Detention of the Unconvicted in Patna, India

Frederick I. Taft
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I. INTRODUCTION

The author visited India during late 1970 and early 1971 as a law student from the United States engaged in field research into one feature of the Indian criminal justice system — its patterns of jail detention for unconvicted persons. One subdivision in the city of Patna, in the State of Bihar, was investigated extensively through analysis of court and jail records and through interviews with defense attorneys, prosecutors, magistrates, jail personnel, various other governmental officials, and several defendants. In addition, the author briefly explored the police and court systems in Calcutta and spoke with officials in New Delhi involved in drafting a proposed revision of the Indian Code of Criminal Procedure.¹

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¹ This research in India was undertaken as part of a third year of study at Yale Law School, New Haven, Connecticut. For assistance in this project the author wishes to single out for thanks Profs. Daniel Freed and William Felstiner of the Yale Law School. The author’s six weeks in the city of Patna were extremely pleasant, due in large measure to the graciousness of his host and hostess, the late Hon. Justice Sayed Akbar Husain and his wife, Nafisa, and to the warmth of their friends, Mr. S. Q. Rizvi and his family.
This article should be of greatest interest to persons concerned with the Indian criminal justice system or with the issues surrounding pre-disposition release in criminal cases. Some of the research methods used by the author to study case records may prove useful to others desiring to scrutinize the operation of a legal system at the grass roots level.\(^2\)

In the course of reporting on this type of cross-cultural research, the author's relevant cultural/legal premises, or at least the most readily discernible of them, should be sketched at the outset. In the author's eyes, then:

- A system of criminal justice should aim to maintain adequate public order and personal security while maximizing personal freedom.
- A legal system should exact criminal penalties only after guilt is established. The process of determining guilt or innocence should include an opportunity for the defendant to demand an adjudication in a court where defendants appear as equals before the law.
- A state should, after due consideration, allocate a fair portion of its limited public monies to the task of providing legal assistance to those defendants in criminal cases who are unable to purchase it on their own.
- No one spends time in jail unless someone else has decided that this should be allowed to happen. The web of decision which holds someone in jail is spun by fallible people with limited sources of information operating under the press of official duties. The length of time a person spends in jail should have limits determined in a way that takes into account the expertise of the persons who spun the restraining web, the specific facts which were known to them, and the care which was taken in the decision process.
- It is necessary as a practical matter to impose post-arrest, pre-disposition jail time on some persons. Mechanisms of conditional release before final case disposition should assure that most arrested defendants do not spend a large portion of this period in jail.
- Those defendants who are unable to secure such pre-disposition release are caught in a bind. If they maintain a plea of not guilty and are acquitted, their pre-acquittal incarceration undercuts their vindication. If they maintain a plea of not guilty and are convicted after trial, they may be sentenced just as heavily as those whose conviction for a comparable offense follows a period of pre-disposition freedom. However, if they plead guilty, they are forsaking their chance to challenge the state's case. The bind is most apparent for the jailed defendant who does not feel conviction.

A copy of the paper and three-volume appendix that constituted the author's initial report on this research is on file at the Yale Law School library. It contains a multitude of charts of case histories and full recounting of all interviews.

\(^2\) See especially infra notes 8-11 and related text.
DETENTION OF UNCONVICTED

is justified, but who foresees less total jail time if he does not demand and wait for a trial but simply pleads guilty.3

— For an individual who is unable to secure release from jail prior to disposition of his case, rules of criminal procedure should operate to place an outer limit on the length of pre-disposition time which he may spend in jail. The state must then prosecute with diligence or countenance the defendant’s conditional release.

— To avoid embittering a populace and to help sustain the health of a country, lawlessness in positions of public trust should be exposed and attacked by those with the moral authority to do so.

— The legal system in all countries needs empirical scrutiny as a basis for systemic reform. There is a simple empirical analysis compelled in every case by the need to weave together particular facts and appropriate law. Through appellate court opinions, this case-by-case empiricism can contribute to the growth of legal doctrine that is rooted in reality. However, case-by-case empiricism can leave important factual patterns unobserved and their implications unexpressed. It leans toward the microscopic rather than the macroscopic perspective. The search for these veiled but important factual patterns should be carried on by legal scholars and practitioners, law students, government officials, members of the press, and other persons with the time, interest, and ability to add to the existing knowledge of how the legal system actually works. The ultimate purpose of such empirical research is to guide the evolution of the legal system so that the country’s societal values are well served.

These beliefs represent that portion of the author’s cultural bias that seems most germane to the research recounted here. They flow from his experiences as a citizen and a student of law in the United States. As befits statements that portray subjective premises, the beliefs are phrased broadly and vaguely. Perhaps the author has been unnecessarily long-winded; a puckish condensation might have been provided by the simple statement that the author believes in due process, or perhaps, fundamental fairness.

The degree of acceptance which these premises would enjoy in India, or in some key portion of the Indian population, is an imponderable. The cultural and economic facts of life that form the setting for the criminal justice system in India are enormously different from those in the United States. India and the United States do, however, share a British legal heritage; as one result, the author found Indian criminal procedure readily comprehensible. Also, the author sensed in India little or no antagonism towards the set of

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3 The author has followed the convention of using the masculine third person singular personal pronoun to refer to any hypothetical, unidentified person. The references would be more accurate if they indicated that the unidentified person could be either male or female. English lacks the neuter third person singular personal pronoun that would make the sex-neutral reference an easy one. The author extends his apologies to his female readers for this unfortunate state of linguistic affairs.
values described above; occasionally he sensed moderate sympathy. The clearest test of the relevance to India of the approach taken by the author will come if this research and the resulting suggestions are published in India and persons involved in the legal system there have a chance to react to them.

II. RESEARCH ACTIVITIES, INCLUDING JAIL OBSERVATION AND CASE SELECTION

The author spent nearly two months beginning in late 1970 in Patna. The city, which dates back several thousand years, stretches for miles along the Ganges River and has about two million inhabitants. It is in the heart of the densely populated and impoverished Gangetic plain which sweeps across northern India. The author studied the criminal process within one jurisdiction, a subdivision located in the newer area of the city. Within the bounds of the subdivision are about half a million people, the major office complexes of the state government — relics of colonial opulence set amid spacious grounds, and vast reaches of low mud, brick, or stone buildings. In the months of the author’s visit the streets of the city were alive with commerce throughout the day, but in the hot months outdoor activities wither under the sun.

The courthouse of the subdivision is a series of rambling structures set high on the riverbank. The compound is graced with several old spreading trees through whose shadows hundreds of people a day come and go on court business. The stands for vending forms or food or a shave or typing services are scattered about the yards. In nice weather attorneys confer with their clients and with each other outdoors. Court hearings take place in small rooms in which the bench is draped with an imposing bright red cloth.

The author made use of court and jail records. After completing the bulk of his research into these records he conducted over twenty lengthy interviews with representative participants in the criminal process. At each stage the inquiry had to be shaped to fit within the range of accessible information. Only a few defendants could be interviewed because of language and privacy problems, compounded by difficulties securing permission to talk with defendants at the jail. The author was, however, granted virtually unfettered access to records of disposed criminal cases handled by magistrates. Court personnel and attorneys were consistently generous with their time and assistance.⁴ The greatest challenge in the

⁴ Most helpful and friendly of all was Mr. Ambikar Singh, Assistant Clerk in the
course of the research came in deciding what to extract from the three floors of records, piled high and covered with dust, that chronicled disposed criminal cases in the subdivision reaching back many years.

Though statutes, treatises, official judicial declarations and appellate proceedings in Patna were all in English, the trials were conducted in the vernacular, mainly Hindi. Opportunities to learn English are dwindling in most of northern India and demands for new respect for native languages are gaining force. The legal system may become a battleground of language conflict unless a way is found to adjust to the changing realities, particularly to the diminishing facility with English among recruits to the legal profession in areas like Patna.\footnote{J. Getman, \textit{The Development of Indian Legal Education: The Impact of the Language Problem}, 21 J. Leg. Ed. 513 (1969) gives a graphic, pessimistic portrayal of the language situation in the law schools of northern India. For a keen discussion of the painfully wide array of problems confronting Indian legal education other than the language issue, see A. Von Mehren, \textit{Law and Legal Education in India: Some Observations}, 78 Harv. L. Rev. 1180 (1965). See also, Symposium on Lawyers in Developing Countries, Especially India, 3 Law and Society Rev. 189 (1969), particularly, T. Bastedo, \textit{Law Colleges and Law Students in Bihar}, Id. at 269.}

At the jail serving the subdivision, the author was shown through the inner wards. The inmates seemed to be treated fairly well. They had great freedom of movement within the walls during the day and were locked in large wards at night. The author happened to witness an impressive display of orderly sectioning by inmates of a ward who elected a representative from among their number to help run the ward. Food, clothing and medical care seemed to be of relatively high calibre, in light of the great poverty in the society lying beyond the walls.\footnote{Might jail conditions for some defendants have compared so favorably with those they knew on the outside that their efforts to secure pre-disposition release were no more than half-hearted? The author has no definite answer. Certainly those who fought being jailed the hardest in court were those who had been well enough off so that they had some money available to help their legal struggle. However, no evidence indicated that those who had been very poor and who could not struggle as visibly liked being in jail. Those few defendants with whom the author was able to communicate, directly or through an inmate-interpreter, articulated in no uncertain terms their belief that society had wronged them and that jail was no treat.} This was one of the main jails of the state and conditions at outlying facilities would probably have been worse. Unconvicted detainees and convicts, young and old, were all in the same jail and received roughly the same treat-
ment. However, prisoners who had been of specified high social rank on the outside (about one to two per cent of the total jail population) were entitled to special privileges within the jail. Securing and maintaining these and other minor amenities of jail life apparently depended on an ability to pay a regular bribe to the appropriate jail official.

Security measures within the jail were mild to the point of being barely visible. On each working shift there were about 30 warders, each carrying no more than a small baton, to control an average jail population of about 1400 men. A tiny female contingent averaging 30 inmates was housed in a separate part of the jail. About once a year, according to the warden, a "law-and-order" situation arises within the jail and a large gong is rung loudly; from a garrison just outside the main gate, special police armed with guns or long bamboo staves stream in and quell the disturbance with a massive show of force. During one of his many research visits, the author had the dubious good fortune to observe the whites of the eyes of these special troops during a charge that quickly snuffed out a mini-riot touched off by a group of professors who had been jailed temporarily in the course of a sitdown strike.

