

## INTRODUCTION: THE COMPARATIVE STUDY OF CONDITIONAL RELEASE

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This symposium is a convincing demonstration that scholarship in comparative law has practical utility for the solution of everyday problems in criminal law administration. Such a collection of Articles is a fitting memorial to Professor Edwin R. Keedy, who did so much himself as a pioneer in the comparative approach to criminal procedure. His outstanding studies in the field were painstaking and thorough; and even after retirement he retained a keen interest in such developments as the reform of French criminal procedure, which was being completed at the time of his death and which is reported in Professor Vouin's contribution to this symposium.<sup>1</sup> More than perhaps any other area of law, the development of procedural rules tends to be stunted by regional and national parochialism. Professor Keedy broke these fetters early in his career when he was a young law teacher at Indiana, and his explorations in the criminal procedure of other countries affected much of his subsequent work. In 1910 he was commissioned by the American Institute of Criminal Law and Criminology to study criminal procedure in England,<sup>2</sup> and two years later under a similar commission he extended his examination to Scotland.<sup>3</sup> The imprint of his English and Scottish studies can be detected at a number of points in the American Law Institute's Code of Criminal Procedure, of which Professor Keedy was Reporter (with Professor William E. Mikell).<sup>4</sup> Furthermore, although the ten months of field study which led to the publication of his exhaustive "The Preliminary Investigation of Crime in France"<sup>5</sup> did not come until after he had finished work on the Code, it is apparent that he must have been familiar with French procedure during his drafting work. Nowhere in the Code is the influence of comparative law more evident than in its treatment of conditional release pending trial—the subject of this symposium.<sup>6</sup> To a substantial

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<sup>1</sup> All references herein to Professors Vouin, Smith, Bratholm, Dando and Tamiya are to their Articles contained in this symposium *infra*.

<sup>2</sup> For articles resulting from this investigation, see Lawson & Keedy, *Criminal Procedure in England* (pts. 1-2), 1 J. CRIM. L. & C. 595, 748 (1910-1911); Lawson & Keedy, *The English Court of Criminal Appeal*, 5 ILL. L. REV. 389 (1911).

<sup>3</sup> Keedy, *Criminal Procedure in Scotland* (pts. 1-2), 3 J. CRIM. L. & C. 728, 834 (1912-1913).

<sup>4</sup> ALI, CODE OF CRIMINAL PROCEDURE (Official Draft, June 15, 1930).

<sup>5</sup> 88 U. PA. L. REV. (pts. 1-3) 385, 692, 915 (1940).

<sup>6</sup> See his exhaustive treatment of bail in the Code, *supra* note 4, at §§ 61-112.

degree the Code was a restatement of prevailing American law, but in dealing with the right to bail the American Law Institute flew in the face of constitutional provisions of the great majority of states which, building upon the eighth amendment of the federal constitution, guaranteed bail as a matter of right in all non-capital cases.<sup>7</sup> Section 70 of the Code would have made admission to bail discretionary for defendants who were charged with more serious offenses or who—regardless of the present charge—had previously been convicted of such serious offenses.<sup>8</sup> This restriction on mandatory conditional release has obvious roots in the discretionary bail system of British law, and in addition there is a striking similarity between section 70 and the French practice discussed by Professor Vouin. It is perhaps not surprising that section 70 was adopted nowhere in the United States; but its tenor indicates that the discussion in this symposium of the more restricted right to pre-trial release which obtains in foreign countries would have met with a sympathetic reception from Professor Keedy.

A comparative study of the conditional release problem is also especially appropriate for this symposium because it complements the statistical studies by previous editors of this *Review* of the administration of bail in Philadelphia<sup>9</sup> and New York.<sup>10</sup> These studies have documented the gulf which separates American legal theory from its practice and have established the urgency of seeking some reform of a system of conditional release which practices economic discrimination on a wholesale scale. An examination of how national experience in

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<sup>7</sup> *Id.* at §70. Of course Professor Keedy recognized this problem and in a footnote provided an alternate section to conform to the usual state constitution. For a discussion of the Code's bail proposals, particularly of §70, see Waite, *Code of Criminal Procedure: The Problem of Bail*, 15 A.B.A.J. 71 (1929).

