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William A. Dobrovir

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PREVENTIVE DETENTION: THE LESSON
OF CIVIL DISORDERS

WILLIAM A. DOBROVIR†

THE QUESTION of preventive pretrial detention is at issue in the current session of Congress, reflecting debate in the Administration and throughout the country. Bills are pending before the Judiciary Committees of the House of Representatives1 and the Senate2 and before the House and Senate Committees on the District of Columbia3 to amend the Bail Reform Act of 19664 to provide for one form or another of incarceration before trial, without bail, of defendants feared to be prone to commit more crimes if freed.

The Senate Subcommittee on Constitutional Rights, the Senate Committee on the District of Columbia, and the House Judiciary Committee have each held extensive hearings on the issue.5 One of the bills was prepared by and is supported by President Nixon's Department of Justice.6 The heart of this bill, as of the others that have been introduced, is the provision for a determination, after hearing, that no conditions of release except — no restrictions short of — incarceration, will serve to "assure the safety of any other person or the community"7 or to prevent a predicted crime of violence.8 If such a determination is made the court may order the defendant remanded to custody for a period not to exceed 309 or 6010 days. If the defendant has not been tried by the time the period ends (unless delay is at the defendant's request) he is to be entitled to reconsidera-

† B.A., Trinity College, 1954; LL.B., Harvard University, 1957; Member of the District of Columbia and New York Bars. The author wishes to acknowledge the major contribution of Jerry J. Berman, Esquire, for the description and analysis of preventive detention during the April, 1968, disorders in Washington, D.C.

5. Only the Hearings before the Senate Subcommittee have been printed as of this writing. See note 14 infra.
9. Id.
tion of his custody under the provisions of the Bail Reform Act as they presently exist.\textsuperscript{11}

The preventive detention bills have been attacked from many quarters, but by none more effectively than by Senator Ervin of North Carolina, Chairman of the Senate Subcommittee on Constitutional Rights. Senator Ervin and other critics have pointed out first that preventive detention is unconstitutional, and second that there is no empirical basis for a judgment that locking up arrestees without bail will significantly reduce crime.\textsuperscript{12} Senator Ervin, in hearings before the House Judiciary Committee, stated:

\[P\]reventive detention rests on an untested theory of predictability. A judicial officer must be able to pick out with precision the suspect who will commit new crime while on bail. Yet there are no standards for determining dangerousness and no statistical guidelines on which to base the prediction which must be made under the proposed law. Nor will any statistics become available if preventive detention is the law because suspects who are detained will not then be able to demonstrate that they would not recidivate. A legislative judgment of predictability which does not rest on an adequate factual foundation may not be constitutionally valid where the consequences to personal freedom and a fair trial are so serious.

Throughout any consideration of the theory of predictability, on which preventive detention is based, we should remember that only a small percentage and number of suspects actually commit crime while on bail. When that fact is coupled with the fact that judges have nothing to guide them other than some enigmatic power of prophecy, the law will most assuredly result in the imprisonment without trial of many persons who are not dangerous and who are innocent of the charges. If the preventive detention law is judged by its susceptibility to abuse, plainly it is an evil law.\textsuperscript{13}

One witness before the Senate Constitutional Rights Subcommittee proposed (perhaps with tongue in cheek):

\begin{quote}
\textbf{an experiment . . . whereby defendants who are predicted to engage in violence on the basis of certain criteria . . . actually be released. . . . Then we can see how many of these defendants would in fact, fulfill the predictions.}\textsuperscript{14}
\end{quote}

13. Id. at 13,329.
14. Hearings on Amendments to the Bail Reform Act Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 91st Cong., 1st Sess., at 175 (1969) (Statement of Professor Alan Dershowitz).}
The witness also added:

We would learn other things as well. Do judges differ in the accuracy of their predictions? I suspect they do. Does the quantity of informational input into the prediction increase its accuracy? How do the various professional experts — psychiatrists, psychologists, probation officers, judges — compare with each other and with laymen in their ability to predict violence? Do we know enough today to devise criteria which spot a high percentage of violent criminals, without also including an inordinate number of false positives? What we learn may be discouraging, but it is far better to know the discouraging truth than to build a house, especially a house with bars, on a foundation of untested assumptions.15

Because preventive detention is not yet part of our law, there are few documented instances of its application that can furnish facts that would prove or disprove the need for, utility and effectiveness of such a device. It is generally accepted, on the other hand, that judges, in setting bail, daily assess the defendant’s “dangerousness” and set bail in amounts designed not to be met.