Jail records revealed that only one quarter of the prisoners were convicts. The rest were awaiting disposition of their cases. The author was able to determine the charges pending against the entire population of "under-trial" prisoners as of a specific date in November, 1970. The term, under-trial, was used to refer only to prisoners whose cases were pending before magistrates; it excluded the convicts and the relatively small number of inmates in serious cases who had been "committed" for trial at a higher judicial level (the Sessions Court) and whose trials were not finished. The existence of this data in a readily accessible form was a fortuity; a legislator had requested a census of under-trial prisoners and the list had been compiled just prior to the author's arrival in Patna.

7 Since the jail drew convicted prisoners from a district which included several subdivisions and drew unconvicted prisoners almost solely from one subdivision, the proportion of convicts would have been even smaller if convicts from outside the subdivision had been excluded from the count.

8 The census of under-trial prisoners in the Patna Central Jail as of a particular date in November, 1970, revealed the pattern of confinement shown in the chart below. Within each broad grouping the offenses are arranged according to the total number of inmate-days generated by each type of offense. Note that many of the under-trial defendants listed under the more serious offenses would eventually have been committed by the magistrates to trial in the Sessions Court and would have faced additional pre-disposition jail time after they had ceased being under-trial prisoners.
Since the census covered almost all of the unconvicted inmates and since it noted the offense charged and the date of jailing it revealed what sorts of offenses had generated the greatest amount of predisposition detention expressed in terms of total inmate-days of jail time.

**PATNA CENTRAL JAIL — UNDER-TRIAL PRISONERS — NOVEMBER, 1970**

<table>
<thead>
<tr>
<th>Category of offense</th>
<th>Number of inmates</th>
<th>Average number of days in jail per inmate</th>
<th>Total inmate-days of jail time</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Offenses against property</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Theft</td>
<td>256</td>
<td>262</td>
<td>66,988</td>
</tr>
<tr>
<td>Robbery</td>
<td>73</td>
<td>222</td>
<td>16,184</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>27</td>
<td>366</td>
<td>9,877</td>
</tr>
<tr>
<td>Cheating</td>
<td>17</td>
<td>448</td>
<td>7,610</td>
</tr>
<tr>
<td>House Trespass</td>
<td>16</td>
<td>246</td>
<td>3,931</td>
</tr>
<tr>
<td>Forgery</td>
<td>5</td>
<td>648</td>
<td>3,238</td>
</tr>
<tr>
<td>Mischief</td>
<td>4</td>
<td>788</td>
<td>3,153</td>
</tr>
<tr>
<td>Criminal breach of trust</td>
<td>12</td>
<td>238</td>
<td>2,853</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>410</td>
<td>278</td>
<td>113,834</td>
</tr>
<tr>
<td><strong>Offenses against the body</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Offenses against life</td>
<td>73</td>
<td>165</td>
<td>12,052</td>
</tr>
<tr>
<td>Abduction</td>
<td>19</td>
<td>519</td>
<td>9,855</td>
</tr>
<tr>
<td>Rape</td>
<td>7</td>
<td>395</td>
<td>2,766</td>
</tr>
<tr>
<td>Hurt, restraint, assault, etc.</td>
<td>13</td>
<td>165</td>
<td>2,147</td>
</tr>
<tr>
<td>Unnatural offense</td>
<td>1</td>
<td>418</td>
<td>418</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>113</td>
<td>241</td>
<td>27,238</td>
</tr>
<tr>
<td><strong>Offenses against the state</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Offenses against public health, safety, etc.</td>
<td>28</td>
<td>44</td>
<td>1,229</td>
</tr>
<tr>
<td>Giving of false evidence</td>
<td>3</td>
<td>389</td>
<td>1,166</td>
</tr>
<tr>
<td>Excise violations</td>
<td>9</td>
<td>168</td>
<td>1,510</td>
</tr>
<tr>
<td>Gambling</td>
<td>12</td>
<td>47</td>
<td>568</td>
</tr>
<tr>
<td>Firearms violation</td>
<td>2</td>
<td>266</td>
<td>531</td>
</tr>
<tr>
<td>Violation of public tranquility</td>
<td>7</td>
<td>61</td>
<td>424</td>
</tr>
<tr>
<td>Sedition</td>
<td>2</td>
<td>203</td>
<td>406</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>9</td>
<td>61</td>
<td>553</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>72</td>
<td>89</td>
<td>6,387</td>
</tr>
<tr>
<td><strong>Preventive sections of Code of Criminal Procedure</strong></td>
<td>67</td>
<td>112</td>
<td>7,537</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>662</td>
<td>234</td>
<td>154,996</td>
</tr>
</tbody>
</table>
Total inmate-days generated by an offense is a crude measure of how great a penalty, at least in terms of pre-disposition jail time, a society is willing to administer to its non-conforming members to keep a particular type of deviance under acceptable control. Comparison of jail time generated by various offenses gives some idea as to which of the society's values are felt to be most threatened and most in need of protection through the criminal justice apparatus. The chart set out in the margin makes it clear that in Patna defense of property interests is the ultimate rationale for over two-thirds of the pre-disposition jail time that persons are made to suffer.9

Also, the Code of Criminal Procedure classifies a theft case as one in which the magistrate may grant or withhold bail at his discretion depending on the circumstances. These facts made theft cases a natural focus for study of pre-disposition detention and the grounds for granting bail. Using court files of disposed cases, the author charted in detail the histories of 34 theft cases involving 48 defendants.10 The sample was designed to approximate the larger

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9 Id.

10 The author used sheets of paper five feet long to chart case histories. Cases were listed by number down the left-hand margin, which was the short one, and across the top the long margin was used to list the important events within the cases about which information would be gathered. When carefully folded the chart was not unwieldy. This data-displaying device permitted assembly and comparison of a large number of separate bits of information in a compact space without the aid of data-processing equipment. For others who may wish to use this method, an indication of what information was gathered may be helpful. Across the top of the chart the vertical subdivisions that determined what information would be recorded were labeled as indicated below. (Subsequent portions of this article will at least partially clarify some of the terminology used here that may be obscure to someone unfamiliar with Indian criminal procedure).

Case no. (beginning with 1) (letters designate multiple defendants)
Date of first court appearance
State or private complaint case
Date of first retaining lawyer, if any (date on first power-of-attorney from in file)
Date of first bail-petition filing in court
Date of all bail decisions (other than simply accepting prior bail on case transfer)
Court making the bail decision
Was bail granted or refused? (all decisions)
Reasons given, if any, for all bail decisions
Bail conditions set, if any, in all bail decisions
All dates on which bail bonds furnished on new or changed conditions
All dates on which bail bonds accepted (new or changed conditions) — accused released
population of all recent theft actions from which it was drawn.  

The other principal research selection from the court files was a group of cases under a “preventive” section of the Code of Crimi-

What indications are given of fitness of sureties — i.e., documents attached to bonds? (if this information was gathered)  
Dates of any returns to jail after first release  
Reasons, if any noted, for returns to jail after first release  
Dates of any releases from jail other than first release  
Days spent in jail on returns after first release  
If a state case, is final form a charge sheet or a final report?  
For state cases, date on which final form filled out at police station  
Date on which SDO Court receives final form in a state case  
Action of SDO Court on the final form on the date received (cognizance or discharge)  
Number of days from the date final form filled out until received by SDO  
Where any reminders sent to the police to produce the final form? Any requested by SDO but not sent by clerk?  
Any specific dates on which reminders were sent or requested (non-exhaustive list)  
Date on which charge framed, if any, in trial court  
Charge under what sections (all of the theft cases involved arrest under at least § 379)  
Nature of the alleged offense  
Plea, if any  
Number of witnesses heard — prosecution and defense  
Does the record indicate difficulty in producing witnesses? e.g. . . . ?  
Name of deciding magistrate  
Date on which case disposed  
Outcome  
If convicted, sentence length (were fines noted in record as paid?)  
Judgment length, in pages? — Care taken?  
Age of accused at disposition, if noted  
Was appeal taken? Outcome if noted and final appeals court date of decision, if noted  
General remarks  
Total days in jail from beginning to end of case  
Total days in jail after first retaining a lawyer  
Total days duration of case from first appearance to disposition  
Days before cognizance taken or final report accepted  
Days after cognizance taken or final report accepted until end of case  
Days in jail before cognizance taken or final report accepted  
Days in jail after cognizance taken or final report accepted.

With so many bits of information gathered about each defendant's case it became possible to study the internal dynamics of the cases and discern possible cause-and-effect relationship among the various events. In order to ascertain the number of days between events that were identified by date, it was necessary for the author to take a large calendar and, beginning with January 1, 1966, to number every day up to the end of 1970. The space for each date on the calendar became filled with five numbers, one for that date for each year from 1966 through 1970. By subtracting an earlier date's number from that of a later date, an interval of elapsed days could be ascertained.  

In order to select a sample group of theft cases, four types of case dispositions were distinguished: discharge by the head magistrate (SDO) upon receipt of a final report from the police, acquittal after receipt of a charge sheet, conviction, and absconding. A scan of six scattered months indicated these dispositions occurred in a ratio of roughly 5:5:5:1. Each month saw about 20 theft cases completed in the subdivision. By taking cases non-selectively within each of these disposition types (for instance, taking all the acquittals for May, 1970), the author gradually built up a sample
nal Procedure which allows arrest when a person is suspected of being about to commit a crime or when he cannot explain his presence in a place. These cases seemed worth examining because of the vagueness of the law involved and the substantial number of unconvicted people who were in jail in connection with this section.

This article is based on research conducted primarily in Patna. Justice in Patna is more representative of urban than of rural justice in India. Also, Patna is an economically poor city and the system of justice there is probably more representative of what is found in the poorer cities in India than of what is found in the more affluent ones. Ethnic heterogeneity helps make generalization about events in India as a whole a precarious matter. However, all of India is subject to one criminal procedure code and one penal code, and the

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1. Ethnic heterogeneity helps make generalization about events in India as a whole a precarious matter. However, all of India is subject to one criminal procedure code and one penal code, and the

2. The sample of preventive cases was assembled by taking all of the cases terminated in one particular month and half of those terminated in another. The significant disposition categories seemed to be only discharge/acquittal and conviction, which appeared in a ratio of about 5:1. In the author's sample, the ratio is 13:4. Convictions are somewhat overrepresented so that some idea may be gained of what occurs to convicted defendants.

3. Other small groups of cases charted by the author concerned minor offenses where the Code requires the magistrate to set bail but leaves the amount to his discretion, capital offenses where the usual practice was to deny bail, and situations in which the case had been terminated when the accused permanently absconded.

4. Above the magistrate's court is the Sessions Court of the district, and above that the High Court for the state. The Sessions Court conducts the actual trials in cases involving the most serious offenses after the defendant has been "committed" for trial as a result of a proceeding before a magistrate. The author gathered information on the length of time consumed in sessions trials, the types of offenses tried, and what happened to the defendants. Access to Sessions Court records was more circumscribed than that gained at the magistrate's court level. At the High Court the author watched the argument in several bail appeals and studied one block of disposed bail appeals.