<sup>8</sup> ALLI, CODE OF CRIMINAL PROCEDURE §70 (Official Draft, June 15, 1930): "Offenses less than capital—before conviction. Any person in custody for the commission of an offense not capital shall, before conviction, be entitled as of right to be admitted to bail, except: (a) When he is in custody for the commission of murder, treason, arson, robbery, burglary, rape, kidnapping, or any offense against the person likely to result in death committed under such conditions that if death should result the offense would be murder, or for any other offense if such offense is punishable by imprisonment for life. (b) When he has been previously convicted of any of the offenses enumerated in clause (a), and such conviction has not been reversed. (c) When he was, at the time he was taken into custody, at large on bail charged with any of the offenses enumerated in clause (a). (d) When he has been previously released on bail for any of the offenses enumerated in clause (a), and there has been a breach of the undertaking. In all cases excepted under this section admission to bail shall be a matter of discretion."

<sup>9</sup> Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954) [hereinafter cited as *Philadelphia Study*].

<sup>10</sup> Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 685, 693 (1958) [hereinafter cited as *New York Study*]. For a summary of this research and some of its implications see Foote, *The Bail System and Equal Justice*, Fed. Prob., Sept. 1959, p. 43.

different parts of the world has dealt with this problem is certainly relevant to the formulation of such a reform.

## I

The resolution in criminal procedure of the rights of the individual with the legitimate interests of the state requires the maintenance of a delicate balance. There is almost universal recognition of the impropriety of punishing—and custody is punishment, no matter what its name—one who is merely accused and who has not been and may never be convicted. On the other hand, all the Articles in the symposium reflect concern lest an accused set at liberty should abscond, or should interfere with the investigation of the crime, or should engage in criminal conduct while at liberty awaiting trial. The dilemma has been beautifully put by the French Minister of Justice: “[C]onditional release is the rule in any proceeding for a ‘crime’ or a ‘délit’. Pre-trial detention must remain the *exception*, which is admitted in the *frequent cases* where the public interest or the search for truth requires it.”<sup>11</sup> Perhaps no compromise of irreconcilable goals will ever be wholly satisfactory, but it is apparent that the balance presently struck in most of the countries discussed herein, as in the United States, leaves much to be desired. To pinpoint this symposium on such an unsolved narrow problem is to invite a fruitful exploration which not only exposes wide differences in different legal schemes but which also tells us a good deal about the value systems which in each country are mirrored in the structure *and practice* of criminal law administration.

If we have much to learn from such an exchange of divergent approaches to a common problem, there is also perhaps some consolation in a recognition of the magnitude and similarity of the problems we all face. One has only to read Professor Bratholm’s article to recognize in Norwegian guise our own most vexing difficulty in preliminary criminal administration: how to enforce the protections of the individual against the tendency for procedural law which is fair on its face to be ignored or, in Professor Bratholm’s words, to “become a matter of wholesale rubber stamping.” His reference to the way in which the Norwegian police ignore the requirement of obtaining a warrant before arrest—despite a strong but ineffectual “rebuke by the Supreme Court”

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<sup>11</sup> U.N., YEARBOOK ON HUMAN RIGHTS 70 (1952) (quoting circular of April 2, 1952, by the Minister of Justice addressed to public prosecutors, [1952] *Semaine Juridique* 16903). (Emphasis added.) The Minister of Justice, at the same time, counselled the public prosecutors to have their agents apply for an accused’s release whenever they did not consider the detention order justified by “urgent” reasons, “even where . . . [the accused] does not himself apply for release . . . .”

—or his account of remand practice in the Oslo police court have exact parallels in careful studies made of Philadelphia practice.<sup>12</sup>

Perhaps the most intriguing thing about this symposium, however, is its hint that behind the wide divergence of legal theory there is much less difference in the end result in practice. This is only a suggestion, because of the statistical thinness of most of these Articles—a defect in comparative law scholarship which will be further elaborated below. In the only countries for which we do have some statistics—Norway, England, and the United States—there is a fairly high rate of pre-trial detention for those accused of other than minor crimes. From a few remarks by Professors Vouin, Dando and Tamiya it is reasonable to infer that France and Japan also have comparably high, if not higher, detention rates. It is appropriate in this introduction to note some of the different reasons for this common end product.

## II

In theory the American bail system stands as an extreme example of the protection of human rights in its opportunity for conditional release pending trial. First, with a very few exceptions in a few states, our state and federal law provides that every defendant charged with a non-capital crime is entitled to be released on “reasonable” bail as a matter of right.<sup>13</sup> Second, the right to have bail set and to achieve release usually arises at the time of the first judicial hearing, which must be held promptly or “without unreasonable delay.”<sup>14</sup> This possibility of speedy conditional release is a noticeable characteristic of accusatorial procedure, in contrast with so-called inquisitorial systems. For example, in French procedure governing even minor crimes, provisional release, though mandatory, may come only after a five-day period following the first appearance before an examining judge—to which must be added a possible forty-eight hour pre-appearance police detention (*garde à vue*). Third, unlike probably all other systems, in the United States the only *legally relevant* consideration in determining the amount of bail which is “reasonable” and beyond which demand for security cannot be used to inhibit release is the risk of non-appearance for trial.<sup>15</sup>

In the leading federal case, *Stack v. Boyle*,<sup>16</sup> the Court stressed the importance of “the unhampered preparation of a defense” and pre-

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<sup>12</sup> *Philadelphia Study* 1032-43. See *New York Study* 705-18. See also Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1184 (1952).

