of dangerous defendants who become incompetent to stand trial and the pre-trial detention of persons who present a risk of flight. He pointed out that the

respondents characterised all these cases "as exceptions to the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial". However, although he freely conceded such a general rule, he thought that these cases "show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterised as totally novel".²⁹

4.42 He then addressed the issue of procedural due process, holding that the extensive safeguards in the Act were even more exacting than those in *Schall*. Regarding prediction he said:

"... as we stated in *Schall*, there is nothing inherently unattainable about a prediction of future criminal conduct."

4.43 The Chief Justice then turned to the excessive bail clause, which the respondents had contended granted them a right to bail grounded solely upon considerations of flight and threats to judicial process by intimidation of witnesses, because these matters related to the function of ensuring the integrity of the judicial process. He rejected this argument:

"While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."³⁰

and

"Nothing in the text of the Bail Clause limits permissible government considerations solely to questions of flight."³¹

4.44 In a vigorous dissent, Marshall J. opened by saying:

"This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of

29 481 U.S. 697 at 710 (1987).
30 481 U.S. 697 at 712-3 (1987).
31 481 U.S. 697 at 713 (1987).

governmental interference in the Bill of Rights."³²

4.45 Marshall J. commenced his argument by raising a serious question as to whether the cases of Salerno and Cafaro presented issues. The issue of pre-trial detention in respect of Salerno had effectively become moot when he was convicted in 1986 after a jury trial on other charges, for which he was sentenced to one hundred years imprisonment. The District Judge, Marshall J. felt, had artificially kept the present matter alive by releasing him on bail pending appeal, with the Government's consent, despite having just sentenced him to one hundred years imprisonment. Meanwhile, Cafaro became a co-operating witness and was released, ostensibly temporarily for medical care and treatment, with the Government's consent. These facts, he thought, raised a substantial question as to the Court's jurisdiction as it was far from clear that there was an actual controversy between the parties.

4.46 Marshall J. proceeded to attack the majority's analysis of due process. According to their test, if Congress determined after investigation that a large proportion of violent crime was committed by unemployed persons after dark and chose to impose a dusk to dawn curfew on the unemployed, the majority would find that this was a legitimate regulatory non-punitive measure. This ludicrous result, he said, resulted from the majority's:

"... cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple; merely redefine any measure which is claimed to be punishment as 'regulation', and magically, the Constitution no longer prohibits its imposition."³³

4.47 He also criticised the majority's view on the excessive bail clause:

"If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the magistrate sets bail at \$1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter."³⁴

4.48 Marshall J. felt that the ultimate irony was that the essence of the case was something to which the majority did not refer, namely the presumption of innocence. He gave the example of a defendant indicted, shown to be dangerous and detained, but ultimately acquitted at trial. The Government in such a case would clearly not be permitted to detain him based on the showing of dangerousness alone, which illustrates that the indictment is being taken as proof of guilt. However, the presumption of innocence declares that he is as innocent

32 481 U.S. 697 at 714 (1987).

33 481 U.S. 697 at 717 (1987).

34 *Ibid.*

on the morning of trial as on the morning after his acquittal. Marshall J. says that the conclusion is inescapable that the indictment has been turned into evidence that the defendant is guilty of the crime charged, and if left to his own devices, he will soon be guilty of something else. He discussed the legal import of the indictment further. It establishes probable cause that the accused committed the offence and from this flows the power to try, which in turn gives rise to the power to assure that the processes of justice will not be evaded or obstructed. However, preventive detention to prevent the commission of further offences bears no relation to the power to try, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment. Marshall J. concluded:

"Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the short-cuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."³⁵

4.49 Stevens J. also dissented, expressing the view that there might be times when the Government's interest in protecting the safety of the community would justify the brief detention of a person who had not committed any crime, but that the provision of the Act which allowed pre-trial detention on the basis of future dangerousness to the community was unconstitutional.

4.50 It is noteworthy that the majority of the Supreme Court in *Salerno* placed reliance on the procedural safeguards in finding that the Act was not unconstitutional. In this regard, a more recent Supreme Court decision seems to suggest that failure to observe the procedural safeguards will not necessarily result in the invalidity of the detention. It may be that the decision is limited either to its facts or the particular safeguard in question - the requirement to hold a hearing at first appearance - but it may illustrate that the procedural safeguards will not be stringently enforced. In *U.S. v. Montalvo-Murillo*,³⁶ a magistrate in New Mexico failed to hold a hearing at the defendant's first appearance before him because the pre-trial services report was not ready. There had been some delay because the accused had been brought from New Mexico to Illinois, and then back to New Mexico. The magistrate decided to order the release of the accused on certain conditions. The prosecutor appealed to the District Court, which refused to order the accused's detention on the basis that the hearing had not been held upon his first appearance as required by s.3142(f) of the Bail Reform Act, although it found that he would have been a candidate for detention. The Court of Appeals for the Tenth Circuit affirmed, but the Supreme Court reversed, holding that the failure to comply with the section did not entitle him to pre-trial release, because nothing in the section indicated that compliance with the first appearance requirement was a condition

35 481 U.S. 697 at 721 (1987).

36 495 U.S. 711.

precedent for the hearing. Automatic release would contravene the object of the Act, which is to provide fair bail procedures while protecting the safety of the public and assuring the defendant's appearance at trial. The Court said that where there were circumstances involving several districts, which contributed to a missed deadline for which no real blame could be fixed, there was no reason to bestow a windfall on the defendant and visit upon the Government and citizens a severe penalty by releasing him every time a minor deviation from the Act occurred. The detention in this case was harmless, because if the hearing had been held earlier, he would have been detained. Stevens J., joined by Brennan and Marshall JJ., dissented, saying that the magnitude of the injury inflicted by pre-trial detention requires adherence to strict procedural safeguards that cannot be sacrificed in the name of community safety.

Use Of Preventive Detention Under The Bail Reform Act, 1984

4.51 At the time of the enactment of the *Bail Reform Act, 1984*, Congress appears to have thought that the power to detain dangerous defendants before trial would be sparingly used. Research has since been conducted into the use of pre-trial detention generally, and detention of dangerous defendants particularly, to test whether this is the case.³⁷ This research shows that detention ordered wholly or partly on the basis of danger as a percentage of all detentions ordered after hearing in all districts of the eleven circuits was as follows:

- in the period January 1, 1987-June 30, 1987: 43%
- in the period July 1, 1987-December 31, 1987: 48%
- in the period January 1, 1988-June 30, 1988: 50%
- in the period July 1, 1988-December 31, 1988: 52%

4.52 Scott cites a study undertaken by a professor from the sociology department at California State University in conjunction with the Federal Pretrial Services Agency of the Eastern District of California, which examined a sample of cases initiated between July 11, 1983 and June 30, 1986 and found that overall rates of detention had not increased since the Act (attributed to the use of *sub rosa* detention prior to it) and that rates of pre-trial flight and crime had not been affected by the Act. Scott also examines the results of a General Accounting Office report on the operation of the Bail Act in four judicial districts (Northern Indiana, Arizona, Southern Florida, Eastern New York), using samples of cases from before and after the Act. This study showed that more defendants are detained under the new Act although fewer are detained because of their inability to meet surety or cash bonds, that the use of the statutory presumptions varied significantly by district and that Government prosecutors sought detention in only 39% of cases where the presumption was available, that

37 See T.E. Scott, '*Pretrial Detention under the Bail Reform Act of 1984: An Empirical Analysis*', (1988) 27 Am. Crim. L. Rev. 1-51, drawing on information from the Administrative Office of the U.S. Courts, the U.S. General Accounting Office (Criminal Bail; How Bail Reform is Working in Selected District Courts (1987)), and Bureau of Justice Statistics (Pretrial Release and Detention: The Bail Reform Act of 1984 (1988)).

rates of failure to appear and crime on pre-trial release, already low under the old Act, were even lower under the new Act³⁸ and that offences on bail were mostly of a less serious nature, consisting of misdemeanours in more than half the cases, and most frequently, driving offences.

4.53 Scott summarises the conclusions from the various sources as being that detentions are being ordered on a large scale, that fewer defendants are being held under cash bonds (which seems to show that *sub rosa* detention has successfully been brought out into the open), that there is an increase in the number of defendants being detained prior to trial, but that detention requests vary widely by district.

Criticisms Of Salerno

4.54 While the decision of the Supreme Court in *Salerno* has established that the constitutionality of the Federal *Bail Reform Act, 1984* is no longer in doubt, the Act is still far from being an accepted feature of the United States legal landscape. The decision prompted widespread comment and trenchant criticism on a number of grounds. Moreover, as the decision concerned the "facial" constitutionality of the Act, i.e. whether it could be said that in no circumstances would it be constitutional, future challenges to the Act in its application in particular situations are still possible. Many commentators have focused on aspects of the Act which might yet be struck down or situations in which the operation of the Act might be unconstitutional.

4.55 Others feel that the decision was simply wrong, contrary to precedent and principle and sacrificed individual rights to expediency. In this section, we look at some of the major criticisms of the *Salerno* decision as expressed by United States lawyers. Some of these go to the heart of the concept of preventive detention *per se*, and are therefore more directly relevant to the purpose of this Paper. Others concern particular features of the Bail Act and the *Salerno* decision which are not necessarily and inevitably linked with preventive detention; they have been included as they are instructive not only of the present climate of United States opinion but also as to how a preventive detention statute should operate, should it be introduced, to avoid some obvious defects.

1. The Analysis Of Punishment And Regulation

4.56 Critics have focused on the characterisation of the preventive detention provision of the Federal Bail Reform Act as a regulatory rather than a punitive measure. The reader will recall that in *Kennedy v. Mendoza*,³⁹ the Supreme Court laid down an eight-pronged test for determining the distinction between

38 The rate of failure to appear was 2.1% under the old Act and 1.8% under the new Act, although two of the four districts had higher failure to appear rates under the new Act. The rate of rearrested defendants on bail was 1.8% under the old Act and 0.8% under the new Act, although again two of the four districts had higher rearrest rates after the Act.

39 372 U.S. 144 (1963).

a regulatory and a punitive measure. This extensive test was reduced in *Bell v. Wolfish*⁴⁰ to a consideration of three factors, and this reduced test was applied in *Salerno*. Critics have said that this involves a fundamental and dramatic shift in the test, with the result that an examination of the impugned measure's objective criteria has been abandoned and the Court now merely contents itself with examining subjective congressional intent.⁴¹ Crucially, the effect of the impugned measure on the defendant is no longer a relevant consideration under the revised test. Some writers have applied the original eight-pronged test to the preventive detention provision to see if the outcome would have been different, and have concluded that it satisfies most or all the criteria of a punitive measure. For example, Eason⁴² says that preventive detention is clearly "an affirmative disability or restraint"; that historically imprisonment has always been regarded as punishment; that it comes into play only on a finding of *scienter* because it is based on an assessment of future dangerousness, that it promotes the aims of punishment (retribution because the defendant's rights are forfeited by reason of his past conduct, and deterrence because it incapacitates the defendants and creates a threat of similar extended detention for other offenders); that the conditions upon which the detention decision is made (past conduct, feared future endangerment of the community) are crimes; and that even assuming there is a rational connection between the measure and its purpose, it is excessive because of the evidence that judges are likely to be poor predictors of criminal behaviour. One writer says that the new test is no test at all and merely "a euphemistic device",⁴³ while another has said that the new test so completely disregards the deterrent aspect of preventive detention and the disabilities it imposes, that it is questionable whether any regulation enacted to serve a compelling government purpose would be characterised as punitive.⁴⁴

4.57 The way in which the reduced test was introduced has been found objectionable. It has been said that this dramatic revision of the test was achieved without reference to precedent or logic, and without even acknowledging the revision.⁴⁵ Another writer takes issue with the examples relied on by the Chief Justice to demonstrate the regulatory power of Congress. For example, the Chief Justice relies on cases concerning the executive war power, although the present domestic peace-time context is quite different. He also relies on cases in which there was a combination of police power and *parens patriae* including *Schall v. Martin*,⁴⁶ and as the writer comments:

"... not only were the above statutory detentions upheld on the basis of both the police power and *parens patriae* power, it was the exercise of

40 99 S.Ct. 1861 (1979).

41 M. Eason, 'Eighth Amendment: Preventive Detention - What will become of the Innocent?' (1988) 78 J. Crim. Law and Criminology 1048-1079; M.G. Styers, 'United States v. Salerno: Pretrial Detention Seen Through the Looking Glass', (1988) 88 North Carolina Law Review, 816-30; M.E. Lupo, 'United States v. Salerno: A Loaded Weapon Ready for the Hand', (1988) 54 Brooklyn Law Review, 171-227.

42 M. Eason, *op cit.*

43 D.W. Price, 'Crime and Regulation: United States v. Salerno', (1988) 48 Louisiana Law Review 743 at 754.

44 M.E. Lupo, *op cit.*

45 M. Eason, *op cit.*, p.1063.

46 467, U.S. 253 (1984).

the *parens patriae* power which distinguished the statutes in question from punishment."⁴⁷

4.58 Eason takes the view that the point of the Chief Justice's discussion is more rhetorical than legal, and that the Chief Justice seeks not to define the regulatory power, but rather to persuade the audience that the detention here can hardly be characterised as novel. Moreover even the supposed balancing between the Government and the individual interest is spurious, as the Chief Justice spends considerably more time on the Government interest. This writer concludes:

"*Salerno* may be interpreted as establishing three broad principles. First, it has broadly defined 'regulation' so that, as a classification, almost any statute which appears to be punitive can be interpreted as a regulation constitutionally adequate under the Fifth Amendment. Second, the Supreme Court has recognised and endorsed a broad congressional regulatory authority which rests solely upon the federal police power. Third, the Supreme Court has not identified any meaningful limitations upon the exercise of this power by the due process clause or the interrelated protections of the Bill of Rights."⁴⁸

2. *The Presumption Of Innocence*

4.59 The reader will recall that in *Salerno*, the Chief Justice asserted that the presumption of innocence has no application at the pre-trial stage. This in turn was derived from a similar assertion in *Bell v. Wolfish*,⁴⁹ where the presumption of innocence was characterised as a rule of procedure relating to the burden of proof at criminal trial. This aspect of the decision in *Salerno* has been strongly criticised.⁵⁰ Price points out that the authority relied on by the Chief Justice for this assertion arose in the context of detainees challenging conditions of pre-trial confinement, not the fact of confinement itself.⁵¹ Natali and Ohlbaum say that the linkage of the presumption of innocence and the right to bail has always been considered to reflect a strong philosophical difference between the accusatorial and inquisitorial systems of criminal justice, and find discussion of this "alarmingly absent" from the majority's judgment in *Salerno*.⁵² They suggest that this breaks with United States legal tradition, as exemplified in *Coffin v. U.S.*,⁵³ where the Supreme Court said that:

"... the principle that there is a presumption of innocence in favour of

47 M. Eason, *op cit.*, at 1219.

48 M. Eason, *op cit.*, at 1226.

49 99 S.Ct. 1861 (1979).

50 M.G. Styers, 'United States v. Salerno: Pretrial Detention Seen Through the Looking Glass', (1988) 66 North Carolina Law Review 616-30; D.W. Price, 'Crime and Regulation: United States v. Salerno', (1988) 48 Louisiana Law Review 743 at 754; L.M. Natali and E.D. Ohlbaum, 'Redrafting the Due Process Model: The Preventive Detention Blueprint', (1989) 62 Temple Law Review, 1225-1260; Eason, *op cit.*

51 D.W. Price, *op cit.*

52 L.M. Natali and E.D. Ohlbaum, *op cit.*

53 156 U.S. 432 (1895).

the accused lies in the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."⁵⁴

4.60 In *Stack v. Boyle*,⁵⁵ the Supreme Court explicitly linked the right to bail and presumption of innocence:

"From the passage of the Judiciary Act of 1789 ... to the present Federal Rules of Criminal Procedure ... federal law has unequivocally provided that a person arrested for a non-capital offence shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defence and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."⁵⁶

4.61 Perhaps the most powerful criticism of all on this aspect of the majority decision is the dissent of Marshall J. in *Salerno* itself, whose judgment recoils at the fact that the majority did not see the presumption of innocence as at the heart of the case.

3. *Lack Of Ability To Predict*

4.62 Judicial and non-judicial comment contain numerous references to our inability to predict future criminal behaviour or criminal dangerousness with any acceptable degree of accuracy. In *Salerno*, as in *Schall* before it, the Supreme Court simply refused to accept the empirical evidence on this issue and indeed characterised it not as an empirical matter, but something, which "from a legal point of view" was possible.⁵⁷ This aspect of the Supreme Court's views has been repeatedly criticised. Also criticised is the Chief Justice's reference to other areas where predictions are relied on, none of which, as commentators are quick to point out, concerned pre-trial assessments of dangerousness in relation to a competent adult.⁵⁸ Two important differences are therefore relevant: first, one of the important factors upon which the assessment is made is quite different - the person has been convicted rather than merely charged - and second, the trial process sifts through the material relied on in a thorough and rigorous way, a feature which is absent from pre-trial detention procedures, particularly when presumptions are employed. One writer points to the policy considerations underlying the Court's attitude to prediction, made explicit in *Barefoot v.*

54 At 453.

55 342 U.S. 1 (1951).

56 At 4.

57 See the comment of Rehnquist C.J. in *Schall v. Martin*, above at p.82.

58 See M.E. Lupo, "United States v. Salerno: A Loaded Weapon Ready for the Hand", (1988) 54 Brooklyn Law Review 171-227; S.M. Marcella, "When Preventive Detention is (still) unconstitutional: the invalidity of the presumption in the 1984 Federal Bail Statute", (1988) 81 Southern California Law Review 1091-124; C.P. Ewing, "Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass", (1985) 34 Buffalo Law Review 173-226.

Estelle,⁵⁹ namely that a rejection of prediction in one area would cast doubt on a practice which is widespread in the criminal justice system. Irish readers may find echoes of Lord Denning's "appalling vista" statement in this view. The writer comments:

"Not only did the Court hold that predictions of criminal conduct (even those made on the basis of scant information in a relatively non-adversary context) may be used as the basis for incarcerating individuals who have merely been charged with crimes, but it did so in a way which signals that the use of such predictions in legal decision-making is now beyond empirical challenge."⁶⁰

4. *The Length Of Detention*

4.63 At the time of the enactment of the *Bail Act, 1984*, Congress chose not to insert any definite time limits for pre-trial detention (unlike the District of Columbia Act) and instead took the view that speedy trials legislation would provide sufficient safeguard against excessively lengthy detention. At present, the *Speedy Trials Act, 1988* creates a time limit of 90 days, but there are specific exclusion periods as well as a catch-all provision which permits the court to consider whether "the ends of justice served by [granting continuances] outweigh the best interests of the public and the defendant in a speedy trial". It seems clear that the framers of the legislation did not anticipate pre-trial detention to exceed 90 days. An attempt was made to introduce a 60 day limit, which was defeated upon Congress being persuaded that the 90 day limit would rarely be exceeded.

4.64 This aspect of the Bail Act is now hotly debated, particularly as research now shows that the time limits are frequently exceeded.⁶¹ Moreover, following the Supreme Court's decision that the Act is facially constitutional, it is felt that this area is one in which there is potential for particular applications of the Act to be struck down as unconstitutional. Courts and commentators alike have taken the view that, even on the assumption that the Act itself is constitutional, there may come a point after which a certain length of detention becomes unconstitutional in a particular case. For example, in *U.S. v. Melendez-Carrion*,⁶² two defendants indicted with fifteen others for bank robbery were facing a delay in trial of 2-3 years because of the number of defendants and the length of time required to transcribe hundreds of tapes of intercepted conversations in Spanish. The Court held that the detention of eight months which had already occurred was unconstitutional.

59 See above at p.93.

60 Ewing, *op cit.*, at p.211.

61 See A.W. Alschuler, "Preventive Pretrial Detention and the failure of interest-balancing approaches to due process", (1986) 85 Michigan Law Review 510-69. It seems that in complex cases, detention over a year is not unusual. See also T.E. Scott, "Pretrial Detention under the Bail Reform Act of 1984: an Empirical Analysis", (1989) 27 American Criminal Law Review 1-51, which says that the period ending Dec. 31 1988, 50% of all detainee cases took over 120 days to close and over 20% took over six months.

62 790 F 2d 984 (2d Cir. 1986).

4.65 At present, courts decide what is excessive and therefore unconstitutional on a case by case basis, with widely varying results. For example, in contrast to *Melendez-Carrion*, in *U.S. v. Zannino*,⁶³ a defendant indicted with six co-defendants in a multi-count indictment had already been detained for sixteen months and had suffered cardiac arrest two months after being detained; however, the Court ruled that further detention was permissible. The Tenth Circuit has held a four month detention unconstitutional;⁶⁴ the Ninth Circuit, a ten month detention constitutional;⁶⁵ the First Circuit, a sixteen month constitutional;⁶⁶ and the Second Circuit, a four month detention unconstitutional.⁶⁷

4.66 The courts employ different tests for approaching the issue of excessive detention. The Second Circuit in *Melendez-Carrion*⁶⁸ employed a three-fold test relating to:

- (1) the length of detention and the non-speculative aspects of future detention;
- (2) the extent to which the prosecution bears responsibility for the delay; and
- (3) the facts concerning risk of flight.

4.67 The Third Circuit has said that a court should look at factors relevant in the initial detention decision such as seriousness of charges, the strength of the government's proof that the defendant poses a risk of flight or danger, the strength of the government's case on the merits, the length of detention that has in fact occurred, the complexity of the case, and whether the strategy of one side has added needlessly to that complexity.⁶⁹ Eason suggests that many of these factors, while relevant to the initial decision to detain, are irrelevant to the quite different question of whether the length of detention has become excessive.⁷⁰

4.68 As a result of these variations, some writers take the view that this case by case approach needs to be replaced with a "bright-line" approach, where a particular length of detention would be characterised as the limit, only to be extended after a rigorous, adversarial, hearing with more stringent safeguards than at the original detention hearing.⁷¹ Eason says that:

"... [the] case by case method has resulted in gross inconsistencies among

63 798 F 2d 544 (1st Cir. 1986).
 64 *U.S. v. Theron* 782 F 2d 1510 (10th Cir. 1986).
 65 *U.S. v. Gelfuso* 838 F 2d 358 at 359.
 66 *U.S. v. Zannino* 798 F 2d 547 at 549.
 67 *U.S. v. Gonzalez-Claudio* 806 F 2d 343.
 68 790 F 2d 984 (2d Cir. 1986).
 69 *U.S. v. Accetturo* 783 F. 2d.
 70 See the articles cited at footnote 41 *supra*.
 71 Eason, *op cit*. See also Scott, *op cit*.

the federal circuit courts. Although the requirements of due process are flexible and vary with the situation, it is fundamentally unfair for accused persons in one circuit to be 'regulated' longer than similarly accused persons in other circuits."⁷²

4.69 Moreover, the court time employed in ruling on such motions deprives judges of time which could be devoted to trials, thereby increasing the delays for detainees in general. The effect of the bright-line approach would not only be increased fairness to the defendant, but would also encourage the government to seek detention only when it has substantially prepared its case for trial, which might curtail use of such detention to some extent - a result which is arguably more in tune with what was anticipated by Congress than the present position.

5. *The Presumptions*

4.70 There are two situations in which there is a reversal of the burden of proof under the *Bail Reform Act, 1984*. Presumptions are a difficult and complex area of law, and there are two main problems in evaluating a statutory presumption:

- (1) what is its effect - does it shift the burden of persuasion or of production (the "evidential burden"); what is sufficient to rebut?
- (2) what test is used to evaluate the constitutional validity of a particular presumption, given that different tests may be used to determine the validity of different types of presumption?

4.71 We will not examine the detailed arguments put forward in the United States concerning the presumptions in the *Bail Reform Act* for a number of reasons:

- (1) Commentators appear to agree that the effect of the presumptions is not entirely clear;
- (2) Commentators appear to agree that it is difficult to know what test of validity would be applied given the difficulty in (1);
- (3) It follows from (1) and (2) that the possible outcomes are too numerous to review here;
- (4) Constitutional considerations attending presumptions in the United States are not necessarily identical with those relevant in Ireland;
- (5) It seems unlikely that a reverse onus provision would be contemplated in the near future in this country, given that preventive detention itself

72 Eason, *op cit.*, at p.1075.

is such a controversial concept.

4.72 Nonetheless, it is worth noting that some United States writers are of the view that, even if the presumptions in question shift the burden of production (the evidential burden) only, it is not at all clear that the presumptions in question would satisfy constitutional requirements of due process. Central to this view is the empirical evidence showing a low rate of ability to predict future criminal behaviour, which makes it difficult to see how presumed facts may permissibly be deduced from certain other facts, even on the lowest "rational connection" test. Moreover, at least one writer suggests that in practice it is possible to identify situations where the practical effect given to the presumption is to shift the burden of persuasion or to treat it as conclusive, as distinct from simply shifting the burden of production.⁷³ For example, in *U.S. v. Suppa*,⁷⁴ the evidence against the defendant, who was facing narcotics charges, consisted of the indictment, his criminal record, evidence that he was currently on bail for a charge in another jurisdiction, a government proffer that a single eye-witness would testify at the trial, and his lack of employment. The defendant wanted to call an FBI agent present in the courtroom for examination but the magistrate refused to permit this. The defendant then proffered that he had been married 27 years, had six children, had a long term residence and had never run from any charge against him, that he did not commit the crime and had never threatened anybody, that apart from the other pending charges, his last charges were 13 years ago, that co-defendants would testify that he participated in no wrongdoing, that there would be testimony discrediting the reliability of the government's eyewitness, and that he had affidavits from persons offering to post property as collateral for his release and character witnesses. It was held that he had failed to rebut the presumption of dangerousness and his detention was ordered. The Court said that even if he had rebutted, the government's proffer coupled with a charge of a crime committed while on bail established clear and convincing evidence of danger. The Third Circuit affirmed. In *U.S. v. Adipietro*,⁷⁵ a narcotics defendant relied on a pre-trial services report which indicated that he had no prior criminal record, owned a home, was employed, had strong family ties, and relatives willing to post a \$100,000 secured bond. In holding that he failed to rebut the statutory presumption, the District Court said that the pre-trial services report was vague, conclusory, and biased in favour of the defendant and that strong evidence existed that he had committed the crime. On the basis of these and other cases, Harwin argues that the defendant needs to do more than simply provide some evidence that he is not a danger and must go much further and show that he did not commit the crime and that he is not a danger to the community. Harwin also relies on cases where the court expressly held that the defendant had rebutted the presumption but went on to rely on the weight of the presumption to hold that the government had proven by clear and convincing evidence that he was a danger.⁷⁶ He says that the effective operation of the

73 M. Harwin, "Detaining for Danger under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof", (1993) 35 *Arizona Law Review* 1091-1122.

