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PRETRIAL RELEASE: CONCEPTS, ISSUES, AND STRATEGIES FOR IMPROVEMENT

Stevens H. Clarke

ABSTRACT

After discussing some important concepts and issues and briefly looking at legal developments since the 1960s, this monograph reviews research on opportunity for pretrial release and the risks involved. It then explores the effectiveness of various reform measures in terms of both widening the opportunity for pretrial release and controlling the risks. The concluding section discusses various strategies for improving pretrial release.

CONCEPTS AND ISSUES IN PRETRIAL RELEASE

Definitions

Pretrial release, also called bail, is the freeing of an arrested criminal defendant before his charges are disposed of, on the condition that he return to court for hearings on his charges as required by the court.[1] Forms of pretrial release include the following:

1. *Secured appearance bond*: release on an appearance bond (a promise by the defendant to pay a certain sum, the bond amount, if he fails to appear as required by the court) which is secured by:
   - — A deposit of the full bond amount in cash ("full cash deposit bond");
   - — A deposit of a fraction of the bond amount in cash ("fractional deposit bond");
   - — A pledge (mortgage) of the defendant's real or personal property, on which a forfeiture judgment can be levied if the defendant fails to appear ("property bond");
   - — A surety (bondsman), usually a licensed professional bail bondsman who charges the defendant a nonreturnable fee or premium for his service. A surety may also be a person who is not a professional bail bondsman but is able to give reasonable assurance to the court that he has sufficient assets to cover the defendant's bond.
2. *Alternative release*: release not involving secured bond, i.e., any form of release not involving a cash deposit, mortgage, or surety (bondsman) as a prerequisite of release. Innovative pretrial release programs have experimented with various combinations of conditions other than secured bond. These forms of release all allow the defendant to be

[1]Other alternatives to pretrial detention are citation (a notice to appear issued to the defendant by a law enforcement officer in lieu of arrest) and summons (an order to appear in court issued by a judicial officer and enforced by contempt sanctions).

freed immediately, without any money put up in advance.[2] (If defendants are held in jail, secured bond is generally what keeps them there.) One form of alternative release, release on recognizance (ROR), is the release of the defendant without secured bond on his promise to appear in court as required. ROR may involve conditions that restrict the defendant's travel, associations, conduct, or place of residence while his charges are pending. Another form of alternative release is unsecured appearance bond, in which the defendant signs an appearance bond unsecured by a deposit, mortgage, or surety. Both ROR and unsecured bond may be accompanied by a requirement that the defendant submit to supervision by some person or organization to assure his appearance in court.

There are two kinds of penalties for failure to appear in court as required after receiving pretrial release: (1) criminal punishment, and (2) forfeiture of the bond, if any. Criminal punishment is authorized for conviction of the offense of willfully failing to appear. This penalty generally applies to both secured bond and alternative release. (Also, courts generally have the power to impose a criminal contempt penalty, such as a fine or short jail sentence, on defendants who willfully disobey an order to appear in court.)

If a bondsman is involved, the defendant and the bondsman normally are jointly and severally liable for forfeiture—that is, the court may collect the forfeited bond amount from the defendant or from the bondsman, or it may collect a portion from each.

Goals of Pretrial Policy: Maximizing Pretrial Freedom and Controlling Risk

Pretrial release policy in the American criminal justice system has two goals: (1) to allow pretrial release whenever possible and thus avoid jailing a defendant during the period between his arrest and court disposition, and (2) to control the risk of failure to appear and of new crime by released defendants. While these goals sometimes conflict, neither can be ignored. The concern of reformers and policymakers has sometimes focused on one goal, sometimes on the other.

During the apparent high point of liberalization of pretrial release, the need to control the risk of nonappearance was not forgotten. The Federal Bail Reform Act of 1966 (discussed below), which emphasized using ROR, required federal judicial officers to set conditions, including secured bond, if they found it necessary, to "reasonably assure" the appearance of a defendant.[3]

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[2]Unlike "pure" ROR, unsecured bond relies on the threat of financial loss to ensure the defendant's appearance; but the threat of forfeiture with unsecured appearance bond is minimal (Thomas, 1976: 25), and the likelihood of actually paying forfeiture is less than that in secured bond (Clarke and Saxon, 1987: 27–29, and 31 (#4)). Unsecured bond can be readily combined with other features of ROR such as postrelease supervision. One study found similar results for "pure" ROR and unsecured bond (Clarke et al., 1976).

[3]18 U.S. Code. Ann. §§ 1346 et seq. (1985).

Since the liberalizing reforms of the 1960s, there has been increasing concern about risk. The U.S. Supreme Court recently upheld the constitutionality of a federal law authorizing preventive detention (i.e., detention of criminal defendants without pretrial release because of their threat to public safety).[4] But this decision does not mean that the courts will detain all defendants who might be dangerous to the public. This is very unlikely, for several reasons: (1) It is difficult to identify "dangerous" defendants; (2) the courts would probably find constitutional limits to preventive detention if it were expanded very far; (3) substantial expansion of preventive detention would probably receive strong political opposition because it is so contrary to American ideas of fairness; and (4) local governments, whose jails are rapidly filling,[5] could not afford the cost of a major expansion of preventive detention.

Legal Concepts of Pretrial Release and the Recent History of Legal Developments

The "Excessive Bail" Clause in the U.S. Constitution. Constitutional law regarding pretrial release is rather sketchy compared, for example, with the law regarding search and seizure. There are two reasons for the incompleteness. First, the Constitution says very little about pretrial release—only that bond must not be "excessive." Second, legal issues regarding pretrial release are rarely raised on appeal. The defendant's pretrial detention is short compared with the time required to have an issue considered on appeal, so pretrial issues quickly become moot. Also, if the defendant is convicted, he is much more concerned with appellate review of his conviction and sentence than with his pretrial detention.

The Eighth Amendment to the U.S. Constitution provides that "excessive bail shall not be required" ("bail" in this context refers to secured appearance bond). Many state constitutions have similar provisions.[6] It is a matter of scholarly debate whether the Eighth Amendment grants a "right to bail" (Verrilli, 1982; Foote, 1965a, 1965b; Meyer, 1972; LaFave and Israel, 1984: § 12.3(b)). The debate in a sense is academic, because the right (if any) is a right only to *have an appearance bond set by the court,* not to *actual release.* The court may set the bond higher than the defendant can afford to deposit or pay a bondsman to secure.

The right to have conditions of pretrial release set in noncapital cases is provided by statute in at least forty states (Verilli, 1982: 353) and in federal court.[7]

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[4]United States v. Salerno, 481 U.S. ___, 95 L.Ed.2d 697 (1987).

[5]See U.S. Dept. of Justice, Bureau of Justice Statistics, *Jail Inmates 1984,* Washington, D.C.: U.S. Dept. of Justice, 1986, which reports that the percentage of the total national jail capacity occupied rose from 65 in 1978 to 85 in 1983 and then to 90 in 1984.

[6]The Supreme Court has never decided whether the excessive bail clause of the Eighth Amendment applies to state courts through the due process clause of the Fourteenth Amendment, but some lower federal courts have assumed that it does (Schilb v. Keubel, 404 U.S. 357, 511 [1971] (dictum), citing Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963); Hunt v. Roth, 648 F.2d 1148 [8th Cir. 1981]; United States ex re. Goodman v. Kehl, 456 F.2d 863, 868 [2d Cir. 1972]).

But, as explained further below, Congress and a number of state legislatures have enacted narrowly limited preventive detention statutes in recent years.

The U.S. Supreme Court's leading decision interpreting "excessive" in the Eighth Amendment bail provision, *Stack v. Boyle*,[8] involved a McCarthy-era prosecution of twelve members of the Communist Party for advocating the violent overthrow of the government. The federal trial court had set bond *uniformly* at $50,000 for each defendant, based on the nature of the defendants' charges and the fact that four other persons convicted of the same charge had forfeited bond. The trial court had not considered the particular circumstances and characteristics of each defendant. The government argued that each defendant was a pawn in the Communist conspiracy and would flee justice in obedience to orders.

The Supreme Court defined the function of appearance bond as follows:

> Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.[9]

The theory implicit in the Court's analysis of appearance bond is that appearance in court is assured by the deterrent effect of the threat of bond forfeiture. This assurance, the Court said, must be individually tailored to the circumstances of the defendant. The Court held that the purpose of setting bond was to assure the appearance of the defendant in court, that an amount exceeding what was necessary for this purpose was unconstitutional, that bond-setting had to be an individualized decision for each defendant, and that "traditional standards" had to be applied. The "traditional standards" that were constitutionally required were "expressed," the Court said, in Rule 46(c) of the Federal Rules of Criminal Procedure, which required that the bond amount must be set to

> insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.[10]

Thus, the Court, in *Stack v. Boyle*, held that while the offense charged is a criterion in setting the bond amount, other factors such as the weight of the evidence against the defendant, the defendant's character, and his financial ability must also be considered.

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[7]18 U.S. Code Ann. § 3246 (1985). The rationale for making bail discretionary for defendants charged with capital offenses is that a defendant on trial for his life may not fear financial loss (Blackstone, ed. Cooley, 1899: Vol. 2, p. 1449).

[8]Stack v. Boyle, 342 U.S. 1 (1951).

[9]Id., 342 U.S. 1, 5.

[10]This version of Rule 46(c) has been superseded by 18 U.S. Code § 1346, which has similar provisions.

Economic Disadvantage in Obtaining Pretrial Release. Reformers of the bail system have been concerned about discrimination against defendants with low incomes. These reformers have opposed secured bond, asserting that it is administered in such a way that low-income defendants are less likely to be released than other defendants and are apt to stay longer in detention (Ares et al., 1963; Freed and Wald, 1964; ABA Standards, 1974; Beeley, 1927; Foote, 1965a). The reason for this concern is obvious: If the pretrial release system relies on secured bond, it will inevitably discriminate against poor defendants. If a defendant has very little money, even a very low secured bond can be enough to keep him in detention.

The concern about remedying poor defendants' disadvantage with regard to obtaining pretrial release has not risen to the level of a constitutional principle. Some have argued that the poor defendant who cannot afford to post bond is being punished by imprisonment before trial (Foote, 1965a). But the Supreme Court has rejected the idea that the "presumption of innocence" applies to the defendant's pretrial status[11] and recently held that pretrial detention is regulatory, not penal.[12] Courts have also not accepted the idea that bond violates the equal-protection clause of the Fourteenth Amendment when it is set too high for an indigent defendant to meet (LaFave and Israel, 1984: § 12.2(b)). As alternatives to secured bond have been increasingly used, some indigent defendants have contended that they have a right to alternative release, but the courts have not accepted this claim.[13] However, since the 1960s, federal legislation and legislation in a number of states have created a presumption in favor of alternative release, allowing secured bond only if all alternatives are considered inadequate to assure appearance.

Efforts to Liberalize Pretrial Release Since 1960. Recent reform efforts aimed at liberalizing and equalizing opportunity for pretrial release were greatly influenced by Beeley's 1927 study of bail in Chicago (Beeley, 1927). Beeley found that bond decisions were based solely on the defendant's charge and discriminated against the poor. He also concluded that bondsmen had far too much power, which led to corruption, and that they too often failed to pay forfeitures. Foote's 1954 study in Philadelphia reached similar conclusions. Action on bail reform began in 1960 with Louis Schweitzer in New York, a private philanthropist who, with Herbert Sturz, began the Vera Foundation and its experimental Manhattan Bail Project. The Vera project expanded the use of ROR by using volunteer project workers, such as law students, to identify for the courts indigent defendants who were safe risks for ROR. Vera's assessment of the risk of nonappearance relied on a point scale based on Beeley's theory of "community ties" (discussed in detail below). The Vera approach was widely followed. By 1965, Vera-type projects in 48 other jurisdictions across the county were using various alternatives to secured bond (Thomas, 1976).

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[11]Bell v. Wolfish, 441 U.S. 520 (1979).

