1977 NATIONAL CONFERENCE ON PRETRIAL RELEASE AND DIVERSION

"THE THREE COMMUNITIES OF PRETRIAL AGENCIES:
THE PRETRIAL ACCUSED
THE JUSTICE SYSTEM
THE PUBLIC"

SPONSORED BY

THE NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES
AND BY
THE PRETRIAL SERVICES RESOURCE CENTER
WITH THE ASSISTANCE OF A GRANT FROM
THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
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1977 CONFERENCE RESOURCE BOOK

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PRETRIAL AGENCIES . . .

. . . AND THEIR COMMUNITIES

MISCELLANEOUS

(This section has been reserved for conference participants to include material gathered during the conference.)

TRIBUTE

This conference is dedicated to the memory of Ennis J. Olgiati. Anyone who has participated in previous National Conferences for Pretrial Release and Diversion, or been active in the field over the last few years had a chance to become acquainted with Joe.

Memories for those of us who were close to him and worked with him are too warm, too numerous to retrace in a few words and do so any better than Dinny Gordon. Suffice it to say that before accepting his assignment as Parole Commissioner, Joe was one of the moving forces in the pretrial field and helped so many of us to share his vision.

Ennis J. (Joe) Olgiati (1929-1976)
A Personal Obituary

Joe Olgiati was both a reformer and a phrase-maker. At times the two personae came together quite wonderfully. During the Senate confirmation hearing for his appointment to the New York State Board of Parole, he told the members of the Crime and Correction Committee that he thought the life sentence was "gradual capital punishment." He bristled at what he felt was the assumption in the Department of Correctional Services that all Italian inmates were mafia hoods; "those guys would get better treatment in the joint if they'd disenvowel their names," he grumbled to me once.

He had high hopes for what he could do as the parole board Chairman. "Our predictions stink," he said about six months ago, "but we can make them better, and we can give inmates greater certainty about what to expect from the parole board." And he wanted to be pushed--by his colleagues, by his critics, by the public. "How long shall we give you to change things?" asked a young criminal lawyer at a parole workshop in early January, a month after Joe had started work in Albany. "I figure it'll be two years before we really begin to catch up," said Olgiati. "But you should start putting pressure on us yesterday."

But he didn't have two years. He had barely six months, and the last two were painful and frightening. Unsurprisingly, Joe was still thinking about improving parole after he knew he was dying of cancer. He described to me in considerable detail the qualities he thought his successor as parole board Chairman ought to have, just in case anyone asked. Two weeks before his death he and I went over a memo he had written for his files about short- and long-term changes that should be made in parole. He was hoping that he still had time to flesh out some of his ideas for the other members of the parole board. Although he was critical of much about parole, it was his home, the institution that had given him his first truly professional job--as a parole officer in 1957--and his boost into the leadership of the most important pre-trial diversion project in the country.

Proud son of an Italian stone-cutter, resident of the same Greenwich Village neighborhood where he grew up, champion handball player, champion of parole reform--Joe Olgiati was all those things. And on top of it all, he was a big, warm, funny guy who helped a lot of people. We were lucky to have him among us.

- Diana R. Gordon

WHAT IS NAPSA?

In early 1972 the National Association of Pretrial Services Agencies was organized by a small group of Directors of several agencies who recognized the need to join together to insure the growth of pretrial services. With the attention focused on Bail Reform in the early 1960's, many fledgling agencies, funded with different types of "seed" monies, were created to assist persons released on their own recognizance with various services. In addition, in the early 70's a number of new programs designed to provide more intensive manpower services and to "intervene" in the traditional adjudicatory process was fostered by Department of Labor monies. The need for focused attention on the extremely vital area of pretrial concerns led program administrators and other criminal justice experts to found and incorporate an Association whose main goal was to provide the focus and unity so lacking.

Incorporated on August 8, 1973, as a non-profit corporation in the District of Columbia, the Association's goals are expressed succinctly in Article II of its Articles of Incorporation .... "To serve as a national forum for ideas and issues in the area of pretrial services, to promote the establishment of agencies to provide such services, to encourage responsibility among its members, to promote research and development in the field, to establish a mechanism for the exchange of information, and to increase professional competence through the development of professional standards and education."

It is clear that the first concern of the founders and the Association as it is today is the person or client the member agency or individual is to serve. The development and study of the most effective and relevant services for persons arrested and charged with crime is the goal toward which all the activities of the Association are geared.

At the same time, in a "system" heavily dependent on traditional approaches to Bail, adjudiciation, and Correctional services, the need to communicate effective program triumphs as well as apparent failures is crucial. The need for careful evaluation of innovations as well as documentation of success is vital to the spread of worthwhile experiments.

Given the importance of its first two objectives, the Association recognizes that it must at the same time assist with the training and technical assistance needed by program managers, line staff, and those within the system but only tangentially affected by the services offered. Thus it becomes crucial to its effectiveness to be national in scope, to include

program directors, criminal justice representatives, and community leaders and members among its membership, and at the same time to focus the interests of these people on those who are potential victims of the system including defendants, victims of crime, and even members of the system itself.

To date the Association has furthered its announced goals by sponsoring several National and Regional Conferences. Governed by an eleven member board elected at its annual meeting, the Association has already had a significant impact on the Criminal Justice System as it changes in the Seventies. It has furnished data to local as well as national legislatures considering "Bail" and "Diversion" legislation. It will be called upon in its totality and in its individual members to assist in the implementation of local and national programs. It is thus clearly its mandate to be in the vanguard of a changing system as one of that traditional system's most volatile catalysts.

The association is a young one but no less effective in its youth. It needs the support of not only the people who function in the system but those outside the system produces. NAPSA is composed of active forward-looking people who are accomplishing much that is new to the courts and to law enforcement. We need others as interested as we to participate in the development of something better.

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NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES

COMMITTEES

The committees are shown below in alphabetical order. Each has a statement from the chairperson or persons concerning the goals and possibilities of that particular committee. Each committee chairperson is indicated along with his or her address.

- Third World Committee

  James H. Davis, Chairperson
  Project Crossroads
  613 G Street, N.W.
  Washington, D.C. 20001

This committee is involved with increasing the participation of minority groups in NAPSA, and in addressing issues of special concern to minority members involved in the criminal justice system.

Planned work products (statement of goals or description of product) and when they are expected to be completed:

- To reorganize present zones (Eastern-central-western), by doing so, this would allow regional members to conduct meetings with minimal travel time and expenses. No target date has been set.

- Committee on Women and Pretrial Services

  Roz Lichter, Chairperson
  Legal Aid Society
  15 Park Row
  New York, New York 10038
  (212) 577-3355

This committee analyzes prospective resolutions, Bylaw changes, and policies and advises the Board of Directors on the legal implications involved. The Committee also assists with the development of guidelines for the conduct of Board and Association matters.

This year's goals are:

1) To continue to support efforts to decriminalize prostitution.
2) To activate our own small research project on women offenders. The project material will be disseminated to all members in the beginning of November. The committee will focus on getting the information requested.

The Committee is dedicated to gathering and distributing information on the women in the Criminal Justice System and to support endeavors that would illuminate issues and problems and that would serve to remedy the problems endemic to the system.

- Interstate Compact Committee

  Tom Petersen, Co-Chairperson
  Administrative Assistant
  State Attorney's Office
  1351 N.W. 12th Street
  Miami, Florida 33125
  (305) 547-7060

  James Droege, Co-Chairperson
  Pretrial Services
  1641 City-County Building
  Indianapolis, Indiana 46204
  (317) 633-3940

The goal of the Compact Committee is to develop agreements and procedures for cooperation between pretrial services agencies.

The purpose is to make program services available to the transient segments of our urban population, and to eliminate the irrational exclusion of non-residents from eligibility for pretrial diversion or release.

Diversion and release agencies could provide cooperation in background investigations before release and supervision, reporting, and other services after release.

The initial effort toward interagency cooperation is directed toward compiling a detailed directory of all pretrial services agencies. With this resource, personnel could informally on a case by case basis arrange for cooperation with an agency in another city or state. Eventually, the conditions and responsibilities of cooperating agencies would be defined in a formal agreement.

- The Law Committee

  John Bellassai, Chairperson
  Narcotics Diversion Project
  613 G Street, N.W., Room 714
  Washington, D.C. 20001
  (202) 727-1033

This committee analyzes prospective resolutions, Bylaw changes, and policies and advises the Board of Directors on the legal implications involved. The Committee also assists with the development of guidelines for the conduct of Board and Association matters.

Planned work products:

- Performance standards recommendations governing members of Board, others.
- Review of classes of membership, cut-off date for joining NAPSA and voting, etc.

- Miscellaneous By-law amendment proposals, etc.
- Any other tasks assigned by Board of Directors.
- Committee consists of lawyers active in NAPSA, Members of present Board of Directors and Advisory Board, past Board of Directors members sit on Committee this year, along with others.
- Committee takes up topics on special assignment basis from Board of Directors.

- Pretrial Diversion Committee

  Jack Calhoun, Co-Chairperson
  Commissioner
  Massachusetts Department of
  Youth Services
  294 Washington Street
  Boston, Massachusetts 02108
  (617) 727-2733

  Madeleine Crohn, Co-Chairperson
  Director
  Pretrial Services Resource Center
  1010 Vermont Avenue, N.W., Suite 200
  Washington, D.C. 20005
  (202) 638-3080

The initial goal of the Committee is developing a position paper on standards and goals. In addition it will consider publishing a list of all Diversion programs, suggestions for an Interstate Compact, and position papers on various diversion related issues.

- Pretrial Release Committee

  Susan Bookman, Co-Chairperson
  Berkeley O.R. Project
  2400 Bancroft Way
  Berkeley, California 94704
  (415) 548-2438

  James Droege, Co-Chairperson
  Pretrial Services
  1641 City-County Building
  Indianapolis, Indiana 46204
  (317) 633-3940

Initially, the Committee is preparing a position paper on standards and goals. It is also considering position papers on a mutual cooperation compact, confidentiality, entry criteria, program scope, etc.

- Research and Evaluation Committee

Dr. Carol Mercurio
9626 E. Kansas Circle #19
Denver, Colorado 80231

The primary concern of the committee is the education of NAPSA membership on recent research findings and on research techniques. Within that goal, the committee elected to place special emphasis on the following areas:

1) Research techniques which can be employed by pretrial service programs to facilitate program monitoring and statistical analyses bearing on program effectiveness;

2) Research techniques which can be used by small programs and "one-man operations" to facilitate obtaining local, state, and federal support, as well as attention to the grant writing process itself; and

3) The coordination of various on-going research efforts to facilitate replication of research studies and to aid in building on previous work.

Although the committee sees education and information dissemination as its primary purpose, it will also be involved in outlining standards for research in the pretrial services field and for conducting research seminars at future NAPSA Annual Conferences.

1) Publish #2 for NAPSA news
2) Assist with preparation for evaluation section in Conference notebook
3) Provide assistance and commentary on Pretrial Standards and Goals to the project coordinators of NAPSA

- Site Selection Committee

Jack Mergen, Chairperson
Administrative Assistant
Nineteenth Judicial District
East Baton Rouge Parish
233 St. Ferdinand Street
Baton Rouge, Louisiana
(504) 389-3400

The Site Committee is responsible for two areas: First, the assembling of information about various cities and locales as possible conference sites. Secondly, the committee provides early pre-conference coordination with the locale site. Committee members should be able to commit some time to the gathering of data, preferrably from their home area, and have access to a long distance telephone. Meetings of the committee should be infrequent. Face-to-face meetings of the committee should only occur at the Annual NAPSA Conference.

- Juvenile Committee

Dr. Peter Parrado, Chairperson
Director
Pinellas County Juvenile Services Program
3435 1st Avenue South
St. Petersburg, Florida 33711

The purpose of the committee will be to create a new interest in and to serve as an advocate for juvenile pretrial and diversion programs. This is essential, as the incidence of juvenile delinquency has shown a dramatic rise in the past few years. Furthermore, immersion of the juvenile within the justice system has not appreciably had an impact on the juvenile crime rate.

- Community Relations Committee

Paul Wahrhaftig, Chairperson
Pretrial Justice Program
1300 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 232-3053

Objectives of Committee

1) Strive to make NAPSA's resources more available to community based justice -- oriented groups;

2) Strive to make more available the input of community based groups to NAPSA.

Committee activities to date have been (1) drafting and submission of a tentative critique of bail standards and goals, (2) assignment of a person to ride herd on the Diversion standards, (3) soliciting Al Henry to come up with a list of cheaper hotels or even crash pads that we could make available to low budget projects who want to attend the Annual Meetings.

PRETRIAL SERVICES RESOURCE CENTER
1010 Vermont Avenue, N.W. Suite 200 Washington, D.C. 20005 (202) 638-3080

SPECIAL ANNOUNCEMENT: TALENTS NEEDED --
READ THROUGH QUESTIONNAIRE

BULLETIN

WHY A RESOURCE CENTER?

In a recent survey of pretrial services agency directors,*91 percent indicated that they felt a need for further training of program administrators and staff alike. Further evidence of the program's need for more information and assistance may be found in the avid participation in the yearly NAPSA conference workshops by those programs which could afford to send staff. And, organizations such as NAPSA, the National Center for State Courts, the Vera Institute of Justice and, until recently, the ABA Pretrial Intervention Service Center, received daily requests for material about the planning and operation of pretrial services agencies.

The need for access to a centralized source of information has been apparent also from individuals or agencies not directly involved in pretrial program administration:

Planners who wish to study the possibility of starting pretrial agencies in their communities; policy makers who are considering the institution of the pretrial concept; judges, district attorneys, defense counsel who wish to become more familiar with the issues at stake; researchers, students, scholars who are studying the field and whose only recourse has been the agencies listed above or individual courts and pretrial programs.

*See Robert V. Stover & John A. Martin, Appendix C: Policymakers' Views Regarding Issues in the Operation and Evaluation of Pretrial Release and Diversion Programs, National Center for State Courts Publication #R0016a, April, 1975.

HOW WAS THE PRETRIAL SERVICES RESOURCE CENTER CREATED?

Sponsored by the National Association of Pretrial Services Agencies, the Resource Center received a grant in October 1976 from the Law Enforcement Assistance Administration which sustains the project until March 1978.

The Resource Center is governed by an eleven member board of trustees composed of members of the NAPSA Advisory Board and Board of Directors. The full time staff of the Resource Center includes a Director, a staff associate, a secretary, and will soon include another secretary and two more staff associates. At some future time the Resource Center will hire consultants for special assignments. The Resource Center formally started its operation on March 1st at 1010 Vermont Avenue, NW, Washington, D.C.

WHAT WILL THE RESOURCE CENTER ACCOMPLISH?

In establishing the Resource Center, the Law Enforcement Assistance Administration intended that the issues described in "Why a Resource Center" be addressed. This is reflected in the grant mandate, i.e., to establish "a staffed organization, with a national scope, capable of responding to the needs of individual pretrial services agencies" and to "develop and coordinate information dissemination, training and technical assistance in the pretrial service field."

As outlined in the proposal, grant objectives include:

Establishing a central information clearinghouse;
Providing technical assistance to and/or developing training programs for pretrial agencies and other interested parties;
Encouraging cooperation and communications among pretrial agencies;
Providing the pretrial field with suggestions or guidelines for future initiatives.

HOW WILL THIS BE DONE?

In order to meet these objectives the Resource Center intends to:

Publish a newsletter and bulletins on a regular basis

Establish a library of resources and material already available;

Establish a "bank" of individuals or agencies with expertise in the pretrial field;

Establish and update a directory of pretrial agencies;

Review with LEAA and other funding agencies the list of grants awarded to efforts related to the pretrial field;

Respond to requests for information or assistance at first through dissemination of existing material; later through "on-site" or tailored assistance when adequate material has not been yet developed;

Refine and further document standards and goals for release and diversion; start work on similar standards and goals for other aspects of pretrial alternatives;

Gather research and evaluation material which has been generated in or by the field and disseminate relevant findings or models.

Beyond the grant mandate and within the scope of time, staff and budget, the Resource Center will establish links with other organizations or agencies in the criminal justice field.

The Resource Center has already helped to organize and cosponsor, with the National Association of Pretrial Service Agency, the National Conference in Washington. It is hoped that the Resource Center will be able to help State Associations or local groups in organizing regional seminars or meetings.

WHY THE RESOURCE CENTER NEEDS YOU

"Being resourceful" in a vacuum would negate the purpose of all the activities described above. One of the major concerns of any organization such as the Resource Center is the establishment of strong links with its "consumers."

The Resource Center's planning and priorities will address, as best as they can, issues brought up by the majority of the consumers. This, however, is possible only if you promptly fill out the attached questionnaire and return it at the mentioned addresss.

QUESTIONNAIRE

PLEASE RETURN TO:

Pretrial Services Resource Center
Research Division
1010 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005

I. I AM INTERESTED PRIMARILY IN RECEIVING:

- o Resource Center Newsletter
- o Special Interest Bulletins
- o Directory of Pretrial Programs
- o Bibliography of Pretrial Material

AT THE FOLLOWING ADDRESS:

_____

_____

_____

II. NEWSLETTER

I am primarily interested to read articles on:

_____

_____

_____

III. TECHNICAL ASSISTANCE

(Approximately $50,000 will be available in the Resource Center Grant for providing technical assistance in areas where material is not already available. In view of the scarcity of funds, technical assistance projects will generally be selected on the basis of common interest.)

My agency/program could use technical assistance for:

_____

_____

_____

IV. BANK OF SPEAKERS/SPECIALISTS

I have special expertise in the pretrial field in: (please be specific)

_____

_____

and would be willing to be placed on a list of consultants which the Resource Center may draw upon depending on requests. (Please attach resume.)

I charge_____ /hour or _____ /day.

The rationale for my fee is _____

_____

(Note: Yearly salary is generally used as an indicator.)

I am generally available under the following conditions (notice, etc.):

_____

_____

V. INFORMATION SHARING

(In an attempt to establish a communications network, the Resource Center is asking each individual/agency to forward material which can be of interest to others.)

My agency/program would be willing to forward material on:

	Describe	
o Research	"	_____
o Program Administration	"	_____
o Training	"	_____
o Legal Issues	"	_____
o Program Description	"	_____
o Other	"	_____

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ACKNOWLEDGEMENTS

The conference co-sponsors cannot possibly acknowledge all those who have contributed their time and efforts in helping to shape the conference or to formulate the Resource Notebook. They wish, however, to extend special thanks to:

Susan Kline Klehr for her work in laying the groundwork for the conference format;

Merrill Grumer for sharing her thoughts and experience from last year;

Tom Gavey, Tom Guidaboni, and the staff and directors of the pretrial agencies in Washington, D. C. for their special help with the conference program and with arrangements;

Carol Mercurio, Dan Ryan and Paul Wahrhaftig for their special contributions in assembling material for the Resource Notebook;

and all authors who have agreed to let us use their material or have written a paper for the Resource Notebook.

THE CONFERENCE

And now a word from the sponsors...

We thank you for agreeing to join us at this conference and would like to share with you our thoughts in preparing the conference agenda. We hope that this will clarify for you the conference format and encourage you to stay for its entire duration.

During the last few years, we have together examined some of our common problems, recognized the need for research and evaluation, and pondered this new discipline to which we belong.

We are suggesting that this year we do an accounting of our existence: verify our purpose, listen to the comments from our broad constituency, and affirm the standards which should guide our work.

The conference format attempts to facilitate this process. We would like to walk you through the three days of sessions:

TUESDAY
1:30 p.m.

The keynote speaker is representative of the largest community which we serve--he is taxpayer, businessman, potential victim, concerned citizen. His address will raise some of the questions which pretrial programs should confront.

The keynote will be followed by a visual presentation which contrasts the adult and the juvenile systems. The summary panel will comment on the dramatizations. Discussion will center on the importance of standards, highlighting how alternatives can be useless without guidelines or can provide a viable alternative when structured.

4:00 p.m.

A selection of workshops will offer an update of information in the release and diversion field, an introduction to those less acquainted with some of the basic issues. This format, using smaller sessions, has been chosen over panels whenever possible to maximize participation. A series of workshops is also scheduled on Wednesday and Thursday. Many topics are scheduled twice to enable you to attend those you missed the first day.

WEDNESDAY 9:00 a.m. — A panel of representatives from "the three communities" will be asked to react to the Standards and Goals proposed at this conference (included in your Resource notebook). Speakers include a sociologist, a judge, detention facility administrator, former policeman, and an ex-offender.

10:30 a.m. — With the information of the last two days in mind, you will be asked to participate in small work sessions. The standards and goals should be analyzed and discussed and suggestions or alternatives to the proposed standards developed. Your work session leader will then draft a summary of the initial recommendations.

1:30 p.m. — A second series of workshops is scheduled.

THURSDAY 9:00 a.m. — The day begins with the third and final series of workshops.

10:30 a.m. — Participants are asked to attend the second work session with the same group as the previous day. During that second session, your work session leader will share with you comments which stemmed from discussions in other groups. Together you will draft the final recommendations which your group proposes as alternatives or suggestions. These recommendations will be conveyed to the NAPSA Board for their consideration when they review the standards and goals.

1:30 p.m. — Once parameters of our profession have been defined, other issues come to mind. What is the future of our work--as demonstration programs run out of federal monies and as general experience suggests more visible or formal means of existence. Institutionalization has its dangers as well for which various options are available. A plenary will analyze those options and will be followed by

2:30 p.m. — a series of simultaneous panels, each reviewing one particular stage of development. This series of panels has been scheduled in response to requests from numerous participants in the last year's conference.

Several other activities will also take place during the conference, some of which are new in our annual conference.

Annual conferences such as ours offer the opportunity to many program administrators and staff to meet, exchange ideas, acquaint themselves with other participants of the criminal justice system and people from other parts of the country. With this in mind, we have attempted to schedule several social activities to facilitate this process: a reception on May 10, a cash bar and cruise on the 11th, a cash bar and banquet on the 12th.

In addition to social gatherings, we have also arranged for Open Forums which will allow for special interest groups to meet and identify present concerns. And we are sponsoring the "Exchange" at two different times in the Tuesday program. The Exchange will include a job bank, a service which will help participants with certain questions or needs for information to meet with other participants, booths with publications or representatives of pretrial programs.

Finally, as we are about to wind down our work for this year's conference, we already are thinking of the year ahead. Next year's conference will only be as good as the information which we receive from you. We need your suggestions, your critiques, your evaluation of each individual effort or contribution. If you are satisfied with this year's conference, do tell us (it will make us feel good...); but, even more so, if you have reservations or critical comments please share them with us. In either case, please fill out the evaluation forms which will be distributed and return them to us.

SELECTION OF WORKSHOPS

As you know, this year many of the workshops are being repeated to increase participants' opportunity to attend those sessions of most interest to them. Because titles can be misleading, the summaries that follow have been prepared to assist you in the selection of workshops. The matrix below has been included to aid you in determining which sessions to attend by illustrating when workshops are scheduled. Times, rooms and resource persons can be found in the program.

WORKSHOP	Tues	Wednes	Thurs
The Bailbondsman		x	
Pretrial Release, the Dangerous Defendant, and Speedy Trial	x		x
Neighborhood Dispute Mediation	x		
Community Based Organization as Third Party Custodians		x	x
Diversion of High Risk Cases	x	x	
Diversion from the Client's Perspective: A Real or Imagined Service?	x		x
Developments in Juvenile Diversion	x	x	
Cost Benefit Analysis		x	x
The Pretrial Agency & the Evaluator		x	x
Developing Project Publications: A Brochure,Annual Report,Press Releases	x		
Legislation		x	x
The Media: Massage Parlor for the Mind	x	x	
The Game of Grantsmanship	x		x
Community Education: The Challenge and the Promise		x	x
The Rights of Victims		x	x
Evaluations, Statistics, & Management Information Systems		x	x
The Juvenile Court: A Preview of Adult Pretrial Diversion?	x		
Third World: Community or Communities?	x		x

Tuesday 4:00 to 5:30 p.m.
Wednesday 1:30 to 3:00 p.m.
Thursday 9:00 to 10:30 a.m.

THE BAILBONDSMAN

This workshop will deal with the traditional role of the bailbondsman and specific successes or barriers being faced in jurisdictions dealing with changes which will alter, reduce or eliminate the role of the bailbondsman. Included will be:

- Brief survey of the historical role of the bailbondsman in in American criminal justice.
- Ten per cent bailbonding program developments.
- Personal recognizance bond and other non-monetary bailbond releases.
- Recent case law and statutory law changes concerning bailbonding.
- Proposals and legislation to outlaw bailbonding for profit.
- Problems which must be faced as the role of bailbondsman is reduced.
- Political considerations in securing bailbond reform.
- Who should be leading bailbond reform in America?

PRETRIAL RELEASE, THE DANGEROUS DEFENDANT, AND SPEEDY TRIAL

This workshop will deal with the conceptual and practical issues of how courts and pretrial release agencies should deal with questions relating to detention and possible release of so-called "dangerous defendant." The workshop material will include the draft of the NAPSA standards and goals relating to pretrial release which will be included in the Resource Notebook.

NEIGHBORHOOD DISPUTE MEDIATION

This workshop will expose the participants to an innovative process for resolving minor "criminal" disputes. Through discussion, participation, and a demonstration, the role which a mediator assumes for resolving criminal complaints diverted from the criminal courts will be illustrated.

Special emphasis will be placed on the role which a neutral party can perform in achieving a lasting settlement of an interpersonal dispute.

COMMUNITY BASED ORGANIZATIONS AS THIRD PARTY CUSTODIANS

Generally there are two basic aims of third party custody groups: affecting change in the criminal justice system and service to those arrested. Two basic modes of operation are: custody as alternative to pretrial incarceration and custody as diversion. Below are listed topics that can be touched on only in the opening presentation or discussed in depth as workshop members desire. We see the workshop, not as a lecture session with questions, but as an opportunity to exchange ideas and information on strategies.

The Organization

- Structural boundaries
  - Geographic
  - Residential space limits for inhouse programs
  - Client screening standards
- Operations
  - Requirements of clients by programs
  - Services to clients
    - Employment
    - Education, training
    - Referrals, followup
    - Counseling
    - Other
  - Street investigation/retrieval
  - Record keeping, confidentiality
  - Reports to court, relinquishment of custody
- Research
- Administration
  - Staff selection, training, supervision, use of volunteers
  - Funding, budget
  - Accountability
  - Evaluation, goals and documentable results

The Criminal Justice System

- Affecting change, advocacy
  - Establishment of bail agency
  - Abolition of money bond
  - Effective counsel, complaint procedures against counsel
  - Speedy trial
- Monitoring police behavior, effectiveness of complaint procedures

The Community

- Recruiting volunteers
- Community education
  - Pretrial issues, incarceration versus release
  - Plight of offender and arrestee regarding employment
  - Jail inmates' need for services
  - Percentage of arrestees judged innocent/guilty

DIVERSION OF HIGH RISK CASES

Definition of "high risk" cases in diversion varies from person to person using the term. Criteria may be seriousness of the offense, prior record, or other demographic characteristics of the accused. For the purposes of this workshop, a common definition will be developed.

The considerations that go into weighing a so-called high risk case for diversion will be discussed from the perspective of the judge, the prosecutor, and the program administrator. Discussion will address the following points:

- what high risk population is appropriate for diversion
- what is the balance between the dangers and the benefits
- what are the special program considerations that flow from this target population
- what is being demonstrated - the reality v. the perception
- what does it mean - what are the implications on other planning and program development efforts

DIVERSION FROM THE CLIENTS' PERSPECTIVE:
A REAL OR IMAGINED SERVICE?

This workshop is designed as an assessment of project services from the clients' perspective.

Former clients of an adult, drug, and a juvenile diversion program will discuss project screening and selection criteria (the appropriateness of their being diverted) and the validity of information provided and used for assessment, case service planning and service delivery.

Attention will be focused on the foundation for project recommendations and the project's ability to predict future client behavior. The workshop will explore programmatic, staffing and administrative variations to determine exactly which elements or components of diversion programs impact most on successful or nonsuccessful completion. This workshop will also explore the longevity of program impact, a program's usefulness after completion, the availability and cooperation of clients during follow-up and evaluation activities, and client/program perspectives and attitudes.

Program/Client Perspectives

P: We trust each other.
We work on a trust basis.

C: Ain't no way in the world I'm going to trust you.
You're my probation officer!

P: If you cooperate with your counselor we'll get your case dismissed.

C: I'll say whatever you want to hear!

P: We're here to help you.

C: You're here to watch me.

P: I'm your counselor.

C: Bullshit, sucker! You don't know anymore than I do!

P: Tell me what's really on your mind?

C: If I did, you'd send me back to court so fast...

DEVELOPMENTS IN JUVENILE DIVERSION

This workshop will begin with an overview of what is being done nationally in juvenile diversion. Discussed will be the eleven juvenile diversion programs funded by the LEAA Office of Juvenile Justice and Delinquency Prevention as well as some examples of what is being done on local initiative. Among the specific questions to be addressed are:

- selection of the most appropriate target group, to provide the most beneficial service without widening the net of control
- what safeguards are necessary
- what services are appropriate, do they make a difference
- what modes of sponsorship and with what effect
- how can legislation support juvenile diversion (specifically discussed will be some pending legislation in California)

The specific focus of the session can, in large part, be determined by the interests of the attendees.

COST BENEFIT ANALYSIS

Cost benefit analysis is a sales tool for the institutionalization of programs. As such, it must be conducted with extremely conservative examples in order to be credible to legislators. Such conservative examples include the use of marginal costs and benefits, as opposed to fully absorbed costs, and the limitation of recidivism benefits. In this approach, consideration should be limited to cost and benefits to the unit of government being asked to subsidize the program; societal costs and benefits have little impact in an area of seekers of governmental resources. Attention should also be given to separating "hard" and "soft" dollar savings.

In addition to presenting an overview of approaches to cost analysis and structures for such studies, this workshop will discuss strategies for institutionalization currently being taken with legislators.

PRETRIAL AGENCY AND THE EVALUATOR

I. Pretrial services agencies and evaluators exist in a critical interdependence. Only with the statistics and empiricals evolved through the evaluations can the efficacy and cost effectiveness of their programs be ascertained.

II. Problems: But this is not to say that there are not problems and that the relationship is not often fraught with tension.

(a) The criteria employed by evaluators, if not developed on the basis of a careful observation of the program to be studied, may not truly reflect the achievements or objectives of the program.

(b) Tools: Even where the evaluative criteria are largely acceptable, adequate measurement tools may not exist. Such, for example, is often the case where such subjective matters as impact upon quality of life are at issue.

(c) Interpretation: Even when available, data may be ambiguous. Thus, for example, a showing of a specified recidivism rate at the end of six months may be good or bad depending on expectations.

(d) Control Groups: No impact study can be meaningful in a vacuum. But the creation of control or comparison groups against whom project participants can be measured is difficult; first, because it is difficult to define and construct an identical group for sampling purposes and second, because the construction of such a group often necessitates the withholding of program services from eligible defendants.

(e) Time Spans: Meaningful research must often be of a long-term nature, with two years being a typical follow up period. To the extent that a pretrial agency's self image, orientation, and priorities may from time to time change, the risk exists that the research will find it is evaluating a program no longer in existence. As a result, the utility, if not the accuracy, of the research may be called into question, but the alternative of "freezing" agency practice for the duration of the research is unacceptable.

(f) Divided Loyalties: It is natural for the pretrial agency to be concerned with how the research is conducted to the extent that favorable findings are desired. It is equally common for the researchers to have ideas in the course of their work as to how the agency can be improved. Thus, each group is interested in the business of the other.

III. Evaluators as a Resource for the Line Agency.

(a) Gathering data which may be useful in the daily operations.

(b) Making of general comments of a descriptive nature.

(c) Familiarizing line agency staff with the latest academic thinking in the area.

(d) Warning agency personnel of insipient problems.

(e) Evaluating operational experiments conducted by the line agency.

DEVELOPING PROJECT PUBLICATIONS:
A BROCHURE, ANNUAL REPORT, PRESS RELEASES

The need for and different uses of project publications will be identified.

Workshop participants will walk through all of the steps involved in developing a product:

- conceptualization and planning
- writing, layout, and design
- editing
- use of graphics, art work, and photographs
- selection of printers
- range of formats available and implications of each on costs
- distribution

LEGISLATION

Developments in the field of pretrial release and diversion are unique among the many significant changes which have occurred in the administration of criminal justice and the rights of the criminally accused in this country since 1960. While most of the changes which did occur emanated from court decisions or legislative reform, implementation of alternative forms of pretrial grew from individual initiative and imagination put into practice by experimental programs in the field. While legislation and court decisions followed in many jurisdictions, many, if not most, pretrial programs today still operate without express statutory authorization and utilize methods of pretrial services for which statutory authorization is lacking. Moreover, even where state legislation exists, it is often piecemeal and unsatisfactory.

The Legislation Workshop will consider bail reform legislation from the concept of an integrated, comprehensive pretrial release system. Enabling legislation for each of the now well recognized forms of release will be discussed both in terms of specific alternative legislative proposals and how each form of release might be incorporated into an overall system of release. Legislation will be discussed in each of the following areas:

- o Presumption in favor of nonfinancial release
- o Police citation release
- o Supervised and conditional release
- o Deposit bail
- o Authorization and funding of pretrial release programs

The workshop will also consider the politics of bail reform, the arguments which can be made against bail reform, and the type of background research and data necessary to support bail reform legislation.

Similarly, the workshop will analyze several approaches being taken to diversion legislation--including diversion of drug related and non-drug related cases and juvenile diversion. In addition to identifying the possible goals of the legislation--authorization, funding, definition of eligibility or conditions of participation, systematic evaluation, etc.--the workshop will consider strategies for seeing that bills become law.

THE MEDIA: MASSAGE PARLOR OF THE MIND

"THE MEDIA PRESERVES THE COMMUNITIES' RIGHT TO KNOW,
BUT WHAT DOES IT DO TO PROGRAMS?"

A short (fifteen minute) dramatization including a "live" interview of a program administrator followed by an immediate "story" release will set the stage for specific hints on how to ensure an accurate news report of facts concerning your or your agency's role in the criminal justice process.

A "fact sheet" that sets the basic fact setting will be distributed to all participants.

THE GAME OF GRANTMANSHIP

You can develop a program that provides a service needed in your community but only in the context of political and funding realities. Workshop attendees will be lead through the grant preparation process and given guidelines on how to present the most appealing package by actually preparing a work product.

The workshop coordinator brings the experience of having been a program administrator, on the staff of the National Center for State Courts and, now, is with the state planning agency. Her perspective is that of one who has both prepared and evaluated a large number of grant applications.

Come play the game!

COMMUNITY EDUCATION: THE CHALLENGE AND THE PROMISE

Working in the criminal justice system in general and in offender related services in particular, one is very aware of the real significance of community education. The extent to which the community accepts the goals and objectives of an organization determines in large part the parameters in which they can work. Public support of pretrial programs is a survival issue both in the areas of funding and authorization (to release, to divert, etc.).

The communities of the pretrial agency are many:

Society	as potential victim, as taxpayer, merchant who suffers economic loss, through the legislature.
Criminal justice system	police, judges, prosecutors.