5. Due to the limited geographic scope of the author's research in India and the paucity of literature describing the grass-roots operation of the legal system in various cities in India, the author is not in a position to make detailed comparisons of Patna to the rest of India.

A senior government official interviewed in New Delhi commented when told of the author's research:

"Ah, Bihar. You were in the worst part of the country, the areas of India along the Ganges. You should have gone to the South. If you had gone there you would have seen the legal system working better. The charge sheet is submitted within 13 or 15 days, and the whole process is over within six months, although it is true that some serious sessions trials [of major offenses] must go on for a long time."

The official was from the South. For further comments by him, see infra note 33.
country has a unified judicial system with all criminal courts ultimately bound by the rulings of the Supreme Court of India. This common legal superstructure tends to make at least urban criminal justice systems in India similar to each other. While the data and the recommendations presented herein have greatest relevance for Patna, some extrapolation of the author's comments to the rest of India seems warranted, so long as the preceding caveats are borne in mind.

III. Release On Bail: Discussion Based On Case Histories

Patterns of pre-disposition release become most comprehensible when the release consequences of each phase of the criminal process are considered separately. The author found the following list of decision points, each of which indicates a shift in the status of the accused's case, to be a useful outline of the criminal process in Patna for cases triable by magistrates:

1. Arrest;
2. Grant or denial of bail;
3. Acceptance or rejection of sureties;
4. Filing by the police of the charge sheet or dismissal report;
5. Pleading to the charges;
6. Termination of cases where accused absconds or the prosecution loses interest;
7. Adjudication of guilt or innocence;
8. Sentencing.

The pre-disposition release pattern and other features associated with each of these decision points are discussed below.

1. Arrest

The decision to arrest is normally a matter of police discretion and is beyond the scope of this inquiry. A few comments, however, will give some idea of who gets involved in the criminal process.

The theft cases studied by the author were all brought under Indian Penal Code Section 379. The pettiest item allegedly stolen was four kilos of wheat; the defendant was an 11-year-old boy who had gathered up the wheat from the ground near a loading dock. The grandest larceny in the sample group was that of a man in a

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15 An exception to this is posed by the "private complaint" proceedings authorized by the Code of Criminal Procedure whereby a private individual can seek from a magistrate an order for arrest and criminal prosecution of another individual in a situation where the police have declined to act.
bank who grabbed 12 hundred-rupee notes and ran. (A U.S. dollar was in 1970 worth unofficially about 13 Indian rupees. Per capita annual income in India in 1969 was estimated to be $86.)\textsuperscript{16} Several of the defendants were charged with pickpocketing. Another popular choice of thieves was copper wire or other railroad supplies. One man charged his neighbor with the theft of a brick wall. In another case, a mother charged her son with locking her out of the house and swiping her valuables. No women defendants were encountered in the sample.

When a person is arrested under the most widely used preventive section of the Code of Criminal Procedure, Section 109, he is charged with intent to commit a crime or with being unable to explain his presence in some place. In these preventive arrests the crime most often suspected to be about to be committed is theft. The facts alleged to show guilty intent, however, often prove no more than that a poor man was found some place other than his own home. The police say that this section is used to cramp the style of hardened criminals whom they know to be guilty of crimes but against whom they do not have strong cases. However, the author found the following indications that the people arrested are not major criminals: (a) many persons arrested under this section are unable to find sureties promptly; (b) there is little interest shown by the prosecutors in pressing these cases, and the police could ask the prosecutors to pay more attention to these cases if they (the police) really cared about the outcome; (c) many of those arrested seem to be people who incurred the displeasure of the police for some reason unrelated to intent to commit crime — a classic defense encountered in these cases is that the accused "is a poor rickshaw man who lives by the sweat of his brow, and whose only crime was to refuse to give the constable a free ride to the tanna [police station]."

The offense in these preventive cases is guilty intent, and a person who acts suspiciously can be convicted. The avowed purpose of the section is to prevent crime. The practical effect is to give the police a way of arbitrarily detaining people and, in the case of poor people without friends, sending them to jail for what often turns out to be a long period of time.\textsuperscript{17}

\textsuperscript{17} Part V-6, below, urges abolition or drastic modification of these preventive laws.
2. Grant or denial of bail

The Indian Code of Criminal Procedure was originally passed in 1898 under British rule, and was adopted by India when Independence was achieved in 1947. It is an elaborate document with 565 sections and 4 large schedules. In Patna, some of its provisions are not honored in practice, but in most respects it continues to determine the order and nature of events in the criminal process there. The Indian Constitution, inaugurated in 1950, has had relatively little direct impact on criminal procedure in the country.\(^{18}\)

All offenses are classified by the Code of Criminal Procedure as "bailable" or "non-bailable." When a person arrested for a bailable offense is brought before the magistrate after arrest, bail is always set at some moderate amount to be determined by the magistrate.\(^{19}\) In non-bailable cases, which are more serious, the granting or denial of bail, the amount of the bond, and the number of sureties are all matters for the magistrate's discretion. "Non-bailable" is a misnomer; "bail-discretionary" would be a more accurate term. The magistrate will not even consider the bail question in a non-bailable case unless he has received a bail petition from the accused. A bail petition is almost never filed unless the accused has the help of a lawyer; a lawyer can be retained and a bail petition filed for a few rupees. Indian law clearly contemplates that many of those who petition for bail in a non-bailable case will not be successful and will remain imprisoned until their cases are concluded.

A common set of bail terms for a medium-range offense (e.g., theft) would be 1000 rupees with two sureties, meaning that the accused person will be released if he can present to the court bonds signed by two people of modest financial position who promise to pay 1000 rupees to the court if the accused absconds.

Release on bond without sureties — that is, release on recognizance — is authorized by the Code of Criminal Procedure if a case against the defendant appears extremely weak at any point in the process.\(^{20}\) In practice, this device is hardly ever used in Patna. One

\(^{18}\) Article 22 of the Indian Constitution does specify that the police have one day to turn over an arrested person to court custody. In Patna, this directive is generally followed, but in other less stable cities, such as Calcutta, the police may detain arrested persons for longer periods. The same article also guarantees the right of an accused to know the charge and to retain counsel.

\(^{19}\) The device of "stationhouse bail," in which the police at the time of arrest set a bond amount, accept sureties, and grant release from the police station, is also permitted by the Code of Criminal Procedure and is use sparingly in Patna with minor offenses.

\(^{20}\) **Indian Code of Criminal Procedure**, §§ 496, 497. *E.g.*, in § 497-2:
magistrate intimated to the author that when release without sureties is used, it is likely to mean that the defendant is a person of high social rank charged with some white-collar offense or is one of a large group of people picked up in the course of some action (such as breaking-up a sitdown strike) where there is no intention to prosecute the cases.

The author's main case sample dealt with the offense of theft, which is labeled non-bailable. The preventive section also studied by the author is a bailable offense, so bail terms were set in all the charted cases involving that section.

For the defendant in a non-bailable case who is able to hire a lawyer and submit a bail petition, the pivotal question will be, "How strong is the prima facie case against him?" The magistrate must extract an answer to this question primarily from the skeletal police report which is submitted when an arrested person is sent to court. In a theft case, the report says what was reported stolen and who said that the defendant stole it. The accused person may through his lawyer challenge the allegations made in the report. The lawyer will file a bail petition and possibly offer some supporting oral argument. Bail petitions conform to certain rituals. Nearly every one says that the accused is innocent and has been falsely implicated, and then goes on to make a set of claims about the dependent relatives, gainful employment, and strong community ties of the accused. Sometimes the petition will deny particular facts reported by the police.

Faced with the police document and the bail petition, the magistrate may call for a memo of evidence from the police which will give further information about the case. If the case is well-advanced, there may be more police documents already submitted, and there may even have been some testimony by witnesses if the trial has begun. In the majority of cases the magistrate will not have these additional sources of information. He must look over the first police report, glance at the bail petition, perhaps hear a few minutes of argument by the defense lawyer, take note of the perfunctory

If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offense, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided (emphasis added).

In other words, release without sureties can be used when the available evidence justifies further inquiry but not a reasonable belief of guilt.
opposition of the prosecutor, and then decide whether or not to grant bail and, if so, at what level. The magistrates do not give reasons for their decisions when bail is granted in non-bailable cases, and they give only cursory explanations when it is denied, making it hard to fathom their calculations.

In general, in a non-bailable case, the stronger the prosecution evidence, the poorer the bail prospects are. Where the evidence is weak or only moderately conclusive, the magistrate may grant bail without further ado or may inquire further into the defendant's situation. If the accused is young, if the police have been slow to file a charge sheet, if the accused is a student, or if he seems to be a respected person with strong ties to the locality — such as a job or a farm, the magistrate will be more inclined to grant bail than he would be if such factors were lacking. If the defendant is from out-of-town or is suspected of being a dangerous person, his chances of being granted bail are reduced. Sometimes the nature of the crime charged will make a difference. Occasionally in a theft case if the item allegedly stolen is very small in value, the magistrate may grant bail no matter how strong the evidence is, but there are many petty cases in which this is not done.

Of the 48 defendants in the author's theft sample, 38 applied for bail. Thirty-six of these people definitely had legal help in filing the bail petition, while the other two may have filed without retaining a lawyer. Of these 36 people with lawyers, 21 hired counsel on the first day they appeared in court, and the average delay before retaining counsel for the other 15 persons was 24 days each. In 35 of 36 cases, the bail petition was filed within two days of the hiring of a lawyer. The high proportion of defendants who secured legal help can be seen as evidence of the surplus of lawyers in Patna that drives the price of simple legal help from a young lawyer down to a few rupees, an amount within reach of most defendants.

In the early stages of the case, the magistrate who must decide on bail is the head magistrate for the subdivision or his assistant. The head magistrate is known as the SDO, which stands for Subdivisional Officer. Every case goes into his file for the period after arrest and before completion of the police investigation. He often has over 1500 criminal cases pending.

In the first round of bail requests in the sample theft cases, the SDO granted bail to 20 people and denied it to 18. In all but three instances, the decision was made on the same day the petition was
filed. Of those granted bail, 85 per cent were in the range of 1000 to 2000 rupees with one or two sureties. The amount tends to be higher for more serious offenses. Bail in a murder case, if granted, would be more commonly in the 2000 to 5000-rupee range, usually with two sureties.