74 799 F. 2d 115 (3d Cir. 1986).

75 773 F. Supp. 1270 (W.D. Mo. 1991).

76 *U.S. v. Ferguson* 721 F. Supp. 128 N.D. Tex. 1989.

presumption, when combined with lax procedural safeguards, places intolerable burdens on the defendant and makes it virtually impossible to escape detention in the presumption cases.

6. *Procedural Safeguards*

4.73 It will be recalled that Chief Justice Rehnquist relied on a number of safeguards in the Act in upholding its constitutionality. Lupo examines the Chief Justice's arguments in *Salerno* and finds them brief and superficial.⁷⁷ For example, the Chief Justice says that the statute prescribes detention for only the most serious of crimes, but in fact the vagueness of the definition of crime of violence could include a person "tipping over garbage cans or receiving pornography".⁷⁸ The Chief Justice mentions speedy trials legislation as a limit on the length of pre-trial detention, without any regard to the fact that the exceptions to the prescribed periods significantly detract from its impact, and he lays emphasis on the requirement that detainees be housed separately, although "housing is simply a euphemism for 'jailed'"⁷⁹ and the qualification "to the extent practicable" destroys the obligation in any event.

4.74 The Act provides that there must be probable cause to believe that the defendant committed the offence charged. However, critics say that this is empty of protection because the indictment itself has been construed as probable cause to believe the defendant committed the offence.⁸⁰ In contrast, the earlier District of Columbia legislation had allowed detention only when at the conclusion of an adversarial hearing a trial judge found a "substantial probability" that the defendant had committed the offence charged, which had been construed to mean a standard higher than probable cause. Alschuler notes that at the time of the enactment of the 1984 Act, the standard of proof was lowered in response to the views of Justice Department lawyers who said that it was too difficult to meet. Alschuler takes the view that the burden of proof issue here is important, because it is the presence of the charge which makes the difference between schemes for the internment of anyone thought dangerous and pre-trial preventive detention. Accordingly, the burden of proof should be reasonably high. Alschuler finds it ironic that the standard of proof is lower here than that for obtaining a preliminary injunction at civil proceedings.⁸¹

4.75 Harwin provides a critical account of the procedural safeguards as interpreted in practice. First, many magistrates, authorised to conduct detention hearings, are not trained lawyers and hearings last an average of ten minutes in

77 Lupo, *op cit.*

78 M.E. Lupo, *op cit.*, at p.211.

79 M.E. Lupo, *op cit.*, at p.213.

80 Eason, *op cit.*; J.B. Howard, "The trial of pre-trial dangerousness; preventive detention after U.S. v Salerno", (1989) 75 Virginia Law Review 639-679.

81 A.W. Alschuler, *op cit.* The civil injunction standard was argued for by Attorney General John Mitchell at the time of the District of Columbia Bill. Alschuler observes that while a comparison between civil injunction proceedings and criminal proceedings might be thought objectionable, equivalence would now be an improvement for the pre-trial detainees.

larger districts and slightly longer in smaller districts.⁸² Moreover, hearings have evolved into a simplified extended government and defendant proffer, although the Act does not expressly permit the government to proceed by way of proffer. At least seven circuits have permitted government proffer. Moreover, at least three circuits have held that where the government proceeds by way of proffer and presents no witnesses, the defendant has no procedural right to rebut the evidence through cross examination of the government agent or informant or witness who ostensibly provided such evidence. Several courts have held that where the government shows that it needs to keep certain information confidential, it may present evidence *in camera* and the defendant must ask the judge questions, who then poses them to secret witnesses *in camera*. A number of courts have held that the government may meet its burden at the detention hearing with evidence that is later found to be inaccurate or subject to suppression as illegally obtained. Harwin points out that given the procedural advantages offered to the prosecution, the defendant may in practical terms be compelled to testify, which brings him into a difficult position regarding the present charge. At least two circuits have refused to grant "use fruits" immunity to the defendant at a detention hearing (i.e. immunity against the use of illegally obtained evidence). Accordingly, the defendant may be faced with the choice of electing to testify without immunity rather than risking pre-trial detention, which may be a constitutionally impermissible, compelled election.

4.76 However, perhaps the most devastating critique of procedural safeguards is provided by a writer who points out that no procedural safeguards of any kind could remedy the inability to predict, as the prediction studies which have yielded high rates of false positives already had important safeguards built into their research design.⁸³

7. *Contrary To System Of Justice*

4.77 At least one commentator has criticised preventive detention on the basis that it is incompatible with the fundamental notions of criminal justice, which are related to the notions of choice and autonomy.⁸⁴ In simple terms, a person must be given the opportunity to conform to or break the law, and preventive detention breaches that principle. This writer looks at an aspect of the Second Circuit's decision in *Salerno* to support this view, where it said that the concept of due process in the Fifth Amendment envisaged a system which is based on:

"... announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the

82 M. Harwin, *op cit.*

83 C.P. Ewing, *op cit.*

84 'Preventive Detention: A Constitutional but ineffective means of fighting pretrial crime', (1986) 77 J. of Crim. Law and Criminology 439-78.

constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as a regulation of those feared likely to commit future crimes."⁸⁵

4.78 Other arguments have also been raised and some of these relate specifically to features of the United States Constitution, such as whether the excessive bail clause simply prohibits excessive bail or also imports a right to bail in non-capital cases, or the particular wording of the 1984 Act, such as the argument that the concept of dangerousness is inadequately defined. These will not be further pursued here. It will be apparent that despite the fact that the United States currently endorses the concept of preventive detention at state and federal, judicial and legislative levels, its legitimacy is questioned severely in several quarters.

CANADA

Introduction

4.79 Prior to Confederation, the law of bail in Canada resembled the early English position whereby bail was a matter of right with respect to misdemeanours but discretionary for felonies. As part of its first criminal legislation in 1869, the Federal Government made bail discretionary for all offences. This broad statutory discretion persisted for over a hundred years in subsequent pieces of criminal legislation until the enactment of the *Bail Reform Act* in 1972. Until the enactment of that statute, the criteria according to which bail could be granted or refused were laid down in case-law. As in other countries, originally the sole criterion according to which bail could be granted or refused was the likelihood of the accused's attendance at subsequent court appearances. Factors such as the seriousness of the offence, the severity of the penalty, the strength of the evidence, and the accused's character and standing in the community were deemed to be relevant to this central question.

4.80 Towards the middle of this century, following the lead of such English decisions as *R. v. Phillips*,⁸⁶ *R. v. Pegg*,⁸⁷ *R. v. Wharton*,⁸⁸ and *R. v. Gentry*,⁸⁹ (discussed in the section on English law), Canadian courts began to recognize explicitly that bail could be denied in order to prevent the accused from committing further offences. In *R. v. Samuelson*,⁹⁰ an attempt by the Crown to rely on *R. v. Phillips* was rejected. The two accused were charged with breaking, entering and theft, and both had records for similar offences. The Crown relied on *Phillips* to support its view that the accused ought to be detained to prevent the commission of further offences. The Newfoundland Supreme Court strongly

85 *United States v. Salerno* 794 F. 2d at 72.

86 (1947) 32 Cr. App. R. 47.

87 [1955] Crim. L.R. 308.

88 [1955] Crim. L.R. 120.

89 [1956] Crim. L.R. 120.

90 (1953) 109 C.C.C. 253.

rejected this argument, saying that it suggested a meaning and purpose alien to the whole process of arrest and bail, namely prevention of crime. However, ten years later, in *Rodway v. R.*,⁹¹ Monnin J. said that while bail is not punitive and is to ensure the attendance of the accused at trial, the courts could legitimately be concerned with the protection of the general public as well as with the rights of individuals. *Rodway* concerned breaking and entering, but this broader principle was subsequently accepted in relation to other cases.⁹²

4.81 Meanwhile, concerns similar to those which had arisen in the United States began to emerge. An influential study was carried out by Professor Martin Friedland into bail procedures in the Toronto Magistrates' Court,⁹³ in which he concluded that the existing procedures for compelling the attendance of accused persons in court resulted in the detention of many whose attendance could have been secured by less intrusive means, which raised questions about the fairness of reliance on advance security as a condition of bail. Another important finding of this study was that an accused detained before trial was more likely to be convicted and to receive a custodial sentence than a similarly placed defendant who had been granted bail. Professor Friedland's study was followed by two significant reports on bail, one by the Royal Commission (Ontario)⁹⁴ and the other by the Canadian Committee on Corrections in 1969,⁹⁵ both of which recommended significant changes in the law of bail. These initiatives led ultimately to the enactment of the *Bail Reform Act, 1972*. It seems, therefore, that concerns about unfair bail practices and the desire for preventive detention, which occurred in two successive waves in the United States, merged to produce a general movement towards bail reform around the same period in Canada.

The Bail Reform Act, 1972

4.82 The Bail Reform Act, 1972 changed the title of the power to grant bail to the new name of "judicial interim release". It conferred new powers of release on the police, created new forms of release for the courts, restricted the use of cash deposits, and introduced new rules for bail hearings and procedures regarding bail reviews. Most importantly, it introduced two legislative grounds for determining the accused's suitability for release; the primary ground, which concerned his attendance at trial, and a secondary ground, which concerned the issue of public safety. Moreover, amendments effected by the *Criminal Law Amendment Act, 1975* expanded the scope of the secondary ground and shifted the onus of proof on to the accused in a number of situations.

4.83 The Bail Reform Act provisions are now contained in s.515 of the

91 (1964) 44 C.R. 327.

92 *R. v. Travers* (1963) 42 C.R. 32 (Que. Q.B.) (assault causing bodily harm); *R. v. Lagus* (1964) 42 C.R. 288 (Sask. Q.B.) (theft); *R. v. Wing* [1964] 3 C.C.C. 102 (B.C. Co. Ct.); *R. v. Moses* [1969] 4 C.C.C. 307 (N.W.T. Terr. Ct.) (non-capital murder); *R. v. McKinney* (1963) 40 C.R. 137 (Sask. Q.B.) (breaking and entering and theft); *R. v. Binns* [1968] 2 C.C.C. 323 (B.C.S.C.) (assault causing bodily harm).

93 M. Friedland, *Detention before Trial: A Study of Cases tried in the Toronto Magistrates Courts*, 1965.

94 Royal Commission (Ontario), *Inquiry into Civil Rights* (1968), vol. 2, chairman Chief Justice McRuer.

95 *Towards Unity: Criminal Justice and Corrections 1969*, often referred to as the Quimet Committee after its chairman.

Canadian Criminal Code. S.515(1) contains a presumption in favour of release without conditions by directing a judge to release an accused on an undertaking without conditions unless the prosecutor shows cause why the detention of the accused is justified or why an order under any provision of this section should not be made. An undertaking is a form of release without monetary component. S.515(2) concerns other forms of release. The judge may order that the accused be released:

- on his giving an undertaking, with such conditions as the justice directs;
- on his entering into a recognisance before the justice without sureties in such amount and with such conditions as the justice directs but without deposit of money or other security;
- upon entering into a recognisance before the justice with sureties in such amount and with such conditions as the justice directs but without deposit of money or other security;
- on his entering a recognisance before the justice without sureties in such amount and with such conditions as the justice directs and on his depositing such sum of money or other security as the justice directs;
- (if he is not ordinarily resident in the province) on his entering into a recognisance before the justice with or without sureties in such amount and with such conditions as the justice directs and on his depositing a sum of money or valuable security as the justice directs.

4.84 S.515(3) describes what we may call the "ladder" approach, under which the judge shall not make an order under the above paragraphs unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made. S.515(4) and (4.1) set out the non-monetary conditions which the judge may attach, e.g. reporting to a peace officer, notifying a peace officer of a change of address, depositing a passport, prohibition from possessing a firearm, ammunition or explosive substances.

4.85 Under s.515(5), a statement of the judge's reasons must be included in the record if bail is refused.

Grounds for detention

4.86 A key provision is s.515(10), which contains the grounds on which the accused's detention may be justified. These are:

- (a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
- (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in para. (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all of the circumstances including any substantial likelihood that the accused will, if he is released from

custody, commit a criminal offence or an interference with the administration of justice.

4.87 Thus the ensuring of the accused's attendance in court is still the primary ground for refusing bail, and a judge may only move to the secondary ground if detention is not justified on the primary ground. The test of detention on the secondary ground is that his detention is "necessary in the public interest or for the protection or safety of the public" and there must be a "substantial likelihood" that the accused would commit a criminal offence or an interference with the administration of justice. The "public interest" limb of the test has been recently held unconstitutional by the Canadian Supreme Court in *R. v. Morales*⁹⁶ (discussed below), but the "protection or safety of the public" limb remains in force. In *R. v. Quick*,⁹⁷ it was held that the phrase "any substantial likelihood" refers to a significant chance, not just a possibility, that the accused will cause harm, but probably does not go as far as "clear and convincing evidence".

The primary ground

4.88 Although s.515(10) provides criteria for release, it does not list the factors which may be taken into account. Case-law has established what factors may be relevant. These have been summarised by Trotter as follows.⁹⁸

- the nature of the offence and the potential penalty;
- the strength of the evidence against the accused;
- community ties of the accused;
- the character of the accused person;
- the accused's record of compliance with court orders on previous occasions;
- the accused's behaviour prior to apprehension; evidence of flight.

The secondary ground - The public interest limb

4.89 Until struck down recently in *Morales*,⁹⁹ the "public interest" has been given a broad interpretation by the courts. In *Re Powers and The Queen*,¹⁰⁰ Lerner J. said that the public interest involves many considerations; the apprehension and conviction of criminals, the deterrence of crime, the protection of citizens, and when weighing the rights of the accused one must also be mindful of the rights of the community. He said that the public must be entitled to live in safety and security as well as have a tolerant and enlightened administration of justice and that this could only be achieved by recognizing the plain lessons of the citizens' ordinary experiences in life and translating them into realistic as well as humane and enlightened procedures. In *R. v. Demyen*,¹⁰¹ which

96 (1993) 17 C.R. (4th) 74, 77 C.C.C. (3rd) 91, [1992] 3 S.C.R. 711.

97 (1984) 13 W.C.B. 185 (Ont. H.C.J.).

98 G. Trotter, *The Law of Bail in Canada*, at pp.83-88.

99 (1993) 17 C.R. (4th) 74, 77 C.C.C. (3rd) 91, [1992] 3 S.C.R. 711.

100 (1972) 9 C.C.C. (2d) 533 (Ont. H.C.).

101 (1975) 26 C.C.C. (2d) 324 (Sask. C.A.).

concerned bail pending appeal, Culliton C.J.S. said that in the determination of what may constitute the public interest, Parliament intended to give the judge a wide and unfettered discretion and that to attempt to define it with particularity would restrict the unfettered discretion which Parliament intended to confer. Accordingly, the proper application was to give the public interest a comprehensive meaning and to decide in the circumstances of each case whether or not the public interest required detention. Again he referred to public opinion and public confidence in the system. A somewhat more complex view of this 'public confidence' aspect of the test was expounded by Boudouin J.A. in *R. v. Lamothe*,¹⁰² in which he said that the public often adopts a negative view of crime and criminals and that this cannot dominate the conception of public interest. He referred to an "informed public" needing to understand that the presumption of innocence is not a purely theoretical notion but a concrete reality and that the perception of the public must be situated at another level, that of the public reasonably informed about our system of criminal law, not merely that of the lowest common denominator. Despite this important refinement of earlier views of the "public interest", it did seem to relate in large part to the image of the system, rather than its rationality or its ability to pursue certain objects effectively.

4.90 Trotter explains the kinds of factor that had been considered relevant to the "public interest" limb of the secondary ground prior to its severing in *R. v. Morales*:¹⁰³

- the seriousness of the offence:

this is "relevant in evaluating whether the reputation of the justice system will be injured by the release of an accused. This is most likely to arise in cases dealing with extreme violence, such as homicide, or in serious drug cases".¹⁰⁴

- the nature and quality of the accused's alleged conduct:

"The reputation of the justice system is likely to be adversely affected if an accused is released in the face of allegations of conduct marked by serious violence. The most common case in which this concern is realised is in the case of murder. Detention in the public interest in egregious murder cases is easy to find."¹⁰⁵

- the strength of the evidence against the accused;
- the nature of the community in which the offence took place. For

¹⁰² (1990) 58 C.C.C. (3d) 530.

¹⁰³ G. Trotter, *op cit.*, at pp.95-104.

¹⁰⁴ *Ibid*, at p.95.

¹⁰⁵ *Ibid*, at pp.95-6.

example it is arguable that the effect of a serious violent crime is worse in a small, closely-knit rural community than in an urban sprawl. This is of course a controversial notion, but it has on occasion been relied on to justify a refusal of bail;

- the character of the accused:

"At issue here is the diminution of respect for the reputation of the administration of justice caused by the release of an accused person with a serious criminal record. The tolerance and patience of the public, as embodied in the concept of the 'public interest', may well be placed under greater strain when the record of the released accused demonstrates contempt for previous court order."¹⁰⁶

4.91 Accordingly, the public interest limb of the secondary ground was a broad and sometimes controversial ground on which to refuse bail.¹⁰⁷

The secondary ground - The protection or safety of the public limb

4.92 With regard to the commission of further offences, it may be noted that the original *Bail Reform Act* restricted the section to the commission of offences involving "serious harm", but this restriction was removed by the *Criminal Law Amendment Act, 1975*. Accordingly the likelihood of any type of offence may be considered. Here the factors taken into account by the courts have included:¹⁰⁸

- the criminal record of the accused;
- whether the accused is already on bail or probation;
- the type of offence with which the accused is charged; it is sometimes suggested that an accused charged with particular types of offences is more likely to commit further offences if released, e.g. burglary, drugs cases, partly because these are crimes that are closely tied to their supposed means of subsistence;
- whether or not the accused has a substance addiction. As we shall see, this part of the secondary ground was upheld by the Supreme Court of Canada in *R. v. Morales*.¹⁰⁹

¹⁰⁶ *Ibid*, at p.103.

¹⁰⁷ It appears to be similar to the "public alarm" ground for refusal of bail, which appears in some Continental European systems and which has been recognised as valid by the European Court of Human Rights. See below.

¹⁰⁸ G. Trotter, *op cit.*, at pp.106-110.

¹⁰⁹ (1983) 17 C.R. (4th) 74, 77 C.C.C. (3rd) 91, [1992] 3 S.C.R. 711.

Reverse onus provisions

4.93 When the Bail Reform Act came into force, the onus was placed on the prosecution in all cases to show why the accused's detention was justified. However, the *Criminal Law Amendment Act, 1975* removed the onus from the prosecution and placed it on the accused in certain situations. S.515(6) now provides that the accused must be given a "reasonable opportunity" to "show cause" why his detention is not justified on either the primary or secondary ground in the following cases:

- (a) when the accused is charged with an indictable offence or while at large in respect of another indictable offence pursuant to the provisions of Part XVI or s.679 or 680;
- (b) when the accused is charged with an indictable offence and is not ordinarily resident in Canada;
- (c) when the accused is charged with an offence under ss.145.2 to 5 of the Criminal Code (breach of recognisance) while on release for any other offence pursuant to Part XVI or ss.679, 680 or 810;¹¹⁰
- (d) when the accused is charged with an offence under ss.4 or 5 of the Narcotic Control Act or conspiring to commit an offence under one of those sections. The same applies when the accused is charged with an offence under s.469 of the Criminal Code, such as murder.¹¹¹

Bail abuse

4.94 Under s.524 of the Code, the accused may be arrested and release cancelled where a breach of the form of bail release has or is about to occur or he has committed an indictable offence while on release. The accused must be given a reasonable opportunity to demonstrate why his or her detention is not justified, and if he shows cause why he should not be detained he may again be released. The court may exercise the power of forfeiture where it knows that a person has failed to comply with a condition of his or her recognisance. There are also specific offences of failing to appear in court and failing to comply with conditions of release.

The Bail Regime And The Canadian Charter

4.95 The constitutionality of certain aspects of the Canadian bail legislation has been challenged in a number of cases in recent years. At this point it must be noted that s.11(e) of the Canadian Charter of Rights and Freedoms (1982) gives all accused persons the right "not to be denied reasonable bail without just

¹¹⁰ This category is similar to (a), except that here the charge which forms the basis for the original release may be a summary conviction offence and the charge under the named sections of the Code may be a summary offence.

¹¹¹ Section 522(2)(a) of the Criminal Code.

cause". S.9 of the Charter confers the right to be free from arbitrary detention, s.11(d) contains the right to be presumed innocent until proved guilty¹¹² and s.12 contains the right to be free from cruel and unusual punishment and treatment. Section 1 of the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

4.96 A number of courts considered the reverse onus provisions in the bail legislation prior to its reaching the Supreme Court in *R. v. Pearson*.¹¹³ In *R. v. Pugsley*,¹¹⁴ the Nova Scotia Court of Appeal considered the constitutionality of what is now s.522(2) of the Code (then s.457(7)(2)(f)) in a case where bail was denied on a charge of murder, and held that the reverse onus provision offended s.11(e) of the Charter, although the detention was nonetheless justified. In *R. v. Bray*,¹¹⁵ the Ontario Court of Appeal disagreed with *R. v. Pugsley* and held that the reverse onus provision affecting a murder charge was a reasonable limitation even if, *prima facie*, it conflicted with s.11(e) of the Charter. It required only that the accused satisfy the judge on the balance of probabilities that his detention was not justified on either ground, a burden which was rationally within his power to discharge.

4.97 Interestingly, the Law Reform Commission of Canada in a 1988 Working Paper¹¹⁶ recommended that the provisions of the Code which place a reverse onus upon the accused to show cause why detention is not justified should be repealed, and replaced by provisions placing the onus on the prosecution to justify detention where necessary.¹¹⁷ It said that not only did these provisions represent deviations from general principles such as the presumption of innocence and proof beyond all reasonable doubt, but that their utility was also in doubt.¹¹⁸

4.98 In *R. v. Pearson*,¹¹⁹ the Supreme Court of Canada had the opportunity to rule on one of the reverse onus provisions in the bail law. In this case, the accused had been denied bail on a charge of trafficking in hashish and cocaine. On appeal to the Quebec Court of Appeal, Proulx J.A., delivering the majority judgment, took the view that the *Bail Reform Act* created a liberal system of pre-trial release, and that both the primary and secondary grounds for detention constituted "just cause" within the meaning of s.11(e) of the Charter. However,

112 S.2(f) of the Canadian Bill of Rights 1960 provides that every law, unless expressly declared by an Act of Parliament that it shall operate notwithstanding the Bill of Rights, shall not be construed or applied so as to deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty or of the right to reasonable bail without just cause. However, the law of bail remained largely untouched by the Bill of Rights guarantees.

113 (1993) 17 C.R. (4th) 1, 77 C.C.C. (3rd) 124.

114 (1982) 2 C.C.C. (3rd) 286 (Nova Scotia Court of Appeal).

115 (1983) 2 C.C.C. (3rd) 325 (Ontario Court of Appeal).

116 *Compelling Appearance, Interim Release and Pre-trial Detention*, Working Paper 57 (1988).

117 Recommendation no.29, p.66.

118 They also recommended that the formal distinction between the primary and secondary grounds for refusing bail be removed and that the grounds should simply be listed. However, the ground relating to public safety was clearly not considered problematic by the Commission and there was no recommendation, or indeed discussion, in relation to it.

119 (1993) 17 C.R. (4th) 1 (C.S.C.), 77 C.C.C. (3rd) 124.

he held that the "drugs" reverse onus provision violated s.11(e) because it was overbroad. He said that it was arbitrary and unjust to submit all persons charged with drug offences to this regime, and that one could not equate a person who is charged with possession of a small quantity of hash with no criminal record (the "generous smoker who shares a single joint of marijuana at a party"), with a recidivist who is charged with trafficking in cocaine. Moreover, this "exceptional" system did not apply to offences which often present a greater risk of dangerousness, such as robbery, sexual assault, marital violence, and extortion. He also held that s.11(d) and s.9 of the Charter were violated. With regard to s.11(d), he said that the prescription of mandatory detention on the sole basis of the charge and without any other consideration prevents dealing with the accused as a person who is presumed innocent. He went on to say that none of these infringements could be justified by section 1. While the struggle against any drug trafficking was an objective of sufficient importance, there was no rational connection between the means by which to achieve that objective, and the "minimal impairment" requirement was not satisfied.

4.99 On appeal to the Supreme Court of Canada, the majority judgment was given by the Chief Justice, Lamer C.J.C., holding that the reverse onus provision in s.515(6)(d) did not violate the Charter. He held that the presumption of innocence operated both at the bail and the trial stages, but that it did not contain any procedural content beyond that contained in ss.11(d) and (e) of the Charter. While s.11(d) of the Charter creates a procedural and evidentiary rule at trial that the prosecution must prove guilt beyond all reasonable doubt, this rule has no application at the bail stage, where the guilt or innocence of the accused is not determined nor punishment imposed. S.11(e) of the charter creates a highly specific guarantee of the right to reasonable bail and the right not to be denied bail without just cause; "reasonable bail" refers to the terms of bail and the "just cause" aspect imposes constitutional standards on the ground on which bail is granted or denied. He interpreted the reference to "bail" in the Charter to mean all forms of judicial interim release, not simply money bail, thus resolving an ambiguity in terminology about which commentators had speculated. Although s.515(6)(d) was an exception to the basic entitlement to bail, the court concluded that there was "just cause" for this restriction. All that it did was to establish an effective bail system for specific offences for which the normal bail system would allow continuing criminal behaviour and an intolerable risk of offending. The Chief Justice relied on American and Australian research to say that the usual process of arrest and bail will not usually be effective in bringing to an end trafficking in narcotics, and that there is a marked danger that an accused charged with these offences will abscond. The reverse onus was therefore reasonable in that it requires an accused to provide information which he is most capable of providing. He held that it was not unconstitutional simply because it applied to the small-time drug offender, because such a person would be in position to rebut the presumption.

4.100 Two judges, McLachlin J. and La Forest J., dissented, holding the subsection did violate s.11(e) in that it failed to distinguish adequately the large scale drug trafficker from the small-time offender. Accordingly, the measure

went much further than was necessary to achieve the objects of avoiding repeat offences and absconding.

4.101 A direct challenge to the secondary ground for detention was addressed by the Supreme Court in *R. v. Morales*.¹²⁰ In this case, the accused had been charged with drug offences, having allegedly participated in a major network importing cocaine into Canada. At the time of his arrest, he was awaiting trial for another indictable offence and was denied bail. A superior court judge released him on conditional bail on a review of the denial of bail and the Crown appealed to the Supreme Court.

