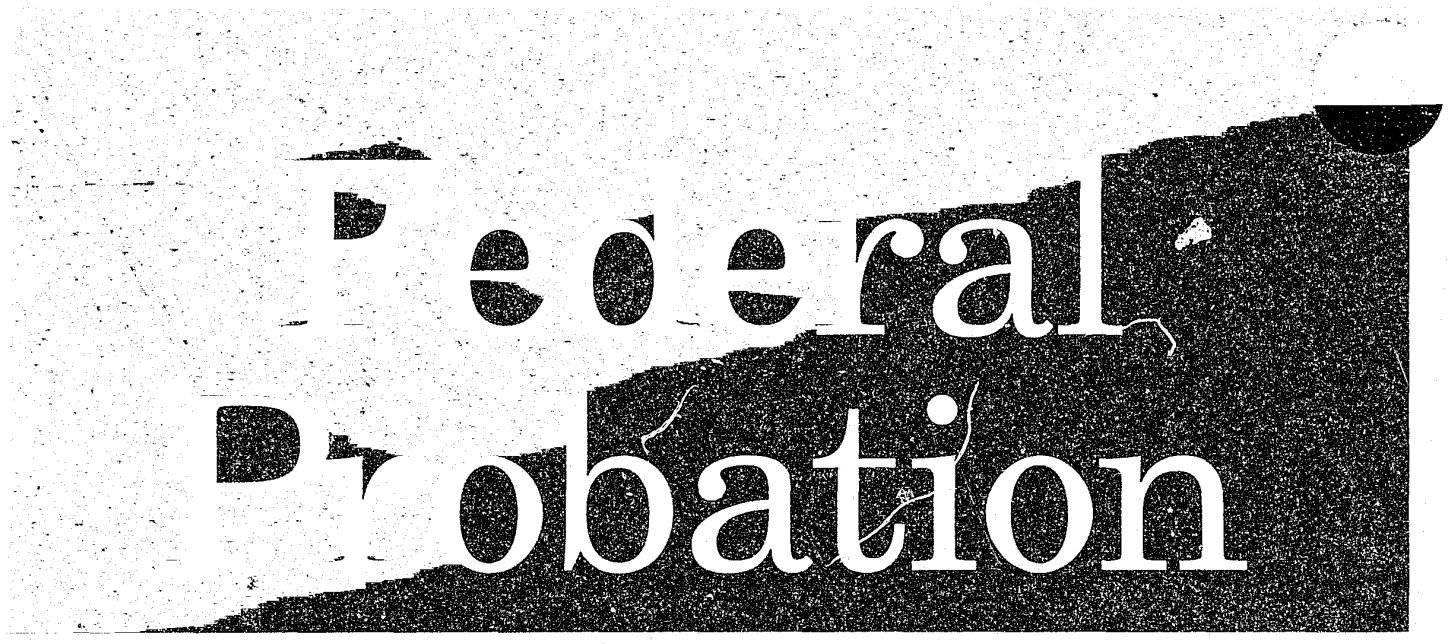

Pretrial Release and Detention and Pretrial Services

Pretrial Detention in the Criminal Justice Process ..... *Vincent L. Broderick*

Bail Bondsmen and the Federal Courts ..... *James G. Carr*

Pretrial Services—A Magistrate Judge's Perspective ..... *Joel B. Rosen*

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Pretrial Services Federal-Style: Four Commentaries ..... *John W. Byrd*
Thomas A. Henry
Marion Gutmann
George F. Moriarty, Jr.

Looking at the Law—The Determination of Dangerousness ..... *David N. Adair, Jr.*

MARCH 1993

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LVII MARCH 1993 NUMBER 1

This Issue in Brief

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.

—United States v. Salerno, 107 S.Ct. 2095 (1987)

While it is impossible to predict future offender population levels with absolute precision, current Federal law enforcement policies and legislative initiatives lead everyone to agree that the number of new Federal offenders will continue to increase at a substantial rate. It is clear that the detention crisis will only become more severe if no action is taken to relieve the current situation. . . . If adequate bedspace to detain thousands of potentially dangerous prisoners is not acquired, public safety and the Federal Criminal Justice System itself could be threatened.

—Federal Detention Plan 1993-97 (United States Department of Justice, December 1992)

This is a special edition of *Federal Probation* devoted to the topics of pretrial detention and release and pretrial services. The two quotations above make an eloquent case for the timeliness and relevance of such an edition. The notion of depriving individuals of their liberty before they are proven guilty is one that deserves constant consideration and discussion by members of a free society. We hope this issue will provoke both.