<sup>13</sup> *New York Study* 695-99.

<sup>14</sup> See, e.g., FED. R. CRIM. P. 5(a). See note 35 *infra*.

<sup>15</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (separate opinion of Mr. Justice Jackson); see Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 686 (1958); *Philadelphia Study* 1033.

<sup>16</sup> 342 U.S. 1 (1951).

vention of "infliction of punishment prior to conviction," adding that: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."<sup>17</sup> It is not surprising that in his Article Professor Smith has jumped upon this application of the presumption of innocence, for read literally it certainly is misleading. He is, of course, correct in stating that in terms of probabilities to presume the innocence of an accused who after judicial hearing has been held for trial or further proceeding would "contradict the experience of mankind over the ages." The statistical probability that an accused is guilty is clearly the justification upon which is bottomed the greater restriction of the right to conditional release in other legal systems. What our Supreme Court had in mind in *Stack v. Boyle* by its reference to the presumption of innocence was, of course, not statistical probability but the reiteration of a value judgment. "Admission to bail always involves a risk that the accused will take flight," Mr. Justice Jackson stated in his opinion. "That is a calculated risk which the law takes as the price of our system of justice . . . . [T]he spirit of the procedure is to enable [defendants] to stay out of jail until a trial has found them guilty,"<sup>18</sup> notwithstanding the risks involved.

To a greater or lesser degree this weighing of values is rejected elsewhere. In a fascinating case in New South Wales,<sup>19</sup> Herron, J., relying on English precedents, explicitly depreciated the policy factors which *Stack v. Boyle* regarded as controlling. While conceding that the opportunity to prepare a defense might "also have some weight," he discounted its importance with the qualification: "but the case would need to be an exceptional one." As for the interests of an untried defendant: while "the liberty of the subject must be kept steadily in mind, . . . I can see nothing inconsistent with this in retaining in custody for a reasonable period a person against whom there has been found by a magistrate, after proper inquiry, a *prima facie* case of a serious crime for which he is ordered to take his trial."

Furthermore, foreign law makes it plain that the justifiable statistical assumption of probability that the accused is guilty of the offense charged easily invites the much more dubious assumption of probability of criminality while on conditional release. Thus one finds legal systems that deny bail "if it may be presumed that [the defendant] will continue to commit the offense if released before his case is con-

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 8 (separate opinion).

<sup>19</sup> *R. v. Watson*, 64 Weekly N. (N.S.W.) 100 (1947), as quoted at [1954] Vict. L.R. 155. For a critical discussion of the *Watson* case and the British precedents see *R. v. Light*, [1954] Vict. L.R. 152, and *Lumsden's Case* (unreported, but quoted at length in *R. v. Light*, *supra* at 155-57).

cluded,"<sup>20</sup> or if "exceptional circumstances would justify the fear that he will repeat a criminal offence. . . ." <sup>21</sup> It is perhaps significant that in the use of the word "repeat" a probability of guilt has become an assumption of guilt.

A fascinating application of this probability-assumption is found in a series of English cases in which Lord Goddard appears to have been the moving spirit. These were cases in which defendants with "long" prior criminal records were enlarged on bail, only to commit crimes before they were tried—in order, it is said, to obtain funds to retain counsel,<sup>22</sup> or to make provision for the wife and children during the anticipated period of imprisonment,<sup>23</sup> or so as not to "hang for a lamb."<sup>24</sup> The court sternly admonished magistrates not to grant bail in cases involving recidivists because with such defendants the commission of crimes while on bail is "sure" to result,<sup>25</sup> or "very often results,"<sup>26</sup> or will result "in nineteen cases out of twenty."<sup>27</sup> I have been unable to find the statistical source of Lord Goddard's assertions since, unlike Scotland, the statistical reports for England and Wales include no information on the prior records of those apprehended and held for trial.<sup>28</sup> Lord Goddard apparently based his conclusions on the cases which came before him. In 1948, a year in the middle of the

<sup>20</sup> Iceland, Act No. 27, Concerning Procedure in Public Cases art. 67 (1951), as translated in U.N., YEARBOOK ON HUMAN RIGHTS 137 (1951).

