ACCUSED AND UNCONVICTED

A Brief on Bail Practices

NEW YORK SENATE RESEARCH SERVICE
Task Force on Critical Problems

January 1978

ACCUSED AND UNCONVICTED

A BRIEF ON BAIL PRACTICES

New York Senate Research Service
Task Force on Critical Problems
for the
Senate Standing Committee on Codes

Carol Trilling Linker
Policy Analyst

Stephen F. Sloan
Director

Albany, New York
January 1978

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Bail reform in New York State may be necessary and desirable in the near future. The present system of bail neither protects the community nor adequately safeguards the rights of accused criminals. The overriding goals in any reforming effort should balance the interests of both the offender and the community, providing on the one hand for pretrial release wherever possible and on the other for freedom from dangerous and violent criminal behavior.

Nationwide reform efforts have attempted to address the inequity resulting from overuse of high bail. The forerunner was the Federal Bail Reform Act of 1966. This was followed by major bail programs in Kentucky, Illinois, Pennsylvania, and the District of Columbia. These efforts have attempted to diminish the inequities inherent in traditional bail systems in which the rich buy freedom and the poor go to jail.

Current analyses suggest that money bail, which severely disadvantages the indigent, may be replaced with a variety of forms of nonfinancial pretrial release. These same analyses also suggest that considerate use of non-financial release will result in neither a serious threat to the community nor wholesale release of defendants who fail to reappear in court. The most common forms of non-financial release are release on recognizance and conditional release. In the latter the accused must meet specified conditions in order to maintain his freedom; in the former, no conditions are set. These non-financial forms of release result in cost savings to local jurisdictions through reduced jail populations. Easing of jail overcrowding in turn makes supervision of truly dangerous detained criminals simpler and more effective.

There exists a dichotomy when considering bailable offenses; traditionally capital and non-capital crimes have been subjected to different release/bail criteria. Since capital crimes are considered to involve the most egregious type of behavior, people feel that the availability of bail should be greatly restricted for these offenders. There is no reason to abolish this traditional distinction, particularly as capital crimes are such a small number of the total crimes committed.

LEGISLATIVE CONSIDERATIONS

Policy on Bail

Consideration of new bail procedures might best be based on a revised policy for pre-trial decisions. In addition to evaluating the traditional bail/release criterion of the accused's likelihood of returning for court appearances, the judge should also consider the potential danger posed to the community and individuals if the accused were released pending case disposition.

In most bail reform programs a key element has been a presumption favoring release unless the district attorney can demonstrate that release will either endanger the safety of persons or the community, or that the accused will fail to reappear in court. A presumption favoring release is essentially opposite to

existing New York State practices whereby the accused and his attorney must convince the court that pretrial release is warranted.

If presumption favoring release becomes the primary policy, the accused would be released on his own recognizance pending trial unless the district attorney can present clear and convincing evidence to the presiding judge that release should be denied, a bail amount should be set, or imposed conditions should curtail the activities of the accused.

Capital cases should be handled under a more restrictive release policy. Here there should exist a presumption that the accused will be detained unless the presiding judge has sufficient evidence to sustain the belief that he will neither flee nor jeopardize the safety of any person or the community.

A New Approach to Pretrial Decisions

A number of considerations must be evaluated if the New York State bail statutes are to be revised along the lines of other major bail reform programs. Detailed suggestions for consideration in developing legislation are found on pages 66-72, and are briefly summarized below:

- Considerations for the Pretrial Decision.--The judge presiding at the arraignment of the accused should have sufficient information to allow for a reasoned pretrial decision. The police complaint sheet, the DCJS's "rap sheet," and ,where available, a report by the pretrial service agency should form the nucleus of the judge's information. Pretrial service agencies are formally established in New York City and five other metropolitan areas. Proposals for a statewide bail agency or for county probation departments to provide pretrial services would probably be unworkable.

- Role of the Pretrial Service Agency.--When a pretrial service agency is established it should evaluate the accused's family and community ties and his financial resources. The agency might also provide services and supervision to those on pretrial release and might serve as a "retrieval" unit.

- Pretrial Release Criteria.--Judges should be minimally guided by consideration of the accused's family and community ties, educational or employment capabilities, financial resources, nature of the offense, strength of the evidence, prior convictions and prior record of appearance at court proceedings.

- Pretrial Release.--The judge, after considering the above factors, must alternatively order the accused released on his own recognizance, released if specific conditions are met, set bail, or deny release altogether. If release or bail is denied, a written reason for the judicial decision is necessary. The judge should have nine pretrial options, ranging from release on own recognizance to pretrial detention (see pp. 70-71).

- Review of those Detained.--Any person denied bail or release, should be entitled to review of his case after 72 hours of detention, and if detention is continued after the initial review, the case should be reviewed every two weeks thereafter.

- Other Considerations.--Other factors to address in bail reform legislation include: expedited court calendars for those detained, confidentiality of information obtained by a pretrial service agency, penalties for pretrial misconduct, release pending appeal, and report and recordkeeping needs.

INTRODUCTION

Bail is a sum of money placed with the court whose purpose is to ensure the appearance of the accused at trial. If paid in full or secured by a deposit (depending on the statutory regulations) it enables the accused to remain at liberty pending trial. In New York, bail presents a morass of confusing and contradictory policies and practices. The Criminal Procedure Law (CPL) is generally accorded haphazard compliance--judges in some instances being quite unaware of the criteria to be examined in making the bail decision and of the various forms in which financial bail may be imposed. In addition, pretrial service agencies which exist in New York City, Buffalo and Rochester are absent in other large cities such as Albany and Binghamton. In Syracuse, pretrial services are provided through the probation department. This is frequently the case in many of the rural counties. The outcome of the bail decision critically affects the final disposition of criminal cases. Those released pending trial have been shown to have both fewer convictions and less severe sentences. It is for this reason that equality in the delivery of services and more rational statutory provisions are necessary to reduce the discrimination which currently exists.

Many believe that new bail legislation is important to the orderly administration of justice. Such legislation should improve the delivery of services to the accused, provide for more reasonable decision-making in bail hearings pending trial, and abrogate the discrimination based on money which at present sanctions release of the rich and detention of the poor.

This report attempts to provide suggestions for revising bail procedures in New York State. To do this, it will examine in some detail the actual and model statutes constructed by various jurisdictions (federal, state and local).

HOW THE BAIL SYSTEM WORKS

In the American system of bail a person arrested for a crime generally has the right to purchase his release pending trial. Bail is a security, a sum of money whose purpose is to ensure the court appearance of the criminally accused. Those able to afford the price are released; those who cannot remain in jail. The practice assumes that the payment of a sum of money will guarantee court appearance. It further assumes the existence of a direct correlation between payment of money and appearance of the accused at trial. Bail is also used sub rosa, to detain those the judge believes to be dangerous and/or those likely to re-engage in crime if released. To circumvent these potential dangers the judge sets bail at an unaffordable sum. This results in de facto detention of the accused due to his inability to post bail.

HISTORICAL OVERVIEW

Historically, high bail has served several purposes. These relate to the pretrial detention of the accused:

- Prior to disposition, it serves to prevent the accused from fleeing criminal prosecution.
- Community safety is also served as detention ensures that additional criminal activity will be prevented.
- Detention serves as an incipient punishment, a warning and a foretaste of the consequences of crime.[1]

The setting of high bail is believed to secure the appearance of the accused at trial, to prevent recurrences of crime, and to impose some punishment. While institutional and societal well-being justify the first two purposes of pretrial detention, the latter, the punishment of the accused, is difficult to justify. By facilitating access to the accused and preventing further crime, the first two purposes serve the aims of society. However, it is abhorrent to the Constitution and to the body of law which has evolved through U.S. Supreme Court rulings to impose punishment in advance of a determination of guilt. It is important to recognize that detention, whatever its formal rationale, constitutes

preconviction punishment. To that extent it should be used with restraint.

Regardless of its various aims, bail until quite recently signified the imposition of a financial obligation. Historical precursors of this system originated in medieval England where the scarcity of judges necessitated that each judge hear cases over large geographical areas. The presence of circuit justices was so infrequent that long delays between arrest and trial were common. Detentions resulting from these delays were frequently more lengthy than any imposed sentence.

Filth and vulnerability to escape characterized the jails. The accused was likely to either die from disease or to escape if detained for a significant period of time. These factors fomented the development of a system which encouraged the pretrial release of the accused. Pretrial release to a third party who served as surety (one who guarantees for another) proved to be a relatively safe way of ensuring the appearance of the accused at trial.

No formal provisions for the pretrial release of the accused existed at this time. The release decision was made by the local sheriff into whose custody the accused was consigned pending court action. The gravity of the charge, the weight of the evidence, and the character of the accused were factors to be considered. In all instances, release was conditioned upon the promise by the accused or a third-party surety that appearance at trial would ensue.

Initially, the system required the existence of a personal relationship between the accused and his surety. However, the financial resources necessary to purchase the accused's release were often difficult to obtain. Concomitant increases in population mobility and social impersonality contributed to the demise of the personal surety system. The necessity for commercial bondsmen emerged. These individuals have been active in the bail system ever since.

COMMERCIAL (SURETY) BAIL

Commercial bail bonding is an outgrowth of this ancient practice. It is a profitable arrangement whereby commercial bondsmen, for a fee, guarantee the total bail amount required by the court, should the accused flee the jurisdiction prior to the completion of his case. The bail bondsman, however, is rarely required to forfeit the total bail amount should the accused disappear. Until recently the commercial bonding system was assumed to operate to the benefit of all the participants:

- the courts, perhaps erroneously, believed that the accused's appearance at trial was assured by the payment of a premium;
- release of large numbers could be accommodated, thus reducing the costs of pretrial detention;
- the accused was free pending trial and could assist in the preparation of his defense; and
- the bondsmen, because of the rarity with which they were required to forfeit money for bail jumpers and because the deposit paid by the accused was nonrefundable, were enjoying a large profit.

This system of cash bail is known as surety bail.

BAIL IN NEW YORK

In New York State, following the commission of a crime, the accused is arrested, booked, and brought to the court for an initial appearance before a judicial officer. This first appearance is called an arraignment and it is here that the bail decision is generally made. Frequently cases are resolved at the arraignment. If the charge is a misdemeanor and the accused is willing to plead guilty, the judge has the authority to dispose of the case and impose a sentence. If, however, the accused refuses to plead guilty or if the arrest charge is a felony, the judge may make a bail decision. For a misdemeanor a bail decision must be made. For a felony this is a discretionary judicial decision, in which the judge has the option of refusing to set a bail sum and remanding the accused to custody (although the accused retains the right to appeal this decision) to await trial. For example, a suspect is arrested for manslaughter in the first degree, a felony. Following booking and the various information gathering procedures, he is brought before the arraigning judge. The accused has a lengthy prior record of violence and the pretrial service agency indicates that few ties or attachments to the community exist. The judge sets bail at $5,000, a sum which he knows is impossible for the accused to raise. The defendant is detained pending trial.

The only statutory rationale for refusing to set bail is judicial belief that the accused is likely to flee. This alone justifies detention. No requirement exists that the judge state the reasons for his decision. In the above example, it is likely that the judge fears additional violence will result should the accused be granted pretrial freedom.

To comprehend the bail process it is important to recognize that bail is not synonymous with release. Mere imposition of bail does not result in the automatic release of the accused. The bail decision may result in either release or detention. Bail is sometimes set low enough to be attainable and nonfinancial forms of release are being used with increasing frequency. However, if the judge decides to detain the accused, he has only to set bail beyond the financial capabilities of the defendant. This is simple to do since the majority of the accused are indigent and any bail at all is unaffordable.

In making the bail decision, the judge relies on three information sources:

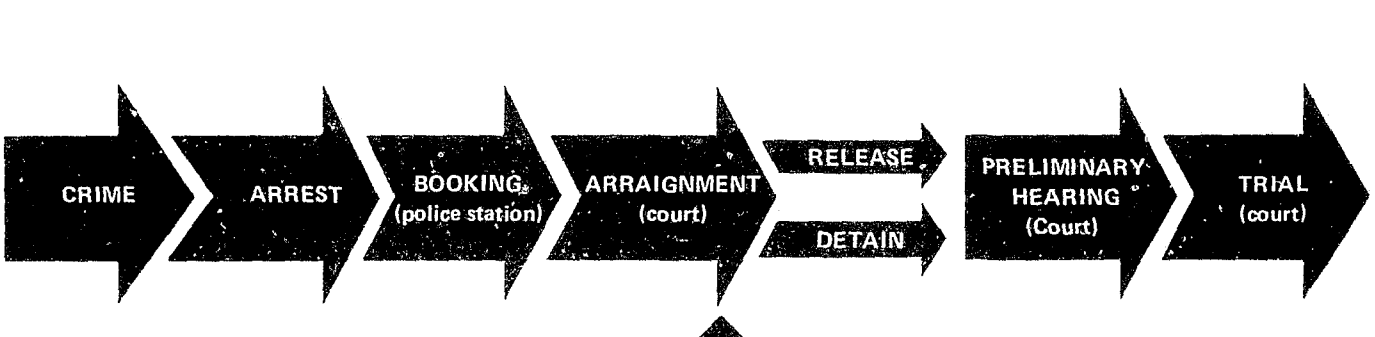
- the police complaint which lists the charged offense and supporting evidence;
- the Division of Criminal Justice Services' "rap sheet" which supplies a record of the accused's prior arrests, convictions, etc.; and
- a report provided by the pretrial release agency (where they exist) which contains information on the "community ties" of the accused, his length of residence, employment record, family circumstances, etc.

There is no inquiry concerning the accused's ability to afford bail. The judge considers the information and decides whether to release the accused outright, set bail (which may or may not result in detention depending on the accused's financial circumstances) or detain. The decision is generally made quickly, within a matter of minutes. This is a short period of time for a decision which, as we shall see, has a considerable impact on the final disposition of the case.

Pretrial release is important to the accused, but it is not always in the best interests of society to release all defendants. While preconviction detention constitutes a particularly invidious form of punishment as it punishes in advance of a determination guilt, it is sometimes necessary. The interests of society must always be balanced against the interests of the accused and if the accused is very likely to cause physical harm detention may be the only solution. Overuse or abuse of detention could result in a system in which guilt is unnecessary to imprisonment. On the other hand, if dangerous defendants are released, society is in danger of increased victimization. It is critical to strike a balance so that neither repression nor wanton victimization predominate and to the extent possible, the rights of both society and the accused are preserved.

For a diagrammatic representation of the bail decision and its location in the criminal justice processing of the accused, see Figure 1.

Figure 1
THE BAIL DECISION IN RELATION TO
CRIMINAL JUSTICE PROCESSING



*It is important to recognize that the bail decision never preceeds arraignment, but it may occur at any subsequent stage of the criminal justice process, including the period between sentencing and post-conviction appeals.

THE NECESSITY FOR BAIL REFORM

In New York State bail reform is a critical issue to many people. Misuse of money bail, inequity to the indigent, and pretrial recidivism contribute to the existing situation. Following is a delineation of the problem related to the present operation of bail.

BAIL DISCRIMINATES AGAINST AND PUNISHES THE POOR

The financially-established can afford to purchase freedom. The poor are jailed because of an inability to finance cash bail. The capacity to pay is frequently the sole criterion in determining who will and who will not be accorded pretrial release. At issue is whether or not reliance on financial bail is equitable or whether, in fact, it promotes discriminatory practices. The Eighth Amendment of the United States Constitution and the Constitution of New York State both provide that bail "shall not be excessive". No criteria are offered by either to determine the limits of excessiveness.

HIGH BAIL RESULTING IN PRETRIAL DETENTION DEPRIVES INDIGENTS OF A "FAIR TRIAL"

Detention undermines the accused's chance to have a fair trial and places him at a disadvantage. Preparation of an adequate defense is impaired; access to counsel is hampered; locating witnesses is precluded; the appearance of guilt easily attaches to a confined defendant; and finally, a court is more lenient towards a defendant who has demonstrated a capacity to conform to laws. These factors disadvantage the detained accused in the courtroom situation. Empirical evidence supports this. The Manhattan Bail Project study[2] determined that only 41 percent of those released on recognizance were convicted whereas conviction rates were much higher (77 percent) for those who were detained pending trial. Of the convicted, those detained were more likely to receive prison sentences than those who were free while awaiting trial. Only 21 percent of the convicted

releasees went to jail compared to 96 percent of the convicted who had been in detention. An earlier study conducted in the New York City courts found that when the released accused went to trial, acquittals were obtained in 31.4 percent of the cases.[3] This compared to 20.2 percent acquittals for those who were jailed pending trial. Convicted defendants free on bail pending trial received prison sentences in 45 percent of the cases while jailed defendants received prison sentences with almost twice the frequency (83.9 percent of the cases). The inference from these results is that pretrial detention may prejudice the outcome of a case as detained defendants are more apt to be convicted and to receive harsher sentences.

Two other interpretations are possible. The first is that judges are capable of screening in advance of trial, those most likely to be convicted and sentenced. The second is that the arraignment may turn into a trial-like encounter where a determination of guilt or innocence is made. When this is the case, there are no provisions for the due process and equal protection rights which the Constitution guarantees to all criminal defendants. Petit jury and defense counsel are absent. There is no opportunity for the defense to produce witnesses or introduce evidence on its own behalf. Fundamental fairness is abrogated and the pretrial detention which may result from such proceedings is the punitive outcome of this encounter.