The issue opens with a "call to arms" to persons actively involved in the criminal justice process—be they judges, probation or pretrial services officers, defense counsel, prosecutors, or prison officials—to use their knowledge and experience to foster effective approaches to the Nation's crime problem. Decrying what he calls a "Draconian" approach to alleviating crime, the Honorable Vincent L. Broderick, U.S. district judge, Southern District of New York, points out the folly in downplaying community corrections, fostering more prison construction, mandating longer prison terms, and enhancing the role of the criminal prosecutor while denigrating the role of the judiciary. In his article, **"Pretrial Detention in the Criminal Justice Process,"** he focuses on accelerating detention rates as a prime example of "one troublesome manifestation of the Draconian approach."

What can bail bondsmen do for defendants that the courts cannot? Absolutely nothing, contends the Honorable James G. Carr, U.S. magistrate judge, Northern District of Ohio, in his article, **"Bail Bondsmen and the Federal Courts."** Writing on the theme "corporate surety bonds fulfill no function and provide no service that cannot otherwise be accomplished within the framework of the Bail Reform Act, Judge Carr explains why releasing defendants on nonfinancial conditions imposed by the court is far preferable to involving bail bondsmen in the release process. He gives possible explanations for the perpetuation of bail bondsmen in some districts and urges pretrial services officers who continue to recommend surety bonds and judges who adopt such recom-

CONTENTS

Pretrial Detention in the Criminal Justice Process ..... Vincent L. Broderick 4

Bail Bondsmen and the Federal Courts ..... James G. Carr 9

Pretrial Services—A Magistrate Judge's Perspective ..... Joel B. Rosen 15

Pretrial Services: A Prosecutor's View .... E. Michael McCann
Douglas William Weber 18

Pretrial Programs: Describing the Ideal ..... D. Alan Henry 23

Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services ..... John S. Goldkamp 28

The Fastrack Program ..... Shelby Meyer
Kim M. Holloway 36

Using Drug Testing to Reduce Detention ..... John A. Carver 42

Technology and Pretrial Services ..... Timothy P. Cadigan 48

The Federal Detention Crisis: Causes and Effects ..... Daniel B. Ryan 54

Pretrial Services Federal-Style: Four Commentaries ..... John W. Byrd
Thomas A. Henry
Marion Gutmann
George F. Moriarty, Jr. 64

Departments

News of the Future 70
Looking at the Law 74
Reviews of Professional Periodicals 80
Your Bookshelf on Review 84
It Has Come to Our Attention 88

Pretrial Programs: Describing the Ideal

By D. Alan Henry
Director, Pretrial Services Resource Center, Washington, DC

Introduction

IN THIS article we will describe what an "ideal" pretrial program would look like, using as examples programs that have implemented the components described. Defining the ideal will be based on national standards relating to pretrial services, as well as the experiences of program administrators, program reports, and research treatises.[1]

Since pretrial programs are not autonomous but are rather a part of the broader local justice and corrections system, with each of their actions having some effect on the other system participants, we will also examine those system components that can affect whether the pretrial program's actions have the intended results. An excellent pretrial program operating in a less than excellent justice system is, after all, similar to a car with new tires and a bad engine, or a new VCR with a broken television: nice, but frustrating to operate.

Before we begin our summary of the criteria associated with an ideal pretrial system and program, we should first justify why such an effort is worth undertaking. Why do we need to know what constitutes "the ideal" pretrial program? Isn't it enough that a pretrial program even *exists* in a jurisdiction? And aren't all pretrial programs virtually the same?

The first rationale for such an examination is the sheer number of persons passing through (or remaining in) our Nation's jails. For example, in 1990, 20 million persons were admitted to or released from jail in this country, a population roughly equivalent to that of the State of New York.[2] More troubling, however, is the realization that the decisions as to who remains in jail after arrest are not always made in a reasoned, informed fashion. Consider:

- in over 20 percent of our large cities, judges do not have pretrial services information and recommendations when setting bail[3];
- in these same cities judges set money bail in a little over 60 percent of the felony cases, effectively passing on the decision as to release or detention to bondsmen. Bondsmen take out about half of that number, although no public official—not judges, prosecutors, or defense—has any control over who is selected to be released.[4]
- 20 of the 39 counties surveyed were found to have released less people pending disposition in 1990 than in 1988; 18 jurisdictions reported a decline in the use of nonfinancial release.[5]
- jail crowding that has now infected virtually every state often results in courts imposing "caps" on the population level, sometimes forcing jail administrators to release low bail cases when the cap is exceeded.[6] "Low bail" quickly becomes relative, as local judges react to this usurping of their authority by increasing bail amounts to exceed the cap level and thus ensure detention. In Chicago, for example, a person having a bail of $100,000 or less set by the court will be released by the sheriff in order to comply with the cap of a Federal court mandate.[7] Often persons so released are not monitored during the pretrial stage.
- crowding invariably results in "lost" defendants. In Baltimore, a recent examination of jail records turned up 67 people in jail with no court dates; one person was incarcerated for over 500 days without a court appearance.[8]

Finally, and perhaps most troubling, pretrial programs, once touted as the panacea for discriminatory bail practices and jail crowding, are sometimes found to be seriously deficient in their efforts. In a national survey of pretrial programs, administrators reported that they interview only 60 percent of those arrested.[9] Twenty-six percent of the programs surveyed make subjective recommendations as to who should be released, in direct contradiction of national standards for pretrial release generated by the National Association of Pretrial Services Agencies.[10] Even programs that do use objective schemes as called for in national standards may be exacerbating rather than relieving the problem: 80 percent of the survey respondents with an objective scheme have never validated it.[11]

Significant efforts are under way to identify and address the causes of unnecessary incarceration—including pretrial—in local jails. The National Institute of Corrections has for over a decade provided technical assistance to jurisdictions trying to solve the problem. But the single largest identifiable group that makes up the jail populations in the country's 3,000-plus jails, and arguably the one most appropriate for expanded remedies—pretrial detainees—receives comparatively little attention. As a result, decisionmakers are unable to get answers to basic questions: Does every pretrial detainee in our jail have to be there? Are there programs that might enhance our pretrial system and decrease our costs? Are our bail statutes in need of change? Is our pretrial services program alleviating crowding or contributing to it? Just how good is our pretrial program?

The Ideal Program

Before outlining the mechanics of an ideal pretrial program, we must first describe the goal of the program, for all else is influenced by that decision, as is any appraisal of the program's "success." Programs tend to have one of two basic goals: to provide the best information to judicial officers to assist in the bail decisionmaking process, or to decrease needless pretrial detention. Many newer programs, born in the wake of jail overcrowding, have had their primary goal defined for them: get the jail population down. The program's success is thus defined by the number of releases or the dollars saved by the county as a result of program actions. Often such programs are located in the jail itself, a relatively recent change in program locus.[12]

But having as its primary goal and measurement of success depopulating the local jail, the pretrial program confuses a desirable side effect with an appropriate goal. Pretrial programs were first established to remedy an error of equity, or lack thereof: Too many poor people were being detained simply because they didn't have the wherewithal to pay a bondsman for their release. It was hypothesized that if judges had verified information that showed strong ties to the community, they would feel confident in releasing them on their own recognizance. This was demonstrated to be true, but it quickly became clear that the information gathered could increase judicial confidence in a decision to detain, as well as to release, that a program was as likely to surface information in its investigation that would show the defendant to be a higher risk for release. This has to be: If pretrial programs fail to provide complete information—good and bad—about arrestees, they become simply an extension of the defense, losing their necessary neutrality in the eyes of the court. Thus, the primary goal of a pretrial program must be to improve the information provided to bail-setting magistrates.[13]

The actual work of any pretrial program can be divided into two areas: identification and monitoring. A program has as its first responsibility to accurately describe defendants appearing before a bail-setting magistrate. Who is the person? Where does the person live? What does the person's criminal record indicate? Are there social or physical problems that might be relevant to the bail decision? As part of the identification the pretrial program should include an assessment of the individual's likelihood of complying with court requirements, if released, and describe the appropriate conditions of release that would minimize any identified risk. Second, the program should provide services that furnish adequate monitoring of those persons released pending trial.

Identification

The identification process includes four distinct steps: screening; interviewing; verification; and assessment.

Screening is the decision by the program (usually based on political directives, fiscal limitations, or a combination of the two) as to which arrestees will be interviewed. This culling takes a number of forms: Some programs will only interview a fixed number of arrestees, based on a number determined by budget negotiations with the city or county. If that number is exceeded, the program receives additional funding.[14] More often the screening procedure is charge-based—certain felonies, misdemeanors, or violations are not interviewed. In our ideal program, all felonies and system violations (probation or parole warrants) where a judicial officer *may* set bail are interviewed.[15]

The interview process should be voluntary, timely, and thorough. The interview itself should only include questions that are clearly related to the defendant's likelihood of returning for court as required and remaining arrest-free, and usually includes family/residence information, employment/support information, medical information, criminal history, and reference information.[16] The specific questions should be reviewed regularly by program staff to ensure that the questions accurately capture the changing face of the arrestee population.