Enlightened and supportive "communities" are an invaluable resource. Much of the potential power of community education is lost when it's just focused once a year on a trip to the legislature or limited to occasional speaking invitations arranged by someone else.

Using their own experience, workshop participants will explore development of a model for community education that is not random and can be applied in approaching a variety of situations:

PLANNING

Identification of the Audience	o their knowledge -- of the criminal and welfare systems o -- of pretrial o their interests, attitudes, vested interests
What's to be Accomplished in the Session	o what information to be transmitted o what attitudes affected o what kind of follow through desired
Development of Approach	o strategy o methods o material, aids, etc.

DELIVERY

ASSESSMENT

RIGHTS OF THE VICTIM

Historically the United States criminal justice system has expended large amounts of tax money to identify, apprehend, prosecute, incarcerate and service the perpetrators of crime. From apprehension to conviction, the legal rights of the criminal offenders are protected; if there is conviction, the counselling and social service needs of the criminal offender are met by correctional treatment. In the last decade a substantial increase in tax revenue has been consigned to provide criminal offenders with the following services: educational advancement and stipends, job training and placement, mental health therapy and supervision, substance abuse diagnoses and treatment and food stamps and other welfare-related assistance.

Only recently have criminal justice administrators and lay citizens realized that the criminal justice system has neglected victims and witnesses of crimes. Law enforcement and prosecution administrators are becoming more aware and concerned that their efforts to optimize crime prevention, detection, apprehension and prosecution have been stymied by the law-abiding public's unwillingness to report crime and participate as witnesses in the prosecutorial process. Lay citizens are becoming more aware and frustrated that their tax dollars are primarily being used to extend services for the perpetrators of crime and not for the innocent recipients of crime. Therefore, the administrators of justice and their cross-section of lay citizens are becoming actively concerned that the scales of justice are weighted to benefit the criminal population, not the victims and witnesses of crime.

OUTLINE

PIMA COUNTY ATTORNEY VICTIM WITNESS ADVOCATE PROGRAM
(Surveys activities for Calendar Year 1977)

I. CRISES COUNSELLING

- A. Offer on-site intervention around the clock;
- B. Client referrals made by law enforcement and health care agents;
- C. Intervention clients are victims, witnesses and other persons;
- D. Train police officers in crises management techniques;
- E. Develop and maintain working relationships with law enforcement agencies.

II. SOCIAL SERVICE ASSISTANCE

- A. Offer social service assistance around the clock;
- B. Client referrals made by anyone;
- C. Social service clients are victims,witnesses and other persons;
- D. Transportation, housing, child care: company for protection and emergency funds are the primary services offered by staff and volunteers;
- E. Crime prevention recommendations made by staff and security improvements made by diversion defendants;
- F. Social service, legal aid and mental health agencies receive client referrals;
- G. Develop and maintain working relationship with human service agencies.

III. WITNESS INFORMATION AND ADVOCACY

A. Offer witness services primarily during normal working hours;

B. Referrals made by deputy county attorneys;

C. Witness clients are primarily involved in superior court cases;

D. Witness clients are contacted for updating court information and disposition;

E. Employers of witnesses are contacted upon request;

F. Advocate for certain witnesses at initial court appearance, recovering property and sentencing pertaining to restitution;

G. Information: Inform superior court and justice of the peace court witnesses about trial dates and continuances;

H. Inform witnesses of legal rights and provide supportive counselling;

I. Assist witnesses who are being tormented or harassed;

J. Develop and maintain working relationships with judicial agencies.

IV. PUBLIC EDUCATION

A. Advisory boards;

B. Speakers' bureaus;

C. Prepare slide presentations;

D. Victim and witness information literature;

E. Weekly radio series;

F. Two day committee seminars;

G. Public service announcements;

H. Newspaper and journal articles;

I. Television and radio news stories;

J. Technical assistance to other jurisdictions.

V. RESEARCH AND EVALUATION

A. Monthly and quarterly client reports;

B. Battered woman study and collaboration with law enforcement and mental health agencies;

C. Client services, follow-up attitudinal;

D. Developing cost analyses and exchange benefit ratio studies;

E. System analyses of criminal divisions' paper-flow systems;

F. Evaluation of household complaint program and adult preparation presentence program;

G. LEGIS reliability studies for a possible terminal.

EVALUATIONS, STATISTICS, AND MANAGEMENT INFORMATION SYSTEMS

The Evaluations, Statistics, and Management Information Systems Workshop will explore "generic" design and methods for evaluation of pre-trial release and diversion programs, the types of statistical data that need to be collected for evaluative purposes and the levels of statistical analysis appropriate for interpreting data, and the uses that can be made of management information systems in designing and implementing evaluation and in assisting in operation the total pre-trial program.

Specifically, resource persons are knowledgeable in the uses of these tools (i.e., evaluation, statistics, and management information systems) in the pre-trial planning process, in several projects (e.g., the Court Employment Program and the Pre-Trial Services Agency in New York City), and in the overall operations of LEAA, Vera Institute, and field and academic research and evaluation programs.

Among the questions addressed will be: What are the current requirements for the evaluation component of LEAA-funded programs? What statistics must be collected? What levels of analysis of data are appropriate? How can management information systems be set up to manage the total operation of the project or agency and still generate research data as a "spinoff"? At what points along the plan-grant proposal-program implementation continuum must (1) evaluation, (2) data requirements, and (3) best use of management information systems be considered?

At least half of the time allotted for the workshop will be devoted to answering questions and interaction with the audience.

THE JUVENILE COURT: A PREVIEW OF ADULT PRETRIAL DIVERSION?

The "juvenile court experiment" originally embarked upon as an alternative to the harsh and unresponsive treatment afforded juveniles in the adult system is felt by many to have failed. Many wonder whether formalized diversion from traditional criminal processing will suffer the same fate.

One can capitalize on the juvenile court experience in assessing current practice and the future of diversion. This workshop will explore the benefits and the hazards of diversion and the balance that must be struck between the sometimes conflicting goals of rehabilitation and due process. Of particular concern is the potential for unmonitored abuse of discretion, for increasing the net of control and coercion, and for violation of due process. Further, when does diversion divert attention from the need for more fundamental reform? A system of safeguards will be discussed.

THIRD WORLD: COMMUNITY OR COMMUNITIES?

Too frequently the assumption seems to be made by policymakers and minority representatives alike that there is a third world community or a third world perspective.

However being Black in D.C. is not like being Black in Alabama, being Asian in California is not like being Asian in New York. Experience, problems, and priorities vary not just by ethnic identity, but from place to place.

We are at a time in our social development and the development of our discipline that we can, and perhaps must, go beyond the blanket labelling, generalizations, and banding together that characterized the beginnings of consciousness in this area. In other words, we must stop making something homogeneous out of something that is not. We should reflect a bit on what the differences really are, on their significance to national and local programming, and on the role of and relationship between third world peoples in the pretrial services.

The goal of this workshop is the development of a more sensitive multi-dimensional perspective on ourselves as both members of the third world community and as non-third world persons who want to be knowledgeable and responsive to all peoples.

ANNOUNCEMENT

THURSDAY, MAY 12, 3:30 - 5:30 IS YOURS!

This time has been reserved to be scheduled completely in response to your requests.

PROBLEM: There is a wealth of untapped knowledge and expertise among attendees.

It is always impossible to structure a conference agenda that speaks to the interests and concerns of everyone.

RESPONSE: Participant Inspired Workshops

This is an opportunity, within logistical limitations, to schedule your own session, request that someone else run a session, continue a discussion from a point earlier in the conference, or convene a meeting with a special interest group.

The possibilities are many. Because this is an experiment and there are many unknowns, much will have to be worked out on site.

Venture with us.

Fill out the attached form, our coordinators will be in touch with you, and we'll all see what happens.

PARTICIPANT INSPIRED WORKSHOPS

Name_____

Title/(Program)_____

How can you be contacted during the conference_____

Topic and Summary of Content:

Possible Resource Persons (list yourself if applicable):

Number of People Expected:

List any supplies or equipment needed in addition to a room with chairs.

This form should be returned to Conference Headquarters, Room 110.

FOREWORD

Documents included in this section focus on the planning and administration of pretrial programs:

- The Pre-Trial Process--Formal and Diversionary: A Model
- The Federal Pretrial Services Agencies
- Pretrial Intervention: The Administration of Discretion
- Excerpts from "Instead of Jail" Pre- and Post-Trial Alternatives to Jail Incarceration

They also address the types of problems or crisis faced by pretrial agencies:

- Special Issue on Bail in Pennsylvania

And provide examples of some of the more recent evaluations or studies of pretrial programs:

- Cost Benefit Studies
- Evaluation Techniques for State-Wide Pretrial Release Programs
- The Effectiveness of Bail Systems:an Analysis of Failure to Appear in Court and Re-Arrest While on Bail
- Voluntary Pretrial Diversion and the Question of Compliance

THE PRE-TRIAL PROCESS--FORMAL AND DIVERSIONARY: A MODEL

By Dr. Gene Stephens

This paper was prepared for the participants of the 1977 National Conference on Pretrial Release and Diversion.

THE PRE-TRIAL PROCESS--FORMAL AND DIVERSIONARY: A MODEL

Dr. Gene Stephens
College of Criminal Justice
University of South Carolina

The pre-trial process in criminal cases often has been considered to span only the period between arrest and the beginning of the official trial. Thus the view of intervention into and/or diversion from this process has been limited to programs or procedures occurring during this period. It appears to this author that the pre-trial process in fact covers a longer portion of the criminal justice process continuum; thus in development of this model, the pre-trial process is defined as the period beginning with lawmaking and ending with pre-trial motions.

The purpose of the model is to identify pictorially the basic components of the pre-trial process in sequential order (middle), the resulting options in the "formal"(i.e., due process) pre-trial process (left), and the options available if a "diversionary" process is followed (right).

In developing the model, some problems arose, two of which bear mentioning prior to explaining the process. First, the model is "generic," and thus, as in all areas of the criminal justice spectrum, the actual process is not exactly the same in all jurisdictions. For example, the definition of "arraignment" and its place in the process differs among the states and between many state criminal courts and the Federal criminal courts. Second, whereas the formal process exists in relatively similar form in most jurisdictions, the diversionary process differs widely from jurisdiction to jurisdiction. The diversionary process, thus, is designed to show where and what diversionary options are or can be available along the pre-trial continuum (and undoubtedly some options have been omitted). Thus to some extent this portion of the model is visionary.

The utility of the model, despite the above mentioned problems, lies in its pictorial representation of the total pre-trial process and easy identification of both formal and diversionary options along the continuum.

The Pre-Trial Process Model

The model begins with lawmaking as it is at this basic level that policy decisions are made, including the important decision as to whether an act or failure to act on the part of any individual will be defined as a criminal violation of the law. Lawmakers have not only the power to define activities as "illegal," but also have the power to "legalize" (i.e., remove all prohibitions) or "decriminalize" (i.e., remove criminal penalties and possibly substitute civil penalties or institute civil controls) activities formerly defined as criminal. Thus the first line of diversion is occupied by the lawmakers.

As the pre-trial process moves from the sphere of the lawmaker to that of the law enforcer, the due process or formal procedure allows several options short of arrest, including "stop," "stop and frisk," "field interrogation," and "station interrogation"--each of which, along with the pre-arrest evidence-gathering procedure of "search and seizure," is periodically redefined by the U. S. Supreme Court. On the diversionary side, a law enforcer may issue a "warning" to a suspected lawbreaker and avoid the need in some cases to proceed to the next step in the process, regardless of whether a crime was or was not committed and regardless of whether there is reason to believe the suspect did commit the offense.

As the next step, arrest procedures, there are legally-defined procedures for formal arrest with a warrant or without a warrant and legal distinctions (again periodically changing) as to which method is appropriate under the particular circumstances. In addition there are requirements as to what "rights" must be afforded the accused and to what extent he must be informed of these rights. On the diversionary side, the enforcer may simply ignore the offense (i.e., non-arrest), exercising his selective enforcement discretion. He may do so for a variety of reasons ranging from a feeling that the offense was not serious enough to justify the time involved in processing the case to a feeling that the offense was at least partially justified under the particular circumstances. In addition, the enforcer may issue a "summons" ordering the accused to appear in court to answer charges without an immediate threat of loss of freedom or of being enrolled (i.e., booked) in the police records. Finally, the enforcer may choose to take or send the suspected offender to a "community-based option" (e.g., a home or treatment program for alcoholics or drug abusers or developmentally disabled, a "halfway-in" house for minor offenders, a public or private social service agency). "Community-based options" thus refer to the public or private community-based programs or services available in lieu of the formal or due process procedures and to which the accused can be diverted from the formal process.

In the formal process, "booking" establishes an official police record for the accused and thus "labels" the suspect as a "police case." It is at this point, following arrest, that few jurisdictions offer release or community-based options in lieu of booking. Still, the fact that a "police record" is about to be established should prod police and court officials to provide a procedure to take one last look prior to booking to determine: (1) Is this case worth pursuing in the formal process; and/or (2) Is the offense serious enough to justify the establishment of an official police record for the accused. Factors which might be considered include seriousness of the offense category as reflected in the penal code, perceived public concern about the offense category, the particular circumstances of the offense (e.g., injury to victim, role of victim in offense, role of accused), and prior criminal record of the

accused. Decisions of this type would take on new meaning if post-arrest, pre-booking options of release and diversion to community-based programs or services were available at this stage.

If the process remains unchanged, the court in most jurisdictions does not get involved in the pre-trial process until the initial appearance at which the accussed must be informed of the charges lodged against him and of his civil rights. (Even here only the lower court is involved, and the trial court, i.e., court of general jurisdiction, remains uninvolved.) In addition, in cases involving less serious charges the lower court may receive a plea and/or try the case, and in more serious cases the defendant may choose whether to plea at this stage. In some jurisdictions evidence to establish a more serious crime has been committed and that there is some reason to believe the accused committed the offense is presented at this hearing. In serious (i.e., primarily felony) cases, the judge makes a decision to "bind over" for further action or to release the accused for lack of evidence. If the case is bound over for consideration by the Grand Jury or district attorney, a decision is rendered as to whether to allow the accused to post bail. If bail ia allowed, it make take several forms ranging from posting cash to release on recognizance (i.e., signing a promise to appear in court at a specified time). On the diversionary side, the accused may be released at this stage either for lack of evidence to support a case against him or other reasons (e.g., a guilty plea and suspended sentence in less serious cases), or may be diverted directly by the judge or on a motion from another officer of the court (e.g., district attorney) to a community-based option.

Next, the accused who is not diverted faces jail. In the formal process, he may avoid jail by posting bail, if allowed; in the diversionary process he may be screened for possible selection to be released temporarily on recognizance bond or for diversion to a community-based option.

In most jurisdictions an optional preliminary hearing is afforded the accused. At this hearing the state must show it has "probable cause" to hold the accused on the charge(s) lodged against him. Evidence must be produced in court to establish this standard of proof (considerably below the "beyond a reasonable doubt" required at the criminal trial), and failure to produce sufficient evidence can result in the release of the defendant. The accused may waive this hearing and await the decision of the Grand Jury or district attorney or he may use the occasion to personally or through his attorney or another court official ask for diversion, possibly to a community-based option.

In the Federal system and many state courts, the next step must be consideration of the charges by the secret, usually 22-member, Grand Jury. A "True Bill" from the Grand Jury results in indictment and continued processing of the case, while a "No Bill" results in release of the accused (although he may be indicted by a subsequent Grand Jury). In some states, the Grand Jury indictment system has been replaced by a system under which the district attorney (i.e., prosecutor) simply constructs a bill of particulars stating specific information concerning the charges against the accused and presents the "Information" to the court for a decision as to whether to continue to process the charge(s). Release can come at this point if the Grand Jury returns a "No Bill," if the district attorney decides not to file an Information or if the judge decides not to proceed on the Information.

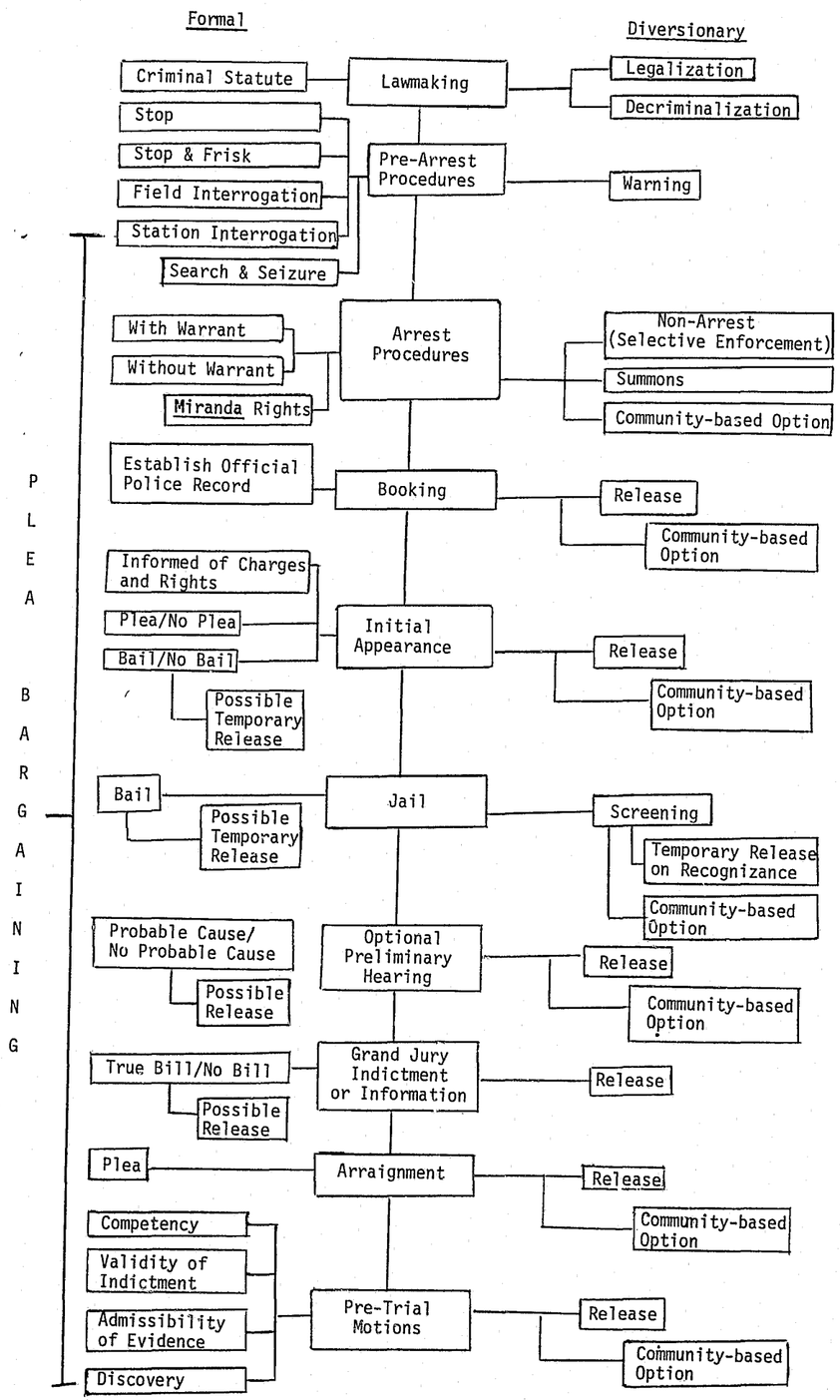
The first official, required plea by the accused in serious cases comes at the next step, the arraignment. This hearing constitutes the first official trial court level appearance and to some represents the end of the pre-trial and beginning of the trial process. However, jeopardy does not begin until the actual trial (i.e., swearing in of jury and witnesses) begins. Some pleas (e.g., no contest) at the arraignment may result in release (e.g., suspended sentence) or diversion to a community-based option.

The final step prior to trial is the filing of pre-trial motions (which might also have been filed at an earlier time in some jurisdictions). These motions take numerous forms, such as asking that charges be dismissed because the accused is incompetent to stand trial, because the charges were improperly drawn or because the evidence was illegally seized. In addition, the accused may seek rights of discovery to gain additional insight into the evidence against him in hopes of refuting it. Many of these motions, if accepted by the court, can result in the release of the accused or diversion to a community-based option (such as a mental health facility in several cases).

Finally, the quasi-official procedure known as "plea bargaining" is available to the accused in many jurisdictions beginning as early as the pre-arrest, station interrogation and continuing through the remainder of the pre-trial process and even into the trial process. The negotiated plea may take several forms, but most often involves a plea of guilty in exchange for a "lighter" sentence or a lesser charge. Plea bargaining is "legal" (i.e., a recognized procedure) in only a few jurisdictions. In other areas it is used (in as many as 95 percent of criminal cases in some jurisdictions) but is not officially recognized or is officially prohibited. Still, in many cases the plea bargain results in diversion from the pre-trial process either through release or assignment to a community-based option.

Thus, the model illustrates that diversionary options can and often do exist at each stop along the pre-trial process, and that, even within the formal process, diversionary options exist at several points. Further, the model provides the lawmaker, the law enforcer and the court official with a clear picture of the options available to them at each step along the pre-trial continuum.

THE PRE-TRIAL PROCESS



PRETRIAL INTERVENTION: THE ADMINISTRATION OF DISCRETION

By Paul H. Johnson

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INTRODUCTION

During the last decade the American public has developed a growing concern that the criminal justice system is incapable of fulfilling its mandate to protect the community from crime. The fear has diminished confidence in the system and has drawn attention to the disturbing reality that traditional judicial processes are not adequately meeting the current demands placed on them (Hamilton and Work, 1973).

American communities are faced with continuing rises in annual crime rates (Federal Bureau of Investigation, 1973),[1] increasing budgetary requirements to meet the costs of the problem, and growing case backlogs at every level of the criminal justice system. Mounting numbers of arrests have created a corresponding need for more courts, prosecutors, defenders and probation officers.

Prosecutor caseloads have grown to unworkable sizes with sheer volume impeding effective prosecution of serious cases (McIntyre and Lippman, 1970). Court congestion has subsequently become a significant problem to include the phase involving the rehabilitation of an offender granted probation. Further, the dispositional alternatives available to the court are often harsh, and ineffective, limited to probation, fine or imprisonment (Downie, 1971). Probation officers are handling heavy caseloads and spending valuable time with those individuals who create the fewest problems and are capable of sustaining themselves without supervision.[2]

This situation, affecting every aspect of the traditional criminal justice system, comprised the circumstances surrounding the development of alternatives to the traditional processes of prosecution and adjudication. The prosecutor and the courts needed alternatives to traditional procedures. In a period of rapid change and public confrontation with the criminal justice system the situation demanded options which were both independent and flexible, providing immediate response to the goals of justice as well as the needs of the individual. One of these alternatives was pretrial intervention(PTI), a post-arrest, pre-arraignment diversion which offered savings in time, caseload and court costs as well as presenting a sound rehabilitative strategy for selected offenders.

Purpose of the Study

This study will examine the exercise of the prosecutor's discretionary decision-making within the context of structured pretrial intervention programs. Attention will be directed toward administrative organization and the loci of decision points within the program as they affect defendant dispostion. The formalization of pretrial intervention programs necessitates some structuring of the prosecutor's decision-making alternatives in the process of diversion with subsequent impact on his discretionary flexibility. It further requires effective organization capable of properly administering PTI programs.

Program survival in any endeavor requires the application of sound management principles. This includes statements of goals, an administrative structure fitted to suit those goals, and clear lines of authority within which decisions may be made and action initiated. Within the planning process, however, lies the ultimate direction of the program, for it is here that goals and intermediate objectives are established (Suchman, 1967). Many well-intended programs have been subverted by ill-advised planning, resulting in either complete goal displacement or eventual failure.

Prosecutor's discretion, which forms the legal cornerstone of pretrial intervention, is a practice which works best without formal structure. Although Prosecutor Robert F. Leonard of Genesee County, Michigan has commented that "much of the criminal process is administrative rather than judicial" (National District Attorneys Association: Screening, n.d., p. 20), it remains to be seen whether the prosecutor's office, itself notorious for lack of administrative efficiency, can provide the administrative leadership and control of the programs consistent with discretion and the goal achievement without compromise. With the growth of such programs, there is the convergence of three forces: discretion, formal organization, and diversion—all of which are summoned to meet the increased demands on the prosecutor's office.

The program organizational structure will be examined for administrative relationships and coordination of activities between the court, prosecutor and program personnel. This will reveal some insight into the guidelines the programs use for progress assessment and defendant evaluation at the end of the program participation. It will further reveal the extent of social history prepared on the defendant, and the role of the counselor and the type of program service available. An important consideration for any PTI program is the need it serves within a particular community. Within this framework, consideration will be given to the manner by which particular pretrial intervention programs identify target groups for services.

Method of Approach

In order to achieve the purpose of this study and maintain logical consistency during the inquiry, the following developmental sequency will be followed:

1. Trace the phenomenon of prosecutorial discretion from its historical background and legal justification as the necessary antecedent for pretrial intervention;

2. Based on system penetration identify from current programs administrative decision-making models and procedures in defendant dispostion;
3. Evaluate benefits, liabilities and probable direction of pretrial intervention programs as a viable alternative to traditional processing.

This method, with its historical and interpretive approach, is intended to provide logical consistency in developing the evolution, concept and issues involved in pretrial diversion, the most recent innovation in offender treatment.

Pretrial Intervention: Overview

Pretrial intervention programs stop the prosecution clock for selected offenders after arrest and prior to arraignment (National Pretrial Intervention Service Center: **Legal Issues**, 1974). The criminal offender is diverted by the prosecutor into short-term, community-based programs of varying duration with the possibility of dismissal of charges upon favorable completion of the specific treatment program. Most programs contain the following elements:

1. Formal offender eligibility criteria;[3]
2. Voluntary offender participation;
3. Manpower services administered by a formal staff;
4. Dismissal of criminal charges for the successful participant (Rovner-Pieczenick, 1974, p. 7).

Such programs operate at the discretion of the prosecutor; they are conditional as regards the participant and may be considered a delay in processing rather than diversion from it (Klapmuts, 1974, p. 111). Pretrial intervention, then, is concerned with individuals within the criminal justice system, for the prosecutor's authority over those individuals continues until the conditions of diversion are completed in a satisfactory manner.

Pretrial intervention provides an effective alternative tool for both the prosecutor and the judge, for it selects out individuals less likely to commit subsequent crimes. Further, it reduces the court volume and delivers effective rehabilitation services to selected defendants (National Advisory Commission on Criminal Justice Standards and Goals **Report on Corrections**, 1973).

Relevance of the Study

This study is concerned with the application of a concept which has proliferated without precedent since its inception. With only three formalized pretrial diversion programs in operation in 1967, there were by 1973 approximately thirty programs in operation in major urban areas providing services to defendants, and fifty-seven projects in 1974, and over 118 listed with the National Pretrial Intervention Service Center as of April, 1975 (NPISC: **Directory**, 1975).

Pretrial intervention programs are gaining influence with state and local criminal justice planning agencies, yet most are not mandated by statute.[4] While the enthusiasm for PTI programs remains high, one must consider the possibility that the nature of discretionary decision-making within the program is substantially influenced more by an absence of traditional resources and the existence of reactive community pressures than by a well-planned program based on sound research principles.

The 1967 President's Commission on Law Enforcement and Administration of Justice (Challenge) endorsed prosecutorial discretion as "necessary and desirable," but further noted that prosecutors' offices suffer from several handicaps in addition to "generally unfavorable working conditions" (**Challenge**, 1967, p. 133). Each of these "handicaps" involved impairment of a prosecutor's decision-making capabilities and a lack of systematized procedures in the charging decision.

There exists a series of legal issues or critical questions regarding the handling of defendants and offenders which have been raised regarding pretrial intervention programs. Treatment of these issues remains tentative for the innovative nature of PTI does not lend itself easily to analysis within the traditional criminal justice system. Further, program characteristics vary widely within jurisdictions making legal generalizations difficult. These issues, centering around the proper exercise of prosecutorial discretion, will be treated in Chapter II.

Diversion: Philosophy and History

The fact of pretrial diversion is the result of a decision to handle a case by some alternative to formal prosecution. In order to understand why pretrial diversion has assumed its present stature within the criminal justice system, it is necessary to review some of the influences affecting its development.

At the close of the last century, the structural underpinnings of this country were couched in comfortable assumptions of permanence and a public philosophy grounded in a universal belief in the rule of law (Lippmann, 1955). The thoughts of Locke, Rousseau and Montesquieu influenced national political development emphasizing the supremacy of individual rights and the equality of each man before the law. There was the assumption that man had control over his environment and the power to direct the activities of his life. Justice was constructed around the concept of individual responsibility; the need for a "habit of obedience" in order to survive. The law, as Bentham noted, was a command which presupposed possible punishment (Schafer, 1969), a concept entirely compatible with personal responsibility and accountability. Incarceration and punishment became punitive tools of social control in the nation's emerging philosophy of criminal justice.

At this point the American concept of justice introduced into its fabric an institutional rigidity not common to other areas of national development. The evolutionary processes experienced by other institutions were essentially capable of adapting to meaningful social policy needs. Criminal justice, on the other hand, evolved less under the power of its own development than as the reactive stepchild of larger social reform. To the contrary, American criminal justice has added, over generations, many procedures which have lost their relevancy within the context of modern society. Philadelphia District Attorney Arlen Specter has commented that "Those who labor daily within the [criminal justice] system often cannot agree on its objectives, but virtually everyone agrees that the system does not work" (Specter, 1973, p. 16).

The confusion involved in the determination of objectives may be due in part to the accelerated rate of change in today's society and the demands made upon traditional institutions to prove their stability by surviving in a rapidly changing social environment (Toeffler, 1971). America is experiencing a period of unprecedented transition, wherein environmental influences surpass those of the family, school and church. Growing communities are not stable in their urban-suburban-rural relationships, and the change is causing an unsettled disposition among the population, most noticeable among the youth. These considerations have moved criminal justice planners to recognize weaknesses in the traditional approaches to crime prevention and caused them to consider non-traditional programs geared to meet the needs of the individual offender.

Diversion pertains to the concept of re-directing an individual from committing a criminal act through a responsible rehabilitative plan of action. By attending to an offender by means other than the rigidity of criminal justice procedure, diversion is intended to assist an individual in developing a personal stability which will guide his actions in the future away from further crime.

The concept of diversion is not new to American criminal justice. The belief that the full judicial process is not necessary in every case of law-breaking has long been practiced informally by law enforcement and the courts, as indicated in Figure 1. The policeman uses his discretionary powers to divert every time he decides on a warning instead of an arrest. In like manner, judgment and discretion are used by the prosecutor who declines to prosecute, the defense attorney who stalls in order to have a case dismissed, and the judge who postpones a hearing. These forms of unsystematic diversion, based on the discretion of the police, prosecutor or magistrate in a particular case, account for the fact that nearly one half of all arrests are dismissed at an early stage in the proceedings (**Challenge**, 1967, p. 133). The term "change" as it appears in this paper refers to the decision of the prosecutor to accept a complaint and initiate, after arrest, formal prosecution procedures against an individual suspected of having committed a crime.

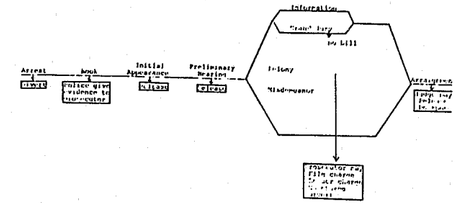


Figure 1. Points of release and diversion between arrest and arraignment.

Diversion Defined

While diversion is not a new concept to American criminal justice, the concept and application of formalized pretrial diversion is a recent phenomenon and has not yet developed terminology usages common to the wide range of programs it engages. This section will discuss diversion and pretrial intervention as terms essential to understanding the nature of the programs. Ultimately each program employs its own set of working definitions suited to its particular purposes. Regardless of its particular form, each program operates on the belief that application of the full process of criminal procedure may be inappropriate for specific offenders (Harlow, 1970).

Diversion is a term with many meanings and uses within the criminal justice system and its recent popular growth as a response to pressures on the system calls for some refinement of its use. Rather than its use as a generic term, diversion needs to be replaced and understood in terms which describe the particular activity to which it is applied.

It is important to understand the use of the term "diversion" within its particular employment. It can unite both humanitarian and pragmatic interests melding administrative needs with rehabilitative principles while offering a viable alternative to prosecution which is consistent with public safety. Klapmuts comments that diversion is a means of:

1. Reducing the volume of persons going through the entire process of arrents, arraignment, trial, conviction, and sentencing;
2. Interrupting the cycle of recidivism among certain offenders without imposing the handicaps of a criminal record;
3. Dealing with persons for whom conviction is otherwise likely without applying the stigma of prosecution and conviction;
4. Freeing the criminal justice system to concentrate its resources on more serious offenders (Klapmuts, 1974, p. 111).

In its most recent applications, diversion has undergone significant interpretations in an effort to provide the concept with working definitions. The NAC Report on

Corrections refers to diversion as formally acknowledged and organized efforts to utilize alternatives to initial or continued processing into the justice system, "...prior to adjudication and after legally prescribed action has occurred" (NAC: **Corrections**, 1973, p. 73).

The Commission's **Report on the Courts** is consistent, noting that diversion refers to "halting or suspending, before conviction, formal criminal proceedings against a person on the condition or assumption that he will do something in return," and that diversion "must be undertaken prior to adjudication and after a legally prescribed action has occurred..." (NAC: **Courts**, p. 27).

Raymond Nimmer has commented recently that

> Diversion ... is the disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on either the performance of specified obligations by the defendant or his participation in counseling or treatment. A diversion program is an enterprise that recurrently arranges conditional, noncriminal dispositions whether or not they are in fact obtained for all defendants complying with the stated conditions (Nimmer, 1974, p. 5).

Pretrial intervention as a type of formalized diversion also suffers from an absence of common terminology. It is synonymous with such terms as "deferred prosecution," "early court diversion," "pre-indictment" or "pre-trial probation." Such programs consist of a formal court- and prosecutor-based diversion which selects individuals from pre-defined categories out of the ordinary course of prosecution either before filing or after filing of a complaint but before entry of a plea by judicial postponing of further criminal proceedings for a stated period. During this period the offender participates voluntarily in a specific program of work, counseling or other services, successful completion of which results in dismissal of charges.

Since pretrial intervention consists of non-criminal disposition of the defendant, it may be considered a "delay" in the prosecution. The defendant is moved out of the process of trial, conviction and sentencing, but not out of the system. The prosecutor retains the option of returning the offender to the criminal justice system for normal processing. Pretrial diversion treats individuals within the criminal justice system, and the authority of the prosecutor continues until the conditions of diversion are either completed in a satisfactory manner or the person is returned to the system for normal processing. Although programs require the cooperation of the police, the court and community services, the legal authority for initiation of pretrial intervention rests ultimately in the discretionary powers of the prosecuting attorney.

The term "pretrial intervention" was adopted by the American Bar Association (ABA) in the establishment of the National Pretrial Service Intervention Center. As a workable term, it was also used by the National Advisory Commission on Criminal Justice Standards and Goals (NAC: **Report on Corrections**, 1973, p. 84).