A recent empirical analysis on bail demonstrated that there is no relationship between those adjudicated guilty and their pretrial status. Any perceived relationship is the result of parallel decision-making criteria used by the judge at both arraignment and trial. In examining the relationship between the imposed sentence and pretrial status, a true relationship was found. Those detained prior to trial were much more likely to receive a sentence involving imprisonment that those released prior to trial.[4] Thus, it appears that some harm to the defendants may result from pretrial imprisonment which is not attributable to differences in the severity of the original crime.

PRETRIAL DETENTION CONSTITUTES PRETRIAL PUNISHMENT

The accused must live in a confined environment in the absence of "proof beyond a reasonable doubt" that he is guilty. Imprisonment of the accused may coerce a guilty plea. Knowledge that the alternatives are confinement if found guilty or confinement while awaiting a determination of guilt frequently induces a plea of guilty by the accused. This is perceived by some to be preferable to coming

to trial, being adjudicated guilty, and then having to serve the imposed sentences. Inducements to plea bargaining are greatest where credit for time served in pretrial detention is not deducted from the sentence or in jurisdictions where the living conditions in detention centers are worse than in prisons.[5]

FINANCIAL BAIL SYSTEM GIVES UNPRECEDENTED POWER TO BAIL BONDSMEN

Bondsmen rather than the judicial officer frequently determine which defendants will be released on bail If a bondsman decides that a particular accused is a poor risk, he can deny him a bond. This decision is not reviewable by the court. In the absence of any formal controls the bondsmen may also utilize their unsupervised authority to track a fleeing defendant and forcibly return him to court. Bondsmen are not regulated by any of the Constitutional imperatives which govern the conduct of police.[6]

STATUTES RELATING TO BAIL DO NOT PROVIDE FOR THE PRETRIAL DETENTION OF THE POTENTIALLY DANGEROUS ACCUSED

Bail statutes promote hypocrisy as judges must detain, under the rubic of risk of appearance, those who are likely to commit additional crime if released. Detention is accomplished, sub rosa, by setting high monetary bail. This is far from an optimum solution as it sanctions total disregard for the due process rights normally accorded those who are imprisoned. If, however, detention in advance of guilt is an acknowledged goal, due process must be observed and all amenities must be granted the accused at a formal detention hearing.

BAIL IS BASED ON THE ASSUMPTION THAT MONEY WILL GUARANTEE THE APPEARANCE OF THE ACCUSED AT TRIAL

Financial status is an inappropriate method for determing either the likelihood of appearance or the likelihood of future criminal activity. Money will not detain those who consider flight preferable to the probable legal consequences nor can it prevent future criminal activity by those profiting from crime. Using money as the sole determinant in release ensures only that the poor will be detained while the rich will be released. These outcomes will disregard both the risk of flight and future dangerous behavior.

Pretrial detention of the accused, as it operates under the prevailing system is obviously fraught with problems. It results in injustice for the accused and provides little in the way of safety for the community. Reforming measures are imperative. In order to develop bail reforms appropriate for New York State, an explanation of both the existing statutory bail system and the policy which governs its operation is necessary.

THE ROLE OF BONDSMEN

Traditionally, bail has been a profitable arrangement whereby the bondsman, for a premium, posts the bond which enables the accused to gain pretrial release. If the defendant flees the jurisdiction prior to the disposition of his case the bondsman is technically liable for the full amount of the bail. While the courts rarely require forfeiture of the full amount, bondsmen nevertheless seek to protect themselves against this possibility by requiring defendants to provide collateral security in the form of stock, bonds and property. There are no statutory constraints on the amount of collateral the bondsmen can require.

This system of surety for profit exemplifies the abuse which operates within an arena of unmitigated discretion. Despite the care with which the court may set bail, the ultimate release decision is governed by the bail bondsmen. It is he alone who decides between good and poor risks, relegating the latter because of their inability to afford the premium, to jail to await prosecution. There are no statutory constraints on decisions made by the bondsmen. They are never required to sell bonds to any particular accused.

The egregious discretion which characterizes the money bail system caused noted jurist J. Skelly Wright to remark:

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety -- who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[7]

The bail system is profitable because the courts rarely extract from the surety companies the total bail sum due when the accused jumps bail. Although there is difficulty in obtaining reliable and up-to-date information, some data are available. One surety company wrote 19,397 bonds in 1957. Of these, 284 or 1 percent were forfeited. In 208 of these cases the accused was eventually brought to court. Of the 208 cases, 20 forfeitures were paid but then remitted; the remaining 188 were vacated. Thus, of the 284 instances in which the accused fled prior to trial, in only 76 instances did the surety company actually lose some money. It is highly likely that these losses were covered if not totally, at least in part by collateral security

pledged by the accused.[8] Findings in a second survey indicated that between 1956 and 1958 one New York surety company wrote $70 million in bonds; $1,400,000 was received in deposits; absolutely no losses were incurred.[9] While these figures are admittedly antiquated, it is quite likely that they accurately represent the ease with which huge profits may be made in the bonding business. It is also likely that the forfeiture rate has not changed much in the intervening years. There is still an absence of controls governing payment to the court should the defendant jump bail. Neither have controls been imposed to circumscribe the discretion within which the bondsmen operate.

Still another criticism leveled at commercial bondsmen concerns the vigilante tactics employed in the retrieval of absconding defendants. These extraordinary powers are a vestige of the private, contractual relationship which formerly existed between the accused and the bondsman who provided the surety. At present virtually no accountability is required by bondsmen in their use of strong-arm and sometimes brutal retrieval tactics. Rather, the practice is sanctioned in many jurisdictions. Twenty-four states provide express statutory authority for the bondsman to arrest the accused; another twenty-one states imply the existence of these powers of arrest.[10]

Thus, the majority of states provide the commercial bail bondsman with the authority to apprehend those who have fled while free on bail and to extradite them to the jurisdiction wherein their case is pending. No procedural safeguard protects the accused from the strategies employed by the bondsmen in their arrest procedures. Legal remedies designed to protect against infirmities resulting from illegal seizure, detention and the use of force by bondsmen are conspicuously absent, and illegal seizure of the accused has failed to provide a basis for action in subsequent criminal proceedings. Thus there exists an implicit approval of the tactics employed by the retrieval squads of surety companies.

FEDERAL LEGISLATION AND SUPREME COURT IMPERATIVES

To define the boundaries within which bail reform legislation must be written, it is essential to acknowledge the guidelines provided by federal mandates and policies. The Constitution, federal law and U.S. Supreme Court decisions generate the sources. While these are generally binding only within federal jurisdictions or in relation to specific state statutes, they help to provide a conceptual framework within which state laws optimally function.

UNITED STATES CONSTITUTION AND JUDICIARY ACT OF 1789

The Eighth Amendment to the U.S. Constitution stipulates that "bail shall not be excessive." No clarification concerning the meaning of "excess" is supplied. The sparseness of this language allows several interpretations. One interpretation suggests that if bail may not be excessive, then total denial of bail is impermissible as nothing could be more excessive than outright denial. This reading of the Constitution provides for an absolute right to pretrial bail. A contradiction inherent in this interpretation is that pretrial bail has been traditionally denied for capital offenses and in those instances where threats were made to witnesses.[11]

A second interpretation of the Eighth Amendment suggests there is no absolute right to bail. Excessive bail is forbidden only for those crimes for which bail is statutorily prescribed. Historical support for this view is derived from English law which clearly defined bailable and non-bailable offenses and from an appraisal of the federal Judiciary Act of 1789. This Act, passed by the same Congress which enacted the Eighth Amendment, provided a statutory right to bail in noncapital cases but denied the right for capital crimes. To interpret the Eighth Amendment as granting an inviolable right to bail contradicts the intention of the Judiciary Act. Passage of the Judiciary Act would have been redundant if the writers of these two documents had intended them to provide for an identical end--a guarantee of bail. "It is more plausible that the Eighth Amendment was not intended to create any right to bail, but rather was intended

to protect against the arbitrary use of money bail in those areas where Congress granted the right by statute."[12] This interpretation, then, defers to statutory provisions in determining where bail is a "right". These parallel interpretations concern the existence of a right to bail. Other questions are raised by the Constitutional mandate that "bail shall not be excessive", as again no definitive guidelines are provided. Excessive may mean more than the defendant can afford, more than is reasonable in relation to the accused's financial situation, or more than is customary for a particular offense. The absence of explanatory provisions clouds the intent.

PURPOSE OF BAIL - BALANCING THE INTERESTS

With the brevity of the Constitutional mandate, it is obligatory that queries be directed to defining the purpose of bail. The two major purposes of bail may be inferred from examining the unique interests of the primary contenders--the state and the individual. Bail is a device for reconciling the conflicting interests of these parties. The interests of the state are both institutional and societal, endeavoring on the one hand to ensure the appearance of the accused at criminal proceedings and on the other to mitigate the effects of dangerous behavior which might occur if the accused were released.

The interests of the individual contrast sharply with those of the state. While the state has an interest in detention and surveillance, the individual's interest is in maintaining his freedom. Pretrial freedom aids the individual in preparing for his defense, in maintaining his community standing, and generally in remaining free of constraints prior to conviction. From the perspective of the accused, the right to bail must be viewed as either a right to pretrial release or a right to affordable bail. Prohibitively high bail is an empty right.

The right to release versus the right to detain define the positions in the controversy. To the Supreme Court has fallen the duty of balancing these interests, tempering the demands of each by the requirements of the other.

SUPREME COURT DECISIONS

Judicial intervention into the area of bail is exemplified in the holdings of two landmark cases, both decided in 1951. Neither decision provides definitive holdings directly applicable to bail in criminal cases, nor are they directly

applicable to bail in state courts. Nevertheless both are frequently cited in support of the various purposes of bail.

Although the holding was more narrowly concerned with violations of the Smith Act and the imposition of $50,000 bonds, it is necessary to focus on the Stack v. Boyle decision.[13] Stack provides authority for the notion that bail may be set to secure the appearance of the accused at trial. Only when the likelihood of appearance was questionable could bail and the ensuing detention be imposed to secure appearance. Based on the traditional right of the accused to freedom before conviction, this notion was grounded in a presumption of innocence and the necessity of preparing an adequate defense. "This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction...."[14]

Pretrial release was predicated upon the accused's assurance that he would return to stand trial and submit to punishment. In this vein the Supreme Court also suggested that the bail determination be based solely on standards which were relevant to the purpose of assuring the presence of the accused at trial and that a presumption of admittance to bail exists for all non-capital cases.

The Stack decision implied a right to bail and a right to pretrial release, both predicated upon the assurance of future appearance provided that the accused was not charged with a capital offense.[15]

Carlson v. Landon[16], decided a mere four months after Stack, involved the enunciation of very different bail-related principles. The case was concerned with the detention, without bail, of aliens who were members of the Communist party. Like Stack, Carlson was not directly applicable to criminal proceedings because it was concerned with deportation hearings. However, the decision dealt generally with the issues of bail and thus provided additional guidelines concerning justifiable uses of bail.

Presumptions favoring pretrial release and a Constitutionally-guaranteed right to bail were absent in the Carlson holding. Rather discretion to grant or deny bail resided exclusively in statutory provisions. "The Eighth Amendment has not prevented Congress from defining classes of cases in which bail shall be allowed in this country."[17] The Eighth Amendment injunction against the use of excessive bail was interpreted to mean that where money bail was statutorily provided, excessive amounts of bail were prohibited. Carlson deviated from Stack by suggesting that anticipation of hurt (from aliens) was a justifiable rationale for imposing pretrial detention. The notion of anticipatory hurt foreshadowed the "danger to the community" criterion of later legislation.

Since 1951, Supreme Court decisions concerning bail have relied on one or another of these cases. Frequent back and forth movement between the different positions is evident. In Herzog v. U.S.[18] the Court reiterated the Stack decision by noting that pretrial release in noncapital cases was the preferred alternative. However, in Ward v. U.S.[19], the Supreme Court held that if a reasonable sum of money could not guarantee the presence of the accused at trial, denial of bail for the purpose of detention was acceptable. In 1959, the Court reverted to the presumptions of Stack when it held in Reynolds v. U.S.[20] that there exists a traditional right to freedom pending trial--the purpose of bail is to ensure the appearance of the accused; to deny bail for purposes of punishment is impermissible.

Offshoots of Carlson matured in the early 1960's. Two distinct interpretations of pretrial dangerousness were represented. Fernandez v. U.S.[21] and Carbo v. U.S.[22] exemplify one of these. Here, bail could be revoked (Fernandez) and/or denied (Carbo) if the accused either engaged in or there existed a "substantial probability" that he would engage in harming witnesses or otherwise hampering the prosecution. Denial of bail was held to be justified in those extreme situations in which the defendant was likely to interfere with the safety and well-being of witnesses or jurors.

In Leigh v. U.S.[23] the second form of "dangerousness" was articulated. Derived from the notion of "anticipatory hurt," it referred specifically to the threat of harm which the accused presented to the community. Protection of the community was acknowledged to be a "compelling interest" in the bail decision process. The Supreme Court suggested that it was permissible to deny bail in instances where it was clear that the freedom resulting from bail release would be abused or the community would be threatened.

Two unique philosophical positions concerning the uses and justifications of bail were defined by these cases. One trend, comprised of the Stack progeny, espoused a right to bail linked to a right to pretrial release, with release premised on non-financial conditions. Release could be denied only if the accused's appearance at future criminal proceedings was in jeopardy. The second line of cases, premised on Carlson, were distinguished by the:

- absence of the release presumption;
- inclusion of the notion that appearance was not the sole concern; and
- consideration of the accused's potential dangerousness, whether directed at the community or at disrupting the orderly processes of justice.

From these cases, it may be concluded that legitimate concerns of the bail decision reside both in ensuring the appearance of the accused at trial and ensuring the safety of the community while the accused is free pending trial.

Regardless of the justifications for bail presented by these cases, none of them furnish standards or guidelines for distinguishing among defendants who are or are not likely to flee and who are or are not likely to be dangerous. Thus, while the rationales for bail were clarified, it was necessary to proceed beyond these cases in attempts to generate workable policy. The Federal Bail Reform Act (FBRA) of 1966 was a result of this effort. The FBRA is the present federal legislation governing bail and pretrial release decision-making. The FBRA will be discussed in a later section of this report when this and other reform efforts are analyzed.

BAIL IN NEW YORK—LAW AND PRACTICE

NEW YORK CONSTITUTION

Like the Constitution of the United States, the New York State Constitution provides only that "excessive bail shall not be required".[24] This lack of constitutional specificity required that the Legislature circumscribe the limits of bail in New York.

STATUTORY PROVISIONS

Statutory Rationale

In New York State the only statutory rationale for the imposition of bail turns on the court's assessment of the likelihood of the accused's flight. His potential for additional crime is statutorily prohibited. The Criminal Procedure Law (CPL) specifies that the "court must consider the kind and degree of control or restriction that is necessary to secure the principal's /accused's/ court appearance when required."[25] Various criteria used to guage the accused's likelihood of return are listed for judicial deliberation. The accused's character, reputation, habits, and mental condition, his employment and financial resources, his family ties and length of residence are subject to consideration. These are referred to as the "community ties" criteria. The present criminal charge and prior criminal record (particularly in response to court appearances), the weight of the evidence, and the probability of conviction are additional factors the judge must consider in making this bail decision.

Forms of Bail

New York State Law authorizes eight different forms in which bail may be posted:[26]

- cash bail;
- insurance company bail bond;
- secured surety bond;
- secured appearance bond;
- partially secured surety bond;

- partially secured appearance bond;
- unsecured surety bond; or
- unsecured appearance bond.