There is little doubt that the average judge will, regardless of the reasons given by him, deny bail to a defendant charged with forcible rape and having an unsavory record of sex crimes, no matter how certain he may be that the defendant will appear in court when required; nor is there any doubt that such practice . . . has the approval of the general public. . . . Upon the premise that in many instances preventive detention is in fact necessary for public protection and will inevitably be practiced even though not specifically authorized, the proposal realistically and implicitly recognizes danger to the community as a valid consideration in the determination of any bail application.16

And judges attempt to justify their own disregard of the law:

An unreasonable law has the ultimate effect of forcing those who administer it to ignore it, calloused of the consequences or else to make extreme rationalizations in circumventing it; this applies to judges. You cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day.17

15. Id. at 175-76.
17. Hearings supra note 14, at 220-21 (Statement of Judge Tim Murphy).
In the several rounds of major civil disorders in America's cities beginning with the Watts disorders in Los Angeles in 1965 there are documented examples of admitted judicial policies of preventive detention. In this article the facts respecting judicial preventive detention in the context of civil disorders are set out and evaluated to see what light they shed upon the wisdom, necessity, and efficacy of preventive detention legislation.

I.

In the Los Angeles, Watts riots in August, 1965, bond for rioters arrested was set at a minimum of $3,000. This was done at the instance of the District Attorney, who, he himself reported, "took the position that to release a large number of these arrested persons on bail could result in their returning to the riot area and increasing the difficulty of control." The District Attorney had attempted to persuade the court not to set bail at all.\(^\text{18}\)

In Newark, New Jersey, during the civil disorders of July, 1967, the courts at first set uniform high bails; $2,500 for those charged with breaking and entering (the charge usually preferred against looters), $500 for those charged with violation of curfew, and $250 for those charged with "loitering." Then as the disorders began to subside — and as the jails filled to overflowing — the Newark Legal Services Project convinced the judges to begin reviewing bonds and to release defendants on their own recognizance. Hearings were held in the jails and NLSP personnel, volunteers and law students, interviewed defendants in order to verify their community roots as a guarantee of reappearance. As a result, more than two-thirds of those held in jail on money bonds were later released on their own recognizance.\(^\text{19}\)

In the Detroit, Michigan, disorders of July, 1967, 74 percent of the bonds (of a total of more than 4000 arrestees)\(^\text{20}\) were higher than $5,000: "[T]he judicial policy during the early stages of the disorder was to set extremely high bail." The public prosecutor "stated that his office would ask for bonds of $10,000 and up on all persons arrested 'so that even though they had not been adjudged guilty, we would eliminate the danger of returning some of those who had caused

\(^{18}\) E. YOUNGER, REPORT TO THE GOVERNOR'S COMM'N ON THE LOS ANGELES RIOTS 15-16 (1965).

\(^{19}\) The information is included in a background report for the National Advisory Commission on Civil Disorders (The Kerner Commission) in the National Archives of the United States and is cited in Dobrovir, THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS, which appears in LAW AND ORDER RECONSIDERED, supra note 16, at 539.

\(^{20}\) Hearings on S. Res. 216 Before the Senate Subcomm. on Investigations: Riots, Civil and Criminal Disorders, 90th Cong., 2d Sess. 1238-40, 1345-46, 1584-87
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the riot to the street during the time of stress.' "21 One Detroit judge was quoted as saying: "We will, in matters of this kind, allocate an extraordinary bond. We must keep these people off the streets. We will keep them off."22 As Judge Crockett, the Recorder's Court's only black judge, who dissented at the time from the preventive detention policy, later wrote, the Detroit court effected "a wholesale denial of the constitutional rights of everyone who was arrested during that disturbance."23 He unequivocally ascribed the harsh procedures to racial prejudice.

The policy of preventive detention was adopted at the express instance of the District Attorney, who later stated that:

When it became clear on Sunday night that a full scale riot was in process, I publicly announced that I was recommending a $10,000 bond on all those arrested for looting. The courts generally followed that recommendation, and some criticism ensued in the form of statements to the effect that the riot was extraneous to the individual consideration of bond and to the point that it was considered by some to be excessively high. I felt then, and I still feel, that the court's response to my recommendation was justified.24

Judge Crockett later reflected on the prosecutor's role:

The truth of the matter is that in the overwhelming majority of the cases the police and the prosecutor simply charged more than they could possibly prove. And I am of the view that much of this was racially motivated, that it was done for the purpose of having a prohibitive bond placed against the black defendants so they could be detained in prison pending their examination and trial.25

As a result of the preventive detention policy adopted in Detroit, only 2 percent — compared with a usual 26-30 percent — of defendants were released on their own recognizance, even though most defendants had strong community ties, jobs, and no criminal record.26 Some bonds were set as high as $200,000.