[12]United States v. Salerno, note 4 above.

[13]Courts may fear that if this claim were upheld, all indigents would have to be given pretrial release without regard to their risk of nonappearance (LaFave and Israel, 1984: § 12.2(b)).

Another alternative to conventional secured bond, fractional deposit bond, was adopted in Illinois in 1964 (Thomas, 1976: 188–199; Bowman, 1965). Its designers reasoned that rather than paying a nonreturnable 10 percent fee to the bondsman, the defendant might just as well deposit 10 percent of the bond with the court. Fractional deposit bond gives the defendant an additional financial incentive to return to court and also makes it easier for the court to collect at least some portion of the bond if it orders forfeiture.

The influence of advocates of alternative release can be seen in the Federal Bail Reform Act of 1966,[14] which created a presumption favoring ROR and unsecured bond. The 1966 Act required federal judicial officers setting bail conditions for noncapital cases to consider not only the charge and the weight of the evidence against the defendant, but also the defendant's "family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance and court proceedings or of flight to avoid prosecution or failure to appear at court proceedings." If, based on these criteria, the judicial officer determines that release on the defendant's promise to appear or on unsecured bond "[would] not reasonably assure the appearance of the person as required," he must take the *least restrictive* of the following types of actions to "reasonably assure" the defendant's appearance:

1. Place the defendant in the custody of a person or organization that agrees to supervise him (the Vera project provided a model for such an organization).
2. Place restrictions on the defendant's travel, association, or residence.
3. Require deposit in cash or other security of 10 percent of the bond amount.
4. Require a secured bond.
5. Impose other conditions deemed "reasonably necessary" to assure appearance, including that the defendant return to custody after specified hours.

The 1966 Act stipulated that secured bond was to be used only for high-risk defendants—those whose appearance would not be "reasonably assured" by other conditions of release. This provision was oddly inconsistent with the view held by advocates of legislation like the Act of 1966 that bond was ineffective in controlling nonappearance (ABA, 1986: §§ 10–3.3, 10–5.5, and 10–5.9, and Commentary). The provision suggests a tacit acceptance of *de facto* preventive detention and perhaps is best seen as a political compromise rather than a matter of principle.

The 1966 Act also influenced state laws. By 1982, at least 14 states had statutes that (1) required bail-setting officials to consider "community ties" (family, residence, and employment) as well as charge, evidence, and criminal record; (2) created a presumption in favor of alternative release; and (3) allowed release in the custody of a supervising person or organization. As explained below, federal law regarding pretrial release was revised by the Federal Bail Reform Act

[14] 18 U.S. Code Ann. § 3146 et seq. (1982).

of 1984 to allow preventive detention with strict procedural safeguards. The 1984 Act retains the 1966 Act's presumption in favor of alternatives to conventional secured bond, but adds community safety as a goal of pretrial release. It requires imposing the least restrictive conditions that will "reasonably assure the appearance of the person as required and the safety of any other person and the community."[15] The 1984 Act retains the factors provided by the 1966 Act for the federal judicial officer to consider in setting conditions of release, but adds others such as the defendant's history of drug abuse, whether the defendant is currently on probation, parole, or pretrial release in connection with a previous charge, and "the nature and seriousness of the danger to any person or the community that would be posed by the [defendant's] release."[16] The 1984 Act also adds a number of conditions of release that the federal judicial officer may impose, such as avoiding contact with crime victims or witnesses, complying with a curfew, refraining from possessing dangerous weapons, undergoing medical or psychiatric treatment, and returning to custody after work or school.[17]

In 1968, the first ABA Criminal Justice Standards incorporated the 1966 Federal Act's presumption favoring ROR and also recommended that compensated bail bondsmen be abolished (ABA, 1974). These provisions were retained in the 1979 revision of the ABA Standards (ABA, 1986: §§ 10–5.5, 10–1.3). While a number of states, as explained above, have adopted the presumption in favor of ROR, professional bail bondsmen have not ceased to exist.

Preventive Detention. Preventive detention in this context refers to denying pretrial release to (and thereby detaining) a defendant before trial, on the basis of a prediction that if released, regardless of the conditions of his release, he will flee, threaten or injure potential witnesses or jurors, or otherwise obstruct justice or threaten the safety of the community. Preventive detention can be *de facto* or *de jure*. *De facto* preventive detention is the setting of a bond higher than the defendant can afford, ostensibly to assure his appearance in court, but actually because the bail-setting official believes the defendant must be detained to prevent injury to certain persons or the community in general. This kind of preventive detention is generally believed to have been widely practiced in the United States for a long time. It is unlikely to be discontinued without abolition of judicial officials' discretion to impose secured appearance bond.

De jure preventive detention involves a refusal, explicitly authorized by law, to set *any* conditions of pretrial release of the defendant, on the basis of a prediction that the defendant will flee, threaten or injure potential witnesses or jurors, or otherwise obstruct justice or threaten the safety of the community if released, regardless of the conditions of release. In recent years, federal and state statutes have appeared that authorize *de jure* preventive detention based on the defendant's dangerousness to the community. One view is that this legislation in part has been a reaction to the improvement in opportunity for pretrial release that occurred when ROR became widely used. This made it "increasingly likely that those defendants perceived by some as 'dangerous'

[15]18 U.S. Code Ann. § 3142(c) (1985).

[16]Id., § 3142(g).

[17]Id., § 3142(c) (1985).

would obtain their freedom pending trial" (LaFave and Israel, 1984: § 12.3[a]). The legislation also allows the government to detain dangerous defendants, such as racketeers, who are able to post very large bonds.

The first preventive detention statute,[18] effective in 1971, was enacted by Congress to apply only to the District of Columbia. It authorized pretrial detention for up to 60 days and applied to a limited group of defendants—including those charged with serious crimes such as murder, rape, robbery, burglary, arson, or serious assault, and those (regardless of charge) who injured or threatened prospective witnesses or jurors. Detention was allowed only upon a finding that no conditions of release would reasonably assure the safety of any person or the community. Statutory criteria for determining dangerousness included charge severity, weight of the evidence, and the defendant's family ties, employment, financial resources, character and mental condition, length of local residence, past conduct, convictions, and previous failures to appear.

No state has adopted as broad a preventive detention statute as the District of Columbia statute, but nearly half of the states now permit some consideration of the dangerousness of the defendant in the setting of pretrial release conditions (LaFave and Israel, 1985: § 12.3(a)). The 1985 revisions of the ABA Standards allowed preventive detention, with strict procedural safeguards, of defendants shown to pose significant threats to the safety of the community and the administration of justice (ABA, 1986: §§ 10-1.1, 10-5.4). About 40 states deny the right to have bail conditions set for defendants charged with capital offenses, and some states have recently extended the denial to defendants charged with serious noncapital offenses (LaFave and Israel, 1985: §§ 12.3(a), 12.4(a)).

Probably the most influential recent preventive detention legislation is the Federal Bail Reform Act of 1984,[19] whose constitutionality was upheld in 1987 by the U.S. Supreme Court in *United States v. Salerno*.[20] The defendants in the case, who were charged with 35 acts of racketeering, including conspiracy to commit murder, asked the Court to declare that the federal preventive detention statute was "unconstitutional on its face"—that is, constitutionally invalid in every set of circumstances to which it could be applied. However, the Court held that the statute was not unconstitutional on its face, leaving the possiblity that there might be some circumstances in which the statute would be unconstitutional.

The legislation reviewed in *Salerno* authorizes a hearing on pretrial detention if (1) the federal prosecutor or judicial officer believes that there is a serious risk that the defendant will flee if released; (2) the federal prosecutor or the judicial officer believes that there is a serious risk that the defendant will obstruct justice or threaten, injure, or intimidate a prospective witness or juror if released; *or* (3) the defendant is charged with certain serious offenses, such as "a crime of violence," an offense punishable by life imprisonment or death, or certain drug

[18]District of Columbia Code §§ 23–1322 et seq. (1981).

[19]18 U.S. Code Ann. §§ 3141–3156 (1985).

[20]See note 4 above.

crimes punishable by ten years imprisonment or more.[21] If after this hearing, the judicial officer "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the [defendant] prior to trial."[22]

In deciding whether there are conditions of release that will reasonably assure the defendant's appearance in court and the safety of other persons, the federal judicial officer must consider "available information" concerning the criteria similar to those of the earlier Federal Bail Reform Act of 1966, including the nature and circumstances of the charges; the weight of the evidence; the defendant's history, family and community ties, and other characteristics; and whether the defendant was on probation, parole, or pretrial release at the time of his alleged offense. The judicial officer must also consider available information concerning "the nature and seriousness of the danger to any person or the community that would be posed by the [defendant's] release."[23] This last factor was not prescribed by the 1966 Act.

In upholding the 1984 federal preventive detention statute, the Supreme Court held that preventing danger to the community from arrested defendants was a legitimate governmental goal, and not a form of punishment without trial. In some circumstances, the Court said, the defendant's interest in liberty may be subordinated to that governmental interest. The Court emphasized that the statute "operates only on individuals who have been arrested for a specific category of extremely serious offenses."[24] (Actually, it does not; even if the defendant is not charged with one of the serious crimes listed above, the statute allows consideration of detention if there is a serious risk that the defendant will flee, threaten or injure potential witnesses or jurors, or otherwise obstruct justice.[25]) The Court also stressed the procedural protections provided by the act: the right to counsel at the detention hearing; the right to testify, present evidence, and cross-examine adverse witnesses; factors specified to guide the judicial officer in deciding whether to detain; a requirement that the government prove its case by clear and convincing evidence; a requirement that the judicial officer make written findings of fact and reasons for detention; and immediate review of the detention decision.[26] The Supreme Court also dismissed the claim by the defendants that the preventive detention statute violated the Eighth Amendment

[21]18 U.S. Code Ann. § 3142(f) (1985).

[22]Id., § 1342(e).

[23]Id., § 3142(g) (1985).

[24]United States v. Salerno, note 4 above, at 710–711, citing 18 U.S. Code § 1342(f).

[25]The detention hearing where there is a risk of flight, etc., is authorized by 18 U.S. Code § 3142(f)(2) (1985). In saying that the pretrial detention statute is limited to defendants charged with certain serious crimes, the Supreme Court may have been deliberately construing the statute narrowly to bolster its constitutional validity. On the other hand, since the *Salerno* defendants *were* charged with the types of serious crimes listed in § 3142(f)(1), the Court may have been limiting its interpretation of the statute to cases like theirs. If this is a correct interpretation of the opinion, the Court's statement limiting the statute to cases involving certain serious crimes may in the future be treated as *dictum* (not binding) with respect to pretrial detention of defendants who present a risk of flight, obstruction of justice, etc., but are *not* charged with the crimes listed in § 3142(f)(1).

[26]United States v. Salerno, note 4 above, at 711–712, citing 18 U.S. Code §§ 3142(f), (g), (i); 3145(c).