Origin and Development of Pretrial Intervention

The first efforts in establishing pretrial intervention projects were initiated by the Department of Labor (DOL) in the early 1960's. Concerned with rising unemployment and the problems of economically disadvantaged workers, the DOL endeavored to develop programs which would improve the situation of these workers in their effort to compete in a technological labor market (Rovner-Pieczenik, 1973).

The Manpower Development and Training Act of 1962 (MDTA) was enacted to deal with these problems. In the process of researching the unemployment situation, it was discovered that there was a special group with which programs had particular difficulty in assisting. These were the illiterate ghetto youth and minority groups who suffer from chronic unemployment. Further research revealed that this group comprised a significant representation of locally incarcerated offenders. While prisoners were technically not eligible for manpower services, some manpower guidelines were subsequently revised to provide for their inclusion on a limited experimental basis.

Early projects were directed specifically toward these youthful incarcerated offenders. The Restoration of Youth through Training Program, initiated in 1963 by the Wakoff Research Center at Staten Island, New York (Sullivan and Mandell, 1967), the Draper Project in 1964 at Elmore, Alabama (McKee, 1968), and Project MORE in Lorton, Virginia (**Project Challenge**, 1968) utilized the correctional institution as an experimental vehicle for entry into the employment world. These projects also demonstrated that the offender usually derives from and returns to the most disadvantaged population in the labor market. Interest was developing on employability of the disadvantaged offender.

Two independent studies were directed toward examining the offender upon his return to the community. In a 1964 study of federal prison releases, Daniel Glaser found that during the first month of release only 25 per cent of the releases were employed at least 80 per cent of the time; after three months, only forty per cent had worked 80 per cent of the time, and 20 per cent had no work (Glaser, 1964, p. 329). A later study by Pownall showed a strong correlation between staying out of prison and stable employment. His study showed that the employment rate in Philadelphia for released prisoners was four times that of males generally in the area (Pownall, 1969).

The Department of Labor manpower programs became the prototype for later developments in diversion. The concept represents a strategy whereby various social science disciplines are directed toward the educational and training needs of unemployed or underemployed persons (Phillips, n.d.). This model has provided groundwork for various state and local legislation and subsequent program development.

The early programs concentrated on the skills needed by offenders to successfully compete in the free world. Feedback from various projects, however, revealed that despite newly acquired skills, special social barriers existed for the released offender. "Labeling" by the criminal justice system not only reinforced the offender's failures but rendered prison skill projects virtually self-defeating (Lemert, 1951). This caused some concern among administrators, and attention was further directed to the "opportunity structure" theory which seemed consistent with program findings and provided a rationale for new directions in Department of Labor experiemental programs (Cloward and Ohlin, 1960).

The Department of Labor then expanded its efforts to probe the criminal justice system at three points to determine where manpower services might be effectively delivered. These points were:

1. After arrest but before trial;
2. After incarceration within six months to one year of parole eligibility, and
3. Post-release (Phillips, n.d., p.3).

In undertaking the delivery of manpower services at the point following arrest but prior to trial, the design proposed diversion of selected offenders, at the discretion of both the prosecutor and the judge into a manpower program tailored to the needs of the offender. If he responded well, a recommendation was made from the prosecutor to the court to dismiss the case. This manpower service, which might be a return to school, learning a job skill, or special placement, was an attempt to divert the offender from the stigma of the criminal justice process, and at the same time, improve upon earlier Department of Labor projects.

In 1967, the Department of Labor funded two pretrial intervention pilot programs which represented a convergence of current theory and administrative reality. The Manhattan Court Employment Project in New York and Project Crossroads in Washington, D.C. were experimental pretrial intervention programs geared to rehabilitate selected first offenders on eligibility criteria agreed upon by court, prosecutor, and project offering to them services and employment in order to have their cases dismissed (NDAA: **Screening**, 1974, p. 25). In addition to diverting offenders, the programs were designed to help the courts dispose of their overload while providing some experimental ground for community treatment (Leiberg, 1971; Manhattan Court Employment Project, 1972).

The successes of these programs, based on increasing offender employability resulted, in 1971, in a second-round Department of Labor finding of pretrial intervention programs in nine major cities, each based on the structure and operating characteristics of the original two pilot programs.[5] Each program was established with full time staff, and encompassed services agreed upon through the cooperation of both court and prosecutor.

Support for the Concept

Support for pretrial intervention, once established, was swift in arriving. The 1967 President's Commission on Law Enforcement and the Administration of Justice regarded the "exercise of discretion by prosecutors as necessary and desirable, but suffering from several handicaps in addition to generally unfavorable working conditions" (**Challenge**, 1967, p. 133). These handicaps included a "lack of sufficient information on which to base their decision..., a lack of clearly stated standards to guide them in making decisions..., and a lack of established procedures for arriving at the charging decision" (**Challenge**, 1967, p. 133).

A subsequent excerpt from the same Report indicates the undeveloped need for diversionary programs:

> Prosecutors deal with many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions is excessive; yet they usually lack alternatives other than charging or dismissing. In most localities, programs and agencies that can provide such treatment and supervision are scarce or altogether lacking, and in many places where they exist, there are no regular procedures for the court, prosecutors, and defense counsel to take advantage of them (**Challenge**, 1967, p. 134).

A recommendation follows which urges "early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required" (**Challenge**, 1967, p. 134).

In 1970, the President's Task Force on Prison Rehabilitation recommended that

> The Congress should enact legislation and appropriate funds for the creation...of special units to provide pre-adjudication...services of all kinds to defendants, and information about defendants to prosecutors and judges, with the object of diverting as many defendants as possible from full criminal process (**Report on Prisoner Rehabilitation**, 1970, p. 22).

That same year, Chief Justice Warren Burger called for reform in the field of corrections, commenting on the need for community involvement and endorsing the role of rehabilitation in the criminal process (Burger, 1970).

In 1971, the ABA **Standards Relating to the Prosecution Function and Defense Function** favored strong en-

dorsement of discretion in the prosecutor's decision to initiate formal prosecution procedures against an individual, and by so doing provided approved guidelines from which programs could be developed.

Standard 3.9, Discretion in the Charging Decision, states, in part:

> The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, not withstanding that evidence may exist (exists) which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:
>
> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
> (ii) the extent of the harm caused by the offense; the disposition of the authorized punishment
> (iii) in relationship to the particular offenses or the offender;
> (iv) possible improper motives of a complainant; prolonged non-enforcement of a statute, with
> (v) community acquiescence) (ABA **Standards; Prosecution,** 1971, p. 92).

* * * * * * * * *

In a related context, **Standard 2.5** notes that "each prosecutor's office should develop a statement of general policies to guide the exercise of prosecutorial discretion" (ABA **Standards: Prosecution Function**, p. 64).

In 1972, the American Correctional Association adopted a Resolution on Diversion Programs at its 102nd Congress of in Pittsburgh. It noted that a great number of offenders now in institutions could be more effectively treated in the community. The Congress urged the "expanded use of diversionary programs, probation and other alternatives to imprisonment for non-dangerous offenders" (ACA, 1972).

In October, 1973, the proposal of two bills, S.798, "The Community Supervision and Services Act," and H. R. 9007, "Diversionary Placement Procedures," signified congressional awareness and support of pretrial diversionary efforts at the federal level. The bills recommend services for selected criminal defendants in the Federal court system prior to trial, noting that "society can best be served by diverting the accused to a voluntary community-oriented program" (**Pretrial Diversion: Hearings,** 1974).[6] Support for pretrial diversion received further momentum and direction from the National Advisory Commission which stated that:

> In appropriate cases, offenders should be diverted into noncriminal programs before formal trial or conviction. Such diversion is appropriate where there is a substantial likelihood that conviction could be obtained and the benefits to society from channeling our offender into an available noncriminal diversion program outweigh any harm done to society by abandoning criminal prosecution (NAC: **Report on Courts,** 1973, p. 31).

A significant consideration is included which suggests that "the limited contact a diverted offender has with the criminal justice system may have the desired deterrent effect" (**ibid.**, p. 32). The Commission concludes by pointing out the practical realities of the current situation with reference to diversionary programs by encouraging social policy decisions which favor diversion.

These endorsements follow on a wave satisfactory experiences with pretrial intervention programs. The ABA estimates that existing formalized programs are reducing court and prosecutor caseloads from 5 to 25 per cent, and that pretrial can be two-thirds less costly than a sentence of eighteen months probation (NDTISC: **Why PTI?** n.d., p. 3).

Pretrial intervention evolves from two directions, both of which may account for its popular utilization. First, it is a simple concept which represents an effective tool for the courts and the prosecutor of certain defendants. Its noncriminal disposition may meet the victim's needs and deter him from future crime. On a more pragmatic level, pretrial intervention offers an effective means of reducing court backlogs and the costs of providing rehabilitative services.

Summary

This chapter has intended to show that the development and endorsement of pretrial intervention programs evolved from a need for more effective allocation of criminal justice resources and the realization that alternatives to normal criminal processing may offer significant rehabilitative benefits. Diversion has long existed in American criminal justice as an undefined, unspecified practice employed by functionaries within the system.

Pretrial intervention was recognized as the handling of a case by some alternative to formal prosecution through re-direction of an individual to a responsible rehabilitative plan of action. The involvement of the Department of Labor was seen as a significant primary force in the initiation of early pretrial programs. Concerned with the problems of disadvantaged workers and rising unemployment, the DOL developed, in the early 1960's, experimental manpower programs which set a pattern for subsequent diversionary projects. Table 1 traces the steps in the development of pretrial intervention programs.

The concept of programs geared to rehabilitate selected first offenders gained judicial support, for it also provided a means by which the criminal justice system could obtain some relief from case overload. These formal pretrial programs, it was noted, were based on the prosecutor's discretion in the decision to prosecute. It remains to be seen what effect this formality will have on the structuring of discretion regarding the disposition of the defendant.

Table 1 notes the significant events in the development of pretrial intervention. Chapter II will discuss the legal framework and issues surrounding prosecutor and his discretion. Chapter III will examine the programs, roles and structures within which discretionary administrative decisions occur. Chapter IV will consider some significant issues relevant to the administration of pretrial intervention programs, and Chapter V will conclude by placing the pretrial intervention concept and practice against the backdrop of the criminal justice system.

TABLE 1

Significant Events in the Development of Pretrial Intervention Programs

Year	Event
1962	Manpower Development and Training Act passed: Demonstration research projects initiated which treat the criminal offender as a manpower source.
1963	Department of Labor sponsors Restoration of Youth Through Training Program for jailed youth in New York City.
1964	Department of Labor funds the Draper Project in Elmore, Alabama, and Project MORE in Lorton, Virginia.
1965	Prosecutor Robert F. Leonard of Genesee County, Michigan, introduces the first formal deferred prosecution program for adults.
1967	The President's Commission on Law Enforcement and the Administration of Justice stresses the need for formal diversion for people with special needs and problems.
1967	Department of Labor funds two experimental court-based pretrial intervention programs, the Manhattan Court Employment Project in New York City and Project Crossroads in Washington, D.C.
1971	Department of Labor sponsors replication pretrial intervention projects in nine additional communities.
1971	Numerous metropolitan areas structure pretrial intervention programs with allocations from Justice Department Crime Control funds.
1972	American Correctional Association recommends expanded use of diversionary programs.
1973	National Advisory Commission on Criminal Justice Standards and Goals recommends cooperative formal diversive programs within each local jurisdiction.
1973	National Pretrial Intervention Service Center established by the American Bar Association.
1974	Federal legislation proposed to create a federal diversion program.
	Rovner-Pieczenik Report published assessing technical adequacy and effectiveness of fifteen urban pretrial intervention programs.

LEGAL FRAMEWORK FOR DISCRETION

In order to understand the particular form that pretrial intervention programs have assumed in current practice, it is necessary to examine the background factors responsible for their development. This chapter will examine the evolution of the prosecutor's office in America, its operational characteristics, and the legal basis of authority for prosecutorial discretion and the role it plays in the pretrial intervention concept.

The Public Prosecutor: Origin and Development

Early English common law did not contain a body of organized legal procedure, and trial either by battle or ordeal was a recognized method of determining innocence or guilt (Train, 1939). This custom of individual redress, based on the assumption that an accused person was guilty, continued until the thirteenth century when public inquiries as a guilt-finding device replaced private war. This inquiry was conducted by local people who acted as witnesses to facts within their knowledge concerning the incident.

The function of these witnessing bodies, however, changed and they became judges of the alleged criminal activity, a development necessitating someone to collect and present evidence. Since the law failed to designate a public official for this task of investigating complaints and conducting prosecutions, the injured person was usually required to set the law in motion himself (Howard, 1931). This resulted in a partial reversion to privately instituted vengence, and allowed the rich to dominate the market of available fighters. This connection between private vengeance and private prosecution influenced English legal procedure for centuries, leading as a counterbalance, to the establishment of the Division of Public Prosecutions in 1879.

In 1555, preliminary examinations were legally established which expanded the law-enforcing power of the local magistrate. Many of the magistrates were corrupt, however, and an accused person suffered the abuses of an inquisitorial procedure which found its way into English courts (Moley, 1930). The system of prosecution lacked uniformity within the country, and the custom of a particular jurisdiction prevailed in the disposition of criminal justice. Under these circumstances, many offenses went unprosecuted because of the time, trouble, expense and corruption involved in the initiation of criminal proceedings. Of those cases coming to court, many were ill-prepared because of the complainant's inability to employ a skilled solicitor (Howard, 1931).

Development of the Public Prosecutor in America

In colonial America the respective legislatures and general assemblies constituted the sole courts of law. Each colony established an office similar to that of the attorney general in England, yet its development in America reflected an effort to correct the abuses of England's system of private prosecution. The first public prosecutors in America appeared in Connecticut in 1704 as assistants to that colony's attorney general. Other colonies followed, and by 1800 the public prosecutor had become firmly established as part of the American legal fabric (James, 1921).

There were distinct reasons for the unchallenged growth of the public prosecutor in America. In addition to the desire to avoid the introduction of private prosecution in this country, colonists considered British criminal justice too brutal and lacking in concern for individual rights. There was a desire to place the functions of a prosecutor on an impartial official who would assure entire jurisdictional populations the services of that office. This was also intended to correct the abuses of the English system whereby the magistrate combined in one office the duties of police and prosecutor in addition to his judicial functions (Moley, 1930). The American public prosecutor sought to preclude the experience of distant and unresponsive officials of the crown enacting legislation while remaining ignorant and unfamiliar with local traditions (**Standards: Prosecution**, p. 52). A further influence in the development of the prosecutor's office in America was the diverse nature of the immigrant population. Each group of settlers brought a wide variety of interests, motives and backgrounds, a phenomenon which was reflected in the differential growth and independence of legal systems and varying development of the law (Flaherty, 1969). With the adoption of the Constitution came safeguards concerning burden of proof, protection against self-incrimination and presumption of innocence. By the end of the eighteenth century, American jurisprudence had extracted most of the principles of Anglo-Saxon law, rejected the inquisitorial procedures of the European judicial systems, and instituted the office of public prosecutor (Howard, 1931).

The Public Prosecutor's Growth of Power

The Judiciary Act of 1789 established the Office of Attorney General (National Association of Attorneys General, 1971). The duties of the office, however, were purposely vague and limited in order to prevent it from becoming a center of federal power. The office-holder's mandate to "Prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" left real power in the hands of the assistant attorneys general who performed their duties at the local level. The law facilitated the earlier colonial system of local county attorneys and reduced the control of the attorney general over local matters (Huston, 1967). This control was virtually eliminated as state constitutions authorized local election of county attorneys (Moley, 1929).

The prosecutor's power is derived from the constitution or statutes of his state (Baker and De Long, 1934). He is a public officer and as such is required to act primarily in the behalf of the public he serves. His main function is to prosecute violations of the criminal law in order to see that "justice is done," a phrase recurring frequently in state constitutions. He has been compared to a "public trustee" and the state laws concerning his functions reflect this attitude.

State statutes sometimes list in detail the extensive duties of the prosecutor, a clear indication that criminal prosecution rests entirely in his hands. More significant, however, is the fact that statutes usually include general statements which extend broad powers to the prosecutor beyond the restrictions of particular functions. These generalities indicate legislative intent to confer upon the prosecutor all powers necessary in the detection, apprehension, arrest and conviction of offenders within his jurisdiction. In return for these powers, the prosecutor is expected to be impartial and responsive to the interests of public justice.

State legislative bodies have endeavored to protect the administration of justice from influences of partiality or meddling. Prosecutors have been purposely granted wide powers of discretion to prevent this occurrence and maintain a balance between effective prosecution and community interests. This allowance accounts for the prosecutor's discretion in deciding which "public wrongs" are of concern to the people of his county and subsequently which cases to prosecute. With the duty to gather information implied, the prosecutor's mandate from the legislature places him in a position to command cooperation from all law enforcement authorities within his county.

Extent of the Prosecutor's Discretion

Pound has described discretion as the "authority to act in certain situations in accordance with an official's own considered judgment and conscience" (Pound, 1960, p. 925), and with "all reasonable and lawful diligence" (Donnelly, 1974, p. 557). While nineteenth century American jurisprudence placed limits on judicial discretion as, perhaps, a response to a traditional fear of centralization, prosecutorial discretion grew unchecked. Much of this growth was a reaction to the careless manner in which police initiated cases, causing the prosecutor to sift out cases, a process which countered the tendency to "arrest first and find a case" practiced by local officials. Coupled with the general executive requirement to enforce the law in the community, the momentum for the evolution of present day prosecutorial discretion was established.

In most states, the prosecutor handles both civil and criminal matters, and possesses discretionary power in the decision on whether to prosecute, the selection of the charge and the recommendation to the court for dismissal of the action (Williams, 1966). The confidential nature of his decisions lessens the visibility with which others may view his actions; it is estimated that 50 to 80 percent of all felony cases initiated by the police are terminated at the prosecutor's office (McIntyre and Lippmann, p. 1155).

The professional environment within which the prosecutor operates is the result of dynamic forces unique to America's development. Close parallels can be drawn between the evolution of the prosecutor's role and the locally individualized development of American political processes (**Standards: Prosecution**, 1971). The unpatterned growth of communities, lack of long-term urban planning and local political influences have precluded any well-defined prosecutorial role in dealing with deviant behavior. Since no firm criteria exist for rendering decisions in particular cases, they lack uniformity. This capacity of the prosecutor to make initial decisions without reference to specific injuctions is a major factor in the allocation of justice (Blumberg, 1967).

The ABA **Standards: Prosecution** notes that since the prosecutor is both 'an administrator of justice and advocate, he must exercise sound discretion in the performance of his functions" (**Standards: Prosecution**, p. 25). Yet beyond this statement of intent, federal and state statutes are silent on the extent of prosecutorial discretion and its practice. In fact, the prosecutor has final authority for the initiation of criminal proceedings virtually without check (Kaplan, 1973). This also includes the decision not to prosecute, which occurs for several local reasons. The courts have held that the prosecutor's discretion is not subject to judicial review except for flagrant abuse, although his actions are subject to removal upon action of the state legislature in most states.[7] Also, lower courts can dismiss a charge at the preliminary hearing if there is no probable cause (McIntyre and Lippmann, 1970). There exists, however, no effective procedure for reviewing his decision not to prosecute (Miller and Remington, 1962). Jackson sees this selectivity as the "most dangerous power of the prosecutor," commenting that "...he will pick people he thinks he should get, rather than picking cases that need to be prosecuted" (Jackson, 1940).

While the discretion of the prosecutor is checked to some degree by the courts, the pressures of public opinion and local considerations primarily guide his actions in the exercise of this power. The character of the charge may restrict the prosecutor's discretion (Skolnick, 1966),

for none of his decisions occur within a political vacuum.

Several scholars see the unstructured nature of prosecutor's discretion as a serious flaw in the criminal justice system. In 1931, the Wickersham Committee commented that

> We have been jealous of the power of trial judges, but careless of continual growth of power in the prosecuting attorney. His office is the pivot on which the administration of criminal justice in the State turns. It is important...to perceive the bad features which have resulted from persistence of the system of decentralized local public prosecution, adapted to the pioneer rural society of last century... (Wickersham, 1931, p. 11).

Herbert Packer notes that the basic trouble with discretion is its lawlessness and use as a "substitute for more tightly drafted laws" (Packer, 1968, p. 290). This attitude sees laws as an attempt to structure and thereby lessen the extent of discretion.

Skolnick remarks that the primary concern of the prosecutor is not primarily to expand his authority but to maintain it and avoid any action which might place limits on it. To accomplish this, the prosecutor strikes a balance "between those cases he can't deal out and those which he needs to settle before trial" (Skolnick, p. 92).

The secrecy and virtual immunity of the prosecutor in his discretionary decision-making has drawn special attention for its potential for abuse. Davis suggests that prosecutors' decisions be protected from ulterior influences in the same manner we endeavor to protect judges' decisions. He recommends that prosecutors

> Make and announce rules that will guide their choices, stating as far as practicable what will and will not be prosecuted, and they should be required otherwise to structure their discretion (Davis, 1969, p. 190).

Despite the harsh and sometimes unbending criticism of prosecutorial discretion, practical reality demands that some discretion be employed in the present system. Every substantive law contains some measure of ambiguity and any one case offers an infinite variety of circumstances upon which individual judgments should be made (LaFave, 1965).

Individualized justice calls for some measure of discretion in the decision to prosecute. Commenting on the nature of discretion, Judge Brietel has stated that

> If every policeman, every prosecutor, every court...performed his...responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing taboos... (Brietel, 1960).

This statement shows a consistency with earlier opinions which highlight the sensitive nature of the prosecutor's role. In 1932, Arnold wrote that

> The idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce appears to the ordinary citizen to border on anarchy. The fact that prosecuting attorneys are compelled to do this very thing is generally ignored....

yet he adds,

> It is the duty of the prosecuting attorney to solve the problem of public order and safety using the criminal code as an instrument rather than as a set of commands. This makes proper and necessary that some laws should be enforced, others ignored... (Arnold, 1932).

The following year, Newman Baker framed well the problems a prosecutor faces daily in his decision on whether or not to prosecute. He says that the average prosecutor must steer a middle course, "trying to serve and protect his community as best he can, but aware of the ultimate futility of combating public opinion" (Baker, 1933, pp. 770-771).

This selectivity has been endorsed by the U.S. Supreme Court in **Oyler v. Boles** (1962). The decision stated in part that:

> ...conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Unjustifiable standards for selectivity include race, religion, or other arbitrary classification (at 456).

Much of the criticism of prosecutorial discretion arises essentially from its potential for abuse than any other person. Like the growth of custom, prosecutor's, discretion experienced an "unplanned evolution" (Davis, 1969, p. 188) whose exact parameters defy measurement and subsequent visible control. Most prosecutors mention two factors which influence their discretion: "the characteristics of the defendant and the circumstances of the event" (Neubauer, 1974, p. 504). Yet the prosecutor is not completely independent and autonomous. Jacoby noted that he operates within "an environment of constraints and controls" (Jacoby, p. 1). These factors include the jurisdiction's demographic makeup, the type and amount of cases, monetary and personnel resources, and the court system within which the prosecutor must work (Jacoby, 1975).

Sustaining Sources of the Prosecutor's Discretion[8]

Discussion to this point has indicated that the prosecutor possesses virtually unlimited discretion in his decision to either abstain from prosecution or to selectively prosecute. There are several influences peculiar to American criminal justice which foster and encourage the continued practice of this type of discretion. One of the most significant influences, as noted, involves the ambiguities which exist in the substantive criminal law. Failure to update penal statutes requires the prosecutor to decide which laws will be enforced and the extent of their enforcement.

Discretion is also required in the interpretation of laws which are morally unrealistic. These laws, enacted to provide a standard for community decency, require particularly sensitive judgment in consideration of local attitudes. Another source of discretion arises for the prosecutor's necessity to interpret broad legal principles to suit specific circumstances. These sources, added to intentional legislative overgeneralization treated earlier, point out the several areas in which selective judgment of the prosecutor is essential to the performance of his duties.

The Prosecutor's Office: Operational Characteristics

There are several considerations within the current operation of the prosecutor's office which affect the nature of its activities and its relationship with other agencies. Since it operates in the absence of centralized control, it lacks structural elements which tie decision-making power to those of other officials within the judicial process. There is the possibility of potential abuse of power through the connection of criminal justice and local politics through the prosecutor's office. There also exists the absence of sound office management and want of continuity and administration within the prosecutor's office. Since the turn of the century there has been a head for office organization, permanent staff and defined responsibilities, all of which provide for a measure of continuity which holds the key to control. Within this environment, several influences determine the scope and direction of prosecutorial activity.

Turnover. The openness of the prosecutor's office is affected by the attitudes of deputy prosecutors, usually young lawyers directly out of law school. The work is considered excellent courtroom training, yet is considered professionally dangerous to stay too long. The turnover rate for deputy prosecutors is the highest of any criminal justice agency and the average retention rate is only two years (McIntyre and Lippmann, 1970). Contributing factors to this situation include low pay and a lack of professional security. The pay is seen as being inadequate in consideration of the time and effort spent in preparation, and job security often depends on the willingness of assistant prosecutors to politically support the chief prosecutor. Perhaps an indicator of the lack of management consciousness, very few states provide any incentive for a lawyer to become a career prosecutor, yet, the office presents a desirable "stepping stone" for the young lawyer (Nedrud, 1960). The result is a loss of good men and women, professional expertise and continuity in the flow of office operations. There exists a relationship between the problems of organization and those of recruitment which affects the overall operation of the prosecutor's office (Simon, 1957).

Case Handling. By properly exercising his role, the prosecutor can control random access to limited court resources and thereby preserve them for matters to which the public attaches priority. Often, however, he is understaffed and lacks sound office management so he sometimes slips into a passive role, treating all cases with equal emphasis. Even if he so desires, he often lacks the administrative means to differentiate among cases on the basis of public priorities.

The need for priorities is paramount especially in large cities that handle thousands of cases. There is little time to prepare cases and they cannot be assigned individually because of limited staff. In this way, the habitual offender can exploit the system and make its weaknesses work for him. Gaining the services of a heavily committed defense counsel increases the chances of continuances or postponements (Miller, 1969).

Courts. Hamilton has commented that the criminal court system is "overloaded...operating fitfully, straining to accommodate an overload of contestion, delay, and overcrowded calendars" (Hamilton, 1972).

Court delay has been blamed upon inefficient time utilization, poor organization, and questionable procedural delay. If the court requires mass production techniques, the prosecutor tries to bring to court only those cases he thinks will result in conviction. The rest are disposed of through reduced charges, plea bargaining and **nolle prosequi** (Winters, 1971).

Another contributor to court delay is the attorney-prosecutor conferences which cause both sides to delay until time is exhausted (Katz, 1969). Meanwhile the case is entered on the docket even though it will never reach the trial stage, clogging the court and preventing priority cases to go before the judge. This exhausts witnesses and blurs their memory so their testimony lacks credibility (Hamilton and Work, 1973).

Case flow from the prosecutors' office depends on the predictability of the judges, and each prosecutor is influenced by the sentencing history of respective judges. Thus, attitudes of the court affect the decision to prosecute, and the prosecutor's decision often conforms to court predispositions.

Community. The press, civic organizations, individuals and political groups influence the policies of the prosecutor. The input he receives from the community is a vital determinant in his decision-making. His changing policies will reflect the public's attitude toward various legislation and will provide guidelines for intelligent use of his discretion. Within the criminal justice system, the prosecutor has more control over an individual's future

than any person (Knudten, 1970). He is under steady public pressure to produce results, and his activities occur within a context of inconsistent role definitions. The prosecutor's role is unique, for he is concerned with every aspect of the criminal justice system. He performs tasks concurrently with the police and the courts and through his discretionary power he decides which cases will be prosecuted, modified, reduced or dropped (Cole, 1973). Upon successfully completing a case, the prosecutor influences through his recommendation, the sentence handed down by the judge. So the prosecutor does indeed play many roles, for he is involved in law enforcement administration and adjudication; the tie that binds the system. His capacity to make vital decisions without reference to specific injunction is a major factor in the allocation of justice.

The National Center for Prosecution Management places the prosecutor as the fulcrum of the criminal justice system as

> ...the only person...who knows why police arrests were reduced from a felony to a misdemeanor; why additional charges were added; why a case was disposed of prior to a court appearance.... His main value lies in the fact that he is the sole source of knowledge about the processing and handling of all cases in the criminal justice system from the time of arrest through case disposition (Snapshot, 1972).

Legal Framework for Pretrial Intervention

The Constitution does not discuss at length concerning criminal prosecutions, for it was believed by the leaders of that day that most criminal cases would be handled by the state courts (Harding, 1959). With few exceptions, criminal prosecutions and related matters fall under the purview of the Bill of Rights and the Fourteenth Amendment. Since pretrial intervention is a recent phenomenon and many of its operations have not yet been contested in court,[9] its primary justification derives from the authority and the discretion of the prosecutor. It was noted that the power of the prosecutor grew both as a response to local demands and as a counter balance to inefficient case investigation and initiation.

The evolution of the prosecutor's office has been essentially a reactive and regional phenomenon, and the case law that exists is consistent in recognizing his control over the initiation of criminal proceedings. The past few years have seen the courts decide in favor of the prosecutors in cases where his power required definition.

In **Pagach v. Klein** (1961), the court stated that Federal courts may not compel an attorney to prosecute regardless of his reasons for not acting: "It by no means follows...that the duty to prosecute follows automatically from the presentation of a complaint" (at 634).

The discretionary power of the prosecutor was again upheld in **United States v. Cox** (1965). In reaffirming this power the court noted that the prosecutor's decision on whether to prosecute may be determined by considerations of policy "wholly apart from any question of probable cause." The court further noted that

> It follows, as incident of the Constitutional separation of power, that courts are not to interfere with the exercise of discretionary powers of Attorneys of United States and their control over criminal prosecutions (at 171).

As the courts consistently defend the powers of the prosecutor, there is also included the overtones of clarifying his roles with regard to his discretion. In **Newman v. United States** (1967), the opinion was handed down that

> Few subjects are less adapted to judicial review than the exercise of the Executive of his discretion in deciding when and whether to institute criminal proceedings or what precise charge shall be made, or whether to dismiss a proceeding once brought (at 480).

Later the opinion reads concerning the prosecutor, that "it is as officer of executive department that he exercises discretion as to whether or not there shall be prosecution in particular case" (at 481).

The pervasive scope of the prosecutor's power was noted in **United States v. Gainey** (1971) in which the Supreme Court ruled that a judge who dismissed criminal charges on the grounds of large backlog and did so without the concurrence of the prosecutor abused his discretion. The prosecutor's decision regarding the disposition of charges have significant legal precedent, for the courts have consistently refused to interfere in this area of prosecutorial activity.

While this basic **raison d'etre** of pretrial intervention rests in prosecutorial discretion, other facets of its existence are looming on the legal horizon. There have been to date no cases filed which relate directly to the concept, yet there remain several legal issues, as yet unformulated and therefore unresolved, which will eventually have significance for future development and planning for PTI programs.

The legal justification for PTI rests on an indirect foundation, that of prosecutorial discretion. The operation and administration of the programs, however, rests on a quasi-legal groundwork, for most of them operate without legislative authorization and on a local basis stemming from interagency aspects of pretrial intervention operation on tenuous ground, and anticipates several constitutional questions centering around due process and equal protection. Some of these issues have been singled out for their potential impact on administrative relationships between the prosecutor and other actions in the operation and administration of pretrial intervention programs.

Since the pretrial intervention concept is essentially a non-criminal procedure, the rights afforded the individual, particularly in pre-arraignment programs, come into question. The question arises as to when an individual officially enters the criminal justice system. Pre-arraignment diversion considers the subject as entering the system only upon his failure to satisfy program requirements. This situation bears directly on the question of the right to a speedy trial, its waiver, and the voluntariness of the subject's decision as guaranteed under the Sixth and Fourteenth Amendments. If an individual fails to meet with program success, he is returned to the system for normal processing.

While sufficient justification for trial delay exists in the fact of program participation, it remains possible that the threat of possible subsequent prosecution constitutes a subtle form of coercion in the participant's mind.

In the matter of a right to a speedy trial, there exists some confusion as to when this right actually takes effect (**United States v. Marion**, 1971). Despite the waiver of speedy trial required by most programs where the charges are deferred, the question remains concerning the constitutionality of the delay. In **Kopler v. North Carolina** (1967), the Supreme Court required "stated justification" for an indefinite postponement of prosecution. Justice Harlan added that "You can't place a man under the cloud of unliquidated criminal charge for an indeterminate period without violating the Due Process Clause of the Fourteenth Amendment" (at 227).

The courts have found it difficult to find a time after which the right to a speedy trial has been denied. **Barker v. Wingo** (1972) noted there is no precise point in the criminal justice system beyond which this right has been denied.

The Speedy Trial Act of 1974, however, has established federal requirements which will undoubtedly be followed by jurisdictions within the near future. This Act requires trial within 100 days of arrest under penalty of dismissal of charges. Notably, this legislation's authorized periods of delay include

> ...delay during which prosecution is deferred by the attorney of the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct (Sec. 3161 (h) (2)).

It is within the content of a waiver to speedy trial that the right to counsel arises. In **Powell v. Alabama** (1932), it was decided that the right to counsel attacks "only at the time that adversarial judicial proceedings have been initiated." Pre-arraignment programs do not qualify an individual to counsel under **Powell**, but **Mempa v. Rhay** (1967) required counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected" (at 124). While the pre-indictment stage is not considered applicable under this ruling, diversion intake proceedings may be the single most important aspect of the individual's subsequent processing (NPISC: **Legal Issues**, 1974).

The Equal Protection Clause of the Fourteenth Amendment has been questioned in several cases over the last few years which may influence pretrial intervention programs. The clause requires that any distinctions in selection of participants must be relevant to the purposes intended as decided in **Salsburg v. Maryland** (1954), and must not be intentionally discriminatory or arbitrary (**Oyler v. Boles**, supra). The entire eligibility criteria and its basis for establishment may be subject to increasing constitutional interpretation, for program selection attaches to considerations of the separation of powers doctrine.

Although the prosecutor can make the decision on whether or not to prosecute, the effect of this practice results in defining classes of offenders and prescribing treatment, rightfully a function of the legislature. Legislatures, however important their role in PTI, have been slow to enact laws which would legitimize the classification of offenders and concurrently provide legal justification of PTI programs.

In this regard, Rovner-Pieczenik found that this reluctance is influenced by local policy makers who suspect that legislation in the operation of PTI programs might inhibit their operation (Rovner-Pieczenik, 1974).

Within these considerations emerge several administrative concerns for pretrial intervention program operation. Like the development of the prosecutor's discretion the evolution of PTI is occurring on a local basis, extensive in its assumptions yet resting on indirect questionable legal justification. Procedures developing on an essentially **ad hoc**, reactive basis with virtually no boundaries to define limits of participant selection, delegation of prosecutorial decision-making and consistent evaluation techniques. The vagueries of the legal issues involved blend into one another and fall under the penumbric nature of the Constitution until direct challenge clarifies the scope of the issue.