The people who are refused bail by the SDO may apply to him again later. They may also appeal his bail decision to the Sessions Court and, if turned down there, to the High Court. These higher courts ask basically the same questions as the magistrates, but they are felt to have broader discretionary authority in granting bail than the magistrates. There is some indication that a long period of detention while under trial will make a magistrate or a judge more sympathetic to a bail request. If a defendant sits in jail long enough, he may be granted bail even in the face of an extremely strong prosecution case. In the theft sample, through the appeals and reapplication process 13 of the 18 people who were refused bail at first were eventually successful in having bail set. The proportion of those requesting bail who eventually succeeded was 33 out of 38, or 87 per cent. Almost all of these 33 people were subsequently able to furnish acceptable sureties and secure release from custody.

The cumulative statistics for the theft defendants show that for the 38 bail applicants, the average delay from first appearance after arrest to first bail decision (either a grant or denial) was 10 days. However, 16 defendants secured a bail decision on the first day they came into court, and the median delay was only two days.

For the 33 people in the theft cases who eventually succeeded in securing bail, the average delay from first appearance to first decision at which bail was granted was 25 days. Here again, though, a large number of defendants had no delay at all; 14 people were granted bail the first day they came into court. The median delay from appearance to success was only three days. There were only five cases in which a successful bail decision was delayed beyond 40 days. The defendant, of course, stays in jail at least until he is granted bail.

In Patna, the standards used by magistrates in deciding whether or not to grant bail where it is discretionary have evolved through reliance on reported decisions in bail appeals and on cumulative experience embedded in local tradition. It is not easy to imagine the legislature or judiciary of the state or of the nation attempting to effect any drastic alteration of the current standards. In particular, the notion that prima facie guilt evidenced by a skimpy record
is generally sufficient grounds for denial of bail is deeply ingrained in the minds of lawyers and magistrates. Weighing whether or not an accused will abscond is clearly less important to the bail decision than an evaluation of the evidence of the crime. Indeed, for those who can afford to hire lawyers and file petitions, the bail hearing can perhaps be seen as a review of whether or not there was good cause to arrest the defendant.

The author’s research indicated that those defendants in theft cases who can raise the bail issue have a fairly high rate of eventual success. It is for those defendants in all non-bailable cases who are without legal help that some modification of the criminal process should be considered. A major constructive step would be to require the magistrates to take the initiative in considering whether or not to grant bail in those cases where no petition is filed within a week or so of arrest. At least it should be ordained that a person can request bail orally or by a letter from jail without having a lawyer file a petition. Alternatively, all but the most serious offenses could be made bailable, thereby eliminating the need for bail petitions in most cases.

In Patna the person on whom the greatest burden of bail decisions falls is the Subdivisional Officer, the head magistrate. To help free him to give more attention to the undefended, he should be relieved of any responsibilities which he has in the executive branch of the subdivision’s government and he should have an adequate number of assistants. Posts with dual executive-judicial responsibilities have been eradicated in much of India, but the reform has yet to reach Patna.

Even if the SDO is given solely judicial duties and expected to consider bail in non-bailable cases on his own initiative for undefended people, many poor persons will not benefit because they will not be able to find sureties. Currently, in bailable cases after bail is set an indigent defendant in Patna often has no way of securing sureties, whereas finding sureties is almost never a problem for those who have enough money to hire an attorney and perhaps pay a professional bondsman’s fee. (This disparity is discussed further in the next section). Release on promise to reappear with no sureties required should be used for many defendants. However, to most lawyers and magistrates in Patna, even those who know that the surety’s duty to produce the accused or pay is rarely enforced, release after arrest means bail and bail means sureties. Perhaps release without sureties has more of a chance of adoption as a remedy for extra-
ordinary procedural delay rather than as a regular alternative to bail. This is one of the premises underlying the comprehensive legislative proposal in part IV, below, directed at the problem of excessive pre-disposition detention of defendants.

3. Acceptance or rejection of sureties

After bail is set, acceptable sureties must still be furnished before the accused will be released. Formerly when an accused person in Patna who had been granted bail had someone present bonds signed by his sureties, the magistrate would send the names to the police to have their reliability checked. The police, it is said, harassed the people who came seeking to have sureties verified. Harassment, in this situation, almost certainly meant that bribes were demanded.

In 1967, the High Court of Bihar circulated a letter saying that police verification of sureties was to be halted.\(^2\) Nowadays in Patna the verification of sureties in criminal cases is smoothly handled within the judicial system. The names of the sureties and the supporting documents are submitted to the Sririste Dar, a clerk of the Sessions Court. He has a desk in a doorway which opens onto the main corridor of the Sessions Court building. The documents purporting to show the reliability of a surety may be, for a 2000-rupee bond, for example, no more than a receipt or stub showing that the surety paid some small municipal tax on a car or other property, or that he pays rent, or that he draws a salary somewhere. The author did not ascertain who goes to see the Sririste Dar; it may often be the clerk of the defense lawyer.

The examination by the Sririste Dar is cursory, a simple check to cull out obvious fakes. If any question is raised in his mind, it may well be put to rest by the payment of a small sum. Payment to clerks of small sums to lubricate the wheels of justice is a common practice in Patna. For example, any papers submitted to the bench clerk of a magistrate must be accompanied by a little gratuity or the papers will have a tendency to get lost before the magistrate ever sees them.\(^2\)

Of the 33 people granted bail in the author's theft sample, 31 secured acceptance of their sureties and on the average this took less than one day once they were granted bail. A higher-than-usual bond amount did not seem to slow the process at all. There was

\(^{21}\) High Court of Bihar, Circular Letter No. 3 of 1967.

\(^{22}\) See infra note 41.
DETENTION OF UNCONVICTED

no indication that the other two ever brought forward sureties for acceptance. Once the sureties have been accepted, release from jail generally follows as fast as the accused's representative or some official notification can go from the court to the jail. Difficulties may arise at the jail if the jailor puts out his hand and the defendant balks at greasing his palm with a few rupees.

Securing approval of sureties is not a bottleneck in the bail-release process. The more difficult step is finding someone who will be a surety — or making it appear that such a person has been found.

Many persons interviewed by the author admitted that there are professional bail bondsmen, but no one would take him to see one since these operations are considered to be frauds perpetrated on the court. For a fee it is possible to have fake sureties arranged by one of these underground bondsmen. The names of real people may be used on these bonds, but the supporting documents are fakes. The people whose names appear may not know they are being used, or they may be poor people who are paid a few rupees for providing a front. The price of the bond is said to vary with the amount, but the amount is probably no more than one or two per cent of the face amount of the bond. The low price reflects the low risk taken by the bondsmen and the lack of any necessity to relocate the accused if he absconds. Even the people who lend their names for the bonds take slight risks. The percentage of absconders is slight — around one per cent of all defendants — and collection of a forfeited bond after an accused absconds is exceedingly rare with genuine sureties, let alone fakes. The financial officer of the magistrates' court remembered only one such collected forfeiture in the preceding two years. Occasionally the case files revealed an effort by a real surety to retrieve for the court, an absconding defendant, but in general the surety arrangements in Patna are an elaborate charade of little consequence. No one interviewed by the author warmed to the idea that the bondsmen, if brought out into the open, might be at least as effective in insuring the attendance of the accused as non-professional sureties.

Wherever sureties come from, poor people often have a hard time finding them. In the theft cases, the poorest defendants never hired lawyers and never even had bail granted, so there was no issue of their finding sureties. But in the arrest-on-suspicion cases, bail was set for all at the outset, and many defendants were unable to find acceptable sureties for long periods of time. All but two of the 15 people involved in these suspicious conduct cases eventually se-
cured bail release, but on the average each defendant spent two months in jail after arrest before making bail.

Eight of these suspicious-conduct defendants got out on bond without help from a lawyer; five made bail only after they had hired a lawyer. These five people waited in jail an average of four months before hiring lawyers; once the lawyers were retained, acceptable sureties were found within an average of four days. The lawyer may secure friends of the accused to be his sureties, but it seems more plausible that the lawyer secures for his client the services of a professional bailor. Considering the long period these defendants spent in jail during which no friends appeared to stand as sureties, the success in finding sureties came suspiciously fast after the hiring of a lawyer. The purchasing of sureties in Patna is probably quite widespread.

Verification of sureties once they are found and presented to the court in Patna seems to be a rubber-stamp operation. Matters are handled more gracefully by the judicial system than they were by the police in former years. Small bribes may still be involved, and underground bondsmen may be thriving, but at least it seems that no one who can furnish bonds signed by respectable-sounding sureties will be turned down or appreciably delayed. The principal inequity at this stage of the criminal process stems from the difficulty many poor defendants have in finding sureties or purchasing the services of a bondsmen who can make it appear that sureties have been found.

4. Filing by the police of the charge sheet or dismissal report

The decision to file charges against the accused is made by the investigating police officer. When the investigation is complete he sends to the court either a "final report" recommending dismissal or a "charge sheet" detailing what offense was committed and what witnesses are available to prove that the accused did it. The head magistrate acts upon the police report in a mechanical fashion, dismissing those cases in which final reports are received and distributing the charge-sheet cases for trial in the courts of his subordinate magistrates. Many weak cases are screened out by dismissal at this stage.

When the head magistrate sends a case on for trial, he takes "cognizance" of the alleged offense. The Code of Criminal Procedure treats this step as a major test of the strength of the case
against the accused, but in fact the taking of cognizance, as observed in Patna, is just a knee-jerk response by the head magistrate to the receipt of a charge sheet.

There is a section of the Code which states that there shall be no more than 15 days spent in jail by anyone before cognizance is taken; in Patna this provision is disregarded and delay during the police investigation can lead to months of custody for those who do not secure release on bail. There is an odd Patna ritual that may be a vestige of this statute: incarcerated defendants for whom police reports have not been completed are brought to the court about every 14 days, even if nothing is scheduled to happen in their cases; after a day’s confinement at court, they are returned to the jail. This periodical remand may be a gesture of deference to the dead letter of the law.

In the author’s sample of theft cases, there were seven people charged after private complaint proceedings. These private cases apparently begin not with an arrest by the police but with a private request to the magistrate to issue a warrant against someone when the police have failed to act. Since the police are not involved, no charge sheet or final report is filed in these cases. These cases are often terminated when the complaining party and the defendant compromise the matter.

Of the remaining 41 defendants in the theft sample, there were 26 for whom charge sheets were submitted and 15 for whom final reports were submitted. The police reports sought dismissals for over a third of the defendants. However, the average delay between the beginning of a case and receipt by the court of the completed police report was just over three months for charge sheets versus over nine months for final reports. The police are three times as quick in seeking prosecution as they are in recommending dismissal. Presumably an open-and-shut case can be sent to the prosecutor promptly, while there is a strong temptation when the case is weak to wait for a long time and see if anything incriminating turns up.