"excessive bail" provision because it in effect allows the setting of infinitely high bond for reasons not related to risk of flight. The Court held that its earlier decision in *Stack v. Boyle* (discussed above), which the defendants relied on, applies only where the government seeks to assure the defendant's appearance at trial. (In that situation, the Court said, bond must be set in an amount necessary to assure appearance at trial, and no more.) The Court said that the Eighth Amendment did not prohibit the government from using regulation of pretrial release to pursue important interests other than assuring the appearance of defendants at trial, such as preventing pretrial crime by arrested defendants.[27]

Summary of Current Legal Concepts and Practices. The following points emerged in this brief review of legal developments since 1960:

1. *Right to pretrial release:* It is still unclear, after the Supreme Court decision in *Salerno,* whether there is any constitutional right to pretrial release, or, to put it another way, how much legislatures could reduce the defendant's statutorily granted right to pretrial release.
2. *Conditions set by a judicial officer soon after arrest:* Typical state laws require that a defendant be brought shortly after arrest, or at most within 24 hours, to a judicial officer who determines whether his arrest is lawful and, if so, conducts a hearing and sets conditions of pretrial release (LaFave and Israel, 1985: § 12.1(b).)
3. *Secured bond vs. alternative release:* Federal laws, the laws of a number of states, and the influential ABA Standards require that the officer setting bail conditions use the least restrictive conditions necessary to assure the defendant's appearance (and, in some cases, to protect the community). This means that there is a preference in the law for alternatives to secured bond.
4. *Setting bond:* When the judicial officer's purpose is to assure the defendant's appearance, the *Stack* decision requires that the officer consider the particular circumstances of each individual defendant and his

[27]Id. The Federal Bail Reform Act of 1984 also contains a provision that seems to threaten federal courts' power to impose *de facto* preventive detention. In the section on pretrial release (not the section on preventive detention), the act authorizes judicial officers to require "a bail bond . . . in such amount as is reasonably necessary to assure the appearance of the person as required," but also provides that "the judicial officer may not impose a financial condition that results in the pretrial detention of the person." (18 U.S. Code § 3142(c) (1987).) According to the accompanying report of the Senate Committee on the Judiciary, the latter provision "does not necessarily require the release of a person who says he is unable to meet a financial condition of release that will assure the person's future appearance." If a judicial officer finds that a high bond is necessary to assure reappearance and the defendant asserts that it is impossible for him to raise the bond, and if the judicial officer finds that it is impossible, then there is no available condition of release that will assure the defendant's appearance. This finding provides a basis for a detention order under the *de jure* preventive detention provisions of the act discussed in the text. (Senate Committee on the Judiciary, S. Rep. No. 98–225, August 4, 1983, U.S. Code Congressional and Administrative News, Vol. 4, St. Paul, Minn.: West Publishing Co., 1985, p. 3199.) Thus, these provisions were intended to substitute formal preventive detention hearings for *sub rosa* use of money bond to detain defendants believed to be dangerous. But in actual application, these provisions may have little effect on *de facto* preventive detention. For example, one U.S. Court of Appeals considered a case in which a federal district court decided that a $1 million bond was necessary to deter the defendant from fleeing. The appellate court held that even though the defendant would have to "go to great lengths to raise the funds," the bond did not violate the 1984 Act's prohibition of using bond to deny release altogether. (United States v. Szott, 768 F.2d 159, 160 (7th Cir. 1985).)

case; the officer must set bond in the amount reasonably necessary to assure the defendant's appearance, and no more.

5. *De facto preventive detention:* Deliberately setting bond that the defendant cannot afford, to prevent his anticipated flight or criminal conduct, while not necessarily legally authorized, is for practical purposes still beyond legal attack. If the judicial officer is not allowed by the law in his jurisidiction to consider the risk of criminal conduct, he can simply find that a high bond is the only condition that will reasonably assure the defendant's appearance. Also, the judicial officer may reasonably infer that if the defendant is likely to commit new crime on release, he is more likely than other defendants to fail to appear in court (Clarke and Saxon, 1987: 18).
6. *De jure preventive detention:* Pretrial detention with explicit statutory authorization to prevent flight or criminal conduct has been upheld by the Supreme Court as constitutional (*Salerno*). The Court emphasized that (1) the federal statute it upheld limits such detention to defendants charged with certain serious crimes (although the statute actually has broader application), and (2) the statute provides strict procedural safeguards.
7. *Economic disparity in bail opportunity:* This continuing problem has not been resolved by development of constitutional law; however, it has been the target of considerable statutory and administrative reform.

Two Theories

Much discussion about pretrial release policy revolves around two theories, or assumptions, neither of which has been adequately tested:

1. Bond deters nonappearance.
2. Community ties measure risk of nonappearance.

Appearance bond, both unsecured and secured, is based on the assumption that defendants are deterred from failing to appear by the threat of bond forfeiture, and also, where a bondsman is involved, by fear of the bondsman, who is himself motivated to pursue a fugitive defendant because of the threat of bond forfeiture. This assumption is implicit in *Stack v. Boyle* and *United States v. Salerno.*

The idea that bail bond deters nonappearance is consistent with the notion that people's behavior is generally affected by cost consequences. But two economists have recently not taken the deterrent effect for granted (Landes, 1974; Myers, 1981). Landes (p. 320) said that "the question of the actual effect [of bond] on disappearance remains open because of the absence of empirical analysis." The issue of whether bond deters nonappearance and the related subject of professional bail bondsmen are considered further below.

The leaders of the effort to liberalize pretrial release in the 1960s based their advocacy of Vera-type ROR programs partly on the implicit theory that the defendant's risk of nonappearance was in inverse proportion to the extent of his "community ties" (Ares et al., 1963), which are measured by whether the defendant has relatives in the local community, whether he lives with a spouse or

family members, his employment status and history, how long he has lived in the community, etc. The originator of the community-ties theory appears to be Arthur Beeley, who studied the bail system in Chicago in the 1920s. Beeley identified distinguishing characteristics of "dependable" defendants (those he believed to have a low risk of nonappearance), which included seriousness of charge, local family connections, skill and regularity in employment, criminal record, and favorable character references. Beeley evidently believed that defendants with local ties to home, family, and job had more to lose by fleeing than defendants with no ties. Like the theory that bond deters nonappearance, the community-ties theory is open to empirical test.

OPPORTUNITY FOR PRETRIAL RELEASE

Rates of Release

There are no regularly published national statistics on pretrial release. Studies of individual jurisdictions suggest that most arrested criminal defendants receive some form of pretrial release, and that the percentage released increased after the liberalizing reforms of the 1960s. Release rates varied widely in the early 1960s, but the variation may have decreased since then.

Thomas found that 48 percent of felony defendants in 20 cities were released in 1962, and 67 percent in 1971.[28] The 1962 release rates for felony defendants ranged from 76 percent (Philadelphia) to 22 percent (Kansas City). By 1971, the highest rate was 87 percent (Minneapolis), and the lowest was 37 percent (Kansas City). The main reason for the increase in the rates, Thomas found, was an increase in the use of release not involving financial conditions, which was granted to 5 percent of felony defendants in 1962 and 23 percent in 1971. Misdemeanor defendants had an average release rate of 60 percent in 1962 and 72 percent in 1971, with release rates varying widely among the 20 cities (Thomas, 1976: 37–49, 65–79).

Later studies have suggested that release rates have continued to increase since the 1960s. Toborg, in 1976–77, found an overall release rate of 85 percent for a general population of arrested defendants in 8 jurisdictions,[29] with 61 percent released on nonfinancial conditions and the others on secured or unsecured bond. (The release rate for defendants charged with Part I crimes—roughly equivalent to felonies—was 80 percent; for those charged with Part II crimes, it was 88 percent.) The release rates ranged from 73 to 92 percent, not nearly as great a range as Thomas observed. However, the ratio of financial to nonfinancial release varied widely—from 14 to 76 percent to 46 to 38 percent (Toborg, 1981: 3–11). Goldkamp and Gottfredson (1985: 58, 63–69) found an overall release rate of 90 percent in Philadelphia in 1977–79, with 40 percent receiving

[28]Thomas' 20 cities were Boston, Champaign-Urbana, Chicago, Denver, Des Moines, Detroit, Hartford, Houston, Kansas City, Los Angeles, Minneapolis, Oakland, Peoria, Philadelphia, Sacramento, San Diego, San Francisco, San Jose, Washington, D.C., and Wilmington (Thomas, 1976: 32).

[29]Toborg's 8 jurisdictions were Baltimore City (Md.), Baltimore County (Md.), Washington, D.C., Dade County (Miami), Fla., Jefferson County (Louisville), Ky., Pima County (Tucson), Ariz., Santa Cruz County, Calif., and Santa Clara County (San Jose), Calif. (Toborg, 1981: 3).

alternative release (including unsecured appearance bond). Clarke and Saxon (1987: Table 1) found an overall release rate of 92 percent in Durham, N.C., in 1985, with 45 percent receiving alternative release.

How Are Pretrial Release Decisions Made?

Pretrial release conditions are usually set by a magistrate or lower-court judge shortly after arrest, often at night and under hectic conditions. But the initial decision tends to "stick," principally because most defendants are released within a day or two (Goldkamp and Gottfredson, 1985: 67–69; Toborg, 1981: 3–9; Clarke and Saxon, 1987: 1).

The applicable law (e.g., the federal legislation discussed above and many state statutes modeled on it) may require the judicial officer to consider a variety of information about the defendant *if such information is available,* but typically there is no *requirement* that the officer obtain and consider this information in making the bail decision. While the initial conditions are subject to later review throughout the processing of the defendant's case, they are rarely changed.

Wice observed that in eleven cities in 1970–71,[30] the typical defendant was held overnight or for the first 24 hours after arrest in a police lockup or jail. During that time, he could be released by the police if he was able to secure the bond set on the basis of a fixed schedule depending only on his charge. If not released during that time, the typical defendant would be brought to an initial judicial hearing the next morning. There, too, the fixed schedule of bond amounts was heavily relied upon because it allowed rapid processing of cases (Wice, 1974: 21–25). Presumably, alternative release is now used considerably more in judicial hearings, but the procedures Wice described may not have changed greatly for most defendants. The typical court hearing to set pretrial release conditions is still very brief and is often based on very limited information (Goldkamp and Gottfredson, 1985: 9–10 [Philadelphia 1977–79]; Clarke and Saxon, 1987: 7–9 [Durham, N.C. 1985]). The available information may be augmented if, as in Philadelphia (Goldkamp and Gottfredson, 1985: 49–51) and Charlotte, N.C. (Clarke et al., 1976: 351–354), a Vera-type pretrial services agency investigates and reports to the court on the defendant's prospects for alternative release.

Analysis of the Setting of Pretrial Release Conditions

Whatever its effects on failure to appear may be, *it is clear that secured bond is an effective obstacle to pretrial release.* Defendants who do not receive pretrial release—except for the very few that are detained on charges of capital offenses or by *de jure* preventive detention procedures—are those who are unable to meet secured bond conditions. Goldkamp et al. (1981) showed that almost all of the variance in Philadelphia defendants' likelihood of being released could be explained by their bond amounts. Landes (1974), whose New York study was limited to indigent defendants,[31] found that a $100 increase in bond, other

[30]Wice's 11 cities were Washington, D.C., Philadelphia, Baltimore, Atlanta, St. Louis, Indianapolis, Detroit, Chicago, Los Angeles, San Francisco, and Oakland (Wice, 1974: xviii).

things being equal, meant a 3.6-percentage-point reduction in the probability of release among defendants who had a bond set. Clarke and Saxon (1987) found that 92 percent of unreleased defendants in Durham, N.C., had secured bond set. Holding other factors constant, each $1,000 increase in secured bond reduced the probability of release by 0.6 percentage point and increased the time spent in detention by about 8 percent. (The Durham analysis considered a general population of defendants with and without secured bond.)

What factors affect the amount of bond? Studies in New York, Durham, N.C., and Philadelphia indicate that seriousness and number of charges against the defendant, prior arrests and criminal convictions, and prior violations of pretrial release conditions generally are associated positively with the defendant's secured bond amount and negatively with his probability of receiving alternative release (Landes, 1974; Clarke and Saxon, 1987: 14; Goldkamp et al., 1981: 54–62). What about other factors? Landes (1974) found that among indigent defendants in New York, those who were employed had lower bond amounts than those who were unemployed, controlling for other factors, and the lower the defendants' weekly earnings were, the *higher* their bonds were. (Landes did not consider defendants' race.) Other community-ties factors, such as whether the defendant was a local resident, appeared to have no significant effects on the bond amount. Goldkamp (1979) found that although Philadelphia in 1977–79 had "one of the most progressive pretrial services operations in the nation [including a Vera-type pretrial services agency], community-ties indicators, such as family ties and residence in the community, appear . . . to have had almost no impact at all on the granting of ROR or on the setting of cash bail" (Goldkamp, 1979: 158). Ebbesen and Konecni (1975), in a study of felony court judges in San Diego, found that while in simulated cases judges were influenced by information on community ties and criminal record, in actual cases their decisions were based primarily on charge severity.