4.102 The Supreme Court, allowing the Crown's appeal and remitting the matter for a new review, held that the criterion of "public interest" as a basis for pre-trial detention violated s.11(e) of the Charter because it authorised detention in terms which were vague and imprecise, and therefore did not constitute "just cause". Lamer C.J. pointed out that there were two concerns underlying the doctrine of vagueness, namely fair notice to the citizen and limitation of law enforcement discretion. While the former consideration, fair notice, was not relevant to the present provision which does not prohibit conduct, the second factor was important. He said that "the principles of fundamental justice preclude a standardless sweep in any provision which authorises imprisonment"¹²¹ and that this was all the more so under a constitutional guarantee not to be denied bail without due cause. He said:

"Since pre-trial detention is extraordinary in our system of criminal justice, vagueness in defining the terms of pre-trial detention may be even more invidious than is vagueness in defining an offence."¹²²

4.103 He rejected the argument that the doctrine of vagueness did not apply to judicial discretion but merely to arbitrary practices by law enforcement officials, saying that:

"A standardless sweep does not become acceptable simply because it results from the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice."¹²³

4.104 He went on to refer to a number of authorities, including *Re Powers and the Queen*¹²⁴ and *R. v. Demyen*,¹²⁵ which, it was argued, established a workable meaning for the term "public interest". He said that, on the contrary, these authorities demonstrated the open-ended nature of the term and imported a standard which is completely discretionary and was incapable of structuring

120 (1993) 17 C.R. (4th) 74 (C.S.C.), 77 C.C.C. 3rd 91, [1992] 3 S.C.R. 711.

121 [1992] 3 S.C.R. 711 at 728.

122 *Ibid.*

123 At 729.

124 (1972) 9 C.C.C. (2d) 533 (Ont. H.C.).

125 (1975) 26 C.C.C. (2d) 324 (Sask. C.A.).

discretion in any way. He went on to find that the violation was not capable of being justified under s.1. of the Charter.

4.105 Of equal importance, however, the Supreme Court held that the "public safety" component of the secondary ground for detention did not violate the Charter. Lamer C.J. said that, as he had stated in *Pearson*, s.11(d) of the Charter created a procedural and evidentiary rule which operated at the trial, but had no application at the bail stage where guilt or innocence is not determined nor punishment imposed. With regard to s.11(e) of the Charter, he said that there were two factors which were vital to a determination that there is just cause under s.11(e), namely that the denial of bail must occur only in a narrow set of circumstances and that the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system. He thought that the first of these criteria was satisfied by the fact that bail was not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail; rather bail is denied only for those who pose a "substantial likelihood" of doing this and where this "substantial likelihood" endangers the "protection of safety of the public", and where detention was "necessary" for those purposes. He was also satisfied that the public safety limb was necessary to promote the proper functioning of the bail system, stating that the bail system did not function properly if an accused interferes with the administration of justice while on bail or commits offences while on bail:

"One objective of the entire system of criminal justice is to stop criminal behaviour. The bail system releases individuals who have been accused but not convicted of criminal conduct, but in order to achieve the objective of stopping criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial."¹²⁶

4.106 Lamer C.J. went on to address the argument that recidivism is impossible to predict, relying on a Canadian study and a number of United States studies. He accepted that "[t]hese studies demonstrate that the art of predicting recidivism and future dangerousness is, at the very least, a somewhat inexact process" but said that "exact predictability of future dangerousness is not constitutionally mandated." He referred to *R. v. Lyons*¹²⁷ in which the dangerous offender provisions of the Criminal Code were upheld and the court accepted that "an individual can be found to constitute a threat to society without insisting that this require the court to assert an ability to predict the future." He also referred to the Oimet Report which has said that prediction in this area was no more difficult than others in which courts are constantly called upon to resolve in other areas of law. He concluded

"The bail system does not aim to make exact predictions about future

¹²⁶
¹²⁷

At 738.
[1987] 2 S.C.R. 309.

dangerousness because such predictions are impossible to make. However, *Lyons* demonstrates that it is sufficient to establish a likelihood of dangerousness, and that the impossibility of making exact predictions does not preclude a bail system which aims to deny bail to those who likely will be dangerous."¹²⁸

4.107 He also mentioned the "substantial" procedural safeguards against the inefficacy of predictions about dangerousness. Finally, Lamer C.J. briefly rejected the argument that the "public safety" limb was contrary to s.9 of the Charter. Accordingly, the Court severed the "public interest" limb of the secondary ground, but upheld the rest of the provision.

4.108 Two judges dissented, holding that the term "public interest" was not unconstitutional. No judge dissented on the ground that the "public safety" was contrary to the Charter.

4.109 In *R. v. Farinacci et al.*,¹²⁹ the Supreme Court considered the constitutionality of s.679 of the Code, which concerns bail pending appeal. Under this provision the appellant may be released pending the determination of his appeal if he establishes that the appeal is not frivolous, that he will surrender himself into custody in accordance with the terms of the order, and that his detention is not necessary in the public interest. It was held that, although the "public interest" criterion was held to be unconstitutionally vague in the context of bail pending trial in *R. v. Morales*, s.11(e) of the Charter did not apply to bail pending appeal and the criterion was not unconstitutional in the present context.

Critical Comment

4.110 The provisions of the *Bail Act, 1972* do not appear to have aroused an intellectual storm in Canada parallel to that in the United States regarding the *Bail Reform Act, 1984* and the judgment in *Salerno*. Commentators have criticised the decision in *R. v. Pearson* in relation to the presumptions. Some doubts have also been expressed concerning the compatibility of the Canadian bail regime with the presumption of innocence. For example, in commenting on the fact that courts rely on the fact that the accused was already on bail or probation to refuse bail on the secondary ground, Trotter says:

"While it may seem appropriate to use the existence of this factor to infer the probability of further criminal behaviour, especially when the accused has managed to compile release order upon release order, reflection on the logical path to this conclusion illustrates that it is predicated upon an impermissible inference. The adverse inference to be drawn from existing release orders is indicative of a trend that is found in other areas of the law of bail, particularly with respect to the

¹²⁸ [1992] 3 S.C.R. 711 at 739.
¹²⁹ (1994) 109 D.L.R. (4th) 97.

reverse onus provisions ... The reasoning undermines the presumption of innocence, as it is predicated on the willingness to treat both the charges that gave rise to the previous release orders and the new charges as proven offences. In fact, they are all merely allegations at this stage."¹³⁰

4.111 However, he adds that reliance on breach of probation orders is less objectionable because in this situation, at least there has already been an adjudication of guilt.

4.112 Morton and Hutchinson raise some doubts about the compatibility of the secondary ground generally with the presumption of innocence, but conclude that some violations of the presumption of innocence may be justified:

"... the secondary ground in s.457 is directed at detaining persons whose acts show that they constitute a menace to society. But the acts that constitute a menace are the very acts that amount to the alleged criminal offence. If we assume that the prisoner is innocent the secondary ground falls by the wayside. An innocent accused might well not appear for trial, particularly if he was resident in a foreign jurisdiction, but an innocent accused poses no more threat to society than any other individual. The secondary ground of section 457 only makes sense if the jurist holding the interim release hearing is prepared to assume, before trial, the guilt of the accused. Of course, the mere fact that the secondary ground of s.457 violates the presumption of innocence does not mean that the section falls. It may well be justified by s.1. It would be the height of folly to release, say, a dangerous psychopath who has been caught in the act of murder simply because he is likely to appear at his trial."¹³¹

4.113 Kiselbach explores the presumption of innocence in some more detail.¹³² He points out that a broad view can be taken of the presumption of innocence as something much more than a rule regarding burden of proof at trial, and says that the concept emerged in the nineteenth century in a form quite distinct from the burden of proof rule. Both the presumption of innocence and the burden of proof in a criminal trial are based on liberal philosophical beliefs concerning the commitment to the dignity of the individual and the notion that it is wrong to punish a person where we are unsure of his guilt, and a social commitment to the individual as an end in himself, whose liberty cannot be extinguished however great the benefit to society. Kiselbach claims Canadian judicial support for the broad interpretation of the presumption of innocence. Moreover, under the Code, an accused cannot be cross-examined by any person as to his charge nor can any inquiry be made as to his offence in a bail hearing -

130 G. Trotter, *op cit.*, at p.107.

131 Morton and Hutchinson, *The Presumption of Innocence*, pp.120-121.

132 D. Kiselbach, 'Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence', (1989) 31 Crim. L.Q. 168-196.

this is consistent with the broad view that he should be treated as innocent prior to trial. The broad view of the presumption of innocence is incompatible with preventive detention:

"Human experience shows that the accused, if released, would likely receive further charges prior to trial. This reasoning must [be] based on the assumption that [the] current charges were validly laid. Predicating detention on the basis of this assumed validity is inconsistent with the presumption of innocence ... charges [are] turned into evidence that the accused [is] guilty or would soon be guilty of something else."¹³³

4.114 Kiselbach suggests that portraying the contest as being between the accused's rights and the public interest is inappropriate, because the common good can only ultimately be assured through due regard for the intrinsic value of freedom. Instead any balancing should be "a balancing of the individual good in public safety over the individual good in preventing the detention and punishment of presumably innocent persons."

4.115 However, as we have seen, none of these matters were deemed fatal to the preventive detention provision by the United States Supreme Court in *R. v. Morales*.

AUSTRALIA¹³⁴

Introduction

4.116 As was the case in the United States, Canada, and the United Kingdom, Australian concerns about the law relating to bail in the sixties and the seventies led to the introduction of bail legislation reforming the existing law. The concerns which prompted these developments were similar to those in other countries, for example, concerns about the effect of custody upon pre-trial detainees and concerns about the discretionary effect of financial conditions imposed as terms of bail. In the late 1970s and in the 1980s, most Australian states enacted bail legislation. For example, Victoria enacted a Bail Act in 1977, New South Wales in 1978, Queensland in 1980, Western Australia in 1982 and South Australia in 1985.¹³⁵ While these statutes differ in matters of detail their basic orientation is relatively similar. In the following section, a broad overview of these Acts will be presented, giving examples of the type of provision enacted, rather than exhaustively examining the legislation in each state. This section will conclude with the proposals of two Law Reform Commissions (Victoria and Queensland) in 1991, which exhibit some change in attitude towards a number of issues, particularly the issue of offending while on bail. Due to the difficulties of obtaining up to date Australian state legislation in libraries in England and

133 *Ibid.*, at p.187.

134 See *Bail or Remand? Conference Proceedings*, ed. Denis Challinger, Australian Institute of Criminology (1991).

135 These jurisdictions have enacted amending legislation, but the Acts cited in the text appear to still constitute the main framework in those jurisdictions.

Ireland, it has not been possible in some cases to examine 1992 and 1993 legislation.

Considerations In Granting Bail

4.117 Examples of individual state legislation setting out the considerations in granting bail will now be given. It should be noted that all have to some extent accepted considerations relating to public safety and the commission of future offences as grounds for refusing bail.

4.118 Under the *New South Wales Bail Act, 1978*, the following are the considerations to be taken into account by the court when considering bail:

- (a) *the probability of accused's appearance in court to answer bail*
having regard only to:
- the accused's background and community ties as indicated by the history and details of his residence, employment and family situation and criminal record;
 - any previous failure to appear to answer bail;
 - the circumstances of the offence (including its nature and seriousness), the strength of the evidence and the severity of the probable penalty;
 - any specific evidence indicating whether or not it is probable that the person will appear in court;
 - the rating obtained in relation to the person in the test referred to in s.33.¹³⁶
- (b) *the interests of the accused*
having regard to:
- the likely period and conditions of pre-trial custody;
 - the need to be free to prepare for appearance in court or obtain legal advice;
 - the need of the person to be free for any other lawful purpose;
 - any incapacitation by intoxication, injury or drug use or other danger of physical injury or need of physical protection.

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S.33 provides that regulations may make provision for a test to be carried out in relation to an accused person for the purpose of obtaining a rating as an indication of his background and community ties.

(c) *the protection and welfare of the community*¹³⁷ (s.32(1)(c) *Bail Act, 1978 as substituted by the Bail Amendment Act 1990*)

having regard to:

- the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature;
- whether or not the person has failed , or has been arrested for anticipated failure to observe a bail condition;
- the likelihood of the person interfering with the evidence, witnesses or jurors;
- the likelihood that the person will or will not commit an offence or offences while at liberty on bail, but the authorised officer or court may have regard to that likelihood only if permitted to do so under section 32(2).

4.119 S.32(2) of the 1978 Act as substituted by the *Bail Amendment Act, 1990* provides that the court may have regard to the likelihood that a person will commit an offence while on bail if it is:

- (a) satisfied that the person is likely to commit the offence or offences;
- (b) satisfied that the offence or offences is or are likely to be serious by reason of their likely consequences; and
- (c) satisfied that the likelihood that the person will commit the offence or offences, together with the likely consequences, outweighs the person's general right to be at liberty.

4.120 S.32(2)(A) provides that in considering whether an offence or offences is or are serious the court should consider the following matters:

- whether the offence or offences is or are likely to be of a sexual or violent nature;
- the likely effect of the offence or offences on the victim and on the community generally;
- the number of offences likely to be committed.

4.121 Under the *New South Wales (Personal and Family Violence) Amendment Act, 1987*, a defendant accused of domestic violence who has previously failed to comply with a condition of bail imposed for the protection and welfare of the

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s.32(1)(c) *Bail Act, 1978 as substituted by the Bail Amendment Act, 1990.*

alleged victim loses the presumption in favour of bail and must satisfy the court that he will comply with such bail conditions in the future. Courts considering bail in such cases must have regard to the protection and welfare of the alleged victim and the previous conduct of the accused indicative of the likelihood of domestic violence against the victim. There is also a 1993 Bail (Domestic Violence) Act, but it has not been possible to examine it.

4.122 Under a 1986 amendment to the New South Wales Act, persons charged with various indictable offences under drugs legislation are excluded from the presumption of entitlement to bail.

4.123 Under s.16 of the *Queensland Bail Act, 1980*, the court may refuse to grant bail to a defendant if satisfied that there is an "unacceptable risk" that the defendant if released on bail would fail to appear, commit an offence, endanger the safety or welfare of members of the public, or interfere with witnesses or otherwise obstruct the course of justice. The court may also refuse to grant bail if satisfied that the defendant should remain in custody for his own protection. Section 16(2) provides that in assessing whether there is an unacceptable risk with respect to any of the matters mentioned above, the court shall take into account:

- the nature and seriousness of the offence;
- the character, antecedents, associations, home environment, employment, background and place of residence of the defendant;
- the history of any previous grants of bail;
- the strength of evidence against him.

4.124 S.16(3) provides for a reversal of the burden of proof in a number of situations, namely, where the defendant is charged:

- with an indictable offence alleged to have been committed while he was awaiting trial for another indictable offence;
- with an indictable offence in the course of committing which he is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance;
- with an offence under the Bail Act.¹³⁸

4.125 In these cases, the court shall refuse to grant bail unless the defendant "shows cause" why his or her detention is not justified. Where bail is granted in such a case, it shall include in the order a statement of the reasons for granting

bail.

4.126 Formerly, there was also a category in respect of a defendant charged with an indictable offence not ordinarily resident in Queensland. However, in *R. v. Loubie*,¹³⁹ the Supreme Court of Queensland declared the provision invalid according to s.117 of the Australian Constitution, which requires that a subject resident in any state may not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a resident of the other state.

4.127 The *Victorian Bail Act, 1977* contains criteria similar to those in Queensland for granting or refusing bail and also requires an "unacceptable risk" of one of the considerations applying. It provides for similar considerations in evaluating the criteria. Again there are reverse onus provisions, similar to the categories in Queensland. A drugs provision has also been added to the reverse onus list under a 1981 amendment to the Victorian Act.

4.128 A final example is the *South Australian Bail Act, 1985*. Section 10 of this Act provides that the bail authority should release the applicant on bail unless having regard to certain matters, it considers that the applicant should not be released. These matters are:

- the gravity of the offence;
- the likelihood that he would abscond, offend again, interfere with evidence, intimidate or suborn witnesses or hinder police inquiries;
- where there is a victim of the offence, any need that the victim may have, or perceive, for physical protection from the applicant;
- any need the applicant may have for physical protection;
- any medical or other care which the applicant may require;
- any previous occasions on which the applicant may have contravened or failed to comply with bail;
- any other relevant matter.

Of particular interest here is the explicit reference to the needs of the victim. Also, under an amending Act in 1987, the judicial authority is required to give special consideration to submissions made by the Crown on behalf of the alleged victim.

Terms Of Bail

4.129 Victoria, Queensland and Western Australia operate predominantly recognisance based systems. The legislation in each of these states lists the forms bail may take, graduated by the severity of imposition in each case, and each directs that no more onerous form shall be imposed on the accused than is warranted by the public interest considering the nature of the offence and the circumstances of the accused. For example, in Queensland and Victoria, the scale is:

- release of accused on own recognisance;
- undertaking supplemented by deposit of money or other valuable security;
- surety entering into a recognisance-type undertaking;
- accused's undertaking with a deposit of money or other security as well as a surety.

These may all be supplemented by non-financial conditions of bail, e.g. staying away from the address or area.

4.130 With reference to terminology, we may note that under the *South Australian Bail Act, 1985*, what we describe as the accused's own recognisance appears to be re-entitled "bail agreement" and surety recognisances are called a "guarantee of bail."¹⁴⁰

Law Reform Commission Proposals

4.131 In 1991, the Law Reform Commission of Queensland published a Discussion Paper on bail.¹⁴¹ One of its main recommendations was a change in the law on pre-trial preventive detention on the basis that the accused might commit further offences. The Commission took the view that although under existing Queensland law, a person can be detained on the basis that there is an unacceptable risk that he would commit "an offence", a refusal of bail on the basis of a future possibility was not justifiable except to protect the community from defendants who were likely to commit a violent offence and in order to protect witnesses. It cited empirical evidence from the United States to the effect that the margin of error in this type of decision-making may be as poor as ten inappropriate detentions to achieve one person held appropriately. Accordingly, the Commission recommended three factors in considering the

¹⁴⁰ LRC Queensland, *To Bail or Not to Bail - A Review of Queensland's Bail Law*, Discussion Paper No. 35 (1991).
¹⁴¹ Section 6 deals with bail agreements, which is an agreement under which a person makes an undertaking to be present throughout the proceedings and to comply with any conditions as to his conduct while on bail, and to forfeit to the Crown a sum stipulated in the agreement if he fails without proper excuse to comply with a term or condition of the agreement. Section 7 refers to a guarantee of bail, which is an agreement with the Crown under which a person guarantees that a person released under a bail agreement will comply with the terms and conditions of the agreement and that if fails to do so, he, the guarantor, will forfeit the sum.

detention of a person on the basis that he might commit a violent offence:

- (a) The defendant must have been charged with or convicted of an offence involving violence against the person;
- (b) the prosecution must provide the court with evidence showing that the defendant would be likely to commit crimes involving violence before trial;
- (c) the court must be satisfied that there is an "unacceptable risk" that the defendant would commit crimes of a similar nature before the trial if released.

4.132 Regarding a refusal of detention on the grounds of intimidating witnesses, they suggesting that bail should only be refused if there is a real likelihood that:

- (a) The defendant would attempt to dissuade a particular witness from telling the truth at his trial or committal proceedings; and
- (b) that the witness would be dissuaded by his actions from telling truth at the trial or committal proceedings.

4.133 A majority of the Commission felt that in all other cases, the lack of certainty inherent in predicting a future possibility could not justify a defendant's detention before trial. Accordingly, defendants charged with property offences should not be detained on the basis of a likelihood that they might re-offend. If charged with further offences while on bail, bail could be cancelled. Moreover, if the defendant is charged with an indictable offence while on bail, under existing law, he will not obtain bail unless he can establish why his detention is not justified. At this point, his detention is based on actual, rather than possible, allegations of re-offending.

4.134 Other suggestions and matters addressed by the Commission included:

- that the reversal of the burden of proof in respect of drugs and armed robbery cases be re-examined;
- that there should be a legislative principle that bail should be granted where there is a likelihood that if convicted the defendant would not be ordered to serve a term of imprisonment;
- that there should be greater use of summonses with regard to young people, because pre-trial detention of young people could cause irreversible harm. They also said that conditions of bail more suitable to the young include close supervision, prohibited association with certain persons, restrictions on attendance at particular places and

limitations on certain activities;

- that there should be increased reliance on summonses rather than arrest for adults also, and the development of guidelines as to when summons or arrest is appropriate;
- that a defendant should not be penalised for failure to appear at a rate greater than the penalty he is likely to receive in respect of the original charge;
- that there should be better explanations about bail undertakings to defendants, both orally and in writing;
- the need for verified information to be given to the courts about the accused's background;
- a need to consider a system of compensation for persons held in custody who are not convicted.

4.135 In 1991, the Law Reform Commission of Victoria also published a Discussion Paper on Bail,¹⁴² in which they expressed a number of concerns. First, the increase in the use of custodial remands was leading to gaol overcrowding and putting a strain on the state's resources.¹⁴³ Second, there was inconsistency between bail decisions and sentencing decisions, in that many offenders who were remanded in custody later received non-custodial sentences. Third, selection of appropriate persons for custodial remand could be improved. They mentioned that the Australian Institute of Criminology had undertaken a pilot project to determine the number and nature of offences committed on bail in order to see if there was any set of characteristics that might help in predicting high risk categories. The Commission itself was keen to undertake a similar study, and commented:

"Whether too many people are being held in custody on remand cannot be answered solely by reference to statistics. Ultimately, it has to be answered by reference to the objectives of the bail system and to the level of risk associated with that system that the community is willing to accept ... But the objectives of the Bail Act alone are not sufficient. The bail system is part of the wider criminal justice system. In reviewing the existing bail system, it is essential to have regard to the fundamental principles of criminal justice. In this context, two principles stand out: the presumption of innocence, and the principle that imprisonment - in this context 'detention' - is only to be used as a last resort."¹⁴⁴

4.136 They examined the reverse onus provisions and commented that there

¹⁴² LRC Victoria, *Review of the Bail Act, 1977*, Discussion Paper No. 25 (July 1991).

¹⁴³ The proportion of remand prisoners in the prison population was 19% in 1991.

¹⁴⁴ LRC Victoria, *op cit.*, at p.7.

did not seem to be any justification for the special treatment of the cases picked out by the Bail Act. In some cases, the reason for showing cause appeared to be consistent with the objective of the bail system, but in others the link was less apparent and the gravity of the offence itself appeared to be the reason for the reverse onus. They took the view that the seriousness of the offence was not the most important consideration in making decisions about bail; the important questions were whether there was a risk the person would not turn up for trial or the risk of further serious offences. Accordingly, they recommended that the Bail Act should be amended to delete the requirement of showing of cause by the defendant in the case of certain offences.

4.137 They also criticised the criterion that bail could be refused on the ground that the accused might commit an offence while on bail or endanger the safety and welfare of members of the public. While there was no doubt that the public was entitled to protection against significant risks of further harm, this did not justify the breadth of this criterion. It should at least be amended to apply to a serious offence or an offence involving violence. They recommended accordingly:

"It is notoriously difficult to make reliable predictions about a person committing further offences. In light of that fact, courts should be very wary indeed of depriving a person of his or her liberty on the basis of a risk of a further offence being committed. The bail system should not be used as an indirect form of introducing a form of preventive detention. The Commission believes that deprivation of liberty on that basis is justified only if there is reason to believe that there is a very substantial risk of the relevant type of offence, and that reason does not lie merely in the fact that the accused has (allegedly) committed the crime in relation to which bail is being sought."¹⁴⁵

4.138 The Commission further recommended that increased use should be made of the summons, rather than the arrest, procedure in all cases where arrest is not necessary to protect the public interest, and that courts should have the power to dispense with bail when there was no appreciable risk that the accused would not abuse bail. The Commission also expressed its approval of bail information schemes, indicating the Manhattan and Nassau Bail Projects as models to be followed.

Comment

4.139 While the bail provisions enacted by the Australian states during the seventies and eighties conferred broad discretion to detain before trial on the grounds of public safety and/or commission of further offences, the recent reports of the Queensland and Victoria Law Reform Commissions recommend that such provisions be considerably narrowed. Both Commissions recommend that

145

Ibid., para. 41, at p.16.

preventive detention should only be used to prevent serious or violent offences. Both are concerned about the legitimacy of reverse onus provisions. Moreover, both make recommendations which would reduce court reliance on bail and improve the quality of bail decision-making.

ENGLAND AND WALES

Introduction

4.140 Until the middle of this century, the law of England and Wales relating to bail espoused the purpose of securing the attendance of the defendant at trial.¹⁴⁶ However, case-law started to recognise an alternative reason for denying bail from 1947 onwards, when the Court of Appeal in *R. v. Phillips*¹⁴⁷ recognised the prevention of offences during the bail period as a legitimate and, indeed, necessary ground for detaining an accused in custody prior to trial. This was confirmed in subsequent cases,¹⁴⁸ and was given legislative recognition in the *Criminal Justice Act, 1967* and subsequently in the *Bail Act, 1976*. The *Bail Act, 1976* reflected the findings of certain studies made prior to its enactment,¹⁴⁹ such as:

- (a) the fact that many pre-trial detainees did not subsequently receive custodial sentences upon conviction;
- (b) that the remand population was contributing to prison overcrowding;
- (c) that very little information was made available during bail hearings and accordingly that the police attitude tended to dictate the result at the hearing;
- (d) that the bail hearings themselves tended to be extremely short with no reasons given by courts for detention decisions; and
- (e) that those remanded in custody were, disproportionately, liable to custodial sentence. The New York Vera project also proved influential in suggesting that good bail risks could be identified and diverted from pre-trial custody.

4.141 The *Bail Act, 1976* is still the primary legislation in the area of bail in England and Wales. However, research continues to be conducted by the Home

146 Robinson (1854) 23 L.J.Q.B. 286, Rose (1898) 78 L.T. 119.

147 (1947) 32 Cr. App. R. 47.

148 *R. v. Pegg* [1955] Crim. L.R. 308, *R. v. Wharton* [1955] Crim. L.R. 565, *R. v. Gentry* [1956] Crim. L.R. 120.