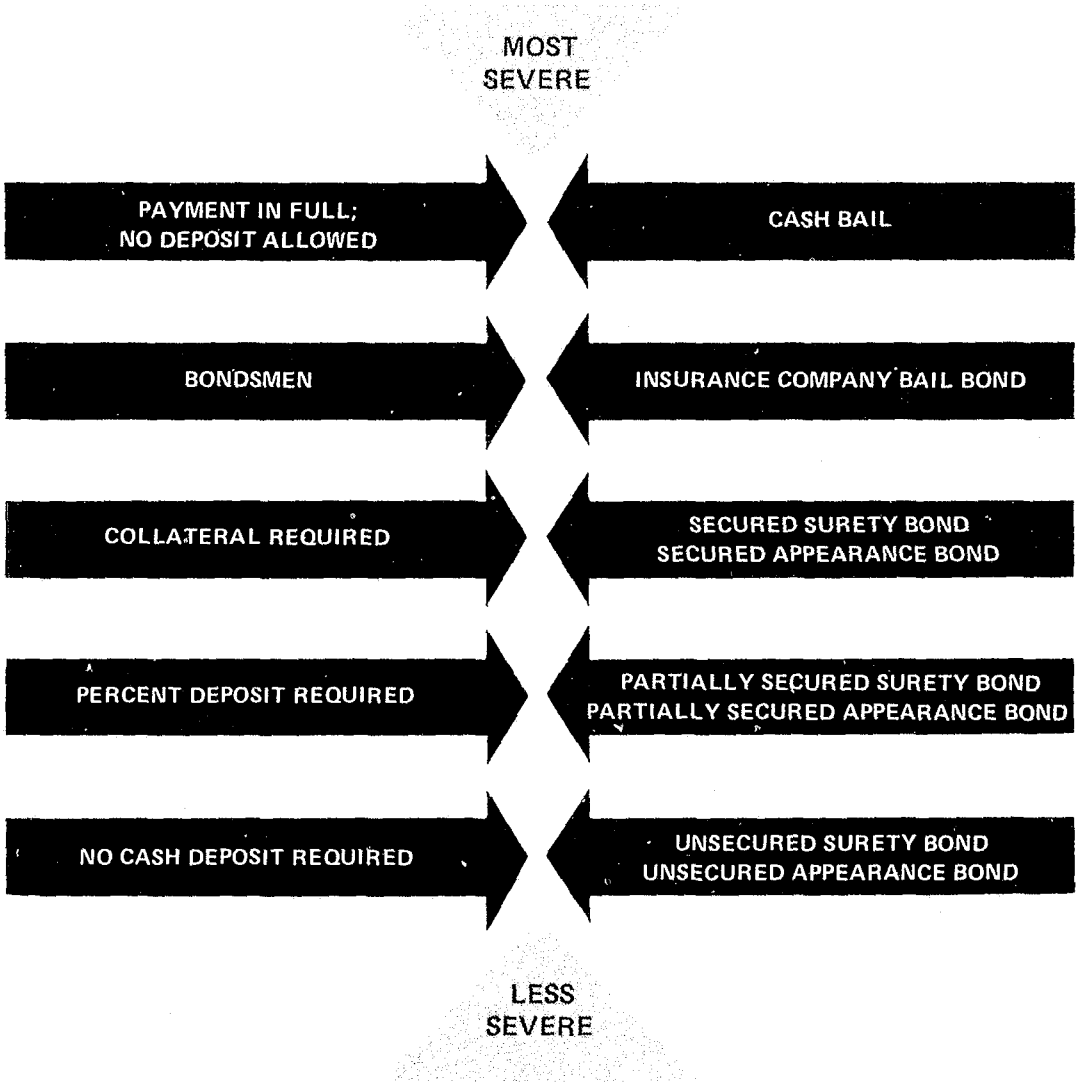
Payment of the judicially designated form of bail enables the accused to secure freedom pending trial. Cash bail refers to a sum of money fixed by the court which may be posted by the accused or someone acting on his behalf. Should the accused fail to appear in court as directed the sum is forfeited. An insurance company bail bond (surety bail) is one in which the guarantee that the accused will appear for court action is assumed by an insurance company. With a deposit from the accused or his friends and sufficient collateral security the company posts the bail bond. In theory the bonding company is required to forfeit the total sum should the accused fail to appear. Forfeiture is rarely enforced. A secured surety bail bond is one in which bail is secured by personal property or real property by a person other than the accused. A secured appearance bond is one in which the accused executes the bail bond himself. A partially secured surety bond is one in which bail is secured by a person other than the defendant by depositing with the court a sum of money not exceeding 10 percent of the total bail amount (in other jurisdictions this is called a "10 percent deposit plan"). A partially secured appearance bond is identical except that the accused himself supplies the 10 percent deposit. An unsecured surety bail bond is one in which a person other than the accused agrees to pay a designated sum should the accused fail to appear. In an unsecured appearance bond the accused agrees to pay a specified sum of money if he fails to appear as scheduled.

A 1972 amendment made the use of unsecured bonds preferential. Designation of the bail amount without further clarification as to form demanded that the least burdensome ones be imposed. If the judge desired the imposition of more stringent forms, it was necessary for him to so specify.

Figure 2 listing the bail forms in order of decreasing severity will aid in the understanding the hierarchical nature of these alternatives.

It is possible for a judge to fix bail in alternate, but practically equal, forms. Satisfaction of any one of these would fulfill the release requirements. Bail could be set, for example, so that either a secured appearance bond of $2,500, a partially secured surety bond of $3,500, or a cash alternative of $300 would satisfy the bail requirements and effectuate the accused's release. To fulfill the first of these the defendant would have to post sufficient collateral to guarantee the $2,500 bail; to fulfill the second a $350 deposit would be necessary; and to fulfill the third, $300 in cash would be required. While the use of these three particular alternatives is unlikely to occur in any one instance, they are presented to demonstrate the variety of alternatives available to the judge. If on the other hand the judge specified only that bail was to be set at $1,500, the least severe default form of bail would apply and

Figure 2
RANGE OF BAIL ALTERNATIVES UNDER PRESENT NEW YORK STATE LAW



bail would be imposed as either an unsecured surety or appearance bond. No cash deposit at all would be required to effectuate release.

Regardless of the form of bail specified, and despite the fact that the default option was required to be the least burdensome, the accused may always post cash bail for the total amount specified by the bail order. When this is done, the entire amount is refunded at the conclusion of the criminal proceedings.

Bail for Felony and Non-Felony Offenses

The New York Criminal Procedure Law specifies that defendants charged with non-felony offenses have an absolute right to bail or release on recognizance at arraignment.[27] Release on recognizance is a nonfinancial form of release wherein the accused is discharged solely on his promise to return for scheduled court appearances. By contrast, a defendant charged with a felony is admitted to bail or recognizance only at the discretion of the local criminal court in which the action is pending.[28] Granting of bail or recognizance by a city, town or village court is, however, prohibited if the accused is charged with a Class A felony, such as murder, or has had two prior felony convictions.[29] An exception to this exists in New York City where the City Criminal Court is permitted to grant bail for all classes of felonies. The same is true for district and superior court judges sitting in local criminal courts. Granting of recognizance or bail, to a person charged with a felony, is prohibited by the CPL until the district attorney has been afforded an opportunity to be heard on the matter of the bail application and until a report on the accused's criminal record has been received from the New York State criminal identification system (Division of Criminal Justice Services).[30]

Appealing a Denial of Bail

If a local criminal court has denied bail or release on recognizance or has set bail at an excessive amount, the accused may apply to a superior court judge for relief from the bail order.[31] The appeals judge has the discretion to:

- order bail when it was denied in the lower court or when the lower court was without authority;
- vacate the original order and fix a lower amount if the bail was deemed excessive;
- authorize a different form of bail; or
- release the accused in his own recognizance.

Superior court judges are prohibited from engaging in these activities until a report of the accused's criminal record is received from DCJS and the district attorney has been granted an opportunity to be heard on the appeal application.

Revocation of Bail

Should the State wish to confine a person previously released, the CPL provides for a revocation hearing in which the original bail decision may be changed. In felony revocation hearings, the court, in its discretion, is permitted to increase the amount of bail or to revoke bail or recognizance entirely. In misdemeanor cases, the court is permitted to increase the amount but not totally revoke bail. The accused may be required to appear at the revocation hearing; his appearance may be secured by the issuance of a bench warrant.

Bench warrants may be issued by superior court, district court, and New York City Criminal Court judges, or superior court judges sitting in local courts. These warrants may be executed anywhere in the State. Warrants may also be issued by city, town, or village courts. Warrants issued by these lower courts may only be excuted in the county where issued and in adjoining couties. Written endorsement obtained from the local criminal court is required to execute the warrant in any other, non-adjacent counties.

Summary

The sole statutory purpose for refusing to grant bail or recognizance or for imposing an excessively high monetary bail is to assure the appearance of the accused at trial. Bail may not be set at an amount in excess of what is required to secure the accused's presence at subsequent criminal proceedings. Any bail amount which is set higher is "excessive" according to the New York State Constitution. However, complete discretion in assigning the amount of bail resides with the judge and no statutory guidelines for determining the limits of excessiveness are provided.

Bail may be set in a number of different forms. Unless the judge so specifies, bail must be imposed in the least burdensome form (unsecured bond). It is also possible to set bail in a number of alternate, though practically equivalent amounts. The satisfaction of any of these secures the pretrial release of the accused. Various criteria are specified which must be examined prior to the adjudication of the bail or recognizance decision. These are generally referred to as the "community ties" criteria. Additionally, the court is required to examine the accused's prior criminal record. Finally, the CPL stipulates that bail or recognizance must be set for misdemeanor cases but that for felonies the decision to set bail or recognizance is discretionary with the court. Granting bail or recognizance on a felony charge is contingent upon the right of the district attorney to be heard on the issue of bail (or to waive his right) and the acquisition by the court of the accused's criminal record.

Having reviewed the statutory provisions for bail, it will be useful to examine bail practices in New York State. This will provide insight into the administration of bail.

OPERATION OF BAIL IN NEW YORK

The availability of statistics on bail is limited to three major high crime areas in the State -- the counties comprising New York City, Monroe County and Erie County. These areas have pretrial service agencies which accumulate data and generate statistical information. In 1976 New York City's crime accounted for just under 60 percent of the State's crime, crime in Erie County (Buffalo) accounted for another 6 percent of the State crime, and Monroe County (Rochester) about 3.5 percent.

New York City

There are two major sources from which the information on bail and bail decision-making in New York City were derived. The Vera Institute of Justice and the New York City Criminal Justice Agency (the City pretrial service agency) collect separate data on the progression of defendants through the bail system. The statistics amassed from these sources are not identical as the sample populations upon which each are based were collected at different times and from different sources. This in no way impinges on the validity of the separate results, and indeed, the results are sufficiently similar so that each lends credibility to the other. Each source presents a slightly different aspect of bail and the bail decision process. Integration of these findings results in a more complete portrait of the bail process.

Before discussing the findings it is necessary to define some of the terminology. The New York City Criminal Justice Agency has three categories into which it allocates its clientele. The categories are based on the ability of the agency to verify the information obtained from the accused. Each defendant is interviewed to determine the strength of his community ties. Those professing strong community ties (length of residence, employment record, family living in area) are eligible for a verified recommendation. Release is recommended if the interviewer is able to adequately verify the information. Those who provide information indicating strong community ties, but for whom the information is not verifiable are classified as non-verified recommended. Those who are unable to provide community tie information are relegated to the category of no recommendation. The agency does not furnish the court with explicit negative recommendations.

The purpose of the following statistical review will be to describe case outcomes at various decision points in the criminal justice processing. This will provide a framework to judge the adequacy of the release criteria through an assessment of the failure to appear rates.

The following results are based on the total population of those defendants interviewed by the Criminal Justice Agency in the New York City Criminal Courts from Brooklyn, Bronx, Manhattan and Queens during June, 1977.

- At the prearraignment interview slightly over a third of the defendants received a verified recommendation for recognizance release and another quarter were granted non-verified release recommendations. Thus, nearly three out of five were recommended for release at this stage.

- Regardless of the original release recommendations, it is clear that at arraignment slightly more than two cases in five were disposed of, making the release recommendation somewhat irrelevant. Disposed cases resulted primarily from judicial dismissals and guilty pleas. Only misdemeanor cases may be disposed at arraignment. Pleading guilty to felonies is prohibited at this stage of processing.

- Well over half of the cases were still open subsequent to arraignment. Of these open cases, nearly half of the defendants were released based on verified recommendations; slightly more than a quarter were released based on non-verified recommendations; and slightly less than a quarter were released in the absence of any recommendation.

- Slightly less than half of the defendants were released on recognizance subsequent to arraignment.

A look at bail decisions in New York City during the same period of time will complete the assessment of the bail process:

- A quarter of those interviewed by the Criminal Justice Agency had bail set at arraignment.

- About one in five posted bail and were released pending trial but that about half the defendants for whom bail was set failed to post the sum necessary to secure release. Slightly more than a quarter of those on whom bail was originally set were subject to post-arraignment recognizance release.

Similar results are derived from data compiled by the Vera Institute. It represents a sample of defendants arraigned in Brooklyn Criminal Court August 6-8, 1976 who were still in detention as of midnight August 8.

There are no figures comparing the numbers dismissed, convicted, and sentenced with those who had the advantage of pretrial release (either on bail or recognizance). Although about half of the accused were free pending final disposition, information on the proportion imprisoned, dismissed or discharged by the conviction and sentencing stages, who were also released pending trial, is unavailable.

In comparing the Vera study with the CJA findings some remarkable similarities are noted. In the Vera study the case outcomes of the nondisposed cases are presented--about one-sixth of defendants had their cases dismissed; another sixth were sentenced to incarceration; a small proportion of the defendants were found guilty and sentenced to either probation or conditional discharge. The largest proportion of the cases failed to achieve resolution within two months. Nearly three out of five cases were disposed of at arraignment in both studies. Both also show that two out of five defendants were released on recognizance. Both studies demonstrate that the proportions posting bail in each sample were also quite similar. In the Vera sample, about six percent of the cases not disposed at arraignment made bail, while in the Criminal Justice Agency data a similar proportion of nondisposed cases also made bail.

Use of ROR is frequently considered an innovative alternative to bail. Evaluation of its success as measured by failure of the accused to appear at scheduled court appearances is important. The failure to appear rate for those released on ROR is quite low. In June, 1977, the New York City Criminal Justice Agency reported that 9.7 percent failed to appear. While this appears somewhat high, when the figure is partitioned by the Criminal Justice Agency recommendations, a more optimistic portrait of ROR emerges. Those for whom the agency made verified recommendations had a failure to appear rate of only 6.6 percent. This is considerably lower than the nearly 10 percent failure to appear rate generated by the entire sample. Those for whom the agency made a non-verified recommendation had a slightly higher rate of 8.8 percent while those for whom the agency made no recommendation had a failure to appear rate of 17.4 percent. Thus the rates are substantially lower for those for whom the agency recommended pretrial release.

These figures may be refined further. Many failures to appear are not the result of willful attempts to flee prosecution. Confusion concerning when and where to appear is more frequently the cause. Removing this factor from the overall failure to appear rate results in a significantly lower percentage, designated the "willful failure to appear rate." This measures the number of scheduled court appearances resulting in the issuance of a bench warrant when the accused failed to return to court within 30 days of his scheduled appearance and attempts to locate him were unsuccessful. It represents those accused who genuinely sought to escape criminal processing by fleeing or hiding. The willful failure to appear rate for the four-county New York City sample was about one in twenty-five. Distributing this among the various Criminal

Justice Agency recommendations results in even more meaningful figures. Those for whom a verified recommendation of release was made willfully failed to appear only one time in fifty. Those who were recommended for release on non-verified information failed to appear only slightly more often. However, those who were released with no agency recommendation failed to appear in one out of ten instances.

The above figures justify the conclusion that the failure to appear rates are highest for those who offer no verifiable community ties, as measured and examined by the Criminal Justice Agency. Those who were released by the court, but for whom no agency recommendation was made, had the poorest appearance record. The failure to appear rate, both willful and aggregate, was considerably higher for this group of defendants than for those who at least professed to having some community ties.

One last finding is remarkable in its implications. In the four-county New York sample, the failure to appear rate was highest for those charged with misdemeanors. For misdemeanants the failure to appear rate was about one in ten, compared to one in fourteen for A and B felons and one in thirteen for C and D felons. Misdemeanants are nearly one and one-half times more likely to flee than Class A felons. A contradiction between common belief and empirical reality surfaces when one considers that those charged with the most serious offenses are less apt to flee than those whose cases would presumably result in less serious sentencing outcomes.

Erie County (Buffalo)

Because different agencies engage in unique record keeping practices, the statistics from Buffalo are only in a general way comparable to those generated in New York City. Thus, comparisons are risky and it is most useful to examine each location as a separate entity. Buffalo, unlike New York City, disposes of negligible proportions of misdemeanor cases at the arraignment. Rather, arraignment in Buffalo serves the express purpose of making the bail release decision. The agency recommends about two-thirds of the defendants for ROR; the court imposes ROR in two out of five cases. Custody release, too, is recommended by the agency far more frequently than it is granted. Bail is imposed in two out of five cases while it is recommended by the agency less than 20 percent of the time. In comparing agency recommendations vis-a-vis judicial decisions, the recommendations were followed about three-quarters of the time.[32] It is important to note, however, that recommendations on A and B felonies are prohibited in Erie County unless reviewed by the director of the agency.

The Erie County Pretrial Services Agency reports:

- Of those arrested on either misdemeanor or felony charges, less than two-thirds were convicted of any offenses.

- Although less than one-sixth of those arrested were sentenced to jail, one-third of these people were in fact incarcerated between arraignment and final dispositon. They spent, on the average, about 3 weeks in pretrial detention.

- The cost of detaining those not sentenced to jail is $1.5 million annually (daily cost is $22).

- Surety bail was assigned more frequently to felons. Defendants released on surety bail show the highest rate of reappearance on any form of bail. This is due primarily to the fact that one in five misdemeanants failed to appear; for felony defendants, on the other hand, only one in fifty failed to appear.

- For those charged with felonies who were bailed at arraignment and for whom agency intervention resulted in a reduction of the original bail amount, detention lasted an average of 35 days. For misdemeanants, the average length of detention was 11 days. This stands in marked contrast to those defendants for whom the agency was unable to obtain lower bail. For these felons the average detention was 53 days and for misdemeants it was 18 days.