In minor civil disorders in Tampa, Florida, and in Rockford, Illinois, unusually high bails were set, resulting in preventive detention of alleged rioters. In New Haven, Connecticut, in July, 1967, release

22. Id. at 1550.
25. Crockett, supra note 23, at 844.

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on recognizance at the precinct (provided by Connecticut law) was "suspended" pursuant to an informal agreement between the Bail Office and the Chief of Police; but as the jails became overcrowded the policy was reversed. In court, the judges began by setting unusually high bonds. As it began to appear that the bondsmen were refusing to write bonds for rioters at all, the court adopted a general policy of release on recognizance so most (estimated at 80 percent) arrestees spent no more than a night or a day and a night in jail. Moreover, out of 550 riot arrestees, apparently no more than one or two were arrested a second time.27

To sum up bail setting in the disorders of 1967, as the Kerner Commission noted, "[n]o attempt was made in most cases to individualize the bail-setting process."28 The Commission strongly recommended efforts to individualize bail setting, to get more background information on defendants, and to ensure that defendants have counsel when bail is set. While equivocating on the issue of preventive detention vel non the Commission urged use of conditions short of incarceration, like third party custody and daily reporting to a police station, to ensure non-participation in further rioting.29

The Kerner Commission Report was released on March 1, 1968. In April, the murder of Dr. Martin Luther King triggered the outbreak of a new round of major civil disorders in Baltimore, Chicago, and the nation's capital, Washington, D.C. But the lessons taught by the Kerner Commission remained unlearned.

In Baltimore in April, 1968, "[v]ery few defendants were released on their own recognizance, and rarely was there time or inclination on the part of the judge to hear a defense plea for a bail geared to the circumstances of the individual defendant."30 Bail was set at $500 for curfew violation, and at correspondingly higher figures ($1000 or more) for other charges. It was apparently the judges' intent to detain defendants in jail; and they succeeded. Bondsmen were largely unavailable, and the curfew kept friends and relatives from reaching defendants. As a result only 99 of 345 curfew defendants who did not agree to immediate trial were able to obtain release.31

Incarceration created intense pressure to proceed immediately to trial. Most curfew defendants (the estimate is 3000) agreed to a

27. From background reports note 19 supra; REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 185 (1968) [hereinafter cited as KERNER COMM'N REPORT]. See also Dean, Plainfield: A Study in Law and Violence, 6 AM. CRIM. L.Q. 154 (1968).
28. KERNER COMM'N REPORT, supra note 27, at 185.
29. Id. at 192.
31. Id. at 48.
“stipulated” trial. Offenders charged with other offenses were offered immediate trial on reduced charges of curfew violation or disorderly conduct. Rather than remain in jail pending later trial, many defendants chose this route.32 These trials “were conducted in the crowded, emotion-filled courtrooms . . . with armed soldiers on guard, and in the midst of the sounds, sight and smells of mass disorder.”33 Trials were held chiefly at night when witnesses could not be found. Neither the prosecution nor the defense was given a fair opportunity to present its case. Vital information — like the police officer’s arrest reports — was often missing.

Facilities for defense lawyers to interview defendants were terribly overcrowded; often the corridors and courtrooms were used, and attorneys interviewed defendants in the rear of the courtroom as trials proceeded in the front. Access to the courtrooms by friends, relatives, witnesses, and bondsmen was seriously impeded. There was no organization of volunteer attorneys. Defendants were brought into court in groups of 50 to 100.34 In effect, the preventive detention policy of the Baltimore courts resulted in the wholesale deprivation of the right to a fair trial and the degradation — if not the disappearance — of justice in Baltimore.