In Durham, N.C., other factors did play a role. According to Clarke and Saxon, whose regression analysis treated alternative release as a zero secured bond amount, the setting of the secured bond "appears to have been based on . . . the type and number of [the defendant's] current charges and his probation status, with a substantial increase of the bond amount for nonresidents and a reduction for young defendants and black defendants" (Clarke and Saxon, 1987: 14).

Goldkamp and his associates seem to have been the only researchers to study the association between the identity of the judicial officer and the bond amount. They found that when 20 judges set pretrial release conditions for groups of 240 defendants each, matched with respect to charge seriousness, there was great variation in the percentage receiving ROR (from 26 to 60 per cent), and also great variation in the median bond amount set (from $700 to $4,000) (Goldkamp and Gottfredson, 1985: 63–69). This finding led directly to their experiment with bond guidelines.

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[31]Indigent defendants were those who were unable to pay for defense counsel and were thus eligible to receive the services of the New York Legal Aid Society.

Multivariate Analysis of Pretrial Release Opportunity

Released/Not Released and Time Spent in Detention. Landes (1974) analyzed (1) whether defendants received any form of pretrial release, and (2) the amount of time defendants spent in detention before release or court disposition. The only factors he found statistically associated with the probability of release were the bond amount, whether the defendant was allowed the option of fractional deposit bond, and local residence. Social and economic factors—age, employment, and income—were not significant. (Landes did not consider defendants' race.)

Goldkamp's multivariate analysis indicated that in Philadelphia in 1975, charge seriousness and prior arrests were the factors most strongly related to whether the defendant was released or not. Three other variables had weak but statistically significant associations: being white, owning a motor vehicle, and having a telephone (the last two factors presumably indirect measures of income) were all associated with a higher probability of release (Goldkamp, 1979: 172–174). (In a separate analysis, Goldkamp had found that bond amount was also strongly associated with the probability of release.)

Clarke and Saxon (1987: 14–15) formed multiple-regression models of both probability of release and length of time in pretrial detention among Durham, N.C., defendants in 1985. They found that the secured bond amount, charge seriousness, and the number of charges were all negatively associated with probability of release and positively associated with detention time. Being on probation for a previous offense and being on pretrial release in connection with an earlier pending charge were also positively associated with detention time. Local residents were more likely than nonresidents to be released, other factors being held constant, and they spent less time in detention. Even though black defendants had lower secured bonds than whites, they were less likely to be released and spent longer in detention than white defendants. Female defendants were more likely to be released and had shorter detention times than male defendants.

To summarize: All three models of bail opportunity found that bond amount and charge seriousness had a strong negative relationship to the probability of release. They also generally indicated that criminal record (including being on probation) negatively affected release. The results were mixed concerning the role of community-ties factors: Landes found that both being a local resident and being employed increased the chance of release (the latter by lowering the bond amount). Clarke and Saxon's models showed being a local resident increased the probability of release (they tested no other community-ties factors). Goldkamp's analysis showed no effect of community-ties factors (i.e., employment, marital status, weekly wages, length of current residence, whether the defendant owned his home, and whether he lived with his spouse or children) (Goldkamp et al., 1981, App. A: 191–242).

Predictability of Whether Defendant Will Be Released

Program planners concerned with improving opportunity for or reducing disparity in pretrial release usually must allocate their limited resources to facilitate the release of defendants *who would not normally be released before trial.* It is difficult to predict at the time of arrest whether a defendant will remain in detention through the normal operation of the bail system. Clarke and Saxon's logistic model of the probability of being released correctly predicted whether 90 percent of their Durham defendants would be released. But if they had simply predicted that *every* defendant would be released, they would also have been correct 90 percent of the time. The model specifically identified only 7 percent of the unreleased defendants.[32]

From a practical point of view, the best way to select defendants who need the most help in obtaining release may be to wait for 24 to 48 hours after arrest. In the normal operation of the bail system, few defendants remain unreleased for more than a day or two; thus there is a very small target group for a bail reform program. Goldkamp and Gottfredson (1985: 67–69) found that 76 percent of their Philadelphia defendants were released within 24 hours of arrest. Clarke and Saxon (1987: Tables 1, 3) found that 75 percent of their Durham defendants were released within 24 hours of arrest.

Defendants who have already been in jail a day or two have much longer mean detention times than do the entire group of defendants considered at the time of arrest. The Clarke and Saxon (1987) data on defendants in Durham, N.C., indicate[33] that while all defendants had a mean detention time of 6 days, those who remained in jail at least 24 hours had a mean of 20 days, those who remained at least 48 hours had a mean of 32 days, those who remained at least 72 hours had a mean of 38 days, and those who remained in at least 96 hours had a mean of 42 days.

Detention times vary among jurisdictions. The most favorable time after arrest to assist defendants in securing release can best be determined by examining local data. Austin et al. (1985) evaluated a pretrial release program, concentrating on defendants who had been in detention several days.

Relationship Between Pretrial Detention and Criminal Case Disposition

Researchers have noted that the longer a defendant stays in pretrial detention, the more severe the outcome of his case is likely to be (Single, 1972; Landes, 1974; Goldkamp, 1979; Goldkamp, 1980; Clarke and Kurtz, 1983). Whether or not being detained before trial actually *causes* dispositions to be more severe is a controversy that has not been resolved. One view is that being held in jail reduces the defendant's ability to contribute to his defense (ABA, 1986: § 10–1.1) and adversely affects the impression he makes on the sentencing judge, which may make his case's disposition less favorable. The opposing view is that

[32]These figures are unpublished results of Model 1, Table 7, in Clarke and Saxon, 1987. Goldkamp (1979: 174–183) developed a typology of defendants based on likelihood of remaining in detention but did not report the accuracy of its predictions.

[33]On the basis of unpublished analysis by the author.

the correlation between detention and disposition is spurious (Landes, 1974): *Other* factors, such as charge seriousness and criminal record, cause *both* pretrial detention and unfavorable disposition. Landes concluded that all of the detention time-case outcome relationships in his sample were attributable to other factors. Goldkamp (1979: 185–213) had mixed results in examining the connection between pretrial detention and case outcome. He found no relationship between detention and court disposition (dismissal, pretrial diversion, verdict) when he controlled for factors such as charge seriousness, number of charges, and criminal record, but he did find that detention was positively related to the probability of receiving an active sentence and, to a lesser extent, to the length of the active sentence. Clarke and Kurtz (1983: 502–505), in their study of defendants in twelve North Carolina counties, controlled for charge seriousness, number of charges, prior convictions, various measures of strength of evidence against the defendant, demographic characteristics of the defendant, and other factors that could affect both pretrial detention and case outcome. Holding these factors constant, they found that the longer the defendant remained in detention, the lower his probability of dismissal of charges, the higher his probability of receiving an active sentence, and the longer his expected active term.

THE RISKS INVOLVED IN PRETRIAL RELEASE: FAILURE TO APPEAR IN COURT AND NEW CRIME COMMITTED BY DEFENDANTS ON RELEASE

Rates of Failure to Appear and New Crime

Few defendants fail to appear for required court hearings, and new crimes (measured by arrests) are only infrequently committed by defendants on pretrial release. Most of those who fail to appear eventually return to court, although they create considerable delay in court processing by their delays.

Thomas (1976: 87–105) reported an overall failure-to-appear rate of 6 percent for both felony and misdemeanor defendants in 1962 in the 20 cities he studied. By 1971, when the percentage released had increased, the failure rate had increased to 9 percent for felony defendants and 10 percent for misdemeanor defendants. The failure rates varied widely among the 20 cities—for example, from 3 to 17 percent for felony defendants in 1971. Thomas found that only about 5 percent of defendants in 1971 remained lost to the court system for over eight days, and an even smaller percentage failed to appear and remained missing for at least one year. Toborg (1981: 15–18), studying eight jurisdictions in 1976–77, found an overall failure rate of 13 percent, but only 2 percent of the defendants she studied failed to appear and remained fugitives for a protracted period. Other studies have reported failure rates of 9 percent for Charlotte, N.C., in 1973 (Clarke et al., 1976), and 10 percent for Alexandria, Va., in 1983–84 (Kern and Kolmetz, 1986: 16–17).

Clarke and Saxon (1987: 18–19) determined that although 16 percent of Durham, N.C., defendants in 1985–86 failed to appear, only 2 percent remained fugitives. Those who failed to appear and eventually returned imposed a high

cost on the court by increasing their arrest-to-disposition times by an estimated 155 percent and wasting the time of court personnel and witnesses with additional court hearings. Failure to appear apparently also lessened the probability of conviction, probably because the delay discouraged prosecution witnesses from coming to court. Thus, failure to appear can be thought of as imposing a cost on the prosecution in cases where the defendant is guilty.

In Toborg's eight jurisdictions, 16 percent of the defendants were arrested and charged with new crimes committed while they were on pretrial release; the rate of new crime for individual jurisdictions ranged from 8 to 22 percent (Toborg, 1981: 19–23). Kern and Kolmetz (1986) reported a new crime rate of 5 percent for their Alexandria defendants, while Clarke and Saxon (1987) found a new crime rate of 14 percent for Durham, N.C., defendants—3 percent were rearrested for felonies and 11 percent for misdemeanors.

Failure to appear and new crime apparently are related. Perhaps defendants who commit new crimes fear apprehension if they return to court for processing of earlier charges, or they may simply be more irresponsible than other defendants. Clarke and Saxon (1987) found that about a third of the defendants who fail to appear also are rearrested for new crimes, and that about a third of those rearrested also fail to appear. Kern and Kolmetz (1986) found an even higher correlation: 72 percent of their rearrested defendants also failed to appear, and 37 percent of their defendants who failed to appear were rearrested for new crimes.

How Predictable Are Failure to Appear and New Crime While Released?

Researchers have been unable to find characteristics that uniquely distinguish defendants who fail to appear and defendants who commit new crime. Gottfredson and Gottfredson (1980: 119–120), reviewing the literature, concluded: "The results of these studies cast serious doubt on current abilities to predict with great accuracy the statistically rare events of failure to appear at trial and pretrial crime." Toborg (1981: 18) commented: "This inability to develop accurate predictors reflects the difficulty of trying to predict an event that is relatively rare and experienced by persons with diverse characteristics."

Practitioners cannot afford to ignore estimates of the risk of nonappearance and new crime. It is possible to select groups of defendants with low and high probabilities of failure and new crime, although a good deal of error is involved in the classification. But in operating a pretrial release program, it may be unwise to stake too much on risk estimates. The fact that the estimates are quite inaccurate suggests that a program based entirely on risk prediction may seriously misallocate its resources.

Attempts to Assess Risk Using Community Ties and Other Factors. Gottfredson (1974) has shown that it is possible for a program using community-ties information to categorize defendants as having high or low probabilities of nonappearance and new crime, but the categorization has a high degree of error. Gottfredson also found that community-ties variables do not

predict risk accurately. In a study of defendants arrested in Los Angeles in 1969–70, Gottfredson compared a random sample of those released on ROR on the recommendation of a Vera-type program with a random sample of those *not recommended* for ROR after screening by the program (the latter were released under special arrangement with the courts for purposes of the study). The ROR program's recommendations were based on the investigators' subjective evaluations of the defendants' risk after consideration of verified information on employment, residence, family ties, criminal record, and type of charge. The ROR-recommended group were half as likely to be unemployed as the unrecommended group and had higher weekly incomes and fewer prior convictions. But in terms of age, race, sex, and type of charge, the two groups were similar.