The police date their reports, but the dates they put on them show months elapsing between the dating of the report and its arrival at court. The existence of such a hiatus is unlikely. A more convincing explanation is that the reports are conveyed promptly to court once they are filled out, but that the police becloud the ques-

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23 See, e.g. Indian Code of Criminal Procedure, § 190.
24 Id., § 167.
tion of responsibility for delay by regularly backdating the reports. The Senior Prosecutor for the subdivision and a police captain admitted that there is some backdating, although they were reluctant to say that it was as widespread as it appeared to the author to be.

There was wide agreement among those interviewed that the police function slowly because they are overworked. The officers who investigate criminal cases also have a heavy burden of administrative and field duties. The maintenance of order is an ever more demanding responsibility throughout India as urban congestion and mass political activism continue to grow. Overworked they may be, but the police also seem inefficient and corrupt. The author heard of the corruption from others, but encountered the inefficiency first hand.

The most remarkably inefficient procedure encountered was that used for the police reports in the suspicious conduct cases; these were vague chronicles often saying no more than that the accused was arrested because he was found in suspicious circumstances. In the author’s case sample, the investigating officer made out the report an average of about three months after the arrest. (Backdating was apparently abandoned, probably because the reports were destined to flow through police channels before being forwarded to the court.)

The completed report was then submitted to the officer-in-charge to be initialed. Once initialed, the report went to a higher police official for sanctioning of prosecution. One more layer of approval was added for some of the cases. Finally the report went to the court. This approval and transmittal process took on the average over a month. Even the police admitted to the author that approval was never denied, so that no real purpose was served. The reports kept following the same nonsensical route because it was done that way before and because many officials in Patna are accustomed to sitting at their desks and initialing dozens of documents brought to them by their clerks.

Better police performance is desirable in Patna. An incentive to improve at least the speed of operations might be provided by new rules of criminal procedure, like those proposed in part IV, below, which would release a defendant from jail if the police report were too slow in appearing in court.

5. Pleading to the charges

Though defendants often assert their innocence in bail petitions,
the first point in the criminal process at which the accused must formally plead innocent or guilty occurs when the charge is framed by the trial magistrate. The charge is not framed until a charge sheet has been received from the police, the case has been transferred from the Sub-divisional Officer to a trial magistrate, the prosecution has supplied copies of the charge sheet and other documents to the accused, and the trial magistrate has found time to schedule a hearing for the accused. These events do not transpire quickly.

In the sample group of theft cases, there were 21 people against whom charges were framed. On the average over four months elapsed between the receipt of the charge sheet by the SDO and the framing of the charge by the trial magistrate. A major cause of delay at this stage is the requirement, made law in 1955, that copies of the charge sheet and other prosecution documents be made available to the accused. This measure, designed to give the accused a better chance to prepare a defense, has in practice led to serious delay because the prosecution is slow to provide the papers. It is unclear why the police do not make enough carbon copies of the charge sheet when it is drawn up so that the accused may have his copy as soon as the prosecution receives the original.

Of the 21 people against whom charges were framed, eight pleaded guilty and 13 pleaded not guilty. The average delay between receipt of the charge sheet and framing of the charge was almost precisely the same for those pleading guilty as for those pleading not guilty. This indicates that no effort is made to discover which defendants are going to plead guilty and give them an opportunity to terminate their cases earlier than those who are going to demand a trial. This practice offers a dramatic contrast to that found in a plea-bargaining system. Indeed, in Patna, any out-of-court discussion of a case between the prosecution and the defense is frowned upon. However, it is widely believed that magistrates dole out lighter sentences to those who convict themselves than to those who are convicted after trial; the author's evidence on this point was inconclusive.

There does appear to be an expectation in Patna that a few people when brought into court for the first time after arrest may want to confess. The SDO directs another magistrate to record the statement of any such "confessing accused." Even with the confession recorded, however, conviction and sentencing will not apparently occur until a charge sheet arrives, which may take months.

The lack of a route to an early guilty plea is a serious problem
only for those defendants who are unable to secure release on bail. Why do not some of these incarcerated defendants take advantage of their biweekly court visits, discussed earlier, to ask the magistrate to let them enter a guilty plea? It may be because, as just indicated, becoming a "confessing accused" does not greatly speed up the arrival of the sentencing date as compared with what would occur if the defendant simply awaited the arrival of the standard pleading hearing. Also, the periodical visits last only until the police report is received; many defendants may be waiting to see if it will recommend dismissal. Another plausible explanation is that when the defendants are brought from the jail they never actually appear before a magistrate. It is quite possible that many defendants come from the jail, sit all day in the detention cell at the court compound, and go back to the jail at night without ever stepping into a courtroom.

In this hypothetical scenario there are related events: the jailor informs the magistrate's clerk that the defendant has been produced and the clerk then checks off the name and schedules another "court" appearance for two weeks later. Thus in Patna it is likely that for many jailed defendants there is neither a proffered incentive to plead guilty before the regular pleading hearing nor even an opportunity to step forward and do so as soon as one is willing.

In the sample of theft cases, all of the eight defendants who pleaded guilty when the charges were framed were in jail at the time. (Three of these eight had retained lawyers at some prior time, but none of them had ever secured release from jail.) Of the 13 theft defendants who pleaded not guilty, seven were in jail at the time. (Only two of these seven who were in jail and who pleaded not guilty had ever retained a lawyer, whereas of the remaining six who were free there were five who definitely had secured legal help.)

These statistics combine to show that of the people in jail when the charges were framed, about half (eight out of 15) pleaded guilty. The average jail time which these people had served before pleading guilty was seven months. No one who was out of jail when the charges were framed pleaded guilty.

In the sample of suspicious-conduct cases, there were four people in the Patna jail when their cases were completed. Of these four, three pleaded guilty. (The fourth was convicted after pleading not guilty.) The three people who pleaded guilty had spent an average of over seven months in jail. Again no one pleaded guilty while out of jail.

In Patna, a guilty plea in a theft or suspicious-conduct case is al-
most invariably the result of a long period during which the accused person has stewed in jail. Often a guilty plea by a jailed defendant is delayed by the dictates of procedure for a length of time which seems contrary to the defendant’s interests. To be fair to those defendants who have no hope of making bail, as urged in part V-1, below, there should be an opportunity to plead guilty and be sentenced promptly, perhaps even before a formal charge sheet arrives after completion of the police investigation. If the accused persons who are brought from jail to the court compound are not actually brought into the courtroom for their biweekly appearances, there should be some way they can communicate to the SDO or the trial magistrate a desire for a hearing at which they can plead guilty. In theft cases a moderate proportion of the jailed defendants would find it in their interest to enter an early guilty plea; in cases involving less serious offenses with lower probable sentences there would be a high proportion of jailed defendants who would benefit from an early guilty plea conviction through lessening of total probable jail time before final release. Of course, for those defendants who anticipate release on bail without great delay, a guilty plea loses almost all of its attraction.

Whenever an accused in Patna cannot secure release after arrest he will be strongly tempted to forego a time-consuming trial and to convict himself at the pleading hearing. (In the theft sample, eight out of 15 jailed defendants gave in to this temptation; in the suspicious-conduct sample, three out of four did so.) The pleading situation arrives someday and that day should not be needlessly postponed for that defendant whose will to plead not guilty has been broken. The risk that an earlier opportunity to plead guilty and be sentenced would make magistrates less generous in granting bail (in hopes of inducing more guilty pleas) does not appear great in Patna where the grounds for bail are fairly well established and fairly carefully applied. Also, since there is a widely-held, firm belief that out-of-court discussion of a case between the prosecution and the defense is improper, there is a relatively low likelihood that an easier guilty plea route would become the precursor of a plea-bargaining system with its attendant penalties for defendants who assert the right to a trial.

Might a plea-bargaining system in Patna lead to a better allocation of resources and expression of societal values than that yielded by the present system? The author doubts any such net gain would occur; he would anticipate in a shift to a plea-bargaining system in-
increased unfairness to defendants without concomitant justifying gains elsewhere in the society. The question, however, admits of no simple answer.

Though an easier guilty plea route in Patna does seem warranted, even more valuable would be putting pre-disposition release within reach of more defendants. This would reduce the number of defendants who must confront, at the pleading hearing and thereafter, the pressure to bring the waiting in jail to an end by pleading guilty. Admittedly, more widespread pre-disposition release would increase the proportion of defendants who would plead not guilty and would demand trials. Trials in Patna are conducted in a rather inexpensive manner and the added expense of such an increase in the number of trials would probably be a good investment in terms of the amount of justice returned.

6. Termination of cases where accused absconds or prosecution loses interest

A magistrate in Patna on rare occasions terminates a case because the accused has absconded or because there is no prosecution interest in it. Such terminations are generally employed only when the magistrate is cleaning out very old cases which have ceased to be of interest to anyone. The average age at termination of the cases charted by the author in which the accused had absconded was about five years.

Lack of prosecution interest was encountered by the author as a reason for termination only in the suspicious-conduct cases. The author charted six suspicious-conduct cases where that reason was given for closing the case. However, in five of these six cases the accused had permanently absconded. In other words, the magistrate could just as well have sent these five cases to the absconder file, but the cases were minor and the evidence presented by the prosecution was in every case nil, so the cases were completely dismissed instead.

No theft cases were found where the case was dismissed due to lack of prosecution interest, and each year in the subdivision there were only a couple of theft cases sent to the absconder file.

The length of time held to demonstrate loss of prosecution interest is usually exorbitant, and this rationale for dismissal seems to be used primarily when the accused has also absconded. If the length of trial delay considered sufficient proof of disinterest to justify dismissal were drastically shortened, the result would be a pat-
tern of delay-caused dismissals similar to the pattern of pre-disposition release proposed in part IV, below. A procedure enforcing a right to a reasonably prompt disposition would, of course, also protect defendants against undue pre-disposition jail time.

7. Adjudication of guilt or innocence

In Patna, all criminal cases are tried to a magistrate or a judge, not a jury. The jury system was dropped in Bihar and in most of the rest of India after Independence. The expense of administration may have been a cause, but the most serious problem was that jurors could be bought. Given the poverty of many people in India, money has too much leverage relative to legal principles. The problem remains with witnesses who may be bribed, but at least with witnesses credibility is always open to question.