The willful failure to appear rate in Erie County averaged less than five percent over a three-year period ending in 1976. This rate is slightly higher than the willful failure to appear rate in New York City. Here too, it represents those individuals who failed to appear within a specified time following their scheduled court appearance and who could not be located by the agency. It was assumed that failure to appear on the part of these people was due to a desire to avoid prosecution.

Monroe County

In Monroe County, which includes the city of Rochester, the pretrial service agency differs operationally from the agencies in both New York City and Erie County. The primary difference is in the agency's supervisory function. In Rochester those defendants who qualify for pretrial release, based on community ties criteria, are released to the custody of the agency which then maintains supervisory powers. This pretrial release must be distinguished from release on recognizance in which the accused is simply left to his own devices. ROR is used sparingly in Rochester. The majority of those released on nonfinancial bonds are supervised by the pretrial service agency.

As the Rochester agency is understaffed, its statistics are sketchy. It is, however, possible to enumerate those interviewed, those released to the agency, those who had bail set, and the overall failure to appear rate for a typical month, September, 1977. Of 1,147 defendants, one-third were interviewed in the city court.

Slightly over a quarter were recommended for release by the agency. About three-quarters of these had their recommendations approved. This accounted for one-fifth of all those arrested. Two-fifths of those interviewed had bail set either because the agency was unable to verify their community ties, because they had too few ties, because they had warrants or detainers from other jurisdictions, or for other reasons.

The failure to appear rate here measured only those defendants who could not be located by the agency and returned to court. It does not include those who failed to appear as scheduled but were subsequently located and returned to court by the agency. For this month, the FTA rate was less than one percent -- a remarkably low figure.

Summary

Thus in New York City, slightly under half of the defendants were released on ROR. In Buffalo, two-fifths were released in this way and in Rochester only one-fifth obtained non-financial pretrial release.

In New York City, the willful failure to appear rate for those with verified recommendations was about one in fifty; in Buffalo too, the failure to appear rate was one in fifty. In Rochester, the figure was one in one hundred (however, it is important to remember that the data was based on only a monthly report; the FTA rate for a nine month period was slightly higher, averaging about one in fifty). It is possible to conclude from these figures that regardless of geographical area, the FTA rate in New York State is both stable and low. The data suggest that it is possible to safely release 98 out of 100 defendants in the absence of any risk that they will fail to reappear.

The New York City, Buffalo, and Rochester agencies are markedly different in their policy patterns. The differences manifest themselves in the fact that in Buffalo recommendations on A and B felonies are rarely made at arraignment -- and only occasionally at later stages of criminal processing -- and in the infrequency of final dispositions at arraignment. These differences undoubtedly reflect differing community attitudes toward crime and its processing, differences which must not be ignored in the State's attempts to provide pretrial services. Despite these differences in policy, the failure to appear rates are similar for all three locations -- well under five percent.

These findings -- and they are echoed in nationwide research -- reduce the credibility of the notion that those with more serious charges should be detained to assure appearance. In New York State, the statistics reveal that felons return to trial with greater frequency than do misdemeanants.

These findings partially negate the claim of the defenders of the existing system who argue that perhaps arraigning judges rightfully detained the most dangerous defendants whereas those charged with less serious crimes are rightfully released. The statistics demonstrate that felons reappear in greater numbers than misdemeanants. This leads to a questioning of the merits of the notion that those charged with serious offenses must be detained. Indeed, this philosophy contravenes the statutes themselves which justify detention on the grounds of risk of flight.

BAIL REFORM—MODELS AND REALITY

From the preceding discussions it is clear that the accused's ability to afford bail has dominated release outcomes. Those able to post bond were freed, regardless of the likelihood of flight or potential for additional crime. Those unable to pay the bail bond were detained regardless of the risk they posed.

The bail system has been largely unsuccessful in its endeavors to translate risk of flight and dangerousness into equitable financial obligations. Thus, even in its own framework, its utility is questionable. Bail operates on the assumption that there exists a relationship between flight, dangerousness and the ability to finance bail. This assumption has persisted despite common sense and quantifiable evidence to the contrary.

The inequity of a system which so grossly favors the financially secure began to receive increased public scrutiny in the early 1960's. The plethora of U.S. Supreme Court decisions and research generated by the Vera Institute of Justice provided a framework for analyzing the existing system. These created an ambience in which change could be wrought. The Vera Institute initiated bail research in the early 1960's. It continues to be a leader in this area.

A BASIS FOR REFORM: THE MANHATTAN BAIL PROJECT

In October, 1961, the Manhattan Bail Project under the auspices of the Vera Institute began operations. The goal of the project was to confront some of the major inequities of money bail and to develop workable alternatives. To achieve these aims, it was necessary to ascertain whether criteria other than the accused's ability to post bond could successfully assure appearance. The essential question: Would indigent defendants, in the absence of the cash necessary to secure release, appear for trial if released on non-financial conditions?

An early study on bail[33] suggested that ties to the community were important in assuring the accused's appearance at trial. Indeed, bondsmen, in deciding for whom to provide bail, frequently employed very similar criteria.

Residential stability, employment history, family contacts in the immediate locale, and prior criminal record were all utilized as indicators to determine the probability that the accused would stay in the vicinity and appear at subsequent criminal proceedings. The underlying rationale was that those with strong community ties would have more to lose by flight--their job, family, friends, etc.--than by the imposition of punishment should a finding of guilt result. These people were the good risks. This non-financial form of release, based on ties to the community, was termed release on recognizance (ROR). It assumed that defendants with acceptable community ties could be released on the strength of their own promise to return to court in the future.

In the Vera project, a group of accused were randomly assigned to experimental and control groups. Those in the experimental group were interviewed to determine the strength of their community ties. The information so acquired was verified by telephoning contacts--family, friends, and employers. Recommendations were then presented to the bail-setting judges. In comparing the experimental with the control group (those subject to conventional arraignment practices) at the conclusion of the project's first year, it was disclosed that six in ten of the Vera release recommendations were followed by the judges for the experimental group. This number greatly exceeded those released using the routine procedures. For the control group, less than one in six were released on non-financial conditions (based on the judge's own determination of the advisability of such release). This project demonstrated that more of the accused could be safely released on non-financial bail than was previously believed. Another interesting finding showed that of those in the experimental group who were granted non-financial pretrial release, slightly under two-thirds were acquitted or had their cases dismissed. Of those in detention prior to case disposition, only about one-fourth had such fortunate case outcomes.[34]

The major criterion employed to evaluate the success of the project was a measurement of the failure to appear rate (FTA). The project would be judged a failure if large numbers of those released on ROR fled before their court appearances. The findings reveal that only 1.6 percent of those ROR's failed to appear. This is slightly lower than the FTA rate of 3 percent ascribed to those released on surety bail.[35]

ROR's real success in reducing the numbers of those detained in Manhattan was only a part of the gains. More significant was the successful implantation of the notion that alternatives to money bail could successfully effect change in so entrenched a system.

This project inspired similar attempts in other jurisdictions, and furthered the governmental realization that change in the bail system was imperative. In 1966, the Federal Bail Reform Act was enacted. The provisions in this legislation paved the way for wide-scale reform at both federal and state levels.

THE FEDERAL BAIL REFORM ACT OF 1966

In 1961 the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary began investigating the possibilities of reformatory legislation. During the next five years under the constant tutelage of Senator Sam Ervin, information was gathered and analyzed. Particular interest was focused on the results of the Manhattan Bail Project. By 1963 various pieces of legislation aimed at eliminating some of the more serious defects in the federal bail system were formulated. In 1964 the omnibus bail reform bill was drafted by the Senate. It was amended the following year. A similar proposal passed the House. Finally in September 1966 the Federal Bail Reform Act (FBRA) became a reality.

The provisions of the FBRA established a presumption favoring release, both before trial and pending appeal, on terms other than financial bond. The FBRA stated: "Any person charged with an offense, other than an offense punishable by death, shall at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond...."[36] While imposition of a money bond was nowhere prohibited, it was accorded low-priority status in the hierarchy of release alternatives. Additionally, while a presumption favoring release was clearly in evidence, no explicit right to bail or to release was delineated.

The avowed purpose of the FBRA was to "revise the practices relating to bail to assure that all persons regardless of their financial status, shall not be needlessly detained...when detention serves neither the ends of justice nor the public interest."[37] To secure this goal, two fundamental principles were established:

- a person's financial status should not be a reason for denying pretrial release; and
- danger of nonappearance at trial should be the sole criterion to consider in the bail-making decision.

Release upon personal recognizance or execution of an unsecured bond was mandatory if the judge believed these could assure the appearance of the accused at future criminal proceedings.

Although a preference for non-financial methods of release was articulated in the FBRA, its provisions also delineated a hierarchy of release conditions. These conditions were intended to assure the appearance of the accused in the event that ROR release was deemed inappropriate. The court was required to select from the list the least restrictive condition which would reasonably assure the appearance of the accused at trial. The aim was to pattern pretrial release to the individual needs of each accused. From least to most restrictive these conditions were:

- third party custody;
- restrictions on travel, association or place of abode;
- execution of an appearance bond secured by a percentage deposit (the deposit, not to exceed 10 percent, is returnable to the accused upon satisfactory completion of the proceedings);
- execution of a secured bail bond or a cash deposit in lieu thereof;
- other conditions deemed reasonably necessary to assure the accused's appearance including daytime release.

The judicial officer, in deciding which condition to impose, was advised to consider the:

- nature and circumstances of the offense;
- weight of evidence against the accused;
- accused's family ties, employment record, and financial resources;
- character and mental condition of the accused;
- length of residence in the community;
- record of prior convictions; and
- accused's record of appearance at other court proceedings in which he was involved.

Thus, two broad types of criteria were utilized by the framers of the FBRA: the first included those factors traditionally employed in setting bail (nature of the crime, weight of evidence, and prior record). The second group included factors assessing the accused's attachment to the community as a method to estimate risk of flight.

In addition to the above, the FBRA listed several other significant provisions:

- The judicial officer shall issue a clearly worded order of the release conditions to ensure that the accused fully understands the conditions. The accused must be fully informed of the penalties which will result if he violates the release conditions.[38]

- A 24-hour review is available for an accused remaining in custody because of an inability to meet his release conditions. If the conditions are not modified, the judicial officer who originally imposed them is required to specify in writing the reasons for this decision.[39]

- With the accumulation of additional information indicating that different conditions would be more appropriate, the judicial officer is permitted to amend, in writing, the order to impose additional or different conditions.[40]

- Having exhausted the "review" provisions, the accused person who remains in detention may move to amend the order of release in the court of original jurisdiction. The court is required to act immediately on this issue. If, however, the original court denies the amendment or imposes additional conditions of release, an appeal may be taken to a court which has appellate jurisdiction over the case.[41] Evidence must be reviewed at this proceeding. If the appellate court finds that the original order is supported by evidence, it must affirm it. If the order is not supported, the court may either remand the case for additional hearings or it may release the accused.

- Fines of up to $5,000 and imprisonment of up to 5 years may be imposed on those who, released in connection with a felony, fail to appear as scheduled. The fine and imprisonment penalties are accordingly less for those failing to appear in connection with a misdemeanor.[42]

- Credit will be given for "any days spent in custody in connection with the offense for which sentence was imposed."[43]

An anomalous situation exists in the FBRA with regard to the issues of dangerousness and preventive detention. For noncapital crimes, pretrial release is predicated upon the promise to appear at trial. Dangerousness, it is alleged, is not a subject for consideration in the determination of this release decision. Capital cases and post-conviction releases are, however, subject to different criteria. In relation to these cases, dangerousness as a criterion for release is explicitly introduced and it is mandated that the potential for dangerousness be scrutinized.[44] Thus, for one set of crimes (noncapital) the judicial officer predicates the release decision solely on the issue of flight, whereas for a second set of crimes (capital and post-conviction) consideration must be given to both flight and dangerousness. While formal provisions relating to preventive detention of the dangerous accused were specifically eliminated from the FBRA for noncapital crimes,[45] the fact that dangerousness may be considered for capital and post-conviction cases provides a means by which pretrial detention of the accused may be introduced. Prediction of future dangerousness and

provision for preventive detention are two of the most crucial issues in bail reform, but the contradictory treatment they receive in the FBRA further complicates an already perplexing controversy.

While the FBRA was applicable only to federal courts and the District of Columbia, the impetus which it provided influenced progressive bail reform in various state statutes. Within five years of its passage, at least a dozen states had revised their bail laws.[46] States such as Alaska[47], Arizona[48], Iowa[49], Kansas[50], Kentucky[51], Oregon[52], and Pennsylvania[53] instituted bail reform procedures which recognized in the FBRA their theoretical underpinnings. Subsequent to the FBRA various other model bail legislation was developed. While these paralleled the FBRA in some of their provisions, various alternative plans were developed.

POST-1966 REFORM EFFORTS

The Federal Bail Reform Act represented a radical departure from the traditional administration of bail and established reforms which would operate according to new principles. The strong preference for release on nonfinancial terms was coupled by the FBRA with the mandate that appearance of the accused was (in noncapital cases) the sole justification for detention. Priority, in terms of the release hierarchy, was given to ROR, and after that to the least restrictive alternative which would reasonably assure the appearance of the accused. All forms of cash bail were considered an onerous burden.

Assessment of pretrial dangerousness was limited to capital cases and to cases on appeal (post-conviction). However, even for capital cases, a strong preference for pretrial release on the least restrictive conditions was articulated. Operating under the mandates of the FBRA the judicial officer was expected to examine not only the traditional criteria of release--the nature and circumstances of the offense and the prior criminal record--but also the more innovative criteria generally encompassed under the rubric of "community ties". These, it was believed, placed the indigent accused in a more equitable position for securing release.

Since 1966 various alternatives to the FBRA have been developed. While all have used the FBRA as their starting point, they have, in their particulars, digressed from some of the premises stated in the federal legislation.

The American Bar Association Standards Relating to Pretrial Release (ABA)

Published in 1968, the ABA standards vary only slightly from the provisions of FBRA. Major differences occur in the following areas:

- The ABA standards provide that citations and summons may be used for minor offenses and for offenses where total length of imprisonment for the alleged crime would not exceed six months. A summons for a crime operates exactly like the more familiar traffic summons wherein the police officer, upon apprehending the accused, merely issues a summons to appear in court on a particular date for further processing.
- Like the FBRA, the ABA considers money bail an onerous alternative, to be used only when no other alternative will secure appearance. Its imposition is never justified in the interests of preventing anticipated criminal behavior.

The ABA repudiates use of preventive detention of the noncapital accused. However, the standards do specify particular release conditions for those likely to flee and those deemed dangerous.

These standards delineate particular release conditions which attempt to restrict the activity of the potentially dangerous accused. They are intended to limit his activity in relation to his associations, his drinking habits, his weapon carrying proclivities, etc. The ABA standards also apply different criteria to capital and noncapital offenses. The standards of evidence necessary for making a finding of dangerousness in capital cases are far more stringent in the ABA standards. Here, the "facts [must] support" a finding of dangerousness before detention may be imposed. In the more lenient FBRA standards, the court need only have "reason to believe" that the accused may pose a danger to the community. [54]

National Advisory Commission on Criminal Justice Standards and Goals (NAC)

The focus of the FBRA and the ABA standards was clear. Both attempted to ignore the issues of dangerousness, preventive detention, and the problems related to recidivist criminal activity. In their promotion of pretrial release these two models predicated all release/detain decisions on a "failure to appear" cornerstone. Consideration of dangerousness was limited to those charged with capital offenses or those whose cases were on appeal.

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals (NAC) proposed a set of guidelines. These deviated significantly from those set by the FBRA and the ABA. Recognizing that one of the major objectives of any bail reform effort was to terminate, in so far as possible, the utilization of high money bail to secure detention, NAC explicitly provided that pretrial detention was per se acceptable. Detention was not however to be premised on dangerousness, but on the risk of flight. This was a radical departure from earlier reform measures, none of which had advocated

outright detention and none of which legitimized the notion that detention could be used to curtail flight.

Despite this, there were some marked similarities between the NAC model and the earlier standards. All relied heavily on nonfinancial types of release, all espoused a general concern for the accused's appearance in court, and in different ways, all expressed some concern for pretrial dangerousness. Indeed while the FBRA and the ABA elected to disregard the problems arising from a consideration of dangerousness, NAC selected an alternate way of resolving this issue. The authors of the NAC standards delineate a single set of standards as the preferable means of circumventing this problem. These standards would be equally applicable to both noncapital (presumed non-dangerous) and capital (presumed dangerous) offenses. Thus, NAC, by failing to make a distinction between capital and noncapital offenses successfully avoided the issue of dangerousness.

While verbalizing a disdain for dangerousness as a viable concern, the NAC standards nonetheless suggested that detention be used to ensure appearance. This distinguishes it from the FBRA and the ABA standards wherein detention of capital offenders was permitted only because of possible harm to the community. Use of preventive detention was borrowed by NAC from standards concerned with defendant dangerousness and converted into standards used to regulate the appearance of the accused.