<sup>21</sup> YUGOSLAVIA, CODE OF CRIMINAL PROCEDURE art. 182(3) (1954), as translated in U.N., YEARBOOK ON HUMAN RIGHTS 305 (1954). The Yearbook gives only brief excerpts from the very interesting Yugoslav code; a full translation appears in *New Yugoslav Law*, July-Dec. 1953, pp. 25-76 and Jan.-June 1954, pp. 27-50 (Union of Jurists Associations of Yugoslavia, Belgrade).

<sup>22</sup> *Postmaster-General v. Whitehouse*, 35 Crim. App. R. 8, 11 (Div. Ct. 1951).

<sup>23</sup> *Ibid.*

<sup>24</sup> Professor Smith in this symposium *infra*. But compare Lord Goddard's rationalization of his position as a kindness to the prisoner's best interests of being hung only for a lamb. *R. v. Wharton* (July 6, 1955, unreported), quoted in a Home Office memorandum which in turn is quoted in Note, 29 AUSTR. L.J. 467 (1956).

<sup>25</sup> *R. v. Gentry*, 39 Crim. App. R. 195, 196 (Crim. App. 1955).

<sup>26</sup> *Postmaster-General v. Whitehouse*, 35 Crim. App. R. 8, 11 (Div. Ct. 1951).

<sup>27</sup> *R. v. Phillips*, 32 Crim. App. R. 47, 49 (Crim. App. 1947). The language of the opinion is: "They [the Court] wish the magistrates who release on bail young housebreakers, such as this applicant [who had a bad record], to know that in nineteen cases out of twenty it is a mistake." Lord Goddard participated in this decision but the opinion is by Atkinson, J.

<sup>28</sup> The problem of recidivism is apparently very great. In Scotland in 1957, in proceedings in the higher courts after full committal, out of 431 persons convicted of housebreaking only 36 had no prior convictions and 350 had "previous proved conviction for the same or similar crime." Criminal Statistics, Scotland, CMD. No. 426, at 53 (1957). It is to be noted that these are figures for those convicted, not those charged. The facts in England may be similar; *but see* Lodge, *A Comparison of Criminal Statistics of England and Wales With Those of Scotland*, 7 BRIT. J. DELINQUENCY 50 (1956) (difficult to make comparisons). Even if they are, however, the proportion of those charged who have prior similar convictions is not the same as, and presumably is much higher than, the proportion of those with prior criminal convictions who commit a "new" offense while on bail.

period in which these decisions were being handed down, the Court of Criminal Appeal heard "or otherwise disposed of" fifty-three cases involving convictions of burglary, housebreaking, shopbreaking, possession of housebreaking tools and robbery.<sup>29</sup> This represented less than one quarter of one per cent of the 22,795 cases heard on those charges in the same year.<sup>30</sup> Even on the highly unlikely hypothesis that every case on appeal represented a "repeated" crime by a bailed recidivist, it would seem to provide a rather inadequate statistical sample on which to base a rule of such sweeping application. "Common sense" observations based on appellate cases where the tiny proportion of appeals cannot be shown to be representative of the mass of cases below (and most probably is not), or deductions from "experience,"—*i.e.*, the selective retention in memory of the cases where the predicted event occurred—are of course notoriously unreliable where one is dealing with caseloads which run into the tens of thousands annually. Unfortunately there are apparently no statistics on either side of the Atlantic relevant to a determination of the likelihood that bailed defendants will commit a crime while on bail. In the absence of any reliable information we are left with the distasteful task of making value judgments which critically affect human liberty on no sounder premise than sheer speculation.

### III

As already indicated, however, if American law is interpreted in the light of its practice rather than its theory a very different picture emerges. The American magistrates, commissioners and justices of the peace who hurriedly and routinely administer a huge volume of bail cases with almost no effective appellate court supervision are in philosophy and practice often much closer to Lord Goddard than to Justice Jackson.<sup>31</sup> This is apparent from even the most cursory statistical examination. The New York study found that the proportion of defendants detained during the whole of the pre-trial period was 74 per cent for robbery and 63 per cent for burglary;<sup>32</sup> the less adequate Philadelphia statistics indicated a 75 per cent detention rate for a category of offenses including these two and a few other serious non-

<sup>29</sup> Criminal Statistics, England & Wales, Cmd. No. 7733, at 33 (1948).

<sup>30</sup> *Id.* at 3, 5. These figures were computed from tables A and B, and represent 11,221 cases before Assizes and Quarter Sessions and 11,574 cases summarily disposed of in Magistrates' Courts.