With no need to present a case in its entirety to one jury, the testimony of witnesses can be recorded by the magistrate in the form of depositions which accumulate over a period of months. The prosecution is responsible for producing witnesses in court. The names of witnesses are taken from the charge sheet and they are notified by court summons. If they do not appear, warrants are issued for their arrest. If the witnesses still do not appear, more warrants and summonses are issued. The warrants never seem to lead to actual arrest of the witness. Arrest would be ironic in some cases, for the warrants may be issued against policemen listed in the charge sheets as witnesses. The summonses are served by a special group of court employees, and the warrants are handled by the police. The procedure looks adequate on paper, but it does not produce witnesses promptly. Sometimes a trial takes well over a year to be completed. The longest trial in the author’s theft case sample took over 500 days.

When a witness does appear, the prosecutor conducts the direct examination with the magistrate participating actively. If there is no defense lawyer, the magistrate’s questions may provide the only semblance of cross-examination. Though the accused is always present in the courtroom when evidence is taken, he is highly unlikely to ask questions of the witnesses. When the available witnesses have been heard and dismissed, the trial is continued to a date usually about two weeks in the future, and a new set of witness sum-

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25 The author did not ascertain whether or not trials of more serious cases in the Sessions Court are conducted in one continuous stretch or through accumulation of depositions.
mons or warrants are prepared. The interval may be shorter than two weeks, but almost never are trials, at least at the magistrate level, conducted continuously for several days. There usually are not enough witnesses present to make this possible. The trials seem to last as long as is necessary to secure the attendance of reluctant witnesses.

The prosecutors are assigned to work with individual magistrates and close professional relationships do develop. In Patna, each magistrate has a caseload of about 500 or more active criminal cases; the prosecutors seem to have no power to drop weak cases and the magistrates rarely dismiss a case before the trial is complete. Although the police think of the prosecutors as representing their interests at court, there is little close working contact between the two groups.

For the 14 cases in the theft sample where the trials were completed the average number of prosecution witnesses was five. Once the prosecution closes its case, the defense may come forward with any evidence of its own. The defendant himself does apparently give testimony in his own behalf in most theft cases, but in lower court trials no defense witnesses other than the accused himself are usually called. This reflects the lawyer's belief that his duty is to render effective cross-examination of prosecution witnesses and to argue well in court, but not to go out and scout for evidence favorable to his client. After all the testimony has been taken and any closing arguments made, the magistrate considers the full sheaf of depositions and reaches a verdict.

In the theft sample, there were 15 people who remained present to the end of their cases who had pleaded not guilty when the charges were framed. One of these people who had pleaded not guilty, waited in jail for 192 days during which the state presented no evidence against him, and then pleaded guilty to get the case terminated. This left 14 cases to be adjudicated by magistrates after trial. Seven convictions and seven acquittals resulted.

The average length of a trial ending in conviction was about four and a half months. The average length of a trial ending in acquittal was 10\(\frac{1}{2}\) months. Some convictions may result from straight-forward, open-and-shut cases; the acquittals may generally reflect more equivocal fact situations. The prosecutors may well work less hard getting witnesses in weak cases, and may be in no

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26 Creation of prosecutorial power to recommend dismissal is urged in part V-2, below.
hurry to close their presentation of evidence if the case looks shaky. Whatever the reasons may be, the average acquittal takes twice as much trial time as the average conviction.

Of the 14 defendants involved in these adjudicated theft cases, five spent some time in jail during the trial. For these five the average stay in jail during the trial process itself — that is, after the framing of the charge and before the end of the case — was about six months.

The outcome of the trial did not seem to correlate in any striking way with the jail-or-bail status of the defendant. The outcome also seemed unrelated to the presence or absence of a lawyer for the accused; of the four people tried who had never retained a lawyer, two were convicted, two acquitted.

There is a provision in the Code of Criminal Procedure which urges the trial magistrate to grant bail in cases where the defendant is in jail for 60 days after the prosecution begins to present evidence. Few lawyers in Patna had heard of the provision and it seemed to be rarely, if ever, invoked. An explanation may lie in the ability of most lawyers to get their clients out on bail well before such a late stage in the trial. Those without lawyers do not benefit from the law because the magistrate does not give it effect on his own initiative. In the theft case sample, there were five defendants who spent more than 60 days in jail after a not guilty plea who might have used this law, but failed to do so; only one had a lawyer.

When all the evidence was finally before him, the magistrate seemed to reach a fair and disinterested decision. The average length of the judgments in the theft cases was nine pages for convictions and five pages for acquittals. The opinions, transcribed in the finest hand of the magistrate’s clerk, were thoughtful documents which scrutinized the evidence in minute detail in search of contradictions or other indications of unreliable testimony. The standard of proof beyond a reasonable doubt and the presumption of innocence were central to the rhetoric and seemed well-served in the substance of the judicial decisions.

In the suspicious-conduct cases, the task confronting the magistrate at the end of a trial must have been a bit confusing, for the offense is unclear. There were six people present at the end of these cases who did not plead guilty. The magistrates acquitted all but one of this group. For this one person the magistrate found that

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27 Indian Code of Criminal Procedure, § 497-3A.
with five witnesses the prosecution had successfully proven that the accused could not satisfactorily explain why he had run away from the police at night when challenged. In the other five cases, the magistrate usually spent two or three pages discussing the evidence and either found fatal inconsistencies in the prosecution case or decided that the defendant had satisfactorily explained in court what he was doing at the time of arrest.  

Some of the procedural delay during trials appeared inexcusable. In one of the suspicious-conduct cases, there were three defendants, one of whom had absconded; the remaining two petitioned the magistrate again and again to sever the case of the absconder and to declare the prosecution’s case against them closed. He refused for over seven months during which the defendants were fortunately on bail. Finally he closed the prosecution case, looked at the evidence presented by the sole prosecution witness, and acquitted the defendants.

In general the process of trial by accumulation of depositions yields sufficiently detailed knowledge of facts so that the final adjudications can be thorough and fair. The verdicts reached by the magistrates in Patna seem to result from conscientious application of law to fact. The problem lies in the great delays countenanced

28 The author also analyzed 50 adjudicated Sessions Court cases. These involve the most serious types of offenses. The trial takes place in the Sessions Court, but only after the defendant has been committed for trial by a magistrate who has conducted a lengthy review of the evidence. The 50 cases involved 191 defendants, of whom 159 were charged with murder, manslaughter, or some form of gang robbery (dacoity). For all of the cases the average time from arrest to commitment was about 10 months; the average length of the subsequent trial process was about nine months. Interestingly, the murder trials were significantly shorter than the average; they required about 5 months from commitment to the end of the case. Of the 50 cases, 26 ended in conviction of at least some of the defendants. The total number of defendants convicted came to 67 out of 191 charged—a rate of 35%.

In the course of the year from October, 1969 to September, 1970, the number of criminal cases pending in Sessions Court went up from 318 to 486, a 53% rise. Court personnel acknowledged that the backlog was growing dramatically, making longer pre-disposition delays likely. Though there were between 11 and 14 judges on the Sessions Court roster during the year analyzed, the average number of trials completed each month was only 11. Even at twice that pace it would have taken 22 months to clear the September, 1970 backlog. The judges do, of course, have other duties besides criminal trials. The probable response of the Court to this backlog problem was not clear.

The author did not have time to investigate the pre-disposition release pattern in the sessions cases. However, it was obvious that the commitment phase of the prosecution caused great amounts of pre-trial delay and jail time for defendants without any compensating benefit, since the magistrates almost never failed to commit the defendants for trial. A proposed revision of the Code of Criminal Procedure which was pending before the Indian Parliament in 1971 called for abolition of this wasteful pre-trial step and the revision may now have passed.
and the corresponding stamina required of any jailed defendant who wants to be declared innocent. The production of witnesses in Patna magistrate trials seems regretably slow. Unless the police were to prove willing and able to arrest reluctant and uninterested witnesses, there would seem to be little that can be done within the present procedure to speed up the process. Whenever prosecution disinterest in summoning witnesses is a serious cause of delay, particularly in weak cases, the magistrate should goad the prosecutor assigned to his court into action. Certainly the magistrate should yield to reasonable requests to close the prosecution case when witnesses are no longer being produced. The procedural modifications suggested in part IV, below, would go far towards mitigating the harshness of trial delay by curtailing jail time of unconvicted defendants.

8. Sentencing

Magistrates have discretionary authority to sentence a convicted person up to a penalty limit provided by law. The great care taken in Patna by the magistrates in determining guilt was unfortunately absent from the sentencing decision most of the time in the author's sample cases. When a verdict of guilty was reached, the sentence was stated at the end of the opinion, usually without any related discussion. In one theft case studied by the author that involved a juvenile, a probation report was requested before sentencing; it was prepared within a month.

The magistrate generally seemed to pick a sentence roughly proportionate to the seriousness of the act committed, and then only rarely did he subtract from that sentence time already served by the defendant, or consider the possibility that the sentence should be suspended altogether. In only two out of 17 theft convictions did the magistrate specifically note the time served in jail before conviction.

Several lawyers indicated to the author that the magistrate was supposed to take into account the pre-conviction jail time, but that this was not required by statute and was often not done. The lawyers and one magistrate did claim that the time already served in jail is likely to be more carefully considered if the accused has pleaded guilty.

In the suspicious-conduct cases, three of the four convictions came on guilty pleas. All four convicts were required to furnish a one-year, 1000-rupee good-behavior bond backed up with two sure-
ties. Three of the people were sentenced to one year in jail (the maximum sentence allowed by law) if they failed to furnish the bond, and one was sentenced to one month in jail if he furnished no bond. The one with the lighter sentence had pleaded guilty, but the numbers involved here are too tiny to permit more than speculation about cause and effect.

There is no indication in the case files that any of these four people convicted of suspicious conduct furnished the good-behavior bond. All of them had been in jail at the time of conviction precisely because they were unable to furnish 1000-rupee bail bonds with two sureties. At the time of conviction the four defendants had already spent an average of 10 months in jail, and there is every reason to suspect that all four served out their entire jail sentences without furnishing the bond.

For theft the maximum punishment allowed by the Indian Penal Code is three years. The average jail sentence for the 12 convicted theft defendants for whom the author has data was five months. There was no apparent correlation between guilty pleas and lenient sentences. The average length of time they had served in jail before conviction was seven months. Someone who gets convicted in a theft case in Patna is likely to have spent more time in jail as an under-trial prisoner than he will spend as a convict. Since all those who spend time in jail and are acquitted spend no time in jail as convicts, it is not surprising that, as mentioned earlier, in the Patna jail on an average day three quarters of the prisoners are unconvicted persons awaiting disposition of their cases.29

Sentencing in Patna is most seriously flawed by the lack of attention to the time already served in jail by the defendant before conviction. The Code of Criminal Procedure should be amended, as suggested in part V-3, below, to decree that deduction of such time from the sentence is automatic. Magistrates would also do well to make greater use of such options as probation and suspension of execution of sentence.