Summary

This chapter has traced the development of the public prosecutor in America from its English origin to the present time. The unique quality of this development was the manner in which the office was intended to offset the abuses of the English system of private prosecution.

There followed a discussion of the public prosecutor's source of power, its growth and the extent of prosecutorial discretion. It was noted that the low visibility and unrestrained nature of his discretion has drawn criticism from scholars who visualize dangers in the concept of autonomous, decentralized public prosecution. Several sustaining sources of prosecutorial discretion were noted which provide impetus for the continuation of the practice. Some of the operational characteristics of the prosecutor's office were considered, noting several aspects of prosecutorial discretion as it applies to pretrial intervention. The chapter closed with some concern for the administrative legality of pretrial programs as manifestation of the prosecutor's discretion.

PRETRIAL INTERVENTION PROGRAMS AND FUNCTIONS

Chapters I and II provided a basic background for the development of the prosecutor's office in America together with the legal framework and issues which define the scope of his activities and the nature of his discretion. Regardless of the particular type of pretrial intervention program under discussion, this discretion of the prosecutor lies as the fulcrum upon which rests the success or failure of any pre-arraignment diversion program.

Chapter III will examine various programs to see how their functions facilitate discretionary decision-making. This will be accomplished by applying a breakout of three topics, each intended to provide an analytical baseline from which pretrial programs may be compared. Section I will present three administrative program models showing the extent of defendant involvement and the roles of its personnel. Section II will consider the processes of defendant selection, service delivery and disposition with an efficiency comparison. Section III will examine the models considering the constraints of money, manpower and accountability. Included will be a brief introduction to organization decision-making and discussion of factors, goals and assumptions shared by the several programs.

This approach requires some consideration of the pressures acting on decision-makers, as well as the source of knowledge forming the decision base and the extent to which facts bearing on a decision are shared within the decision-maker's organization.

Decision-making comprises an integral function within any administrative structure, and subsequent implementation is intended to meet organizational goals (Etzioni, 1961). In an attempt to determine the location and extent of decision-making in pretrial programs, a procedure was adapted which would identify basic administrative program models and processes and provide a consistent factor for comparison purposes. In light of the wide variety in programs, the criterion selected was the penetration of the individual offender into the criminal justice system. Although several programs stand firm on the claim that their particular innovations preclude entry into the formalized system of police, prosecutor and courts, each has some point at which an offender makes formal contact with an official who will make a decision affecting the life of the offender.

Section I
Administrative Program Models

Penetration into the system served as the basis for the determination of three administrative models of pretrial programs:

1. Prosector model;
2. Prosecutor/Probation model;
3. Court model.

These models are useful for the determination of administrative decision-making and the application of discretion. They further facilitate the identification of the various levels of authority between the offender and the decision-maker, and the understandings between and among responsible officials which enable the functioning of pretrial programs.

Another basis for decision-making analysis is within the functional aspect of the particular program operation. Regardless of its degree of formality or extent of services, each program contains three basic processes:

1. Screening and selection;
2. Disposition of the offender through some form of probation or service;
3. Success/failure criterion.

Identification of three basic models and three functional processes common to each provides a structural base from which consistent analysis may proceed regarding loci of authority, areas of administrative interaction and sources of real or potential conflict among agencies.

Common Factors in Pretrial Programs

Limited formal guidelines exist regarding the implementation of diversion projects. Those states which have enabling legislation authorizing pretrial intervention programs have tended to develop them in direct response to particular community needs. In all cases, however, the prosecutor, usually in cooperation with the pretrial program and the court, can determine what offenses and offenders will be diverted, the length of the diversion and the services available.

The projects currently in operation and reviewed in this study have policies and procedures which differ greatly both in their operational practices and their concern for the rights of the individual offenders. They all base their activity, however, in the hypothesis that there is a close and possibly causative correlation between criminal activity and a lack of economic and social stability. This is usually characterized by unemployment and a lack of educational and vocational training. Further, most projects become an adjunct to existing criminal justice agencies and have made a realistic appraisal of the treatment resources available within their respective communities.

Regardless of the characteristics and variety present in operating programs, all pretrial intervention efforts require basic support from two sources: the prosecutor and the local community. The prosecutor, as discussed, is the sole authority in the charging decision. Within the community, the active concern and cooperation of law enforcement, the courts, defense attorneys, social services, businessmen, and the local citizenry is vital for program implementation and support.

The areas of assumptions and goals of pretrial programs are similar, yet their particular operating characteristics are quite different. It is significant to briefly examine assumptions and goals at this point in order to further show that pretrial intervention is a scattered response to an essentially homogeneous situation.

Most programs assume that an individual-centered concept can successfully divert a person from future crime, and that the threat of pending prosecution can serve as a deterrent to criminal involvement and an incentive to constructive activity. Also, programs operate on the assumption that treatment is most effective when it occurs close in time to the offense and arrest. There is another assumption which reflects a current trend in correctional thinking, that most first offenders are best served by a return to the community. This leads to the final assumption that the criminal justice system can be effectively used as a rehabilitative tool (Rogers, 1973). It is important to note that the success of the program is dependent upon the validity of the assumptions it incorporates.

The goals of the various programs are framed within the realities of the current judicial situation. Although goal statements consist of varying degrees of clarity and measurability, they reflect the essential utility of diversion programs as a means to reduce prosecutorial case load and subsequent court congestion. There is the realization that time, expenses and manpower consumed in official processing can be significantly reduced by limiting the penetration of minor offenders into the criminal justice system.

Stated goals pertaining to pretrial programs usually include references to the personal fulfillment accruing to the offender by his participation in a diversionary program. These include his avoiding the perils of a criminal record and the "sigma" therein incurred, the potential for a productive role and the realization of personal reward by avoiding the processes involved in traditional court procedure.

The circumstances of the situation within prosecutors' offices and local courts indicate, however, that benefits for the offender may be secondary considerations: they state the desired result of an efficient diversionary program. The measurable benefits are realized by the judicial system whose continuing operation depends on reducing the costs of crime associated with due process.

Models of Pretrial Intervention Programs

In the discussion of model construction which follows, the criterion of penetration into the criminal justice system may be dipicted as indicated in Figure 2.

	Program Model		
	Prosecutor	Prosecutor/Probation	Court
Activity	Pre-file	Voluntary Probation	Arraignment (deferred plea)
Defendant contact	Police Prosecutor	Police Prosecutor Probation Agency/ Program	Police Prosecutor Defense Court Program
	Charge not filed		Charge filed

Figure 2. Defendant contact with the criminal justice system by program model.

Prosecutor model. In this model, selected individuals are diverted directly to the prosecutor or his assistant upon arrest before their case comes in contact with the court processes.[10] The prosecutor defers filing of the case based on a contractual agreement between himself and the offender. The defendant agrees to comply with terms and provisions laid down by the prosecutor for a specific length of time. This is usually informal probation, a stipulation to live within a certain mode of conduct, for a period ranging from three months to a year. This agreement can involve offender referral to community resources by the prosecutor which will assist the offender in meeting his particular needs.

This model is the least structured, most highly centralized and informally operated of all the programs reviewed. The prosecutor is the sole decision-maker in the selection, screening, and disposition of cases as well as the only determiner of offender success or failure. Emphasis in the Prosecutor model is placed on the prosecutor's evaluation of the defendant rather than the offense. There is no formalized selection or offense criterion and compliance with the contractual agreements is essentially unsupervised and dependent upon the motivation of the offender. The Prosecutor model has no formal program whose target group is the deferred offender, and those selected for participation by the prosecutor are those who exhibit a considerable degree of personal stability and do not require either extensive supervision or services. Funding for this model usually comes from existing budgetary allocation. Figure 3 depicts the activity flow for this model.

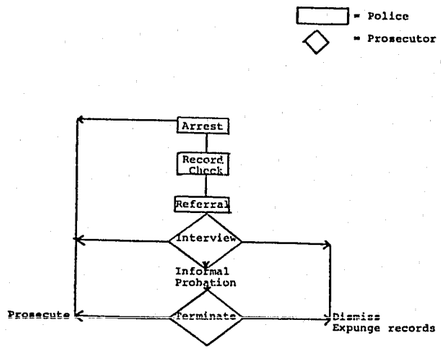


Figure 3. Prosecutor model activity flow.

Prosecutor/Probation model. The second model involves the defendant with further penetration into the criminal justice system. Although similar to the Prosecutor model, the Prosecutor/Probation model involves more agencies and programs with regard to the offender, and more decision points affecting his disposition.[11]

This deferred Prosecution model is structured after the Genesee County, Michigan program, and realizes the advantages for both the system and the offender in providing a reasonable alternative to prosecution and adjudicative processing. The criteria for diversion are standardized into an automatic screening and referral for certain classes or types of offenses in an attempt to provide equal justice for the same crime. The screening is a critical point in this model, for it requires close coordination and cooperation with the police. Once the police arrest an individual, approval of the prosecutor is required for the continued detention of that individual. The prosecutor, or his project representative, discusses the case with the arresting officer, and based on the results of this discussion the prosecutor either rejects the request for a warrant or issues a request to the judge who then issues a warrant. As in the previous model, applications for the filing of complaints are directed from the particular law enforcement agency to the office of the prosecuting attorney.

Utilization of this model provides a voluntary formal probation-type treatment for selected offenders without requiring their further penetration into the judicial system. This program draws a distinction between "lawbreakers" and "criminals," gearing its services toward the former. A "law breaker" is one who has been arrested for a non-violent felony, does not display a pattern of antisocial behavior, and is unlikely to get into trouble again.[12]

The program often operates under the title of "probation authority," the director of which is appointed by the prosecutor and provides expertise to the prosecutor in the decision to divert. The program is usually separate from, though accountable to the prosecutor, for its representatives are responsible for conducting screening, interviewing and background investigations on voluntary participants. After determining particular offender needs, the program recommends an individualized treatment plan to the prosecutor who, upon granting approval, extends the treatment option to the participant for acceptance. Having received the offender's agreement to the treatment plan, the prosecutor defers filing of the charge for a period up to one year, pending successful completion of the terms of probation. The case is dismissed then by the prosecutor and the police records of this arrest and processing are expunged. Failure on the part of the offender results in the return of the case of normal judicial processing.

The program itself, while providing counseling, does not provide services but acts as a hub which coordinates offender needs with available community resources. Much of this information comes from cooperation received from probation authority's advisory council, a rotating membership group of citizens concerned with the program, reflect community attitudes and assist the prosecutor in determining policy. They also work with offenders in securing job placement and other community services.

The Prosecutor/Probation model capitalizes on the contact and counseling of an offender usually within twenty-four hours after his arrest. By selecting only those offenders who have a high probability of success, the program diverts individuals who are most likely to be

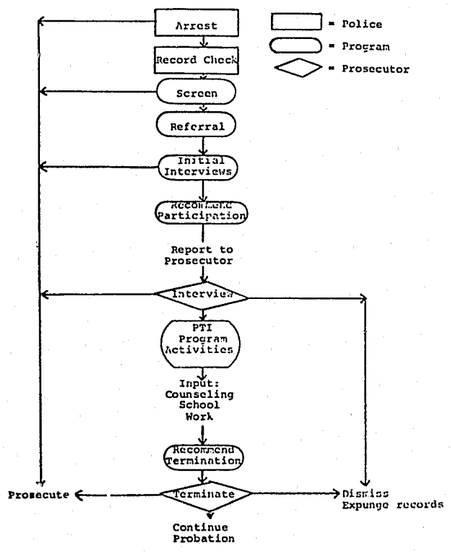


Figure 4. Prosecutor/Probation model activity flow.

placed on probation by the court. The pivot of this model, as in the previous discussion, is the prosecutor, for his discretion determines client direction. Programs are usually initially financed through federal funds with local budget assuming major costs within a three to five year period. Figure 4 shows the activity flow for the Prosecutor/Probation model.

Court model. The Court model operates on the basic design of the Manhattan Court Employment Project and Project Crossroads, the first two Department of Labor-sponsored demonstration projects, and emphasizes the job-oriented programs.[13] The Court model is judicially controlled and, unlike the previous models, allows penetration of the client into the criminal court system. In this post-charge model, project workers in criminal court screen each defendant's record one day prior to his appearance before the judge for setting of bail and assignment of counsel.[14] Recommended defendants are then interviewed, and their records are submitted to the prosecutor. Upon approval, the prosecutor submits to the presiding judge a request for a continuance of the case for a specified period of time. The defendant is then formally admitted into the project.

At the end of the stated treatment period, the defendant returns to court and, based on the project's recommendation and the prosecutor's concurrence and recommendation to the judge, receives dismissal of charges, a further continuance, or the resumption of prosecution. All requests for defendant participation are contingent on terms agreed upon by the prosecutor, the court, and project personnel.

These programs avoid identification with either the prosecutor or defense, and make themselves available as an alternative disposition for use by the prosecutor, the defender and the court.[15] Court programs are introduced into the administration of existing criminal justice agencies and operate from a highly structured organizational base. Although the Court model originates from a different point in the criminal justice process, it endeavors to provide supportive services, and economic and social stability similar to the other models.

Consistent with the "manpower" concept of diversionary programs, the Court model extends its rehabilitative effort with strong emphasis in vocational training, educational counseling and assistance, and job placement.[16] Programs utilize to the fullest existing community resources and require a high level of cooperation between agencies, services, and defendant in order to deliver rehabilitative services.

Selection criteria for the Court model is high, and usually restricted to certain classes of misdemeanors and non-violent felonies. The defendant usually must have no more than one previous conviction of a specific type, and input into the program is regulated by monthly intake quotas to retain optimum offender/counselor ratio.[17] Figure 5 depicts the Court model's activity flow. The prog-

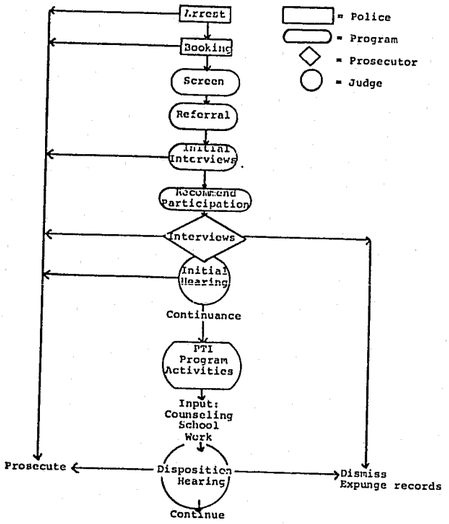


Figure 5. Court model activity flow.

ram is operated by a director, usually appointed by the major, and/or a coordinator for public services who must coordinate policy and procedure between prosecutor, presiding judge and project staff.

Programs following the Court model were totally funded in their experimental stage by DOL and LEAA. When federal funding was lifted, program costs have been assumed by local budgets and services contracted to the city.

Variations

The models herein presented are structured approximations of real situations intended to use penetration of the offender into the criminal justice system as a base line from which to determine discretionary decision points. As is the situation in reality, no model adequately represents the variations which exist beyond the model's fundamental features. There are significant variations within the basic program models which show both the extent of their activity and the features different models have in common. These deserve brief mention.

The Wichita Falls, Texas, County Probation Department supervises the "Extra-Judicial Probation Project" and, despite its elusive title, is an example of the Prosecutor model. While accepting referrals from the grand jury and local district and county judges, the program endeavors to formulate some type of informal probation prior to the prosecutor's filing of a complaint or formal petition. The prosecutor retains control, and in cooperation with the court, secures case dismissal upon the

defendant's successful completion of the contractual terms. The program unites the services of the court, a supervising probation officer and the prosecutor while retaining the essential pre-file, unstructured informality of the Prosecutor model.

In Denver, Colorado, on the other hand, the District Attorney Diversion Effort (D.A.D.E.), a Prosecutor model, serves a much larger population with less involvement of non-prosecutorial personnel. The defendant agrees to comply with specific terms laid down by the prosecutor in exchange for deferred filing of the case. There is no involvement of the court or probation services, although the defendant may be assigned an "Advisor" who will provide supervision and support during the contractual period.

The Prosecutor/Probation model is signified by an agency which serves a counseling and coordinating function. The Tampa, Florida, Pre-Trial Intervention project combines aspects of all three models by first initiating a document of deferred prosecution between the prosecutor and the defendant providing formalized counseling services, and as in the Court model, requires the defendant to either work or attend school. Further, the defendant is closely supervised, indicative of Prosecutor/Probation and Court models.

The Court model represents the widest operational diversity among the three designated typologies. The Escambia County, Florida, Public Defender, Bail, Pre-Trial, Diversion, and Intervention Program limits its clients to indigents assigned Public Defender services by the court. The Public Defender in this program has the ultimate authority for project direction, accountability and financial reporting.

The Anoka County Minnesota, Court Services Diversion Program more closely resembles the Prosecutor/Probation model since the program is prosecutor-initiated and probation personnel conduct initial interviews and background investigations. Detailed social histories, however, are conducted by court services personnel. Unlike other programs reviewed, contact with the offender, once in the program, or his lawyer are referred through court services.

While not exhaustive, these examples serve to point out the flexibility and diversity these programs represent in their effort to suit defendant needs within a framework of local resources.

Section II
Processes of Defendant Selection

Preventive intervention programs, established as an alternative to prosecution, contain the implication that they are capable, through the delivery of appropriate service, of changing an individual's behavior. The Fergus Falls, Minnesota program has expressed this type of diversion as an "expression of humanity" developed from within the criminal justice system. While this is not the only consideration motiviating program development, such thinking will be seen as a significant influence in the following discussion of program processes and discretionary decision points.

Type I: Prosecutor Model

The Prosecutor model is the most basic and subjective of the pre-file types. In its basic form, it contains no systematic programming of participants and relies entirely on the prosecutor for initiation, implementation, and evaluation.

Selection. The Prosecutor model selection process represents the highest degree of prosecutorial discretion and subjective evaluation of the three models. There are no screening guidelines so no particular categories of offenses are excluded. This situation results in little or no case screening, and all cases are referred directly to the prosecutor for disposition. The prosecutor will request a police record of the individual and, together with the current charge sheet, will decide whether or not to file on the individual. For those initially selected for diversion, the prosecutor arranges an interview with the defendant, advises him of his eligibility for diversion, and offers voluntary contractual compliance in lieu of prosecution. This type of selection process tries to avoid a "treatment trap" by emphasizing the offender and his needs rather than the offense.[18]

Service delivery. The Prosecutor model has no formal staff or treatment program. The main actors are the prosecutor and defendant, with informal probation- the key treatment tool. Where terms are specified, they are usually of a general nature, including such traditional restraints as avoiding persons of disreputable character and working at gainful employment, the latter usually at the initiative of the probationer. Terms may include agreement to restitution and the payment of probation fees.[19]

With the noticeable absence of investigation, case history services and counseling, the Prosecutor model in its simplest form presents at once a compromise between the prosecutor's completely ignoring an offense and his reluctance to create a criminal record for a selected defendant. It has only one decision point, the prosecutor, and while it represents the least restrictive application of discretion within any model, it also exemplifies an official acquiescence to the benefits of expediency.

Disposition. While the Prosecutor model has no consistent success/failure criteria, most have adopted some element of structure which involves more individuals than the prosecutor alone in the process of deciding on defendant disposition. The Denver project is involved in frequent direct referrals to an existing community resource with individualized standards and reporting procedures specified for particular defendants in determining success or failure. In these cases, the prosecutor relies on the recommendation of the supervisor in the termination decision. In Wichita Falls, the prosecutor diverts selected defendants to the supervision of the county probation department.

This model in its purest form places the prosecutor as the sole determinator in deciding the entry and disposition of all participants. Control over the client is loose; counseling is virtually non-existent and feedback to the prosecutor on defendant progress is unsystematic and can derive from any law enforcement or probation agency as well as the community resource to which the defendant was referred.

Type II: Prosecutor/Probation Model

This model, as stated previously, incorporates the pre-file characteristic of the delay in instituting criminal proceedings, of the Prosecutor model. Programs within this design, however, are highly structured and systematically operated.[20] They present to the client, through a formalized treatment program, a deeper penetration into the criminal justice system and more decision points at which his disposition is determined. Table 2 depicts the defendant selection process.

TABLE 2

Prosecutor/Probation Selection Flow

Work Item	Action	Person/Agency
Arrest	Detention	Law Enforcement
Booking	Criminal record review	Law Enforcement
Review charge sheets (screening)	Arrest reports	Assistant/Prosecutor/Program
Eligibility determined (initial-"paper")	Review offense record	Assistant/Prosecutor/Program
Initial interview	Decision file refer to program	Assistant Prosecutor/Program
Investigate	Social history	Program/Probation
Interview defendant	Explain program	Program/Probation
Contact counsel	Explain: Waive rights Advise to sign terms or not	Counsel
Interview defendant	Sign agreement Recommend to prosecutor	Program/Probation
Accept or deny	Review case Final decision	Prosecutor
Disposition of charge	Charge withheld Prosecution deferred	Prosecutor

Selection. This model includes stated eligibility criteria centering around prior record, age, residence and type of change.[21] Most programs, however, are moving toward a concept of crimes excluded and are establishing an offense criteria, basically a non-violent crime, coupled with a non-repeating situational offender type. Some include as an entry requirement evidence of employment need.[22]

After arrest, a project screener, sometimes an assistant prosecutor, screens cases and selects out those which appear to be eligible for the pretrial intervention program. At this point the defendant is interviewed by the screener and a tentative selection decision is made. Those cases selected are referred to an agency, either the program or the probation office, for a thorough social history. The defendant is then interviewed again, this time by program or probationary personnel, advising him of his eligibility for status as a voluntary probationer. Usually no Miranda warning is included since this would be inconsistent with confidentiality, and the defendant's statements will not be used as evidence at trial.[23] The Genesee County program requires an acceptance of "moral responsibility" for the alleged offense from the defendant at this point.[24]

If the defendant accepts the terms of probation and waives his right to a speedy trial, the prosecutor agrees to hold the charge in abeyance under the terms of probation, and upon successful completion of the program, will retire the file. The defendant's acceptance into the program is based on four considerations:

1. Approval by the prosecutor;
2. A favorable assessment of the defendant's potential for cooperation and responsibility determined by the investigating agency;
3. The approval of legal counsel, if desired;
4. Written application for deferrment by the defendant.

While the final selection process may take two weeks, the defendant is conditionally accepted into the program immediately upon initial screening.[25] The prosecutor retains control over the selection process although he usually acts in agreement with an advisory or selection committee. The investigating agency recommends to the prosecutor a treatment plan for the defendant.

This selection process incorporates the characteristics which separates this model from the others under discussion. Cases are screened out either by an assistant prosecutor, program or probation personnel before charges are filed with the prosecutor approving final selection. The decision-making becomes more complex with the inclusion of these persons. In this model the court is not involved; agreement between the judge and the prosecutor excludes the judge from active participation in the decision to divert.

The acceptance of such programs has resulted in an expansion of eligibility criteria and has been influential in establishing programs as an entity independent of the prosecutor's office. Operation De Novo in Minneapolis has adopted this concept, with the project assuming the full requirement for program administration; services and client selection. The prosecutor, however, remains the sole authority in the decision to accept or reject screener recommendations, usually through a "criminal unit" or similar department within his office.

Service delivery. Within the Prosecutor/Probation model, it is important to recall that structurally these programs have evolved as an adjunct to an existing agency

rather than as a novel imposition to the criminal justice system. As such, project service delivering functions are reflective of local needs, existing policies and available resources. Program organization, then, is centered around establishing components which will maximize the delivery of available services through sound policy management and guidelines and effective functional relationships. Most programs consist of three major elements:

1. An advisory body from the community lending legitimacy and community input to the effort;
2. A project director/administrator who implements program policies and decisions;
3. Counselors/caseworkers, usually volunteers, who work directly with clients from selection through program termination.

Counselors carry the load of the program's services, providing, in addition to traditional supervisory services, individual group counseling as well as serving as a resource for other services needed by their defendant. The Prosecutor/Probation model emphasizes the counseling role, requiring as many as twice weekly meetings with clients.[26] As such, the counselor becomes a key decision-maker in the defendant's disposition. It is the counselor who submits a case summary of the defendant to the prosecutor with a recommendation for the type of termination.

Counselors initially work out a "treatment plan" with the defendant, based on the time frame of the program. This plan can consist of meeting immediate needs, and determining long range goals which involve referral to other community resources. Treatment within this model has a conceptual framework of intensive short-term supervision and the coordinated utilization of community resources. While a plan may normally include job placement, vocational training or education, the emphasis of treatment rests in the intensity of counselor-defendant relationship and counseling activities. It is this relationship which forms the basis of the counselor's estimate of defendant future needs and serves as a basis for an assessment of his progress. In one program, Orange County, Florida, the defendant may be terminated if he leaves a job without telling or is doing poorly in school and job. By presenting intensive counseling as the primary rehabilitative vehicle, these programs often utilize volunteer students from local universities interested in assisting qualified staff counselors observe the client both in scheduled sessions and in the field.

Disposition. The determination of success, failure, request for or extension of a defendant within the Prosecutor/Probation model is, for the most part, the result of a discretionary decision made by a counselor and endorsed by the prosecutor. The heavy emphasis on defendant-counselor relationship encourages subjective evaluating to become the rule in disposition determination. While firm criteria such as re-arrest or leaving the program provide undisputed justification for program dismissal and initiation of charges, most decisions to terminate unsuccessfully are value-laden and discretionary similar to Nimmer's finding in the De Novo Project (Nimmer, 1974, p. 61).

This situation extends from the interpretive standards utilized by the screeners at the initial selection process. The interviewer, in addition to determining "paper eligibility," places emphasis on his perception of the defendant's attitude in terms of willingness to "cooperate" with program personnel, accept correction and assume responsibility.[27] This becomes a significant determinant in his recommendation to the prosecutor as well as the standard for success/failure in programs consisting only of informal probation. Few programs reviewed provided any effort to uniformly measure and assign weight to these determinants for evaluation purposes. One program, the Tampa, Florida project initiates a "report of good progress" to the prosecutor between the third and sixth month, or sixth and ninth month, depending on the type of offense. Based on these reports, an individual can be determined unsuccessful, in addition to absconding and committing a new offense, by reason of "failure to cooperate."

Type III: Court Model

The Court model is the most widely adapted of the three programs and is based on operating procedures of the two original programs, the MCEP and Project Crossroads. With regard to client penetration into the criminal justice system, this model takes him into the judicial framework. Formal charges are actually filed on the individual, and the individual makes his initial appearance before a judge or magistrate setting of pretrial release conditions. Prior to this hearing project screeners have determined eligibility of an individual. Table 3 depicts the selection for this model.

TABLE 3

Court Selection Flow[a]

Work Item	Action	Person/Agency
Arrest	Detention	Law Enforcement
Booking	Crime Record Review	Law Enforcement
Statement of Charges	Affidavit	Law Enforcement/ Assistant Prosecutor
Record Packet Compiled	Referral to court clerk	Law Enforcement
Eligibility "paper" determination	Review record Service Decision	Project Screener/ Assistant Prosecutor
Initial Interview	Explain Verify record Decision Application	Project Screener
Consult Prosecutor	Request consent decision[b]	Project Screener
Court appearance (disposition)	Request postponement	Project Screener/ Assistant Prosecutor
Disposition	Release to custody of program decision	Judge

[a] Based on MCEP model.

[b] Usually delegated to assistant prosecutors.

Selection. It is in the selection process that the Court model differs most significantly from the previous models. The structured involvement of the judicial branch creates more decision points affecting the defendant and requires some formalized cooperative procedures between judge, prosecutor and project. Not only does this model retain the prosecutorial discretionary decision on whether or not to charge, but also defendant participation depends on the decision of the judge to grant his release to the custody of the project.[28]

After the individual is arrested and booked, the arresting officer completes a charge sheet which he formally coordinates with an assistant prosecutor. Concurrently, a criminal packet based on police records check is compiled on the individual and forwarded to the court clerk for use by the judge in the disposition hearing. At this point, the project screener determines the "paper eligibility" against project criterion and interviews the individual to explain to program and the client's interest in it. Some programs utilize a standardized interview form for this purpose.[29] Another decision point occurs as the screener decides on defendant eligibility or rejection. Often this screener will be accompanied by a project representative whose knowledge of street life would identify defendant misreprsentation not detected by the screener.

The screener then consults the prosecutor assigned the project liaison or designated representative's case for approval of client participation. The MCEP found the relationship between screeners and the prosecutor's liaison representative was particularly important in the program's initial phases.

Upon the prosecutor's approval, the screener, often an assistant prosecutor, appears in court with the defendant and asks the judge for a postponement contingent upon project participation. Upon his approval, the defendant is released to project custody.[30]

Service delivery. Similar to the Prosecutor/Probation model, the Court model consists of defined staff functions under the administration of a project director. Personnel in these programs, however, seem generally more professionally qualified than in previous models.[31] This may be a result of more concentrated direction of court programs toward the area of job development services. This facilitates goal setting, narrows in on defining needed staff skills and thereby defines the recruiting marketplace. Further, original Department of Labor funding and continuing Department of Justice funding is plentiful in these programs. Most services are expansive and well staffed with depth in experience. Similar to the better developed Prosecutor/Probation endeavors, Court programs consist of intake, counseling, educational and vocational components, though sometimes these last two are combined under a career development concept. In addition to staff and vocational counselors, these programs usually retain full time psychologist and a supervisor/anaylist who coordinates the counselors and evaluates guidance procedures and techniques for quality of service.[32] Volunteer counselors are used and do not receive formal training; however, permanent staff members with counseling experience assist in their on the job training.

New participants receive psychological and vocational tests and evaluations from which an "enrollee profile" may be developed. This profile, coupled with individual's social history, forms the basis of an individualized treatment program. Career developers maintain constant contact with local employers willing to hire project participants who are usually the hard core unemployed, and maintain placement followup services. The role of career developers is more pronounced than in the Prosecutor/Probation, as referrals to employers is a major activity and field placement a constant activity. These programs maintain accountability of the participant population, to include demographic surveys, intake and exit population comparisons and continuing attempts to measure program impact on the community.[33]

Disposition. With the Court model, the disposition of the defendant is more diverse, systematic, and measurable than in previous models. The expanded activities of the career developer call for procedural regularity and specified accountability when working in the vocational market as well as requiring accurate periodic reports on client progress.

The Court model integrates the activities of the counselors and career developers to give a broader, less subjective evaluation of the client. Project F.O.U.N.D. in Baltimore has even attempted to control the variables which influence counselor effectiveness. This is to offset the discretionary decisions of counselors when evaluating on such indicators as "motivation" and "evidence of progress." While court projects retain these phrases, their use, scope and influence as a dispositional factor is balanced by more measurable indicators of job performance, counseling session attendance and abiding by conditions written in the original agreement.

Disposition of a defendant is determined largely from the standard of his personalized career plan, and the exhaustive effort expended in this development pervades the entire program in terms of operations efficiency. There is significant concern for the legal rights of the client, and most programs have standard forms for speedy trial waiver, written agreements stating the terms of participation, and detailed client information sheets.[34] These programs, most of which were initially federally funded, clearly outline job descriptions, tasks and program organization, all of which facilitate the continuing evaluation of program effectiveness in terms of the client.

Section III
Optimizing Procedural Constraints

Type I: Prosecutor Model

While it is true that the activities of public agencies are framed by the limitations of money, manpower and accountability, the degree of constraint depends on the relationship of the agency's operating structure to the functional requirements of goal-achieving. The Prosecutor model, for example, expresses goal statements regarding the diversionary effort similar to the more formalized programs, yet its activity is little more than an extension of existing prosecutorial services.

This situation does not enhance diversion as a constructive alternative to prosecution, for there exists little or no method of defendant accountability within the informal probation framework, and no formal attempt to determine if his needs are being met. There is no advisory board to guide the prosecutor in his diversion policy making, nor is there any such visible need since no additional funds are requested for these services. Since referrals are sporadic, there are few working relationships with other firms or agencies. The prosecutor, while undoubtedly well-intended in his diversion effect, has no means of adequately determining the disposition of an offender. The constraints, in effect, do not exist for this model, yet this does not optimize the intervention effort.

Type II: Prosecutor/Probation Model

The Prosecutor/Probation model builds accountability into both policy guidelines and client dispositions. Its advisory board helps determine policy and provides the prosecutor with a touchstone to public opinion for input on charging policy and changing political moods. The nature of this model's program delegates considerable authority to the project for determining disposition of defendants, and in this respect, the prosecutor can become little more than an endorsement for project decisions.

Most prosecutors operating within this model agree that administrative handling of diverted cases conserves the manpower resources of this office, as well as those of the courts and probation agencies. Another effective method of conserving manpower common to some programs is utilizing an assistant prosecutor as the project screener, thereby reducing budgetary positions.[35]

Financial expenditures and accountability are the most elusive components of procedural constraints.[36] This model is supported generally by LEAA through state criminal justice agencies, and private trust funds. Accountability of funds being a prime consideration, programs have constructed several efficiency schemes intended to maximize the investment. Genesee County utilizes a time-cost approach in relation to categories of responsibilities. Others use a per-client-cost basis, while others state that suitable cost analysis data are not yet available. There are isolated labored efforts to figure the program's economic return to the community and the extent of savings of the taxpayer's dollar. One of the simplest and most common accountability schemes is that practiced by the Dade County, Florida project. It has constructed a cost/benefit analysis based on costs of resources used in the criminal justice system. It compares the costs of probation and incarceration with those of the pretrial intervention program.

Several programs rely heavily on volunteer counselors, college students and paraprofessional "street people" to work with clients. While this saves money, most of these volunteers do not receive any formal training, and their discretionary judgment as an important decision-point for defendants may be misguided without programmed on the job supervision.

Type III: Court Model

As previously discussed, a participant in the Court model penetrates deeper into the criminal justice system and so comes into contact with more of its representatives than with other programs. Many of the features of the Prosecutor/Probation model are found in the Court model with the addition of the judge as a decision-maker. Accountability for defendant disposition, while resting primarily with the judge, requires a broader base of cooperation and coordination.

This model has more formalized accountability of a client than the other programs, essentially because of the judicial accuracy required as a standard by most judges. Usually the prosecutor and the judge consult on the advisability of client participation, with the prosecutor assuring close supervision of the participant before the judge will agree on a continuance. Another reason for closer accountability lies in the original source of funding. Most of these programs were initially funded through the Department of Labor which emphasized vocational training endeavors, an activity requiring clearly specified measurable goals and activities. Court sponsored programs, as a result, provide a closely supervised client whose accountability and subsequent disposition rests in the decisions of several supervisors seeing the defendant under diverse conditions optimizing an objective evaluation.

One significant characteristic of the Court model is the efficient use of available manpower. This stems from the requirements of the research design to provide exact job positions and descriptions and, equally important, the inclusion of a research unit. This has provided programs with measurable objectives and realistic appraisal of job/task descriptions. This in turn has introduced a responsible comprehensive and moderately standardized methodology identifying goals, measuring effectiveness and structuring manpower needs to fit the program goals.

The Court model, with its expanded mission to provide vocational services in the form of training and placement, spends more money than previous models. The apparent success of the pilot programs, coupled with intelligent planning, has made federal money available to initiate court-based programs. Many programs relied exclusively on LEAA funds for the first year's operation, then went to a 75/25 ratio for subsequent period. The Santa Clara County, California program started with a Department of Labor grant for 100 per cent funding, and then to a matching funds arrangement with the county.