When the basic interview is completed, staff members attempt to verify as much information as possible. The purpose of verification is twofold: First and primary is to identify a place in the community where the defendant will be able to be reached if released. Second, fraudulent information can be identified and clarified and, if appropriate, influence the risk assessment.

With the interview and verification complete, the program staff must assess the risk posed by the defendant, based on the information obtained. The assessment will take one of two forms, depending on the jurisdiction. In some places, the program's assessment will actually determine who stays in and who is released; a straightforward "in/out" decision.[17] In the majority of places, however, the assessment will be for a more limited purpose. Instead of actually determining release, the assessment will be submitted to the decisionmaker—the bail-setting magistrate—for his or her consideration.[18] The principal distinction between the two (besides the obvious) is that in the former the assessment must include some consideration of the charge itself and the allegations surrounding the charge. In the second instance, where the

assessment is provided to the actual decisionmaker, the charge may or may not be included in the assessment.[19]

In an "ideal" program, the assessment should be objective in nature and exclude the present charge, except in limited instances where conditions of release might be affected. For example, if the instant charge is an assaultive crime, and if the program's assessment of the defendant's background indicates release is appropriate, an additional condition of staying away from the complainant during the pendency of the matter would be included.

The program should be able to call on a number of supervision options, reflecting the arrestee population in the jurisdiction, to include in the assessment or recommendation. These should be guided by the "least restrictive option" principal and be tied to either rearrest or court appearance concerns, *not* rehabilitating the arrestee. In virtually every instance, the program should provide the judge some condition or combination of conditions that, if imposed, would likely ensure the person's appearance and good conduct pending disposition, underscoring Chief Judge Renquist's clear reminder in *U.S.* v. *Salerno* (1987): "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

Finally, in our ideal program, dollar amounts would never be recommended as conditions of bail, *except* when there is clear evidence that the person will be able to post the amount recommended and that such a condition is the least restrictive option to ensure appearance. (Money bail posted with the court, while arguably able to ensure appearance, has had no demonstrable impact on community safety.) In no instance should a bail amount be recommended to a judicial officer when detention is the program's intent or when the program has not determined the individual's capacity to post such bond with the court.[20]

The above translates into various assessment schemes, including point scales, bail guideline grids, and others. No matter which is used, it must be regularly assessed. Too often programs maintain recommendation schemes that have not been evaluated in years (if at all); sometimes the scheme was simply borrowed from another jurisdiction whose arrestee population is markedly different.

Monitoring

An ideal pretrial program's work is only half finished when the bail decision is made. In order for judicial officers to seriously consider various supervisory conditions of release when setting bail, they must have confidence that those conditions will be monitored and that notice will be quickly provided when violations occur. Pretrial programs should provide the monitoring necessary to ensure that defendants released pending disposition are informed of changes by the court as to time, date, or location of hearings, and comply with all conditions imposed by the court. Post-release monitoring encompasses notification, conditions supervision, and detention monitoring. Notification services are perhaps the most basic service the pretrial program can provide after release. There is much experience demonstrating that improving the notification process of defendants as to court dates will measurably decrease failures to appear in a jurisdiction.[21] Such efforts can take the form of simple notification letters or phone calls reminding defendants of up-coming court dates. While this process is usually undertaken by the clerk's office (and on a case-by-case basis by defense counsel), there are instances where the pretrial program will have more current information for contacting the defendant than is available to the court. In the ideal program, the notification process goes a bit further. When a failure to appear actually occurs, the court passes the case, giving the pretrial staff time to contact the defendant and get the defendant back to court so that the warrant need not be issued.

Conditions supervision is the process of ensuring that defendants adhere to any restrictions imposed on their release by the judge. This monitoring process must include a structured, agreed upon manner of responding to apparent violations: Will the court be notified of all violations, no matter how significant, or will authority to deal administratively with some violations be delegated to the program? Will counsel be notified of violations by the program? Will violation notices be presented at the next scheduled court appearance or submitted as they occur? Most important, will the program provide a sanctioning recommendation to the judicial officer, along with the notice of violation? The specifics of the procedures for responding to violations will of necessity be site specific; still, in every instance they should be timely, complete, and, where sanctions are recommended, adhere to the "least restrictive option" concept.