In the Chicago civil disorders of April, 1968, normal bail rules were likewise suspended. Ordinary stationhouse bail procedures (which allow an arrestee to post bond at the police station and obtain immediate freedom for charges of minor offenses) were ignored; all defendants were held for appearance before a magistrate. Money bond was set in nearly every case, ranging from $1,000 for disorderly conduct to $5,000 as the minimum for a looting charge. Some bonds were set as high as $100,000. In 82 percent of misdemeanor cases bond was set at over $1,000. There “was little individual variation in the setting of bonds . . . the magistrates [were unwilling] to allow a rioter to be free, under a nominal bond, to return to the scene of the riots.”35 It was apparently not until a mandamus action was filed and the Cook County (the black) Bar Association put pressure on the Chief Judge of the Circuit Court of Cook County that the court began — on April 14, ten days after the disorders began and one week after they were over — to hold bond review hearings. These resulted in reduction of bonds in 85 percent of the 496 cases reviewed.36 Forty two percent of those arrested in the riot spent at least three days

32. Id. at 48–49, 57–58.
33. Id. at 55.
34. Id. at 54, 73.
35. CHICAGO RIOT STUDY COMM., REPORT TO THE MAYOR 92 (1968).
in jail; one-fifth spent nearly a week in jail; 60 remained in jail on June 12, two months later, and 40 remained in jail on July 3. The high bail policy in Chicago was at least in part the result of

the kind of political pressures under which the judiciary was operating. On Saturday night, April 6, an assistant public defender was in the midst of a bond hearing when the Corporation Counsel, Richard Elrod, came up to the judge and told him that no bonds were to be set below $1,000 . . . whereas previously some variation in the bonds had been evident and some individual consideration given.

The harshness of the judges in Chicago should not have been surprising. Setting up a kind of judicial rehearsal for the April disorders, around 250 persons had been arrested on charges of looting during a snowstorm in January, 1967. Average bail set was $14,000, compared with a normal range of $1,500-$3,000. Defendants had no lawyers. Continuances of about three weeks — meaning three weeks of pre-trial jail — were uniformly granted at the behest of the prosecution. When preliminary hearings were finally held, bails were reduced to $250-$1,500 and most defendants posted bond and were released. The judges and prosecutors admitted that the purpose of the high bails was to teach the accused looters a “lesson.”

In short, it seems that in the various instances of civil disorder where the prosecuting authorities and the courts have adopted a policy of preventive detention to “safeguard” the community, the policy has been applied wholesale and indiscriminately. It has been used to “punish” accused persons before trial. It resulted in periods of detention of several days, a week or longer after the disorder had ended. In several instances it pressed defendants to forego their right to trial. And all these things have occurred without any evidence that such a policy would make any contribution to public safety.

II.

After the civil disorders of April, 1968, in Washington, D.C., a study was commissioned and conducted with the purpose of delving deeper into just these matters to determine, if possible, what were the benefits and harms of preventive detention during the disorders. 40

37. Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder, supra note 36, at 503.
40. The Study was commissioned by the District of Columbia Committee on the Administration of Justice under Emergency Conditions, a “blue ribbon” group
The study's findings, summarized below, were based on interviews with the chief prosecutor, with judges and other policy-making officials, with police officers, assistant prosecutors, defendants and citizens; on transcripts of more than 400 bail hearings and on the records of more than 900 interviews of arrestees by the D.C. Bail Agency, all of which were analyzed and computer data processed; on detailed analysis of court, jail and other official records; and on transcripts of more than 100 preliminary hearings.

The policy of preventive detention during the Washington, D.C. disorders was adopted shortly after defendants began to appear in the Court of General Sessions on Friday afternoon, April 5. The rumor began (as one judge announced in court) that defendants released on personal recognizance as required by the Bail Reform Act in force in Washington had been seen "immediately taking off from the court and heading in the direction of [the looting] at a run." (The rumor was never substantiated). The United States Attorney, the chief prosecutor of all but petty offenses in Washington, urged on the judges, first privately and then in open court that, unless a reliable third party would undertake to ensure the defendant's non-return to the disorders, money bond should be set. The judges, with one or two exceptions, agreed to adopt this policy, and for the next two or three days many of the judges uniformly set money bond—$1,000 for the looting charge, second degree burglary, and $500 for misdemeanors—where no third party could be produced.