149 Gibson E., *Time Spent Awaiting Trial*, Home Office Research Unit Report (No. 2), H.M.S.O. (1960); Bottomley A.K., *Prison before Trial*, Bell Occasional Papers on Social Administration (1970); Davies C., 'Imprisonment without Sentence', *New Society*, March 27, 1970 and 'Pre-trial Imprisonment: A Liverpool Study', (1971) 1 Brit. J. Crim. 11; Zander M., 'Bail: A Re-Appraisal', Jan.-March Crim. L. Rev., and 'A Study of Bail/Custody Decisions in London Magistrates' Courts', April 1971 Crim. L. Rev.; Dell S., 'Silent in Court', and 'Remands in Custody' (1971) 121 *New Law Journal*; and Simon F. and Weatheritt M., *The Use of Bail and Custody by London Magistrates Courts before and after the Criminal Justice Act, 1967*, Home Office Research Unit Report No.20, H.M.S.O. 1974.

Office and other groups and individuals into the problems mentioned, and there have been numerous initiatives to address them, such as bail information schemes, bail support schemes, and the establishment of bail hostels. A number of additional measures have been introduced to deal with the problem of offending on bail, such as speedy trial legislation to reduce trial delay, and a provision requiring the court to treat offending on bail as an aggravating factor when sentencing. However, the issue of offending on bail has continued to be controversial despite the inclusion of this as a ground for refusing bail in the 1976 Act. Controversy in recent years has been fuelled by the publication of a number of police studies of the rate of offending on bail, discussed in Chapter Two. The Northumbria study called for certain measures in light of its findings, including the creation of an offence of offending while on bail and forfeiture of the right to bail by individuals who persistently offend in breach of bail. A Home Office study reviewing studies of bail offending was published in 1992, and suggested that the police studies exaggerated the problem.¹⁵⁰ The Home Office then commissioned a further study of bail offending, which is currently awaiting publication.

Criteria For Bail Prior To The 1976 Act

4.142 As noted above, until the middle of this century, courts in England regarded the sole purpose of bail as being to ensure that the accused would stand trial. However, in a number of cases from 1947 onwards, the Court of Appeal signalled a change of view in cases concerning appeal against sentence. In *R. v. Phillips*,¹⁵¹ Atkinson J. observed that the applicant had a long record of larceny and house-breaking, and said that the Court:

"... feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had ... To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake."¹⁵²

150 *Offending while on Bail: A survey of recent studies*, P.M. Morgan, Home Office, Research and Planning Unit, Paper 65 (1992).

151 (1947) 32 Cr. App. R. 47.

152 In fact, the Irish figures show that this claim is greatly exaggerated. See Chapter Two above.

4.143 In *R. v. Pegg*,¹⁵³ again an appeal against sentence, the court held that there was no ground for interfering with the sentence passed on the applicant, but said that it desired to point out to justices that it was not right to grant bail in cases where it was not suggested that the prisoner had any answer to the charge and where the prisoner had a very bad record. The justices were wrong to grant bail in this case. *R. v. Wharton*,¹⁵⁴ also concerned an appeal against sentence, this time for robbery with violence, which had been committed while the appellant was on bail in respect of another offence. Leave to appeal was refused. The appellant had committed this offence while on bail, and the court said that it had indicated over and over again, that unless the justices felt real doubt as to the result of the case, men with bad criminal records should not be granted bail. In *Gentry*,¹⁵⁵ an appeal against sentence for garage breaking and stealing was refused. Lord Goddard C.J. said that the court had said on many occasions that it was inadvisable to grant bail to men with long criminal records unless there was very real doubt as to the man's guilt.

4.144 The difference of approach between these cases and Irish jurisprudence could hardly be more extreme. The Court of Appeal appeared to view guilt as flowing inevitably from the fact of charge in the case of a person with a long criminal record, thus placing the onus on the accused to raise doubts about his guilt at the pre-trial stage. That this was a clear violation of the presumption of innocence was not even adverted to. Whatever about the ultimate merits of pre-trial preventive detention, it is remarkable that this significant change in English practice was achieved in the questionable forum of an appeal against sentence without any discussion of fundamental principles of criminal justice and without any suggestion that the power to detain preventively should be exercised sparingly.

The Bail Act, 1976

4.145 The criteria upon which bail may be granted or refused were subsequently set out in the *Bail Act, 1976*. Section 4(1) provides that a person shall be granted bail in cases covered by s.4(2) except as provided for under the First Schedule to the Act.¹⁵⁶ If an exception under the First Schedule applies, then the court has discretion to grant or refuse bail. These "exceptions" to the right to bail may be divided into three categories: all offences, imprisonable offences and non-imprisonable offences.

4.146 In relation to *all offences*, an accused may be denied bail where:

- (a) he was released on bail for the offence and has been arrested for

153 [1955] Crim. L.R. 308.

154 [1955] Crim. L.R. 565.

155 [1956] Crim. L.R. 120.

156 Situations not embraced by s.4(2) are: after conviction, unless the adjournment is for inquiries or a report to be made; proceedings against a fugitive offender for an offence; treason; on appeal against conviction or sentence to the Crown Court or High Court; on committal to the Crown Court for sentence; on committal to be dealt with for breach of suspended sentence; warrants for arrest of a defendant. In these cases, there is no statutory right to bail and bail is at the discretion of the court or judge.

absconding or breaching bail or a surety has withdrawn;¹⁵⁷

- (b) the court is satisfied that the accused should be kept in custody for his or her own protection (or if a juvenile, for his or her welfare);¹⁵⁸

or

- (c) he is in custody pursuant to sentence.¹⁵⁹

4.147 NACRO have criticised the second of these categories as too broad and have recommended that the wording should be narrowed to situations where;

- (i) there are substantial grounds for believing that other persons would cause physical harm to him if he were released on bail; and
- (ii) he should be kept in custody to protect him from physical harm.

4.148 In respect of *imprisonable offences*, dealt with in part 1 of the First Schedule, the defendant may be refused bail if the court is satisfied that there are "substantial grounds for believing" that the defendant if released on bail would:

- (a) fail to surrender to custody;
- (b) commit an offence while on bail; or
- (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.¹⁶⁰

4.149 Bail may also be refused where it has not been "practicable" for want of time to obtain sufficient information to make the bail decision;¹⁶¹ or where the defendant has been convicted and it would be impracticable to complete any necessary inquiries or report on bail.¹⁶²

4.150 It may be noted that the court must have "substantial grounds" for believing that the defendant might commit an offence if given bail, but the range of offences he might commit is not limited, for example, to serious or violent offences, although the offence with which he is charged must be an imprisonable offence.

4.151 Where the court is deciding whether or not to grant bail in respect of imprisonable offences on the grounds of failure to surrender, the commission of

157 Para. 8, part 1, and para. 5, part 2 of the First Schedule.

158 Para. 3, part 1 and para. 3, part 2 of the First Schedule. It will be recalled that this ground for refusing bail in Ireland was rejected by the Supreme Court in *Attorney General v. Callaghan* [1966] I.R. 426.

159 Para. 4, part 1 and para. 4, part 2 of the First Schedule.

160 Para. 2, part 1 of the First Schedule.

161 Para. 5, part 1 of the First Schedule.

162 Para. 7, part 1 of the First Schedule.

offences or interference with witnesses, the court is obliged to take certain considerations into account, namely:

- (a) the nature and seriousness of the offence or default and the probable method of dealing with the offender for it;
- (b) the character, antecedents, associations and community ties of the defendant;
- (c) the defendant's record respecting the fulfilment of his obligations under previous grants of bail in criminal proceedings;
- (d) the strength of the evidence of his having committed the offence or defaulted, except in the case of a defendant whose case is adjourned for inquiries, or a report.¹⁶³

The court may also take into account any other matters which appear relevant.

4.152 With respect to *non-imprisonable offences*, bail may only be refused, in addition to the categories common to all offences (above) where the defendant has previously been granted bail in criminal proceedings, has failed to answer bail, and the court believes that in view of that failure he would again fail to surrender to custody if given bail.¹⁶⁴

4.153 It may be noted that a Home Office Circular has said that homelessness should not lead to a custodial remand without the exploration of other alternatives.¹⁶⁵

4.154 NACRO have recently expressed concern about the proportion of defendants remanded in custody before trial who did not subsequently receive custodial sentences and argue that the criteria for remanding in custody prior to trial are easier to satisfy than those after conviction under the *Criminal Justice Act, 1991*. Accordingly, they have recommended that bail should not be refused unless "there is a substantial likelihood that a custodial sentence will be passed if he is convicted and found guilty."¹⁶⁶ A similar view has been expressed by Cavadino and Gibson,¹⁶⁷ and Andrew Ashworth.¹⁶⁸

Conditional Bail

4.155 Under s.3(6) of the Act, a person granted bail may be required to comply with certain conditions necessary to ensure that he surrenders to custody, does not commit an offence while on bail, does not interfere with witnesses,

¹⁶³ Para. 9 of part 1 of the First Schedule.

¹⁶⁴ Para. 2, part 2 of the First Schedule.

¹⁶⁵ Home Office Circular 155/1975.

¹⁶⁶ NACRO, *Legislation on Bail: What Should Be Done?* (1992), p.4.

¹⁶⁷ Cavadino and Gibson, *Bail: The Law, Best Practice and the Debate*, at p.168.

¹⁶⁸ A. Ashworth, *The Criminal Process: An Evaluative Study*, at p.224.

makes himself available for the purpose of inquiries or reports or does not otherwise obstruct the course of justice. The first three of these purposes are similar to the reasons for which bail may be refused, although there is no requirement of finding that there is a "substantial probability" that the accused might do any of these things when deciding whether to impose such conditions.

4.156 S.3(6A) provides that the court is obliged to impose certain requirements concerning medical examination in murder cases unless it already has satisfactory medical reports. These requirements are that the accused shall undergo medical examination by two medical practitioners for the purpose of enabling reports to be prepared and that the accused shall attend such institution or place as the court directs and comply with any other directions which may be given to him for that purpose by either of those practitioners.¹⁶⁹

4.157 Also, under s.30 of the *Magistrates' Courts Act, 1980*, if on the trial by a magistrates' court of an offence punishable on summary conviction by imprisonment, the court is satisfied that the accused did the act or omission charged but is of opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, the court shall adjourn the case to enable a medical examination to take place and remand him, for not more than three weeks where the remand is in custody, and for not more than four weeks if he is remanded on bail. On such an adjournment where the accused is remanded on bail, the court shall impose conditions and these must include requirements that he undergo a medical examination by a medical practitioner, or where the inquiry is about his mental condition and the court so directs, two practitioners, that he attend an institution or place or practitioner as the court directs, and that he complies with any other directions which may be given to him by a person specified by the court.

Reasons For Decision

4.158 When the court refuses bail or attaches conditions to it, there is an obligation to state the ground on which the court relies and the reasons which make it appropriate to rely on that ground. A copy must be given to the accused to enable consideration be given to an appeal.¹⁷⁰ The Crown Court need not give a copy of its reasons to the accused if he is represented unless the accused's legal representative requests the court to do so.¹⁷¹

4.159 If the charge is murder, attempted murder, manslaughter, rape or attempted rape, a court which grants bail in the face of representations by the prosecution relating to failure to surrender, the commission of an offence, or interference with witnesses, must give reasons for doing so and these reasons must be recorded in the court register.¹⁷²

169 This provision was inserted by the *Criminal Justice Act, 1988*.

170 *Bail Act, 1976*, s.5(3), s.5(4) and r.90 Magistrates' Court Rules, 1981 S.I. 552.

171 Section 5(5) of the *Bail Act, 1976*.

172 S.153 of the *Criminal Justice Act, 1988* amending Schedule 1 of the *Bail Act, 1976*.

Appeal By Prosecution Against Grant Of Bail

4.160 The *Bail Amendment Act, 1993* conferred on the prosecution the power to appeal to a judge against the grant of bail by a magistrates' court in the face of representations by the prosecution, in a case where the person is charged with an offence punishable by at least five years imprisonment, the offence of taking a conveyance without authority or aggravated vehicle-taking. Oral notice must be given to the magistrates' court at the conclusion of the proceedings and before the accused is released from custody. Written notice of appeal must be served on the accused and the court within two hours of conclusion of the proceedings. Once oral notice of appeal is received, the magistrates must remand the accused in custody pending the hearing of the appeal. The appeal is by way of rehearing and must take place within forty-eight hours from the date on which oral notice is given, excluding Sundays and the usual public holidays. This provision was opposed (unsuccessfully) by both the Law Society and NACRO on the basis that it gave the prosecution "two bites at the cherry" (before the remanding court and then on appeal) and also because it permitted the holding of the defendant in custody pending appeal.

4.161 A second proposal in the original Bill was to reverse the statutory presumption in favour of bail in cases where the accused has been convicted of an imprisonable offence committed on bail during the past ten years, but this proposal was dropped from the Bill during the Standing Committee stage in the House of Commons.

Enforcement

4.162 Failure without reasonable cause to surrender to custody is a criminal offence under s.6(1) of the *Bail Act, 1976*. It is also an offence, having had reasonable cause to fail to surrender, to fail to surrender as soon as reasonably practicable thereafter under s.6(2). Both offences are punishable either on summary conviction or as a criminal contempt of court,¹⁷³ and on summary conviction, the accused is liable to imprisonment for up to three months or a fine not exceeding level 5 (£5,000) or both.¹⁷⁴ An offence dealt with in the Crown Court as a contempt attracts up to 12 months imprisonment or an unlimited fine. The court may also forfeit or estreat a recognisance entered into by a surety.

4.163 Unlike in Scotland, it is not an offence to break conditions of bail. The Act merely puts the accused at risk of arrest which leads to the possibility of the withholding of bail when he is brought before the court.

4.164 The *Criminal Justice Act, 1993* inserts a new provision in the *Criminal Justice Act, 1991* regarding sentence. Section 29(2) of the 1991 Act now provides that in considering the seriousness of an offence committed while the offender was on bail, the court shall treat the fact that it was committed in those circumstances as an aggravating factor. This confers a greater discretion on the

173 Section 6(5), *Bail Act, 1976*.
174 Section 6(7), *Bail Act, 1976*.

sentencing judge than does the equivalent Irish provision, which requires sentences in respect of the original and the bail offence to be consecutive.¹⁷⁵ Following the publication of the Northumbria and Avon and Somerset police studies on bail offending,¹⁷⁶ the police had argued for the creation of a specific offence of committing an offence while on bail, but this view was rejected by the Home Secretary on the basis that a person would be sentenced twice in respect of the same behaviour, once for the substantive offence, second time for the offence of committing it on bail.¹⁷⁷

The Criminal Justice And Public Order Act, 1994

4.165 Section 25 of this Act provides that bail shall not be granted to a person charged with or convicted of murder, attempted murder, rape, attempted rape or manslaughter, where that person has a previous conviction for any of those offences and, in the case of a previous conviction for manslaughter, was sentenced to imprisonment or long-term detention. This section can only apply in a limited number of cases as bail would not normally have been granted in cases of this sort. However, the section removes the court's discretion.

4.166 Section 26 of the 1994 Act creates an addition to the exceptions to the right to bail which are set out in Schedule 1 to the *Bail Act, 1976*. It applies where a defendant is accused or convicted of an indictable offence, or one triable either way, which appears to have been committed while he or she was on bail. A court will now be able to remand a defendant in custody in these circumstances without any other exception applying, i.e. a substantial likelihood that the defendant would abscond, re-offend or interfere with witnesses. The court will still be required to have regard to the nature and seriousness of the offence and to the circumstances of the defendant as set out in para. 9 of the Schedule.

Bail Information Schemes

4.167 Many groups and individuals have been concerned about the hurried nature of bail proceedings and the lack of information about the defendant presented to the court, which they say is in marked contrast to sentencing hearings, although there are custodial possibilities in both. The 1974 Home Office Circular stated that the Government would be grateful if the courts and the probation service would consider the introduction of schemes to gather information on the community ties of defendants for presentation in court. Schemes established in the 1970s appear to have been short-lived. In 1987, eight pilot bail information schemes were established under the auspices of the Association of Chief Officers of Probation with the assistance of the London branch of the Vera Institute of Justice, which had been responsible for the

175 Section 11, *Criminal Justice Act, 1988*. See above, Chapter One.

176 See above, Chapter Two.

177 See A. Hucklesby, 'The Problem with Bail Bandits', (1992) New L.J. 558, discussing certain commitments made by the Home Secretary concerning bail, some of which have since been implemented.

Manhattan Bail Project. The objective was to provide the Crown Prosecution Service with factual and verified information about defendants to enable them to consider whether or not to oppose bail and to make a recommendation to the court, independent from the police view, concerning bail. Officers of the scheme visited police cells every morning and obtained information about cases in which there would be police objections to bail. They then interviewed defendants to obtain information about community ties, took steps to verify this information and typed up a bail information sheet for the Crown Prosecution Service and defence solicitors. According to a report of the Vera Institute in May 1988, the scheme had proved useful and 391 of 874 persons granted bail had received bail because of this intervention.¹⁷⁸

4.168 By July 1992, there were 179 court-based bail information schemes in England and Wales. A number of studies have been conducted into the operation of the bail information schemes and have been discussed by Cavadino and Gibson.¹⁷⁹ These schemes have been considered a significant success, particularly in diverting from custody defendants of no fixed abode, for whom bail hostel places were provided. For example, a Home Office Research Unit Paper in 1992¹⁸⁰ examined three court-based schemes, and found, *inter alia*, that in Hull the Crown Prosecution Service made no objection to bail in 39% of cases where bail information was provided, compared with 13% of cases where such information was not provided; that 69% of court decisions were in favour of bail, where information was provided compared with 38% where none was provided, and that the percentage of defendants diverted from custodial remand because of bail information was 18%. They also found that there was no significant difference in the failure rate of those given bail following bail information and those where it was not given. On 25th February 1992, the Home Secretary Kenneth Baker made a statement to the House of Commons expressing, *inter alia*, a commitment to further development of the bail information schemes.

Bail Hostels¹⁸¹

4.169 Bail hostels were established in order to prevent persons from being remanded in custody simply because they were of no fixed abode. A Home Office research study in 1989 found that 14% of those remanded in custody in a particular sample of defendants had been so remanded primarily for this reason.¹⁸² By July 1993, there were 30 combined probation and bail hostels, i.e. for persons on bail, on probation or on post-custody supervision. The government has funded the expansion of a number of bail hostels.

178 Stone C., *Bail Information for the Crown Prosecution Service*, Vera Institute of Justice, 1988.

179 Cavadino and Gibson, *op cit.*, at pp.93-100.

180 Home Office Research and Planning Unit Paper No. 69, *Bail Information Schemes: Practice and Effect* (1992). See also Her Majesty's Inspectorate of Probation, *Bail Information: A Report of a Thematic Inspection*, Home Office (1992). See, generally, Lloyd, *Bail Information Schemes*, and Cavadino and Gibson, *op cit.*, at pp.93-107.

181 See Cavadino and Gibson, pp.108-116.

182 Home Office Research Study No. 53, *Remand Decisions in Brighton and Bournemouth* (1989).

4.170 NACRO have argued that in addition to bail hostels, legislation should be amended to structure judicial discretion; and recommend the following provision:

"Where in the opinion of the court a defendant who habitually resides at no fixed address would probably surrender to custody if he were accommodated in suitable accommodation, the defendant shall not qualify to be refused bail ... unless he has refused to be accommodated in suitable accommodation or the court is satisfied on the basis of a report from a probation officer or a social worker of a local authority social services department that no suitable accommodation is available for him."¹⁸³

4.171 While the purpose of bail hostels has been to divert certain accused from pre-trial custody in prison, some concerns have been expressed that the effect has been one of "net-widening", i.e. that persons who would otherwise have been granted bail or conditional bail have been ordered to stay in bail hostels.

Electronic Monitoring

4.172 In 1989, trials of electronic monitoring of defendants awaiting trial and granted bail were carried out at three courts. These were defendants who would otherwise have been remanded in custody, but consented to electronic monitoring instead and were fitted with an anklet fitted with a low powered radio transmitter. They were monitored and reported to the police if not at home during the periods ordered by the court. A Home Office Research Study¹⁸⁴ reported that this measure was both costly and unpopular with magistrates and judges, and that only fifty defendants had been made subject to it over the period, of whom eleven had offended and eighteen had violated bail conditions in other ways.

Bail Support Programmes

4.173 Some bail support programmes have been developed. In some respects, these are similar to probation schemes and have been primarily directed at juveniles. They employ a range of approaches to encourage an accused juvenile to comply with the conditions of his or her bail, such as reporting to an office, attendance at youth activities, monitoring of school attendance, assistance with employment problems, curfews, working with families to resolve conflicts and the encouragement of parents to take responsibility.

Time Limits

4.174 Custody time limits have been in place in England and Wales since 1987. Section 22 of the *Prosecution of Offences Act, 1985* empowered the Secretary of

¹⁸³ NACRO, *Legislation on Bail: What Should Be Done?* at p.5.

¹⁸⁴ Home Office Research Study No. 120, *Electronic Monitoring: The Trials and their Results*, H.M.S.O. 1990.

State to make regulations prescribing time limits with regard to the preliminary stages of criminal proceedings as to the maximum period to be allowed to the prosecution to complete a particular stage, and the maximum period for which the accused might be held in custody while awaiting the completion of that stage. Following trials in particular areas, the Secretary of State introduced the *Prosecution of Offences (Custody Time Limit) Regulations 1987*,¹⁸⁵ which were amended in 1988,¹⁸⁶ 1989,¹⁸⁷ and 1991.¹⁸⁸ As amended, they apply pre-trial custody limits to all magistrates' court areas and to the Crown Court. The time limits vary according to whether the matter is before the Crown Court or the magistrates' courts, and in the latter case, upon whether a mode of trial decision has yet been made. The regulations to date apply only where the accused is in custody and facing proceedings for an indictable offence or an offence triable either way. There is no limit for cases triable summarily only. The relevant periods are as follows:

Triable either way; A maximum of 70 days between first appearance and the commencement of summary trial or committal. Where justices decide on summary trial, there is a limit of 56 days between first appearance and summary trial, but this only applies if the decision to proceed to summary trial takes place within the 56 days.

Offences triable only on indictment; A maximum of 70 days between first appearance and the time when a decision is made whether or not to commit to the Crown Court for trial, and 112 days between committal and arraignment, or between the preferment of the bill of indictment and arraignment.

4.175 If a custody time limit expires, the accused must be released on bail, but there is no question of treating the accused as acquitted, as would be the case in relation to overall time limits, if and when they were introduced.¹⁸⁹ Bail may be unconditional or conditional except that the court may no longer require sureties or the deposit of a security.

4.176 S.22(3) of the *Prosecution of Offences Act, 1985* provides that the court may extend the time limit if satisfied that (a) there is good and sufficient cause for doing so and (b) the prosecution has acted with all due expedition. Either party may appeal to the Crown Court from a magistrate's decision on extension of time.

4.177 The case-law on extension of time limits has identified a number of principles. The court must be satisfied on the balance of probabilities that there is good reason to grant an extension.¹⁹⁰ The seriousness of the offence

185 S.I. 299.

186 S.I. 164.

187 S.I. 77 and S.I. 1107.

188 S.I. 1515.

189 Section 22(3), *Prosecution of Offences Act, 1985*.

190 *R. v. Governor of Canterbury Prison, ex p. Craig* [1991] 2 Q.B. 195.

charged and the shortness of the delay involved are not good and sufficient cause for extending a time limit; the requirement that the prosecution should have acted with all due expedition is judged objectively, and it is not sufficient that the prosecution have done their best in difficult circumstances.¹⁹¹ It has been held that the unavailability of a courtroom and judge to try the case does not justify an extension.¹⁹² It has been held that the protection of a member of the public from serious bodily harm was capable of being a good and sufficient cause for extending the custody time limit.¹⁹³ It has been held that a new custody time limit runs with a fresh charge,¹⁹⁴ even if based on the same set of facts.¹⁹⁵ However, it would be an abuse of process if the prosecution were to prefer new charges in relation to the same facts solely for the purpose of defeating custody time limits.¹⁹⁶ The burden of showing bad faith would be upon the defendant, although the prosecution must be expected to provide the court with the reasons for the withdrawal of one charge and the preferring of another.¹⁹⁷

4.178 Morgan and Jones comment with regard to time limits:

"... there are two key difficulties associated with the fixing of time-limits. First, any limit which did not lead to a significant number of breaches could be said to be relatively pointless in the sense that it exerted little downward pressure on current practice. Indeed, it could be counter-productive in that practitioners might be tempted more fully to use the time set below the limit. It follows that limits need to be set with some care and adjusted in the light of what proves to be achievable. Second, to the extent that there is a 'local legal culture' tolerant of delay, it is precisely those courts in which limits most need to be enforced that may be most ready to grant extensions. On both counts the operation of limits needs constantly to be monitored."¹⁹⁸

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- 191 *R. v. Governor of Winchester Prison, ex p. Roddie* [1991] 1 W.L.R.303. In this case, the police were drastically understaffed, the police typing system was "hopelessly inadequate", and there were substantial delays in receiving the forensic evidence. Lloyd L.J. said that "The test of due expedition must be measured against some objective yardstick. Otherwise it would be easy to fulfil the second condition wherever there are chronic staff shortages. This would defeat the object of the *Prosecution of Offences Act, 1985*, which was, clearly, to reduce the time spent by defendants in custody."
- 192 Norwich Crown Court, *ex parte Stiller, Buffry and Smith* [1992] Crim. L.R. 501.
- 193 *R. v. Luton Crown Court, ex p. Neaves* [1992] Crim. L.R. 721. In this case, the custody time limit in respect of a defendant accused of rape was extended. This decision might be criticised on the basis that, just as legislation provides that the same limits apply to all offences no matter how serious, the same limits should apply to all defendants, no matter how dangerous. It is arguable that the thrust of the extension proceedings should concern the reason why the case has not been proceeded with in time, rather than why the accused should not be released.
- 194 *R. v. Wirral District Magistrates Court, ex parte Meikle* [1990] Crim. L.R. 801.
- 195 *R. v. Waltham Forest Magistrates Court, ex parte Lee and Lee* [1993] Crim. L.R. 522.
- 196 *Ibid.* The court held that in this case there was "not a scrap of evidence" that there was some improper motive on the part of the prosecution. On the contrary, the evidence suggested that the prosecution had properly reviewed the circumstances and submitted a lesser charge (s.18, *Offences Against the Person Act, 1861* instead of attempted murder).
- 197 *Ibid.*, per Pill J.
- 198 Morgan and Jones, "Bail or Jail", in *Criminal Justice Under Stress*, ed Stockdale, at p.47.