<sup>31</sup> Instances of improper use of bail in New York City include magistrates' setting excessive bail to give young persons accused of crimes "a taste of jail"; to "protect society" from felony narcotics defendants; and to reduce the number of burglaries and robberies by incarcerating those accused of receiving stolen property. See *New York Study* 705; see also *Philadelphia Study* 1038: "Bail is used to 'break' crime waves."

<sup>32</sup> *New York Study* 711.

capital crimes.<sup>33</sup> Despite its more restrictive law the English detention rate for comparable crimes is apparently lower. For the years 1957 and 1958, of the 25,190 defendants committed for trial for burglary, house-breaking and shopbreaking, 52 per cent were confined throughout pre-trial; of the 1,572 robbery commitments, 66 per cent.<sup>34</sup> In fact, a proper comparison might reveal still lower rates in England, since in the same two years an additional 22,961 burglary, housebreaking and shopbreaking defendants and 285 robbery defendants were dealt with summarily and presumably subjected to little or no pre-trial detention.<sup>35</sup> In the only other statistical comparison which this symposium makes possible—and such comparison is crude—the New York and Philadelphia detention rates for serious crimes like robbery and burglary appear to be roughly equal to those in Norway and much higher than those in Sweden.

The question arises, therefore, why it is that an American law which explicitly rejects such justifications for pre-trial detention as the risks of further criminality and of tampering with the evidence nonetheless ends up with such a high detention rate. One reason for this is that the courts have developed standards of what constitutes "reasonable" bail which have completely lost touch with economic reality. Even the Supreme Court's liberal decision in *Stack v. Boyle*<sup>36</sup> implied that reasonableness is to be equated with an amount "usually fixed" for charges of crimes of comparable seriousness.<sup>37</sup> In Philadelphia and New York the amount "usually fixed," while varying

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<sup>33</sup> *Philadelphia Study* 1048.

<sup>34</sup> These statistics were compiled from the 1957 and 1958 volumes of Criminal Statistics: England and Wales, CMD. No. 529 (1957); CMD. No. 803 (1958), table 1, at 21 in each volume.

<sup>35</sup> *Id.* table C, at 9 in each volume. The statistics permit comparison only of undifferentiated categories comprising all those persons who at any time before trial are released on bail. It may be that such comparison puts England in a more favorable light than would be warranted by the facts. Williams indicates that delay in getting bail set poses a problem in England and he urges "a speedier method of getting bail." G. WILLIAMS, *THE REFORM OF THE LAW* 188 (1951). In states like Pennsylvania and New York the two-court procedure required to get bail set in more serious cases raises comparable delay problems, but American practice in general probably operates more rapidly than that in England.

The critical comparison, however, is still whether or not the accused obtains conditional release *at some point* before trial. While delay of a few days or a week in obtaining release is unfortunate, later conditional release nevertheless enables the defendant to reap the major benefits of pre-trial liberty: (1) he can search for evidence and participate in the preparation of a defense; (2) when he arrives for trial he will walk into the courthouse through the front door, avoiding the psychological disadvantage of the accused who is brought in in custody and is thereby typed by judge and jury as a n'er-do-well and economic failure; and (3) if he has obtained or maintained a job while on pre-trial release, his status as a job holder rather than an indigent prisoner will markedly improve his chances of obtaining probation. For an indication of how important the last two factors may be, see the discussion in *Philadelphia Study* 1052-54. *New York Study* 726-27.

<sup>36</sup> 342 U.S. 1 (1951).

<sup>37</sup> *Id.* at 6.

greatly from court to court and as between federal and state courts, was for the more serious offenses at a level which a majority of defendants could not manage.

To some extent, of course, this high "normal" level of bail may be the product of judicial ignorance of practical facts. Bail in the amount of \$500 or \$1,000 is doubtless regarded by American judges as minimal for anything other than minor offenses. Yet in New York 28 per cent of those held in \$500 bail and 38 per cent of those held in \$1,000 bail did not obtain pre-trial release. In Philadelphia state cases the comparable figures were 15 per cent and 22 per cent, and in Philadelphia federal cases 32 per cent and 50 per cent. As the amount of bail required rose above \$1,000 the proportion of defendants who did not obtain pre-trial release rose sharply in both cities.

There is a good deal of evidence, however, to document the suspicion that many magistrates recognize clearly the consequences of high bail and deliberately set it high to achieve by indirection the same ends which British, French and Japanese laws directly authorize.<sup>38</sup> We appear to have evolved a two-part law of conditional release: bail as of right for the financially able; for others conditional release dependent upon judicial discretion as exercised through a manipulation of the amount of "reasonable" bail which will be required.