Most programs beyond their first year are funded through a combination of LEAA and county revenues on a cost sharing basis. The court-based programs are generally quite sophisticated in analyzing the project costs. and, like many Prosecutor/Probation programs, do not compute success on a cost per person basis.

The constraints on project processes depend on their target group and specific organizational breakout geared to achieve program goals. The Court model, through design structure and continuous re-evaluation of its performance, makes overall best uses of manpower and accountability. The Prosecutor/Probation model, however, reduces client penetration into the system, thereby reducing costs and manpower. It must be remembered that model types are highly dependent on local situations for their acceptability and implementation.

Summary

Chapter III has examined decision-making within pretrial intervention programs and the role participants, showing that as the defendant penetrates deeper into the criminal justice system, the more decision-points there are and the more formalized become the vehicles of decision-making.

Three administrative models were identified to illustrate this phenomenon. Each model was then applied to the processes of selection, service delivery, and disposition to show the location and extent of discretionary decisions involving client disposition. The circumstances surrounding the decision-makers were examined for limitations of objectivity and influence in the prosecutorial decision-making process. It was found that prosecutors and judges usually endorse the recommendations of the program counselor through the program director.

The chapter concluded with a brief discussion of the constraints upon the program processes. Table 4 summarizes the application of selected characteristics and constraints within the three models. It was determined that although funding procedures and amounts may differ, accurate planning and allowance for feedback serves as a check on arbitrary discretionary decision-making.

TABLE 4

Selected Characteristics and Constraints
Optimization by Program Model

Characteristic/ Constraint*	Prosecutor Model	Prosecutor/Probation Model	Court Model
Funding (Acquisition)	( )	+	x
Structure	( )	+	+
Eligibility (fixed criteria)	( )	+	x
Screening (extent)	( )	+	x
Staffing (qualifications)	( )	+	x
Record-keeping	?	+	x
Follow-up	?	?	x
Service Delivery	?	+	x
Disposition (defendant evaluation)	?	+	x
Money (utilization)	( )	+	+
Manpower (utilization)	( )	+	x
Accountability (defendants)	?	+	x

* A minus (-) indicates a definite weakness, a plus (+) indicate that the characteristic/constraint is adequately controlled, an x (x) indicates particular excellence in that area, a question mark (?) indicates a source of concern, and a blank ( ) indicates that the factor does not apply.

CONTINUED

1 OF 4

ISSUES IN PRETRIAL PROGRAM ADMINISTRATION

Communities operating pretrial intervention programs usually evaluate them from a local perspective. Their worth is framed in terms of local benefits to the defendant, the community and the criminal justice system. The reasoning follows a simple logic: the defendant gains economic stability and a redirected life style. The community is rewarded with reduced crime rates, and the criminal justice system achieves a measure of efficiency through relief of lesser cases. Indicators of these advantages are found through such terms as "recidivism rates," "success/failure ratio," and "cost/benefit analysis," all geared to reflect the program's response to the local crime situation.

This type of analysis by itself, however, is superficial, for it does not take into consideration the organizational dynamics and administrative relationships which are variables in the sustaining power of any program. In order for programs to grow, they must have some means of recognizing strengths and weaknesses and the intensity of demands placed on their operation. They must remain sensitive to the environment within which they are mandated to function, and possess the flexibility to respond to changes as reflected in that environment (Easton, 1965). This chapter will present a synthesis of significant issues surrounding the convergence of discretion, formal structure and diversion in pretrial intervention programs as indicated in Figure 6.

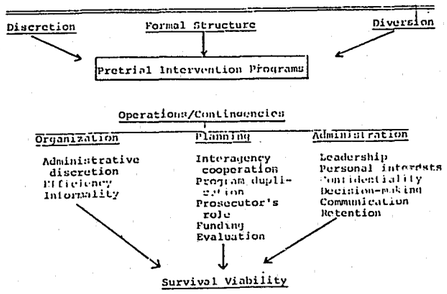


Figure 6. Convergence and contingency synthesis.

Attention will be directed to the assets and liabilities of several problems around which organizational operations and contingencies are clustered. The relevance of these issues and their alternatives will be treated with respect to the impact they have on the viability and long-term survival prospects of pretrial programs.

The issues fall into three general categories:

1. Influences of organization;
2. Program planning;
3. Planning administration.

The first category considers certain issues surrounding the application of modern organizational practices and bureaucratic procedures to pretrial programs. The second category examines issues and problems affecting the establishment, operating structure and continuity of the program within the community. The third category is concerned with the internal operation of the pretrial program itself; the manner in which organizational variables affect ongoing activities.

The Impact of Organization on Pretrial Programs

Since its recommendation by the President's Commission in 1967, diversion has moved from a conceptual stage into a many-faceted and structured response to particular community needs. Pretrial intervention programs, in an effort to provide a vehicle for service delivery, have established organizations tailored to accomplish specific tasks and maximize procedural efficiency. This process involves the identification of all services available, personnel required, functional coordination, a decision-making structure and the means to achieve goals (Simon, 1957).

Administrative discretion. Pretrial intervention programs are a recent innovation to American criminal justice, yet their operational cornerstone rests in the concept of administrative discretion. This phenomenon, which pervades all levels and activities of governmental endeavor, has accompanied the rapid social development within this country. It has become a convenient means to deal with the complexity of modern society and provide some continuity to the overlapping problems of any interrelated society (Drucker, 1974).

Within the field of criminal justice, administrative discretion assumes a unique function. It involves the legal system's approval and sponsorship of administrative decision-making in the disposition of an offender (Cole, 1973).[37] This discretionary power is practiced at the pretrial stage by functionaries of intervention programs each time their decisions affect the actions of a program participant. It involves the making of value decisions (Sayre, 1958), and it is this factor which becomes the pivotal variable in the survival of pretrial programs. Administrative discretion is practiced throughout each level of pretrial program activity, and will be treated as it relates to the issue under discussion.

Pretrial programs were initiated on an experimental basis with project design and planning evolving on an incremental basis. While administrative discretion was included as an operational factor, its extent was not known. The essentials of program functions evolved as the scope of the endeavor became more clearly defined and the role relationships better delineated. Flexibility and innovation keynoted the development of initial policy, and an enlightened "muddling through" attitude by the dedicated staff and volunteers provided momentum for beginning efforts.

Efficiency. The "settling in" of pretrial programs, however, introduced a measure of systematic formality intended to make the effort more efficient and predictable (Udy, 1962). Based on lessons learned, rules and procedures were introduced to program operations, and pretrial intervention programs received their first measure of bureaucratic structuring.

The characteristics of bureaucratic organization are intended to give programs maximum capability to accomplish their tasks. Based on the science of management, bureaucratic organizations assume a legalistic and rational posture, with significant attention directed toward the role of the expert (Thompson, 1961). With the emergence of more pretrial programs and the extension of their services, the characteristics of job specialization, hierarchy of authority and formalized rules are becoming more evident.

The concern for program efficiency, best enhanced by the adoption of bureaucratic procedures, is emerging as the senior priority within pretrial programs. This tendency can be seen by the efforts of respective programs to justify their continued existence through the relationship of cost to benefits. Further, the stipulation of maximum monthly participant entry quotas in several programs indicates a procedural policy guided by efficiency considerations.

When applied to the gray zone of discretion, efficiency can create a dilemma for the program members. On the one hand, it identifies common goals and encourages each member to pursue sub-objectives consistent with these goals. This is beneficial in that such goal identification assists in defining the limits and incumbent duties of particular positions and fosters a common philosophical base from which members may perform their tasks. On the other hand, the insistence on promoting efficiency through identification of standardized goals can settle innovation and inhibit the exercise of individual judgment necessary in the functioning of pretrial programs. Where published rules become the guidelines, workers, especially counselors, may be hesitant to act without some precedent for the anticipated action. In a program predicated on the opportunity to avoid the formalism of the judicial system, the efficiency criteria can become self-defeating. In his effort to provide equal protection in the selection and treatment of program participants, the prosecutor may return full circle to the impersonal practice of structured processing.

Informality and due process. These dangers are not unique to pretrial intervention programs, for the juvenile justice system has been traditionally a diversionary approach to justice intended to reduce the harshness and impact of the criminal law on young offenders. Like current pretrial programs it operated initially on a rationale that counseling and informality should replace the punishment and formality of the adult criminal system. In consideration of factors bearing on the survival of pretrial programs, it is appropriate to draw upon the experience of the older system; the similarities may provide useful guidance for administrative viability.[38]

From its beginning as a reform movement, the juvenile court system grew on the zeal of its founders, while the substantive areas of the law it was intended to correct, were largely ignored. Juvenile statutes contained terms so broad that they became increasingly meaningless (Cavan, 1969). Since it was intended to individualize justice to fit the character needs of the individual child under the concept of **parens patriae**, the juvenile system functioned frequently without the constitutional protections afforded an adult.[39]

The juvenile court emphasized the needs and problems of the accused, and the non-criminal nature of the court was intended to enhance the treatment of the youth. The court was developing into a non-adversary, administrative proceeding which left due process behind. With its goal assistance to the child in the form of guidance, protection and understanding, there was no need perceived to impose statutory limits on the jurisdiction of the juvenile courts. Eventually, all semblance of due process disappeared. In many cases, there was no adjudicative hearing which might establish the innocence of the child, and the system revolved around the coercive power of the state to administratively invoke a disposition upon the child. It was assumed that every child entering the juvenile justice system was in need of help which the court could provide or direct (Handler, 1965).

The comparisons with the early stages of pretrial programs are evident, especially in two areas: the suspension of due process rights, and the recognition of an administrative alternative to the court in disposing of certain cases. The voluntary nature of pretrial participation may be considered a subtle form of coercion by the state, especially when programs require statements of "moral responsibility" for the alleged act as in the Genesee County, Michigan program. The matter of restitution, practiced selectively in the De Novo project, provides an example of a program venturing into an unresolved legal area.[40]

Some pretrial programs use terms such as "in need of assistance," or "in need of supervision," terms borrowed directly from juvenile justice. The implications are the same in both instances, that the normal criminal justice process is not suitable for certain classes of offenses. The purpose remains the same for both, that diversion at an early stage will avoid the incursion of either a delinquent or criminal label. Yet in both juvenile justice and pretrial programs, the extent of diversion does not exceed the reach of the formal system, should subsequent offenses bring the diverted individual to official attention.

The purpose of this comparison is to draw attention to the fact that pretrial programs share common ground with the early phases of the juvenile system. The many mistakes which led to the formalization of the juvenile court were prompted by abuses of administrative power in the absence of definitive law protecting the original ideals of the concept. Pretrial programs exhibit the same zeal, with administrative decisions often substituting for due process procedure. It is notable, in this regard, that Daniel Freed, among others has recently urged caution in moving too quickly into implementing diversion programs as "permanent fixtures" until sufficient evidence is available to provide a distinction between defective theories and useful discoveries.[41]

Program Planning

The planning phase of pretrial intervention programs presents the area in which ultimate success or failure is initially determined. The design of the program and consideration of all relevant environmental influences will provide planners with the means to anticipate and resolve issues of program survival as they arise.

Interagency cooperation. The legitimacy of a proposed program derives from its placement as a part of an existing justice system. While the initial impetus for a program will usually originate with either the prosecutor's office or the court, a successful program needs broad-based agency support to survive. Early programs recognized this need and solicited active support of judicial administrators, the prosecutor's office and project representatives in the initial planning stages. The Manhattan Court Employment Project included the Legal Aid Society, representative of more than 80 per cent of the defendants in Manhattan's Criminal Court, and the city's Criminal Justice Coordinating Council. Another early project, Boston's Court Resource Program, recognized the independent nature of each particular local court in its planning.

Functional working relationships are an absolute necessity between the prosecutor, court and supporting agencies. In hasty planning, it is possible to overlook the reality that different agencies have different working philosophies, all of which must be coordinated to meet program requirements. Organizers must identify and tie together the services, resources and community support available to the program, and communicate the values of the pretrial intervention program to their agencies and the community.

The failure to reform, appraise and solicit the cooperation of all concerned agencies can effectively sabotage the pretrial program. Interagency rivalries and jealousies are a fact of public life, and the influences of two large agencies, DOL and LEAA in the same program can intensify the clash of operational philosophies. Decisions must be reached concerning the sponsoring agency of the program, its relationship to local criminal justice agencies, and the lines of authority. Controversy in this area can lead to the issue of credential justification of proposed program administrators. If the administrator recommended to direct the project is from an agency from outside the criminal justice system, a possibility in the proposed Chatham County, Georgia pretrial diversion program, there is the risk that his unfamiliarity with criminal procedures may preclude his effectiveness.

Program duplication. The unplanned growth of pretrial programs has caused another issue to develop which threatens program survival: duplication of similar projects within the same geographic area. Such duplication can destroy either or both programs, for they compete for the same tax revenue. The Escambia County, Florida program **Status Report** notes the confusion existing between its program and a new project undertaken in the same area by the State Probation and Parole Commission. The **Report** carefully notes that each program serves different target groups with different services. The San Bernardina County Deferred Prosecution **Report** notes difficulties encountered with a "somewhat misguided private organization" which is finding fault with the research methods employed by the county project. The difference, thinly disguising a general criticism of the program's adequacy and adherance to LEAA grant guidelines, has drawn factional lines between administrators who can ill afford such animosity.

The development of such controversies points up the importance of extensive planning in the initial stages of program establishment. Such duplication can be prevented by planners expanding the scope of their inquiry beyond the limitation of their governmental jurisdictions and matching the similarities of competing programs. In most cases, program similarities far outweigh their differences and joint cross-jurisdictional cooperation will provide a more effective and less expensive diversionary program. While every contingency cannot be anticipated, planners should build in operational flexibility compatible with the environment within which they expect to function. Goal setting, regular exchanges of information and an appraisal of existing political realities among various PTI administrators will be a considerable assistance in securing program survival.

The prosecutor's role and program goals. Of all the individuals participating in the diversion process, only the prosecutor is an elected official. He is the one person whose primary professional concern extends beyond the pretrial intervention program. The prosecutor dominates the charging process and as such, exercises the final control over the amount and type of participants the program will receive. His need for office efficiency in light of manpower shortages moves him to support pretrial programs, for their screening function at the prefile stage legitimately relieves him of this procedural requirement. His decisional environment, though, encompasses influences which require compromises and informal agreements, some of which affect program operation. One example is the modification of selection criteria by program directors on the recommendation of the prosecutors. In an effort to provide equal opportunity for program participation, certain projects originally limited to acceptance of disadvantaged individuals has lifted this restriction to avoid discriminating on the basis of socio-economic background.

All prosecutors desire to secure felony convictions, and to this end they will file a case if it appears strong enough to secure a conviction (Miller, 1969). Once a prosecutor makes the decision that a conviction is likely in a particular case, it is unlikely that the case will be diverted. It is at this point that the interests of his office may clash with the goals of the diversion program. While the criteria for diversion may be clearly stated to include the type of offense alleged to a particular defendant, the circumstances of the event may override consideration of the defendants characteristics and the decision made to charge rather than divert. This practice is most likely to occur under the Type I model, wherein, the prosecutor considers each case on its individual merits.[42]

The prosecutor's decision on whether to defer will derive primarily from the manner in which the community responds to the decisions he makes which affect their welfare (Neubauer, 1974). Political interests, in turn will influence eligibility and disposition decisions for each community possesses a unique "local ecology" within which justice must be approached.

Despite his nominal power and influence over pretrial projects, the prosecutor does not operate within a political vacuum or initiate decisions within the programs themselves. Recommendations on who to divert come from below, from within the project structure. While the prosecutor ultimately establishes the policy on diversion, often with the counsel of an advisory group, that policy is dependent in large part upon the participants to the decision (Simon, 1957).

Funding. Another consideration essential to the survival of any program is funding. The original pilot projects, the Manhattan Court Employment Project and Project Crossroads, met with such success that the second-round, nine-city demonstration projects were totally funded at a cost of approximately $5 million (NPISC: Descriptive Profiles, 1974, ii). As programs grow, however, the competition for the federal dollar becomes more intense and procedures for securing it more rigorous. While the availability of DOL funds continues, ongoing programs are required to assume greater proportions of operating costs through local means. Federal funds are available through LEAA, but a combination of inaction by state agencies and a lack of understanding of the block grant concept and grant writing has caused programs to review and improve their operations to better compete with other programs for funds.[43]

The points mentioned above require only administrative expertise for solution, for as long as federal funds are available, money is not a key determinant in policy decisions. Where local funding is a fact in the forseeable future, however, money becomes a prime consideration in the program's structure. Administrators must anticipate this situation, for eventually the greater part of funding will derive from local sources. The viability of the program will then depend, in large part, on community reception of its activities when compared with similar agencies, particularly those providing probationary services.

With the cost burden shifted to the community, the pretrial program will come under closer scrutiny from citizens and competitors alike. It is at this point that much of the discretionary-based activities of the program's operations will require some accountability, especially in the area of achievements and cost/benefit results.

Evaluation. The area of evaluation presents one of the most significant liabilities to program survival. Misused by almost every program, evaluators' efforts are "uniformed, oversold, and widely misconceived" (Zimring, 1974, p. 225). This comment is reflective of the great variance and inconsistencies noted in the methods programs used to measure their success. Several projects stated that an evaluation scheme had not been developed, while others compared the cost of one client in the pretrial program with a counterpart within the correctional system. All were based on immediate cost savings. Hidden costs, sunk costs and manpower costs were generally not mentioned, reflecting the unrealistic successes noted by Rovner-Pieczenik in her research effort. The evaluation activity seemed to consist mainly of an exercise in the justification of program effectiveness on the lives of participants.

Regardless of the measurement schemes employed, the data available covered only successful programs. No information was available on projects which failed. This situation raises an immediate question concerning the causes of the failures and the reasons for them. The absence of follow-up information is a handicap to operating programs which do not have access to facts which might provide some assistance in identifying the pitfalls of program operation.

Program Administration

As pretrial intervention programs grow it becomes increasingly important to examine their internal structure.

This is necessary to determine who the decision-makers are, the extent of their influence and the issues surrounding their decision-making processes. The juncture of these factors determines the policy and direction of the program.

Program leadership. The project director sits at the fulcrum of program activity and as a decision-maker is a key determiner of the program's administrative survival. He must convert program concept into viable activity; it is the director who converts policy decisions into viable working realities. Like the prosecutor, he has a primary interest in program efficiency and maintenance. His job consists of interpreting policies received from the sponsoring agency and providing stability within the operation of the program. It is at this point that the project director becomes a decision-maker critical to the program's survival. He is the individual who must plan his activity in consideration of outside pressures and community interests exerting influence over the program's direction.

As the key point of contact between the program and the community, the director is tasked with the sensitive requirement of estimating community acceptance of the program. In this respect, the relationships between the director, project personnel, other criminal justice agencies and community supporters is critical. He must maintain liaison with these interests which in turn will provide some indicator or the community's willingness to support the program. Coupled with the efficiency of the referral process, the director can recommend constructive policy input to the prosecutor concerning the public's reception of the program.

While the project director conducts program activity along guidelines provided him by its sponsoring agency, he must have the power to make the decisions necessary for the operation of the project. This requires a clear delegation of authority from the sponsoring agency to the director defining the scope of his activity and the limits of his discretion. This delegation of authority and job specification, two of the characteristics of bureaucracy, can be seen as operational essentials to program survival. These factors, however, may not be initially present. In El Paso, for example, Project P.I.V.O.T. experienced a considerable period of disorganization in the absence of job descriptions and overlapping authority between the director and the project administrator.

Persuasion and the ability to influence the orientation of individuals working under his direction can be powerful tools when employed toward program goals and the elimination of sources of conflict (Etzioni, 1961). These same tools, however, may also become a coercive force exercising a light informal control over program personnel, causing them to comply with the leader's personal motivations, often at the expense of the program (Simon, 1957).

The abuses of leadership have an increased possibility for occurence in programs which have a high personal involvement at the lowest level, such as pretrial programs. Through irresponsible operation, a manipulative leader can turn the program from a useful tool into an end itself (Constas, 1958). The importance of good leadership has been recognized and emphasized by program sponsors of the Kalamazoo, Genesse and Escambia County programs respectively in realization of the influence the director's personality can have on program success and operational continuity. Leadership as a personal quality is only as effective as the administrative power vested in the office-holder's position. Where sponsoring agencies are indecisive or fail to support or monitor program leaders, the community support necessary for program survival will dissipate and leave the project without the means for diversion.

Personal interests. Earlier it was noted that bureaucratic elements were introduced into the diversion concept as a matter of necessity to apply limited resources to a maximum number of individuals through the characteristic of efficiency. This innovation, like leadership, carries with it certain potential abuses of bureaucratic operation. Since programs represent administrative disposition of a case which would normally be handled through adversary proceedings, there exists the threat of private negotiations, bargains, and compromises on the part of key officials which could completely subvert the program's rehabilitative efforts.

An example of this is the situation in which the prosecutor routinely elects to prosecute rather than divert certain classes of offenses regardless of their diversion eligibility. This form of activity; lending itself to the interests of the prosecutor rather than the program participant, can easily transfer the abuses of plea-bargaining into the practice of diversion-bargaining. This is a potential ploy for ambitious prosecutors for whom the advantages of a high conviction record is seen as an aid to political advancement (Engstrom, 1971). Program directors, in an effort to present a successful project record, may urge counselors and screening personnel to retain only "good risk" participants. This subjective judgment, to be treated in the following section, may be strongly influenced and defended by the director, thereby reducing the visibility of the decision-maker's rationale.

Confidentiality. This brings into discussion another issue ancillary to commission of administrative abuses in support of personal interests. The information gathered at the pre-disposition stage is becoming a matter of growing concern for prosecutors and program administrators. Originally obtained by project screeners for the initial diversionary determination, this information is finding its way into other decision processes such as pre-plea-bargaining and dispute mediation. Unfortunately states have been remiss in dealing with the limitation of access to collected pretrial release information (Scherman, 1975).

Confidentiality presents an area of policy determination for program administrators. They must decide which individuals within the program have access to files and formulate file disposition procedures on each defendant. Files should be limited to project use only, for the access of this information could subvert the entire purpose of the pretrial program. The nature of the programs requires extensive records and evaluations of defendant progress which are used for his ultimate disposition. The alternative to written records, no written records, creates a situation untenable to the effective operation and progress measurement of the defendant.

Subjective decision-making. Within pretrial intervention programs, the counselors assume the role of expert and as such become a source of administrative power. This power originates from their control over the first-level discretionary decision-making process at the screening stage. Their judgment at this point involves their perception of the organization's rationale and becomes their basis for action. Counselors are selected, however, for their special ability to devote themselves to the problems of others and support the often unpredictable occurrences of a counselor-client relationship. This dedication to service and the orientation to assist individuals in need through the employment of interpersonal skills emerges as the counselor's chief concern within the program. Its goals are viewed through the predominantly subjective nature of counseling and, as noted in Chapter III, a counselor's recommendation concerning participant disposition is accepted largely without question.

The effectiveness of the program, however, avails itself to initial abuse at the first counselor-defendant encounter. With limited definitive guidelines to objectify his decision, the counselor can act without restraints and exercise value judgments based on initial perception. This appraisal may be highly prejudicial and based on the counselor's estimate of a rewarding relationship rather than a more objective inquiry into the participant's need for services. It may also be strongly influenced by standards handed down by the director.

While initial entry criteria may stipulate program eligibility, the counselor's subsequent perception of the participant in terms of motivation, cooperation and initiative can be the real deciding factors in his disposition. While it is a difficult task to objectify the indicators used in the counseling effort, in-service training specifying the goals of the program and type of clientele would reduce the occasion of a participant's "impression management" talent overwhelming the perception of a well-intended counselor. This would also reduce the possibility of conflict arising when goals are not perceived similarly by all program members (Rehfuss, 1973).

While this training introduces a degree of objective quantification criteria, it retains the flexibility of the counselor to respond to his client's requirements. Complete objectivity in the relationship of program workers with a participant would provide uniformly equal treatment, but would result in a self-defeating checklist-type operation. Meeting unique individual needs might be forfeited, thereby subverting the rehabilitative effort of the program.

Communication. Communication is a most important consideration in program success. Pretrial programs are unique in that they contain an amalgam of legal, rehabilitative and administrative professionals all linked by the lifeline of prosecutorial discretion and community support. The nature of communication, especially in the verbal form, is also unique in its diversity, ranging from the legal terminology of the prosecutor to the "street talk" exchange between counselor and participant.

Within PTI programs, there is the liability of workers within particular levels of project activity restricting their exchanges to each other on a horizontal plane without regard to others outside the particular professional area. This exchange within a small scope of activity, for example, counselors speaking only to other counselors concerning client rehabilitation, can adversely affect the operation of the entire program.

Special efforts should be made to develop a common communication base throughout the program. This effort should include a face-to-face exchange of information among all program members and their specific problems. Counselors, for example, work at all hours and must be prepared to respond to the defendant's actions in an unpredictable complex social realm. Administrators, whose professional day follows a more conventional pattern, must understand the counselor's working world in order to support his portion of program operation.

One means of coping with tendency of program personnel to insulate themselves against outside communicative influences is the option of placing individuals alongside of jobs other than their own for a brief period. This will introduce some measure of understanding which will encourage an expansion of communication.

The requirement to communicate within the program is of particular importance considering the relationship of pretrial projects to criminal justice. It is likely that the majority of project personnel, perhaps even the director, have had no prior association with the criminal justice system. This lack of knowledge in its local operations can cause periods of wasteful, overlapping activity.

Retention. One of the significant problems facing the growth of pretrial programs is the selection and retention of qualified personnel. This is especially acute with counselors and administrative assistants, and received comment in most of the programs reviewed. Similar to the situation in the prosecutor's office, qualified people are discouraged from staying with the program because of its limitations in salary, career opportunity, and professional security.

This situation creates considerable operational turbulance affecting every functional area of the program's scope. Most significantly, it hinders continuity in the program's on-going tasks and requires constant revitalization of its working philosophy. The reliance on volunteers, especially as counselors, will perpetuate high tur-

nover rates. The relaxed qualification requirements for these volunteers, usually only evidence of social stability, provide little indication of the ability to determine and deliver the services required by a defendant.

Summary

Chapter IV undertook to examine some of the issues and alternatives which surround the organizational dynamics and administrative relationships affecting program viability. These issues were treated within the categories of the influences of organization, program planning and program administration.

Administrative discretionary power was seen as the pivotal variable in the survival of pretrial programs, with concern for efficiency assuming top priority. The dangers of efficiency and formalism were noted through a comparison of pretrial program administrative practices with those which evolved with the growth of the juvenile justice system.

Program planning emphasized the need for exhaustive identification and evaluation of agencies, individuals and available services before initiating the operation of pretrial programs. Issues involved interagency cooperation, the role of the prosecutor with reference to program goals, funding and program evaluation. These considerations pointed out that the extent of planning will affect the overall balance of the organization and the quality of its service delivery.

Program administration considered the internal operations of a program and the issues arising from considerations of leadership, the abuses of influence and the issue of confidentiality. Particular attention was devoted to the subjective nature of administrative decision-making at all levels of program activity, and the nature of the counselor's decisions with reference to organizational goals. The importance of communication, especially its verbal form, was treated for the problems it can raise if not properly integrated into the total program operation. The unique structure of the pretrial program was noted for its tendency to restrict inter-level communication. The chapter concluded with a discussion of the issues surrounding the problem of personnel retention. The fact of high turnover was seen to hinder operational continuity and facilitate leniency in hiring practices.

CONCLUSION

The purpose of this study was to examine the discretionary decision-making of the prosecutor within the context of pretrial intervention programs. Special concern was devoted to the structure and administrative relationships within which the pretrial diversion concept operates, and the decision points which affect the disposition of a program participant.

In order to achieve this purpose, the study considered various structures built to implement the prosecutor's discretion, its diffusion within pretrial programs and the attempts to channel it for the benefit of both the criminal justice system and the individual participant. Throughout discussion of various programs the importance of planning the organizational location of discretionary decision points, their relationship and proximity to the prosecutor stand out as prime considerations in the administration of pretrial intervention programs. Within this context, several observations emerge concerning the convergence of discretion, formal organization and diversion.

The study has shown that pretrial intervention programs operate as an alternative to formal processing for the prosecutor and the courts. As such, these programs provide an additional measure of services to different types of participants. Programs remain, however, well within the structure of the criminal justice system: a return to normal judicial processing is not only an incentive to participate, it is a distinct probability for the unsuccessful program participant. Analyses of the various programs show their close association with the criminal justice system and point out the fact that ultimately, program policy decisions rest in large part with the interests of the prosecutor and the judge.

It is appropriate to explore whose interests are best served by pretrial intervention programs. While one of the purposes of PTI is to relieve prosecutorial case overload and crowded court dockets, little research exists to support the claim that it makes an appreciable contribution in this respect. From the participant's standpoint, PTI is an attempt to turn his arrest from a liability into a constructive experience. Here also, there is insufficient data to measure the effect of PTI participation on the participant. The deficiency in both of these areas is a result of the reluctance of programs and agencies to cooperate in an objective evaluation effort. As a result, PTI is translated into practice with little validation of the concept.

Pretrial intervention as a form of diversion remains within the control of the criminal justice system despite its variations and innovations. While a major thrust of PTI is intended to serve the constructive needs of the defendant, particular in terms of providing him with the assurance of a clean record, there exist threats to this intention. It is possible that as a result of its close association with the criminal justice system, PTI will lose its significance as a means of avoiding the stigma of a criminal record. Already much of the literature uses the term "offender" when referring to program participants. Since a finding of guilt has not been found on the participants, this improper usage could inadvertently introduce criminal labeling into PTI, an occurrence it sets out specifically to avoid. There remains a further consideration in this regard. It is possible that the introduction of PTI as an alternative to full prosecution may become but another "process" representing only a re-direction of the criminal justice system rather than a viable attempt to achieve behavioral change in the defendant.

The fact remains, however, that PTI programs are growing as a new approach to corrections, away from the courts and into the community. The crucial ingredients in the success of all these projects are the availability of resources and services within the community and local support from the business sector. In every case reviewed, the communities contained a permanent working force whose facilities provide employment for qualified PTI participants. Community cooperation with pretrial programs is reinforced by the assurance of a highly selective participant screening procedure. This provides cooperating citizens, firms and agencies with the security that PTI participants present a minimum criminal threat to their activities.

Consistent selection of low-risk participants by program personnel may, however, contain a self-defeating flow in project operation. By limiting participation to low-risk individuals, the program is extending supervisory services to those who need them the least. It is probable that those persons selected for PTI would either be released or receive probated sentences if the program did not exist. It remains for programs to select individuals who are most in need of services rather than only those most likely to succeed. Through this action programs will develop more meaningful success/failure standards to replace the "lack of motivation-attendance-cooperation" criteria, and will preclude PTI from becoming a dumping ground for weak cases.

Within the entire range of programs studied, there appears a tendency for sponsors and administrators to move into action without ample consideration for its possible consequences. This is most evident in the lack of

concern about unresolved legal issues. While many practices claim justification under the umbrella of "prosecutor's discretion," it remains that the prosecutor's venture into formalized diversion programs is a recent innovation which requires additional attention to emerging legal circumstances. Areas of concern include the voluntary nature of a defendant's participation, the lifeblood of most programs, and the practice of restitution in the diversion context. It appears likely that, with the expansion of pretrial programs, the courts will devote greater consideration to the subject of due process and equal protection within the pre-adjudicative, diversionary framework.

The success of pretrial intervention depends in large part upon the administration of its programs, particularly its leadership. PTI has moved from the informal, unwritten contract between the prosecutor and the defendant into the contractual relationship between the defendant and the formalized program. The formalized diversion concept is moving toward objective definitions of goals and plans of action intended to provide equal treatment for all eligible defendants. Programs emerge with extensive funds and professional talent with which to implement the discretion of the prosecutor. This requires a firm application of management principles in the hands of a capable administrator.

The complex organizational setting of the pretrial program requires the selective judgment of a competent administrative leader who can balance program goals with community needs. While the prosecutor and his discretion remain the cornerstone of pretrial intervention, programs have extended beyond his ability to both determine and supervise the application of that decision. Administrative discretion executed through a capable program administrator will augment the prosecutor's powers and facilitate his goal of seeking impartial justice in the diversion endeavor. It becomes imperative for prosecutors and judges to realize the value and importance of a competent program administrator who can interpret the power of discretion and exercise it in the manner in which it is intended.

Regardless of its particular administrative form, pretrial intervention programs represent a community's approval to approach particular types of alleged criminal activity by some alternative to full prosecution. While program organization brings a measure of visibility and structure to the prosecutor's discretion, programs cannot be administered entirely by regulations. A large degree of personal judgment is both necessary and desirable. In this regard it is important to consider the role perception of each individual within the program hierarchy, for this orientation will influence to a significant degree the identification of program goals and resources. The community is the final determinant in assigning these priorities.

Pretrial intervention programs provide the prosecutor with alternatives which did not previously exist. The programs often represent a community's desire for a compromise between incarceration and outright release of a defendant. The key to its continued success lies in its identification and allocation of resources, an on-going evaluation of its effectiveness, and the willingness of the community to support it.

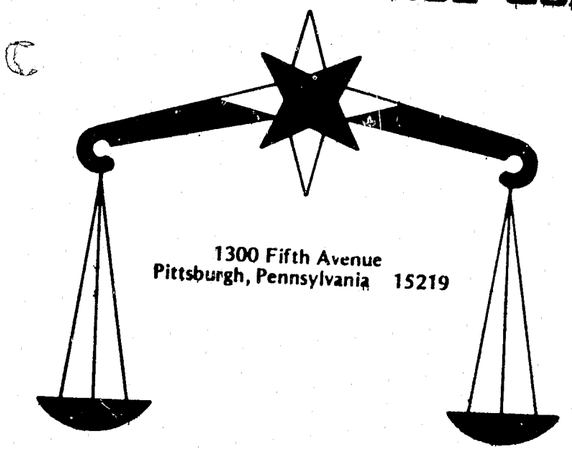
SPECIAL ISSUE ON BAIL IN

PENNSYLVANIA

EXCERPTS FROM THE PRETRIAL JUSTICE QUARTERLY, VOL. 6 NO. 3, WINTER 1977

This paper is provided through the courtesy of Paul Wahrhaftig and the American Friends Service Committee, Pittsburgh, Pennsylvania.

PRETRIAL JUSTICE QUARTERLY



1300 Fifth Avenue
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SPECIAL ISSUE ON
BAIL IN PENNSYLVANIA

VOL. 6 No. 3, WINTER 1977

Q: WHAT DO YOU DO IF THE ROOF FALLS IN?

A: REARRANGE THE FURNITURE

A Comprehensive Analysis of Pennsylvania's Bail Crisis

If it has not been clear for the last 50 years that the money bail system is built upon worm-eaten wood it is clear now that the house has collapsed. The Pennsylvania Crime Commission has issued its report on "Abuses and Criminality in the Pennsylvania Bail Bond System;" a catalogue of the kinds of underhanded dealings bondspeople have used to maintain their position. Meanwhile in Allegheny County (Pittsburgh) the Federal Grand Jury has handed down indictments against one third of the bail setting magistrates in the county, one of whom has already committed suicide, as well as against bondsmen and politicians.