In the NAC guidelines, pretrial decision making was conceived to be a bifurcated process in which the judicial officer first decided whether the accused would be released or detained. Subsequent to a decision to release, more or less onerous conditions of release were contemplated. ROR, unsecured appearance bond, custodial, supervisory, and conditional release were among the alternatives available for judicial consideration. Selection depends on the risk of flight which the defendant was presumed to pose.

The framers of the NAC guidelines understood that detention, whether it occurred sub rosa disguised as high bail or whether it occurred undisguised, will continue to exist. By providing detention as an explicit and justified alternative, NAC standards clarified the decision making process. This clarity can only have a beneficial effect on the operation of bail.

Protecting against the unfettered use of pretrial detention under the auspices of concern for appearance in court, the NAC guidelines provided for procedural safeguards. These include the right to:

- notice of the intention to detain or revoke release;
- a hearing on the issue;

- be represented by counsel (including appointment of counsel);
- present evidence;
- subpoena witnesses;
- confront and cross-examine witnesses; and
- have written notice of reasons for detention or revocation of release and the evidence relied upon.

Although safeguards lengthen and complicate the hearings, the availability of a lucid rationale to justify detention simplifies its imposition. With detention a permissible alternative, the cloud of hypocrisy which enveloped bail could be lifted. The decisions which would transpire regardless could be made openly, safely encompassed by procedures designed to minimize abuse.[55]

The 10 Percent Plan

Up to this point discussion has concentrated on various models for pretrial release all of which repudiate the use of money bail. Because of the significance of a much used financial alternative, it is necessary to digress from the established format and describe a plan which while using financial bail avoids the pitfalls and inequities of the commercial bonding system.

"The 10 percent provision is designed to restore the administration of bail to the courts and to eliminate the professional bail bondsman from the criminal justice administration processes."[56] The operation of the 10 percent plan (also called a partially secured bond) is very simple. The accused, or a third party acting as his surety, deposits with the court clerk a sum equal to 10 percent of the bail amount. This deposit, minus a small service charge, (generally 1 percent or 2 percent of the bail amount) is returned to the accused (or his surety) at the conclusion of the criminal processing. As with the commercial bondsman, a deposit is required, but unlike the commercial bond system, no collateral is required and more significantly, the deposit is refunded. Although this form of money bail was believed to be more equitable than the surety for profit systems, it was recognized that there would always be some defendant who would be unable to afford the relatively paltry sums required by the deposit.

This plan provides the accused with a real financial incentive to appear. It accepts the realities of financial bail and within that scope, strives to produce a design which operates as equitably as possible by reducing the penalties (detention) which accrue to the indigent as a result of his indigency. More importantly it avoids reliance on the bondsmen as an integral component in the release plan systems.

Although both bondsmen and the deposit systems require 10 percent deposits, the latter enables more accused to secure release. There are a number of reasons for this:

- While able to raise the amount of the deposit, some defendants are unable to afford the amount required by the bondsman because of the nonrefundable dimension of the surety for profit system. Friends and relatives are more likely to contribute money towards bail when they know it will be returned at the conclusion of the proceedings.
- Many defendants may have the requisite financial resources to afford the deposit, but may be incapable of satisfying the collateral conditions required by bondsmen. A study examining the 10 percent deposit alternative in Connecticut, found that in a sample of 179 detainees, almost a fifth attributed their continued incarceration to an inability to provide collateral.[57]
- Those, particularly misdemeanants, who expect to be incarcerated a short time because of disposition at arraignment, may be unwilling to pay a nonrefundable sum to bondsmen. This is true of those who expect to plead guilty or who expect their cases will be dismissed.

Thus, the deposit system, while requiring the payment of a sum roughly equivalent to that required by bondsmen, effects the release of greater numbers of accused.

STATE AND LOCAL APPROACHES TO BAIL REFORM

STATE AND LOCAL APPROACHES TO EQUITY IN BAIL

ILLINOIS

Illinois was the first state to experiment with alternatives to traditional bail. Although its 10 percent plan was enacted in 1964 prior to the passage of the FBRA, to suggest that Illinois was not influenced by the federal legislation would be misleading. Bail hearings and information gathering were ongoing at the federal level for at least five years prior to enactment of the FBRA. The federal activity clearly influenced the bail system in Illinois.

Although Illinois did not statutorily prohibit the use of bondsmen, the statutes provided that only the accused was permitted to pay the 10 percent deposit. Third parties (i.e., bondsmen) were prohibited from financing the deposit. To strengther this mandate, the Cook County Circuit Court ruled that the clerk of courts could deliver receipts for deposits and make refund checks payable only to the accused.[58] Thus, in practice if not in law, the 10 percent deposit plan became the exclusive means of providing for financial bail.

The default rate for bonds written by bondsmen in the years preceding the statutory revisions hovered around 10 percent. Despite claims from bondsmen that default rates would increase dramatically, statistics in the years immediately following the new legislation indicated that default rates remained stable. In 1968, the default rate for Chicago was 10.7 percent; for the remaining districts in Cook County it was 13.1 percent, an insignificant difference compared to pre-1964 rates. In 1969, the default rates mirrored those of 1968; no significant differences in default rates emerged.[59]

This form of financial release was used infrequently by Cook County judges. Release was more often secured through the deposit of cash, stock, bonds, or real estate valued at the bail amount. These traditional forms of financial release accounted for just under two-thirds of the bail cases in Cook County while the 10 percent deposit was used in about one-third of the releases. Least

popular of all was the provision for non-financial release, release on recognizance. This was used in only about 5 percent of the pretrial releases in Cook County.[60]

OREGON

Reformatory bail legislation was passed in Oregon in 1973. The Oregon statutes expressed a preference for nonfinancial types of release in their mandate to "impose the least onerous conditions reasonably likely to assure the person's later appearance."[61] Innovations occurred in the provisions of these statutes. A written release agreement in which the terms and conditions of release and the amount of security (if applicable) had to be signed by the accused. This helped ensure his awareness of the agreement. The methods of release -- release on recognizance, conditional release, or security (financial) release -- were determined by reference to criteria which the judicial officer was required to consider in his decision. If financial release was selected (this was considered the most restrictive in the hierarchy of release alternatives) the accused was permitted to select the form of payment. He could deposit 10 percent of the bail amount or alternatively deposit stocks, cash, etc., equal in value to the total bail amount with a full refund guaranteed at the termination of the action. There was a presumption favoring pretrial release of the accused with the burden of proof for the imposition of detention placed on the prosecutor.[62]

Two classes of offenses were exempted from the rules relating to pretrial release of the accused -- murder and kidnapping. Even here the presumption of release existed unless the "proof is evident or the presumption strong that the person is guilty."[63] It was the obligation of the judicial officer to determine whether the above criteria are met.

The Oregon statutes also authorized a citation program. This provision too, illustrates a predilection toward release. It entails an on-the-street decision by the arresting officer concerning whether to issue a citation in lieu of arrest. Citations were employed not only for county violations and misdemeanors, but also for felony offenses which were likely to be bargained to misdeanors at sentencing.[64] The assumption underlying the citation program hinged on the notion that if a police officer believed the accused was a likely candidate for ROR, he would be more inclined to issue a citation rather than arrest the accused and initiate the time-consuming pretrial release proceedings.

In summary, Oregon has effectually eliminated commercial bondsmen, expressed a preference for nonfinancial release, and permitted the accused optimum input into the proceedings surrounding his release, by allowing him to select his own financial bail alternatives.

PHILADELPHIA, PENNSYLVANIA

In 1971, by local court rule, Philadelphia reformed its city-wide bail system. In 1973, the Pennsylvania Supreme Court used this model to revise the state rules governing bail.

The Philadelphia system provided for various forms of release. At the discretion of the court the accused could be released on ROR, nominal release (release in which the accused is released upon receipt of $1.00), conditional release (requirement that the accused abide by certain specified conditions), or money bail. If the release is premised on money bail, the accused can either post the full amount in cash, purchase a surety bond from a bonding company, or post a 10 percent deposit. If the accused is unable to raise a 10 percent deposit, a friend or relative is permitted to pay it for him. This effects a third-party surety release in which the deposit money remains the property of the third party. Third party release helps assure the appearance of the accused at later criminal proceedings as the third party has an obvious vested interest in returning the accused to court. The practical result is that commercial bail bondsmen are no longer functional in the bail system.

Philadelphia has an active pretrial services agency which interviews virtually all of those arrested. The agency interviews each of the accused, collects information on their "community ties," financial situation, prior records, etc., and then verifies this information. The agency recommends ROR for slightly less than half of the clients--47 percent are so released. An additional quarter not recommended for ROR are granted it by judicial discretion. Money bail is set for three-fifths of the accused; more than 90 percent use the 10 percent deposit system. These two programs constitute the majority of all releases in Philadelphia.

Conditional release serves as a more burdensome form of release. Those who are judged too risky for ROR or who are unable to raise the 10 percent deposit are released with a variety of conditions attached to their activities. The conditions generally entail regular attendance by the accused at one of a number of treatment facilities.[65]

Success of the Philadelphia program is judged in terms of those who fail to appear at subsequent procedings. The ROR and the 10 percent plan have very low failure to appear rates, both under two percent. The conditional release program has a somewhat higher rate, about six percent. However, the number of those using the plan is trivial, making the failure to appear rate of minor consequence.

The results of the Philadelphia program are admirable. At a time during which the arrest rates consistently increased, the jail population decreased. In 1976, the jail population shrank from 2,700 to 1,711, and many detained were ineligible for release due to detainers (hold orders from another jurisdiction). This represents a considerable savings to the city coffers, not to mention the ancillary savings in terms of human resources.

A unique aspect of the Philadelphia program is the inclusion of a retrieval unit (a bench warrant unit), whose task is to inform warrant suspects of their court dates. While the investigators are armed and possess arrest powers, their work is not oriented towards the use of force. Their major service is to stay in contact with the released. Through telephone calls and personal contact they remind the accused of court dates. In the event the date has passed, they attempt to persuade the accused to report to the court. This approach operates effectively because the typical failure to appear, here and elsewhere, is not a person who has wittingly sought to escape; it is an individual who either forgot or failed to understand that he was to reappear.

The staff operating the Philadelphia unit is quite large--about 150 members. Up to 60 of these are members of the retrieval unit. Small numbers of staff operate the interview facility in the detention center--these staff members are all attorneys or law students. The conditional release staff is composed of about 10 members whose task is to make regular progress reports on these conditionally released. They determine whether the released is following the imposed conditions and attending the specified treatment centers.

Philadelphia, a city which has a crime profile somewhat comparable to New York City, has exhibited success with its pretrial services agency. The agency supervises the accused, makes release recommendations, and is responsible for the retrieval of defendants who fail to appear for scheduled court appearances. In addition, the 10 percent deposit system has been successfully employed for those cases in which ROR is deemed unsuitable.

KENTUCKY

February, 1976 marked the passage of an encompassing bail reform package in Kentucky. Not only was bail bonding for profit statutorily abolished (the first state to formally legislate this type of provision) but trial courts were required to provide pretrial release services to the accused. A definite presumption favoring release was established with preference given to ROR and unsecured bail bonds. Believing these means of release incapable of securing appearance, the trial judge was permitted to impose any other conditions which, while providing for release, would also assure appearance. Included were provisions restricting travel, place of abode and associations, provisions for third party custody, the execution of a secured bail bond, and any other conditions which would reasonably assure the accused's appearance at trial. In imposing bail, the judge, in his discretion, could require the accused to post the full cash amount of the bond in the form of properties, securities, or cash (fully secured). The accused was alternatively permitted to post a 10 percent deposit (partially secured). In the first instance, the full amount is returned to the accused upon completion of the criminal proceedings. Under the 10 percent deposit plan, 90 percent of the deposit is returned, while 10 percent of the deposit (1 percent of the full bail sum) is retained to cover administrative expenses.

The Kentucky pretrial service agency has three local program areas corresponding to the major population centers. In the rural areas a single pretrial investigator adequately services a two, three, or four county circuit. Statewide, the program is directed by a small central staff whose major concerns involve coordinating the programs, making adjustments when problems arise, and collecting and evaluating statewide statistics on the program's operations.

A novel aspect of the Kentucky statute is its provision for a community forum whose purpose is to encourage community leaders and criminal justice officials to meet regularly to discuss the policies, procedures, and problems of the local programs

The Kentucky State Police form an integral component in the program's functioning. They are responsible for verifying prior criminal records and retrieving the accused who fails to appear. The State Police provide a statewide 24-hour criminal records checking system. This information is essential to the judge as one of the sources upon which he bases his bail decision.

Evaluation of the Kentucky program is made difficult because of its immaturity. Data exist for only a single year of operations. Findings indicate that of those arrested, placed in custody, and eligible for pretrial services interviews, over two-thirds were in fact contacted by the agency. Of these,

three-fourths were found eligible for ROR. Two-thirds were actually released on ROR; one-tenth were released on an unsecured bail bond; less than five percent were released on nonfinancial conditions; and one-fifth were rejected by the judiciary for program release.

A strong preference for nonfinancial release is demonstrated by the fact that few of those arrested and placed in custody were released on the 10 percent deposit system. Failure to appear rates for the 10 percent plan were relatively high. Thirteen percent of the total number of accused representing 6.7 percent of the total required court appearances failed to appear as scheduled. This is considerably higher than the failure to appear rates of those released under the supervision of the Kentucky pretrial services agency. Only 3 percent of those so supervised neglected to appear for court proceedings. This represented 1.9 percent of all required court appearances.[66]

An interesting feature surfaces in examining the agency clients who failed to appear. Money bail statutes are premised on a theory which suggests that those charged with capital offenses are most likely to flee. These people, it is said, have the most to lose following conviction. In Kentucky, 90 percent of those failing to appear were charged with misdemeanors at arrest; the remainder were charged with felonies. Interestingly, over half of those failing to appear were charged with the most minor of infractions -- alcohol or traffic violations. Thus, the theory behind money bail once again succumbs to the rigors of empirical tests.

One last fact merits mention. Re-arrest data collected on those released prior to trial reveals that in Kentucky less than 5 percent of those released were re-arrested on a second charge while on program release.

DISTRICT OF COLUMBIA

Pretrial detention of the dangerous defendant has been an ongoing concern of bail and release endeavors. Few attempts have been made to address this factor. High money bail was traditionally used to keep potentially dangerous defendants out of the community. It involves the intentional setting of money bail beyond the financial resources of the presumptively "dangerous" accused in order to effect his detention.

The District of Columbia is unique among jurisdictions in recognizing that the screening of accused for potential dangerousness is a legitimate function

prior to making a release decision. Risk of flight and dangerousness are afforded co-equal status in the District's Code (Bail Act of 1970) which establishes nonfinancial bail procedures. The D. C. Code specifies four categories of accused liable for detention:

- Those who are presently charged with the commission of a dangerous crime (robbery, burglary, arson, forcible rape, and sale or distribution of drugs).
- Those who in the past exhibited a propensity to engage in crimes of violence. The criteria specifying those detainable under this provision are:
  - .those currently on pretrial release or release pending appeal, charged with a prior crime of violence;
  - .those convicted in the past 10 years of a crime of violence; or
  - .those on parole or probation for a crime of violence.[67]

  Crimes of violence are murder, forcible rape, carnal knowledge of a female under the age of 16, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, and assault with a dangerous weapon.
- Narcotic addicts charged with one of the above crimes of violence.
- Those accused who, regardless of offense charged, attempt to obstruct justice by threatening jurors or witnesses.

It must be obvious from the above reiteration that in attempts to clearly specify those who are and are not eligible for detention, practically anyone accused of any felony could be included. The potential for abuse in so general a statute is overwhelming.

In an attempt to limit the potential abuse inherent in such far-reaching criteria, the D.C. Code requires that a hearing be held to establish the accused's potential for dangerousness. At this hearing due process rights afforded defendants at other stages of criminal processing are provided. The safeguards delineated in the Code specify that the accused is entitled to representation by counsel, to be able to testify and present information and witnesses in his own behalf, and to appeal. The Code also provides that the information used at the hearing need not conform to rules pertaining to the admissibility of evidence at trial, and further that should the accused take the stand, his testimony will not be admissible for a determination of guilt at any subsequent proceedings. As a further safeguard, the Code specifies that persons detained pending trial are entitled to speedy processing of their cases. These cases are to be placed on expedited calendars to ensure that the pretrial detention does not continue more than 60 days.

While the D.C. Code has harsh statutory provisions, in actuality, the

preventive detention provisions have been infrequently used. In the first ten months of operations, there were only 20 occasions in which the preventive detention provisions were used.[68] Unexpected repercussions did occur, however. Subsequent to the passage of the D.C. Code the use of non-financial release in the District of Columbia escalated, with a concomitant decrease in cash bail. A 1971 study,[69] demonstrated that 55.5 percent of the defendants processed through the D.C. bail system were released on recognizance (although with conditions attached), 13.2 percent were released on bail and 31.3 percent were detained. In 1962 on the other hand, there were no recognizance releases, 38.5 percent bail releases and 61.5 percent detained. Thus the D.C. Code altered bail practices in a direction which removed some of the harsh financial burden accruing to indigent defendants.