Gottfredson's results (Gottfredson, 1974: 294), with some additional analysis, show that the ROR-recommended group had a much lower nonappearance rate (25 percent) than the unrecommended group (52 percent). The proportions of those who failed to appear and remained fugitives, while small, were also quite different: 3 percent for the ROR-recommended group and 6 percent for the unrecommended group. The two groups also differed in the rate of rearrest for new crime: 26 percent for the ROR-recommended group and 47 per cent for the unrecommended group.

The Los Angeles ROR program, using community-ties information and subjective criteria, evidently was able to identify groups with considerable differences in risk. But its risk classifications involved a high degree of error. Of the defendants for whom ROR was not recommended—which implied a prediction that they would fail to appear or would commit new crimes if released—about half (49 percent) did not fail to appear, and 53 percent were not rearrested. The percentage of defendants correctly classified by the program investigators was virtually the same as the percentage correctly classified by simply predicting that no defendant would fail to appear and no defendant would be rearrested.[34]

Gottfredson tested the relationship between risk and community ties by forming regression models to predict nonappearance and rearrest. He found that the variables used in the Vera Institute Scale, including community-ties factors as well as type of charge and criminal record, were almost useless as predictors, individually or combined in a weighted score (Gottfredson, 1974: 293–297). In other words, neither community ties nor charge and record predicted risk well.

Clarke and Saxon (1987: 22) developed logistic models, which included age, sex, race, type of charge, number of charges, various measures of criminal record and previous failures to appear, and local residence, but no other community-ties factors, to predict failure to appear and rearrest. For these models, the percentage of variance explained was low, the sensitivity (percentage of nonappearing or rearrested defendants correctly identified) was low, and the percentage

[34]Reanalysis of Gottfredson (1974: 294) indicates that 61 percent of the defendants were correctly predicted by the Los Angeles program to fail to appear, but 59 percent could have been correctly predicted by simply predicting that no one would fail to appear. Fifty-seven percent were correctly predicted to be rearrested, but 61 percent could have been correctly predicted by predicting that no one would be rearrested.

correctly classified was no better than that which could have been obtained simply by predicting that no one would fail to appear or would be rearrested.

Kern and Kolmetz (1986) used the same type of data that Clarke and Saxon used, as well as a variety of community-ties variables, such as the defendant's marital status, number of jobs held within the last year, length of local residence, income, and drug problems. Like the Los Angeles ROR program studied by Gottfredson, Kern and Kolmetz (1986: 27) were able, by using a score developed from their models, to identify groups of defendants that had substantially different rates of nonappearance and rearrest. But their models, like the decisions of the Los Angeles program and the Clarke and Saxon models, involved as much error as simply predicting that no defendant would fail to appear or be rearrested.

Testing Preventive-Detention Criteria

Angel et al. (1971) sought to test the predictive effectiveness of the criteria used in the District of Columbia preventive detention statute. They selected a sample of 427 defendants arrested in Boston in 1968 who would have qualified for preventive detention under the District of Columbia statute if it had been in effect in that jurisdiction. To maximize the predictiveness of the statutory factors, Angel et al. formed a dangerousness scale consisting of a sum of these factors weighted according to their correlation with recidivism (defined as conviction of a new crime committed while on pretrial release). This scale, like the prediction methods discussed above, succeeded in separating defendants into two groups with very different probabilities of recidivism. Of those classified as dangerous, 41 percent became recidivists, while only 4 percent of those classified as not dangerous became recidivists. But the classifications were very inaccurate: *59 percent of those classified as dangerous in fact did not become recidivists.* The proportion correctly classified as either recidivists or nonrecidivists (88 percent) was no more accurate than that obtained by predicting that no defendant would become a recidivist (90 percent). Angel et al. also considered 102 Boston defendants who were detained and would have met the District of Columbia criteria for preventive detention. Using their predictive scale, Angel et al. estimated that if these detained defendants had been released, the total pretrial recidivism rate for all released defendants would have increased only slightly (from 8 percent to 10 percent).

Goldkamp (1983) had the opportunity to analyze ordinary pretrial detention (without a special preventive detention statute) as a predictive decision, using a "natural experiment." He studied a sample of 462 Philadelphia defendants who had not received pretrial release through the normal operation of the bail system but were ordered released by a court as a result of a lawsuit concerning conditions of confinement. To reduce the population of the Philadelphia prisons where the detainees had been held, the court ordered the release of defendants whose bond was low (i.e., for whom the required 10 percent deposit was $150 or less), on the premise that these defendants were "the safest, lowest-risk defendants in the jail, those who but for a few dollars would have been able to secure pretrial release in any event" (Goldkamp, 1983: 1564). Goldkamp

compared these 462 court-ordered releasees with defendants released through normal operation of the bail system. The nonappearance rate of the court-ordered releasees was 42 percent, compared with 12 percent for a sample of "normally" released defendants. The rearrest rate of the court-ordered releasees was 28 percent, compared with 17 percent for the "normally" released defendants. These large differences in nonappearance and rearrest rates are inconsistent with the court's assumption that the defendants it ordered released were as safe as those ordinarily released. These differences also show that the ordinary bail system, in detaining these 462 defendants, had "predictive merit" (Goldkamp, 1983: 1575). But the system's implicit positive predictions were usually wrong: 58 percent of the 462 defendants (who ordinarily would have been detained) did not fail to appear, and 72 percent were not rearrested.

The Relationship of Court Disposition Time to Nonappearance and New Crime

Common sense tells us that the longer a defendant is free on bail, the more opportunity he will have to flee or "forget" his scheduled court appearance, and the more opportunity he will have to commit a new crime if he is so inclined. The contribution of time at risk (the amount of time a released defendant's case is pending) to nonappearance and rearrest was analyzed by Clarke et al. (1976) in a study of Charlotte, N.C., defendants. Using survival-table methods, they found that "the likelihood of 'survival'—avoidance of nonappearance and rearrest—dropped an average of 5 percentage points for each two weeks [the defendants'] cases remained open." They concluded, as have a number of researchers (e.g., Angel et al., 1971: 359–362), that reducing court delay is essential to improving the bail system, and that "estimated court disposition time should be taken into account in supervising released defendants" (Clarke et al., 1976: 372).

EFFECTIVENESS OF PRETRIAL RELEASE AND STRATEGIES FOR IMPROVING IT

Some Concepts and Principles

Measuring Overall Effectiveness of Pretrial Release. In measuring the effectiveness of a bail system, one should consider both opportunity and risk. Goldkamp (1986) has developed a convenient measure: the percentage of arrested defendants who (1) are released and (2) do not fail. "Failure" may be defined as nonappearance or rearrest for a crime committed while on pretrial release. For example, if a jurisdiction releases 85 percent of its defendants and 86 per cent of released defendants do not fail to appear, its effectiveness in terms of appearance would be measured as 85% × 86% = 73%.

Opportunity and Risk, Benefits and Costs. Most criminal-justice policymakers would agree that the effects of any strategy to improve pretrial release on both opportunity and risk should be considered. For example, if the expected benefit of a strategy is lower jail costs resulting from fewer detainees, the costs of the strategy should also be considered—not only the direct outlay of funds, but also possible increased risks of failure to appear and new crime. If possible,

measures to counter increased risks should be implemented at the same time bail opportunity is expanded. Once the decision to commit resources to a strategy has been made, the resources should be allocated where they will do the most good.

Improve Existing Agencies or Create New Ones? Reformers of a system such as pretrial release often think in terms of creating a new agency to solve the problems of the system. This may indeed be the best strategy, but consideration should be given to solving problems by working with existing agencies rather than by creating new agencies. Creating new agencies is generally more expensive and more difficult to accomplish than improving existing ones. A reform may last longer if it is built into the existing machinery of criminal justice than if it is effected by a newly created agency whose continued funding is doubtful. New agencies may tend to supplant the desirable activities of existing agencies, thereby causing resentment and uncooperativeness in those agencies. Introducing new techniques and incorporating new resources in existing agencies may increase the acceptance and effectiveness of reform programs.

The Incremental Approach. The best approach to improving a system as delicate and complex as the criminal justice system may be to take successive small steps, each followed by careful evaluation to see whether the expected changes (and not unexpected, detrimental ones) are occurring. A number of small and relatively inexpensive changes can probably be made across the system that, in combination, will improve bail opportunity and risk control. Examples of such changes are given below (not all have been tested systematically).

Strategies Based on Court Disposition Time

The released defendant's probability of failing to appear or committing a new crime increases with the time his case remains pending. Therefore, reducing court delay could help to reduce nonappearance and new crime without reducing opportunity for bail. Released defendants would be removed from risk sooner, thus eliminating failures to appear and new crimes that would occur if the defendants remained at risk for a longer time. The time spent in detention and the jail population would also both be reduced. But the costs of reducing court delay, e.g., the costs of new court personnel or facilities, and the possible effects of speeding up prosecution and defense, must also be considered.[35]

Another strategy based on the contribution of court delays to bail risk would be to increase the control of released defendants as the "age" of their pending cases grows, in accordance with their growing likelihood of failure to appear. (For example, Clarke and Saxon (1987) showed that for defendants in Durham, N.C., the cumulative probability of failing to appear was 0.04 after 25 days from release, 0.08 after 45 days, 0.12 after 65 days, and 0.15 after 85 days.) Depending on the survival curve determined for a particular jurisdiction, program

[35]Reducing court delay should not be relied upon as the sole means of controlling the risks of pretrial release. Failure to appear and rearrest also occur early in the pretrial release period. Clarke and Saxon (1987: 22) found that 36 percent of defendants who eventually failed to appear had already done so within 30 days of release, and 48 percent of those who eventually were rearrested for new crimes had already (allegedly) committed those new crimes.

planners might want to tighten controls on released defendants at appropriate intervals, perhaps every 30 days, if the defendants' cases remain open. Examples of tightening controls include increasing supervision as a condition of release or raising bond amounts. The strategy of progressively tightening controls is advantageous to resource allocation. It targets for extra effort an easily identified, rapidly decreasing group of released defendants whose charges have not been disposed of by the court. Another advantage is that the "tightening" strategy probably would not result in the detention of a large number of defendants who do not need to be detained (i.e., who would not fail to appear and would not commit new crimes).

Better Communication with Released Defendants

The fact that most defendants who fail to appear eventually return to court for disposition of their charges suggests that much failure is not intentional. Researchers (e.g., Wice, 1974: 65–69) have noted that one reason for failure to appear is poor communication by the courts—inadequate explanation to the defendant of his obligation to appear in court and failure to provide notice and reminders of continuing court sessions. Improving communication with defendants would not seem to require any new agency—just redirected effort by existing court staff. I found no research on this point, but it seems possible that nonappearance could be reduced by this relatively inexpensive means.

Effectiveness of Specialized Pretrial Release Agencies in Increasing Bail Opportunity

The Vera Institute pioneered the strategy of expanding opportunity for pretrial release by creating a specialized agency to select defendants for ROR and to control risks by supervising them after release. Agencies designed on the Vera model quickly sprang up in many other parts of the country (Thomas, 1976: 20–24). By 1979, the ABA Standards recommended that every jurisdiction have a "pretrial services agency or similar facility" (ABA, 1986: § 10–1.4). How effective have such agencies been in increasing bail opportunity?

Thomas (1976: 151–154), in his review of changes in pretrial release from Vera's beginnings to 1971, noted that after the first few years of specialized agencies administering ROR and other alternatives to secured bond, judges quickly adopted these alternatives, granting them even when not recommended by the agency, or granting them in jurisdictions without specialized agencies. Thomas concluded that the specialized agencies have demonstrated the use of alternative release so effectively that they may have made themselves superfluous:

> In demonstrating the feasibility of own recognizance and educating judges in its use, the [specialized] programs have engineered changes which run much deeper. *By 1971 the use of nonfinancial releases was clearly not contingent upon the intervention of a pretrial release program.* The willingness of police agencies and the courts to grant nonfinancial releases without program intervention strongly suggests that the changes which have occurred in the use of alternative forms of release will be lasting. At the same time, however, it raises questions as to the continuing need for and role of pretrial release programs. (Thomas, 1976: 154, emphasis added.)