#### IV

The economic aspects of a financial-incentive system of conditional release strike down to a far more fundamental problem: what does one do about indigents who cannot be subjected to any financial restraint whatsoever? The American answer to this question is an unfortunately simple one: leave them in jail. The reader of this symposium who looks for the foreign answers will be alternately perplexed, incredulous and intrigued by suggestions for practical solutions of the problem.

In his discussion of the Scottish system, for example, Professor Smith discounts economic discrimination, stating that in a proper case the accused "will be released, though his means are very limited," and that the High Court will reduce the bail "to what the accused can in fact raise." He makes the same assertion regarding England, observing that "except in rare cases" there is no discrimination favoring "a suspect with substantial means" over the "impecunious." Professor Vouin reports that although the French Code does not expressly formulate the rule that the amount of security demanded of a released defendant should be based upon his means, "it is naturally followed in practice." And we know that in Korea the Code expressly requires

<sup>38</sup> See *Philadelphia Study* 1032-36; *New York Study* 705.

what these observations seem to imply of their respective countries: ". . . the court shall not fix bail money beyond the financial ability of the accused."<sup>39</sup>

If all this means what it appears to say, to an American observer it would seem that the indigent accused are being released without any financial security whatsoever—and one would suppose in large numbers, too, for the criminal classes in Glasgow, London, Bordeaux or Seoul must exhibit at least as high a proportion of rock-bottom poverty as is found in American urban practice.<sup>40</sup> Can this be true? Unfortunately Professors Smith and Vouin do not elaborate. And since professional bail bondsmen are the only hope of the poor in America, this writer's confusion is further compounded by Professor Smith's assertion that bondsmen do not flourish in England and cannot be found at all in Scotland. "The accused," it is said, "supported by his associates or relatives, finds the money." Unless the bail demanded is in truly *de minimis* amounts such as \$25 or \$50, I do not know where many American defendants, their associates or their relatives would find it. Even if they did, what protection would the deposit of such nominal sums afford society? Bail, after all, is to be set in an amount sufficient to create an incentive against default of the defendant's obligations. For the fifty per cent or more of American urban accuseds who are indigent or near indigent there is obviously no way out of this dilemma within the confines of the traditional bail system.

The most significant aspect of this symposium, therefore, may lie in its many ingenious suggestions for alternative non-financial sanctions. American criminal procedure has an unfortunate tendency to be all black or all white and to ignore ameliorating middle-ground alternatives. We almost invariably initiate a criminal prosecution with the extreme step of arrest and confinement, ignoring the sensible and in most cases practicable alternative of summons. In determining the treatment of those who are convicted, we either imprison with total deprivation of liberty under very restrictive conditions or we release on probation or parole under unfortunately minimal supervision. Only in isolated instances have we utilized the compromise which is so much more common overseas: provisional liberty under strict controls—the prisoner, for example, sleeping in but released during the day to a job in civilian life.

This tendency to rely on only polar alternatives is at its worst in our law of conditional release pending trial. American practice almost

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<sup>39</sup> KOREA, CODE OF CRIMINAL PROCEDURE, ch. IX, art. 98(2) (1954) (as translated in U.N. YEARBOOK OF HUMAN RIGHTS 184, 185 (1954)).

<sup>40</sup> See Leibowitz, Speech, Harv. L. Record, Oct. 29, 1959, p. 4: "85% of the criminal defendants can't even afford an attorney."

universally utilizes only two extremes:<sup>41</sup> release upon purchase of a bond without any formal police or other supervision during what may be a prolonged pre-trial period, or total imprisonment under the most deplorable conditions to be found in American penological practice today. The one extreme subjects society to unjustifiable risks, the other severely penalizes the unconvicted detainee.

In theory, of course, the bail bondsman might be supposed to have a sufficient interest in protecting his investment so that he would keep a watch over the accused who was on conditional release. In practice the enforcement of bond forfeiture is so spotty, the legal restriction of profits compels the bondsmen to carry so heavy a caseload, and the time which elapses before a bail case in a metropolitan center gets to trial is so long, that effective supervision is out of the question. As for those at the other extreme who are detained in default of bail, the pious hope that such detainees should not be punished but should be detained in "secure individual rooms in buildings equipped much like a clean third-class hotel,"<sup>42</sup> is probably nowhere the practice. The conditionally detained are usually commingled with drunks, addicts and convicted prisoners in county or local jails, which with a fortunately growing but still relatively limited number of exceptions are the snake pits of American correctional practice. Compared even with reformatories and penitentiaries, let alone with third class hotels, most jails are deficient in social services, physical facilities, work programs, inmate activities and even in security against escape. The New York bail study, which dealt with one of the country's better detention facilities, reported that unconvicted prisoners awaiting trial were held under "a pattern of custody which, paradoxically, is more restrictive than that ordinarily imposed on convicted prisoners" in the Rikers Island Penitentiary administered by the same correctional system.<sup>43</sup>