In many of its provisions the D.C. Code reflects the provisions of the FBRA. A critical distinguishing feature is the D.C. Code's expansion of the class of dangerous offenders to those charged with noncapital crimes (the FBRA's sole concern with pretrial detention of the dangerous focused on those charged with capital offenses). The inclusion of information on past criminal conduct to the release criteria specified in the FBRA ensured that assessments of prior dangerousness and previous failures to appear would be given consideration in the release decision.

ASSESSING THE BAIL ALTERNATIVES

Abolition of surety bail may be effected by reliance on 10 percent deposit plans, conditional and partial release programs, and preventive detention. These alternatives have been used with varying frequency and success in different jurisdictions. Since these alternatives attempt to balance the interests of the offender with those of the state, conflicts develop. Therefore, it is critical to examine the success of these different proposals in an effort to select those which are best suited to the interests and contingencies of New York State.

Unique concerns characterized bail reform in the decades of the 1960's and the 1970's. A pervading interest in social change characterized the 1960's, resulting in progressive bail program developments. ROR best exemplified this emphasis and implementation of bail projects based on ROR was greatly expanded subsequent to the success of the Manhattan Bail Project. In the 1970's, the increasing interest in law and order refocused the concern regarding the rights of the accused. This has been mirrored in recent bail practices. There has been a shift towards implementing those alternatives which fall more closely within the framework of traditional (surety) bail. Ten percent deposit plans, conditional release, and preventive detention were developed to answer to the social ideology of this decade.

To develop bail legislation in anticipation of the decade which stretches before us, it is useful to assess previous reform endeavors. This will enable culling from past practices those aspects best suited to a cohesive and coherent system of pretrial release in New York State. Examination, in some detail, of the previous programs is necessary.

SURETY BAIL

Conditioning pretrial release on the posting of a cash bond assumes that money will serve to ensure the accused's appearance in court. It requires

the belief that the defendant will be motivated to appear to avoid forfeiting the collateral required by the bondsman. Use of money bail also requires translating risk of flight into dollars and cents, a practice of questionable validity.

An expert in the area of bail, Wayne Thomas, asserts that the future of cash bail is nonexistent, "It does not now perform any important system functions and will not long remain a part of the criminal justice system."[70]

In a study prepared by the Pretrial Service Agency in Buffalo, New York, it was found that those accused released under fully secured forms of bail (traditional bail) have the highest rate of nonappearance at scheduled court procedings.[71] This is not a tribute to its inherent utility. If surety bail is least likely to ensure appearance and in addition, it handicaps many indigents who might safely be released, some question regarding retention of the surety system must be asked.

Despite the fact that many experts agree that the old system of surety bail will ultimately wither away, there is little doubt that for the present the use of money to secure release will metamorphose and take the form of a 10 percent deposit plan.

TEN PERCENT DEPOSIT PLANS

It may be argued that the 10 percent deposit plan effectively ensures appearance because of the true financial incentive which it incorporates. Differences among the states in the operation of deposit plans generate different release patterns. Illinois, Oregon, and Kentucky use a "no option" plan. The accused is not permitted to decide whether to hire a bondsman. Release is secured by means of either a 10 percent deposit or payment in full of the bail amount. Surety bonds are not permitted. In other jurisdictions, including New York and the federal system, deposit options are available as one of several forms of cash bail. These option plans less effectively promote release because with the availability of other forms of cash release, the deposit plan is rarely used.

The option plan differs markedly from the no-option plan. In the latter, the defendant may elect to post a deposit bond whenever bail is set. In the option plan, on the other hand, the judge decides first whether or not bail may be posted in the form of a deposit bond and secondly, often decides the amount of the deposit. In New York State statutes, the deposit amount may be fixed by the judge for each separate case (not exceeding 10 percent).

Very different bail practices result where the decision to impose deposit bail is discretionary and often options exist. Of paramount significance is the infrequent use of deposit bail when surety bail also remains an alternative. For example, in 1972 in the District of Columbia where deposit bonds were permitted since 1966, only 405 deposit bonds were posted, compared to 1,500 surety bonds.[72] In New York deposit bail is used only rarely. In Buffalo, for example, only 5.2 percent of all bail releases were accomplished using this means of release.[73]

Still a different type of deposit system operates in Philadelphia where both surety and deposit bond alternatives are available. Selection of the form of payment resides with the accused resulting in near total abolition of surety bail and bondsmen. In 1974, two years after the Philadelphia plan went into effect, nearly all cash bonds were 10 percent deposit bonds. However, surety bail and bondsmen have not been specifically prohibited. In Illinois they have been prohibited and not a single commercial bond has been written since 1965.[74]

Bail bondsmen are the major critics of 10 percent plans. They claim that free enterprise is hampered, and that the face amounts of bail increase once judges realize that only 10 percent of the amount of bail is required. The net result they claim will be release of fewer defendants. This concern has proved unfounded. While bail amounts have increased slightly over the years (no more than would be expected due to inflation) no decrease in the numbers of those able to afford bail has been manifested. In Chicago, for example, the number of accused felons released on bail increased from 26 percent in 1962 to 47 percent in 1972. During the same period, the custody rate decreased from 60 percent to 30 percent.[75] It would thus appear as though the deposit plan enhanced rather than hindered pretrial releases. Indeed, this is not an unexpected outcome. As roughly equivalent deposits are paid to the bondsman, or under the 10 percent plan to the court, the differences in these two systems lie mainly in the return of the deposit and in the use of collateral security.

Bondsmen expressed concern that the failure to appear (FTA) rates, in the absence of their unique retrieval practices, would escalate. However, long-term experience with the deposit system has failed to confirm this apprehension. FTA rates are as low or lower than those achieved by surety bail. In 1969, FTA rates in four Illinois counties were 0.0, 0.3, 1.0, and 4.0 percent, respectively. These rates were comparable to the FTA rates in jurisdictions in which bondsmen still operated. Similarly in Philadelphia, the FTA rate in 1972 was 7.5 percent with a willful failure to appear rate of 2.7 percent; in 1974 the FTA rate was the same.[76]

Apart from bondsmen's claims, various other assets and liabilities are mentioned in connection with deposit plans. One of the assets is the ability of deposit plans to raise money for the jurisdiction in which they operate. The administrative costs of deposit versus surety bail are about the same. However, the collection of forfeiture money from bondsmen results in far less revenue than that collected from the bail deposit plans. In Philadelphia on the other hand, in the first seven months of the program's operation, it was projected that the city would realize between $500,000 and $1 million from the deposit plan. This money would have formerly gone to the bondsmen.[77]

A criticism leveled at deposit plans involves the possibility of reduced use of nonfinancial types of release with increased use of 10 percent plans. Reliance on deposit bail, it was feared, would reduce judicial reliance on ROR and other nonfinancial forms of release. This fear was sustained by statistics from Chicago. A 1971 study of bail practices in Chicago disclosed that ROR was used in only 10 percent of both felony and misdemeanor cases. Ninety percent of the cases at arraignment relied on some form of cash bail. Extremes of this sort are not inevitable. In the federal system, regulated by the provisions of the FBRA, there is a presumption favoring nonfinancial release. Even though the judge may select the 10 percent deposit as a means of effectuating release, this is used infrequently. Statistics from the District of Columbia confirm that the deposit plan is rarely used as a release option. Many more releases are effected through nonfinancial conditions.[78]

It must finally be recognized that deposit plans do not effect wholesale release of the accused. Those unable to afford the deposit required by the bondsmen will be equally handicapped by the deposit plans. Those participating in deposit plans will be those who can afford the deposit, but who would have been detained by an inability to provide the collateral required by the bondsmen.

While deposit bail is viewed as a middle position, operating between release on surety bail and release on nonfinancial conditions, it fails to provide a release program for the very poor. There are many people for whom raising a $20 deposit on a $200 bail presents insurmountable difficulties. Yet, there are among these, many who would neither flee nor pose a danger to the community if released. It is for these people that other nonfinancial alternatives must be developed.

CONDITIONAL AND PARTIAL RELEASE

One of the main problems besetting conditional release programs is the inability to enforce the welter of conditions which may be imposed. While some of the programs merely admonish the accused to stay out of trouble and to return to court as requested, others attempt to circumscribe the activities of their clients. Admonitions to refrain from alcohol, to obtain employment and to associate only with certain individuals, are sometimes unrealistic and impossible to enforce. They fail to control the behavior of the accused and because of this they engender disregard for the system of criminal justice.

While some of the conditions have merit, many do not. To request that an uneducated, perpetually unemployed and unemployable defendant find a job is unrealistic. With a job, he would probably not have been before the court initially. Alternately, the condition stipulating that the accused report weekly to the pretrial service agency has considerable value. It enables the agency to advise the accused of his next scheduled appearance and it keeps the accused in contact with a sympathetic organization.

Another problem besieging conditional release programs is rampant overuse of conditions. When conditions are available, judges use them, despite their relevance to a particular defendant; the use of unhampered ROR may concomitantly decrease. For example, in the District of Columbia in 1971, almost 90 percent of the nonfinancial releases were encumbered with conditions. By 1972, this figure had increased 94 percent. Overuse occurs in two ways--conditions are unnecessarily imposed on far too many defendants and more conditions than could possibly be useful are imposed on any one defendant.

Respect for the court system is eroded by judicial indecision in dealing with violators. In 1973 in the District of Columbia, the Bail Agency reported 2,608 violations. In only 58 instances were sanctions imposed.[79] Irrelevance of the conditions to securing appearance contributes to judicial reluctance to impose additional penalties for violations.

Philadelphia's conditional release program is one of the more successful. Serving a very small defendant population (approximately 3 percent of those interviewed) and imposing only a single condition, it allows for excellent supervision and services. Each defendant is assigned to a named community group or treatment facility where his regular participation is required. His appearance and progress are regularly verified. In 1976, the FTA rate was an amazingly low 4.9 percent.

Benefits and liabilities derive from conditional release programs. The use of nonfinancial release increases the release population by discharging those who might otherwise be detained. Unfortunately, this may result in the release of fewer defendants unhampered by any conditions at all. Thus, while more releases may be effected, more defendants are likely to be restrained by the imposition of conditions circumscribing their behavior. However, this type of release offers judges a middle position located between outright release on ROR and the more restrictive release on surety bail.

The District of Columbia which experienced some initial problems with the multiplicity of available conditions modified its program in 1974. Thereafter, the Bail Agency recommended that the accused either be released on ROR or that it be the responsibility of the agency to specify conditions related to securing the appearance of a particular accused. In the event that conditions were imposed, the nature of the conditions were to be discussed with the defendant prior to their imposition so that he would clearly understand his obligations. This plan helped ensure the relevance of the conditions to the exigencies of a particular case.

Supervision of offenders is essential to conditional release programs. Pretrial agencies provide a framework within which contact with defendants may be established and maintained and in which notification of court appearance is effected. Conditional release programs are more costly than other types of nonfinancial release. However, the financial benefits which accrue by avoiding detention are believed by many experts to be well worth the investment.

RELEASE ON RECOGNIZANCE

While ROR in general has received less criticism than other forms of pretrial release, there are bureaucratic and administrative problems which impinge on the efficacy of the program. A criticism often leveled at ROR concerns its limited use. Community ties criteria are employed to release many defendants without adversely affecting appearance rates. From the available but scanty evidence, it appears that many more defendants could be safely released.

A recent study examined the validity of community ties as reliable predictors of reappearance at court.[80] The study found that the "vast majority of defendants were successes while on pretrial release." This study is unique in that by special arrangement with the Los Angeles Court, a sample of defendants deemed ineligible for ROR were in fact released. A true experimental situation was created in which it was possible to examine the return rates of both those

with and without strong community ties. The findings indicate that for every 85 defendants released under standard ROR procedures, 15 were released who should not have been, i.e., they failed to reappear. However, for every 27 properly detained, 73 others who would, under normal circumstances have been detained, did in fact return to fulfill their obligations. In other words, prediction was wrong in 73 percent of the cases.

What emerges from this study and others is the fact that the majority of persons released prior to trial do appear as required. To date, research has been unable to determine why offenders fail to appear or to isolate the factors which predict nonappearance.[81] While ROR programs have established that those with strong community ties will generally return, no analysis has shown that those who fail tomeet the community ties standards, as a group, fail to return to court.

Verification practices present another problematic area. Here the concerns are more administrative. Telephone contact is the major means of verification and families of indigent defendants frequently have no access to phones. Verification procedures are thereby impeded and discrimination results. Recommendations may be delayed or even withheld because of an inability to access those capable of verifying the accused's information. In New York City, the Criminal Justice Agency found that the failure to appear rates for those with verified community tie information were nearly the same as those for whom community tie information could not be verified (6.6 percent versus 8.8 percent according to the June 1977, Criminal Justice Agency report). This suggests that verification may be less critical to appearance at trial than was believed at the inception of the ROR programs.[82] It also suggests that ownership of a phone may be a key release criterion.

Yet another problem besets ROR procedures. Various agencies in different jurisdictions specify that certain offenders be excluded from agency consideration. In Buffalo, the pretrial service agency refuses to consider Class A and with some few exceptions, Class B felons. In New York City, the Criminal Justice Agency no longer makes recommendations for offenders charged with murder.

Failure to consider these excluded offenses conflicts with the basic premise upon which pretrial agencies operate, i.e., to recommend release, insofar as possible, for all those who are likely to return for trial. Neither the offense charged nor the prior record of the offender (both of which are significant factors

in the bail decision) has any demonstrable relationship to the likelihood of flight. The rationale underlying the exclusion of particular offenses is that these offenders are perceived to be dangerous to the community and more likely to flee because of the severe punishments which result. Use of this rationale contravenes the statutory criterion for detention--solely to ensure appearance. Furthermore, statistics demonstrate that those engaging in the more serious types of crimes are less, rather than more, likely to flee prosecution.[83]

PREVENTIVE DETENTION

Despite the fact that it was heralded as a means of obviating hypocrisy in the bail process, the District of Columbia Code has been largely unsuccessful. For this reason it has been infrequently employed. Numerous liabilities attend the D.C. Code; some of the major problems will be enumerated here.

- Release Criteria Are Too Broad.--The criteria specifying those eligible for inclusion are too encompassing to be useful. The fact that nearly all felons are eligible is of limited use in isolating those who might flee or be dangerous. If the criteria are so broad as to qualify nearly all criminals, no discriminatory function exists.

- Weakens the Prosecutor's Case.--The level of proof required to detain the accused presents obstacles to the prosecutor. In order for the prosecutor to establish the need for detention, it is necessary for him to disclose a substantial portion of his case. Revelation of so much information at the detention hearings results in a trial where the prosecutor is essentially disarmed. Divulging the information necessary to ensure detention provides the defendant with sufficient clues to rebut any prosecutorial arguments. The defense is furnished with sufficient information to counter any points advanced by the prosecution.

- Duplication of Efforts.--The D.C. Code provides for detention hearings which are separate from the bail hearing. The United States Attorney initiates proceedings which culminate in the bail hearing. If on his motion, the judicial officer concludes that no condition or combination of conditions is adequate to ensure community safety, a detention hearing is ordered. These hearings are time-consuming. In addition, the out-of-court time required for preparation for the hearing erodes still further the limited time which attorneys can devote to their cases. Both the prosecutor and the defense have two preparations to complete: one for the detention hearing and another for the trial. A duplication of effort results and barring exceptional cases these preparations are not worth the effort.

- Difficult to Assess Dangerousness.--Prediction of dangerousness is one last problem area and it is serious. The aim of the Code is not to detain all accused but only those who are dangerous. Thus, there is a forced reliance on the ability of the court to determine those who present a potential for danger to the community. As the crime charged is of no predictive use and the D.C. Code includes nearly all serious crimes within its provision, the determination of dangerousness must be based on other, less objective criteria.

A Vera Institute study undertaken ten months after the District of Columbia preventive detention code was in effect found that only 20 applications for preventive detention hearings were initiated out of a total of more than 6,000 felons.[84] Of these, only ten individuals were actually detained. Subsequent to the detention, five were either reversed on appeal on grounds of unconstitutionality or rescinded pending appeal. Four of the five defendants obtained pretrial release. Of the ten not originally detained, two secured release subsequent to the detention hearing, three were detained because of hold orders from other jurisdictions, commission of other crimes, etc., and the remaining five were detained in lieu of bond. Thus of the original 20 cases (and this is an extremely small number considering the vast numbers of defendants arraigned in the District of Columbia Courts) six secured some sort of pretrial release under the provisions of the statute, six had detention orders withdrawn, five were held because of an inability to raise bail, and three others were held because of detainers from other jurisdictions. Thus while hearings were initiated for 20 defendants, none was in fact detained on the basis of the D.C. Code. Because of this, the Vera study concluded:

> The infrequent use of the preventive detention statute has precluded any significant impact on pretrial crime; on pretrial detention and release rates; on subsequent phases of the criminal process; or on the operations of the District's criminal courts in general.[85]

Despite the problems with the D.C. Code, there is some merit to the concept of preventive detention. If accuracy in prediction could correctly identify classes of defendants based on their potential for dangerousness, a less invidious discrimination than the present money-based system could result.