Toborg (1981: 31–34) compared defendants recommended for ROR by a specialized agency with similar defendants not screened by an agency, in three jurisdictions (Tucson, Ariz., Lincoln, Neb., and Beaumont-Port Arthur, Texas). She found that those investigated and recommended for ROR by the agencies were more likely to be released than the controls. Flemming et al. (1980) analyzed the effects of a bail reform program in a large northeastern city they called "Metro City" over six years (1968–74). They found almost no improvement in overall rates of ROR after introduction (in mid-1971) of a specialized ROR agency. *The Toborg and Flemming results are not necessarily contradictory.* Although being favorably screened by a specialized agency may increase defendants' chances of release (on ROR), it is possible—especially if ROR is already in frequent use—that the agency will play a "zero-sum game." While those the specialized agency serves have greater chances for ROR, those it does not serve or recommend will have poorer chances, and the net result may be little improvement in ROR.

When alternative release is already being used extensively, the introduction of a specialized pretrial release agency may simply supplant existing judicial activity with little overall improvement in bail opportunity. This apparently occurred in Charlotte, N.C., when a specialized agency was introduced after magistrates had already been authorized and encouraged to use unsecured bond. Clarke (1974) concluded that about two-thirds of the defendants released through the efforts of the new agency would have been released by magistrates on unsecured bond in the absence of the agency. For such defendants, the new agency substituted a more expensive form of release for a less expensive form, with no apparent gain in risk control. The new agency increased bail opportunity somewhat, but its resources probably would have been used more effectively if it had focused on defendants whom magistrates had turned down for unsecured bond. Also, the program might have been more effective if it had worked with magistrates rather than as a separate agency. The same improvement in bail opportunity might have been achieved at less cost.

Effectiveness of Postrelease Supervision in Controlling Risk

In recommending that every jurisdiction provide a specialized pretrial services agency, the ABA Standards urge that deemphasis of bond be accompanied by effective enforcement of nonfinancial conditions of release. The Standards recommend that this enforcement should be provided by postrelease supervision of defendants, including keeping in contact with them, reminding them of their court dates, assisting them in getting to court, and informing the court of violations of pretrial release conditions and rearrests (ABA, 1986: § 10–5.2 and Commentary).

How effective is postrelease supervision of defendants in controlling risk? Toborg (1981: 35–38) compared groups of supervised and unsupervised defendants in three jurisdictions[36] (in two of the jurisdictions, the supervised and unsupervised groups were randomly selected from the same population, and in

[36]Tucson, Ariz., Lincoln, Neb., and Beaumont-Port Arthur, Texas.

the third, the groups were comparable). She found no significant difference in nonappearance rates, which suggests that postrelease supervision had no effect.

Clarke et al. (1976) used a nonexperimental approach to assess the effectiveness of supervision by a specialized pretrial release agency in Charlotte, N.C. Two groups of defendants were compared: (1) defendants selected for alternative release and supervised by the agency, and (2) defendants selected for alternative release in a similar fashion by magistrates but not supervised after release. Clarke et al. controlled for prior arrests and time at risk (i.e., the amount of time the defendant remained on bail with charges still pending). They found that whether low-risk defendants (those with no more than one prior arrest) were supervised after release did not significantly affect their "survival" rates (i.e., their probabilities of avoiding both nonappearance and new crime) at various points in time. But high-risk defendants (those with two or more prior arrests) who were supervised after release had significantly higher survival rates than high-risk defendants who were not supervised. For example, 70 days after release, the supervised high-risk defendants' survival rate was 82 percent, whereas that of unsupervised high-risk defendants was 55 percent. These results suggest that postrelease supervision was effective for defendants with substantial criminal records, who constituted about one-third of all released defendants studied, but not for low-risk defendants. Using postrelease supervision on the low-risk two-thirds of the Charlotte defendants was analogous to prescribing expensive medicine for patients who are not sick enough to need it.

A Focused Supervision Strategy

Austin et al. (1985) evaluated a program that might be described as a "second-generation" Vera-type agency. From 1980 to 1983, the National Institute of Justice tested a highly focused program of postrelease supervision in three jurisdictions.[37] This program did not attempt to reach all defendants immediately after arrest, but targeted only those arrested for felonies who had already failed to receive either bond release or ROR through the normal operation of the bail system. The 3,232 defendants considered for the program had already spent an average of nine days in detention; they were screened by the program staff, who then made recommendations to the court regarding release under supervision. In each case, a judge made the final release decision. About half of the interviewed defendants were selected for release. They were randomly assigned to receive either (1) supervision consisting of telephone and face-to-face contacts to keep track of them and remind them of court appearances, or (2) supervision plus other services such as vocational training or substance-abuse counseling. The median length of supervision was 48 days.

The supervised defendants in both groups had a nonappearance rate of 14 percent, a fugitive rate (rate of nonappearance without return to court) of 2 to 8 percent, and a rearrest rate of 12 percent. All risk rates were generally lower than those for defendants released on ROR and bond in normal court opera-

[37]The three jurisdictions were Dade County, Fla., Milwaukee County, Wisc., and Multnomah County, Ore.

tions. The evaluation showed no difference in failure rates between the supervision-only and supervision-plus-service groups.

The evaluation by Austin et al. indicates that many defendants not released during initial court processing, who would ordinarily spend long periods in jail and contribute heavily to the jail population, can be released under supervision without exceeding the usual level of risk. It should be emphasized that the focused supervision program involved not only screening by special staff but also selection by judges.

Effectiveness of Appearance Bond

Despite the greatly increased use of alternative release since 1960, secured appearance bond continues to be frequently used, and professional bail bondsmen continue to play a major role (Toborg et al., 1986: 1; Goldkamp and Gottfredson, 1985: 22). Research findings about the effectiveness of appearance bond and how it could be improved are summarized below:

1. Do Bond and Bondsmen Deter Failure to Appear?

Deterrence resulting from the threat of financial loss. One view is that the threat of bond forfeiture motivates defendants to appear in court. But the draftsmen of the ABA Standards (which take the position that nonmonetary conditions of pretrial release should be used in most cases) have expressed an opposing view:

> Monetary conditions are singularly ineffective in achieving even their legitimate objectives. The primary deterrent against abscondence [nonappearance] and recidivism is fear of recapture and increased punishment. It is difficult to imagine a defendant ready to take these risks but nonetheless deterred by the risk of financial loss. (ABA, 1986: commentary to § 10–1.3)

The best way to learn whether the threat of forfeiture deters nonappearance would be to conduct a controlled study in which comparable groups of defendants are released with different amounts of bond, and then compare their nonappearance rates. To my knowledge, no such research has been done. The little research that has been done on this question has dealt with defendants released through the normal operation of the pretrial release system.

Landes (1974), in his study of 858 indigent defendants in New York in 1971, concluded that bond did deter nonappearance—not when the defendant deposited the bond amount in cash, but only when a bondsman was involved. Landes' findings are suspect because very few (apparently only about 30) of the indigent defendants had bail bond secured by a bondsman. Being poor, most were either released on alternatives to secured bond or not released at all.

Myers (1981) studied a group of felony defendants in New York in 1971 (a different sample from that of Landes). Controlling for a variety of factors such as charge, sex, age, race, and likelihood of conviction, he found that the probability of failure to appear decreased by about 5 percentage points for each additional thousand dollars of bond. But paradoxically, his analysis also indicated that being released on ROR (with a zero bond) was associated with a *reduced* chance

of nonappearance. Other things being equal, a defendant's chance of nonappearance was 5 percentage points less if he were on ROR than if he were released on bond. Myers offered no explanation for this difference. Perhaps it can be attributed to the deliberate selection of lower-risk defendants to receive ROR, on the basis of criteria that Myers did not control for in his multivariate model, or perhaps it was due to postrelease supervision of the ROR defendants.

Clarke and Saxon (1987: 21–22) examined the relationship between the secured bond amount and "survival time"—the time during which the defendant was likely to remain free (with charges still pending) without failing to appear. They found, controlling for other factors, that survival time increased (i.e., failure risk decreased) as the bond amount increased, but only by 9 percent for each additional thousand dollars of secured bond. The relationship was only marginally significant statistically.[38] They concluded that secured bond was at best a weak deterrent to nonappearance.

In studies such as those discussed above, one must consider the possibility that the effect of bond on nonappearance is camouflaged. Judicial officers may to some extent be successful in setting bond in proportion to risk of nonappearance, thus partly erasing differences among defendants. But a better explanation for the weakness of the relationship of bond to failure to appear may be the laxity of enforcement of forfeiture.

If a bondsman is involved as intermediary, isn't the effect of bond on the defendant lost? The authors of the ABA Standards have said that

> the risk of such loss [forfeiture] is usually illusory in any event, since it is ordinarily the surety [bondsman] rather than the defendant who has taken the financial risk, and the chance of the surety ever recovering from the absent, often judgment-proof defendant is minimal. (ABA, 1986, commentary to § 10- 1.3)

The opposing view is that bondsmen are motivated by the threat of financial loss and have extraordinary legal powers to bring the defendant back to court if he flees. But holders of each view would probably agree that where a bondsman is involved, the main issue for research is the effect of bond on the *bondsman*, not on the defendant.

Is the threat of forfeiture real? Critics of bondsmen, going back to Beeley (1927), have said that bondsmen face very little threat of forfeiture when their clients fail to appear. Research still strongly supports this contention. Toborg et al. (1986: 21–22), on the basis of interviews with bondsmen in six jurisdictions,[39] estimated that forfeitures amounted to 1 to 2 percent of all bond amounts secured by bondsmen. Since nonappearance rates are considerably more than that—in the neighborhood of 10 to 15 percent—it would appear that most failures to appear do not result in forfeiture of bond. In Durham, N.C., where bondsmen were allowed to charge a nonreturnable fee of 15 percent of the bond amount, 19 percent of bondsmen's clients failed to appear, yet bondsmen were ordered (by court judgment) to forfeit bond, partially or fully, in only 13

[38]The relationship was significant at the 0.10 level.

[39]Fairfax, Va., Orlando, Fla., Indianapolis, Memphis, San Jose, and Oklahoma City.

percent of the cases, which amounted to only 1 percent of total bonds secured. Wice's study (1974: 60-61) had similar results. The main reason for the lenity of forfeiture proceedings in Durham was that most bonded defendants who failed to appear eventually returned to court, and because they did, the court remitted their forfeitures in full or in part. However, such failures meant a considerable cost for the court and the prosecution because they caused great delay and reduced the defendant's probability of conviction. Thus, Durham's forfeiture policy did not support what is in theory the only function of bond: making defendants appear in court when they are required to appear.[40]

2. Professional Bondsmen: Pro and Con.

Supporters of the institution of the professional bail bondsman—primarily judges and lawyers who do not publish their views—credit the bondsman with an important deterrent function. They believe that the bondsman is strongly motivated by the threat of bond forfeiture to control or recapture the defendant, and they put much stock in his formidable legal powers. Those powers derive from the contract with the defendant and from court decisions, reinforced by statutes in most states. The bondsman may "surrender" the defendant at any time (i.e., arrest him and turn him in to the court), thereby discharging his liability on the bond (although he must return his fee if he does so before the defendant's case is disposed of). If the defendant flees, the bondsman may pursue him anywhere in the country, personally or through agents (which may be policemen he deputizes or professional "bounty hunters"), and arrest him anytime, anywhere, without a warrant, probable cause, or certain other restraints that apply to police when they arrest criminal suspects.[41]

Opponents of bondsmen object to defendants with little or no income having to pay a nonreturnable bondsman's fee to obtain release. They believe that bondsmen, as intermediaries, nullify whatever deterrent effect the threat of forfeiture might have on the defendant. They also object to the court, a public agency, delegating to private businessmen its functions of releasing defendants and assuring their presence in court. The drafters of the ABA Standards, which call for abolition of compensated sureties, commented:

> One would be hard put to think of a function less appropriately delegated to private persons than the capture of fleeing defendants. Indeed, the central evil of the compensated surety system is that it generally delegates public tasks to largely unregulated private individuals. Thus, in form it is the judge who determines whether a defendant should be released to trial and, if so, on what conditions, but in practice, the private surety can veto any decision the judge makes. (ABA, 1986: commentary to § 10–5.5)

Critics of bondsmen cite instances of abuse of their broad powers to apprehend fugitives (Wice, 1974: 60–61). They also charge that bondsmen are ineffective in bringing nonappearing defendants back to court. Thomas (1976: 255–256)

[40]Toborg et al. (1986: 21) indicate other reasons why courts may remit forfeitures: If the defendant is incarcerated in another jurisdiction, forfeiture is usually not required, and if the bondsman expended considerable effort to find the defendant, though unsuccessfully, the court may remit part of the forfeiture.