Given these conditions, American legal administration has every reason to open its mind to the experience of other nations. Professors Dando and Tamiya describe the Asian practice, dating back to the eighth century, of non-monetary release into the custody of a responsible third party, a custom preserved in the new Japanese code and

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<sup>41</sup> The use of release on one's own recognizance without financial security appears to be statistically insignificant, although it may be somewhat more common in the federal courts. See *Philadelphia Study* 1036. In New York a comparable procedure, misnomered "parole," was very seldom used in felony cases at the time of the University of Pennsylvania study. (The study did not examine misdemeanor cases.) One reason for the comparative non-use of "parole" was alleged to be the lack of any sanction for its violation, and in 1958 the legislature made it a crime to jump "parole." N.Y. PENAL LAW § 1694-b. Since this statute was adopted it has been reported to the writer without verification that the proportionate use of "parole" has increased.

<sup>42</sup> TAFT, *CRIMINOLOGY* 379 (rev. ed. 1952).

<sup>43</sup> *New York Study* 72A.

which they see as of great potential importance with the development of adequate social welfare agencies to administer the necessary supervision. Along similar lines Professor Vouin has an intriguing proposal for the extension of probation supervision (*liberté surveillée*) so that it would be applied in cases of provisional release, even during the preliminary investigation. He points out potential values for such a system which go far beyond mere watch-dog supervision and embrace the psychological and social assistance requisite to convert the pre-trial period to constructive uses. Even conceding the substantial expense of such social supervision, it would still be cheaper than the alternative of imprisonment. The fact that an accused released under supervision might be able to retain employment would both effect further savings in the support of his dependents and broaden the practical availability of probation as a treatment in the event of conviction.

Other alternative restraints are suggested by Professor Bratholm, who points out that bail is rarely used in Scandinavian countries and in the German Federal Republic. These restraints include the duty of periodically reporting to the police station, confiscation of the accused's passport, and any other measures in the discretion of the court which are suited to prevent escape or the commission of crimes by the accused. In Sweden, according to Professor Bratholm, "bail is not recognized, as it is considered to lead to inequality before the law." Since he also reports that Sweden has a high rate of conditional release, it would be interesting to get data of the non-financial sanctions which that country apparently successfully employs.

As an additional sanction the federal government,<sup>44</sup> New York,<sup>45</sup> Minnesota<sup>46</sup> and Canada<sup>47</sup> have created a criminal penalty for jumping bail; and New York also makes it a crime to fail to appear after release on recognizance without financial security.<sup>48</sup> Whether such a sanction would have significant deterrent value against one who was tempted to abscond to avoid being punished for an even more serious offense is questionable,<sup>49</sup> although in the case of persons released without financial security such a statute might be a useful complement to

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<sup>44</sup> 18 U.S.C. § 3146 (1958).

<sup>45</sup> N.Y. PENAL LAW § 1694-a.

<sup>46</sup> MINN. STAT. ANN. § 613.35 (1947).

<sup>47</sup> CAN. REV. STATS. c. 36, § 189(c) (1927), as amended by STATS. OF CANADA 11 Geo. VI, c. 55, § 2 (1947).

<sup>48</sup> N.Y. PENAL LAW § 1694-b. One federal court has used its contempt power to punish a defendant's wilful disobedience of an order to appear. *United States v. Hall*, 198 F.2d 726 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953). Compare *Collins v. Georgia*, 32 Ga. App. 450, 123 S.E. 723 (1924) (held error to declare defendant in contempt for refusing to appear in absence of specific statutory authority).

<sup>49</sup> For an earlier discussion of the use of the Minnesota and New York statutes see *Philadelphia Study* 1068-69 nn.144-48.

the much more effective device of probation-like supervision while on conditional release.

## V

The final observation which this symposium invites concerns the methodology of its scholarship. All of the articles give admirable descriptions of the legal principles in force in the various countries and of the policies which underlie their law. However, because Professor Bratholm has recently completed a statistical study in connection with a book on Norwegian arrest and detention, his Article contains empirical support found lacking in the Articles of the other scholars. Although his Article gives only a few tantalizing glimpses, it would appear that the book upon which it is based makes a major contribution to empirical scholarship, and one can only hope that before long the book itself will be translated into a language more accessible to the American reader than Norwegian.