Unfortunately, research aimed at determining the reliability of the different predictors of pretrial recidivism (the common indicator of dangerousness) has proved futile. In tracing the criminal justice records of a sample of Washington, D.C. defendants, a National Bureau of Standards (NBS)[86] study (1970) found that only 7 percent of those originally charged with felonies were

rearrested on felony charges pending trial. Less than one in twenty initially charged with violent or dangerous crimes were rearrested for similar kinds of acts. These figures are trivial in terms of total crime, and many believe do not justify the prohibitive costs of preventive detention. Thus, the NBS' conclusion that there was absolutely no correlation between the offense for which the accused was originally arrested and the charge at rearrest, is of considerable significance. It implies that the arrest of an individual on a charge stemming from a violent crime is not a predictor of identical future crime. Interstingly, this study found no correlation between each of ten separate release criteria and recidivism. These release criteria were the ones most commonly employed by judges and bail agencies in making release decisions. They consisted of the community ties criteria and certain personal characteristics of the offender, none of which was able to predict recidivism.

The Harvard Law School also undertook to examine the effects of the D.C. preventive detention code.[87] Simulating the existence of the D.C. Code in Boston, a sample of pretrial releasees was scrutinized. Only about one in 20 of these offenders were convicted of a second crime while on release for any of the crimes defined by the D.C. Code as being "dangerous or violent." One in 25 were rearrested for misdemeanors and crimes not involving serious bodily harm. Like the NBS study, the Harvard study examined the relationship between the criteria used to effect pretrial release and recidivism. The initial charge, generally considered one of the more significant factors in setting bail, proved to be little better than a random predictor of pretrial recidivism. Family ties, income and employment, character and mental condition, prior record, and previous failures to appear all failed to discriminate between those who committed crime when released and those who did not.

The National Bureau of Standards and the Harvard Law School studies are responsible undertakings, examining both the reliability of various predictors of recidivism and the accuracy with which individual offenders may be designated as dangerous. Both studies assert that pretrial dangerousness, as measured by pretrial recidivism, is not a significant problem. Both also discuss the impossibility of accurately distinguishing those who will recidivate from those who will not. The problems inherent in any predictive device are magnified here where the repercussions of detention so negatively affect the final disposition of the case. Similarity of the conclusions achieved by both studies lends validity of their assertion that prediction of those likely to engage in pretrial crime remains a perplexing and uncertain undertaking.

INADEQUACIES IN NEW YORK STATE BAIL PRACTICES

The statutory requirements regulating bail in New York State are generally inadequate and archaic when compared to both the federal and the more progressive state statutes. It is necessary to critique these prior to developing legislative suggestions which are more in line with new developments in bail and pretrial services.

- Presumption Favoring Release.--New York statutes fail to provide for a presumption favoring the release of defendants. While the right to bail exists in misdemeanor offenses such a right is not provided for felons and a right to bail, it must be recalled, is not identical to a right to release.

- Burden of Proof.--The burden of proof concerning the appropriateness of the least burdensome forms of release is placed on the accused. This conflicts with the notion of "innocent until proven guilty," a cornerstone of American criminal law. The language of §510.20 (2) of the Criminal Procedure Law stipulates that the defendant be provided an opportunity to be heard and "to contend that an order of bail or recognizance must or should issue, that the court should release him on his own recognizance rather than fix bail, and that if bail is fixed it should be in a suggested amount and form." It is thus incumbent upon the defense to establish that a nonexcessive amount will reasonably assure presence at trial or that if released on recognizance the defendant's return will be ensured. Presentation of evidence and witnesses to substantiate these requests are an obligation of the defense.[88]

- Confidentiality of Information.--The Criminal Procedure Law fails to guarantee that information used at the bail hearing will not be used against the accused at trial. The question of guilt must be separated from the question of whether or not to release. This can only be accomplished with separate fact-finding hearings and complete confidentiality of records.

- Guidelines Regarding "Excessive" Bail.--A final problem with the New York statutes lies in their failure to provide guidelines to determine the breadth of excessive bail. This problem is not unique to New York as no guidelines are provided in the United States Constitution specifying the limits of excessiveness in federal jurisdictions. Federal bail cases are, however, presently governed by the provisions of FBRA; New York has no such recent legislation.

Additional injury accrues to the accused in the actual administration of bail. The bail decision is formulated on the basis of a three-part information base: the police complaint, the Division of Criminal Justice Services' "rap sheet" and a report of the pretrial services agency (if available). While use of these three sources of information is not inherently prejudicial to the accused's case, in practice, injury may occur. The information contained in these documents is rarely up-to-date or accurate. The complaint is generally written in abbreviated and conclusory terms with the criminal charges often of greater severity than warranted by the evidence. The information on the "rap sheet" may also be inaccurate. Old charges are frequently listed as open arrests; dismissals are frequently unrecorded, although the arrests upon which they were based are presented. Many pretrial services agency reports are unverified. These tend to be ignored by judges who question their reliability. Thus, the only information supplied by the defendant himself is frequently ignored. The resultant bail decisions are thus based on one-sided, dated, and inaccurate information, which is often given cursory examination by the judge anyway since in few instances does arraignment take more than five minutes.[89] Haste and haphazard handling charaterize this decision point which is critical to the outcome of the case.

CONCLUSIONS

Overall, bail policy and pretrial detention are at variance with the legally defined goals of bail. This is particularly exemplified by practice in which the most difficult conditions of release are set for those defendants most likely to return. Bail decisions are in general based on the seriousness of the present arrest charge and on a prior felony record. It has been demonstrated that those bear no direct relationship to the likelihood of reappearance. Another significant determinant in the bail outcome is the financial status of the offender. Those who can afford bail are released. This criterion, too, has been shown to have little effect on the accused's reappearance.

IS BAIL REFORM EXPENSIVE?

The data below describe the costs of interviewing potential candidates for pretrial release compared to the costs of pretrial detention. While it is impossible to clearly delineate the actual amounts saved, the following discussion describes in approximate fashion the possible savings.

ERIE COUNTY

In Erie county, the 1976 operating budget for the Pretrial Service Agency was $98,000. This included the salaries of four full-time and six part-time (12-25 hours per week) employees. It also covered the rent, supplies and other operating expenses of the agency. Approximately 6,400 defendants were interviewed by the agency. Cost to the Agency per interview was about $15.00. About 41 percent of those interviewed were ultimately released on the ROR, thus the cost to the Agency per released defendants was about $26.00. The daily cost of jailing a defendant in Erie County is $22.00. This includes food, medicine, laundry, transportation and supervision.

Approximately one-third of the defendants were detained between one and two days; two-thirds of them were detained less than ten days. However, the average length of detention time pending case disposition was 27 days. This average figure is somewhat artificially inflated due to the long term detention of a relatively small number of defendants.

MONROE COUNTY

Pretrial Services Agency costs for Monroe County resemble those for Erie County. The 1976 operating budget was $87,000--there were five full-time staff and seven non-paid volunteers. Of the 5,300 defendants interviewed, about 70 percent were released to the custody of the supervisory agency. The cost of interviewing each defendant was about $16.50. The cost to the agency for supervising each released defendant was somewhat higher, about $23.50 per defendant.

In Rochester the jail cost was about $35 per day. The average detention time was much lower than in Buffalo, about 3 days. Thus, on the average, it cost $105 to detain a defendant pending trial. This is about four times the amount spent for pretrial service interviews.

PHILADELPHIA, PENNSYLVANIA

In Philadelphia the 1976 operating costs were $2,300,000. Seven-hundred thousand dollars of this was allocated to the warrant unit. The remaining $1,600,000 was spent on the various services offered by the Philadelphia Pretrial Services Division. The Division processed 37,000 defendants a year, over 40 percent of whom were released on either ROR or the 10 percent deposit system of bail. The cost of each interview and the follow-up supervisory programs was about $43.00 for each defendant.

In Philadelphia 25 percent of the defendants were detained for one or two days; 43 percent were detained less than a week. For the remaining 56 percent, however, the average length of pretrial detention was about four and one-half months. The pretrial detention cost to a defendant in Philadelphia is about $28.00 a day. So here too, the cost of detention far surpass the costs of interviewing and supervising defendants.

NEW YORK CITY

The costs of operating the Criminal Justice Agency varied considerably among the boroughs of New York. The cost of interviewing and verifying defendants at arraignment varied from about $10 in Manhattan to slightly over $15 in the Bronx. The annual costs of operating these pretrial service units ranged from $401,000 in the Bronx to $526,000 in Manhattan.

Subsequent to release at arraignment, the defendant becomes the recipient of numerous notification and case-maintenance processes. The per capita costs of these supervisory services ranged from $24 in the Bronx to $41 in Manhattan. These costs failed to account for the overall operating expenses of the agency. When these additional costs were incorporated, the gross costs to the Agency for both ROR and the subsequent follow-up ranged from $89 in Manhattan to $72 in Brooklyn to $54 in the Bronx.

Criminal Justice Agency research estimates that it costs at least $20 to house a defendant for one day in a City detention facility. It also calculated that the average ROR'd defendant would spend at least 20 days in detention if the program did not exist. Other defendants, those assigned to supervised

release programs would spend an additional 180 days in detention in the absence of Agency intervention.

Subtracting the gross cost of operating the Agency programs from the gross costs of detaining all those released resulted in a net gain of between $3.4 million (Manhattan) and $4.7 million (Bronx).[91]

DISTRICT OF COLUMBIA

In the District of Columbia, the bail agency operated on an annual budget of $762,000 in 1976. The staff was composed of 55 full-time equivalency positions, twelve of which were clerical and secretarial. Twenty-five thousand defendants were interviewed duri the year, 12,000 of whom were supervised. Interviewing cost about $30, and supervising about $63, per defendant. Two detention centers operate in the District of Columbia. Slight differences between them in the per capita cost of detention exist, but they averaged about $35.50 per day. No breakdown was available describing the proportion of defendants released within 1 or 2 days, less than a week, etc. Thus, although pretrial service agency costs more in Washington, D.C., in part because of numerous services provided to both the court and defendants, the costs are still less than detention pending case disposition.

KENTUCKY

In Kentucky it is difficult to determine the costs of pretrial detention, due to the operation of the "fee system" in local jails. In the fee system, the jailer is given a fixed daily fee to buy food for each prisoner in his custody Remaining monies, unspent after food costs are expended, becomes the property of the jailer. Money is allocated from various other sources to pay for transportation, medicine, laundry and other miscellaneous items. These confounding elements make it impossible to ascertain the aggregate costs of detention in Kentucky.

The Kentucky pretrial agency operated on an annual budget of $1.5 million in fiscal 1977. A staff of 110 persons was employed to process 60,000 defendants yearly. The costs of serving each defendant is about $17. The average length of detention varies greatly around the state. In rural areas detention is quite short--about two days. In the urban areas it is considerably longer, averaging one to one and a half months. In the urban areas release time may be partitioned

into different lengths of time: about 60 percent of the defendants are released within one to two days; 30 percent within a week; and 10 percent are detained about two months.

SUMMARY

From the above data it seems clear that the fiscal resources allocated to the pretrial release of defendants saves money by reducing the sums spent on detention. The cost of a pretrial interview generally approximates the cost of a single day's detention; many defendants are detained for more than a day. Thus, it seems clear that the monetary costs of release are cheaper than those of detention.

LEGISLATIVE CONSIDERATIONS FOR CHANGING BAIL PRACTICES IN NEW YORK STATE

Bail reform in New York State may be necessary and desirable in the near future. The present system of bail neither protects the community nor adequately safeguards the rights of accused criminals. The overriding goals in any reforming effort should balance the interests of both the offender and the community, providing on the one hand for pretrial release wherever possible and on the other for freedom from dangerous and violent criminal behavior.

Nationwide reform efforts have attempted to address the inequity resulting from overuse of high bail. The forerunner was the Federal Bail Reform Act of 1966. This was followed by major bail programs in Kentucky, Illinois, Pennsylvania, and the District of Columbia. These efforts have attempted to diminish the inequities inherent in traditional bail systems in which the rich buy freedom and the poor go to jail.

Current analyses suggest that money bail, which severely disadvantages the indigent, may be replaced with a variety of forms of nonfinancial pretrial release. These same analyses also suggest that considerate use of non-financial release will result in neither a serious threat to the community nor wholesale release of defendants who fail to reappear in court. The most common forms of non-financial release are release on recognizance and conditional release. In the latter the accused must meet specified conditions in order to maintain his freedom; in the former, no conditions are set. These non-financial forms of release result in cost savings to local jurisdictions through reduced jail populations. Easing of jail overcrowding in turn makes supervision of truly dangerous detained criminal simpler and more effective.

There exists a dichotomy when considering bailable offenses; traditionally capital and non-capital crimes have been subjected to different release/bail criteria. Since capital crimes are considered to involve the most egregious type of behavior, people feel that the availability of bail should be greatly restricted for these offenders. There is no reason to abolish this traditional distinction, particularly as capital crimes are such a small number of the total crimes committed.

Legislation intended to restructure bail practices in New York State should include a consideration of the policy underlying bail in redesigning procedures.

POLICY ON BAIL

In constructing revised New York pretrial statutes two dimensions should be considered. One of them, the likelihood of reappearance at future court proceedings, is not new. Rather, it is the traditional justification for high bail or outright detention. The other is an innovative undertaking. It mandates that the judge be given statutory power to consider the risk of danger which the accused poses to the community if released pending case disposition. While this has existed as a sub rosa practice it exists as an explicit statutory rationale only in the District of Columbia Bail Act.

The restructuring of the bail statutes should be premised on a basic change in the manner in which the burden of proof is determined. Under present New York State practices, the accused and his defense attorney must present arguments which lobby for pretrial release. The major bail reform efforts nationwide have changed this traditional practice of placing the burden of proof on the defendant. The new legislation places the burden of proving that bail or detention should be imposed solely on the presentation by the district attorney. Thus, there emerges a presumption favoring release unless the district attorney can demonstrate that release will either endanger the safety of persons or the community, or that the accused will fail to reappear in court.

If presumption favoring release becomes the primary policy, the accused would be released on his own recognizance pending trial unless the district attorney can present clear and convincing evidence to the presiding judge that release should be denied, a bail amount should be set, or conditions be imposed to curtail the activities of the accused.

Capital cases should be handled under a more restrictive release policy. Here there should exist a presumption that the accused will be detained unless the presiding judge has sufficient evidence to sustain the belief that he will neither flee nor jeopardize the safety of any person or the community.

DEFINING THE TERMS

Two terms necessary to bail restructuring must be defined prior to further discussion of pretrial alternatives.

- "Assuring the Safety Of" and "Posing a Danger To" Other Persons and Society. These phrases refer only to the accused's demonstrated prior conduct, prior convictions, and civil commitments. Arrests and allegations should not be considered. Physical violence to other persons should be the sole criterion. No other form of personal conduct should be

considered in determing danger to persons or the community if the accused were released prior to trial.

- Ensuring Appearance.--The traditional consideration in the pretrial decision has been the likelihood of the accused's reappearance in court. The prior record of court appearances (if any) should be examined to determine past compliance. Of secondary concern, or in the event the accused has no prior court record, the judge should evaluate the accused against the specified criteria to determine the form of release (discussed next).

CONSIDERATIONS FOR THE PRETRIAL DECISION

The judge presiding at the accused's arraignment hearing should be provided with sufficient information to allow for a reasoned pretrial decision. The necessary information under the present New York State bail system is derived from three sources:

- the police complaint which lists the charged offense and supporting evidence;
- the Division of Criminal Justice Services (DCJS) "rap sheet" which supplies a record of the accused's prior convictions, etc.; and
- a report provided by the pretrial service agencies (where they exist) which contains information on the "community ties" of the accused, and other personal data relevant to the pretrial decision.

The police complaint and the DCJS "rap sheet" are available statewide, but pretrial service agencies are established only in New York City, Erie, Monroe, Westchester, Onondaga, Nassau, and a number of the smaller counties where they frequently operate under the auspices of county probation departments.

Pretrial service agencies are an integral component of most reform programs, and there are suggestions calling for a statewide bail agency in New York. However, a number of circumstances suggest that a statewide pretrial service agency is unwise, unworkable, and a needless creation of bureaucracy. Foremost is the sharp contrast in judicial thinking and criminal justice procedures which exist in various parts of the State. Uniformity and consistency of pretrial decisions should be primary goals, but achievement of these goals may have to be tempered to local needs and philosophies. Present bail statutes provide an umbrella of uniformity under which existing pretrial services operate. This statutorily imposed uniformity has not prevented diversity in the administration, organization, and services which different agencies provide. Thus while the statutes furnish consistency, the individual administration of the agencies permits regional differences to be manifest. A feasible statewide solution might be to permit each county to choose whether or not to establish a pretrial service agency, or in the case of rural areas, inter-county regional pretrial services agencies.

A counter approach which would give county probation departments increased responsibilities in providing pretrial services has also been suggested. Countervailing arguments suggest this approach is in neither the public's nor the accused's best interest. Existing pretrial service agencies generally view themselves as neutral, information gathering units or as advocates for the decendant. They do not exist in the direct line of the criminal processing of a defendant. Rather, they occupy an ancillary staff position. Although involving no incarceration probation is punishment. Probation departments thus eschew a neutral position. They perceive themselves as well-established and integrated components in the processing of criminal defendants who are sentenced to these agencies to supervise them for a judicially specified term. As supervisors of convicted defendants they cannot maintain objectivity and neutrality, a posture which is essential if the agencies are to serve as an unbiased information gathering instrument of use to the judge in making the pretrial decision. Pretrial service agencies must remain discrete from the criminal justice processing system; if they become protagonists in the system their utility will be severely diminished.