IV. A WAY TO CURTAIL EXCESSIVE PRE-DISPOSITION JAIL TIME

The road to release on bail for an arrested person in Patna is

29 The analysis of Sessions Court cases by the author showed that out of 191 defendants, 67 were convicted and given average sentences of about four years. Those convicted of murder drew sentences that averaged somewhat higher—about six years three months. For all of those defendants the period between arrest and final disposition averaged 19 months.
paved with rupees. If he has money or can get it, he can purchase the services of a bondsman who will procure sureties for him once bail is set, and, if no bail has been granted, he can hire a lawyer to fight for him until it is. In non-bailable cases it may take a succession of bail appeals and reapplications, but a defendant who can afford to be persistent will usually gain his pre-disposition freedom, at least when the offense is not perceived as heinous. The lawyer's task will be eased if the evidence is weak or the accused is a local resident without a criminal reputation.

Judicial officers may feel that a person should not stay behind bars for a great length of time without being convicted; the head magistrate of the subdivision in Patna hinted to the author that such a feeling exists. However, in no case did the feeling seem to have hardened into an explicit doctrine applicable to bail decisions or into a belief that some judicial effort should be made to limit the pre-disposition detention of those too poor to make bail or to hire legal help as a first step towards having bail set. Indeed, the magistrates feel that they have only enough time to consider those issues which are clearly framed for decision. They feel no major obligation to an unrepresented defendant beyond the duty to pass a fair judgment on the evidence if there is a trial and a reasonable sentence if there is a conviction.

Legal aid to the poor in Patna is reserved for an occasional case involving a trial for murder or some other serious offense. Fortunately, a substantial proportion of all defendants can eventually pay for some legal help; the figure was 75 per cent in the author's theft case sample. In a non-bailable case, an unrepresented defendant will rarely, if ever, succeed in having bail set; he will be in jail until the end of his case. Any thorough proposal designed to curtail excessive pre-disposition detention cannot ignore these defendants without lawyers.

The Indian Code of Criminal Procedure had, as of 1970, two provisions that embodied time limits aimed at curbing pre-disposition jail time; as discussed above, neither was actively enforced in Patna. One was ignored, perhaps because its 15-day limit on detention before submission of the police report was unrealistically short and perhaps because the sanction for excess detention was unspecified. The other was virtually unknown, probably because it dealt with a late stage of the criminal process and those who could

30 Legal aid is not much more extensive than this elsewhere in the country. R. PRASANNAN, Legal Aid in India, 8 J. IND. L. INST. 224 (1966).
have used it rarely had attorneys. In 1969 the Law Commission of India drafted a revision of the Code of Criminal Procedure and commented in relation to the former provision:

The assumption is that the investigation must be completed within 15 days, and the final report . . . sent to the court by then. In actual practice, however, this has been found unworkable. Quite often, a complicated investigation cannot be completed within 15 days and if the offense is too serious, the police naturally insist that the accused be kept in custody. . . . If the present time limit of 15 days is too short, it would be better to fix a longer period rather than countenance a practice which violates the spirit of the legal safeguard. . . . We propose that the maximum period should be fixed at 60 days.31

In the final draft of the bill submitted to Parliament,32 the time limit was shortened from 60 days back to the “unworkable” 15, with the provision that the magistrate could grant extensions where justified. The senior official who made this change in the final draft feared that what would be realistic for those parts of India where the courts function slowly would be unnecessarily long for those parts where the courts are speedy. He was concerned that 60 days of detention while the police investigated the case would become not just the outer limit in the worst areas, but the usual time throughout the country. By calling for an explicit decision by the magistrate on extensions beyond 15 days, he felt he was creating a necessary degree of flexibility and bringing into the open the exercise of supervisory power by the magistrate.33 His position may

32 The revision had been submitted as Bill No. XLI of 1970 and was to be resubmitted in 1971. The author has access to almost no information concerning events on the Indian legal scene since 1970, and does not know how the bill fared.
33 The official’s title was Joint Secretary in the Ministry of Home Affairs. In an interview with the author he stated (commentary typed up from notes after interview): “We have here a good and complicated criminal procedure code. In most places it works well. In seeking to improve things in the worst parts of the country, we have to be sure that we don’t make changes which will upset the operation of the Code in the other parts of the country.”

His reaction to the results of the author’s research was colored by his belief that it had been conducted in the worst part of India, the area along the Ganges where poverty is so severe. In south India, he claimed, the legal system functions far better. Also, though he seemed to want to be as fair as possible, he had a low opinion of the persons who get involved in criminal cases:

In a bailable offense if bail is set and the person cannot make it, naturally the person must be kept in jail. You must give full weight to the interests of the state in these situations. The poorer these fellows are, the less regard they have for society. If you let such people out they will take the next train and go. The law cannot go to the extreme of looking into the difficulties of the poor . . . It is unfortunately true that people in this country
have merit, though his proposal would do little to alter the status quo in Patna or other areas where the 15-day time limit is simply disregarded. Debating time limits seems futile, however, until the associated procedural sanction for exceeding the limit is clarified. A legal restriction that carries no sanction is ticketed for oblivion.

Any recasting of Indian procedural law aimed at protecting defendants who are in jail from burdensome delays should be realistic. It should articulate remedies which focus on securing release on bail and which range in impact from modest to severe as delay lengthens. Also, unless a means is found of appointing counsel for those who are too indigent ever to retain an attorney on their own, the remedies will be of no value where they are most needed. Offered below is a set of suggested procedural rights describing remedial sanctions to be triggered by prosecution delay. The approach is hopefully both imaginative and realistic. It is designed to keep the cost of legal aid to indigents low. The specific time limits proposed are somewhat arbitrary and open to debate.

A. When a person has been in jail for three months after arrest while awaiting disposition of his case and when he has not been able to retain a lawyer, then the defendant’s poverty is manifest and a lawyer should be appointed by the court for the limited purpose of helping the defendant to secure release on bail. The lawyer should file and press bail petitions and, if necessary, look for sureties. An amount of money should eventually be paid from the public treasury to the lawyer for the services rendered to the defendant in seeking jail release. This amount should be a modest, fair sum and the amount should be greater if the lawyer secures the client’s release than if he fails to secure release. Where the three-month time limit goes by for a jailed defendant and no

are generally very poor. The level of honesty is not very high. I do not want to decry my countrymen, but the majority do not feel that they have to keep their word. In the villages where everyone knows each other, people tend to keep their word better. Because of these things I won’t personally recommend that the bail system be relaxed. . . . There are rowdies who must be controlled. They would cause trouble which the police know about, often through undercover channels. Section 109 and the other preventive sections are necessary for the control of such elements.

The official’s belief, shaped by years of experience including service as a magistrate in south India, seemed to the author to be reasonable, though on the conservative end of a spectrum of reasonableness. Any persons within India who push for defendant-oriented reforms must anticipate confronting the beliefs typified by this official, for they seem to be prevalent in the country.

34 If enough funds could be made available, a less harsh method of testing for indigence could be used. Ideally, upon arrest a defendant who felt he could not afford a lawyer would have a chance to describe his situation to the head magistrate and try to qualify for immediate legal aid. A consoling feature of the proposal offered here is that when failure to retain counsel during several months in jail is the test of indigence, those who can with effort raise money for private hiring of an attorney face a strong incentive to do so and, thereby, to leave legal aid money for the most destitute.
appointment is made by the magistrate in charge of the case, the appointment should go to the first lawyer whom the accused can find to appear for him.\footnote{The link-up of client and lawyer is facilitated in Patna by reliance on touts who are paid, supposedly by the client but probably by the lawyer, to put persons with legal needs in touch with an attorney. If the procedure proposed here were in effect a clever tout would certainly develop sources within the jail that would provide him with the names of individuals who would qualify for legal aid.}

Under this proposed procedure, the demonstrably poor prisoner would receive needed help from outside the jail, the lawyer would receive business laced with incentive to perform well, and the defendant, if released on bail, would have his freedom while awaiting court action on his case and would have a chance to earn money to pay for further legal expenses. If the defendant is released, he is no longer in jail as a drain on public resources.

B. When confinement of a defendant after arrest reaches six months and where a bail amount has been set (either because a bail amount is automatically set for that offense or because a bail petition was successful), the defendant should be released by the magistrate on a personal recognizance bail bond, unless the magistrate responsible for the case determines that there is a serious risk that the defendant will abscond. If the defendant has never privately retained counsel, then a lawyer should be appointed by the court to assert this proposed right to personal recognizance release. As in the suggested procedure in A, above, the appointment should be made by the magistrate handling the case or should go, once the six months of jail time has elapsed, to any lawyer whom the defendant can find to represent him. Once again, a fair sum should be paid from the public treasury to the attorney, and it should be greater if the client's release is actually secured.

C. When a person has been confined for 12 months after arrest while awaiting disposition of his case and when the prosecution has not completed its case against him, he should be released on a personal recognizance bail bond (without sureties), whether or not bail has been previously set, except in certain extremely serious cases, such as those involving capital offenses, where release could be discretionary. If the defendant has never privately retained counsel, then a lawyer should be appointed by the court to assert this proposed right of the defendant to personal recognizance release. Appointment and payment of counsel should be handled as suggested in the immediately preceding sections.

The modifications of law and the funds necessary for this reform package would probably have to come from the Parliament of India, though a state could undertake it. Of course, no reforms of this sort will be adopted in India unless they are widely discussed there and eventually championed by effective political groups. Though the author hopes to see publication and discussion of this particular proposal in India, it is not on well-meaning outsiders but rather on her own legal empiricists and reformers and on a concerned citi-
zenry that India must depend in the long run to keep her legal system as healthy as possible.

V. Final Observations

1. In Patna the first opportunity for defendants to register a guilty plea and be sentenced generally comes only after the police investigation has been completed and a charge sheet submitted, and after the trial magistrate has found time to schedule a pleading hearing. This is unfair to those defendants, particularly in minor cases, who are unable to secure bail release and who wish to plead guilty but must wait months to do so. An earlier opportunity for the defendant to terminate his case with a voluntary guilty plea should be created.

2. The Indian Code of Criminal Procedure is silent as to whether or not a prosecutor may recommend to a magistrate or judge that a case be dismissed. The Code should be amended to provide that prosecutors may recommend dismissal of cases. *Nolle prosequi* should then be used to avoid wasting effort on cases that do not merit further prosecution due to weak evidence or other factors.

3. At the time of sentencing a convicted defendant in Patna, the judicial official rarely mentions the pre-disposition jail time served by the defendant. Whenever a sentence of imprisonment is passed upon a convicted person, the magistrate or judge should be required to deduct from the sentence time served in jail by the defendant while awaiting resolution of the case. The person meting out a course of punishment should not turn a blind eye to punishment already suffered by the defendant.