What has been the response to this exposure? In this issue we pull together reports from various Pennsylvania Counties, large and small to answer the question. The results are dismal. They are even more dismal when one considers the selection process. The counties where we have been able to get information are ones where some sort of bail reform has taken place or a citizens group is active. In the totally unreformed counties we do not even have the contacts to ask our questions to.

Out of Staters--while these articles focus on Pennsylvania Counties, the wide diversity they reflect ought to bring out issues relevant to your state. It is also worth considering whether once you get outside of the major metropolitan areas your state's bail system is a chaotic as ours. Our general impression is that bail practices vary among Pennsylvania counties as among independent states.

Bail Reformers and Bail Fund Organizers

This overview should give you some insights into the workings, problems and potential of bail funds and other citizen based bail reform thrusts.

"Official" Response to Exposure

It is not surprising that the official response to bail disclosures has not been radical. It should be. Radicals are accused of wanting to tear the house down before proposing solutions. Here, the house is already torn down, and that was done by maintaining the status quo. By and large the articles reveal that public officials are responding to the crisis by

ignoring it (Berks County), discounting its reality (Montgomery County) or by proposing face saving window dressing changes. Thus, many counties are tightening up on collecting bail forfeitures, some are installing cash deposit bail systems, but precious few are even considering following the Philadelphia precedent of doing away with the professional bondsman. This reluctance is disturbing since two counties have a five year track record of surviving successfully without bondsmen (Philadelphia and Delaware.) No one is seriously considering the inherent discrimination and corruption that abounds when peoples ' freedom is related to the amount of money they have in their pockets--bondsman or no bondsman.

"Citizen" Response To Exposure

With a couple of noteworthy exceptions the state resounds with the thud of the ball being dropped by citizen criminal justice organizers in county after county.

Organizers call for the total abolition of money bail with a guaranteed release for all. That goal makes logical sense, but it is so far from political reality that the plan will not be implemented in the forseeable future. So what should be proposed for now? There is no agreement.

What about bail funds? They now exist in five counties, two others have gone out of business. What is their function and goal. Are they to be a permanent part of the county's criminal justice scene. If so, they are unwieldy and time consuming to manage and are likely to burn out as did the Bucks County one. Are they to evolve into or stimulate the development of Pretrial Release Agencies. Those agencies are not necessarily the answer--Allegheny County has two and still has its indictments.

We seem to be boxed into categories of bail and bail agencies which have now become conventional. At least the folks in Lehigh Valley are beginning to cross conceptual barriers and link "bail" questions with "victim compensation" questions.

New Directions

If you have skipped to this paragraph to get your quick organizing ideas, better skip back again. There are no easy answers; just a need for some really creative thought.

The one principle that seems clear through our long historical experience is that no real change will come about in the bail system as long as it remains the closed domain of the court and public officials. The possibilities of corruption at all levels are too intense. Corruption aside, no bureaucracy likes to change fundamental operating principles and those related to bail are no exception. Outside influences must be infused.

Some Suggestions

1. Reduce county-by-county chaos. Presently each county's bail system is the fiefdom of the local court, subject to very vague central limitations. A comprehensive set of bail rules ought to be established which reduces local variations. The rules ought to be backed up by a centralized resource, such as the State bail agency in the Kentucky model which can act as a resource to local programs and help them find common solutions to common problems.

An alternative centralized resource could be a well funded Pennsylvania Association of Pretrial Service Agencies. Such associations are being set up under the direction of the National Association of Pretrial Service Agencies in many states (New York and Michigan for instance.) They can help establish uniform rules, provide back-up training and help develop a common statewide voice for pretrial change.

With either of the above the precedent set in the Kentucky statute ought to be enlarged upon. Kentucky has citizen advisory boards attached to their pretrial service agencies. We feel that is a step in the right direction, but that in order to really open up the closed judicial shop, the bail agencies, state agencies, or state associations of pretrial service agencies should have a large citizen representation on the board. That representation should involve consumers of the system--those that have been bailed out, residents of high crime areas and victims of crime.

Note that we do not hold up the Kentucky system as a model. Already most Pennsylvania counties are releasing more folks on Nominal Bond and O.R. than Kentucky does under its new statute. However, the statute does have some good new concepts built into it that should be considered.

What Can Be Done Now?

Once goals are properly assessed, bail funds are still a valid operation and a good way of putting pressure on the criminal justice system. They provide a model for citizens to have a role in the system, to monitor it, and to make some independent choices as to what should be done in certain cases.

The system needs sophisticated monitoring. In the early 1970s Court Watching was the vogue. Students, housewives, and other concerned people sat in local courts, and observed arraignments and preliminary hearings. From those experiences grew both data and committment that developed the impetus for bail funds and other activities.

For all their effort and the good that they did, bail funds only scratched the surface. Observers were mainly limited to what took place in open court and on the records. It is only through active working with individuals enmeshed in the system that the problems come through clearly. Generally you will never know that a bondsman is overcharging by court watching. You will if you are working with the person who posted bail.

The system is riddled with concerned volunteers and agency people who work one-on-one with defendants. They do their best to work their way through the mine fields of problems--high bail, overcharging bondsmen, detainers, lack of available employment, etc. But usually they do not have the time or information to attack the larger issues. A sophisticated monitoring project could be developed where these one-on-one workers bring their experiences to the Monitor. The monitor could collect them, check them out and seek patterns. That information then taken back to community groups can become the basis for taking concerted action to remedy those ills.

KNOW YOUR LOCAL BONDING AGENT

Pennsylvania Crime Commission Report

A catalyst for change in Pennsylvania's bail system is the recent report of the Pennsylvania Crime Commission of the Commonwealth Department of Justice. The report, "Abuses and Criminality in the Bail Bond Business in Pennsylvania," focused on the individual bondsmen and surety agents. It concluded, "Most of the bondsmen investigated were found to have violated at least one of the criminal statutes pertaining to the conduct of their businesses. The most prevalent offense, however, is the one most damaging to the individual defendant: the misrepresentation of lawful fees, resulting in illegal overcharges." The report is detailed in 6 PJQ 5 (1976.)

The report was only the first shoe to drop. Once the footwear starts flying it may appear that a centipede is disrobing. An investigation is currently underway against a Luzerne County magistrate. The Commission is following up on its earlier information and is digging deeper. The Insurance Department which has some regulatory power over bondsmen, is also following up on the report.

The investigation is moving into a second stage, examining the corporate responsibility for the bail business. Since so much illegal activity was found at the base level, the bondsman and surety agents, the insurance companies sponsoring the bail surety agents may have known about or participated in the illegal activity. This investigation, relying mainly on piecing together of corporate records, is dull work, but may have some interesting results in the future.

The Commission is also considering drafting legislation to correct the situation. This may include stricter regulation of bondsmen, and/or emphasis on alternative forms of bail. No formal proposal has yet been developed.

In the meantime, local groups should keep an eye on what their bondsmen are up to. It is hard for many politicians to realize that a person who often is a friend of theirs and a nice guy, really does the kind of things documented in the Commission report.

GLOSSERY

Here are some definitions of terms used in this issue.

Bail Agency--An administrative unit, which seeks to interview defendants, collect and verify information pertinent to bail setting and to present that information to the bail setting authority in order to aid in the bail setting decision. The agency often will follow up with releasees to help insure that they will appear in court.

Bail Fund--A non-governmental organization, often community based which seeks to expand the number of people released while awaiting trial. They post bond for defendants at little or no cost to the defendant if they were unsuccessful in talking the bail setting authority into a low or nominal bond. In Pennsylvania all bail funds use real estate to back up their bonds and retain a cash contingency fund to pay for the few failures to appear that they experience.

Bail Piece--An order obtained by a bondsman recommitting the bailee to jail and relieving the bondsman from responsibility under the bond. Supposed to be used when the bondsman can demonstrate to the court that the defendant is about to flee.

Bondsman, bondspeople, bond agent--Term is used here in the broad sense, a person who for profit, posts a bond with the court in the amount required to allow the defendant to be released. A fee is charged for this service. Technically in Pennsylvania there are two types of bondsmen:

1. "Professional bondsmen" secure their bond with an interest in real estate;
2. "Surety agent" secures the bond with an insurance policy issued by an insurance company.

Unless specified otherwise the term "bondsman" covers both.

Cash Deposit Release--A means of retaining money security for bail but bypassing the bail bondsman. Defendant or friends post 8-10% (depending on local rule) of the bail amount with the court. Upon appearance the deposit, less a service charge is returned or in some jurisdictions applied to offset the defendant's fine and court costs.

Conditional Release--Usually means release without financial security, but the accused agrees to comply with specified conditions designed to increase the chances that the accused will appear. Examples--call in to bail agency frequently, participate in a narcotics rehabilitation program, etc. Violation of conditions can be grounds for terminating bail.

Detainers--Known in some other states as "hold orders." Order from another jurisdiction or agency which requires those holding a person in custody not to release the defendant until the matter at question is resolved. Until that time the defendant is ineligible for bail. Detainers may result from an alleged parole or probation violation, unpaid court costs, being wanted in another county or state or by the Feds.

LEAA, Law Enforcement Assistance Administration--The federal agency dispensing funds under the 1968 Safe Streets Act, as amended. LEAA funds in Pennsylvania are channelled through the Governor's Justice Commission.

Nominal Bond--Essentially the same as Release on Recognizance (ROR) except that the traditional bond form is used, a person or representative of a bail agency signs as surety, and a $1.00 fee is charged. (Usually even that fee is fictional.) If defendant flees the state the surety, or person appointed by the surety has the same power as a bondsman to retrieve the accused without extradition proceedings.

O.R. Program--Another term for bail agency, but more clearly delineates that the purpose of the agency is to increase use of own recognizance releases.

Release on Recognizance (R.O.R.)--Release of accused until trial based on the accused's promise to appear. No exchange of money is required to secure the release.

Straight Bond--A plain old fashioned bail bond whereby the accused must arrange for security to cover the entire bond amount set. That is usually arranged by buying a bond from a bail bondsman.

Surety Bond--Usually used interchangeably with "straight" bond, although technically it denotes a bond posted by a surety agent.

PENNSYLVANIA BAIL RULES

It may come as a shock to those who travel from county to county observing the diversity of bail practices, but Pennsylvania is governed by a uniform set of bail rules. The Rules of Criminal Procedure starting at number 4000 were mandated by the Supreme Court in 1973. Basically they define the broad parameters within which local courts must operate.

Thus, Rule 4006 authorizes percent deposit bail in an amount not to exceed 10% "in such local jurisdictions as may provide." A lot of room is left for local jurisdictions to tailor their bail system to their particular needs. Those interested in monitoring the system however should frequently refer back to the rules, for often options exercised by local courts are well beyond that allowed by the rules.

For instance, there is the problem of some Allegheny County District Justices who set a $3,000 bond and require that it be secured by a bondsman only and not by property or other means authorized by Rule 4006.

If violations appear, complaints can be made to the Supreme Court Criminal Procedure Rules Committee. For an article detailing the procedures, and some other enforcement options, see "Supreme Court Rules Committee: Limited Tool for Change," 1 PJQ 29 (1972.)

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A NOTE ON DATA

On Reckenin' With All These Numbers

In this special issue on bail we of necessity have resorted to quoting a lot of statistics. We use this data with an urging that the reader accept it with a large grain of salt.

In the first place, except where noted, we have used at face value data supplied to us by the programs themselves. While we have no reason to believe that they are not basically accurate, you should know their source.

Comparisons between programs are extremely difficult to make. Is a 1.7% failure to appear rate in one jurisdiction really better than a 5% one in another? It may not be, but to demonstrate that fact is extremely difficult. There are a range of factors that can affect the FTA rate. Among them are:

1. Varying procedures. Bail procedures vary from county to county in Pennsylvania almost as much as from state to state. Thus the FTA rate is going to be affected by the fact that cash deposit bail in Philadelphia involves a 10% deposit which is always returned, less a service fee, upon appearance; whereas in Allegheny County it involves an 8% deposit which is retained by the court to offset fines and costs if the accused is convicted. Even so simple a variance as whether or not, upon the conclusion of the preliminary hearing a date is fixed for the Court Arraignment may affect the FTA rate.

2. Varying definitions. What is an FTA rate? In Philadelphia, Failure to Appear rates are calculated based on the number of court appearances scheduled. If one person must appear at five hearings and then fails to appear at the final sentencing one, it is scored as four appearances and one failure to appear--a 20% FTA rate on that one person. In other jurisdictions the rate is calculated by the individual. If one individual fails to appear for any hearing s/he is scheduled for it is a failure. One person, one missed appearance equals

a 100% FTA. Reasons for using the different systems may range from the philosophical to politics. The Philadelphia system renders a low FTA rate, but does accurately measure court disruption. Four hearings were scheduled and conducted with no trouble, but the court was inconvenienced by the defendant's failure to appear at the fifth. Pretrial Services is a court administered agency. On the other hand those who measure FTA by the individual may measure a better accounting to society about the numbers of people actually at large.

3. Sophistication of data gathering resources. Philadelphia with its centralized court system and computers has minute data available from the point of arrest on. In contrast, in Allegheny County virtually no information is available on defendants until after cases have survived preliminary hearings. Data then can only be based on cases not dismissed at preliminary hearing. Not even information on the number of bonds, Nominal Bonds, or cash deposit bonds on cases dismissed at preliminary hearing is available.

What Information Is Relevant?

Recognizing the data limitations, how then can one decide how to move forward. The numbers can be used as a very rough guide. None of the bail projects report a gross increase in fugitivity. They tend to indicate they do as well as or better than bondsmen. It would seem to make sense to operate from some basic principles. First, it is clear that the traditional bail system is inherently corrupt and by its very nature discriminates against those without funds. Thus the departure point is moving away from a failing system. Any change that is tried that reduces the potential for damage through corruption and discrimination, and increases the chances that people will be treated with dignity should be tried. If after a reasonable shakedown period thereis no perceptable stacking up of people in the jail, increase in fugitives in the streets, or vacant courtrooms, then the reform probably worked. Then people ought to start trying to implement the next step towards establishing a decent and humane system of pretrial release.

THE PHILADELPHIA SCENE

A City With No Professional Bondsmen

To most Pennsylvanians Philadelphia is another world. Its sheer size tends to blind small town and middle sized city people to the big city experience. After all Philadelphia's Pretrial Service Division has 114 employees while Allegheny County, the second largest in the state has 15. However, one might easily say that if a technique works in as large and chaotic a place as Philadelphia it ought to work more simply and easier in almost any other part of the state. Chester County has learned this lesson.

Philadelphia initially reformed its own bail system by local court rule in 1971. The Philadelphia model was the basis of the revised bail rules issued by the Pennsylvania Supreme Court in 1973. Under the Philadelphia system there are various forms of release. At the discretion of the court a defendant may be released on ROR (Release on own Recognizance) or Nominal Bond. The court may release the accused on "Conditional Release," that is without a deposit of money but with a requirement that the accused coordinate with a named community group or volunteer. Finally the court may set a money bond. If money bail is set the accused may meet that requirement by posting the full amount in cash or property, purchasing a surety bond, or posting a 10% cash deposit. When the 10% deposit option is used the accused is entitled upon appearance to the return of the entire amount less a 2% service charge. Since the 10% deposit option is available to all defendants subject to money bail and a returnable deposit is more attractive than paying a fee to a bail bondsman, bail bondsmen have disappeared from the Philadelphia scene.

Statistics

So now that virtually no accused defendants are supervised by bondsmen are bodies stacked up ceiling high in the jail or fugitives crowding the streets? Apparently not according to the Annual Report of the Philadelphia Common Pleas & Municipal Courts, 1975. All the release data is based on a total of 39,398 cases interviewed by the agency--virtually all arrests according to Pretrial Services Director, Dewaine Gedney.

ROR Data

The agency recommends 46.4% of its clients for ROR. 50.5% are actually released in that manner. The failure to appear rate, when a bench warrant is issued, is 7.2%. The Pretrial Services Division's Bench Warrant unit then goes into effect using the telephone and other means of communication to find the missing defendants. If push comes to shove, they are armed and deputized so they may arrest missing defendants if required. They seldom have to do so. Missing defendants who are not back in custody or had their bail reinstated within 90 days are scored up on the statistics as a fugitive. ROR's fugitive rate then is 1.7%.

10% Cash Deposit Bail

43.4% of Philadelphia defendants are held on money bail. 92% of those are released. Of those released, 94.4% use the 10% cash deposit mechanism. The Failure to Appear Rate is 7.2% and the fugitive rate is 1.9%. The program notes that 83.6% of the cash deposits are posted by a third party. It is possible to do so since Philadelphia, unlike some other counties,does not seize upon the bail deposits as a collection device to cover court costs. All but 2% comes back to the person making the deposit.

Gedney stresses the importance of assuring the money is returned upon appearance. By making it possible for third parties to deposit the money and have a vested interest in making sure the accused appears, the court system in effect is buying the services of their party custodians. Statistics seem to support this observation. The percentage of 10% deposits being made by third parties, has increased over the years to 83.6%. As that rate increases the failure to appear rate has declined. It is now 7.2% with a fugitive rate of 1.9%.

Through the above two programs 96.1% of the accuseds are released. The Conditional Release Program operates to try to release those deemed too serious a risk for ROR but who have been unable to raise their 10% deposit. That program has been very small. 1,181 releases have been granted with a failure to appear rate of 6%. There has been a tendency for sentences for this group to run more towards probation than for a control population which was not released.

General Observations

Gedney is very enthusiastic over the 10% deposit system. While he recognizes that it still works to the disadvantage of defendants with limited funds, it is an easy program to implement. One does not need a vast staff like Philadelphia to administer it. Chicago does it with four paid staff. Judges feel comfortable with it since they do not have to change their patterns. Where they used to set a $1,000 bond they may still do so, but release comes easier.

Philadelphia Peoples' Bail Fund

It should be noted that some Philadelphia defendants have one more option for release after the above are exhausted. They may apply to the Philadelphia Peoples' Bail Fund, a privately operated bail fund. The bail fund (featured in "One Million Dollars in Bails Posted," 5 PJQ 36 (1976)) bails out people who apply to it essentially on a first come first serve criteria. It seeks to demonstrate that it is impossible to separate the good risks from the bad risks. If people are released and properly notified of court appearances they will show up at an acceptable rate. The Peoples' Bail Fund reports a failure to appear rate comparable to that of Pretrial Services. The Fund's fugitive rate is 2.45%. (Note, the data is calculated on a similar basis except whereas Pretrial Services lists a person as a fugitive after 90 days, the Bail Fund lists them as fugitive after approximately 10 days. Thus if the data were equalized it would be even closer.)

Jail Population

The jail population in Philadelphia has declined recently although arrests have gone up, according to Gedney. In the last year the jail population has gone down from 2,700 to 1,711.

Detainers

Of those who are unable to be released, 30% of them have detainers--

hold orders from another jurisdiction, probation or parole department. With the increased use of computers in Philadelphia people are more likely to find themselves caught with a detainer. Policy apparently is that when a person released on probation or parole for a violent offense is arrested, a detainer is automatically lodged, holding the defendant until the matter can be reviewed by the parole or probation officer.

Retrieval Unit

Philadelphia Pretrial Services is unusual among release agencies in that it has a retrieval unit (Bench Warrant Unit) which is armed and has arrest powers. Gedney points out that virtually all of the retrieval work they do is non-arrest. They use telephones, go out into communities, remind people of the date they missed, talk, cajole, and generally get their client to come in. They are oriented, unlike police, towards trying to get bail reinstated rather than automatically jailing the defendant. The typical failure to appear is a person who has not fled the jurisdiction, but messed up on communications, is in jail on another charge but that fact was not cross filed with the court, is in the hospital or just conveniently forgot.

Is a retrieval squad necessary? Most program directors feel some kind of follow up effort is needed to talk in those who initially did not appear. However, substitute police are a different question. In Philadelphia the retrieval squad apparently does make sense. Even Pretrial Services prime critic, Bud Schoefer, Director of the Bail Fund, acknowledges the need for the retrieval unit. He traces its history back to the city administration's attitude towards pretrial release. The mayor and police authorities opposed it. Police did not follow up on fugitive warrants. Then when reforms were suggested, police authorities would cite the terrible backlog of fugitives on the Philadelphia streets. Obviously someone must make the effort. If the police or sheriff's department will not pick up bail fugitives, then maybe the job by default becomes that of the bail agency.

continued--bottom of next column

BUCKS COUNTY

A Good Bail Fund Does Not Necessarily Mean Reform

Bail Fund

Bucks County citizens were pioneers in implementing bail funds. Their fund established in the mid-1960s was the first in the state and probably the first bail reform program of any sort in the state. Basically, concerned whites banned together, pooled their individual properties and church properties and set up a bail fund. They initially fought out the tough issues necessary to operate a bail fund--what kind of papers are necessary for a bond to be posted? What kind of contract should be used between the property owner and the fund, etc? Virgil White, a local attorney served, in effect, as the fund's foreign ambassador travelling to other counties helping other citizens and courts examine the potential for expanding pretrial release in their counties.

It is now about two years since the bail fund has ceased operations. It is worth analyzing where the county is today now that the fund is gone, in order to analyze the long-range impact of the Bucks County Bail Program.

Bucks County Today

Bucks County is located next to Philadelphia and the New Jersey border. Lower Bucks County is very urbanized with typical big city crime problems. Upper Bucks is rural, and the middle, not surprisingly lies inbetween. Farm land is disappearing and industry is taking over. Residents perceive crime encroaching from New Jersey, particularly drug peddling since Bucks County is not as efficient in arresting drug peddlers as the New Jersey folks are

Continued on next page

The Bottom Line

Finally, Gedney notes that the new Pretrial Release and Cash Deposit programs run with a lower fugitive rate than did the professional bondsmen who used to dominate the Philadelphia system.

across the border.

There is no ROR program nor 10% cash deposit system in Bucks County. Basically District Justices set bail as they always have--arbitrarily and with little inquiry into the defendant's background, according to Assistant Public Defender Terry Clemons. Only in very rare cases will a District Justice ask for a 10% cash bail. Otherwise the defendant must post the full amount in cash, property or buy a bail bond.

Those not so affluent arrive at the county jail where the Public Defender interviews them. He fills out a bail questionnaire in the form of a petition to the court. Before going to court he tries to argue the D.J. down on the bail or to convert it to a 10% one. He is not very successful. After receiving many responses that D.J.s did not feel authorized to set a 10% bail the President Judge issued a letter saying that the practice is permissable but not required.

If the defendant is not released by the preliminary hearing, the public defender takes the petition for bail reduction to the Common Pleas Court. Judges tend at that point to grant the 10% cash deposit alternative. By this time the defendant has been in jail about 10 days.

Citizen Role

Citizen groups, primarily white-liberal, are dissatisfied with the system. They have been seeking a role which might expand the right of pretrial release. For reasons to be discussed below they do not want to revive the bail fund. Their activities have taken two thrusts.

1. They have a tiny cash reserve (about $500) which they use to post bond in particularly glaring (and low bail) hardship cases.

2. Volunteers are beginning to work with Terry Clemons to do bail interviews with people in jail and verify the resulting information. The defender's staff does not have time to do the job properly so volunteers are more than welcome. Volunteers come primarily from a group working in the jail called BACR (Bucks County Association for Correction and Rehabilitation.)

Meanwhile the Bar Association is trying to get the Court to establish a rule setting up a 10% cash deposit system. The Court seems to express some fears about granting percent bails to everyone since they are so close to the New Jersey border. They feel more comfortable with the services of a bondsman to bring defendants back across state lines. Others argue that bondsmen never did that anyway. They just waited until the defendant was rearrested on some other charge in New Jersey and then brought him back.

Seizure of Deposits

The Clerk of Courts has established a policy that when one puts up bail money it not only secures the defendant's appearance but also the payment of fines and costs. Until those are paid the appearance is not complete and bail money will not be released, even though the money was put up by a third party such as the community fund. It is worth noting that this policy does not apply to bail posted by bondsmen. Terry Clemons is preparing a petition to challenge this procedure.

What Happened to the Bail Fund?

There are many reasons for the demise of the fund. One is that bail funds are very complex, technical, cumbersome forms of community action. A given set of volunteers can only maintain momentum for so long. Many felt that after eight years they had paid their dues.

Property became increasingly tied up. Backers discovered that instead of property being tied up for six months until the defendant came to trial, often it was encumbered for a year and a half until appeals were exhausted. The number of failures to appear began to mount. There were a couple of reasons here. One is that once someone fails to appear the case is left open for as long as possible hoping that the defendant will turn up (usually through phone calls, etc. but eventually through rearrest on other charges.) Eventually they are settled, but the backlog keeps growing. Furthermore, in its later years the bail fund became more liberal in its policy bailing out higher risk cases. Addicts proved difficult since

the project had no back-up services to work with the folks once released and hence lost contact with many of them.

Eventually the burden became too heavy and the program closed its doors. It helped out a lot of people in the last ten years, but had little long range impact. Two problems should be focused upon for the benefit of future organizers.

1. The program seemed to have no clear vision of goals or how to achieve them--other than providing an immediate service. Was structural change needed? What sort of change? How should that change be brought about? At best the fund's theory was one of persuasion. If they could show that people can be released without a money deposit and would reappear, then the Court will pick up on that idea and adopt it. This theory seems to be at the heart of most bail funds today. The Bucks County experience is only one of the many showing that bureaucracies seldom change fundamental procedures because someone on the outside demonstrates a better idea.

2. Community involvement in the bail fund was very limited. It was composed primarily of liberal, suburban whites of good will.

There was virtually no representation or involvement of the client community in the project. Thus a program could not be set up in which the affected community had a vested interest in making the program work. More importantly no way was found for the client community (ex-offenders, their neighbors, minorities) to develop any new relationship with the court and bail system. Unless the community gets some form of handle on the bureaucracy, it will continue its preordained course.

Monday Quarterbacking

What if there had been real client community involvement in the program? First, it might have lasted longer. CAP in Delaware County is almost as old. Occasionally it limps along but keeps coming back because the program is seen as vital by those it serves. They have a possessary interest. Secondly, they might have sought as a goal an ROR program with a governing board which had significant community representation. If that were not possible, they at least would have had an aware, informed, vitally concerned group who could monitor the system and raise issues from a community perspective. They might have run their own candidates for District Justice.

The Bucks County Bail Fund should not be denigrated. It served valiantly and inspired many organizers in many other counties. It is our hope that critical examination of any programs failures as well as its successes will improve future organizing.

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ISN'T IT AWFULLY RISKY LETTING A BAIL FUND USE MY PROPERTY??

Send a stamped self addressed envelope to AFSC and ask for "How Safe Is My Property? 1300 Fifth Ave. Pittsburgh, Pa. 15219

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EVALUATION BLUEPRINTS FOR PUBLIC DEFENDERS

LEAA has published two manuals to help criminal justice experts evaluate the effectiveness of their public defender system. EVALUATION DESIGN FOR THE OFFICE OF THE PUBLIC DEFENDER is a blueprint by which a five-member evaluation team would judge the operations of the public defender system in a city or county. It would be composed of "outsiders" to maintain objectivity. Three lawyers, a management analyst and a community member are the suggested team. The second manual is for public defender systems which want to assess their programs and pinpoint problem areas. These dual manuals were developed by the National Legal Aid and Defender Association and can work in tandem. Suggestions from the self-evaluation manual can be used by a chief public defender for a check on his or her own operation. Copies of the manuals are being mailed to 500 public defender agencies across the country. Other interested persons should write to: National Legal Aid and Defender Assoc., American Bar Center, 1155 East 60th Street, Chicago, Illinois 60637. (Reprinted from Connections.)

ALLEGHENY COUNTY

You always thought the Pittsburgh Pirates were a baseball team. Wait until you read the 45 or so indictments that have already come down (more are rumored in the process) hitting at corruption, kickbacks and the like in the bail field. Bondspeople, district justices, constables, clerks and a former state senator (already serving time) have already been indicted. An initial problem for Allegheny County President Judge Ellenbogen was to devise a plan to cover all the 53 minor judiciary districts with 1/3 of the magistrates suspended.

Pittsburgh is the state's second largest city, a major corporate headquarters and heavy in steel and coal industries. It is surrounded with 124 independent municipalities. There are about 60 overlapping police jurisdictions within the county and up until July fifty-six District Justices plus a centralized arraignment court used by the Pittsburgh Police staffed by magistrates appointed by the mayor.

The indictments came as a surprise to those not directly involved in the bail system for the public had throught that the county's bail system had been reformed in 1972. At that time two bail agencies were funded. The County Bail Agency, (CBA) administered by the Court was basically an adaption of the standard pretrial service agency seen in Philadelphia and other jurisdictions. The Community Release Agency, (CRA), a community based bail agency was also established which relied more on informal community contacts. Bondsmen were placed under new and stiffer regulations.

Bondsmen Survive

The 1972 reforms were designed to perpetuate the bondsmen since the Court believed that they performed a valuable function. Thus three basic kinds of bonds were authorized: Nominal Bond/Release on Own Recognizance for the good risks, 8% Cash deposit bond for the pretty good risks, and

continued--next page "Allegheny Co."

ALLEGHENY COUNTY (PITTSBURGH) REPORT ON BAIL PROBLEMS

by--Judge Robert E. Dauer
Court of Common Pleas

I feel that I should report to you and to the Board of Judges some serious problems concerning the bail system in Allegheny County which could develop into a crisis. Because of my assignment for the past eighteen months to handle bail appeals from magistrates, during which time I have heard more than seventeen hundred such appeals, I have had the opportunity to be more cognizant of this situation than most of the other members of the court.

Although some of the faults with our county bail system have existed for some time, the current situation has been precipitated by a combination of continuing misconceptions of the bail laws on the part of issuing authorities with the demise of the local bail bond business. Unless this situation is rectified, the result may be a complete breakdown in our bail system, overpopulation of the jail, and may, pose a constitutional threat to the rights of criminal defendants.

The primary fault with the bail system lies with the incorrect procedures followed by some District Justices of the Peace and City Court Magistrates in setting bail at preliminary arraignments. The Pennsylvania Rules of Criminal Procedure (Rule 4006) and the Rules of the Criminal Division of the Court of Common Pleas of Allegheny County (Rule 4006) clearly state in discussing types of bail: "...any of the following shall be accepted." These rules then list as acceptable types of call: payment of the full amount of the bail in U.S. Currency; payment of ten percent of the amount of bail (our local rules also provide for eight percent of the amount of bail) (Rule 4006.1); deposit of the bearer of bonds of United States, the Commonwealth of Pennsylvania or any political subdivision; posting of realty; and surety bonds of a professional bondsman author-

continued--page 32 "Allegheny-Dauer"

ALLEGHENY COUNTY--from page 29

"Straight" or full bonds for the poor risks. For all practical purposes the "straight" bond could only be met by a bondsman. Early court instructions required magistrates to set straight bonds on numbers runners, a category that generally appears since they see their resulting fine (if any) as a business expense. That is one example of gravy given the bondspeople.

Before the reform there were over half a dozen bonding outfits in the county. Because in 1972 the court required bonding agents to post large cash deposits to insure collection of forfeitures, the number dropped to two major firms and one part time writer. Thus while the Nominal Bonds and 8% ones cut the total number of clients needing surety bonds, the surviving bondsmen did a larger business after 1972 than before.

Throughout the following period District Justices were always authorized to set "straight" bonds where they felt justified. That of course left the field wide open to bondsmen to "encourage" justices to set lucrative straight bonds; hence the indictments.

County Bail Agency

Meanwhile the County Bail Agency was established and is currently directed by Jim Lotz. It has 15 employees, cut in the current fiscal year from 21. It seeks to interview all arrestees before their bail hearing. This is not too difficult in the centralized city court or a new centralized night court staffed by the District Justices when the outlying offices are closed. During the day they must rely on the District Justice to do the interviewing and then call into the bail agency for a record check and verification. Bail Agency staff is authorized to recommend any category of bond, ROR, 8% or straight and often name a specific amount.

Data on the agency's performance is very sparse. A report covering October 1975--September 1976 shows the failure to appear rate to be 6.8% for Nominal Bonds/ROR, 8.8% on eight percent deposit bonds, 13% on full cash bonds (statistically insignificant number), 9.7% on surety bonds and 5.9% on property bonds. While no written data seems available Lotz states that after his staff either by telephone or by going out into the community. Thus they are able to bring the failure to appear rate down to nearly 1.7%. This follow-up crew does not have arrest powers.

Release data is also vague. No data is available on the 30-40% of cases dismissed at preliminary hearing. It would appear to be another invitation to corruption for a county to maintain a record keeping system where there is absolutely no way anybody can monitor 30-40% of the bails being set in a county. A second problem is that there is no way of determining which releases were obtained by the County Bail Agency and which were done by Community Release Agency. The most recent data is that 48.8% were released on Nominal Bond/ROR, 14.6% on surety bonds, 34.3% on 8% deposit bonds, 1.2% on property bonds and 2.3% on cash deposit bonds.

Community Release Agency

CRA's story is a long and difficult one. Its original 1972 format was innovative. It was to be, and still is, a private non-profit community controlled agency. It was set up as a variant on the traditional pretrial release agency. It differed in that a person's community roots were checked out through the neighborhood grapevine rather than a rigid point system. After release CRA used a similar process to keep in touch with its clients. It was immediately confronted by opposition from the court which led to a two year battle. As with most confrontations virtue and intransigence were not qualities monopolized by either side. Many of the resulting scars still remain. CRA reorganized in 1974 to test out a new format; that of pretrial supervised release which would be a non-monitary alternative to bail.

The new CRA is funded by the Governor's Justice Commission and United Fund. It focuses on jail residents who have been unable to qualify for Nominal Bond and do not have sufficient financial resources to make the bond set or who are detained under a parole or probation order. Five hundred and forty six such "high risk" cases were interviewed by CRA staff in the jail in 1975. The cases are then discussed at a staff meeting where a group decision is made as to which defendants should be recommended by CRA. Considerations of risk of flight and risk of danger to the community enter into the decision. If it is decided to move ahead with a client, a release program will be designed which at a minimum will involve structured ways of keeping in touch with the agency and usually will involve some "rehabilitative" programming. Clients have been enrolled in schools, colleges, training programs, narcotics programs and jobs.

The background information is then presented to the Court. The Court requires that such presentations be made jointly with the County Bail Agency. Evaluators have pointed out that this requirement causes duplication of effort and hampers CRA's direct access to the courts.

Of the 546 clients CRA interviewed in 1975, CRA recommended 38.6% be released. The County Bail Agency recommended release for only 25.1% and the court granted releases to 26.6%.

CRA's annual report tactfully points out that the above data indicates an underutilization of resources. A $220,000 project with a staff of 15 should be able to handle a heavier client load. Here the friction point is exposed. Supporters of CRA argue that the small caseload is because the court has closed them out of any significant access to clients. They say the only function that the Court can conceive for them is to be the Court's eyes and ears making sure people appear. For example, CRA wants to work with both whites and blacks, but the court sees them as a black project and thus 84% of those released to them are black. (Of those initially interviewed 72.8% are black.)