[41]8 American Jurisprudence 2d, Bail and Recognizance §§ 119–124 (1980)

cites a 1972 Los Angeles study of more than 1,000 cases of bonded defendants who failed to appear, showing that bondsmen took no action whatever to return the defendant to court in 89 percent of the cases. Clarke and Saxon (1987: 29–30) found that about one-third of defendants in Durham, N.C., who failed to appear were brought back to court by police because they were rearrested for new crimes. Of those not rearrested for new crimes, the percentage who never returned to court was nearly twice as high for defendants with bondsmen (26 percent) as it was for other defendants (14 percent). The bondsmen's clients may have been inherently riskier than other released defendants, but the bondsmen did not appear to be doing a good job of countering these risks or recapturing their nonappearing clients.

What about the profits of bondsmen? Clarke and Saxon (1987: 31–32) found that although 19 percent of Durham bondsmen's clients failed to appear, only 1 percent of their bonds were ordered forfeited. Bond money "turns over" an average of four times per year, and a bondsman's fee is 15 percent, so bondsmen may earn about 50 percent a year on their capital, minus office expenses. Toborg et al. (1986: 21–23), surveying six jurisdictions, also estimated a forfeiture rate of 1 to 2 percent, and Toborg's earlier study (1981) of eight jurisdictions reported a nonappearance rate of 14 percent for defendants released on financial conditions (including unsecured as well as secured bond). She found no reliable data concerning bondsmen's earnings (Toborg et al., 1986: 21–23).

3. *How Can the Deterrent Effect of Bond Be Improved?*

If the deterrent effect of bond on nonappearance can be improved, the improvement will improve opportunity for release as well as risk control. With a stronger deterrent, bonds can be set lower and more defendants can be released (or released sooner) at a tolerable level of risk. This approach would also tend to reduce disparity in opportunity with regard to race and income. Because this approach would probably release some defendants with higher-than-average risks, it should be tried incrementally and cautiously, with periodic evaluation of its results.

Progressive "discount" of forfeiture. One method of increasing enforcement of forfeiture would be to adopt an explicit policy of discounts of forfeitures, the amount of the discount varying inversely with the time it takes the nonappearing defendant to return to court. A system of forfeiture discounts would take into account the cost of court delay caused by failure to appear and would offer incentives for mitigation of this cost. I found no published evaluation of a forfeiture discount system.

Deposit bond. Deposit bond has an advantage over bond secured by a bondsman: Rather than paying a nonreturnable fee to the bondsman, the defendant has the incentive of getting his deposit back if he returns to court as required (perhaps with a small amount deducted for court costs). If total bonds were reduced to the level of what the bondsman's fee would have been—perhaps 10 to 15 percent of bond amounts at their current level—then defendants who could afford to pay bondsmen could also afford to post cash bond. The court

would retain some of the defendant's money, which would make it easier to enforce forfeiture and insure that the defendant would face at least some financial loss as a penalty for nonappearance.

Fractional deposit bond—release secured by deposit of a fraction of the total bond amount—has an advantage over full cash deposit: The defendant not only has the incentive of receiving his deposit back if he returns to court, he also has the disincentive of forfeiting the remainder of the bond if he fails to appear. The drawback is that deposit bond systems eliminate the bondsman and whatever risk control the bondsman might provide. That control could be provided by court staff assigned to supervise or maintain contact with bonded defendants whose risk is highest. A court cost (preferably considerably less than the amount deposited) could be charged to defray some of the cost of supervising those released in this way.[42] The fraction of the bond required for deposit could be set no higher than the percentage the defendant would otherwise pay a bondsman; this would mean that defendants who could afford to pay a bondsman could also afford the fractional deposit.

Henry (1980) reviewed the effects of fractional deposit bond in Kentucky, Illinois, Philadelphia, Detroit, and Washington, D.C. His conclusions were as follows:

- When a jurisdiction implements a *defendant option* percentage deposit system, bail bonding for profit will cease to exist.
- When a jurisdiction implements a *judicial or court option* percentage deposit system (assuming surety bond remains as an option), the percentage deposit option will rarely be used by the judiciary.
- A decrease in the jail population *may* occur as a result of the implementation of a percentage deposit system.
- Insufficient data currently exist to determine if the implementation of a percentage deposit system will have any effect on a jurisdiction's rearrest rate (rate of rearrest for crimes committed while on pretrial relaese).
- Failure-to-appear rates will not increase with the implementation of a percentage deposit system.

Recent research suggests that if a fractional deposit system is to be effective, it should be accompanied by a comprehensive bond-setting policy. The program analyzed by Flemming et al. (1980) in "Metro City" from 1968 through 1974 combined a Vera-type ROR agency with fractional deposit (10 percent) bond at the defendant's option. Defendants overwhelmingly preferred to deposit 10 percent with the court rather than pay the bondsman's fee. The fractional deposit system virtually supplanted bondsmen. But judges—apparently because they were dissatisfied with the program—raised total bond amounts by as much as 400 percent after the program began, and the proportion of all defendants released on bond declined considerably. Although the ROR agency evidently released some who could no longer afford bond, the program resulted in almost

[42]The constitutionality of imposing such a court cost was upheld in Schilb v. Keubel, 404 U.S. 357 (1971).

no increase in the overall release rate. (Flemming et al. did not consider whether fractional deposit bond affected failure rates.)[43]

The Experiment with Pretrial Release Guidelines in Philadelphia

Goldkamp and Gottfredson (1985) planned and evaluated an experiment with guidelines for setting conditions of pretrial release, including secured bond and ROR, in Philadelphia in 1981–82. A judicial committee, assisted by researchers, developed the guidelines after "informed debate." The guidelines, like some guidelines for sentencing (von Hirsch et al., 1987), took the form of a two-dimensional matrix involving both the severity of the charge and the estimated probability of failure (nonappearance or rearrest or both). Departures from the guidelines were allowed in unusual cases. Judges were randomly selected to use either the guidelines or the usual methods of setting bond, and defendants were randomly assigned to the two groups of judges to insure comparability.

Comparison of the guidelines and nonguidelines defendants revealed surprising similarities. The percentage of defendants detained (for more than one day) was the same in both groups (27 percent). The rates of nonappearance (about 12 percent) and rearrest (about 10 percent) were almost the same for both groups. The percentage released on ROR (44 percent) was the same for both groups, and the median bond amounts were not markedly different ($1,500 for the guidelines group and $2,000 for the nonguidelines group). Charge severity and risk assessment "appeared to play only a slightly greater role in the decisions of the guidelines judges [than in those of nonguidelines judges]" (Goldkamp and Gottfredson, 1985: 199).

The main difference between the guidelines and nonguidelines judges' bail decisions appears to have been in consistency. Sixty-five percent of the guidelines judges' secured bond decisions conformed to the guidelines, but so did 38 percent of the decisions of the nonguidelines judges. "The guidelines had a major impact on improving the equity of bail decisions . . . under the guidelines framework, the bail decisions of the experimental [guidelines] judges were substantially less variable, markedly more consistent [than those of the nonguidelines judges]." The researchers also concluded that guidelines are an analytic tool that can be used to identify and control risks (Goldkamp and Gottfredson, 1985: 198–199).

Improving the Deterrence of Criminal Penalties for Failure to Appear

There is disagreement about whether prosecution for the crime of failure to appear is effective in controlling that risk, and I have found no research evaluating this strategy. The ABA recommends:

> Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense. Each jurisdiction should establish an adequate

[43]Thomas (1976: 189–190) also found that bond amounts increased in Chicago, Champaign-Urbana, and Peoria, Ill., when fractional deposit bond was introduced. However, the increases were not enough to reduce rates of pretrial release.

> apprehension unit designed to apprehend defendants who have failed to appear or who have violated conditions of their release. (ABA, 1986: § 10–1.4)

This position is consistent with the ABA view that the bail system, to control risk, should rely less on bond and more on postrelease supervision of defendants. The ABA draftsmen assert that enforcement of a criminal statute prohibiting failure to appear is "essential to the success of any pretrial release program" (ABA, 1986: § 10–1.4, Commentary).

Wice (1974: 70) disagrees with the ABA view. He asserts that although it is a crime to fail to appear in nearly every jurisdiction, enforcement of these criminal statutes will not help to reduce failure. Wice's argument is that prosecution for failure to appear will be subsumed in the more important prosecution regarding the defendant's original charge or charges, and that the sentence for nonappearance—if any—will simply run concurrently with the principal sentence. But many defendants are not convicted, or if convicted, they receive probation. If they willfully fail to appear and do not have bonds, should they not receive some sanction?

I have found very little in the literature on pretrial release concerning the enforcement of criminal statutes prohibiting failure to appear. Wice (1974: 68–70) suggests that there is little follow-up of defendants who fail to appear. Clarke and Saxon (1987: 36–37) found a 16 percent nonappearance rate in Durham, N.C., but no instance of prosecution for the crime of willful failure to appear.

In a jurisdiction where there is virtually no prosecution of defendants for failing to appear, a little deterrence from this source might go a long way toward reducing nonappearance. Prosecutors could announce a policy that willful failure would no longer be tolerated. They could then select for prosecution a small percentage of nonappearance cases, perhaps those where the defendant had serious charges or where there is evidence from which willfulness can be inferred.

To be a crime, failure to appear must be willful—i.e., intentional and without legal excuse. One reason for the reluctance of prosecutors to prosecute defendants for failing to appear—apart from the tendency to merge the nonappearance with the defendant's original charge—is the necessity to prove willfulness beyond a reasonable doubt. Direct evidence that the defendant intended not to appear is difficult to obtain, but circumstantial evidence may be acceptable. Federal court decisions illustrate the kinds of evidence that might be used. A federal statute[44] makes it a crime to knowingly fail to appear, and federal courts have held that this failure must be willful.[45] One U.S. Court of Appeals has held that a deliberate decision to disobey one's obligation to appear in court cannot be found beyond a reasonable doubt merely from the facts that the

[44]18 U.S. Code Ann. § 3146 (1985).

[45]United States v. McGill, 604 F.2d 1252 (9th Cir. 1979, *cert. denied*, 444 U.S. 1035.

defendant had notice of his obligation to appear and failed to appear.[46] Circumstantial evidence may, however, be considered in determining willfulness.[47] Such evidence would include the defendant's failure to appear for his preliminary hearing, the defendant's changing his residence without notifying the court, or the defendant's counsel being unable to contact him before trial, despite diligent efforts.[48] Also, past violations of pretrial release conditions are admissible and relevant in federal courts to prove willfulness of failure to appear.[49]

SUMMARY AND CONCLUSIONS

Purposes of pretrial release. Pretrial release (bail) is used to avoid jailing arrested defendants pending court disposition and to provide reasonable assurance that they will return to court when required, without posing unacceptable risk to the public. Opportunity for pretrial release and the risks of nonappearance and new crime are linked. Increasing opportunity for release increases risk and the need to control it, and conversely, if risk control can be improved, opportunity can be increased. Avoiding discrimination against low-income defendants with respect to bail opportunity is another important concern, although it has not become recognized as a principle of constitutional law.