4. Defendants in Patna absconded in only about one per cent of the cases and often displayed monumental persistence in returning to court dozens of times while on bail awaiting resolution of

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36 An example of a law which makes such a deduction mandatory is provided by OHIO REV. CODE § 2967.191 (1973):

The adult parole authority shall reduce the minimum and maximum sentence of a prisoner by the total number of days the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine his sanity, and confinement while awaiting transportation to the place where he is to serve his sentence. The adult parole authority shall also reduce the minimum and maximum sentence of a prisoner by the number of days he is confined for a pre-sentence examination . . . after a verdict or plea of guilty and before commitment.

their cases. (In contrast, prosecution witnesses, many of whom were policemen, regularly ignored subpoenas and caused immense trial delay.) This low absconder rate should encourage liberalization of pre-disposition release practices. A counterassertion could be made that the rate is low because the system effectively detains until disposition those who would abscond; though this reasoning finds no support in the author’s data, the definitive answer could only be provided through experimenting with a more liberal system of conditional release.

5. The legal system in Patna processes an enormous bulk of paper with little use of expensive machinery. The social characteristics that make this possible are invaluable, but some of the paper-handling habits could be made more productive at little cost. For instance, Indian officials should learn to delegate authority more readily so that they need not spend large blocks of time glancing at and initialing dozens of routine papers and book entries prepared and presented to them by subordinates.

6. The preventive sections of the Indian Code of Criminal Procedure (Sections 107-110) are anachronisms in modern India. Police enjoyment under these sections of a free hand in dealing with impoverished persons unable to explain their activities does not justify the extreme punishment often suffered in cases where no tangible harm or attempted crime can be shown. The preventive sections should be abolished. As an alternative to repeal, the sections could be rewritten to limit severely the amount of jail time that a person may serve after an arrest under a preventive section.

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37 In the Patna cases studied by the author, the record for persistence was set by a defendant in a theft case who appeared in court on over 105 separate occasions. His record was tarnished by the fact that he eventually absconded.

38 The preventive provisions could be rewritten to incorporate some of the procedural devices suggested in part IV, supra. Thus, a rewritten preventive section might require that any person arrested under that section who remains unconvicted and who has been unable to secure release on bail after 30 days in jail must be released on a personal recognizance bond. To help give effect to this right, the law would direct the court to appoint counsel (who would be paid by the state) for any unconvicted defendant who remains in jail under a preventive section for 30 days and who does not retain a lawyer. When no such appointment is made, the first lawyer whom the prisoner can find to appear for him would receive the appointment and qualify for the fee. If a defendant is found guilty of violating a preventive section and is unable to post the good-behavior bond set by the court, the rewritten law could permit a sentence of no more than 30 days in jail for this failure to post a bond. Release from jail on a bond without sureties would be required at the end of 30 days in jail after conviction and this personal recognizance bond would serve as the good-behavior bond for the duration of the sentence.

For well-researched article which articulates concern for the potential for abuse in the preventive sections see M. KHAN, Sociological Impact of Sections 109 and 110 of the
Unfortunately, these sections are widely regarded by those involved in the criminal justice apparatus as perhaps unfair but probably necessary tools for the police. The opposition to the provisions in India is scattered and the prospects for significantly changing the law are dim.\textsuperscript{39}

7. The police system in India seems quite effective in maintaining order in a country riven by economic and social stress. However, abuse of power by the police through monetary corruption and occasional physical brutality directed at criminal suspects appears to occur, at least in some of the large cities, often enough so that it should be a cause for national concern.\textsuperscript{40} Similarly, at least in Patna,

\textit{Criminal Procedure Code,} 5 J. IND. L. INST. 498 (1963). Khan examined 89 preventive law cases in a Delhi jurisdiction and found that almost all the defendants were from the lowest economic group. Not surprisingly, only 30 out of 89 were able to secure release on bail before disposition, and out of the 59 who remained in jail, 49 were eventually found to have been improperly implicated and were discharged. \textit{Id.} at n. 24. He decries the lack of some more equitable system of pre-disposition release in these cases, especially in light of the flimsy charges usually leveled. Noting the extreme rarity of appeals and the lack of adequate legal help for most defendants at the trial level in these preventive cases, he urges that some sort of legal aid be considered for preventive-law defendants. He asks, "Since a large number of innocent defendants are unduly harassed by not being released on bail but ultimately discharged, what should be the maximum limit of time within which proceedings be finally decided?" \textit{Id.} at 507-8. To hint at an answer he quotes from the \textit{Draft Principles on Freedom from Arbitrary Arrest and Detention, 18th Report, UNESCO Commission on Human Rights,} Arts. 14(1), 16(2); the quoted passage recommends making pre-disposition release more available to impoverished persons and instituting a set of procedural time limits tied to mandatory release that are very similar in outline to those suggested by the author in this note and in part IV, \textit{supra.}

\textsuperscript{39} In Bihar a left-of-center coalition government was formed in December, 1970. The Minister Without Portfolio, the leader of the new government, was a remarkable politician who had begun his career as a police constable. He was strongly opposed to Section 109, the most heavily-used preventive provision. As Police Minister in an earlier government he had suspended enforcement of the section. When the author spoke with him in 1970 he had already secured an order releasing all people who had been held in jail under the section for over a year. He believed the provision was used by the police to detain poor people and to give a false impression of effective law enforcement. Clearly he would do whatever he could to curb its use in Bihar, and would encourage repeal by Parliament.

\textsuperscript{40} A respected high police official in Bihar commented to the author that when he was in training, the sub-inspectors used to take bribes, but they stopped when they became inspectors. Today this is not so, he said, and the corruption reaches much higher into the ranks of the police. Lack of adequate pay he cited as the main reason. Underfinanced police, in his estimate, confront a society that flirts with political upheaval of the poor masses and with economic chaos; all police work suffers under such strain. The author encountered no direct evidence of police corruption in Patna.

Calcutta was the only other city in India in which the author made extensive inquiry into the criminal justice system. In that city in late 1970 and early 1971 a wave of political violence blamed on a leftist group called the Naxalites was cresting. Newspaper articles describing half a dozen politically motivated killings the previous day were not uncommon. One mysterious mass execution of eight persons on the police wanted list was not surprisingly attributed to the police themselves. At a small Calcutta police station the author talked with a senior officer and was shown tiny detention
the lower strata of the judiciary and their employees seem to get their jobs done reasonably well, but in the process countenance widespread corruption, mostly in the form of petty bribes given to purchase cooperation rather than large bribes intended to alter the outcome of cases. Lawyers and judicial officials indicated to the author that witnesses in many cases are open to bribes and that a major cause of the abandonment of the jury system throughout most of India was the corruptability of jurors. In a country with many poor citizens, the temptation to abuse a public trust will often prove irresistible. India should neither hide such problems nor grow complacent about them, for they tend to demoralize the society and impede the economy; public corruption can spawn an alienated, restless citizenry.

8. Empirical legal research goes on in India now only on a
modest scale. An awareness of the value of such work seems to be
dawning in the academic community, but the prospects for help
from the public sector in underwriting the costs of expanded em-
pirical research seem dim. The needs outside the legal system
that compete for scarce public resources are extreme and urgent.
Basic public health measures, for instance, are patently inadequate

42 The Indian Law Commission is the most significant publicly funded institution
encountered by the author that regularly undertakes systematic empirical legal research.
The Commission has a professional staff of around a dozen persons which serves as a
source of investigative and drafting talent when the Indian Parliament seeks a com-
prehensive revision of some area of law. The Commission conducts most of its infor-
mation-gathering through questionnaires and library work, but the staff and the Com-
mmission members have been known to travel widely to discuss possible changes in
law and observe local practices. The massive task of drafting a revision of the Code
of Criminal Procedure was completed in 1969. The Commission draft showed aware-
ness of the need to speed up resolution of cases to cut down on pre-disposition jail
time for defendants. The reception which the Commission's recommendations received
in Parliament is unknown to the author. A comparably massive review of the Indian
Penal Code was underway in 1971.

Most legal writing in India deals with doctrinal issues. The Journal of the In-
dian Law Institute has published several articles cogently arguing for more empirical
investigations of India's legal system. One such article focuses on the criminal justice
system and frames the overall issue well:

The objective of doctrinal research is to clarify the law, to take a cer-
tain position, to give reasons where the law is in conflict and perhaps to
suggest suitable remedies and ways and means to improve the law in specified
areas. This is certainly a vitally important task; but without suggesting in
any way to neglect the same, it may be pointed out that this type of "library
room" research does not delve much into the socio-economic facts which
form the basis of rules of law.

If one might put it very broadly the interdisciplinary non-doctrinal type
of research puts emphasis on what men actually do rather than on what men
through their laws and court opinions profess that they do. For that purpose,
the social, economic, and at times the psychological facts have to be gathered.
These facts may be utilized to emphasize the gap between the law as it is, and
the law as the objective reality would indicate that it ought to be. To achieve
this objective the "going situation" must be subjected to a thorough em-
pirical examination. The data so produced should be logically criticized.
It will then be possible to project future changes confidently and realistically.

Administration of criminal justice is one of the fields that needs and pro-
vides the greatest scope for such kind of investigative research.

R. PRASANNAN, The Need for Non-Doctrinal Research in Criminal Justice Admin-
istration, 8 J. IND. L. INST. 252-3 (1966). See, also S. JAIN, Legal Research and
Methodology, 14 J. IND. L. INST. 487, 499-501 (1972), and N. MENON, Law and

There are few authors in India who have risen to the challenge posed in the quoted
passage. The writer did another useful piece of fact-gathering and interpretation in
R. PRASANNAN, Legal Aid in India, 8 J. IND. L. INST. 224 (1966). Also noteworthy
within the area of criminal justice empirical research is M. KHAN, Sociological Impact
of Sections 109 and 110 of the Criminal Procedure Code, 5 J. IND. L. INST. 498
(1963). Khan scrutinized records in one jurisdiction of all cases brought under these
two suspicious-conduct sections of the Code of Criminal Procedure in the course of a
six-month period. His provocative analysis of 89 cases touched on matters including
the social class of the defendants, the importance of legal representation, bail release
patterns, and conviction rates.
in many parts of the country. Given this economic context, field research in law in India will have to be done in most instances by inexpensive means.\footnote{Some of the research methods described in this article may be adaptable for further use in India.} Similarly, proposals for reform derived from such research should aim to improve or bolster the legal system with no more than slight additional cost. The existence of these constraints should not hide the high prospective return on new efforts invested in such research. In sum, the Indian legal system would do well to foster a tradition of pragmatic empirical research conducted by inexpensive means.