While the money amounts set were modest, they were nevertheless effective to detain defendants; 75 percent of those for whom money bond was set went to jail. Either they could not raise the bond premium, or they could not find a bondsman; the white (9 of the 10) bondsmen, sympathizing with the looted merchants, seem to have engaged in a private policy of preventive detention of their own; declining to write bonds for defendants charged with riot-related offenses. In effect, during the disorder the court (or most of its judges) adopted a new standard for determining whether or not an arrestee should be released before trial—not whether he was a good

appointed by Attorney General Ramsey Clark, Mayor Walter Washington, Chief Judge David L. Bazelon of the U.S. Court of Appeals for the District of Columbia, and Chief Judge Harold Greene of the District of Columbia Court of General Sessions. The Study was carried out by a task force under the direction of the author of this article and was published under the title, A STAFF REPORT TO THE DISTRICT OF COLUMBIA COMM. ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS, JUSTICE IN TIME OF CRISIS (1969) [hereinafter cited as JUSTICE IN TIME OF CRISIS].
risk to return for trial, but whether in the judge's view he was likely to contribute to further disorder, to commit further offenses.

III.

The adoption of such a policy of preventive detention was in clear violation of the Bail Reform Act of 1966. The principle of the Act is that the preferred release condition is not money bail but release on personal recognizance. The judge at the defendant's first appearance is to look into the defendant's community roots, as shown by information supplied by the D.C. Bail Agency, and if his family and local ties, employment, prior record, and the nature of the offense indicate that he is a good risk to return for trial, he is to be released on his own recognizance. The judge is allowed to impose a number of other conditions should he decide that personal recognizance alone is not sufficient; but the least favored of these is a money bond. The Act makes no provision for preventive detention or for consideration of "dangerousness."

A number of arguments were advanced, at the time of the disorders and thereafter, in support of the legality of the policy of preventive detention under the Bail Reform Act as well as under the Constitution. None of these arguments survive analysis.

1. The Act provides that the judge is to consider "the circumstances of the offense" in setting conditions of release. It is argued that this allows the judge to consider the danger to the community caused by civil disorder as such a "circumstance." The express words of the Act, however, are that in determining the conditions that "will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused. . . ." Thus for pre-trial release the likelihood of reappearance is the only standard. On the other hand, in the section which governs "release in capital cases or after conviction," the judge, in addition to considering the likelihood of conditions to "assure that the person will not flee" is expressly empowered also to consider the likelihood that he will "pose a danger to any other person or to the community."

The legislative history of the Bail Reform Act confirms that the only standard for setting bail before trial is the likelihood of the con-

42. 18 U.S.C. § 3146(b) (Supp. IV 1968) (emphasis added).
ditions to assure reappearance, and not any possibility that the accused might commit additional crimes if released.

This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. It must be remembered that under American criminal jurisprudence pre-trial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.44

By 1968, the United States Court of Appeals for the District of Columbia Circuit had held:

The Bail Reform Act creates a strong policy in favor of release on personal recognizance, and it is only if "such a release would not reasonably assure the appearance of the person as required" that other conditions of release may be imposed. Even then, the statute in 18 U.S.C. § 3146 creates a hierarchy of conditions, one of the last favored of which is a requirement of bail bond.45

Construing the Bail Reform Act, another court of appeals held that "conditions of release in non-capital cases must be for the sole purpose of reasonably assuring the presence of the defendant at trial."46

Finally, one year after the disorders, the United States Court of Appeals for the District of Columbia made it still clearer that the only standard for choosing conditions of release under the Act is the likelihood of appearance for trial. In United States v. Leathers,47 the court held:

46. Brown v. United States, 392 F.2d 189, 190 (5th Cir. 1968) (emphasis added).
47. 412 F.2d 169, 170-71 (D.C. Cir. 1969) (emphasis added). The distinction between release before conviction under section 3164 and release after conviction under section 3146 is pointed out by decisions by the district court in United States v. Erwing, 268 F. Supp. 877 and United States v. Erwing, 268 F. Supp. 879 (N.D. Cal. 1967). The same defendant was before the court on motions relating to bail in two separate proceedings — one an appeal from a conviction of a narcotics violation and the other pending trial on a narcotics violation committed while on bail before trial on the first conviction. The court granted the Government's motion to revoke bail pending appeal of the conviction on the ground that under section 3146 it could take into account the danger the defendant posed to the community, finding that as a narcotics peddler, he did pose such a danger. The court, on the other hand, granted the defendant's motion to reduce bail pending trial on the second charge. It held that section 3146 provides that "the purpose of bail in non-capital cases prior to the conviction is to insure the defendant's personal appearance at court proceedings." 268 F. Supp. at 880. Upon the Government's concession that there was little risk of flight by the defendant, the court held that "the only reason for the $50,000 bail in this case is to keep defendant in custody and, of course, such a purpose is improper in light of defendant's appearance record." Id.
The Bail Reform Act specifies mandatorily that conditions of pretrial release be set for defendants accused of noncapital offenses. When imposing these conditions, the sole concern of the judicial officer charged with this duty is in establishing the minimal conditions which will "reasonably assure the appearance of the person for trial . . ." The structure of the Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released.