CRA detracters see the agency as intransigent. Court related people see it as refusing many opportunities to get its foot in the door, gain credibility, and build a base for expanding in the future.

Regardless of where the truth lies it is tragic that after four years the court and community have not been able to move closer together. CRA's new director, Earl Belton describes CRA's history as a bed of roses--thorns and all. There are some indications that under his new regime some creative thought is being focused on CRA's problems.

CRA's follow-up is quite close. This supervision can be used to the benefit of the client, for CRA staff will testify at trial about the extent to which the defendant has "straighted-ed out" while released. This testimony would only be made with the consent of the client since CRA jealously guards the confidentiality of its records. A judge is less likely to send a defendant to prison who shows evidence of making it on the outside.

What is the result of this informal attempt at pretrial diversion? 34.3% of CRA clients were found not guilty, 18.2% received fines, 9.1% went into the formal pretrial diversion program (ARD), 26.3% received probation, 2% received county jail sentences (six months or less) 8% went to prison and 2% received "other" determinations. Remembering that CRA's clients were initially labeled high risk the data looks good. However there is no control data available to compare with since no other county agency keeps similar records.

Finally, no agency report is complete without the failure rates. CRA clients were rearrested at a rate of 8.3%. CRA had to revoke bonds of 4.9% and 4.9% failed to appear.

Court Response to the Bail Crisis

With indictments reigning down upon Pittsburgh the opportunity for change is upon the county, but precious little has been done. Both newspapers have editorially supported doing away with the bondsmen and making 8% deposit bonds available to everyone. The Court finally set up a committee to study the matter. Typically it is all judges, one D.A. and one public defendor. The committee has met in secret and has issued its report which is still not public. Rumors are unclear on whether the recommended scheme would eliminate the bondsmen. It apparently calls for raising the amount of cash

deposit bonds to 10% and raising the amount retained as a service fee to 2% and no expansion in their use. The memo from Judge Dauer, printed in this issue in its entirety gives readers an impression of how the bail crisis is seen by the most liberal judge on the committee, and even that does not consider any real change.

An Allegheny County quirk is that if one posts an 8% deposit bail, appears and is acquitted the money is returned less the service charge. If the defendant is convicted, the court seizes the bail deposit to pay the fine and court costs. If any is left it is returned to the defendant or whoever deposited the bail. Thus third parties are discouraged from putting up their money to bak up their friends.

Although the court is aware of Philadelphia's argument that by returning the deposit whether or not convicted, they are in effect buying third party supervisors for bailees--people with a vested interest in returning the accused to jail--the Court sees adding a little more money to the county coffers as of paramount concern. Under changes recommended by the Court committee it is reported that the deposit retention aspect is maintained.

The recommendations were forwarded to the Bar Association for comment. The only word that has leaked out from there is that the lawyers would like the deposit to be used to pay attorney fees rather than court costs.

While the Court and lawyers argue over who is going to pick the pockets of the cadavers, while CRA remains in the background and while no pressure comes from the community, no real change is imminent. The prospects are that the professional bonding system will continue in the County, people will continue to be forced to pay money for their freedom, corruption and political payoffs will overcome.

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REAL CHANGE IN BAIL IS ONLY BROUGHT ABOUT THROUGH PUBLIC PRESSURE. What can you or your group do in your community? Call us at 412-232-3053 or write, AFSC 1300 Fifth Avenue, Pittsburgh, Pennsylvania, 15219

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ALLEGHENY -- DAUER--cont. from page 29

ized to do business in the Commonwealth. In the Comment following both the state and local rule, it is stated: "an issuing authority or a clerk of court may not refuse to accept any of these types of bail specified by this rule."

This rule is not being followed by most issuing authorities throughout the county. With at least the sanction if not the approbation of the court it has been the general practice of these issuing authorities while setting the amount of bail at preliminary arraignments to limit the type of bail acceptable to one or more of those designated in the rules, i.e. the issuing authority specify that the bail shall be "straight" bail, that is either cash or surety bond only. There are even some issuing authorities who set amounts of bail in the alternative requiring one amount for "straight" bail or a substantially greater amount for percentage bail.

Although of questionable legality, this practice has been permitted by the court presumably in the theory held by some judges that straight bail was more of a guarantee of appearance than percentage bail. The statistics that have been supplied to me by the Allegheny County Bail Agency show that this is not necessarily true and that there is substantially the same percentage of bail forfeiture by defendants on nominal bail, percentage bail or "straight" bail.

Be that as it may, with the bail bondsman for all practical purposes a thing of the past in Allegheny County. Continuation of this practice on the part of the issuing authorities can lead to an intolerable situation. Formerly when bail was limited to surety bail, the defendant need only to go to a bail bondsman where his bail would normally cost him between six and seven and one-half percent of the face value of the bail bond. It is to be noted that in such cases, the defendant was buying his freedom for even less than the eight percent court bail although he had no chance of getting a refund as in the case of the court bail. The situation has now drastically changed. To my knowledge, only one bail bondsman is still conducting business in Allegheny County. It is my understanding that he will not give surety bonds for more than $5,000.00 bail nor will he give any surety bonds unless the applicant has collateral (real estate) to be put up in case of forfeiture.

Therefore, the defendant who has been limited to "straight" bail by the issuing authority must deposit the total amount of bail in cash or other valuables, a situation which in the past only existed when all bondsmen refused to take the bail. Such cases were few and far between and only involve criminals with long records and absolutely no roots in the community. Since the vast majority of criminal defendants are indigents, the result of the practice on the part of issuing authorities in many cases is an effective denial of reasonable bail in violation of the Eighth Amendment of the United States Constitution and Article I Sections 13 and 14 of the Pennsylvania Constitution.

Purpose of Bail

Another serious problem in the county bail system is an apparent lack of understanding on the part of some issuing authorities of the well established legal principle that the fundamental purpose of bail is to secure the presence of the accused at trial. Bail is being used by some issuing authorities not only for the purpose of preventive detention but to effect punishment for alleged crimes for which the accused has not yet even been tried let alone found guilty. Although far from clear in reading the recent appellate opinions on bail,[1] it may be that there is no absolute right to bail in non-capital cases in Pennsulvania. However, it is very clear that anticipated criminal activities alone cannot stand as grounds for the denial of bail and the use of excessive bail to effect punishment for untried alleged crimes is not only contrary to American principles of justice but obviously unconstitutional.

It is also absolutely clear that absent evidence that the accused will flee, the importance of the presumption of innocence, the distaste for imposition of sanctions prior to conviction and the desire to give the accused the maximum opportunity to prepare his defense dictate that bail should be granted. Unless the issuing authority is convinced that bail should be denied, the amount of bail must reasonably afford the accused or his family a practical chance of obtaining the freedom of the accused under the applicable bail rules or it becomes a travesty of justice.

Burden of Proof

The appellate courts have also held that even in capital cases the Commonwealth has the burden of proving the likelihood that the accused will not appear for trial and that therefore bail should not be granted. There are very few cases other than murder cases in which the Commonwealth represented either by the district attorney or even the arresting officers furnish the issuing authorities with proof or for that matter any evidence, that the accused will flee and unless such proof is furnished, the issuing authority has no right to deny bail and certainly not to use the ruse of excessively high bail to accomplish the same result.

Excessive bail is frequently required by issuing authorities who then inform the bail agency, and in some instances the court, that they have no objection to the reduction of the amount of bail they have just imposed. Obviously, the setting of such high bail in the first place was not upon proof by the Commonwealth of impending flight or even upon belief of the magistrate that such high bail is necessary to insure appearance. There have been several instances in which magistrates have informed the court that the reason for the excessive bail set at the preliminary

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Commonwealth vs. Caye, 447 Pa. 213, 290 A.2d 244 (1972);
Commonwealth vs. Truesdale, 449 Pa. 325, 296 A2d 829 (1972);
Commonwealth vs. Segers, 460 Pa. 149, 331 A2d 462 (1975).

arraignment was to please local police, constituents and in some cases just to obtain good press.

Remedies

To rectify these practices and to avert such problems as overpopulation of jail facilities and unnecessary loss of criminal prosecutions on technicalities, I respectfully make the following recommendations:

1. That the President Judge, in his supervisory capacity over the county magistrates, send to all issuing authorities a letter cautioning them against the use of the above practices and the abuse of their judicial discretion in setting bail; or in the alternative convene a meeting of the magistrates for the purpose of instructions on the laws of bail and applicable rules of court to be conducted for them by attorneys or local law professors.

2. The President Judge should specifically order the District Justices of the Peace and City Magistrates to cease limiting the types of bail acceptable and to comply with the Rules of Criminal Procedure and the Rules of the Court of Common Pleas.

3. The Board of Judges should amend Rule 1406.1 et seq. of the Court of Common Pleas so as to provide for payment of ten percent rather than eight percent into court for percentage bail as permitted by the Pennsylvania Rules of Criminal Procedure (most counties in Pennsylvania require ten percent payment.)

4. The Board of Judges should consider further amending these rules to provide that the county retain two percent of the face value of the bail (one-fifth of the amount paid into court) as a service charge rather than the current ten dollars when a defendant is found not guilty or the charges against him are dismissed. Although the statistics available to me from various sources differ somewhat, it can be reasonably estimated that this would result in an additional $130,000 in the county treasury. This could be earmarked for the employment of additional deputy sheriffs to be used to locate "bail jumpers" and/or to defray the expense of the bail agency on the county taxpayers.

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LEHIGH VALLEY
(LEHIGH AND NORTHAMPTON COUNTIES)

A Bail Fund Seeking New Directions

The Lehigh Valley is in North East Pennsylvania and encompasses Lehigh and Northampton Counties. It is a very picturesque setting, with ample rural areas for city residents to escape to. Its main urban areas are Bethlehem, 75,000 population; Allentown, 100,000 and Easton, 70,000. Prime industry is steel, which currently is depressed. The cities have fairly large minority representation, attracted by the steel mills. The city of Bethlehem lies in both counties, so the problems of the two are inter-linked although the judicial and administrative system definitely is not.

Bondsmen

One bonding agent remains for the two counties who is reputed to owe money for past forfeitures.

Lehigh Valley Bail Fund

Neither county has a bail project nor a 10% cash deposit system. Therefore, the only non-traditional means of meeting bail is through the Lehigh Valley Bail Fund. Using property made available by individuals and churches the program, with its paid staff of three posts bonds at no cost to the individual defendant. The Fund's director, Carol Thompson notes that since the program opened in July 1973 it has bailed out 650 people. Its recorded failure to appear rate is 5%. Those that actually disappeared and have never been retrieved amount to nine people (1.3%.)

Recently the fund was worried because one of their clients for whom they had posted a $10,000 bond fled. He did so when the judge found him guilty at his trial, informally told him he would be given a healthy term in prison after the lunch break, and

then recessed. Through their street contacts, the bail fund staff, found their fugitive--playing basketball at his usual neighborhood playground.

Costs

The bail fund's budget is $43,000 per year. They calculate they have saved the two counties over $100,000. In making that calculation they have used rough data that is more sophisticated than that used by most bail projects. Entering into the calculations are the following items: (1) Non-fixed jail costs--ie. food, toothpaste, blanket washing materials, etc. (2) Welfare costs--in terms of jobs saved and what it would have cost the welfare department to support the family when the head of the household loses his or her job, (3) Taxes saved through job maintenance, (4) Police time used to escort defendants to and from the jail for hearings.

Release Criteria

The fund uses the general community ties backed up with references concepts to determine who is eligible for their services. They interview each jail inmate whose bond is less than their limit, $5,000. Some with higher bonds are interviewed also in the hopes that the program can get the bonds reduced to a level they can manage. Inmates in North Hampton County can call direct from the prison.

The program has dealt with migrant workers. They find that those who regularly return to the area to work as a regular part of their migrant pattern are relatively good risks. The first time through migrant is not.

Once the program decides to bail out a client the bond must be posted. In North Hampton this may be done centrally at the Court House. In Lehigh County they must travel to the office of the District Justice who set the bail. To get to some of the outlying offices may use up most of the day.

Goals and Future Plans

The program is hopeful of receiving $5,700 grants from each county to match their Governor's Justice Commission funds for next year. If that happens they will have moved a long way towards their goal. That is to unify the bail system for the two counties by entering into a purchase-services arrangment with both counties. Essentially the bail fund would perform the services of a bail agency for the counties but still retain its independent board. With that independence the resulting program should have a better chance of continuing its dedication and avoiding the risk of becoming just another agency staffed with patronage employees.

Board Structure

The program's board is one problem though. It is primarily white, middle class, liberal. They have tried to involve more "community" people and even bailees but have not been successful. This is a problem shared by most of the bail funds which started from a white liberal inspiration. Community Assistance Project in Chester demonstrates that blacks and ex-prisoners do see the importance of bail funds and will stick with the dull organizing-if they see the project as their own. With the possible exception of the Philadelphia Peoples' Bail Fund, a mixture of white liberal and minority community people has not worked in this area. It is a problem that must be solved by the Lehigh Valley Bail Fund if it is to keep from being totally taken over by the existing criminal justice system, regardless of contractural arrangements.

New Directions--Victim Compensation

The Fund and courts have been wrestling with what to do about the few bonds that have to be forfeited. With the criticism about failure to collect bond forfeitures coming from the Crime Commission the courts apparently feel they must collect from the bail fund. However, the absurdity of forfeiting money whose source is one governmental agency (LEAA) to another seems apparent. A working arrangement has been agreed upon with both counties. For those cases that have really become fugitives the fund will either pay 10% of the bail amount to the county or if deemed appropriate by the court it will pay restitution to the victim up to a maximum of 10%

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5. To increase the confidence of the public in the bail system, it is recommended to the Administrative Judge of the Criminal Court Division that the assignment of a judge to hear bail appeals should be rotated on a monthly basis among all the judges of the Criminal Division.

DAUPHIN COUNTY

Volunteer Work Goes A Long Way

Dauphin County in Central Pennsylvania has a population of around 250,000. It is centered on Harrisburg, the state capitol with a population of around 60,000. Its prime industry is government, but steel mills and farms are both a strong part of the Dauphin County scene.

The Dauphin County Bail Program, a bail fund, is about the only organized means of non-financial release available to county residents since there is no ROR program. The fund bailed out its first client in 1975. For collateral it uses property made available by individuals and the Friends Meeting House.

Currently it is an entirely volunteer operation with Chris Flemming, staff member of the Pennsylvania Program for Women and Girl Offenders, acting as bondsperson. Responsibility is spread broadly in the organization to keep the load from falling too heavily on any one person. For instance, volunteer interviewers do the initial screening. The bondsperson does the actual bailing out. Once the person is released he or she is assigned to a contact person. The contact person, often a member of the board, is the one to whom the bailee reports at pre-agreed intervals, notifies the bailee of hearing dates, and generally keeps the lines of communications open. Conditions may be imposed on defendants with a drug or alcohol problem that they report to a drug rehabilitation center.

This volunteer structure may change soon since the Governor's Justice Commission is seriously considering funding the program. While the opportunities for expansion and increased professionalism abound with funding, there are those in the organization who are apprehensive. They fear the loss of their broad based volunteer involvement.

Since October of 1976 the fund has bailed out 32 people. The number interviewed is over sixty, but some were not eligible for service because their bail was too high or they did not meet the bail fund's criteria. Criteria is fairly simple. The defendant must have been a Dauphin County resident at least for a reasonable time and have some kind of references that can be checked out. Bail can not be more than $5,000. The fund has discovered that after they check out an individual with a higher bail and decide they find the person appropriate for release, the District Attorney's Office is usually cooperative in getting the bail reduced to an amount the fund can handle.

Detainers

Many people interviewed have detainers. The program has been successful in getting detainers lifted in county probation cases but not very successful in state parole and probation cases. Generally if the violation was technical it can be negotiated out. They find that often the detainee is unaware that the detainer even exists until fund volunteers check the records. It seems that unless someone inquires about a detainer it is not checked out and may hold the defendant in jail even if there was no substantive reason for lodging it in the first place.

Failures To Appear

They have had three bailees fail to appear in court. One was in the hospital and the other two, although still in the city, did not show. Both

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LEHIGH VALLEY--from page 35

of the bail amount. Thus, if an alleged burglar failed to appear and his bond was $1,000, the fund could either forfeit $100 to the court or pay $100 towards the purchase of a replacement television set for the victim.

As an interesting sideline, the fund has received a grant to run a drama workshop in the Lehigh County Jail. A photo exhibit of the workshop will then be exhibited in the galleries in Harrisburg. It is also beginning to give some thought to operating a citizen dispute resolution program.

This is one bail project that we can not say is stuck in a rut.

city and county detectives are helping to locate them.

Reaction To Crime Commission Report

In early August, District Attorney LeRoy Zimmerman held a meeting for all the licensed bondspeople--a total of five. The meeting was about bail procedures; specifically relating to the Crime Commission Report on bail. (Note, in many Pennsylvania counties, the District Attorney's Office often serves as the administrative branch of the court overseeing bail, calendar control, etc. dispite the obvious conflict of interest.) Bondspeople were assured that Dauphin County is not like Pittsburgh and will never be in terms of bail corruption. However he did want to clean up a few things just to make sure. The following issues were discussed:

Forfeitures: Rules are being tightened. Apparently in the past not much attention was paid to collecting forfeitures. Now, thirty days after the date of forfeiture (the date the defendant was to appear in court and failed to do so) the bonding agent must present the defendant or a check in the amount of the bail. If the defendant is brought in after 30 days, the bail will still be revoked but the money will be returned to the bondsperson minus any costs the county has incurred due to the failure to appear.

Property: The legal value of property used for posting bond is being investigated by the D.A.'s office. Bondspeople were advised to check judgmental liens on their properties and not to extend bail beyond the amount of property available.

Bail Pieces: Orders from the court relieving the bondsperson of responsibility under a bond and revoking the bond, the orders being referred to as "bail pieces," are not to be issued automatically by the Clerk of Courts anymore. The bail agent must apply by petition to the court and must be acted upon by a judge.

Extradition: Bailing agents must pay the county in advance for extradition of the defendant.

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LANCASTER

Lancaster County in Southeast Pennsylvania is one of the wealthiest counties in the state. One of its strong income producers is tourism. Its rural Pennsylvania Dutch tradition is a magnet to big city vacationers. The same heritage makes the politics conservative. The city of Lancaster's population is around 57,000 and the county is 325,000. Minorities make up about one-fifth of the city's population and the largest minority is Spanish speaking. The prison population is less than 25% minorities.

Banned Bondsman

In the wake of the Crime Commission Report Lancaster's last licensed bondsman for profit has been put out of business. The Insurance Commission failed to renew his license at the request of the Lancaster court officials. Thus the only licensed bondsman remaining in the county is Karl Landis Director of the Lancaster Association for Pretrial Justice, a bail fund. Traditionally Lancaster has been one of the few counties in the state to strictly enforce bail bond forfeits, and the for-profit bondsman had gotten too far behind. Observers attribute this strict enforcement to Pennsylvania Dutch frugalness rather than a zeal for bail reform.

Continued on next page

DAUPHIN COUNTY----continued

The DA also advised the bonding agents to use "good judgment" when bailing people, especially those charged with violent crimes or big drug offenses. He is being pressured by the public about these people getting out too quickly and he is checking to see who is going to be bailed out.

Beyond this "tightening up process" there seems to be no significant reactions to the disclosures of the Crime Commission Report.

To fill the gap left by the demise of the private bondsman, the Lancaster Court has set up a unique 10% cash deposit system. 10% bonds may be issued at the discretion of the District Justice. Full bonds may still be required for people from out of state, with prior FTAs on their record etc. Raising a full bond without a bondsman is not easy. A strange twist to the 10% system is that the Court of Common Pleas will not honor a 10% bond set by a District Justice. This rule has no effect on those who posted their bond immediately. Once they have paid their money their bond must be honored. However the defendant who is given a $1000 bond at 10% and does not raise the $100 by his preliminary hearing all of a sudden finds when he raises the money the next day, that the Court will not honor the bond. He must wait until the public defender takes a bond reduction petition to the Court which will usually agree once again to set a 10% bond. It seems like an unnecessary delay and extra work.

A fee of 2% of the first $500 is charged and 1% of any amount thereafter. Upon acquittal the deposit is returned. Upon conviction it is held to pay court costs unless it was posted by a third party. In that case the third party gets its money back.

Bail Fund

The Lancaster Pretrial Justice Association opened up its bail fund in February of 1976. Presently it has $3000 in the bank and has four properties (individual and church) which they are using to secure bail. They have bailed out six people so far. They have been able, using their background verified checks to get bail reductions for another two dozen cases. One District Justice remarked as she was given the verified background information that this was great. "Normally all I know is what the police tell me," Bond was reduced.

Landis sees the short term goal of the project to help indigent people. Long term they would like to promote some sort of social change through convincing the court it is necessary to have a bail agency.

Landis expresses amazement at the number of people who are not eligible for bail. The project has not yet tried to get a detainer released.

The project's board is basically liberal professionals--Friends, Unitarians, Mennonites, stockbrokers, lawyers, etc. They would like to expand their board to include more monied sources as well as some community people.

Criteria

The bail funds criteria for release are generally flexible and subjective. They can only post a maximum of $2000 which excludes most serious crimes automatically. However, they have split higher bails with defendants--with the defendant posting half as a 10% deposit and the fund posting the other half as a property bond. Since people who come to them for help have been in jail two or three weeks, the assumption is that they are indigent. They look to recent history of jumping bail and generally go by a subjective "feel" of who will reappear. Being from out of state, for instance would not automatically exclude a potential client, but a "floater" would not be bailed.

Decisions of the bondsman on who to post bond for must be ratified by two board members as well as the property owner. This is the only one of the bail funds to bring the property owner into the decision making process. In others the owner must trust the judgement of the organization posting bonds.

Intake is from the county jail. The project advertises in the prison newsletter and some of the jail staff is helpful in referring cases to them.

The project follows up by postcard or telephone. There usually is not much communication involved. Landis sees a potential for using board members in working with released persons but is worried about them being perceived as probation officers--people who say they are interested in helping but have the power to jerk you off the streets. The project has done some informal job placement and referral services for its clients.

MONTGOMERY COUNTY REPORT

Montgomery County is usually looked upon as a suburb of Philadelphia. Its 600,000 population is spread over scenic rural areas as well as suburban tracts. It is viewed as an affluent bedroom community. One of its fears is the encroachment of Philadelphia city crime into the suburbs.

They have had a bail administrator for about three years. Alan Josell, the administrator, is described as a "one man show." He might better be called a ½ man show since he also practices law. He reviews the jail population, and if he finds a defendant in there because a District Justice set high bail, he first will try to negotiate bail down with the justice. If he is unsuccessful he goes before a judge assigned for the purpose and argues for a bail reduction.

Since May of this year a 10% cash deposit has been available. The local court rule was written by Josell. The percent option is not routinely available to anyone but is set at the option of the bail setting authority. It is still possible to require a "straight" or fully secured bond from defendants who do not appear to be trustworthy. According to the local rule the 10% option can be granted by a magistrate, a judge or the bail administrator.

A 2.5% fee is retained by the Court. If the defendant is found guilty court costs are levied, these costs are taken out of the 10% bail deposit if the deposit was posted by the bailee. If put up by a third party, no court costs are withheld.

Statistics

No statistical data is available. The court is now transferring to computerized statistics. A few years ago Josell computed that 52% of defendants were receiving Nominal Bonds. He has no means of knowing whether the rate has changed today. Observers note that the rate of non-financial releases tends to vary according to the whim of the judiciary. No data is available on the 10% bonds either, but from conversations with the bench warrant squad at the Sheriff's department, Josell's impression is that the failure to appear rate is acceptable.

Bail Fund

Meanwhile a bail fund continues to exist in the county. Founded in 1970 the Montgomery County Community Project Bail Program has limped along on meager resources trying to gain broader acceptance of non-monitary releases. The fund, using over $13,000 worth of church and individual properties posts bond for selected individuals at no cost to the accused. According to their 1975 annual report they had bailed out 104 people to the tune of $136,000 and 23 were currently out on bail. They had a cash contingency fund of $7,183.10 to use incase they had to pay off any forfeitures. There had been three skips in the previous three years which they paid off. Other clients initially failed to appear but with a few telephone calls or staff visits were persuaded to appear and often get their bonds reinstated.

Bail Fund Since Implementation of 10% Deposit System

Ms. M. Worth Acker, board member of the project states, "Neither of these programs has eliminated the need for our project. We are still bailing out those who cannot raise 10% as well as those required to post full bonds." Although the project ran out of money in September and October and had to release its only staff member, they bailed out 15 people that period.

Detainers

The jail population, according to Acker appears to be rising, but the number of detentioners is staying about the same. About half of the detentioners in the Montgomery County Prison have detainers. These hold orders from parole, probation or other jurisdictions are seen to make the defendant "ineligible" for bail. At times the fund, or the Pennsylvania Prison Society, working with private lawyers or public defenders have gotten the detainers dropped and have gotten the defendant released.

Responses to Crime Commission

The Crime Commission focused a couple of paragraphs on a Montgomery County bondsman who "freely admitted... a clearly illegal overcharge," and noted that he "settles all outstanding forfeitures by payment of a nominal

amount, as determined in a semi-annual out-of-court settlement with the Montgomery County Solicitor's Office." Josell reports a good deal of bitterness has resulted from the investigation--focused on the investigators. They came in purporting to do a study and came out doing an expose. The report does not seem to have caused much ferment for change.

PITTSBURGH PLAN FOR PRETRIAL JUSTICE

Sharp readers will note that mention is made of two Pennsylvania bail funds that have gone out of business. Bucks County is one. The other was Pittsburgh Plan for Pretrial Justice. It operated for only nine months in 1972 and bailed out nine people.

It succeeded in getting across its political message - that affluent, influential churchgoers felt concerned enough about their bail system that they would commit their property to a bail fund. The message was clear, the court established its agency, and the fund went out of business.

MORE ON BAIL IN BACK ISSUES

Bondsmen: Monitoring

How to Keep Your Bondsman Honest---Well Maybe Cool. 2 PJQ 13 (73)

More on Keeping Bondsmen Honest 2 PJQ 30 (73)

Keeping Bondsmen Honest, Part III. 2 PJQ 36 (73)

Bail Funds

One Million Dollars in Bail Posted, (Philadelphia Peoples' Bail Fund) 5 PJQ 36 (75)

Bail Fund Property Donor's Concerns; How Safe is My Property? 4 PJQ 17 (75)

Pittsburgh Plan for Pretrial Justice 1 PJQ 34 (75)

Other Bail Projects

Community Bail Insurance 2 PJQ 11 (73)

BACK ISSUES ARE AVAILABLE FROM AFSC OFFICE FOR 25¢ a copy or $7.25 for a complete set. See order blank in this issue.

BERKS COUNTY: READING

by--Manetta Maniaci, Berks County Prison Society

I am responding to your request on information concerning recent county responses to the bail exposures. Frankly, the word hasn't reached Berks County. No one seems interested in monitoring our own bail bondsmen. However, there have been some important recent changes worthy of notation.

We have two remaining bail bondsmen in Reading. The others were not licensed or are in jail themselves. The two remaining bondsmen have recently gone into business together, being cousins. This happened at the same time when there were some failure to appears and apparently some forfeitures. I noticed, through interviewing defendants, that the bondsmen suddenly were asking outrageous prices for releases. For a $1000 bail they requested $300, and if possible some collateral such as a car or property. The defendants were never sure how much of the $300 was to be returned to them, and how much was the actual fee. Both bondsmen work full time and are not interested in bailing anyone who is risky. This has effected the jail population. The average jail population has risen from 175 in August, to 183 in October and bail releases fell from 54 in August, to 32 in October.

The 10% bail program of the county is very selective because there is no staff, and the Prison Society has to handle recommendations, and paper work. It takes from two to three days to release a person. Out of eighteen District Justices, two will not participate in percentage cash bail at all. (The Berks County Prison Society is a privately funded community group. As one of its broad activities aimed at assisting prisoners and former prisoners, it established a property based bail fund. As the program gained credibility it discovered that in many cases once they had verified background information on their clients they were often able to get the client released on ROR or 10% cash deposits. Since release in this manner is less cumbersome than posting property the Prison Society has almost completely phased out its property-bond operations.--Editor.)

ERIE

Erie in the Northwestern corner of Pennsylvania is a small city and Pennsylvania's only port on the Great Lakes. Its bail project, The Bail Bond Assistance Program is a small, low budget operation funded by the Governor's Justice Commission (LEAA) and housed in Gannon College. Its paid staff consists of David Alessi who teaches in the criminology department, a part time assistant administrator and eight student volunteer interviewers.

Interviewers are criminal justice or related majors. They interview defendants detained in the county jail. In recent reports they note that no one was detained in the jail for more than 24 hours before being interviewed by program staff. The staff collects background information, makes sure the inmate has a lawyer and has made contact with friends, family and employers on the outside. The information is then made available to defense counsel to use in bail reduction petitions. The program seems to offer no services to follow up and assure that those released will appear.

Alessi complained about the lack of available statistics. Data is either non-existant or divided up between so many offices that it is impossible to put any data together not only about how bondsmen operate but even how his own program operates. No one can tell how many bonds have been forfeited, how many failed to appear, nor how much has been collected for forfeited bonds. Similarly, Alessi can not say how many people interviewed by the program were released nor what happened to them.

Inspite of the lack of solid information available Alessi feels that the program has established credibility within the system and is in a position to expand. He is confident that the county will fund his or another bail agency when LEAA funds run out in June and that the newly funded operation will expand to providing information to the magistrate rather than wait until defendants are committed to jail.

He feels that the slowness in getting bail reform established is painful, but that the concept is gradually becoming a part of the Erie system.

CHESTER COUNTY

Chester County's bail system demonstrates that big city concepts of pretrial release can be transferred to smaller counties successfully. Chester County has had a Bail Agency--OR Program for three years administered by Norman I. Diem. Since January of this year a 10% cash deposit option has been available to all defendants. They interpret Rule of Criminal Procedure 4006 to mean that if a county establishes a cash deposit option as a valid means for posting bail, that option must be available to all defendants. Hence, Chester County's one bondsman has been reduced to a minor role, primarily bailing out people on credit terms who could not afford to put together the 10% cash deposit required.

The bail agency has five employees and has a retrieval unit with arrest powers. In many ways it reflects an adaption of the Philadelphia system to a small county.

How Successful Has It Been?

Approximately 2200 people were arrested in the county last year and about 70% of them were released on Nominal Bond or ROR. Diem cites the close cooperation of the District Justices and the acceptance of ROR and cash deposit by police as reasons for achieving this good record. The project claims a failure to appear rate of 1%.

That FTA rate bears some examination. It is a rough figure for computer technology has not fully taken over the county yet. Basically the number of people who failed to appear, or whose release was revoked by the agency in anticipation of a FTA is divided by the total number of releases for the period. If the program's caseload is expanding, then this division method will produce an artificially low skip rate. It is more accurate to divide the number of failures by the number of people (or appearances) scheduled during that period. However, this possible distoration is more than remedied by a very stringent definition of failure to appear. If a defendant misses a hearing at all, even if he shows up later in the day, or the next morning,

it is counted as a statistical FTA. One would expect a much higher FTA rate with that definition--comparable to the 7.2% reported by Philadelphia. Note also that the Chester figure is a combined one for ROR and 10% bonds.

It appears clear, however, that by whatever means one uses to calculate the percentages in Chester County, that acceptable numbers of people are being released and are being returned to court without relying on the professional bondsman.

Problems

Life is not a bed of roses in Chester County either. Diem listed some thought provoking problems encountered. For instance, as in Philadelphia, they encourage third parties to post the 10% deposit for the defendant. They may do so because the entire deposit, less a service charge, is returned. They chose this method over Allegheny County's (where if the defendant is convicted the money is retained to offset court costs and fines) for two reasons. The first was to encourage third parties to post the bonds and thus develop a vested interest in the accused person returning to court. They also felt there might be a constitutional problem in automatically seizing the cash deposits. A person posting a full cash deposit or a property deed for the full amount of the bail would not be subject to immediate seizure. In those cases a long delay is involved and usually no seizure is made.

Now that third parties can post the cash percent deposit what happens when the girl friend who posted the deposit breaks up with the defendant and wants her money back? Some fancy administrative shuffling is involved to essentially revoke the bond, locate someone else with some money, and substitute a new bond. The defendant may find himself sitting in jail a day or two while all this gets straightened out. Should the third party be allowed to lift the bond for any other reason than a demonstratable clear probability that the defendant will flee?

Forfeited Bonds

Chester County's one bondsman has a long string of forfeited bonds on his record that have not been collected by the court, according to Diem. He feels there is a strong constitutional issue involved. People who post 10% bonds and fail to appear automatically have their money forfeited. However, bondsmen and people who post property bonds seldom have their forfeitures acted upon.

Think Small?

Thinking back over his three years with the Bail Agency, Diem feels that starting small had a lot of advantages. It gave staff time to build good solid relationships with key people in the criminal justice system. However, it has had its disadvantages too. In a tight money economy it is very difficult justifying expansion of the program to meet the needs now that the base building work has been done. These two considerations provide quite a dilemma for the planner of new projects.

Retrieval Unit

The bail agency, like Philadelphia's, has a retrieval unit. These are people with arrest powers who bring in the defendants who have failed to appear. Diem feels that strong efforts should be made to bring in failures to appear so that they will not ruin a good working system.

Migrant Workers and the Spanish Speaking

Chester County is solidly in the migrant farmworker stream and is a center for mushroom growing. Mushroom pickers while not technically migrants under Pennsylvania definitions pose similar problems to a bail agency. What does a bail agency do with a client when they administer the traditional community roots questionnaire and find out--the client speaks no English, has been in the county and employed for three days, does not know the name of the employer, the name of any streets, has no telephone number nor can name anyone who has one.

The agency staff is bilingual to begin with. Beyond that they have not found a comfortable solution to the problem. The only technique that seems to work is to hold the defendant in jail and do a prolonged screening check

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DELAWARE COUNTY

Delaware County is another of the five Philadelphia area counties. It has two urban centers, Chester and Upper Darby. Chester, is highly industrial and has a large black population. Other parts of the county are suburban-rural.

Bondsmen Banned Five Years Ago

The can of worms was opened on bail corruption in the county back in 1972 and resulted in the county revising its bail system to exclude the professional bondsman. There are basically two available forms of release. Nominal Bond or R.O.R. is used in 50% of the cases. (ROR is the usual form, Nominal Bond is used for out of state people, generally across the nearby New Jersey border, because theoretically it gives bail officials the power of the bondsman to bring the defendant back without going through extradition proceedings.) The second form of release is with a 10% cash deposit. 1% is retained as a fee.

So how has the county survived without bondspeople? Joseph Nacchio, Director of the Delaware County Bail Agency estimates the failure to appear rate at 2.5%. That figure as in Philadelphia is based upon the number of hearings missed, not the number of missing defendants.