SCOTLAND¹⁹⁹

Responsibility For Bail Decisions In Scotland

4.179 The police, the procurator fiscal and the courts all have an input into the question of the pre-trial status of the accused. When the police arrest an accused, they must consider three possible methods of bringing him before the court: (i) release the accused and report the case to the procurator fiscal for a possible summons to court, (ii) release the accused on signing an undertaking that he will appear in court on a specified date, or (iii) detain the accused until the procurator fiscal decides whether to proceed with the case to court. When the procurator fiscal examines the police report of a case which has been dealt with under either of the last two methods, he must decide whether (i) to bring the accused before the court immediately or (ii) to release the accused from the undertaking and summons him instead. If the fiscal decides to detain the accused, he is the prisoner of the procurator fiscal, who must determine what attitude he will take towards bail.

4.180 Police procedures for bail decisions are operated within the Force Standing Orders, which generally stipulate that an accused should not be detained unnecessarily and that information and reasons need to be supplied to the fiscal if a decision is made to detain. Usually circumstances are indicated in which it would be inappropriate to release the accused, such as in cases of treason, murder, incest, or cases which are likely to be dealt with under solemn procedure. The procurator fiscal operates within the Procurator Fiscal Regulations which direct attention to such matters as the likelihood of absconding, the character of the offence charged, the previous record, whether the accused is on bail and alleged to have committed a similar or more serious offence, whether his record indicates that he is involved in a career of crime and recently convicted or released from prison. Originally, the 1980 guidelines stated six principles which were the basis for opposition to bail, but these have now been increased to nine. The shift from the original to the new guidelines shows that considerations of public protection have increased the circumstances under which bail can be opposed. There is, for example, a general principle that the nature of the offence can determine whether the accused is remanded.

4.181 Bail may be granted by the sheriff to persons accused of all crimes except murder and treason.²⁰⁰ Even in the case of murder and treason, the Lord Advocate or the High Court may release a person on bail.²⁰¹ Sections 28(1) and 29(8) of the 1975 Act provide that the judge may "at his discretion" admit the accused to bail.

199 *The Scottish Criminal Courts in Action*, A.L. Stewart (Edinburgh 1990); *Bail and Custodial Remand*, Report of a Working Group appointed by the Scottish Association for the Care and Resettlement of Offenders (1987); *Criminal Procedure*, A.V. Sheehan, (1990); F. Paterson and C. Whittaker, *Operating Bail: Decision Making Under the Bail etc. (Scotland) Act, 1980*, Scottish Office Central Research Unit (1994).

200 Ss.28(1) and 28(1) of the *Criminal Procedure (Scotland) Act, 1975*.

201 Section 35 of the Act provides that 'Nothing in this section shall effect the right of the Lord Advocate or the High Court to admit to bail any person charged with any crime or offence.'

The Bail etc. (Scotland) Act, 1980

4.182 One of the primary purposes of the *Bail etc. (Scotland) Act, 1980* was to reduce the emphasis on money bail. Section 1(1) provides that it shall not be lawful to grant bail or release for a pledge or deposit of money, and that release on bail may be granted only on conditions which shall not include a pledge or deposit of money, subject to subsection (3). Subsection (3) provides that the court may impose as one of the conditions of release on bail a requirement that the accused or a person on his behalf deposits a sum of money in court, but only where the court is satisfied that the imposition of such a condition is appropriate to the special circumstances of the case.

4.183 Section 1(2) sets out the conditions which may be imposed in granting bail; they shall be such as the court considers necessary to secure that the accused:

- (a) appears at the appointed time at every diet (hearing) relating to the offence with which he is charged of which he is given due notice;
- (b) does not commit an offence while on bail;
- (c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; and
- (d) makes himself available for the purposes of enabling inquiries or a report to be made to assist the court in dealing with him for the offence with which he is charged.

Criteria For Bail

4.184 Apart from the above, there are no statutory criteria governing the grant of bail in Scotland. Guidelines were laid down by Lord Wheatley in the 1982 case of *Smith*, and are known as the *Wheatley guidelines*.²⁰² In this case, the respondent was charged with breaking and entering and stealing. The sheriff granted bail on the standard conditions and the Crown appealed. The reasons for the Crown's opposition were that the accused was undergoing a probation order of one year at the time of the alleged offence, and there were three cases outstanding against him, and that he had a long list of previous convictions (thirty- one court appearances involving thirty-eight offences). Lord Wheatley observed that he found it inappropriate that this man should have been granted bail, and went on to set out the following guidelines concerning the grant of bail:

- the accused should be granted bail unless it could be shown that there were good grounds for not granting it;
- two categories of consideration arose, namely the protection of the

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Smith v. M. 1982 J.C. 67, 1982 S.C.C.R. 116, 1982 S.L.T. 421.

public and the administration of justice;

- previous convictions *per se* should not be regarded as an automatic reason for refusal of bail, but if there were a significance in the record and the nature of the charges, or the consideration of the protection of the public arose, e.g. where the accused had a persistent record of housebreaking, or had just been discharged from prison, or had been charged with a similar offence, bail might be refused;
- while the presumption of innocence was, no doubt, a factor, it did not exclude competing factors which might be more formidable in the circumstances of the case;
- unless there were cogent reasons to the contrary, bail should be refused when the accused was alleged to have committed the offence charged while in a position of trust, e.g. already on bail, or ordained to appear, on licence or parole, on probation or deferred sentence, or performing a community service order;
- bail might be refused when possible intimidation of witnesses was alleged, when the accused was of no fixed abode, when there were reasonable grounds for expecting that he would not attend for trial, or, in very special circumstances, because of the nature of the offence.

4.185 Lord Wheatley added that it was not a good ground to suggest that a person should be detained because the police were making further enquiries, unless this was in the public interest or in the interests of the administration of justice.

4.186 In addition to reducing the use of money bail, one of the purposes of the *Bail etc. (Scotland) Act, 1980* had been to lessen the use of pre-trial detention. However, it seems that the Wheatley guidelines had the effect of restricting the award of bail and reversing the trend immediately following the 1980 legislation. Over the years, rigid adherence to the Wheatley guidelines appears to have declined. It has recently been remarked that:

"The Wheatley guidelines, which were once an unambiguously authoritative interpretation of the Bail Act, no longer have this status. Remaining, in theory, of the same status as when they were first set down, it has been found during the study that in practice, their authority is questioned with some practitioners going as far as to deny their continuing relevance to bail decisions. The extent of their relevance for contemporary decisions is therefore a matter of debate ..."²⁰³

4.187 SACRO (The Scottish Association for the Care and Resettlement of

Offenders) have suggested that the criteria for bail in Scotland should be amended so that there is a clear presumption in favour of bail and that the onus of proof should lie on the prosecution to show why bail should not be granted.²⁰⁴ They recommend that judges should be required to state reasons for decisions in bail applications,²⁰⁵ which is not required under current law, and that the *Wheatley* guidelines should be reviewed.²⁰⁶ However, they do not voice any opposition to the relevance, under the guidelines, of the fact that the accused was on bail, probation, temporary release, or performing community service at the time of the alleged offence. SACRO noted that at the time of writing, there were no bail hostels in Scotland and that accused were frequently refused bail on the ground of lack of fixed abode. They recommend the introduction of bail information schemes and bail hostels. They also recommend not only significant changes in pre-trial conditions of detention, but suggest that the remand centres should be removed from the ambit of the Scottish Prison Service.

Enforcement

4.188 Under section 3(1) of the *Bail etc. (Scotland) Act, 1980*, an accused who having been granted bail fails without reasonable excuse (a) to appear at the time and place appointed for any diet of which he has been given due notice, or (b) to comply with any other condition imposed on bail, is guilty of an offence. The penalties for these offences are a fine not exceeding £200 and imprisonment for a period not exceeding 60 days (where the conviction is in the district court) or 3 months (where the conviction is in the sheriff court). However, under section 3(3), where an accused who has been granted bail in relation to *solemn* proceedings fails without reasonable excuse to appear, he is liable to an unlimited fine and imprisonment for a period not exceeding two years. At any time before the trial of an accused under solemn procedure for the original offence, the indictment may be amended to include an additional charge under s.3.²⁰⁷ Section 3(5) provides that those penalties may be imposed in addition to any other penalty which the court is competent to impose, notwithstanding that the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence. A constable may arrest without warrant an accused who has been released on bail where he has reasonable grounds for suspecting that the accused has broken, is breaking or is likely to break a condition imposed on his bail.²⁰⁸ Where an accused is brought before a court following such arrest, the court may recall the order granting bail, release the accused under the original order granting bail, or vary the order granting bail so as to contain such conditions as the court thinks necessary.²⁰⁹

204 SACRO, *Bail and Custodial Remand* (1987), at p.15.

205 *Ibid*, at p.16.

206 *Ibid*, at pp.15-16.

207 Section 3(4).

208 Section 3(7).

209 Section 3(9).

4.189 Where the accused or a cautioner has deposited a sum of money in court, and the accused fails to appear at the time and place appointed for any diet of which he has been given due notice, the court may, upon motion of the prosecutor, immediately order forfeiture of the sum deposited, although it may also recall the order and direct that the money forfeited shall be refunded if it is satisfied that this is reasonable in all the circumstances.²¹⁰ The court may also order forfeiture if the accused fails to comply with any other condition imposed on bail.²¹¹

4.190 Paterson and Whittaker say that when the offence of breaching a condition of bail (including offending while on bail) was first introduced, there was uncertainty as to whether both the substantive charge and the charge of offending on bail could be prosecuted, with the result that procurators chose to prosecute one or the other. However, a High Court ruling decided that it was acceptable to charge both offences, on the basis that if someone commits an offence while on bail they have breached the trust of the court, and a sentence for this is a sentence for the breach of trust rather than an additional sentence for a substantive offence.²¹²

Time Limits

4.191 For many years prosecution of crime in Scotland under solemn procedure has been governed by time limits designed to prevent an accused being detained for unnecessarily long periods without being indicted or tried. These are now contained in the 1975 Act.

The Twelve Month Rule

4.192 A jury trial of an accused must be commenced within twelve months of his first appearance on petition. If the trial does not begin within that period, the accused must be charged and is "for ever free from all question or process for that offence."

4.193 The court has power "on cause shown" to extend the 12 month period. The leading case is *H.M. Advocate v. Swift*²¹³ where the following principles were laid down:

- an extension is to be granted only if sufficient reason for it is shown and the judge is prepared to exercise his discretion in favour of the Crown;
- fault on the part of the Crown is not an absolute bar to the granting of the extension, but the nature and degree of that fault are relevant factors in assessing sufficient reason and the exercise of discretion;

210 Section 4(1)(a).

211 Section 4(1)(b).

212 Paterson and Whittaker, *op cit.*, at p.114, citing *Aitchison v. Tudhope* 1981 S.L.T. 231.

213 1984 J.C. 83, 1984 S.C.C.R. 216, 1985 S.L.T. 26.

- the gravity of the charge is not in itself a sufficient reason for granting an extension;
- the shortness of the extension sought and the fact that the accused is not prejudiced are not relevant in assessing the sufficiency of the reason for granting the extension, but may be factors relevant to the exercise of discretion when sufficient reason has been demonstrated;
- mere pressure of business is not enough to justify an extension.²¹⁴

The 60 Day Rule

4.194 An accused who has been committed for trial in custody may not be detained for a period of more than 60 days from full committal without having been served with an indictment.²¹⁵ After 60 days, he is entitled to give notice to the Lord Advocate that if he is not served with an indictment within 14 days of such notice, the prosecutor will be called upon to show cause before the High Court why the accused should not be released from prison. Where cause is not shown to the satisfaction of the court, the court shall grant a warrant ordering such person to be released at the expiry of three days from the issuing of such order, unless within those three days an indictment is served upon him. The consequence of exceeding the time limit is that he must be released, although he can still be served with an indictment. The prosecutor may raise an indictment against him and obtain a warrant from the judge authorising his apprehension and recommitment to prison to await trial. In the event of a trial on indictment not taking place at the second diet thereof, or any other day to which it may be adjourned or postponed by the court, the High Court may consider all the circumstances of the case and in its discretion order the immediate release of the accused or grant a warrant for his release on a named day, or decline to pronounce any order.

The 110 Day Rule

4.195 Where the accused has been detained for 80 days and an indictment is served upon him, and he is detained in custody after expiry of that period of 80 days, then unless he is brought to trial and the trial concluded within 110 days of the date of his being committed, he "shall be forthwith set at liberty and declared for ever free from all question or process for the crime with which he was charged."²¹⁶

4.196 The High Court may order the accused to be kept in custody, with a view to trial, for such further period as to the court seems just if satisfied that the trial ought to be allowed to proceed after the expiry of the 110 day period, where

214 See also *McGinty v. H.M.A.* 1984 S.C.C.R. 176, 1985 S.L.T. 25, *Dobbie v. H.M.A.* 1986 S.C.C.R. 72, 1986 S.L.T. 648; and *Rudge v. H.M.A.* 1989 S.C.C.R. 105, 1989 S.L.T. 591.

215 Section 101(1) of the 1975 Act.

216 Section 101(3).

the delay in prosecuting is due to:

- (a) illness of the accused or judge or juror;
- (b) absence or illness of any necessary witness;
- (c) any other sufficient cause for which the prosecutor is not responsible.

4.197 SACRO report that a special study of those held on remand on 11th December 1984 found that the average period served by those then in custody and awaiting trial was six weeks, and that a study conducted by the Highland Region Social Work Department in 1986 showed that in a three month period there were 107 remands to Inverness prison, whose lengths of custody were:

| | | |
|-----------------|---|------------|
| 1 week or under | - | 33 persons |
| 2 weeks | - | 28 persons |
| 3 weeks | - | 22 persons |
| 4 weeks | - | 13 persons |
| 5 weeks | - | 7 persons |
| over 5 weeks | - | 4 persons. |

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS²¹⁷

Introduction

4.198 In this section we examine whether the European Convention for the Protection of Human Rights and Fundamental Freedoms sets out any particular limits on how Ireland may legislate in relation to bail. A number of Convention provisions would appear to be immediately relevant. Article 5(1) of the Convention provides:

"Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save 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 on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

4.199 Article 5(3) of the Convention provides:

"Everyone arrested or detained in accordance with the provisions of

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See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (1990).

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 trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

4.200 Article 6(1) of the Convention provides, in the relevant part:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

4.201 Accordingly, three issues arise in relation to the question of the relationship between Irish bail law and the European Convention: (1) What grounds of pre-trial detention are permitted by the Convention? (2) What length of pre-trial custody is permitted? (3) What length of time is permitted before a case is brought to trial, whether or not the accused is in custody?

1. What Grounds Of Pre-trial Detention Are Permitted By The Convention?

4.202 The wording of Article 5(1)(c) permits the pre-trial detention of the accused in two situations; first, where it is reasonably necessary to prevent his absconding, and secondly, where it is reasonably necessary to prevent his committing offences. However, in its case-law, the European Court of Human Rights has also recognised the additional grounds of the risk of suppression of evidence,²¹⁸ the danger of collusion,²¹⁹ the danger of subornation of witnesses,²²⁰ and the disturbance of the public order.²²¹ We will examine a number of these in some further detail.

4.203 It may be noted that the Court of Human Rights has repeatedly said that the grounds for detention must not only exist at the outset of detention but must persist throughout the period of detention. If a certain ground existed at the outset but ceased to have effect after a certain period of time, detention after that point ceases to be lawful. For example, in *Stögmüller*,²²² the applicant was detained for two years and seven weeks in connection with fraud and usury offences. The Court held that after a certain point, both the danger of absconding and the danger of further offences had ceased to exist, and the applicant's detention had therefore ceased to be reasonable. The Court has also said that the validity of certain grounds for detention, for example, the risk of collusion and the risk of absconding, tend to diminish over time by reason of their very nature.

218 *Wernhoff v. Federal Republic of Germany* (1968) 1 E.H.R.R. 55.

219 *Ibid.*, *Clooth v. Belgium* (1991) 14 E.H.R.R. 717, *W. v. Switzerland* (1993) 17 E.H.R.R. 60.

220 *Ringeisen v. Austria* (No. 1) (1971) 1 E.H.R.R. 455, *Letellier v. France* (1991) 14 E.H.R.R. 83, *Tomasi v. France* (1992) 15 E.H.R.R. 1.

221 *Kermache v. France* (1991) 14 E.H.R.R. 520, *Letellier v. France*, and *Tomasi v. France*.

222 (1969) 1 E.H.R.R. 155.

(i) *The likelihood that the accused will abscond*

4.204 On a number of occasions, the Court has said that the severity of sentence to be expected on conviction is not sufficient to establish the existence of a danger of absconding.²²³ In any event, the Court takes the view that the fear inspired by the potential severity of sentence necessarily decreases as the detention continues and the balance of the sentence which the person might serve diminishes.²²⁴ Nor does the risk of absconding arise merely because it is possible for the accused to cross the frontier.²²⁵ There must be a whole set of circumstances, including the likely sentence or the accused's particular distaste for detention, or the lack of well-established ties in the country, which give reason to suppose that there would be a risk of absconding.²²⁶ In *Neumeister (No. 1)*, the Court said:

"Other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial."²²⁷

4.205 In *Wemhoff*,²²⁸ the Court said that when the only reason for the continued detention of an accused is the fear that he will abscond, his release must be ordered if it is possible to obtain guarantees from him that will ensure such appearance.²²⁹ In *Neumeister v. Austria (No. 1)*, the applicant was detained for a total of two years and four months in connection with his suspected participation in a tax fraud scheme on the ground of potential absconding. The German Courts had rejected successive offers of bail by the applicant until the offers came close to the sum which represented the loss caused by his alleged offences. The European Court criticised this, saying that the guarantee was designed not to provide reparation of loss but to ensure the presence of the accused at the hearing, and therefore its amount must be fixed principally by reference to him, his assets and his relationship with the persons who are to provide the security. It held that there had been a violation of Article 5(3) because in view of all the circumstances, the risk of absconding had diminished at a certain point to the extent that the taking of guarantees would have been effective. However, in *W. v. Switzerland*,²³⁰ the European Court approved the view of the domestic courts that the circumstances of the case and the applicant's character entitled them to reject his offer to provide security for

223 *Neumeister v. Austria (No. 1)* (1968) 1 E.H.R.R. 81, *Matznetter v. Austria* (1969) 1 E.H.R.R. 188.

224 *Matznetter v. Austria*. In *Matznetter*, the court held that the risk of absconding had diminished and after a certain point had ceased to be a valid reason for his continued detention. However, the risk of his committing further offences had continued to be valid.

225 *Stögmüller v. Austria*, (1969) 1 E.H.R.R. 155.

226 *Ibid.*

227 (1968) 1 E.H.R.R. 91 at 128. Similarly in *Letellier v. France*, (1991) E.H.R.R. 83, the Court said that the danger of absconding must be evaluated with reference to a number of factors and not merely the severity of sentence. The same view was expressed in *Tomas v. France*, (1992) 15 E.H.R.R. 1 and in *W. v. Switzerland*, (1993) 17 E.H.R.R. 60.

228 (1968) 1 E.H.R.R. 55.

229 This was re-iterated in *Letellier v. France*, (1991) 14 E.H.R.R. 83.

230 (1993) 17 E.H.R.R. 60.

his release; both the amount and unknown provenance of the money meant that it was not a fit guarantee to prevent him from absconding.

(ii) *The likelihood of the accused committing further offences*

4.206 In *Matznetter*,²³¹ an Austrian financial consultant had been detained for two years and two months in connection with his suspected offences of fraud. He made three applications for release, the first two of which were rejected by the Austrian Courts on the grounds of potential absconding and potential further offending. Regarding the latter, the European Court said that a judge might reasonably take into account the seriousness of the consequences of criminal offences in order to decide if the person concerned could be released in spite of the possible existence of a danger of his repeating those offences. In this case, the danger of repetition of offences was a valid reason for continued detention of the accused in light of the special circumstances of the case i.e. the prolonged continuation of reprehensible activities, the extent of the loss sustained by the victims, and the wickedness, experience and great skill of the person charged. This ground for detention persisted although the ground of absconding had eventually ceased to be valid.

4.207 In *Clooth v. Belgium*,²³² the applicant was arrested and remanded in custody on suspicion of arson and murder of a teenage girl, in circumstances in which the girl's body was found mutilated in an abandoned building. His detention lasted three years, two months and four days, after which he was released with no case to answer. Psychiatric reports showed the applicant to be dangerous and in need of therapy, which the authorities did not provide. The Government argued that in view of the applicant's mental disturbance and the atrociousness of the crime of which he was suspected, it could be feared that he would perpetrate other offences if he were released, particularly as all the psychiatric experts considered him to be dangerous. The European Court said that the seriousness of a charge may lead to detention in order to prevent any attempts to commit further offences, but it was necessary that the danger be a plausible one and the measure appropriate in light of the accused's history and personality. In this case his previous convictions (aggravated theft and desertion) were not comparable to the present charges. In addition, the expert's report which described him as dangerous mentioned the need for him to be taken into psychiatric care. The Court said that such conclusions ought to have persuaded the courts not to extend detention without an accompanying therapeutic measure. Accordingly, after a certain point, this ground ceased to be a justification for the continued detention of the applicant.

4.208 In *Toth v. Austria*,²³³ the applicant was detained for two years, one month and two days on suspicion of aggravated fraud. The Government argued that there was a genuine risk of repetition of offences because the applicant had

231 (1969) 1 E.H.R.R. 198.

232 (1991) 14 E.H.R.R. 717.

233 (1991) 14 E.H.R.R. 551.

several previous convictions for offences similar to those which were the subject of the pending proceedings. The Court agreed with this view, noting that the domestic court decisions had taken account of the nature of the earlier offences and the number of sentences imposed as a result.²³⁴

(iii) *Disturbance of the public order*

4.209 In *Kemmache v. France*,²³⁵ the applicant was detained on remand on four occasions totalling two years, ten months and ten days, while the criminal proceedings lasted more than eight and a half years. The Court said that in exceptional circumstances, the notion of disturbance of the public order (which it understood to mean disturbance of public opinion following the release of a suspect) may be sufficient to merit pre-trial detention, but only when based on facts showing that the accused's release would actually disturb the public order, and detention may continue only for so long as public order remains actually threatened. In this case, these conditions were not satisfied. The Court reiterated this view in *Letellier v. France*²³⁶ and *Tomasi v. France*.²³⁷

(iv) *Collusion or Interference*

4.210 In *W. v. Switzerland*²³⁸ the Court said that it may be necessary to detain a suspect in order to prevent him from interfering with an investigation, especially in a complicated case where manifold difficult enquiries are necessary. However, while this may be necessary at the beginning of an investigation, it does not justify long term detention. In the normal course of events, the risk of interference diminishes with the passage of time as inquiries are effected, statements taken and verifications carried out. However, in this case, the Court agreed with the Federal Court's opinion that the applicant's personality, antecedents and conduct in the context of other proceedings made his continued detention necessary in order to prevent interference.

2. *What Length Of Pre-trial Custody Is Permitted Under Article 5(3)?*

4.211 The wording of Article 5(3) might at first sight seem to leave a choice to the authorities either to prolong the detention up to the moment of judgment, which must then be given within a reasonable time, or to release the detainee provisionally pending trial, which trial would no longer be subject to a time limit. However, *Neumeister*²³⁹ rejects this view and associates reasonableness with the length of detention, not the processing of prosecution and trial.

4.212 It may be noted that the criteria for reasonableness in Article 5(3) are

234 The Court also found that there were sufficient reasons for believing the applicant posed a risk of absconding. However, in addition to showing good grounds for continued detention, the courts must show special diligence in proceeding, which was not the case here, and there had been a violation of Article 5(3).

235 (1991) 14 E.H.R.R. 520.

236 (1991) 14 E.H.R.R. 83.

237 (1992) 15 E.H.R.R. 1.

238 (1993) 17 E.H.R.R. 60.

239 (1968) 1 E.H.R.R. 91.

somewhat different from those in Article 6(1), and accordingly, the conduct of a particular case may violate one but not the other article. As the Court said in *Stögmüller*,²⁴⁰ the reasonable time stipulation in Article 5(3) refers only to persons charged and detained, and requires special diligence on the part of prosecutors in such cases, whereas the reasonable time stipulation in Article 6(1) aims to prevent a situation where an accused remains in too long a state of uncertainty about his fate, even if he is not in detention. In *Ringeisen*,²⁴¹ for example, the Court held that there had been no breach of Article 6(1) because the length of criminal proceedings was due to the complexity of the case and the legal measures taken by the applicant, but held that there had been a violation of Article 5(3). Similarly, in *Neumeister v. Austria (No. 1)*,²⁴² the Court held that while there had been a violation of Article 5(3), there had been no breach of Article 6(1).

4.213 The Court has said on a number of occasions that there is no absolute numerical limit to a reasonable period, and that the current approach is to examine the factors relied on by the domestic courts and the non-refuted facts advanced by the applicant, and then decide whether the period was reasonable in the circumstances of the particular case.²⁴³

4.214 In the first place, there must be a reasonable suspicion that the accused committed a criminal offence. If this reasonable suspicion ceases to exist, the continued detention becomes unlawful. However, the fact that a reasonable suspicion exists, while a *sine que non* of a lawful detention, is not sufficient to justify, after a certain lapse of time, the prolongation of the detention.²⁴⁴ There must be continuing valid grounds for the detention and a ground which justifies detention as the outset may cease to confer justification for continued detention. However, if valid grounds continue to justify detention, the Court rarely holds the detention period to have been unreasonable. For example, in *Wemhoff v. Federal Republic of Germany*,²⁴⁵ the applicant was detained for three years and five months in respect of suspected offences of fraud, breach of trust and bankruptcy. His numerous requests for release were rejected by the German courts. The Court held that there were grounds for refusing his release, namely that the applicant might suppress evidence in view of the character of the offences, the extreme complexity of the case, and the danger that he might abscond. In view of these facts, his continued detention had not been unreasonable. In *W. v. Switzerland*,²⁴⁶ where the accused had been detained for 1,465 days, it was held that the delays were due to the complexity of the case and conduct of the accused and there had been no violation of Article 5(3). However, in *Tomasi v. France*,²⁴⁷ the Court held that the sufficiency and

240 (1969) 1 E.H.R.R. 155.

241 (1971) 1 E.H.R.R. 455.

242 (1968) 1 E.H.R.R. 91.

243 *Stögmüller, Wemhoff, Neumeister, Duinhof, Matznetter, Letellier v. France, W. v. Switzerland*; citations above.

244 *Stögmüller, Clooth, Kemmache v. France, Letellier v. France, Toth v. Austria, Tomasi, W. v. Switzerland*; citations above.

245 (1968) 1 E.H.R.R. 55.

246 (1993) 17 E.H.R.R. 60.