In many instances the practical reality of initial appearance schedules precludes complete information being available to the pretrial program, and therefore to the judge, for bail-setting. As a result, post-release services provided by an ideal pretrial program will include a process that ensures changes in the status of pretrial detainees that could affect bond status are identified and provided to the judge with jurisdiction over the case. Such followup reports should highlight the change in status that has been identified and how such change affects the program's assessment of the defendant. Copies of the reports should be made available to counsel in the case when submitted to the court.

As part of their regular contact with released defendants, the supervision staff will often identify services that the defendant might wish, services not imposed by the court as a condition of release but which might simply help the defendant. The program should be able to match up such defendant needs with community resources, identifying programs that can provide the treatment, counseling, or simply the information requested by the defendant.

Besides the use of defendant supervision information on an individual basis, the ideal program will also aggregate the results of such information to inform policy decisions, providing reports to court officials. When cases tend to fail (perhaps when transferred to another court), the types of conditions that are violated most frequently and the system's responses to violations can provide judicial officers (and system administrators) ideas for decreasing defendant failure.

Finally, there are characteristics of the ideal program that, while more difficult to measure precisely, consistently are included in analyses of "good" programs. The first involves the dissemination of information related to criminal justice and public officials about trends that the pretrial program is in a particularly effective position to spot. Sometimes included in annual reports, this service increases the visibility and, it appears, the reputation of the program. Second, the ideal program usually has assumed additional duties for the system. Such duties might include jail classification, diversion screening, indigency determination for appointment of counsel, presentence investigation reports, or other services. Third, the ideal program is involved in the training of new judges, either locally or at the state level. Finally, the ideal program administrators can pick up the phone and call the prosecutor, sheriff, or presiding judge and get a response. They have established a relationship with the other actors that allows for the speedy resolution of simple problems and the careful consideration of more complex ones.

System Factors

Even when the characteristics described above exist in a program, the system "litmus test" results may be less than ideal: Failure to appear or rearrest rates may be unaccountably high or the local jail might be packed with pretrial detainees. These undesired events can often be attributed to factors beyond the control of the pretrial services program. For example, an overcrowded jail may simply be the result of a population explosion in the jurisdiction and a jail built for a smaller system. There are certain system characteristics that appear to, at a minimum, be catalytic and in some instances have been mandatory in achieving improved pretrial systems. First is judicial leadership. As with court delay reduction efforts, it appears that strong, continuous leadership from the judiciary is associated with better pretrial practices. Court delay reductions, besides improving case dispositions, also reduce the number of failures to appear and rearrests. But there is something more. Where there is strong leadership, questions tend to be addressed quickly, there is little internal squabbling, and the system is perceived as speaking with a single voice—each of which improves pretrial practices. Second, pretrial programs that operate under a clear bail statute (or court rule) tend to be more successful. A clear statute addresses the issue of danger and how it should be considered in the bail-setting process and lays out in a prioritized manner the types of options a judicial officer should consider in setting bail. Third, systems that liberally employ the use of citations and summons in lieu of detention are more likely to have effective pretrial services. Fourth, systems that ensure that defense counsel is present early in the process—prior to the first court appearance—can be expected to have effective pretrial services. Finally, a justice system that has an effective management information system, accessible to all the key participants, able to produce useful aggregate data quickly, and that is easy to program, is likely to have a good pretrial program.

There is one final component to our ideal pretrial program that must be included: The ideal pretrial program must change, and change regularly. The administrators and staff of the program will at times make other system participants uneasy, as they seek to bring about changes in release practices that have heretofore been accepted as gospel. But it must take place, for every system served by a pretrial program—here defined as the community system served, not simply the justice community—is changing constantly. Different population groups are entering and leaving, community ties are changing, and speedy access is making every community a neighbor. Pretrial programs must change to ensure that their procedures and those of other system actors do not inadvertently continue practices that are outdated and unfair—becoming apologists for what is, rather than positive forces of change in local criminal justice systems.

Pretrial services programs will not correct all system problems, nor can they address the root causes of crime, such as poverty, the polarization of the economy, prejudice, and insufficient educational opportunities. But what they can—indeed must—do is continue to try and make the justice system more just. Webster's first definition of just is, "having a basis in fact"; the second is broader: "acting or being in conformity with what is morally right or good." Pretrial administrators

and staff can make sure that their decisions and their work satisfy both definitions; if they are successful, they will truly have an "ideal" pretrial program.