ROLE OF THE PRETRIAL SERVICE AGENCY

If a county, or a group of counties, opt to establish a pretrial service agency, the agency should be empowered to carry out the following functions:

- evaluate the accused's family and community ties in order to establish his commitment to the area and his likelihood of reappearance; and
- evaluate his financial resources in order to provide the court with this information in the event bail is set.

In addition, the pretrial service agency may be given additional responsibilities such as:

- providing services to those on pretrial release and serving as the court-appointed supervisor of those released; and
- establishing a "warrant" or "retrieval" unit for locating those accused who fail to make required court appearances.

PRETRIAL RELEASE CRITERIA

The judge presiding at the arraignment should make the final pretrial decision. Using the police complaint, DCJS "rap sheet", and the pretrial service agency report, the judge should evaluate the potential for flight and the likelihood that any persons in the community would be jeopordized if the accused were released. Arguments

supporting release or detention may be supplied by both the accused and the district attorney. However, the burden of proving that detention is warranted rests with the district attorney. In making this decision the judge should minimally be guided by a consideration of the following factors:

- family and community ties;
- educational, vocational, employment capabilities;
- financial resources;
- nature of the offense;
- strength of evidence against the defendant;
- prior convictions; and
- record of appearance at court proceedings on previous arrests.

PRETRIAL RELEASE

After consideration of these factors the judge should alternatively order the accused released in his own recognizance or released if specific conditions are met, set bail, or deny release altogether. If release is denied or bail cannot be made, the accused is entitled to receive written notice of the reasons for the judicial decision. The judge must impose the least onerous form of release that he reasonably believes sufficient to assure both accused's reappearance in court and the safety of the community or other persons. The burden of proof for more severe release conditions rests with the district attorney. In order of increasing severity, the judge should have these pretrial options:

- Release on Own Recognizance.
- Weekly Check-In.-- Regular weekly phone calls or visits to the pretrial service agency (where they exist) or with court staff could be required to ascertain both that defendant is in the area and to remind him of his court obligations.
- Third Party Supervision.--Another form of conditional release involves release of the defendant to the custody of a third party such as a parent, guardian or pretrial service agency who will agree to supervise him both to reduce his likelihood of recidivating and to help assure his future court appearances;
- Release Conditioned upon Attendance at a Treatment Facility.--If accused is known to have drinking or drug-related impediments to a crime-free life his pretrial release might be conditioned on his participation in some sort of treatment program.

- Restrictions on Travel and Place of Residence.--Another condition would be to mandate that the accused not travel outside of the local area or change his place of residence without both notifying and receiving approval from the court or pretrial service (whichever has jurisdiction over him).

- Execution of a Bond.--Release may be obtained by the execution of an appearance bond in a specified amount. This is secured by a deposit not to exceed 10 percent. Alternatively, if the defendant so chooses, he may secure his freedom by the purchase of a surety bond secured by cash, property, or other solvent securities. If the defendant selects the 10 percent deposit option, the deposit, less a small service charge of 1 or 2 percent, shall be returned to him at the conclusion of his criminal proceedings.

- Partial Detention.--If total release is deemed inappropriate the accused may be released on a part-time basis. He may be released during the day or for specified periods during the day for educational, vocational or rehabilitative purposes. He must return to custody at night or on weekends, or whenever his release conditions so specify.

- Other Conditions.--Any other conditions or combination of conditions may be imposed which are deemed necessary to secure appearance and ensure community safety.

- Detention.--In the event that no conditions or combination of conditions can adequately assure the appearance of the accused or the safety of other persons or the community, the judge may impose detention pending case disposition.

No financial conditions may be imposed to ensure the safety of other persons or the community. The judge is permitted in those statutes to detain the defendant in those rare instances in which it has been demonstrated by clear and convincing evidence that the accused presents a danger to other persons or the community.

The accused should be required to sign and then receive a copy of the securing order. This should specify in clear and plain language the conditions of release, or in the event of a recognizance release, the stipulation that the accused is obliged to return to court as requested. Penalties for non-compliance should be clearly stated.

REVIEW FOR THOSE DETAINED

If pretrial release is denied at arraignment and the defendant is committed to jail to await trial, periodic review of the pretrial decision must be made. New evidence and/or witnesses may be introduced to substantiate the accused's arguments favoring pretrial release.

A person detained for over 72 hours due to an inability to meet the conditions of release is entitled to an automatic review of his case by a judge other than the one who denied release (where this is practical). The case must be reviewed and a

decision made as to whether the accused should be released or continued in detention. Both the defense and the prosecution may present evidence. If release is denied, a written justification for the denial must be provided by the judge.

In the event the accused is not released after the 72-hour review, reviews should be automatically conducted at 2-week intervals for as long as he remains in detention. The accused is entitled to present new evidence and circumstances relevant to the release decision as is the district attorney. Again, the presiding judge should provide in writing the reasons for any denial of release. A defendant may waive any or all of this review.

EXPEDITED COURT CALENDAR FOR THOSE DETAINED

Any person detained before trail should be placed on the expedited court calendar, so as to minimize the "punishment before establishment of guilt" resulting from pretrial detention. New York State has speedy trial provisions which specify that no more than 6 months are permitted to elapse from the commencement of a criminal action when the offense is a felony; 90 days when the offense is a misdemeanor; and 60 days when the offense is a misdemeanor punishable by a term of imprisonment of not more than three months. If the trial does not occur within these designated time periods, the New York codes require the dismissal of charges and the release of incarcerated defendants. The Federal law, too, has speedy trial provisions. The Federal Speedy Trial Act mandates that by 1979 no more than 100 days may elapse between arrest and trial for a felony. The defendant may waive his right to a speedy trial. Although this is federal legislation and is applicable only in the federal court system, it was designed as a model for the states to adopt. This time limitation assures that pretrial detention will have reasonable bounds and that the defendant will be provided with rapid processing through the criminal justice system.

CONFIDENTIALITY OF INFORMATION

To accord the accused the right to privacy and to in no way infringe upon his Fifth Amendment rights, it is necessary that the use of evidence acquired at the pretrial service agency interviews may not be disclosed to any other person or agency other than the defense counsel.

PENALTIES FOR PRETRIAL MISCONDUCT

While on pretrial release the defendant may either commit additional crime or violate the conditions of his release. In either case he has demonstrated an inability to conform to societal proscriptions. Punishment should follow these responsibility.

- Penalties for Offenses Committed While on Pretrial Release.--Any person convicted of an offense committed while released pursuant to the conditions stipulated above shall be subject to the following penalties. These must be imposed consecutive to any other sentences.

  - .A term of imprisonment of not less than 1 year and not more than 2½ years if convicted of committing a felony while released; or

  - .A term of imprisonment of not less than 30 days and not more than 180 days if convicted of committing a misdemeanor while so released.

- Penalties for Violation of Conditions of Release.--A person conditionally released who violates the conditions of release may have his release revoked. A revision of his conditions of release shall ensue.

RELEASE PENDING APPEAL

Release while a case is on appeal differs from pretrial release because the guilt of the defendant has been established. For this reason a person who has been convicted and sentenced and has filed an appeal shall be detained unless the judge finds by clear and convincing evidence that the:

- person is likely neither to flee nor present a danger to other persons or society; and

- appeal raises substantial questions of law or fact likely to result in reversal or an order of new trial.

RECORDKEEPING AND REPORT REQUIREMENTS

A key element in evaluating the effectiveness of any new bail statutes will be accurate and up-to-date statistics on pretrial decisions. The Office of Court Administration in conjunction with local pretrial service agencies (where available) should establish appropriate recordkeeping procedures on statistics relevant to pretrial decisions. Statewide recordkeeping is imperative. The Office of Court Administration must provide an annual report to the Governor and the Legislature regarding the status of pretrial decision-making and should recommend any legislation that may be necessary to increase effectiveness and assure statewide uniformity on these decisions.

FOOTNOTES

1. Wayne H. Thomas. 1976. Bail Reform In America. p. 15.

2. Charles Ares, Anne Rankin, and Herbert Sturz 1963. "The Manhattan Bail Project." New York University Law Review. Vol. 38. p. 67.

3. Caleb Foote. 1958. "The Administration of Bail In New York City," University of Pennsylvania Law Review. Vol. 106. p. 693.

4. John Goldkamp. 1977. Bail Decision-Making and the Role of Pretrial Detention In American Criminal Justice. See generally Chapter Six, Ph.D. dissertation, School of Criminal Justice. SUNYA, (MS).

5. Ronald Goldfarb. 1975. Jails, The Ultimate Ghetto of the Criminal Justice System. See generally.

6. John Murphy. 1974. "Revision of State Bail Laws," Ohio State Law Journal. Vol. 32. summer. p. 455.

7. Pannell v. United States, 320 F. 2d 698, 699, D.C. Cir. (1963).

8. See Footnote 2, p. 83.

9. Daniel J. Freed, and Patricia M. Wald. 1964. Bail in the United States: 1964. A Report to the National Conference on Bail and Criminal Justice, Washington, D.C. May. pp. 25-26.

10. See Footnote 6, Appendix I.

11. Frederick D. Hess. 1971. "Pretrial Detention and 1970 District of Columbia Crime Act--The Next Step in Bail Reform" Brooklyn Law Review. Vol. 37. No. 2. winter. p. 305.

12. See Footnote 11, p. 308.

13. 342 U.S. 1 (1951).

14. 342 U.S. 1 (1951). pp. 4-5.

15. See Footnote 4, Chapter 2, p. 6.

16. 342 U.S. 524 (1951).

17. 342 U.S. 524 (1951). p. 546.

18. 72 Sup. Ct. 349 (1955).

19. 76 Sup. Ct. 1063 (1956).

20. 80 Sup. Ct. 30 (1959).

21. 81 Sup. Ct. 642 (1961).

22. 364 U.S. 611 (1962).

23. 82 Sup. Ct. 994 (1962).

24. New York State Constitution, Article 1, Section 5.

25. CPL Section 510.30 (2)(a).

26. CPL Section 510.10 (1)(a-h).

27. CPL Section 530.20 (1).

28. CPL Section 530.20 (2).

29. CPL Section 530.20 (2)(a).

30. CPL Section 530.20 (2)(b).

31. CPL Section 530.20 (1).

32. Figures acquired from conversations with Bart Grahl, Consultant, Erie County Pretrial Service Agency.

33. Horace Beeley. 1927. The Bail System In Chicago.

34. Lee Freedman. 1976. "The Evolution of a Bail Reform" Policy Sciences. Vol. 7. p. 290.

35. Note. 1967. "Bail Reform Act of 1966" Iowa Law Review. Vol. 53. p. 173.

36. 18 U.S.C.A. Section 3146 (a).

37. See Footnote 35, p. 177.

38. 18 U.S.C.A. Section 3146 (c).

39. 18 U.S.C.A. Section 3146 (d).

40. 18 U.S.C.A. Section 3146 (e).

41. 18 U.S.C.A. Section 3146 (b).

42. 18 U.S.C.A. Section 3150. See also, generally, Robert Bogomolny and Michael Sonnerreich. 1969. "The Bail Reform Act of 1966: Administrative Tail Wagging and other Legal Problems," Arizona Law Review. Vol. 11. No. 2. summer.

43. 18 U.S.C.A. Section 3568 (Supp. 1966); also see Footnote 35. p. 177.

44. 18 U.S.C.A. Section 3148 (Supp. IV, 1969).

45. Sam J. Ervin, Jr., 1967. "The Legislative Role in Bail Reform," The George Washington Law Review. Vol. 35. No. 3. pp. 443-446.

46. See Footnote 1, p. 7.

47. Alaska Stat. Section 12.30.020 (Supp. 1970).

48. Arizona Criminal Code Section 13-1577 (Supp. 1970).

49. Iowa Code Ann. Section 763.16 (Supp. 1971).

50. KCCP Section 22-2802 (1969). (Kansas).

51. KRS 431 (1976). (Kentucky).

52. ORS Section 135.230-.290 (1973). (Oregon).

53. (Pennsylvania) Rules of Criminal Procedure, Chapter 4000.

54. See Footnote 4, Chapter 2, Part V, generally for a more detailed description of the differences between the two sets of standards.

55. See Footnote 54.

56. U.S. Congress (Senate) Committee on Judiciary. Subcomm. on Improvements in Judicial Machinery, and Subcomm. on Constitutional rights. 1964. Hearings (S. 2839 and S. 2840) 88 Cong. 2nd Session. p. 164.

57. Paul Rice, and Mary Gallagher, 1972. "An Alternative To Professional Bail Bonding: A 10 Percent Cash Deposit For Connecticut," Connecticut Law Review. Vol. 5. pp. 143, 174.

58. See Footnote 6, p. 473.

59. See Footnote 6, p. 476.

60. See Footnote 6, p. 479.

61. ORS Section 135.245 (3)(1973). (Oregon).

62. William Snouffer, 1974. "An Article of Faith Abolishes Bail In Oregon," Oregon Law Review. Vol. 53. p. 275.

63. ORS Section 135.240 (2)(1973). (Oregon).

64. See Footnote 61, P. 278.

65. Dewaine Gedney, Jr., 1976. Pretrial Service Report. See generally.

66. Kentucky Pretrial Service Agency. 1977. First Annual Report. pp. 16-18.

67. See Footnote 11, p. 299.

68. Bases, Nan C. and William F. McDonald. 1972. Preventive Detention in the District of Columbia: The First Ten Months. Vera Institute of Justice and Georgetown Institute of Criminal Law and Procedures.

69. See Footnote 1, pp. 40-41.

70. See Footnote 1, p. 254.

71. Bart Grahl, 1977. "Guilty of Poverty," p. 18. (MS).

72. See Footnote 1, p. 187.

73. See Footnote 66, p. 13.

74. See Footnote 1, p. 185.

75. See Footnote 1, p. 190.

76. See Footnote 1, p. 193.

77. See Footnote 1, p. 196.

78. See Footnote 1, p. 197.

79. See Footnote 1, p. 176.

80. Michael Gottfredson. 1974. "On Empirical Analysis of Pretrial Release Decisions" Journal of Criminal Justice. Vol. 2. p. 287.

81. See generally, 1975. "An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Program," National Center For State Courts. pp. 26-31.

82. See Footnote 1, p. 148.

83. Refer to those sections of text dealing with FTA rates in New York City, Buffalo, Rochester, etc.

84. See Footnote 1, p. 232.

85. See Footnote 68, p. 3.

86. J.S. Locke 1970. Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study. National Bureau of Standards Technical Note 535.

87. Arthur R. Angel. 1971. "Preventive Detention: An Empirical Analysis," Harvard Civil Rights Liberties Law Review. Vol. 6. pp. 300-396.

88. If, on the other hand, legislation contains presumptions favoring the release of the accused, the burden of proof rests with the prosecutor. It is his responsibility to demonstrate that the least restrictive alternative will not reasonably assure the accused's presence and that the imposition of more onerous measures are necessary. This mandate is in line with a cornerstone of American justice: the presumption of innocence, without which, pretrial lock-up of large numbers of offenders could, in theory, be effected.

89. New York (State) Senate. Codes Committee. 1974. Testimony presented by William Gallagher, Legal Aid Society. October 3.

90. Pretrial Service Agency. Quarterly Operations Report; June 1, 1976 to November 30, 1976. (New York City).

91. CPL Section 30.30(1)(A-d).

PUBLISHED REPORTS OF THE TASK FORCE ON CRITICAL PROBLEMS

Oil - It Never Wears Out. It just Gets Dirty. Report on Waste Oil. October, 1974. 39 pages.

Insurance and Women. October, 1974. 30 pages.

The Other Side of Crime...The Victim. January, 1975. 18 pages.

No Deposit, No Return...A Report on Beverage Containers. February, 1975. 106 pages and Appendices.

Subsistence or Family Care...A Policy for the Mentally Disabled. March, 1975. 37 pages and Appendices.

"...But We Can't Get a Mortgage!" Causes and Cures. May, 1975. 61 pages and Appendices.

Productivity. October, 1975. 107 pages.

One in Every Two...Facing the Risk of Alcoholism. February, 1976. 101 pages.

Small Business in Trouble. March, 1976. 50 pages.

The Three Billion Dollar Hurdle...Information for Financing Education. April, 1976. 66 pages.

Vital Signs...Sustaining the Health of Tourism. (A Report on Highway Advertising Signs). June, 1976. 83 pages and Appendices.

Administrative Rules...What is the Legislature's Role? June, 1976. 31 pages.

Promoting Economic Development...Rebuilding the Empire Image. October, 1976. 44 pages and Appendices.

Sunset--It's Not All Rosy. (A Report on a New Approach to Legislative Oversight). April, 1977. 88 pages and Appendix.

Preventive Care--Funding Private Medical Schools in New York. April, 1977. 21 pages.

Family Court--The System That Fails All. May, 1977. 105 pages and Appendices.

Higher Education Assistance Corporation and Tuition Assistance Problems. August, 1977. 38 pages plus Appendices.

END