247 (1992) 15 E.H.R.R. 1.

relevance of the reasons for a lengthy pre-trial detention were unclear, and went on to consider the conduct of the proceedings. It found that the French courts had not acted with the necessary promptness, resulting in detention for five years and seven months, in breach of Article 5(3).

3. *What Is A Hearing In A Reasonable Time Under Article 6(1)?*

4.215 As noted above, the purpose of the reasonable time requirement in this context is to guarantee that an end is put to the insecurity in which a person finds himself on account of a criminal charge. Van Dijk and van Hoof have summarised the types of factor that may be considered as follows:²⁴⁸

- the complexity of the case;
- efforts made by the judicial authorities to expedite proceedings;
- whether the behaviour of the accused has contributed to the delay;
- although the overburdening of the judiciary is not generally recognised as an excuse, a temporary accumulation of cases may be regarded as a justification for a degree of delay, provided that the authorities do everything in their power to cope with the situation as quickly as possible.

Van Dijk and van Hoof conclude:

"From the case-law the general picture emerges that the Strasbourg authorities tend to apply fairly broad standards with respect to the above-mentioned criteria. Thus, even periods of seven and eight years were still considered 'reasonable' by the Commission in certain cases, and a period of nearly five years by the Court."²⁴⁹

Comment

4.216 The current Irish law relating to bail undoubtedly complies with European Convention standards as set out in Articles 5(1)(c), 5(3) and 6(1). The grounds on which bail decisions are currently made in Irish law comply with those recognised by the Court and the factors taken into account when considering those grounds are also similar. For example, when considering the risk of absconding, the Irish courts consider a wide range of factors, including community ties as well as severity of sentence, as endorsed by the European Court. Moreover, the periods of detention recognised as valid by the Court appear to be considerably longer than periods spent in detention by Irish pre-trial detainees.

²⁴⁸ *Op cit.*, at pp.331-333.

²⁴⁹ *Ibid.*, at p.333. Footnotes omitted.

4.217 In addition, the European Convention would expressly allow amendment of Irish law relating to bail so as to permit pre-trial detention to prevent further offences. The Court has on several occasions recognised that this is a valid ground, provided the alleged danger is plausible and the measure appropriate in light of the accused's history and personality. Indeed, the Convention goes further and appears to permit the ground of possible disturbance of the public order, in the sense of disturbance of public opinion by reason of the release of the accused. This appears somewhat similar to the interpretation of the "public interest" limb of s.515 of the Canadian Criminal Code by the Canadian courts,²⁵⁰ before this was struck down as contrary to the Charter in *R. v. Morales*.²⁵¹ The attitude of the European Court regarding the grounds for detention, and the issue of delay, tends to reflect the domestic European legal systems from which the judges are drawn.

4.218 Article 5(5) of the Convention provides that everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 shall have an enforceable right to compensation. Most European jurisdictions appear to have provided for compensation for a person either illegally detained before trial or who is detained before trial and subsequently acquitted. Whereas there is always a right to damages under Irish law for false imprisonment, there would be no right to damages once detention was *bona fide*, within the terms of the Convention, even if followed by an acquittal. A judge withdrawing a case from a jury may, in his discretion, award costs against the prosecution. This will only arise where the accused is not on legal aid.

CONTINENTAL JURISDICTIONS

4.219 This section contains an extremely brief survey of the criteria for pre-trial detention in a number of continental jurisdictions.²⁵²

Belgium

4.220 Under the 1990 Statute on Detention on Remand, a warrant for the detention on remand of an accused may be ordered by a judge under the following conditions:

- (1) there must be a serious suspicion that the person committed an offence;
- (2) the offence must be an arrestable offence, i.e. carrying a sentence of one year imprisonment or more;
- (3) detention on remand must be absolutely necessary in the interests of public safety;

250 See above, pp.104-5.

251 [1993] 17 C.R. (4th) 74, 77 C.C.C. (3rd) 91, [1992] 3 S.C.R. 711.

252 See Van Den Wyngaert, *Criminal Procedure Systems in the European Community* (1993).

(4) (except for extremely serious crimes) one of the following four reasons must be present:

- a risk that the suspect if released will commit new offences;
- a risk that the suspect will abscond;
- a risk that the suspect will meddle with the evidence;
- a risk that the suspect will collude with third parties.

4.221 Before the 1990 statute, the investigating judge had no choice but to detain or release a suspect. Now he may order alternative measures such as house arrest, a restriction order, medical or other treatment, or money bail. These alternatives must relate to one of the four reasons for which a detention warrant may be issued and the general conditions for detention on remand must be met.

4.222 There is a periodic review of the lawfulness of detention on remand. There is no appeal against the original warrant of the investigating judge. However, there is a verification procedure before the judicial council, which reviews the legality of the warrant as well as the continuation of the detention. These checks take place after five days and then each month. The hearing of the judicial council takes place in the presence of the accused and his lawyer, the public prosecutor and the investigating judge. If the judge decides to prolong detention, the accused may lodge an appeal against this decision with the court of indictment.

4.223 A person who has been unjustly detained may be entitled to compensation. There is a distinction in procedure (i) where the detention was unlawful and (ii) where the detention was lawful but followed by an acquittal. Where the detention was unlawful, the person may bring a compensation claim against the State in the ordinary civil courts. In the second case, a claim for compensation must be addressed to the Minister of Justice.

Denmark

4.224 Detention on remand may not be used if the crime carries only a fine or lenient imprisonment. The conditions of detention on remand are:

- (1) there must be a reasonable suspicion that the accused has committed an arrestable offence, i.e. an offence which carries a penalty of at least one year and six months imprisonment;
- (2) there must be a serious reason to believe that the accused:
 - (a) will abscond;
 - (b) might commit further offences of the same sort if left at large;

(c) will meddle with the evidence.

4.225 In particular cases it is also possible to use detention on remand to protect the public sense of justice, if the *prima facie* evidence against the accused is very strong, provided the crime carries a penalty of at least six years imprisonment. There must be a special consideration for the enforcement of the law, or the crime must be a violent crime for which the punishment is at least a sentence of 60 days imprisonment and consideration for the enforcement of the law demands that the accused is not at liberty.

4.226 The person must be produced in court at least every four weeks to renew the remand. There is the possibility of release on bail, but this is reluctantly used since it is felt to be economically discriminatory.

4.227 If acquitted, a person has the right to compensation, unless special circumstances prevail.

Germany

4.228 A person may be detained on remand on the following grounds:

- (1) the person has already escaped;
- (2) the danger of absconding;
- (3) the danger of meddling with the evidence;
- (4) the danger of re-offending.

4.229 With the exception of the last ground, there is no absolute limit on the duration of detention on remand. There is a complicated system of review designed to reduce the periods of detention. Release on bail or on a variety of other securing conditions is possible and is frequently granted.

4.230 An accused who is acquitted has the right to be compensated. Higher rates of compensation tend to apply in the case of illegal detention according to general principles of civil law.

Italy

4.231 Detention on remand may be ordered if there is a danger that the accused will meddle with the evidence, if there are reasons to believe that he will abscond, or when it is feared that he will commit serious crimes. Detention to prevent repeat offending has been declared contrary to the presumption of innocence. However, the relevant provision was amended in respect of more serious offences and in respect of organised crime; for these offences, detention on remand is mandatory unless it can be established that there is no danger. Detention on remand may not exceed six years, after which point the accused

must be released even if convicted. This period may be extended by the judge. Release may be conditioned by guarantees, but bail is no longer permitted because of its potential for discriminating against indigent accused. An accused may be placed under house arrest.

4.232 Since 1988, an accused who is acquitted is entitled to adequate compensation, as is a person who has been illegally detained.

Luxembourg

4.233 Detention on remand may be ordered by a judge if the following conditions are met:

- (1) the offence is an arrestable offence, i.e. carrying a sentence of two years or more in prison;
- (2) there are serious reasons to believe that the suspect has committed the offence;
- (3) one of the following reasons for detention is present:
 - that the suspect will abscond;
 - that he will meddle with the evidence;
 - that he will commit new offences.

4.234 The decision to detain must be reviewed every month. Release upon conditions, including bail, may be ordered.

The Netherlands

4.235 Detention on remand may be ordered by a judge where there is *serious* suspicion that he committed a criminal offence (not merely reasonable suspicion) and where there is a risk of one of the following:

- (1) flight;
- (2) that the accused might commit another offence carrying a penalty of at least six years imprisonment or which would seriously endanger the state or persons or property;
- (3) a risk that he might prevent or obstruct the investigation of his case.

4.236 Detention on remand may also be imposed if the offence has seriously shocked the community, where the offence carries a penalty of life imprisonment or at least twelve years.

4.237 The judge imposing detention must take into account the sentence that is likely to be imposed if the offender is convicted. He should not impose detention unless the expected sentence involves the unconditional deprivation of liberty and is likely to be of at least the length that detention on remand would be.

4.238 Conditional release from remand occurs frequently, although such persons are rarely required to put up bail, again on the basis of discrimination against poorer defendants.

4.239 Compensation may be awarded if the case ends without the imposition of a punishment or measure, or if the sentence involves a punishment or measure for an offence for which the Code does not allow detention on remand. Compensation is at the discretion of the court. In the case of an illegal detention, the person may bring a civil claim against the state.

Spain

4.240 Detention on remand may be ordered by judicial authorities for an offence carrying at least six months to six years imprisonment. In other cases, detention may be ordered only if the detention is considered necessary by reason of the antecedents of the suspect, the circumstances of the crime, the social alarm caused by the offence or the frequency with which similar offences are committed. Detention may be continued only for so long as the reasons which provoked it continue.

4.241 Detention cannot exceed three months if the offence is punishable by one month to six months, one year if the offence is punishable by six months to six years, and two years in the case of a higher penalty. In the second two cases, time limits can be extended up to two or four years respectively by means of a judicial decision following a hearing in the presence of the accused and the public prosecutor.

4.242 Provisional release may be secured with or without bail. Persons are entitled to compensation where detention is followed by acquittal or discharge, provided they can prove prejudice.

Comment

4.243 From this brief survey of a number of Continental jurisdictions, it may be seen that the possibility that the accused might commit further offences is accepted as a ground for detention by all of the countries mentioned. Indeed, some go further and recognise public alarm at the offence charged as a ground for detention. Most of the countries provide for compensation both where the accused is ultimately acquitted or, under principles of civil law, where the detention was illegal. We may note the distrust in several countries of bail on the basis that it discriminates between defendants on economic grounds.

Other Jurisdictions - Recapitulation

4.244 From this review of bail law in other jurisdictions, we may draw out some general strands. *First*, there is concern in many countries about the use of bail on the basis that it discriminates against poor defendants, and accordingly in some countries the use of money bail has been greatly reduced.

4.245 *Secondly*, in many countries there is a desire to improve the quality of bail hearings; accordingly, bail information schemes have been developed (e.g. in the United States, in England and Wales) and in many countries the judge must give reasons for his or her decision on bail.

4.246 *Thirdly*, there is a general view that custodial remands should be used only when strictly necessary. Accordingly, we have seen recommendations that custodial remands be used only when imprisonment is a likely sentence, and recommendations that the summons procedure, instead of arrest and charge, be used more frequently. In most legal systems reviewed, there was a "ladder" approach, under which a judge could only impose a custodial remand if it was strictly necessary and none of the options on the lesser rung of the ladder, such as conditional release, could achieve the same purpose as a custodial remand. We have also seen the development of bail hostels to ensure that persons are not remanded in custody merely because they are homeless. We have seen a number of intermediate options such as supervised release or house arrest.

4.247 *Fourthly*, in connection with bail offending we have seen that all the jurisdictions reviewed permit custodial remand, at least to some degree, in order to prevent the commission of further offences. Sometimes this is only to prevent further serious or violent offences; sometimes it covers any further offences. Usually this ground for detention only applies when the offence charged is a relatively serious offence, and in some cases, a full hearing is required before detention on this ground may be imposed. Some countries have employed reverse onus provisions or presumptions making it difficult for particular categories of offender to obtain pre-trial release, on the basis of the assumption that these categories of offender are more likely to recidivate before trial. We have also seen that some continental systems and the case-law of the European Convention go further and permit custodial remand where the release of the accused would alarm public opinion, although a similar provision in Canada was struck down as unconstitutional. A number of other provisions dealing with bail offending have also been noted, such as the offence of breaching bail conditions (where non-offending is a condition of bail), estreatment of bail where further offences are committed, or a requirement that the court aggregate sentence where the offence was committed while on bail.

4.248 *Fifthly*, we have seen that many countries have been introducing time limits and, in particular, custody time limits, in order to limit the length of time spent by accused persons in custody.

4.249 *Finally*, we have seen that the trend in continental criminal justice systems is to provide compensation to accused persons detained in custody prior

to trial who are illegally detained or who are subsequently acquitted, and that the Law Reform Commission of Queensland has recently expressed support for such a scheme.

CHAPTER 5: PREVENTIVE DETENTION – THE ARGUMENTS

Introduction

5.1 It is important to place a discussion of pre-trial preventive detention in the context of what a custodial remand means, both to the accused and to society. In discussing the merits of pre-trial detention, it is often taken for granted that custodial remand should only be imposed where necessary, but it is valuable to remind ourselves of the reasons why this should be so.

5.2 The costs to the accused and his family of being remanded in custody are enormous. An accused may lose his employment, his family will suffer financially and emotionally, and he will be at a disadvantage in preparing for trial. As the National Association for the Care and Resettlement of Offenders has said:

"... if a defendant is in custody, the remand centre or prison may be a considerable distance from the solicitor's office and much time will be wasted in travelling, complying with the security formalities and waiting for the defendant to be found and brought to the interview room ... In tracing witnesses, defendants have to rely entirely on a busy solicitor and the good-will of friends. In obtaining evidence in mitigation, they have to rely once again on their solicitor, friends and relations. If they are not happy with the way their case is being handled, they are not well placed to do much about it."¹

5.3 Two Australian practitioners have expressed similar views, focusing on the psychological effects of custody:

"It is the moral sapping, debilitating effect of incarceration on remand that contributes to the potentially permanent effects of a refusal of bail. In the despondent state that overcomes many people immediately they are imprisoned, clear and definite instructions may be more difficult for a legal representative to obtain. Many prisoners seem to give up hope."²

"The person who is out on bail has a greater chance, no matter what the charge is, of ultimately defeating it, because he is better equipped to face up to cross-examination and the other processes of trial, if he has been in his own surroundings before he ultimately comes into court."³

5.4 A number of studies have suggested that even when various factors, including the strength of the evidence, are controlled, persons detained in custody before trial are more likely to be convicted and are more likely to receive a custodial sentence. This does not *necessarily* suggest, of course, that detention contributed to the conviction of an innocent person without evidence.⁴

5.5 In *Attorney General v. O'Callaghan*, Walsh J. said:

"From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be released pending trial ... In the modern complex society in which we live the effect of imprisonment upon the private life of the accused and of his family may be disastrous in its severe economic consequences to him and his family dependent upon his earnings from day to day or even hour to hour. It must also be recognised that imprisonment before trial will usually have an adverse effect upon the prisoner's prospects of acquittal because of the difficulty, if not the impossibility in many cases, of adequately investigating the case and preparing the defence."⁵

5.6 Finally, it may be noted that custodial remands are financially burdensome for the State, both in terms of the detention places which have to be provided, and because the constant escorting of the accused to and from court eats into the resources of the prison staff.

2 Michael Barnes, Solicitor, Brisbane; submission to the Queensland Law Reform Commission, *To Bail or Not To Bail*, Discussion Paper No. 35 (1991).

3 Frank Galbally, quoted at p.224 of the Queensland Law Reform Commission Discussion Paper.

4 See M. Friedland, *Detention Before Trial: A Study of Cases tried in the Toronto Magistrates Courts* (1965); "Preventive Detention: An Empirical Analysis", 6 *Harvard Civil Rights - Civil Liberties Review* 289; M. Melvin and P.J. Didcott, *Pre-Trial Bail and Custody in the Scottish Sheriff Courts*, Edinburgh (H.M.S.O. 1978); Brody and Tarling, *Taking Offenders Out of Circulation*, Home Office Research Study No. 64 (H.M.S.O. 1980). Goldkamp and Gottfredson, in *Policy Guidelines for Bail* (1985) at p.17, note 7, say: "Since the first mention of differential case outcomes for detained and released defendants ... nearly every subsequent study has included findings showing that greater proportions of released defendants received favourable dispositions - with respect to dismissal, conviction and sentencing - than detained defendants", citing nine such studies.

5 [1966] I.R. 501 at 513.

Pre-trial Preventive Detention - Should It Be Extended?

5.7 In the rest of this Chapter, we look at the arguments for and against a change in the Irish law relating to bail to permit the pre-trial detention of an accused on the basis that he might commit offences if released.

What is special about pre-trial offences that might warrant a departure from the norm and the introduction of preventive detention?

5.8 Whatever view one takes about the merits of pre-trial preventive detention, it must be acknowledged that such a measure would constitute a significant departure from the traditional methods of the criminal justice system, albeit in a limited area. Why might such a departure be warranted in the case of offences committed during the bail period? What is special about the bail period that might warrant such a measure? Is offending on bail more objectionable than, for example, stealing a car on the way home, having been released from a prison sentence?

5.9 A number of reasons may lie at the heart of the view that offending during the bail period warrants exceptional measures:

- (i) Such behaviour can be said to illustrate an exceptional degree of insolence on the part of the offender. Already facing criminal charges, he is seen to be thumbing his nose at, or flouting the authority of, the system by continuing to engage in the type of behaviour in respect of which he will shortly be tried.
- (ii) A second and related view might be that the bail period is a period of trust, and that to engage in criminal behaviour during that period represents a breach of that trust and therefore should be seen as exceptionally grave, warranting exceptional measures. This view also sees bail offending as an affront to the dignity of the system.

These arguments would seem to apply to a number of situations and not merely to release on bail. For example, when the accused is on probation, or undergoing a sentence of community service, or on temporary release, it might equally be said that the system has placed its trust in him to be of good behaviour, and that engaging in criminal behaviour during such period manifests insolence or breach of trust. Indeed, this is the view taken in Scotland, as we have seen. These arguments therefore suggest that pre-trial preventive detention is appropriate not merely where the person has offended on bail, but in other situations also.

- (iii) The third possible reason for treating bail offences differently is that bail is a privilege, a respite for the accused before his trial, and that offending during that period is a breach of that privilege. According to that argument, the accused who is charged is guilty more often than not, and delays in the system prevent this from being established and his

sentence imposed immediately. Thus when he offends he is doing so in a period of liberty to which he is not really entitled, and which was granted to him as some kind of concession.⁶ This argument appears to have particular force where an offender is caught red-handed or the evidence appears overwhelming; in such cases, the trial appears to be a formality.

From a legal point of view, the problem with this argument is that its premise - that the accused is guilty - conflicts with the presumption of innocence; the charge does not establish guilt, but merely shows that there is sufficient evidence to put the accused on trial at some later point. Accordingly, the accused's liberty prior to trial is not a concession, but something to which he is entitled until he is shown to be guilty in a criminal trial, and his trial can never be seen as a mere formality. The presumption of innocence, moreover, is not merely a lofty idealistic principle, but reflects the fact that some defendants who are charged are indeed innocent of their charges.

It might, however, be argued, that while the presumption of innocence is an important cornerstone of our criminal justice system generally, it is misguided to insist upon it as a reason for releasing the accused when the evidence of guilt is extremely high, e.g. where the accused is caught red-handed.

- (iv) A fourth argument and perhaps the argument most often used by proponents of pre-trial preventive detention, is that, at present, criminals released on bail pending trial know that they can re-offend with impunity and that they will be unlikely to receive a greater sentence by reason of their bail offences.

However, this argument might be said to prescribe stronger medicine than is warranted by the disease. If judges do not punish offenders adequately for bail offences, it may be argued that the appropriate solution is that they should so punish them, not that offenders should be preventively detained to prevent those offences. This argument holds that the deterrent-based system is not being applied, rather than that it is not effective when it is applied. There is little evidence to suggest that offenders are not punished in respect of bail offences, and current Irish law requires sentences of imprisonment for bail offences to be consecutive to a sentence of imprisonment in respect of the original offence. The conclusion must be that offending on bail is not being deterred.

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For example, an article in the Irish Times recently commented: "The 'revolving door' system in Irish prisons is a source of great annoyance among police in the inner city. The bail system allows persistent offenders almost immediate release from custody after charge and is regarded as a severe impediment to effective policing." Irish Times, Monday, 12th September 1994, p.9. The view is premised on the idea that persistent offenders should automatically be imprisoned on the basis of a charge alone.

- (v) Two further arguments point to the psychological effects the release of an offender has on the public and the police. It might be said that it is damaging to police morale to see an offender recently apprehended for one crime released to commit more crimes, thus leading to a sense of futility about their ability to enforce the law. They complain that they are attempting to enforce the criminal law with their hands tied behind their backs. The public, this argument continues, rightly or wrongly loses confidence in the system when apprehended criminals are left free to roam the streets even though they have already been caught in respect of one or more offences.

Much in these arguments implies the points raised above, which run into the problem of the presumption of innocence. However, it is important to have regard to confidence levels in the Garda Síochána and public confidence more generally. As we have seen, some systems have found that "public alarm" is a valid reason for refusing release.

As against this, however, it might be argued that while the emotional impact of pre-trial release on the police and the public must be taken into account, it must be put in the balance with other factors such as the extent to which it invades constitutional liberties or principles. Moreover, public opinion cannot be allowed supremacy over constitutional liberties if it is based on incorrect information, e.g. about the efficacy of pre-trial preventive detention, or prejudice, or simple misunderstanding of the issues and the context.

- (vi) Another argument which is sometimes used to support the introduction of pre-trial preventive detention is that judges already engage in preventive detention even though they are prohibited to do so by law. This practice is usually referred to as detention *sub rosa*. For example, some might argue that murder defendants are refused bail because they are more likely to abscond (because of the seriousness of the charge and the penalty involved). In reality, they are refused bail partly because public opinion would be outraged at their release, and partly because it is felt that even if the chance of a repeat murder is low, the threat which it represents is so great as to justify refusal of bail. According to this argument, it would be much better if the practice of detaining accused persons on grounds of public safety were brought out into the open and regulated rather than permitted to operate at the level of a "black market" in judicial practice.

It seems more appropriate to evaluate the merits of pre-trial preventive detention independently of this consideration, and then to decide whether the law should be changed or whether the law should remain as it is and be enforced more rigorously. The fact that an illegal practice already exists is rarely a good argument, standing alone, for making that practice legal.

- (vii) The last argument is the claim that bail offenders are disproportionately responsible for crime and that to detain such persons would reduce the level of crime to a greater degree than a system based on punishment and deterrence.

Ultimately, the answer to this question must be provided by empirical evidence. Further research is required to establish whether preventive detention would in fact be more effective in this respect. One could argue that the burden of proving efficacy lies on those who would replace the existing system with preventive detention, given the high costs involved, both financially and in matters of principle.

Does pre-trial detention intended to prevent the commission of further offences constitute punishment or regulation?

5.10 According to one view, pre-trial preventive detention is a punishment and therefore unacceptable because punishment can only be imposed after conviction. From another viewpoint, pre-trial preventive detention is a regulatory measure which deprives a person of liberty, not to punish, but to pursue other legitimate objectives, just as, for example, civil commitment of mentally ill persons is justified although it is not punishment following conviction. Before we embark on this issue, we should note that the answer to the question posed does not dispose of the ultimate issue, namely, whether pre-trial detention is justified. Even if we conclude that pre-trial detention to prevent offences is not punishment, we then have to consider matters such as the objectives being pursued, whether those objectives are legitimate, and whether the method chosen is proportional to the objective chosen. In this section we do not deal with that ultimate issue, but merely the preliminary issue as to how pre-trial preventive detention should be characterised.

5.11 In *People (Attorney General) v. O'Callaghan*,⁷ both O'Dalaigh C.J. and Walsh J. characterised pre-trial detention to prevent the commission of further offences as punishment. Walsh J. said that such detention has a "substantial punitive content", while O'Dalaigh C.J. said that unless detention had the object of ensuring attendance at trial, it must be considered a punishment. However, neither offered any detailed discussion of the issue nor any general test by which a measure may be characterised as punitive or not. As Walsh J. made the above comment in the context of a discussion of the effects of pre-trial detention on the accused, it might be thought that he viewed the *effects* of a measure as determinative of the question. However, in *Re Article 26 and the Offences Against the State (Amendment) Act, 1940*,⁸ internment was viewed as a "precautionary measure taken for the purpose of preserving the public peace and the order and security of the State." We are left with two quite different views on two measures both involving preventive detention and no method by which to evaluate the correctness of either view. Accordingly, it may be useful to address the issue

7 [1968] I.R. 501.

8 [1940] I.R. 470.

once more.

5.12 Perhaps the most detailed discussion of the punishment/regulation distinction arose in the United States. It will be recalled that an eight part test was formulated by the Supreme Court in *Kennedy v. Mendoza*⁹ for distinguishing between a punitive and a regulatory measure. These eight factors were:

1. legislative intent - only if this is non-punitive should the other factors be examined;
2. whether the measure involved an affirmative disability or restraint;
3. whether the measure was historically regarded as punishment;
4. whether the measure came into play only upon a finding of *scienter* (*mens rea*);
5. whether its operation would promote retribution or deterrence;
6. whether the behaviour to which it applies is a crime;
7. whether an alternative purpose to which it may rationally be connected is assignable for it;
8. whether it appears excessive in relation to the alternative purpose assigned.

5.13 The Supreme Court applied a scaled-down version of this test both in *Schall v. Martin*¹⁰ and *United States v. Salerno*¹¹ to find that pre-trial preventive detention was not punitive, thus reaching precisely the opposite conclusion to the Irish Supreme Court in *O'Callaghan*. This shorter test merely looks at matters (1), (7) and (8) above.

5.14 In addition, we might consider the classic definition of punishment offered by H.L.A. Hart:¹²

1. It must involve pain or other consequences normally considered unpleasant;
2. It must be for an offence against legal rules;
3. It must be of an actual or supposed offender for his offences;

⁹ 372 U.S. 144 (1963).

¹⁰ 467 U.S. 253 (1984).

¹¹ 481 U.S. 697 (1987).

¹² *Punishment and Responsibility* (1968), at pp.4-5.

4. It must be intentionally administered by human beings other than the offender;
5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

5.15 It may be noted that there are two main types of defining factor; one type of factor defines a measure according to its *function*, while the other defines a measure according to its *effect*. Thus, for example, an examination of whether the measure involves the infliction of pain, or involves a disability or restraint, involves looking at the *effect* of the measure on the individual concerned, whereas an examination of legislative intent, whether an alternative purpose can be assigned to the measure and whether it involves pre-conditions such as findings of *scienter* or of criminal behaviour, involve looking at the *function* of the measure. Radically different answers to the question "Is a particular measure a punishment?" emerge, depending on which approach is employed. We suggest that a test should incorporate elements of both approaches and look at a wide range of factors to determine whether a measure constitutes punishment.