2. It is argued that, with or without respect to the provisions of the Bail Reform Act, a court has an inherent power, in extraordinary circumstances, to set conditions of release based upon considerations other than the risk of flight. The answer is that the United States Supreme Court has construed the eighth amendment to the Constitution, which provides that "excessive bail shall not be required," as meaning that "bail at a figure higher than an amount reasonably calculated" to assure the presence of the defendant at his trial "is excessive under the Eighth Amendment." Hence "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."48 The Supreme Court based its holding upon the constitutional presumption of innocence: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"49 and as Mr. Justice Jackson noted in a concurring opinion, the "spirit" of bail "is to enable [defendants] to stay out of jail until a trial has found them guilty."50

There is one narrow exception to this principle. A defendant may be remanded to custody in the course of his trial where it clearly appears that his continued freedom would impede the orderly progress of the trial. Application of this exception has been confined to cases involving conduct — usually tampering with or intimidation of witnesses — in court or out of court while the trial was in progress.52

The impropriety of using bail for any purpose other than assuring reappearance is illustrated by a district court decision before enactment of the Bail Reform Act.52 Bail had been set for the defendant in the amount of $50,000, conditioned upon his remaining in the Northern District of Illinois. He left the jurisdiction, flew to Los

49. 342 U.S. at 4.
50. Id. at 8.
Angeles, and there was arrested for larceny. The surety applied for remission of the forfeiture. The Government opposed, including as expenses incurred because of violation of the conditions the cost of investigating the Los Angeles offense. The court refused to allow this element in computing the amount to be forfeited, holding:

If a purpose of the clause limiting travel was to insure against future criminal conduct, it could easily have read with more clarity toward that end. More important, however, is that such a purpose would be utilizing bail for a function which, historically, it was never intended. 53

3. The only direct test of the court's preventive detention policy was an action, filed during the days of the disorder, by the American Civil Liberties Union on behalf of a number of incarcerated defendants. The complaint named the judges of the Court of General Sessions and the United States Attorney as defendants, and sought injunctive relief against the judges' denial of "release on personal recognizance in almost all cases where felony charges are involved, regardless of community ties. . . ." 54 The action was dismissed and this dismissal, the Chief Judge of the Court of General Sessions later contended in an article, supports the legality of the policy of restricted release and its "self-evident reasonableness . . . under the circumstances." 55

The district court's decision does not, however, support the legality of the policy. The district court found that at the time of argument of a motion for a temporary restraining order and a preliminary injunction, on Monday, April 8, the judges of the Court of General Sessions "were then prepared to consider 24-hour review applications under 18 U.S.C. 3146(d) as to such persons who remained detained." The district court, in its order filed April 19, dismissed the action "for want of equity" on the ground that the legal remedy of 24-hour review was "adequate" and hence the district court "should not, in the present posture of this matter, interfere with the operation in due course of the judicial process of the District of Columbia Court of General Sessions."

4. It was argued, finally, that the disorders in the District of Columbia in April were in the nature of a civil insurrection justifying departure by the court from the legal norms in force in order to protect the community. The authorities, however, are not without remedy in such a situation. As Judge Greene himself wrote, "[i]f the dis-

53. Id. at 602.
order becomes so widespread that normal judicial processes break down, let those who have the power to do so declare martial law."\textsuperscript{56}

So much for the question whether the policy of preventive detention was in conformity with applicable law. The facts relevant to the need for and usefulness of the policy tell much more effectively against it.

IV.

None of the hearsay that triggered adoption of the policy of restricting release for the purpose of preventing further participation in the riot — that people released at court were returning to the riot — was ever substantiated. It was reported, as rumor, in many forms. One judge expanded the few into "many." One Assistant U.S. Attorney stated that "a number of defendants" let out earlier had been arrested again for looting. Another judge pinned down the rearrests to "five" of "the first twenty-five people they released on personal recognizance on Friday."

A check of those persons who appeared in court on Friday, April 5, shows that only one was rearrested that same day. The defendant, after release, scuffled with a policeman outside of court, was arrested again and charged with disorderly conduct.