Law and policy. Scholars disagree over whether the Constitution, whch forbids "excessive bail," creates a right to pretrial release. In any event, the right would be to have bail conditions set, not to obtain actual release. Detaining the defendant by setting bond beyond his means for practical purposes is beyond legal attack. Typical laws provide for setting bail conditions shortly after arrest. Laws in federal and many state jurisdictions express a preference for alternatives to secured bond (such as release on recognizance (ROR) and unsecured bond) and authorize secured bond only if other conditions are inadequate. The Constitution requires that, if a bond is set, an individualized determination must be based not only on the severity of the charge, but also on such factors as the weight of the evidence, the defendant's character, and his or her financial ability.

Liberalizing bail opportunity and controlling risk. Bail opportunity has expanded steadily since 1960, when the Vera Institute established the first specialized agency to screen and select defendants for ROR and supervise them after release. About 50 to 60 percent of all arrested defendants received some kind of pretrial release in the early 1960s; the proportion had increased to about 80 or 90 percent by the late 1970s. The chief motivation for the liberalizing movement has been the desire to redress discrimination against low-income defendants.

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[46]United States v. Wilson, 631 F.2d 118 (9th Cir. 1980)

[47]United States v. Smith, 548 F.2d 545 (5th Cir. 1977), *cert. denied*, 431 U.S. 959.

[48]United States v. Phillips, 625 F.2d 543 (5th Cir. 1980); Gant v. United States, 506 F.2d 518 (8th Cir. 1974), *cert. denied*, 420 U.S. 1005.

[49]United States v. Wetzel, 514 F.2d 175 (8th Cir. 1975), *cert. denied*, 423 U.S. 844.

Concern about control of bail risk has grown as opportunity for bail has improved. The Federal Bail Reform Act of 1984 retains the preference for alternatives to secured bond established by earlier legislation, but it puts new emphasis on protecting community safety and adds restrictions that federal judicial officers can put on pretrial liberty. The 1984 Act also authorizes preventive detention of defendants upon proof, in a hearing, that the defendant may be expected to flee, obstruct justice, or intimidate or injure witnesses or jurors, and that no conditions of pretrial release will reasonably assure the defendant's appearance and the community's safety. The U.S. Supreme Court, in upholding the constitutionality of the 1984 Act, stressed that it applies only to defendants charged with extremely serious offenses and provides strict procedural safeguards.

How bail decisions are made. Bail conditions are usually set by a magistrate or lower-court judge, often at night and under less-than-ideal conditions. The bail conditions set are seldom changed, primarily because most defendants obtain release on these conditions. While many jurisdictions require the judicial officer to consider a variety of information, *if such information is available,* the information is not consistently provided. Most pretrial release decisions are based on little more than charge severity and criminal record. Judicial officers vary greatly in bail decisionmaking; concern about inconsistent practice has led to experimentation with judicially developed bail guidelines in Philadelphia.

Secured bond is effective in keeping some defendants in jail. Research indicates that the amount of secured bond (if any) is the main determinant of whether a defendant is released and how long he spends in pretrial detention. The bond amount apparently is set mainly on the basis of charge and criminal record, with little or no consideration of the defendant's community ties. Some studies indicate that community ties, such as whether the defendant has a local residence, lives with his family, and is employed, favorably affect his bail opportunity; others suggest that community ties do not affect bail opportunity even when the information is provided to judicial officers.

Which defendants need assistance in obtaining pretrial release? Researchers agree that it is difficult to predict at the time of arrest which arrested defendants will not receive pretrial release through the normal operation of the court system. Since most defendants who are released receive their release within 24 hours of arrest, the best strategy for selecting defendants who most need help in obtaining release may be to focus on those who have been in detention for more than 24 hours. One analysis indicates that defendants who remain in detention for at least 24 hours stay there more than three times as long, on average, as the entire population of arrested defendants.

Measuring and predicting bail risk. As bail opportunity increased in the 1960s and 1970s, so did bail risk. Research suggests that nonappearance rates (percentages of defendants who failed to appear in court as required) increased from around 5 percent in the early 1960s to 10 to 15 percent in the 1980s. Pretrial rearrest rates (percentages of defendants arrested for new crimes committed while on bail) in the late 1970s and early 1980s ranged from 5 percent to 16

percent in various studies. Researchers agree that almost all defendants who fail to appear return to court eventually, but one study indicates that failure to appear nevertheless greatly delays the court and probably weakens the prosecution.

While a number of studies show that groups of defendants with low and high risk levels can be identified, nonappearance and pretrial rearrest prediction is quite inaccurate. In all the studies reviewed, prediction models were unable to improve on the accuracy of simply predicting that *no* defendant would fail to appear or be rearrested. Community-ties information is apparently no better as a predictor than charge severity and criminal record.

The consequences of inaccurate risk prediction. A study of legislative criteria for preventive detention illustrates the consequences of the errors inherent in a strategy based on predicting risk. The researchers selected a sample of released Boston defendants who would have been classified as "dangerous," and therefore could have been jailed under a 1971 federal statute authorizing preventive detention in the District of Columbia. The majority (59 percent) of these "dangerous" defendants in fact did not become recidivists while on bail. The proportion correctly classified as either recidivists or nonrecidivists (88 percent) by the statutory criteria was no higher than the proportion correctly classified by predicting that no defendant would become a recidivist (90 percent). In the absence of an explicit preventive detention statute, bond is often set higher than the defendant can afford for the purpose of preventing him from failing to appear or committing new crimes. A study of "ordinary" detention in Philadelphia indicated that most detained defendants who were released through an unexpected court order did appear and were not rearrested for pretrial crime.

Making the pretrial release system more effective. Increasing jail populations have caused many jurisdictions to seek to improve bail opportunity while keeping bail risk at a tolerable level. The best approach may be to combine a number of incremental, relatively inexpensive strategies, with cautious evaluation of each step, rather than to attempt sweeping changes.

Controlling bail risk by reducing court delay. Some research shows that the released defendant's chance of failing to appear or of committing a new crime increases with the time his case remains open. A number of authorities recommend reducing court delay to help control bail risk. Reducing court delay will also reduce detention time and jail populations. But it should not be the sole means of controlling risk, because many defendants fail to appear, and many commit new crimes soon after arrest.

Reducing risk by progressively tightening controls. Because the cumulative probability of failing to appear or committing a new crime increases with the time a released defendant's case remains open, it may be advantageous to increase risk control by increasing the bond amount or the supervision of the defendant at appropriate time intervals. This would focus court resources on an easily identified and rapidly decreasing group of released defendants.

More effectively notifying released defendants of their obligations. Several studies have revealed poor communication by the court regarding the defendants' obligation to appear in court. Improving this communication may be an inexpensive way to reduce nonappearance.

Effectiveness of specialized pretrial release agencies. Specialized agencies that screen defendants immediately after arrest for alternatives to secured bond and that supervise them after release multiplied rapidly after the pioneering experiment of the Vera Institute in 1960. These agencies have effectively demonstrated the use of alternative forms of release. Several studies have found that defendants released on ROR and unsecured bond have lower nonappearance and pretrial rearrest rates than those released on bond, probably because those selected for alternative forms of release are inherently less risky. The American Bar Association (ABA) recommends that every jurisdiction have a specialized pretrial release agency, although several researchers agree that alternatives to secured bond are now so widely used and accepted by judges that specialized agencies may have outgrown their usefulness and may in fact largely duplicate work already done adequately by existing court staff.

Does postrelease supervision reduce risk? The ABA, which recommends deemphasizing bond as a means of release and risk control, urges energetic enforcement of nonfinancial release conditions—for example, by keeping in contact with defendants, reminding them of court dates, assisting them in getting to court, and informing the court of any violations of conditions or rearrest. One study of three jurisdictions suggested that such supervision had no effect on risk, while another suggested that postrelease supervision did reduce the risk of nonappearance and new crime over time, but only for the high-risk defendants (those with criminal records) who constituted one-third of the total released.

A "focused" supervision strategy. In three cities, a variation on the original Vera Institute concept of a specialized pretrial release agency was found to have favorable results. Rather than attempting to reach all defendants immediately after arrest, the program concentrated on the felony defendants who remained in detention several days because they failed to receive release through normal court operations. Half of these defendants were selected for supervised release by a combination of screening by professional staff and selection by judges. Those released in this fashion had nonappearance and rearrest rates somewhat lower than those of defendants released through normal court operations.

Effectiveness of bond. Research suggests that bond is at best a weak deterrent to nonappearance. One reason for bond's weak effect may be that court enforcement of forfeiture is very lenient, especially where professional bondsmen are involved. Studies in seven jurisdictions indicate that nonappearance rates for bondsmen's clients range from 10 to 20 percent, yet bondsmen forfeit only 1 to 2 percent of their total bonds. Perhaps the main reason for the courts' forgiveness is that most failing defendants eventually reappear in court. The lenient policy toward forfeiture seems to ignore the high cost of nonappearance in terms of increased court delay and weakened prosecution.

How can bond be more effective in controlling risk? One approach would be stricter enforcement of forfeiture. Progressive discounts could be offered to encourage nonappearing defendants to return to court quickly. In an atmosphere of virtual nonenforcement of forfeiture, even a small increase in enforcement could reduce nonappearance substantially. Another approach would be to make greater use of bond secured by cash deposit, either by setting bonds much lower and requiring full deposit or by authorizing a fractional deposit of perhaps 10 or 15 percent of the bond amount. Cash deposit gives the defendant an incentive to return to court for a refund (unlike bondsmen's fees, which are nonreturnable) and facilitates the court's collection of at least part of the bond amount to enforce the obligation to appear. A small amount could be deducted from bond deposits to cover some of the court's cost for processing the bond and for supervision of those few defendants who may require it.

The professional bondsman. Professional bondsmen continue to play a major role in pretrial release. Supporters of bondsmen argue that bondsmen have strong financial motives and extraordinary legal powers to pursue and recapture their fleeing clients. Opponents (such as the ABA, which recommends abolishing professional bondsmen) have several arguments against the institution of the bondsman: (1) the bondsman system discriminates against defendants who are unable to pay bondsmen's fees; (2) courts should not delegate their important functions of releasing and assuring the release of defendants to largely unregulated private businessmen; and (3) bondsmen abuse their broad powers of recapture. Research indicates that bondsmen are not especially effective in bringing nonappearing defendants back to court. A study in one jurisdiction where nonappearance was 19 percent for defendants with bondsmen indicates that with fees of 15 percent, forfeitures amounting to 1 percent, and bond money turning over about four times a year, bondsmen could earn 50 percent a year on their capital, minus office expenses.

Guidelines for pretrial release. An experiment with guidelines for the setting of bail conditions (including ROR and bond) was recently conducted in Philadelphia. Based on analysis showing that judges differed widely in their bail decisions, the guidelines were developed by a judges' committee assisted by researchers. Departures from the guidelines were allowed in unusual cases. A controlled evaluation with random selection of judges and cases showed that the guidelines clearly increased the consistency of bail decisions. The judges subject to the guidelines conformed to guideline recommendations in 65 percent of their cases, compared with 38 percent for judges not subject to the guidelines. There were no differences in percentage released, percentage receiving ROR, nonappearance, and rearrest between defendants assigned to guidelines judges and defendants assigned to nonguidelines judges.

Prosecution for willful failure to appear. While most jurisdictions make willful failure to appear (i.e., intentional failure to appear, without lawful excuse) a crime, defendants are rarely prosecuted for the offense. The ABA recommends vigorous enforcement of these laws, a position consistent with its policy of reducing reliance on bond and bond forfeiture. Where there is virtually no prosecution for the offense of nonappearance, even a small increase in

enforcement might reduce nonappearance substantially. The prosecution must prove that the failure to appear was willful. A review of federal cases suggests types of circumstantial evidence that could be used to prove willfulness.

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