Professor Bratholm's work is essentially statistical. He can tell us, therefore, "that detention is resorted to in a surprisingly large number of cases in Norway, and that the period of remand in custody is generally unwarrantably long." Furthermore, he shows us the great potential significance of comparative statistical studies. He demonstrates that although the controlling law in the various Scandanavian countries is very similar, there are marked differences in practice among the major cities, with the frequency of remand in custody in Oslo being substantially higher than in Copenhagen and four times as high as in Stockholm. Such comparisons certainly raise significant questions and suggest the inference of unnecessary Norwegian abuse of pre-trial custody. It is difficult to believe that Oslo criminals as a class are so much more intractable than their counterparts in Stockholm and Copenhagen as to justify the more repressive Norwegian practices. The police and judicial justification for such repression is always necessity, to which Professor Bratholm's research in effect replies: "Why is so much detention necessary in Oslo if the police in Stockholm do not find it necessary there?" If there is an answer, the burden has been put upon the Oslo police to produce it.

The kind of information which this symposium gives us as to Scandanavian practice is significantly lacking for the other countries. In regard to France, Japan, Scotland and England it is difficult to judge the efficacy and social effects of their legal procedures without some idea of what proportions of defendants are detained for how long and for what reasons. Statistical information independently available for England pinpoints the importance of these questions. For the years

1957 and 1958 of 52,025 persons committed for trial for all indictable offenses, 21,550 (or 41 per cent) were detained without release on bail. For the class II offenses which embrace the major robbery and burglary-type crimes, 16,477 were detained compared with 15,367 released on bail, or a detention rate of 52 per cent.<sup>50</sup> There is no statistical breakdown of the detention category, so that it is impossible to determine how many, if any, of the detained cases represent prisoners for whom bail was set but not obtained, or in how many cases there may have been an abuse of discretion in the denial of bail. The frequency of detention would certainly seem high enough to warrant an empirical investigation to determine its causes.

The need for such a study seems to me to follow from Professor Smith's observations that in England "there is little evidence" of abuse and that police opposition to bail occurs only in "rare cases." The changes proposed by Dr. Glanville Williams are characterized by Professor Smith as "reforms . . . designed to improve procedure rather than to correct abuses." Perhaps I put a different interpretation on Dr. Williams' words; what he said was that "[a]lthough the police do not as a body abuse their powers, there are too many individual instances of abuse."<sup>51</sup> Clearly we all agree that the incidence of abuse is an important fact that should influence law-making. And, where we are dealing with poor people who have little opportunity to assert rights of which they are probably ignorant—with the result that abuses tend to be unnoticed both by the judiciary and by legal scholars—I do not see how this incidence can be determined with any reliability short of a statistical investigation.

## VI

Like any good study in comparative law, this symposium stretches the imagination. That the kind of reform it suggests is of a different order than that propounded by Professor Keedy thirty years ago in the ALI Code reflects the basic changes which have come about in our approach to criminal procedure. Professor Keedy's draftsmanship came before *Powell v. Alabama*<sup>52</sup> opened a whole new era of concern for indigent defendants, before the federal courts slowly but steadily expanded the protections afforded indigents,<sup>53</sup> before the late Judge Jerome Frank carried on his persistent campaign for a more realistic awareness of the extent of economic discrimination in our criminal pro-

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<sup>50</sup> See note 34 *supra*.

<sup>51</sup> G. WILLIAMS, *THE REFORM OF THE LAW* 188 (1951).

<sup>52</sup> 287 U.S. 45 (1932).

<sup>53</sup> See Note, *Aid for Indigent Litigants in the Federal Courts*, 58 COLUM. L. REV. 832 (1958).

cedure<sup>54</sup> and, of course, before the Supreme Court decided *Griffin v. Illinois*,<sup>55</sup> a case one can only hope will influence the indigent defendant litigation of the next quarter century as the last has been dominated by *Powell v. Alabama*.

So far the bail system has survived this reappraisal unscathed.<sup>56</sup> It seems inevitable, however, that unless the trend toward a greater realism in equal justice is to be reversed, the pattern of economic discrimination in our present system of pre-trial conditional release is going to be recognized and successfully challenged. These Articles start us thinking toward that day.

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<sup>54</sup> *E.g.*, *United States v. Johnson*, 238 F.2d 565, 573 (2d Cir. 1956) (dissenting opinion, citing his earlier work), *vacated and remanded*, 352 U.S. 565 (1957) (*per curiam*).

<sup>55</sup> 351 U.S. 12 (1956).

<sup>56</sup> The only post-*Griffin* case in point appears to be *United States ex rel. Hyde v. McMann*, 263 F.2d 940 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959), where the discrimination issue was raised on a very poor record. The court disposed of the case on due process grounds without even mentioning the equal protection problem.