The principal justification given for a policy of restriction on release during a disorder is that it must be assumed that suspected looters are likely to return immediately to the scene of the looting to continue their former lawlessness.\textsuperscript{57} This has been offered in justification of the policy of the Court of General Sessions in April. This speculation has prompted the response of a commentator reviewing release policies in Detroit:

[It] ignores the fact that prior to release there has been an arrest with its attendant formalities, a period of detention, and an appearance before a judge who undoubtedly impressed upon the accused the possible consequences of reinvolve in the lawlessness. Such exposure to the criminal system may be sufficiently sobering for the defendant to lead him to conclude that for him the party is over. This would seem to be partially true in regard to those persons who became involved in the first place only because of the excitement and novelty of the disorder.\textsuperscript{58}

Statistics on the rate of re-arrest of alleged rioters bear this out. Of the 6,230 civil disorder arrests reported by the District of Columbia

\textsuperscript{56} Id.


\textsuperscript{58} Id. at 1565-66; see also id. at 1574.
Police Department from April 4 to April 15, only 193 persons were arrested twice for any combination of offenses, including two curfew arrests. This is 3.1 percent of all persons arrested during the civil disturbance. Out of 1,604 non-curfew arrests between April 4 and April 7, 46 (2.9 percent) were re-arrested either then or later, their first arrest having been for a felony or serious misdemeanor. These 46 were persons who would have appeared before a magistrate for the setting of bond and who could therefore have been preventively detained.

Only 21 of these (1.4 percent), however, were arrested twice during the period between April 4th and 7th, the height of the disorders, and 15 of these were arrested the second time only for curfew violations, leaving six arrested twice for serious offenses. While some persons guilty of serious misconduct were charged only with curfew violations in the confusion of the early hours of disorder, there remain something less than 21 persons presumed to have made a second contribution to disorder. 59

The total number of rioters was estimated to have been 20,000. Of these, less than one-third (6,230) were arrested and of these 1,340 — 6.7 percent of the rioting population — had bail hearings. (The remainder were released on summons or had their charges dismissed at the first appearance.) Of this number 449 were actually remanded to jail as a result of the policy of preventive detention — but of those freed after a bail hearing, only 21 were arrested a second time during the critical days.

Comparison of all the figures: total number of rioters, total arrested, total brought to court, and number arrested twice, demonstrates how limited is the opportunity of a court even in a major disorder to restrain those posing a danger to the community.

Had the court been faced with more than a handful of instigators of disorder, store-breakers, arsonists, or violent rioters, this fact might have supported the argument that preventive detention was necessary. But such “hard core” offenders were not before the court.

Few of the looters were actual breakers. Early in the disorder, one judge observed: “We are getting a lot of, apparently, hangers-on in this thing; we haven’t had many actual perpetrators.” Only three of 415 transcribed bail hearings indicate that the defendant was actually breaking into a store; the transcripts of preliminary hearings of 158

59. A low rearrest figure, of course, does not demonstrate that many persons did not return to the disorder who escaped arrest. It is estimated that there were 20,000 rioters. The chance of being arrested was on this basis no more than one in three. There conceivably were others who were arrested only once but participated in unlawful activity again. A low rate of rearrest may evidence the perspicacity of the judges in picking out, for restrictive release conditions, precisely those who would have been likely to return to the riot, but this is unlikely.
persons (35 percent of all defendants who had preliminary hearings) show only five defendants against whom there was evidence of breaking.

Judges of the Court of General Sessions admitted in open court that although they were following a policy against release they found most defendants to have been "respectable," "law-abiding" people before their arrest in the disorder. The D.C. Bail Agency recommended a higher percentage of riot defendants for non-financial release than it did for the usual defendant population; and one of the reasons bondsmen refused to write bonds during the emergency was that so few of the defendants were "prior customers."

It is apparent that virtually no instigators, fire-setters, or breakers were caught; moreover, of the 1,340 persons before the court for bond hearings only 29 were charged with the dangerous felonies: arson, simple or aggravated assault, destroying property and robbery; 69 others were charged with gun or other weapons misdemeanors. And many of these offenders slipped the preventive detention net; the 449 arrestees remanded to jail after a bail determination included only 17 charged with dangerous felonies and 29 charged with weapons misdemeanors.