5.16 According to the above tests, is pre-trial detention to prevent further offences punishment? There should be no question that such a measure would satisfy parts 1,4 and 5 of Hart's test, and part 2 of the *Mendoza* test. However, does it satisfy the other parts of Hart's test? The second and third parts of Hart's test seems to envisage the measure being administered in respect of behaviour already engaged in, rather than future offences. Intuitively, we tend to apply the term punishment to a measure which is imposed because of past rather than future behaviour. Turning to the *Mendoza* test, the issue becomes more complex.

5.17 Historically, it is undoubtedly true that imprisonment has been regarded as punishment, but that may be because imprisonment has usually been imposed as punishment after conviction. Does the measure come into play upon a finding of *scienter* (*mens rea*)? Arguably not, if this is taken to mean an offender's mental attitude towards his behaviour at the time of that behaviour; on the other hand, one could argue that since preventive detention is imposed because of an offender's present intention to commit further offences, this is equivalent to *scienter* in a broad sense. However, this may misrepresent what preventive detention seeks to do; it would be more accurate to say that preventive detention is employed because the offender has an intention to commit further offences *now*. This leads to the question whether a disposition to commit further offences is *scienter*. Another part of the *Mendoza* test asks whether the measure promotes retribution or deterrence. It seems more plausible to say that what it primarily seeks to achieve is the prevention of offences before they have been committed by incapacitating potential offenders, although this course of action might have secondary deterrent effects. It seems difficult, however, to characterise it as retributive as this term, like punishment, seems to be appropriate only in respect of past behaviour. One requirement which does appear to be satisfied is that the behaviour which preventive detention targets is a crime; that is precisely the

reason for attempting to prevent it. Finally, we can say that preventive detention does have a purpose, alternative to punishment, rationally assignable to it, namely the prevention of crime. Whether the measure is excessive in its method of achieving that object requires a consideration of a number of matters, which will be discussed below.

5.18 According to the arguments considered so far, it seems that the balance favours a non-punitive view of preventive detention. However, there is one other important factor, namely the fact that, in Ireland, as well as in many other countries, detainees are required to serve this period of detention in prison. It could be argued that this merely reflects administrative expediency, as detention in prison is not logically or necessarily connected with pre-trial detention, and so while the State should be urged to house pre-trial detainees elsewhere, pre-trial detention should nonetheless be characterised as non-punitive. Indeed, the I.C.C.L. have argued that it is unconstitutional to house pre-trial detainees in ordinary prisons because it treats equally groups which are not similarly situated and therefore breaches the guarantee of equality.¹³ A contrary argument might be that the harsh effects of imprisonment tip the balance in favour of viewing pre-trial detention as punitive. We have seen that it is generally accepted in the United States, even by those who view pre-trial preventive detention as non-punitive (including the Supreme Court), that once detention goes beyond a certain length of time, that which was not initially punitive becomes punitive. Might it not be argued by analogy that which in some conditions would not be punitive may in others become so? We might draw support for this view from the decision of Barr J. in *J. v. District Justice Delap*.¹⁴ In this case, an order had been made for the detention of a fifteen year old in a reformatory school until the age of nineteen. This was challenged on the basis that there was no distinction between imprisonment and such detention, and that this was essentially a three year sentence of imprisonment. Accordingly, it was argued, the provisions of the *Children Act, 1908* which authorised three years of effective imprisonment by a District Court were in breach of Article 38.5 of the Constitution. However, Barr J. held that there was a valid distinction between a reformatory school and imprisonment, taking into account matters such as the fact that it was staffed by teachers, that it was managed by the Department of Education and had no connection with the prison service, and that its purpose was to provide training and educational facilities. From this decision it appears that the actual conditions and ethos of detention are crucial to determining its nature. We may also note the majority in *Salerno* drew support for their view that pre-trial detention was regulatory from the fact that the statute required pre-trial detainees to be housed separately from convicted offenders.

5.19 If the Irish courts were to be presented with this issue again, a deeper analysis might be forthcoming, and it is possible that a different conclusion might be reached. Deprivation of liberty, wherever the prisoner is housed, will always be experienced in the same way. It is suggested that the reason why a person's

13 Irish Council for Civil Liberties, *Innocent Until Proven Guilty*.
14 [1989] I.R. 167.

liberty is restricted is the relevant consideration.

Constitutional Issues

5.20 Opponents of preventive detention cite a number of Constitutional principles and rights that would be violated by a system of pre-trial preventive detention. Among the most commonly cited are the presumption of innocence and the right to liberty. However, there may be others. In this section, we examine two matters: (1) what principles and rights are infringed by pre-trial preventive detention and (2) whether and how such infringements might be justified.

1. What Principles Or Rights Would Be Infringed By Pre-trial Preventive Detention?

(a) Liberty

5.21 It is self-evident that any form of detention *prima facie* violates the right to liberty.

(b) The principle that criminal behaviour must be defined by reference to behaviour rather than the condition or character of the accused

5.22 In *King v. Attorney General*,¹⁵ the Irish Supreme Court struck down s.4 of the *Vagrancy Act, 1824* insofar as it provided for the offence of frequenting certain places by every suspected person or reputed thief with the intention of committing a felony. Under s.15 of the *Prevention of Crimes Act, 1871*, in order to prove that a suspected person intended to commit a felony, it was not necessary to show that he was guilty of any particular act tending to show his purpose or intent, and he could be convicted if, from the circumstances and from his known character, it appeared to the court that his intention had been to commit a felony. The Supreme Court held that this provision was incompatible with the rights to liberty and equality and the constitutional requirement in Article 40.3 to defend and vindicate the personal rights of citizens. The judgment in *King* appears to illustrate a commitment to the principle that criminal behaviour defined by reference to the condition or character of the accused, rather than discrete acts of crime, is unconstitutional. Pre-trial preventive detention, insofar as it rests on the past record and behaviour of the accused, deprives a person of his liberty by reason of his character or condition and thus might well violate this principle. As the I.C.C.L. has said:

"To be detained under the proposal, an accused must be recognised as having criminal propensities. This would treat an accused as a member of a class thought likely to commit crime if released pending trial. Detention would be based on a determination of the quality of the

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[1981] I.R. 233.

accused, about the kind of person the accused is, rather than his alleged acts. This would violate the fundamental requirement, affirmed in *King*, that punishment be imposed only if it is made clear in advance precisely what one must do to become subject to the criminal law and how one might avoid doing so. A preventive detention system would permit punishment to be imposed on individuals on the basis of circumstances other than convincing proof of conduct whose criminal consequences the accused would have foreseen."¹⁶

5.23 A rejoinder to this argument might be that it is wrong to punish a person for what he or she is, rather than what he or she does, only when he or she has no control over what he or she is. Thus it would clearly be unacceptable to criminalise persons for being of a particular race, or having a particular disease, or having a mental illness. However, pre-trial preventive detention, the argument continues, focuses on the accused's disposition *as manifested by his past actions*, over which he had control at that time. It should be remembered that in *King*, the provisions struck down also permitted a reliance on the accused's previous behaviour to indicate his present propensity, and yet the Supreme Court held them invalid.

5.24 The discussion of false positives by the Floud Committee,¹⁷ and the reaction it provoked, is interesting in this context. The Floud Committee said that the fact that a person predicted to offend did not offend did not make a "false positive", because he still has the disposition to offend, which is all that the prediction suggested. To put it another way, a prediction of dangerousness is a statement about membership of a group (of potentially dangerous offenders) rather than of future behaviour (further offending). They then built on this interpretation of "false positives" to argue that the balance should be tipped against persons who presented this disposition.¹⁸ This has been labelled the "dispositional false positive" compared with the "actual false positive."¹⁹

5.25 Commenting on this, Radzinowicz and Hood have said:

"We reject this speculative approach. It amounts to asserting that it is an offence to present oneself as a risk, even though it has to be admitted, on the empirical evidence, that the risk may not be high and in more cases than not will fail to materialise."²⁰

5.26 It has been pointed out that this view of false positives makes the accuracy of prediction impossible to test, because it will be said that the offender who does not re-offend nonetheless had the disposition to offend and only chance prevented him from giving effect to his disposition.²¹ These criticisms

¹⁶ I.C.C.L., *op cit.*, p.61.

¹⁷ Floud and Young, *Dangerousness and Criminal Justice* (1981).

¹⁸ See above at pp.85-79.

¹⁹ Bottoms and Brownsword, 'The Dangerousness Debate After the Floud Report', (1982) 22 Brit. J. Crim. 229.

²⁰ [1981] Crim. L.R. 756 at 758.

²¹ Monahan, *Predicting Violent Behaviour*, at p.78 and Bottoms and Brownsword, *op cit.*

support the view that detaining a person on the basis of a supposed dangerous condition criminalises the condition rather than the behaviour and is illegitimate.

5.27 It might also be said that once a system recognises as legitimate the detention of a person charged who is deemed to be dangerous, the way is opened for detaining persons *not charged* who are deemed dangerous by reason of their past behaviour. This might seem exaggerated, but under one view of the presumption of innocence, a person charged is still innocent, and from a legal point of view there is no valid reason to distinguish between a person charged and an uncharged person. A rejoinder to this might be that there is a distinction, in that the charge, particularly when directed by the D.P.P., illustrates probable cause to believe that he is guilty and therefore suggests present, not merely past, danger.

(c) *The presumption of innocence*

5.28 Of central importance to a discussion of the Constitutional issues is the presumption of innocence. We will discuss this in some detail because there are a number of aspects to the issue, and some commentators and courts have denied the relevance of the presumption of innocence to the question of pre-trial preventive detention. We must pose a number of questions: (i) Does the presumption of innocence apply at the pre-trial stage? (ii) If so, how precisely would it be violated by pre-trial preventive detention?

(i) *Does the presumption of innocence apply at the pre-trial stage?*

5.29 There are two views on this matter. One view of the presumption of innocence suggests that it is merely a procedural rule carried over from the common law which operates in the trial context and has no application outside that forum. The second view is that the presumption of innocence is a principle governing all stages of the criminal process until a verdict of guilty is reached. These different views on the ambit of the presumption of innocence feed into the question of the proper purpose of bail. If the first view of the presumption is correct, it would not necessarily be impermissible to impose restrictions on the accused designed to ensure purposes other than his attendance at trial. Thus pre-trial detention to prevent crime would be acceptable. However, if the second view of the presumption of innocence is adopted, restrictions prior to trial, if any, must be minimal and must be designed to ensure that his trial will take place. Restrictions based on possible absconding, interfering with witnesses or tampering with evidence have been held not to conflict with the presumption of innocence because they serve the purpose of ensuring that the accused will stand trial and in no way reflect on his guilt or innocence of the offence charged or any other offences.

5.30 We have seen that the Supreme Court of Canada took the view that while the presumption of innocence in the Charter creates a procedural and evidentiary rule at trial that the prosecution must prove guilt beyond all reasonable doubt, the rule has no application at the bail stage, where the guilt or

innocence of the accused is not determined nor punishment imposed.²² This paved the way for a broad interpretation of the purpose of bail. In *Pearson*,²³ Lamer C.J. took the view that pre-trial detention to prevent the commission of offences served the purposes of the bail system, in that it established an effective bail system for specific offences for which the normal bail system would allow continuing criminal behaviour and an intolerable risk of offending. Thus he assumed that one of the purposes of the bail system was to prevent the commission of offences. In *Morales*,²⁴ he repeated this view, saying that pre-trial preventive detention is not undertaken for a purpose extraneous to the bail system but rather promotes the functioning of that system because it does not function properly if the accused commits further offences.

5.31 Similarly, in *Bell v. Wolfish*,²⁵ and again in *Salerno*,²⁶ Rehnquist C.J., giving the opinion of the majority of the United States Supreme Court, said that the presumption of innocence has no application at the pre-trial stage. This also led to a broad view of the purposes of bail. Rehnquist C.J. said that although the primary function of bail was to safeguard the court's role in adjudicating on the guilt or innocence of defendants, the Eighth Amendment's excessive bail clause did not prohibit the government from pursuing other compelling interests through regulation of pre-trial release.

5.32 However, in Ireland, the Supreme Court has expressed its adherence to the second view of the presumption of innocence. In *O'Callaghan*,²⁷ Walsh J. explicitly said that the presumption of innocence is not merely a procedural rule at trial but that it operates at the pre-trial stage also. The same implication is clear from the other Supreme Court judgments dealing with the issue, as they held that the sole purpose of bail is to ensure that the accused will stand trial. It may be noted that the Irish Court's analysis is similar to that of Marshall J., who dissented in *Salerno*. Marshall J. said that an indictment establishes probable cause that the accused committed the offence and therefore is the source from which the power to try flows, which in turn gives rise to the power to ensure that the processes of justice will not be evaded or obstructed, whereas detention to prevent the commission of further offences bears no relation to the power to try, and therefore the interests it serves are outside the scope of bail. This is premised on the view that the presumption of innocence applies at the pre-trial stage.

5.33 What does the presumption of innocence mean, particularly at the pre-trial stage? It is easy to determine the content of the presumption at the trial stage. It requires the State to prove the guilt of the accused beyond all reasonable doubt. However, at the pre-trial stage, there are a number of possible interpretations of what the principle requires. The narrowest is that the

22 *R. v. Pearson* (1993) 17 C.R. (4th) 1, 77 C.C.C. (3rd) 124.

23 *Ibid.*

24 (1993) 17 C.R. (4th) 74, 77 C.C.C. (3rd) 91, [1992] 3 S.C.R. 711.

25 (1979) 99 S. Ct. 1861.

26 481 U.S. 697 (1987).

27 [1996] I.R. 501.

presumption of innocence only prohibits *punishment* of the accused at any time prior to trial and conviction. A wider view is that the presumption of innocence prohibits *any restrictions* on the accused's liberty (punitive or not), prior to trial and conviction, unless that measure is to ensure that the trial takes place. We shall return to this distinction shortly.

(ii) *How does pre-trial detention to prevent the commission of further offences violate the presumption of innocence?*

5.34 In order to understand how pre-trial detention to prevent further offences may be said to violate the presumption of innocence, we should briefly refresh our memories as to how pre-trial preventive detention would operate. Although different systems employ a range of different tests which must be satisfied before a person may be detained, they can be reduced to two basic matters which must be considered prior to the imposition of detention: (a) the current charge (in some systems any offence, in others a particular type of offence, such as an imprisonable offence, or a violent offence) and (b) the accused's disposition as indicated by his past record (taking into account matters such as his previous record on bail, his previous criminal convictions, his character and circumstances). Both of these matters are deemed, to a greater or lesser extent, to point to the likelihood that he would offend during the bail period.

5.35 Pre-trial detention to prevent the commission of offences may be thought to violate the presumption of innocence in two distinct ways. First, insofar as this form of detention relies on the *present charge* as part of the evidence that he might offend if released, it can be said to violate his right to be presumed innocent of that charge. The present charge is part of the evidence which is supposed to suggest his likelihood to offend again; clearly it only makes sense if the charge is being equated with guilt. Indeed it goes further; the charge is taken to suggest not only that he is guilty of the offence but that very soon he will be guilty of something else. Can one talk of his offending "again" if it has not yet been proved that he committed the present offence? As Marshall J. pointed out in *Salerno*, if the defendant were ultimately *acquitted* of the present charge, there would no question of continuing to detain him on the basis that he still posed a risk of committing further offences. Thus an untried indictment was being treated as proof of guilt. We may also note that many legislative provisions authorising pre-trial detention to prevent the commission of offences require the court to look at the strength of the evidence of the current charge. This seems to carry the implication that the court should be more or less reluctant to impose detention depending on whether he is more or less likely to have committed the offence charged. This provides further clear evidence that the current charge is being translated into guilt. We may note that Marshall J., in his dissenting judgment in *Salerno*, thought that the presumption of innocence was breached in this, rather than the second, respect.

5.36 The second way in which the presumption of innocence is sometimes said to be violated is in respect of the *future offences* rather than the current

charge. This view was taken by the former Chief Justice O'Dalaigh in *O'Callaghan*,²⁸ when he said that such detention "transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted."²⁹ Moreover, he said that one of the salient differences between the pre-trial preventive detention contended for and the internment provisions of the *Offences Against the State (Amendment) Act, 1940*, the constitutionality of which has been upheld, was that the latter power could only be exercised when the person had already engaged in certain forms of behaviour, not merely on the basis that he might engage in certain behaviour in the future.

5.37 If the view that the presumption of innocence is violated by pre-trial preventive detention depends on it being considered a punitive measure, and if the Supreme Court saw fit to change this view, much of the objection to preventive detention would be removed. *If any restriction of liberty* imposed for any reason other than to ensure that the accused will stand trial is unlawful, nothing turns on whether one views pre-trial preventive detention as punitive or not.

5.38 None of the judges in *Ryan v. D.P.P.*³⁰ explained precisely how pre-trial preventive detention violated the presumption of innocence, although they strongly approved of the Supreme Court judgments in *O'Callaghan* declaring that it did so.

5.39 If the presumption of innocence is violated in at least one, and possibly two ways by pre-trial detention to prevent the commission of further offences, is it possible to justify such violation and rescue it from unconstitutionality? This possibility was not discussed at any length by the judges in *O'Callaghan* and *Ryan*, although in *O'Callaghan*, Walsh J. did refer to "extraordinary circumstances ... to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or some situation akin to that", in which a person might be deprived of his liberty in advance of conviction. It may be that Walsh J. thought that this was the only situation in which this form of violation of the presumption of innocence might be justified. This would be a most generous reading of the presumption of innocence and a most restrictive view of possible justifications for its violation.

5.40 However, it is to be expected that the presumption of innocence, like any other Constitutional principle or right, must be balanced against competing individual rights or the public good. This is supported by the decision of Costello J. in *O'Leary v. D.P.P.*³¹ Costello J. discussed the effect of a statutory presumption in shifting the burden of proof, and said that while a presumption shifting only the evidential burden of proof did not violate the presumption of

28 [1968] I.R. 501.

29 At 508-9.

30 [1989] I.R. 309.

31 [1991] I.L.R.M. 454.

innocence, a presumption shifting the ultimate burden of proof might violate it. However, he went on to say that even in the latter case, such a breach might be justified, although in the circumstances of the case it was not necessary for him to elaborate on this idea.

2. *Possible Justifications For Breaches Of Constitutional Rights Or Principles*

5.41 In the recent case of *Heaney and McGuinness v. Ireland and the Attorney General*,³² Costello J. directly addressed the question of justifying breaches of fundamental principles (here the right to silence), in the context of a challenge to s.52 of the *Offences Against the State Act, 1939*. In the course of his judgment, Costello J. said that while the right to silence, both before trial and during trial, was a constitutionally protected right within the guarantee of a fair trial in Article 38.1, it could in certain circumstances be abridged by the Oireachtas. He said that in deciding whether such a restriction is constitutionally permissible, courts in this country and elsewhere had found it helpful to apply the test of proportionality, a "test which contains the notions of minimal restraint on the exercise of protected rights and the exigencies of the common good in a democratic society." He said that such a test had been adopted by the European Court of Human Rights and had been recently formulated by the Supreme Court of Canada in *Chaulk v. R.*³³ in the following terms:

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. This means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; (c) be such that their effects on rights are proportional to the objective."

5.42 In the bail context, it might be said that the competing public interest is that of members of society to enjoy their own rights of liberty and property without being victimised by the accused and/or the right of society collectively to be free from crime. However, before we examine the factors involved, we must look carefully at that which is being balanced. It is sometimes said that that which we are attempting to balance are the accused's rights (liberty, presumption of innocence) on the one hand, and the public interest (to prevent crime) on the other. However, this representation of the problem leaves out some important dimensions. *First*, the rights to liberty and presumption of innocence are not only rights of the accused but also matters of public interest. The public has an interest in ensuring that only the guilty are convicted and that the innocent are acquitted; perhaps for deterrent reasons,³⁴ perhaps for retributive reasons,³⁵

32 High Court, 29th June 1994, Costello J..

33 (1990) 3 S.C.R. 1303.

34 It might be argued, for example, that a system which punished the innocent on a regular basis would lead members of society to think that one 'might as well be hanged for a sheep as a lamb' and would therefore lose much of its deterrent value.

perhaps for wider utilitarian reasons,³⁶ or even for independent reasons of fairness.³⁷ We shall simply call it the public interest in the integrity of the criminal justice system. This view is supported by the view expressed by O'Higgins C.J. in *The People v. O'Shea*:³⁸

"The Constitution is concerned with justice and ... with criminal trials being fairly conducted in due course of law. While these considerations provide safeguards for the person accused, they also guarantee to the State which accuses him, and which has a duty to detect and suppress crime, that he will be tried fairly and properly on the evidence adduced against him and in accordance with law."

5.43 Similarly, in *People (D.P.P.) v. Quilligan (No. 2)*,³⁹ Walsh J. observed:

"[The accused] are entitled as of right to a fair trial, but the People, who in the Director of Public Prosecutions have brought this prosecution, are also entitled to have the matter tried and fairly tried in accordance with law."⁴⁰

5.44 Having first refined the question as one of not pitting the individual's rights against the public good, but as seeking to achieve a balance between different aspects of the public good and individual claims, the *second* way in which our balance must be refined is to consider the public interest more carefully. The public interest in preventing crime can be served by the deterrence or traditional method which seeks to prevent crime by punishing it after the event thus setting an example to others not to behave similarly.⁴¹ Under the preventive detention model, however, crime is prevented by incapacitating the accused in advance. Accordingly, the problem is not merely of reconciling the accused's rights with the requirements of the public good in some general sense, but to achieve a balance between the rights of the accused, the public interest in the integrity of the system, and the public interest in crime prevention, taking into account that there are at least two fundamentally different ways of attempting to prevent crime. We now turn to the factors which should be taken into account in attempting to reach an appropriate balance.

35 It might be argued, for example, that insofar as criminal punishment is retributive, it only serves this purpose if it imposes punishment upon a guilty person.

36 It might be argued, for example, that a system which punished the innocent on a regular basis would lose the confidence of the public.

37 It might be argued that our Constitution commits us to a system of criminal justice in which utilitarian considerations, such as the prevention of crime, must be tempered by considerations of justice and fairness.

38 [1982] I.R. 384.

39 [1989] I.R. 46.

40 For other cases in which mention was made of this view, see Kelly, *The Irish Constitution*, 3rd ed., at pp.619-620.

41 We may note that both judges in *Ryan* and Walsh J. in *O'Callaghan* said that deterrence was the accepted method of preventing offences. This could merely mean that because deterrence has traditionally been the method used to prevent crime, a change of method would require legislative enactment. However, it is possible that what was being asserted was that the only constitutionally permitted method of preventing crime was deterrence.

Efficacy of each model of preventing crime

5.45 The key merit of the preventive detention model as asserted by its proponents is its greater efficacy in preventing crime. The idea is that the system prevents harm from occurring by isolating the potential offender in advance rather than waiting until the offence has been committed. Moreover, if bail offenders are disproportionately responsible for a large amount of crime, detaining bail offenders would be a highly effective way of reducing crime level and would encourage tipping the balance in favour of preventive detention.

5.46 Perhaps the strongest argument against preventive detention takes issue with it on its own territory. It challenges the very benefit it is supposed to confer. In order to operate effectively, a system of preventive detention would either have to select among persons charged those who would commit further offences or detain everybody. However, it is argued, the empirical evidence suggests that such a selection would not be possible, with the result that a preventive detention policy might not be effective at all in isolating potential offenders. It also suggests that preventive detention would probably have minimal effect on the crime rate. Moreover, to detain everybody would be so disproportionate to the benefit achieved, not to mention costly beyond belief, that it would not be acceptable. Accordingly, it is argued, preventive detention either fails the efficacy test, or at least, has not yet been shown to score higher than the existing system of deterrence.

The principle of responsibility

5.47 In his celebrated essays in 1968, Hart discussed the centrality of the notion of responsibility to the criminal law, as exemplified by such notions as *mens rea* and excuses. He said that the function of excusing conditions in the criminal law is:

"as a mechanism for ... maximising within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict the future ... by attaching excusing conditions to criminal responsibility, we provide each individual with benefits he could not have if we made the system of criminal law operate on a basis of total 'strict liability'. First, we maximise the individual's power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual's choice as one of the operative factors determining whether or not these sanctions shall be applied to him. He can weigh the cost to him of obeying the law - and of sacrificing some satisfaction at the cost of the penalty. Thirdly, by adopting this system of attaching excusing conditions we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of the

law."⁴²

5.48 Hart points out that this view of excusing conditions sees them as important not because they achieve greater efficacy, but rather for independent reasons. Indeed, he concedes that "recognition of these conditions may, and probably does, diminish that efficacy ...". This "choosing system" is considered to be of moral importance, even if less effective than some other system, because:

"In this way the criminal law respects the claims of the individual as such, or at least as a choosing being, and distributes its coercive sanctions in a way that reflects this respect for the individual".

5.49 He also says:

"a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him."

5.50 Although Hart made these comments in the context of justifying the underlying notion of responsibility in the criminal law, his comments are also of relevance to our present discussion. This "choosing system" and its benefits, which are sustained under a traditional model of criminal justice, would be lost under a system of preventive detention. The Irish Council for Civil Liberties has also pointed out this particular price to be paid if preventive detention were introduced:

"Civil commitment has been allowed for mentally disordered persons to prevent anticipated behaviour considered dangerous to the community. But, at present, there is recognised a crucial difference between civil commitment and preventive detention. Civil commitment entails the confinement of a person who is ascertained to have an incapacitating psychiatric illness and, who for reasons beyond his control, is considered dangerous. Preventive detention, in contrast, involves the involuntary confinement of a person who is assumed to have the capacity to obey the law but is suspected of being unprepared to do so. A system of preventive detention, if adopted, would collapse the distinction between civil commitment and criminal justice. Consequently, it would impair individual responsibility in a way that confinement of the dangerously ill does not. It would undermine the fundamental concepts of criminal jurisprudence. These concepts include the presumption of innocence, proof beyond all reasonable doubt, *mens rea* and *actus reus*. They are based on the recognition that real criminal behaviour emanates from blameworthy choices."

42 H.L.A. Hart, *Punishment and Responsibility* (1968), p.47.

5.51 It might be argued that while the traditional system should be maintained because of the benefits to the population as a whole as described by Hart, one could nonetheless justify a small pocket of preventive detention for the most carefully selected, serial offenders.