NOTES

[1]See, for example, "Pretrial Services: Today and Yesterday," *Federal Probation*, June 1991.

[2]*Jail Inmates, 1990.* Bureau of Justice Statistics.

[3]Data from the National Pretrial Reporting Program (NPRP). NPRP is a series commissioned by the Bureau of Justice Statistics undertaken by the Pretrial Services Resource Center on a biannual basis that surveys 40 of the largest counties identified by the Census Bureau to represent the largest 75 counties in the United States. In each of the counties, a randomized sampling of felony cases is taken from a particular month and tracked to disposition, or for 1 year. The data include not only dispositions, but also failures to appear, rearrests, type of pretrial release, and time to disposition, as well as charge type and demographic information. NPRP data were collected in 1988 and 1990. Data for 1992 are currently being collected. In 1990, the weighted data base for the entire sample represented over 57,000 felony arrests. The data are representative of the larger court systems in the country, but do not include Federal cases.

[4]Id.

[5]Id.

[6]Id. Three-quarters of the 1990 NPRP sites reported they were under court orders related to jail crowding. Ironically, while the systems that reported being under court order averaged 119 percent of capacity, the 10 systems that indicated no court involvement reported averaging 140 percent of capacity. It now appears that the problem of overcrowding is also affecting the Federal court system, as is discussed elsewhere in this issue.

[7]Testimony from Chicago pretrial services senior staff at October 1992 NAPSA conference workshop: "Jail Crowding."

[8]"Jail Records Unearth 'Lost' Defendants," *Pretrial Reporter*, Vol. XV, No. 4.

[9]"Pretrial Services and Practices in the 1990s: Findings from the Enhanced Pretrial Services Project" (BJA Cooperative Agreement #88-DD-CX-K007).

[10]Ibid. In the Federal system virtually every program employs subjective recommendation schemes.

[11]Id.

[12]A 1989 survey of pretrial programs showed 15 percent located in local corrections. In fact, the relationship between jail administrators and pretrial program administrators has changed dramatically as a result of jail crowding—not surprising, perhaps, when one considers the number of jail suits that have been filed. In many instances, jail administrators are the primary advocate for the establishment of a pretrial program or the expansion of existing pretrial services in a county, contradicting the traditional picture of the jail administrator as a conservative law and order type and the pretrial program staff members as left-wing "do gooders." Being the target of jail suits–suits that are difficult to defend successfully—jail administrators have often taken on the role of pretrial activist, identifying target populations in the jail that need not be there, sometimes even establishing programs to aid in their release. See for example the evolution of pretrial services in Dade County under the auspices of the local department of corrections during the 1980's or the supervised pretrial release alternatives fostered by the current sheriff of San Francisco to alleviate crowded facilities.

[13]In practice, the effect on the jail will be measurable. Assuming the pretrial program's work is respected by the judiciary, unnecessary pretrial detention will decrease and system participants will be more confident that those who remain in jail are in fact those for whom detention is required.

[14]See San Mateo County, California's supervised release program.

[15]Some programs routinely don't interview misdemeanors or ordinance violations. This might be necessary for budgetary reasons, but no arrestee should be held on bail due to the inability of the program to provide the judge information. The program that routinely excludes misdemeanors or ordinance charges should have the capability to provide such an interview immediately in individual cases when the court feels it is necessary.

[16]For examples of interview forms used by various programs, contact the Pretrial Services Resource Center.

[17]See, Oregon Statute ORS 135.230 *et seq.*

[18]In some jurisdictions, programs provide both types of assessment, depending on the charge. In Tucson, for example, the pretrial release program has delegated release authority in the case of misdemeanors. For felonies, the program provides background information and an assessment to a judge who makes the release decision.

[19]While the National Association of Pretrial Services Agencies' Performance Standards are clear in their preference for pretrial program assessments being "charge blind," many programs review the police report on the arrestee as they prepare their recommendation.

[20]This is a limited approach to money bail as an appropriate condition of release, reflecting the American Bar Association's position on a program's role. See, however, NAPSA's Standards which call for the abolition of *all* money bail. However, in no instance should a program recommend surety bail. Every national association's professional standards in criminal justice call for the abolition of surety bail. In the face of such testimony, it is difficult to conceive of a pretrial program making such a recommendation.

[21]For a description of one such effort, see "D.C. Trio Finds Superior Court No-Shows," *Legal Times*, February 25, 1991.