To sum up, all the evidence available contradicts a contention that preventive detention during the Washington civil disorders was either necessary or useful. There is further evidence, moreover, that the policy resulted in substantial injustice. First, at least 38 percent of those remanded to jail as a result of the preventive detention policy were later freed either by acquittal or dismissal of charges. Second, many defendants who had bond set spent ten or more days in jail. A few were still in jail in July because judges refused to reduce amounts set or because attorneys failed to pursue such review as was possible under law. Such detention can mean the loss of a job for a marginal man and the disruption of his family life. Even a short detention for women arrested in the disorder results in their separation from children, many of them infants. Third, the policy resulted in serious inequality. Persons who could find third party family members or others to come to court and vouch for them or take third party custody could obtain release; others whose friends or family could not get to court because of the curfew (for the many arraigned at night), illness, the need to care for children or the like, were likely to have money bond imposed. The employment of money bond as a detention device discriminates between the poor and the not-so-poor; where a surety bond was set, release at court often would

60. B. GILBERT, TEN BLOCKS FROM THE WHITE HOUSE (1968).
depend upon the chance of encountering a bondsman in or near the
courthouse, and the availability of a friend or relative, or the willing-
ness of the defense lawyer, to seek out a bondsman.

There seemed to have been no agreement among the judges about
what might make a person dangerous. (One of the judges sitting on
Sunday evening, April 7, released 90 percent of the defendants before
him on non-financial conditions; another, sitting at the same time, im-
posed money bond in every case.) Some judges granted release on
personal recognizance to defendants with records of convictions of
serious crimes, to defendants arrested with weapons in their possession,
to defendants charged with a crime of violence, and to defendants
charged with having acted in concert with others. There was no
agreement on what factors insured a defendant's harmlessness to the
community. The rate of release on personal recognizance for 90
"model" risks was 37.8 percent, considerably higher than the overall
rate of 30.4 percent; nevertheless, 36.7 percent of these people were
ordered to make money bond or to go to jail.

There is, in fact, no reliable set of criteria for assessing danger-
ousness. Some judges interviewed believe that they could tell intu-
itively whether or not a person was dangerous. One judge likened the
procedure to playing a violin. One judge referred to the "dark glasses,
green pants," the "fourteenth street crowd." Another judge relied on
the defendant's attitude, whether he seemed to show remorse. Still
another judge based his determination on whether he thought the
defendant was telling the truth.

Most judges said that they would look at a defendant's prior
criminal record to see if it evidenced "dangerous proclivities." The

defined as "model risks" persons who were recommended for release by the D.C. Bail
Agency, were District residents for one year or more, lived with spouse, parents, or
other family members, were employed for one year or more and had no record or a
record only of petty misdemeanors. For the 90 (out of 137) such persons for whom
information was available on conditions of release, a surety bond or percentage money
bond was imposed in 37 percent of the cases.

63. The difficulty in formulating standards for gauging dangerousness is illus-
trated by a recent decision on post-conviction release, which of course does not raise
the serious constitutional questions of pre-trial detention. In United States v. Blyther,
295 F. Supp. 1088, 1090 (D.D.C. 1969), the trial judge denied bail pending appeal to a
defendant convicted of carrying a dangerous weapon on the ground that the defendant
had "an extensive criminal record involving numerous acts of violence." On motion
to the Court of Appeals, two judges noted that the defendant's record did not seem
to show to them "acts of violence." On remand, the District Court dryly noted that "it is apparent that there is a
difference of viewpoint as to what constitutes an act of violence." The acts were:
carrying an unlicensed loaded revolver in company with an armed criminal companion,
a juvenile joke robbery, and contributing to the delinquency of a minor. The defendant
had also been twice convicted of unauthorized use of a motor vehicle.

The point is not who is correct; but rather that three experienced jurists
could differ so about what constitutes a crime of violence evidencing a dangerous
propensity.

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criminal records of the 46 repeaters who might have been preventively detained by the court suggest that even this test is unreliable. Of those 46, 26 had no prior criminal record at all.

Most of the judges also would look at the nature of the offense charged to see if it evidenced dangerousness. To the objection that the charge was not yet proved, one judge replied that in that context the presumption of innocence was "madness;" that it is a procedural matter for trial but should not affect the court's decision on pre-trial release. Finally, as one judge remarked, the possible detention of innocent persons is the price that "we" must pay for order.

V.

The evidence appearing from study of preventive detention as applied in recent civil disorders demonstrates the unwisdom of the device. Judges are unequipped to predict accurately whether any one is likely to commit a new offense if released. Indeed, it seems unlikely that anyone can make such a prediction with any degree of accuracy. Judges, like all of us, tend to follow their prejudices. Serious injustice and unequal protection of the laws is the inevitable result.