Certainty and seriousness of respective right infringements

5.52 What is meant by this is that important factors in the balancing exercise are the certainty and seriousness of the infringements of rights which a choice in either direction would involve.

5.53 In this area, the views of the Floud Committee and its critics are interesting. The Floud Committee⁴³ said that it was usually accepted that the inevitable inaccuracy of predictive judgments meant that two kinds of mistakes could be made: a person could be released who went on to cause harm, or a person could be detained who would not have committed an offence. However, they rejected the view that both were mistakes of equal gravity and went on to say:

"The question is not 'how many *innocent persons* are to sacrifice their liberty for the extra protection that special sentences for dangerous offenders will provide?' but 'what is the moral choice between the alternative risks: the risk of harm to potential victims or the risk of unnecessarily detaining offenders judged to be dangerous?'

The essential nature of the problem of preventing wilful harm is misrepresented by talk of balancing individual and social interests or minimising social costs. The problem is to make a just redistribution of risk in circumstances that do not permit of its being reduced. There is a risk of harm to innocent persons at the hands of an offender who is judged likely to inflict it intentionally or recklessly - in any case culpably - in defiance or disregard of the usual constraints. His being in the wrong by virtue of the risk he represents is what entitles us to consider imposing on him the risk of unnecessary measures to save the risk of harm to innocent victims. Considerations of fault determine the allocation of risk if we cannot reduce the risk to be allocated."⁴⁴

5.54 In sum, they thought that the dangerous offender should bear the burden of the allocation of the risk because of his disposition. This view was put forward in the context of post-conviction preventive sentencing, but we think that the argument could also be made in the pre-trial detention setting, although it loses some of its force. So, it could be argued, certain risks are inherent in either course of action; the risk of harm if the offender is released, and the risk of unnecessary detention if he is not. If we cannot reduce the risk, we must decide where to allocate it. It can be argued that it makes more sense to place the risk

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Floud and Young, *Dangerousness and Criminal Justice* (1981).

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Ibid., at p.49.

on the offender who has previous convictions, a bad record when previously on bail, and is currently accused, than on the innocent public at large.

5.55 Bottoms and Brownsword have criticised the Floud Committee's position,⁴⁵ elaborating on Dworkin's concepts of rights and the justifications for infringing those rights.⁴⁶ They suggest that the Floud Committee's balancing exercise was much too crude, and suggest a somewhat more elaborate test for determining whether a restriction of a right may be justified. The overall test, they say, should be whether the unrestrained exercise of the right (here, the accused's liberty before trial) would present a "vivid danger" to a competing right (here, the right of other people to be free of crime). Vivid danger depends on the *seriousness* of the injury involved, the *frequency* with which it might be committed, *how soon* it might be committed, and most importantly, the degree of *certainty* that it will occur. They suggest that at present our poor predictive ability means that preventive detention fails the certainty limb of the test. Ashworth makes a similar criticism of the Floud Committee's position saying that the certainty of the violation of the accused's right to liberty must be put in the balance with the mere risk of the violation of the public's rights.⁴⁷ According to these views, balance should incorporate matters such as certainty and seriousness of violation.

5.56 A consideration of the respective *seriousness* of the rights to be restricted might lead to the conclusion that the present law should be amended to permit the pre-trial preventive detention of persons accused of certain extremely serious offences if there is a risk that they might engage in offences of this nature in the pre-trial period. For example, offences of life-threatening violence, fatal violence and rape might be said to involve potential injuries to the liberties of members of the public such that although it is uncertain that the accused will engage in such behaviour, or even that he did engage in such behaviour, that risk cannot be taken. It can be argued that pre-trial preventive detention should not be permitted simply according to categories of serious offences, but should require the court to examine whether the circumstances of the offence itself suggest a likelihood of repetition. For example, an accused charged with murder of his wife might not be thought to present a danger of repeating the offence of murder during the pre-trial period, whereas an accused charged with a series of murders of young children to whom he is not related might suggest that he would strike again, even though the offence category (murder) is the same.

5.57 Again, it can be argued that as the risk of further serious offences is statistically low, and our ability to predict who might commit further violent offences poor, the lack of certainty would outweigh the seriousness factor.

45 Bottoms and Brownsword, *op cit.*

46 R. Dworkin, *Taking Rights Seriously* (1977).

47 A. Ashworth, *The Criminal Process: An Evaluative Study*.

The sacrifice of innocents

5.58 This factor simply points to the costs, in human terms, of the respective crime prevention models. Undoubtedly, the traditional system is preferable in terms of this value, because it waits until the offence has been committed and then must prove that it occurred beyond all reasonable doubt. Accordingly, it expresses a commitment to not restricting or interfering with innocent persons. Preventive detention may well restrict persons who would not have committed offences if released on bail. The less accurate the prediction, the higher the risk of false positives.

5.59 The I.C.C.L. have expressed similar sentiments:

"The expression guilty beyond reasonable doubt is not a mathematical formula of how many innocent individuals we are willing to punish. The standard strives to realise certainty of guilt as far as humanly possible. The point is: it refuses to take a deliberate chance of punishing any innocent person. The trier of fact in a criminal trial is placed under a duty to aspire to a subjective state of certitude on the facts in issue. Because the proposal for preventive detention would tolerate sacrificing innocent individuals, the basic security afforded by the present system, which guarantees never to punish in the face of reasonable doubt, would be eroded."⁴⁸

5.60 Finally, Von Hirsch has said:

"Proponents of preventive confinement must argue in terms of balancing the individual's interest in not being mistakenly confined against society's need for protection from the actually dangerous person ... [T]hat cost-benefit thinking is wholly inappropriate here. If a system of preventive incarceration is known systematically to generate mistaken confinements, then it is unacceptable in absolute terms because it violates the obligation of society to do individual justice. Such a system cannot be justified by arguing that its aggregate social benefits exceed the aggregate amount of injustice done to mistakenly confined individuals."⁴⁹

Strength of the evidence against the accused

5.61 It might be argued that where the evidence against the accused is overwhelming even at the pre-trial stage, such as where he has been caught red-handed, the balance should tilt away from the presumption of innocence. So, for example, a statute which permitted pre-trial preventive detention where the evidence against the accused is very high, might be constitutionally permissible. However, we would argue that the strength of the evidence alone should not tip

48 I.C.C.L., *op cit.*, at p.62.

49 A. Von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons", (1972) 21 Buffalo L. Rev. 717 at 740.

the balance, if pre-trial preventive detention is to serve the purpose of preventing further offences and not to collapse into imposing advance punishment for the original offence. It is only if the strength of the evidence can be coupled with the possibility of repetition - from the nature of the offence and the circumstances of the accused - that the balance might be tilted in favour of preventive detention.

An Alternative Approach To The Constitutional Issues

5.62 We will conclude this section by drawing attention to arguments which have been made against the approach to the Constitutional issues adopted in *O'Callaghan* and *Ryan*. This is done in order to emphasise the complexity of the Constitutional issues involved, and the delicate balances that have to be drawn.

5.63 The following are the main elements in the Constitutional framework. Article 40.4(1) provides:

"No citizen shall be deprived of his personal liberty save in accordance with law."

The objectives of our criminal justice system, as set out in Article 38.3 1^o of the Constitution are:

- (a) the effective administration of justice;
- (b) the preservation of public peace and order.

5.64 Only when it is determined that the ordinary courts are inadequate to achieve those aims may special courts be established. Accordingly, these are the ordinary, peace-time, objectives of the ordinary courts and it would not, therefore, appear necessary to await extraordinary circumstances or a national emergency, as suggested by Walsh J. in *O'Callaghan*, to adopt measures necessary to secure the preservation of public peace and order.

5.65 It is suggested that the natural way to preserve the peace is to adopt measures which prevent the peace being disturbed. This may entail the refusal of bail to prevent future offending in certain, carefully controlled, circumstances. This is grounded on the premise that the law relating to bail is an integral part of the criminal justice system governed by *both* objectives of that system and not simply the first objective, the effective administration of justice.

5.66 The refusal of bail on grounds of future offending is held to be in conflict with the presumption of innocence. But in strict logic the refusal of bail on *any* ground, or any restriction on liberty, can be said to be in conflict with that presumption, described by Walsh J. in *O'Callaghan* as "a very real thing". Walsh J. says that, from time to time, "necessity demands that some unconvicted persons should be held in custody". While he describes necessity as "the operative test", he does not elaborate at all as to the circumstances in which "necessity" arises.

It has to be said that such necessity may be grounded on a prediction that a person, presumed innocent, will not appear at his trial to clear his name or will commit the serious offence of interfering with witnesses. Such an exercise in prediction as to the intentions of the accused gives rise to most if not all of the questions raised as to evidence etc. by Finlay C.J. at page 407 of his judgment in *Ryan*.

5.67 The presumption of innocence is not mentioned specifically in the Constitution. It is a common-law principle of evidence in criminal trials. Cross describes it thus:

"When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt. This is the fundamental rule of our criminal procedure, and it is expressed in terms of a presumption of innocence so frequently as to render criticism somewhat pointless."⁵⁰

5.68 The Irish Supreme Court has extended the principle's application to pre-trial procedures. Not so the United States or Canadian Supreme Courts, who would have acquired the principle from the same English common-law sources as ourselves. Under the European Convention on Human Rights, the presumption of innocence in Article 6(2), co-exists with the right to detain to prevent offending in Article 5(1)(c).

5.69 It is sometimes suggested that pre-trial detention is the same as detention on mere suspicion. But there is a fundamental difference between detention after charge and detention on suspicion.

5.70 When a person is accused of a crime, whether the proceedings have been commenced by charge or summons, consequences "flow", as Marshall J. put it in *Salerno*.⁵¹ The accused acquires all the rights conferred on an accused by the Constitution or listed in the European Convention, e.g. the right to legal

50 *Cross on Evidence*, 7th ed. (1990), p.125. Cross points out that the practice of using this expression can lead to serious confusion of thought, as was shown by the much discussed decision of the American Supreme Court in *Coffin v. The United States*, (1895) 156 U.S. 432. The accused had been convicted of misappropriating the funds of a bank after the jury had been told that they should acquit him unless satisfied of his guilt beyond reasonable doubt, and a new trial was ordered because the judge did not enumerate the presumption of innocence among the items of evidence favourable to the accused. In other words, the Supreme Court considered that the presumption was something different from the rule concerning the onus of proof on a criminal charge, for they regarded it as an instrument of proof - an item of evidence which had been withheld from the jury. This decision has been universally condemned, it could hardly have been pronounced if the court had not been misled by the verbal dissimilarity between the rule that the prosecution bears the legal burden of proof, and the presumption of innocence.

51 See para. 4.48 *supra*.

representation.⁵² The other side of that coin, it can be argued, is that once accused, he is liable to restriction on his liberty, if only to the extent of having to appear on a certain date to be tried. Detention before trial can be distinguished from internment or a charge under s.4 of the Vagrancy Act, which relate to a person's predisposition only. Where a person is accused of a crime, some lawful prosecuting authority has determined that he has a specific case to meet. As Marshall J. acknowledges, probable cause has been established that the accused committed the offence and from this flows the power to try.

5.71 In that a common informer can commence a prosecution, different prosecution decisions may carry differing weight and significance. But where a person is accused by the Director of Public Prosecutions, the State's independent prosecuting authority has decided he has a case to meet. The Director has the power, at the moment, to direct that an accused, presumed innocent, be tried in the Special Criminal Court and be deprived of his constitutional right to trial by jury. The decision of the Supreme Court in *Savage and McOwen v. D.P.P.*⁵³ confirmed that the exercise of this power cannot be reviewed by the courts. When the Director accuses a person of an offence of a serial nature and seeks a remand in custody, it can be argued that the court should be entitled to refuse bail on the basis of a prediction of future offending, just as it is at present entitled to refuse bail on a prediction of future absconding or interference with witnesses. In the latter case, the refusal is justified by the aim of securing the administration of justice; in the former, the justification would be the twin constitutional aim of preserving public peace and order.

5.72 Punishment, as such, is only imposed by a court for something that has happened already. The question is whether any restriction on liberty, before conviction, is justified as a preventive measure.

5.73 In his judgment in *O'Callaghan*, O'Dalaigh C.J. suggests that internment is not preventive detention but punishment for activities in which the person to be interned under the 1940 Act "is engaged". However, it can be argued that the 1940 Act takes present conduct as an indicator of future conduct. A Minister is unlikely to intern a person who has ceased unlawful activity, e.g. through illness. As the Supreme Court held in its judgment on the reference of the 1940 Bill, "detention is not in the nature of punishment but is a precautionary measure taken for the purpose of preserving the public peace and order and the security

52 Under Article 6(3) of the European Convention, everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

53 [1982] I.L.R.M. 385.

of the State."⁵⁴ Later in the judgment the following passage is quoted from *The King (Zadig) v. Halliday*:⁵⁵

"One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1 (a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety ...".

5.74 Writing shortly after the *O'Callaghan* judgment was delivered,⁵⁶ Ronan Keane, B.L., as he then was, said that, in this context, we are concerned with the criminal justice which is designed solely to prevent the commission of crimes in the future and not to punish the wrongdoer for crimes already committed:

"Preventive justice in this sense has existed in our law and that of the United Kingdom for many centuries and it can hardly be supposed that the Supreme Court in *O'Callaghan's* case intended to suggest that it was unconstitutional in all its manifestations. In its classic form, it consists of an order binding over a person to be of good behaviour or keep the peace on pain of forfeiting a recognisance of a defined amount. The noteworthy and distinguishing feature of this procedure is that the order can, and frequently is, made although no offence whatever has been committed ...".⁵⁷

5.75 Later in the article, he considers the situation which might arise when an acquittal follows a remand in custody:

"O'Dalaigh C.J. and Walsh J. conceded that a person could be legitimately refused bail on the grounds that he might tamper with the State's witnesses or with jurors. What is the situation of the same person if he is subsequently acquitted? He has suffered imprisonment, not for the offence with which he was charged, for of that he is innocent, and not with the offence of interfering with the course of justice, which he never had the opportunity of committing. It is impossible to resist the conclusion that his imprisonment is not in the nature of punishment at all; it is in fact a measure of preventive justice, designed to ensure that the future offence of interfering with the course of justice is not committed by the individual concerned."⁵⁸

5.76 He concludes the article as follows:

54 [1940] I.R. 470 at 479.

55 [1917] A.C. 280 at 273.

56 Keane, 'Preventive Justice'. *The Irish Jurist* (1967), p.233.

57 *Ibid.*, p.234 (footnote reference omitted).

58 *Id.*, p.238.

"There may very well be good reasons for the general principle enunciated by the Court that (in O'Dalaigh C.J.'s words) "the single question in all bail applications is, is the applicant likely to stand his trial?" But it is respectfully submitted that the argument based on preventive justice which was used in support of this principle does not appear either logical or convincing. If a person charged with a criminal offence is alleged to have committed other offences while on bail on a previous charge, the Court in refusing him bail is manifestly not punishing him for an offence which he has not committed. It is exercising the jurisdiction which it possesses to grant or refuse bail in such a manner as to ensure the prevention of crime; and it is no more inflicting punishment on an accused person than it does so in making a binding over order against a person who is innocent of any offence. The fact that the former process involves as a direct consequence the loss of a person's liberty does not, it is suggested, make it an impermissible form of preventive justice. The Constitution certainly provides that no person may be deprived of his liberty save in accordance with law; but whether one adopts the liberal interpretation of this phrase favoured by Gavan Duffy P. or the narrow approach of the 1940 Supreme Court, it is hard to see what is contrary to law in the imprisonment before trial of a person duly charged in the ordinary process of the criminal law and refused bail in order to prevent the possible commission by him of further offences before his trial."⁵⁹

CHAPTER 6: ALTERNATIVE METHODS OF DEALING WITH BAIL OFFENDING

1. *An Offence Of Breaching Bail Conditions, Where One Of The Conditions Of Bail Is That The Accused Refrain From Offending/An Offence Of Offending Bail*

6.1 Legislation could specify that courts granting bail should make it a condition of bail that the accused refrain from offending and that it should be an offence to breach a condition of bail. Alternatively, one could simply create an offence the ingredients of which were that the accused committed an offence while on bail. This has been provided for in Scotland and in the United States. Thus, if an accused commits an offence (offence A), is given bail, and then commits another offence (offence B), he will ultimately be liable to penalties for three offences; the two substantive offences and the offence of offending a bail condition. The benefit of this is that it signals clearly to the accused, to other potential bail offenders, and to society, that offending on bail is considered particularly reprehensible and that additional penalties will be incurred in respect of such behaviour.

6.2 One difficulty with this suggestion is that it might be thought to breach the principle of double jeopardy, in that the offender would be punished twice in respect of one set of behaviour. As we noted earlier, the Scottish courts have surmounted this obstacle by saying that the offence of breaching a bail condition targets the breach of trust involved, whereas the substantive offence targets the actual behaviour.

6.3 It should be noted that this type of approach would not result in the detention of the accused prior to trial in respect of the original offence. Even if the trial for offence B could be held before that for offence A, which is unlikely, the penalty would not necessarily be imprisonment, or if it was imprisonment, it would not necessarily bridge the time intervening before the trial for the original offence.

2. *Attaching A "Good Behaviour" Condition To Bail*¹

6.4 A slightly different proposal is the suggestion that a judge, when granting bail, might in addition to the normal conditions of bail be permitted to attach a "good behaviour" condition, breach of which would lead to detention of the accused pending trial on the original charge.

6.5 This is a somewhat diluted version of pre-trial preventive detention, because it would permit the offender to offend on bail once, while preventing him from doing so again. Its primary attraction is that it appears to avoid the difficulties of prediction, because detention is imposed only when the offender has already offended on bail. However, this brings one at once face to face with the essential problem. How can one detain someone without a proper trial for the offence which 'permits' detention commence? If one can do so without a trial, why wait for the second offence at all?

3. *Estreatment Of Bail If The Accused Commits Further Offences*

6.6 It has been suggested that bail might be estreated where the accused commits further offences, just as it is presently estreated where the accused absconds. This is the position under current Scottish law. Again, one would have to await the trial of the further offences. It is difficult to see how this would be effective in preventing the accused from committing such further offences which, is presumably, the object of the exercise. It diverts punishment from the accused himself. The fact that the courts are extremely reluctant to estreat bail in present circumstances would not encourage one to adopt this approach.

4. *Reduction Of Delay*

6.7 One of the most significant ways in which bail offending could be reduced is by reducing the length of time persons are at liberty before trial. In the light of the difficulties associated with other methods of dealing with bail offending, this may well be the most effective remedy. The question then becomes how delays should be reduced.

6.8 Time limits have been employed in a number of jurisdictions to address pre-trial delay. While this may be useful, it seems to us that to impose time limits without tackling the causes of delay may be meaningless. If delays were caused by inefficiency or laziness on the part of the prosecuting authorities, time limits might act as a spur, but there is no evidence that this is the cause of delay in the Irish system. Accordingly, a real attempt should be made to address the root causes of delay. Otherwise, the enforcement of time limits will simply be met by constant applications for extensions of time, exacerbating the existing blockages in the system without any substantial benefits.

6.9 It seems to us that there are at least two significant causes of the delays

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This proposal was made by Mr. Brian Lenihan, B.L.

in the Irish system. First, there are not enough judges available. Cases which are ready to proceed have to wait their turn simply because there is no judge to deal with the case. The appointment of more judges together with appropriate court staff and back-up services, particularly at Circuit Court level in Dublin, would remove a significant cause of the delay. Second, some aspects of criminal procedure are cumbersome and productive of delay. It might also be possible to dispose of questions with regard to the admissibility of evidence prior to trial, in a pre-trial motion. In cases where a particular form of evidence which is crucial to the prosecution case is ruled inadmissible, a *nolle prosequi* might be entered at an early stage, thus enabling another case to take the place of that case. Conversely, in cases where a challenge to a particular piece of evidence is the essence of the defence, an early indication that the evidence is admissible might lead to a guilty plea, again freeing up court time to deal with a contested case.

5. ***Section 11 Of The Criminal Justice Act, 1984***

6.10 The view might be taken that s.11 of the 1984 Act has been deprived of some of its deterrent power as a result of

- (a) the courts' interpretation of the section to permit one of the consecutive sentences to be a suspended sentence, and
- (b) the courts' view that while each sentence must be proportionate to the offence, the overall sentence must be proportionate in its totality. The Legislature might wish to indicate that this interpretation was not intended, if this be the case.

APPENDIX

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 10(2) of the Covenant provides:

- "(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."

The Covenant entered into force for Ireland on 7th March 1990. When ratifying the Covenant Ireland entered a number of reservations. One of these related to Article 10(2) and is still in effect. It reads:

"Ireland accepts the principles referred to in paragraph 2 of Article 10 and implements them as far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively."

States Parties are required under Article 40(1) of the Covenant periodically to submit reports to the Human Rights Committee on the measures they have adopted to give effect to the provisions of the Covenant. Ireland's First Report, submitted to the Committee in 1992, states in relation to Article 10(2):

"124. *Separation of Accused Prisoners*

Article 10(2)(a)

Rule 192 of the Rules for the Government of Prisons 1947 provides that "prisoners awaiting trial shall be kept apart from convicted prisoners, and while attending church and at other times shall, if possible, be placed so that they may not be in view of the convicted prisoners".

125. *Segregation*

In practice, every effort is made to keep accused prisoners separate from convicted prisoners. However due to pressure on accommodation, it is not always possible to achieve this all of the time. Mixing may occur during exercise and recreation periods.

126. *Separate treatment appropriate to their status as unconvicted persons*

The position of accused persons in custody is respected by the prison regime. It recognises that they have not been convicted of any offence and strives to ensure that they are given preferential treatment and status. This treatment status includes:

- (i) separate accommodation where possible (as outlined above),
- (ii) no requirement to work,
- (iii) entitlement to a visit every day, except Sunday. (Convicted prisoners are entitled to one visit per week),
- (iv) separate church and devotional facilities,
- (v) the facility to continue to manage their own private affairs,
- (vi) a separate exercise yard as far as practicable,
- (vii) wearing of their own (private) clothes if they so request.

127. *Juvenile Offenders*

Article 10(2)(b) & 10(3)

Male juveniles aged 16 years and over and females aged 17 years and over may be committed on remand or under sentence to prisons and places of detention operated by the Department of Justice. Offenders under those age limits are committed to institutions operated by the Department of Education. In very exceptional cases a juvenile aged 15 to 16 (male) or 15 to 17 (female) may be committed to a Department of Justice facility if certified to be of so unruly a character as to be unsuitable for a Department of Education facility.

128. Arrangements are made as far as practicable to keep young offenders separate from adult prisoners. This is easier in the case of males because there are two institutions (one closed and one open) given over exclusively to them, as well as segregated parts of the newest institution. It is not practicable, because of small numbers, to provide the same separation facilities for females.

129. Special care is taken in the case of accused young persons to apply conditions appropriate to their status and in accordance with the arrangements already described in this document for accused persons generally."

U.N. STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS

A section of the Rules deals specifically with "Prisoners Under Arrest or Awaiting Trial". The section provides:

"84. (1) persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be

referred to as "untried prisoners" hereinafter in these rules.

(2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.

(3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.

85. (1) Untried prisoners shall be kept separate from convicted prisoners.

(2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.

88. (1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.

(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.

90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for

communicating with his family and friends, and for receiving visits from them, subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

In addition, Rule 8 provides for the separation of certain categories of prisoners:

"8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults."

EUROPEAN PRISON RULES

Part V of the Rules (Rules 90-100) relates to special categories of prisoners, of which "untried prisoners" is one. Rule 90 applies to all the special categories and reads:

"Prison administrations should be guided by the provisions of the rules as a whole so far as they can appropriately and in practice be applied for the benefit of those special categories of prisoners for which additional rules are provided hereafter."

The additional rules applicable to untried prisoners are as follows:

"Untried prisoners"

91. Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners, who are presumed to be innocent until they are found guilty, shall be afforded the benefits that may derive from Rule 90 and treated without restrictions other than those necessary for the penal procedure and the security of the institution.

92. 1. Untried prisoners shall be allowed to inform their families of their detention immediately and given all reasonable facilities for communication with family and friends and persons with whom it is in their legitimate interest to enter into contact.

2. They shall also be allowed to receive visits from them under humane conditions subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

3. If an untried prisoner does not wish to inform any of these persons, the prison administration should not do so on its own initiative unless there are good overriding reasons as, for instance, the age, state of mind or any other incapacity of the prisoner.

93. Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser, and to receive, confidential instructions. On request, they shall be given all necessary facilities for this purpose. In particular, they shall be given the free assistance of an interpreter for all essential contacts with the administration and for their defence. Interviews between prisoners and their legal advisers may be within sight but not within hearing, either direct or indirect, of the police or institution staff. The allocation of untried prisoners shall be in conformity with the provisions of Rule 11, paragraph 3.

94. Except where there are circumstances that make it undesirable, untried prisoners shall be given the opportunity of having separate rooms.

95. 1. Untried prisoners shall be given the opportunity of wearing their own clothing if it is clean and suitable.

2. Prisoners who do not avail themselves of this opportunity, shall be supplied with suitable dress.

3. If they have no suitable clothing of their own, untried prisoners shall be provided with civilian clothing in good condition in which to appear in court or on authorised outings.

96. Untried prisoners shall, whenever possible, be offered the opportunity to work but shall not be required to work. Those who choose to work shall be paid as other prisoners. If educational or trade training is available, untried prisoners shall be encouraged to avail themselves of these opportunities.

97. Untried prisoners shall be allowed to procure at their own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

98. Untried prisoners shall be given the opportunity of being visited and treated by their own doctor or dentist if there is reasonable ground for the application. Reasons should be given if the application is refused. Such costs as are incurred shall not be the responsibility of the prison administration."

Rules 11 and 13 which deal with the allocation of prisoners are also of some relevance. Rule 11 specifies:

"1. In allocating prisoners to different institutions or regimes, due account shall be taken of their judicial and legal situation (untried or convicted prisoner, first offender or habitual offender, short sentence or long sentence), of the special requirements of their treatment, of their medical needs, their sex and age.

2. Males and females shall in principle be detained separately, although they may participate together in organised activities as part of an established treatment programme.

3. In principle, untried prisoners shall be detained separately from convicted prisoners unless they consent to being accommodated or involved together in organised activities beneficial to them.

4. Young prisoners shall be detained under conditions which as far as possible protect them from harmful influences and which take account of the needs peculiar to their age."

Rule 13 states:

"So far as possible separate institutions or separate sections of an institution shall be used to facilitate the management of different treatment regimes or the allocation of specific categories of prisoners."

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