There is both an official Bail Agency and a bail fund in the county. The Delaware County Bail Agency has a staff of 18. It has no deputized retrieval unit. People who fail to appear are usually contacted by telephone and letters. One problem the agency faces is the decentralized minor judiciary. In an attempt to interview all defendants before arraignment the staff travels from District Justice to District Justice. They are generally clustered in Chester and Upper Darby but there are enough in outlying areas in the county to make this a real challenge. The use of "beepers" has helped keep field staff in communication with the central office.

Nacchio finds that a lot of the jail population are repeaters and it is not uncommon to find the client has a hold order or detainer from the parole or probation office which blocks release. His staff does nothing in those cases. Another problem is finding accurate background information on Philadelphia residents picked up in Delaware County. During the daytime they can call into Philadelphia Pretrial Services Computer. However since an average arraignment takes place at least six hours after arrest in Philadelphia and within three hours in Delaware County, the Philadelphia computer system is not geared to feed back the information in enough time.

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until some relative or friend finally finds the defendant in jail. That person then can seek out relatives or other contacts in the labor camp that could provide the appropriate contacts for release. Diem clearly sees the cultural conflict problem but does not see a solution to it absent active support from growers, farmworker unions, or other groups.

Information On Previous FTAs

Gathering accurate information on previous failures to appear is difficult for the program, especially if the defendant is from another county. Police rap sheets just list arrests but not how the case was disposed of. The program is not particularly interested in the number of previous arrests. It is concerned with whether or not the accused appeared in court for those cases. No centralized dispositions are available. Computer confidentiality regulations make it even more difficult to get the information from Philadelphia and other jurisdictions that have it in their computers, according to Diem.

Other Counties

Chester County seems to end up with a lot of defendants from other counties. Diem is eager to work out compacts or agreements with court or citizen based pretrial release agencies and supervising agencies in other counties so county lines will cease being insurmountable barriers to pretrial release.

DELEWARE COUNTY--from page 43

The agency's critics see political patronage and low staff motivation on behalf of clients as a real problem.

The bail fund is run by the Community Assistance Program in Chester. It is a small black community based operation which currently uses two pieces of property to bail out people if they are unable to persuade the District Justice into setting a Nominal Bond. In recent months the program slowed down, but is currently being reorganized under CAP's new director, Mort LeCote.

When its staff run into clients with detainers, according to staff person Laverne McNeil they will check into why the detainer was imposed. If it is to get the person to pay back court costs, they work out a payment arrangement. If it is for a probation or parole violation they check out why and try to see if by backing up the client with supervision or even finding a job they can obtain a release of the detainer. They have done so in some cases.

People bailed out through CAP are required to spend some time with the program. This usually involves attending classes which teach such skills as how to investigate your own case. Counseling and paralegal skills are developed wherever possible. At the same time staff seeks to open up jobs for ex-convicts with federal employers so more of their clients can gain employment. The bail fund is only one of the many justice related projects sponsored by this center.

Since the bondsman was banned back in 1972 the current Crime Commission's re-evaluations about corruption have had no effect on Delaware County.

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It makes you wonder when a judge who complains that he can not make ends meet on a $40,0000 salary requires an unemployed defendant to put up $1,000 bail to get out of jail.
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AND THEN THE LEGISLATURE...

As of this writing the legislature is not yet in session, but it looks like a promising year.

S.B. 65, Senator Eugene Scanlon (D) of Pittsburgh has prefiled a bill which would ban the bondsman. Then it would set up a statewide 10% cash deposit bail system. A minimum deposit of $25 would be required to cover processing costs. Upon discharge of the bond 90% of the deposit would be returned with a minimum amount of $5 retained by the Clerk of Courts. Fines and court costs would be deducted from the bond deposit before returning it.

Joseph Rhodes, (D) of Pittsburgh has declared his intention of reintroducing his bill, known last year as H.B. 982. That bill expands the right to release and for the most part eliminates money being used as a condition of release. (See 4 PJQ 26 (1975) for details.)

We will keep you posted of legislative developments in future issues.

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WHAT CAN YOU DO TO CHANGE THE BAIL SYSTEM in your state or home town. Call AFSC 412-232-3053 and ask for Paul Wahrhaftig.
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PRISONERS' RIGHTS COUNCIL SUIT

On October 26, Prisoners' Rights Council filed a class-action suit in the Federal Court in Philadelphia alleging that the Philadelphia prisons are violating the rights of prisoners. PRC states that the Philadelphia prisons deny their imprisoned electorate access to political candidates and campaign literature thereby forcing 2,000 people to vote in relative ignorance. Parties involved in the suit include residents of the Philadelphia prisons, former political candidates and the PRC. A temporary stipulation was worked out among all the parties involved for the distribution of campaign literature before the November 1976 election. Hearings are scheduled for December 1976. For further information contact Allan Lawson, (LO-3-0336.) (Reprinted from Connections.)

KENTUCKY AND THE BONDSMAN

H.B. 254 enacted by the General Assembly of the Commonwealth of Kentucky on February 4, 1976 begins with a preamble that in unusually clear language pinpoints many of the abuses of the bail system in that state. It could equally well describe the present Pennsylvania system.

WHEREAS,the people of the Commonwealth of Kentucky by ratification of the Judicial Article mandated a reform in the administration of justice including the pretrial release of citizens charged with bailable offenses; and

WHEREAS, the present system providing for the pretrial release was designed to fulfill the constitutional mandates that bail shall be allowed in all cases, other than capital offenses, in an amount to insure the presence of the defendants as ordered by the courts; and

WHEREAS, bail bondsmen have, in large part, pre-empted those constitutional mandates and have reaped huge profits from the bail bonding business to the detriment of the rights of many citizens and have been a major cause of corruption in the administration of justice; and

WHEREAS, the present system has become so dominated by the bail bondsmen that pretrial release of defendants on their own recognizance in cases involving minor offenses has been discouraged without regard to the likelihood that most defendants will appear as ordered by the court if released on their own recognizances, all for the purpose of creating profits for the bail bondsmen; and

WHEREAS, in many instances the present system financially burdens lower income persons charged with minor offenses by virtually requiring them to pay for the services of a bail bondsman without regard to the likelihood that they will appear as ordered by the court if released on their own recognizances; and

WHEREAS, the present system has otherwise fostered wide-spread abuse of the rights of the citizens of this Commonwealth through the corruptive

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PRETRIAL SERVICES IN KENTUCKY

Implementation of Statewide Bail Reform Statute

by-Stephen F. Wheeler

Because of the domination of the pretrial release process by the often corrupt practices of the bail bonding business, Kentucky has become the first state to adopt national criminal justice standards and has eliminated the practice of bail bonding for profit. In its place Kentucky has substituted a system which places this decision back into the hands of the judiciary while providing judges with the information they need to make a knowledgeable release decision. This new system will benefit not only those who are accused of committing wrong-doings, but will provide the community needed protection in this era of increasing criminal activity. While the amount of a bond must logically be commensurate with the nature of the alleged offense and cannot be oppressive, statutorily it must also be considerate of the past criminal acts and the reasonably anticipated conduct of the defendant.

Statutory Scheme

The new Kentucky statute is examined in the accompanying article in this issue, "Kentucky Bans the Bondsman."

Administration

The responsibility of administering this program rests with the judicial branch of government. Authority over the program has been statutorily placed in the Administrative Office of the Courts.

The Pretrial Services Agency has been structured along the lines of judicial circuits. The state's three major population centers (Louisville, Lexington, and Covington) have staffs adequate to provide constant 24-hour, 7-days-a-week service. In the rural areas, a single pretrial officer has been found adequate to service a two, three, or four county circuit. The statewide program, while as decentralized as possible, is directed by a three-member central staff working out of Frankfort.

This central staff is able to

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influences of the bail bondsman in violation of the spirit of the Kentucky Constitution guaranteeing the equal administration of justice; and

WHEREAS, it is the intent of the General Assembly of the Commonwealth of Kentucky to provide for a uniform workable system for affording persons charged with bailable offenses their constitutional rights to pretrial release that will insure appearances as ordered by the courts without imposing undue hardships upon those persons;

NOW, THEREFORE...

Bondsman Banned

The act then goes on to declare, "It shall be unlawful for any person to engage in the business of bail bondsman." A new bail system is established. Section 2 mandates that all trial courts shall provide pre-trial release investigation and services (bail agencies) and provides the money to do the job.

Methods of Release

Sec. 3 provides the available forms of release. Defendants are to be released on their own recognizance or on unsecured bail bonds "unless the court determines" that that would be insufficient to secure appearance." If ROR would not be sufficient the court may use any of the following alternatives: (1) place the person in custody of a designated person or organization agreeing to supervise him; (2) place restrictions on travel, association or place of abode; or (3) require execution of a bail bond.

At the discretion of the court the bond can be met with personal sureties, with a 10% deposit or a full cash deposit. "Personal Sureties" refers to the common rural practice of having one's friends post the arrestee's bond. At first glance it would appear that to ban the bondsman and still allow the court to set a bond requiring a full cash deposit would mean that many would not be released.

However, Sec. 4 governing the amount of bond seems to provide good protection. It specifies that while the amount of bond shall be sufficient to insure compliance, it shall be "not oppressive" and that it should be "considerate of the financial ability of the defendant." These two qualifications should give defendants grounds to challenge bail that is set beyond their means.

The end result is that Kentucky has done away with the professional bondsman. It has mandated the establishment of pretrial release agencies throughout the state and has provided a promising statutory framework. The statute is not radical and may not result in the immediate release of many more defendants than under the previous system, but it does provide some good tools for local courts and communities to work with to expand the universe of those released.

KENTUCKY STATUTE UPHELD IN COURT

Stephens vs. Bonding Association of Kentucky, Supreme Court of Kentucky, File No. 76-504 (1976)

Bondsmen challanged the act on due process grounds that it abolishes an entire business. The Court held that the legislature had acted within its inherent police powers (power to regulate regarding the health and welfare of its citizenry.) Exercise of such powers almost inevitably involves the destruction or limitation of property rights without hearing. There is no violation of the constitutional mandate (due process) if the police power is properly exercised. Waxing eloquent, the Court noted that the act "permits commercial bonding companies as surety for profit to go quickly and gently into that good night."

Copies of H.B. 254, of 1976 may be obtained from the Speakers Office, Kentucky Legislative Research Commission, State Capitol, Frankfort, Ky. 40601.

PRETRIAL SERVICES IN KY.--from page 45

coordinate the statewide program and make reasonable adjustments when problems arise. It provides a vehicle by which statewide statistics regarding the program's operation can be collected and evaluated. This staff also provides statewide supervision and assistance to the local programs. For example, it has recently conducted a personnel time utilization study for the Louisville program. That study will help the Agency in Louisville schedule its personnel more effectively and follow more efficient office procedures.

Community Input

A forum for the advancement of community ideas regarding pretrial release has been created in each county. Advisory boards composed of community leaders and justice officials regularly meet in each county and discuss the policies, procedures, and any deficiencies existing in the local program. These boards resultantly add a greater degree of operating flexibility within and among the local pretrial programs.

The agency administering pretrial services is basically assisting the trial bench reach a purely judicial decision. The agency serves as a neutral information gathering arm of the Court. It does not serve as an advocate for either the defendant or the Commonwealth. The agency gathers verified information that is used by the trial bench in reaching a knowledgeable release decision.

Considerable executive department support has been rendered to the pretrial agency. For example, the Bureau of Kentucky State Police has cooperated in the areas of criminal history verification and fugitive apprehension. The Bureau has provided a 7-days-a-week, 24-hours-a-day service for pretrial officers across the state through which the records of the central depository are available by telephone. Further, the State Police have established a uniform procedure for apprehending those who fail to appear for their court hearings. This latter effort has resulted in very few individuals jumping bail and remaining at large in the community.

Operating Procedure

The basic procedure utilized by the agency is patterned after several recognizance projects operating throughout the United States. After an arrested person is booked by the appropriate law enforcement agency, he is given the opportunity to be interviewed by a pretrial officer. He may accept or decline this opportunity. The interviewer collects data pertaining to the family, community, and economic ties of the defendant. After the information is gathered from the arrestee, the pretrial officer verifies its validity, and checks the defendant's past criminal record. Once the information is verified, it is given to the appropriate trial judge. He then makes the release decision.

Once the release decision is made, the pretrial officer routinely notifies each defendant of his court appearance date, and monitors their appearances. If an individual fails to make his appearance, and if he can not be located by the pretrial officer, law enforcement agencies are notified. In most instances, the pretrial officer will secure a bail jumping warrant against the defendant who fails to appear.

If the defendant declines his opportunity to be interviewed, is found ineligible by the program, or is rejected by the trial judge for recognizance release, he may be released by any of the alternative methods spelled out in the statute. Statutorily, he also has the right to have the release decision reviewed after 24 hours if he remains incarcerated.

Preliminary Results

This agency began to operate on June 19, 1976. Since its beginning, roughly one-fourth of all incarcerated persons in the Commonwealth have secured their release prior to trial without having to put down a monetary deposit. Jail populations have decreased throughout Kentucky. While accurate figures were not kept (or at least never reported) by the commercial bonding companies on the rate their clients jumped bail, testimony given during the legislative hearings indicated a range of between 2% and 25%. The pretrial agency has recorded an appearance rate exceeding 98% during its first three months of operation.

Editors Note--

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COST BENEFIT STUDIES

COMPILED BY THE NAPSA RESEARCH
AND EVALUATION COMMITTEE

This compilation was prepared for the participants of the 1977 National Conference on Pretrial Release and Diversion.

COST BENEFIT STUDIES

During past NAPSA Conferences, there has been an expressed interest in how to prepare cost benefit studies. The following examples are included to assist members to develop appropriate methodologies for their respective jurisdictions.

The studies were collected and edited by members of the NAPSA Research and Evaluation Committee.

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Cost-Benefit Analysis and Alternatives to Incarceration

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HISTORICALLY, the confinement of an individual in a small cell behind a large wall segregated from the rest of society for the purported benefit of society was rationalized and condoned because it satisfied a public retributive urge, compelled conformity to "social norms," deterred other potential law violators, and allowed preventive imprisonment of dangerous persons. The philosophical trend then turned away from each of these rationales, and thoughtful and humane scholars, administrators, and clinicians justified incarcerating facilities solely on their rehabilitative potential. While rehabilitation remains a meritorious goal, the impartial observer would have to be disillusioned, if not totally dissatisfied, with the ineffectiveness of institutionalization in this area.

Martinson's recent article in *Public Interest*, "What Works?—Questions and Answers About Prison Reform," (Spring 1974), deals extensively with the effects of rehabilitative treatment on recidivism, "the phenomenon which reflects most directly how well our present treatment programs are performing the task of rehabilitation" (p. 24). Based on 231 studies during the period 1945 to 1967 whose focuses ranged from "institutional" environmental changes to decarceration, he writes that "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism" (p. 25). The "most" that can be said in support

of many of these programs is that the participants "do no worse" than their counterparts in traditional institutional settings. However, not one beneficial element was established; "even in the case of treatment programs administered outside penal institutions, we simply cannot say that this treatment in itself has an appreciable effect on offender behavior" (p. 47). Logically, this study suggests that "if we can't do more for (and to) offenders, at least we can safely do less" (p. 48).

The President's Commission on Law Enforcement and the Administration of Justice, in *The Challenge of Crime in a Free Society* (Washington, D.C., 1967), emphasized on several occasions that while imprisonment does not effectively rehabilitate or deter, it may possess destructive potential: "life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading . . . . The conditions in which [inmates] live are the poorest preparation for their successful reentry into society, and often merely reinforce in them a pattern of manipulation and destructiveness." Based on comments like these and society's social conscience and desire to be humane, various criminal justice communities have, in recent years, begun what may broadly be called "Alternatives to Incarceration." The National Task Force on Higher Education and Criminal Justice, in its "What are the Alternatives to Incarceration," (New York, N.Y., mimeo, no date), has listed 16 different alternatives which include "forms of respites from being locked up and ways to get people out early as well as alternatives in the pure sense" (p. 1).

These alternatives need some stable ground on which they can be compared. Since their substantive rehabilitative character, recidivism, cannot be truly measured yet, and the most that can be said of the most rigorous research design is that offenders do "as well" in the community or at least "no worse" than they do in traditional institutions, a cost-benefit study may give legislators and criminologists grounds to compare the only variables which are measurable at this time.

Given the fact that traditional institutions are not doing the job of rehabilitating offenders, a less costly, less personally damaging alternative should naturally be utilized whenever it is at least as effective as imprisonment. Until one type of incarceration is shown to be more effective than another, a major criterion for evaluation will have to be comparative cost.

Why a Cost-Benefit Analysis?

While there is no settled definition of cost-benefit analysis, this type of study generally requires (1) an assessment of the respective "costs and benefits" of the alternatives to be compared, and (2) the formulation and application of "criteria of choice" which are designed to discriminate between the alternatives on the basis of the net benefits associated with them. In effect, a cost-benefit analysis is a comparative listing and measuring of the economic pros and cons of projects reduced to a single monetary dimension. All this effort leads to a rational choice between alternative courses of action.

Project Scope

The obvious difficulty in any cost-benefit analysis is determining variables to be measured and then designing methods to accurately measure them. It is suggested that there are three relevant points of view in any correctional study of this nature—government, society, and the individual (the person incarcerated)—which influence the selection of variables to be measured. Each point of view has its own distinctive costs and benefits, some of which are directly measurable, some of which are indirectly measurable and some of which are not measurable at all.

To be precise with regard to "point of view" the following operational definitions have been formulated:

A. *Governmental Point of View:* Those costs and benefits which affect the flow of funds of local, State, or Federal governments.

B. *Societal Point of View:* Those costs and benefits which affect national income or accumulated wealth of society.

C. *Individual Point of View:* Those costs and benefits which affect the personal income or the accumulated wealth of the convicted criminal or his or her family.

Much of the confusion surrounding cost-benefit calculations can be overcome by clearly specifying what point of view is being taken by the program's evaluators. Cost-benefit calculations will clearly differ depending on the point of view chosen, and a thorough evaluation of programs should necessarily present all three points of view defined here.

In addition to the need to be explicit as to the point of view chosen by the evaluators, a cost-benefit analysis should clearly distinguish between

primary, secondary, and tertiary costs and benefits. As an example of the type of explicitness that is believed to be essential, consider the operational definitions adopted for primary, secondary, and tertiary costs and benefits for program evaluation from the three points of view, as shown in table 1 below.

A number of fundamental concepts of cost benefit accounting, as opposed to fiscal accounting, are utilized in table 1. Only costs or benefits that are directly attributable to a given program are to be counted. These relevant, incremental costs and benefits are economic losses or gains which will result from the implementation of a given program immediately, as well as those losses or gains that will occur in the future. To establish a framework for counting the economic costs and benefits it is helpful to think of the effect a given program will have on the current and future budgets of the government, the convicted individual (or family) or, more broadly, society as a whole. From any of these three viewpoints, expenditures attributable to a specific program represent money diverted from alternative uses. Economic gains or benefits represent monetary increases that would not otherwise occur.

TABLE 1.—*Classification and specification of costs and benefits*

I. *Governmental Point of View*—those costs and benefits which affect the flow of funds of local, State, and Federal governments.

A. Costs	B. Benefits
1. *Primary*—those present and expected future fiscal budget dollar outlays directly attributable to a given criminal justice program.	1. *Primary*—those present and expected future fiscal budget cost reductions directly attributable to a given criminal justice system.
2. *Secondary*—those measurable and expected future direct or opportunity costs not appearing in reported fiscal budgets but directly attributable to a given criminal justice program.	2. *Secondary*—those measurable present and expected future economic gains, other than cost reductions, directly attributable to a given criminal justice program.
3. *Tertiary*—those *un*measurable present and expected future costs directly attributable to a given criminal justice program.	3. *Tertiary*—those *un*measurable present and expected future gains directly attributable to a given criminal justice program.

II. *Societal Point of View*—those costs and benefits which affect national income or accumulated wealth of society.

A. Costs	B. Benefits
1. *Primary*—those present and expected future fiscal budget dollar outlays which represent a diversion of national income (wealth or services).	1. *Primary*—those present and expected future fiscal budget dollar gains of national income (wealth or services).
2. *Secondary*—those measurable present and expected future direct or opportunity costs not appearing in reported fiscal budgets.	2. *Secondary*—those measurable present and expected future economic gains, other than cost reductions, directly attributable to a given criminal justice program.
3. *Tertiary*—those *un*measurable present and expected future costs directly attributable to a given criminal justice program.	3. *Tertiary*—those *un*measurable gains directly attributable to a given criminal justice program.

III. *Individual Point of View*—those costs and benefits which affect the personal income or the accumulated wealth of the convicted criminal or his or her family.

A. Costs	B. Benefits
1. *Primary*—those present and expected future personal or family expenditures that are increased by participation in a given criminal justice program.	1. *Primary*—those present and expected future personal or family expenditure reductions directly attributable to a given criminal justice program.
2. *Secondary*—those measurable present and expected future opportunity costs to the convicted criminal or his or her family.	2. *Secondary*—those measurable present and expected future economic gains to the convicted criminal or his or her family, other than cost reductions, directly attributable to a given criminal justice program.
3. *Tertiary*—those *un*measurable present and expected future costs to the convicted criminal or his or her family directly attributable to a given criminal justice program.	3. *Tertiary*—those *un*measurable gains to the convicted criminal or his or her family directly attributable to a given criminal justice program.

Information Requirements

Program evaluators in the criminal justice sys-

TABLE 2.—*Cost and benefit factors*

Costs	Sources of Information	Benefits
Government Viewpoint		
I. *Primary*		I. *Primary*
A. Capital Expenditures		A. Any reduction in budgeted costs as shown in the column opposite.
1. Land	(1) (2)	
2. Building	(1) (2)	
3. Other fixtures	(1) (2)	
4. Renovations	(1) (2)	
5. Other repairs	(1) (2)	
B. Operating Expenses		
1. Custodial Costs		
a. Food	(1)	
b. Clothing	(1)	
c. Utilities	(1)	
d. Salaries & Fringes	(1)	
e. Supplies (admin.)	(1)	
f. Staff travel and education	(1)	
g. Miscellaneous	(1)	
C. Other Budgeted Items	(1)	
II. *Secondary*		II. *Secondary*
A. Costs of other components of the criminal justice system		A. Any reduction in direct or opportunity costs as shown in the column opposite.
1. Holdover costs	(1) of other inst.	
2. Supervision costs	(1)	
3. Transportation	(1)	
4. Court costs	(1)	
B. Training costs of correctional personnel	(1) (8)	
C. Lost tax revenue		
1. Land	(2)	
2. Income	(2)	
D. Damage to facilities due to riots or other destruction	(2)	
E. Loss of interest on dollars spent in corrections	Total costs (1)	
F. Transfer payments		
1. Welfare		
2. Social Security		
G. Government losses as a result of increased crime severity caused by incarceration: additional prevention, detection, and processing costs	(1) (2) (3) (7)	
III. *Tertiary*		III. *Tertiary*
Unmeasurable costs beyond the scope of the study		Unmeasurable benefits beyond the scope of the study
Societal Viewpoint		
I. *Primary*		I. *Primary*
Consider each of the budgeted items—governmental point of view	(1) (2)	Consider each of the budgeted items —governmental point of view
II. *Secondary*		II. *Secondary*
A. Community loss of volunteer personnel, i.e., doctors, students, psychologists, etc.	(3) (4)	Any reduction in direct or opportunity costs as shown in the column opposite
B. Lost income or productive value	(6) (2)	
C. Potential damage to the community	(7) (9)	
D. Increased crime costs	(3)	
III. *Tertiary*		III. *Tertiary*
Unmeasurable costs beyond the scope of the study		Unmeasurable benefits beyond the scope of the study
Individual Viewpoint		
I. *Primary*		I. *Primary*
Additional personal or family expenditures	(5)	Reduced personal or family expenditures and wages earned while a program participant
II. *Secondary*		II. *Secondary*
A. Present and future direct income lost	(7) (9)	Increased lifetime earnings due to program
B. Loss of other family income	(5)	
III. *Tertiary*		III. *Tertiary*
Unmeasurable costs to individual and family		Any unmeasurable gains

tem rarely (if ever)[1] consider more than primary costs and benefits and usually do so only from the perspective of the government rather than from the perspective of the convicted individual or society as a whole. This is undoubtedly due to the problem of access to timely cost information, the lack of program followup in the context of a controlled experimental design, and the uncertainty surrounding estimates of secondary and tertiary costs and benefits.

The detail called for in cost-benefit accounting goes far beyond information currently available to most criminal justice program evaluators. Listed below are the types of information necessary to implement a thorough cost-benefit analysis:

(1) Institutional budgets—line and program.
(2) Estimated land, building, and equipment valuation.
(3) Supportive criminal justice system costs.
(4) Valuation of volunteer services.
(5) Demographic information of program participants and families.
(6) Employment profile of program participants.
(7) Criminal records of program participants.
(8) Grants and other sources of nonbudgeted income to the program.
(9) Valuation of criminal activity in economic terms.

Table 2 utilizes the classification and specification scheme for costs and benefits (i.e., primary, secondary, tertiary, governmental, societal, individual) and identifies specific sources of information according to the numbers in the list given above.

Case Examples

A recently published bibliography, *The Economics of Crime and Corrections* (Washington, Correctional Economics Center of the American Bar Association's Commission on Correctional Facilities, September 1974), lists less than two dozen completed cost-benefit studies related to the criminal justice system. Many are as yet unpublished; not all deal with the United States; and only three explicitly focus on the evaluation of alternatives to incarceration. The lack of published studies (especially in the area of alternatives to incarceration) may reflect the dual faith that there is both a "sharp contrast between per capita costs of custody and any kind of community program" (Washington, *Report on Corrections*, National Advisory Commission on Criminal Justice Standards and Goals, 1973, p. 222), and that benefits from community corrections will outweigh those obtained from traditional forms of incarceration. Any alternative that reduces costs and increases benefits while not adding public risks would certainly seem worthy of adoption without resorting to elaborate cost benefit calculations. But costs and benefits often require closer scrutiny than reported budgets or purported benefits allow. Martinson's dishearteningly negative findings on the effect of rehabilitative treatment on recidivism is a good example.

As a first illustration of the cost-benefit analysis framework discussed above, consider only the average per capita primary cost from a governmental viewpoint in 1972 of operating a traditional house of correction and a prerelease program in the State of Massachusetts. Utilizing the reported budgets of both institutions gave an average cost per inmate of $6,964 per year for the house of correction and $6,164 for the prerelease center. Yet hidden costs of operation and the opportunity cost (or loss) resulting to the government because of property and income taxes foregone, increased the average cost per inmate in the house of correction to $10,190, and in the prerelease center to $11,458. Tables 3 and 4 show the original budgeted expenditures and the adjustments made to more completely reflect all primary and secondary costs. Clearly, this is just an isolated example from which no inference other than that of the unreliability and incompleteness of reported institutional budgeted expenditures should be drawn. Without any measurement of the benefits and risks of each program, and of the compatability of offender profiles, an informed comparison of programs simply cannot be made. Nevertheless, a 46 percent cost understatement in the case of the house of correction and a 55 percent cost understatement for the prerelease center, suggest that cost benefit calculations must go deeper than institutional budgets.

TABLE 3.—*Governmental costs house of correction*

1.	Budget (1972)	$1,580,768	
2.	Supplementary budget	52,800	
3.	Reported total yearly institutional costs		1,633,568
4.	Personnel not on budget	46,571	
5.	Expenditures unrelated to house of correction	(62,326)	
6.	State grants expenditure	27,500	
7.	Federal grants expenditure	266,560	
8.	Total additional direct program expenditures		278,305
9.	Total Primary Goverment Costs		1,911,873
10.	Additional public assistance payments due to incarceration	28,170	
11.	Property tax loss	266,742	
12.	Income tax loss	106,236	
13.	Total Secondary Goverment Costs		401,148
14.	Total Primary and Secondary Government Costs		$2,313,021

TABLE 4.—*Governmental costs prerelease center*

1.	Budget (1972)	$73,970	
2.	Personnel not on the budget	41,250	
3.	Unbudgeted expenses	2,504	
4.	Revenue from rent paid by program participants	(7,800)	
5.	Total Primary Goverment Costs		109,924
6.	Additional public assistance payments due to incarceration	3,276	
7.	Property tax loss	1,377	
8.	Total Secondary Goverment Costs		4,653
9.	Total Primary and Secondary Goverment Costs		$114,577

A 90-day manpower training program for first offenders (John F. Holahan, *op. cit.*) presents a second partial example of the cost-benefit classification scheme presented here. Holahan evaluated costs and benefits from the viewpoint of society, society (noncriminal), and program participants, and utilized an experimental and (quasi) control group for his study. It would have been a simple matter to include the government viewpoint but here we shall only concentrate on total society cost and benefits.

Societal primary costs directly attributable to the program amounted to $507 per capita after proper allocation of joint costs (two distinct programs were in operation). Societal benefits were heroically evaluated by examining diversion and recidivism cost differences between the experimental and control groups for:

(1) Welfare costs of thefts.
(2) Police costs.
(3) Court costs.
(4) Corrections costs.
(5) Probation and parole costs.
(6) Physical injury; property damage costs.

As benefits were expected to accrue to society in different time periods, Holahan discounted them to present values by utilizing high, medium, and low (15 percent, 10 percent, 5 percent) interest rates. At a 10 percent interest rate the present value of these primary benefits amounted to $228 per person. A final source of societal benefits resulted from an estimate of earnings differentials due to the education or tutoring assistance provided to program participants. At a 10 percent interest rate these secondary benefits amounted to $371 per person. Benefit to cost ratios ranged from 1.8 to 2.2, depending upon the interest rate, and indicated that the program was an efficient use of society's resources.

Further illustrations of cost-benefit analysis to probation subsidy, diversion, and supported work programs are presented in a recent American Bar Association Correctional Economics Center publication, *Cost-Benefit Analysis* (Washington, May 1974). This organization is also expected to publish a handbook for cost-benefit analysis based on the classifications presented in this article, in the near future.

Conclusion

The approximately two and a half billion dollars spent each year for correctional activities probably grossly underestimates the true costs of such programs to society. Yet this huge direct and indirect appropriation of resources is used to support a multitude of competing and complementary programs and institutions, with few rational guidelines available to help decide on the relative allocation of funds. Cost-benefit analysis is a method of program evaluation that can help to determine the most efficient use of resources. The thrust of the preceding article has been towards making cost-benefit analyses more uniform in their approach through the adoption of clear cost and benefit categories and unambiguous points of view. Without such standardization, cost-benefit comparisons of correctional programs may be only confusing and subjective exercises. Cost-benefit analysis can be a partial aid to responsible officials faced with comparing and screening out human resources oriented programs. But even the most meticulous and ingenious measure of the fiscal merits of a particular program cannot and should not ever be the sole criterion of program evaluation; for what is *not* measurable or testable may, in the end, be what is most important.

[1] John F. Holahan's *A Benefit-Cost Analysis of Project Crossroads* (Washington, D.C., National Committee for Children and Youth, 1970) is a notable exception.

VI

GRANTS ADMINISTRATION, FEDERAL REVIEW, COSTS

Grants Administration

The District Attorney's Diversionary and Release on Recognizance Program has demonstrated during this evaluation period efficient grants management techniques. No serious problems as a result of assuming responsibility for the ROR function have occurred. Both Fiscal and Narrative Progress reports have been submitted in a timely and efficient manner, and no unnecessary budget adjustment requests have been submitted. Program and fiscal records are maintained in an excellent manner which facilitates both monitoring and review. The administrative staff is knowledgeable, professional, and helpful.

Federal Review

On March 13 and 14, 1975 the program was visited by the Law Enforcement Assistance Administration, Dallas Regional Office Monitor, for the purpose of preparing an on-site monitoring report. This report was completed on June 6, 1975 and was received in this office during February, 1976.[23]

Specific recommendations made in this report are as follows:

1. Grant adjustment notification should be immediately forwarded to NOCJCC, the SPA, and LEAA.

2. The recordkeeping system in the Release-on-Recognizance Unit should be modified to keep a current list of those persons currently on Release-on-Recognizance status. It was found by this review that this information was not being kept. It was brought to the attention of the evaluator that he should be able to, at the close of any date, show how many participants are actually in active R.O.R. status.

3. The District Attorney's Office should immediately find its Affirmative Action Plan and a copy of its certification of such plan and have them available for any future monitoring visits.

4. The present policy that all participants in the diversion program go on the computer and their records kept on it forever, in this monitor's opinion, should be modified. Said records should be made available only to the District Attorney's Office and to other law enforcement agencies within the NOCJCC system. These records should not be made available, as presently they are, to anyone making a background check on a person who was in the diversion program. This appears to be contrary to the goal of the program in that if a person successfully completes the program, the case is dismissed. This information is made available to anyone requesting information on a person who has gone through the program. Hence, it can serve as a roadblock toward any future job-seeking ability or job placement of the person who successfully went through the diversionary program.

5. The District Attorney should make immediate efforts to have this program funded within its budget or by the City of New Orleans when present funding expires.

Concerning these recommendations, the program responded that recommendations numbers one, two, and three have been implemented.[24] In response to recommendation number four, the

[23] U. S. Government Memorandum, Department of Justice, LEAA, June 6, 1975, "On-site Monitoring Report 72-ED-06-0017-TA-11, District Attorney's Diversionary and Release on Recognizance Program," from R06 Courts Specialist, Fred L. Lander, III.

[24] Letter dated April 2, 1976, "District Attorney's Office Diversionary and ROR Program," from William F. Wessel, First Assistant District Attorney.

program agrees in concept but asserts that they "have no control over what other agencies do who have access to that information." Recommendation number five concerning future funding was attempted. Neither the City of New Orleans nor the District Attorney's Office have the financial resources at this time to assume total financial support for this program. In lieu of total financial assumption, State Bloc funds were applied for and received.

Costs

Cost or cost/benefit analyses are probably the most difficult of evaluative tasks, particularly in preliminary reports. In support of this difficulty, it should be pointed out that only two serious attempts have been made nationally for diversionary programs, and none for ROR programs. Several factors act to limit cost analysis of the New Orleans program. First is the preliminary nature of this report. Until more individuals are terminated from the program, it is impossible to create a cost scheme based on successful terminations. Secondly, the dual service aspect of the program (ROR and diversion) causes problems in prorating costs for each function. Third, the lack of bail bonding information available in the local environment is small and its validity highly questionable. Fourth, the cost of processing one individual through each relevant agency of the criminal justice system is speculative. Even a simple cost per case based on operating budgets is difficult because of multiple funding sources which have developed as a result of city, state, fines and fees, and federal grant revenues. Lastly, and common to all programs of this type, is that no adequate measure of social costs has been developed.

In view of the above mentioned problems, any comparative costs or cost/benefit analysis of the DADPROR at this point should be treated as preliminary, tentative, and tenuous. However, in order to aid in the development of a realistic cost appraisal of this program, it is incumbent that some method be posited which will stimulate reactions which will hopefully lead to constructive criticism for further refinement and improvement of the method. Based on data available to the evaluator, the following procedure and result is suggested. While the method and the results are subject to improvement and change, it is felt that it does provide a benchmark for preliminary comparisons.

The following assumptions provide a starting point for the analysis:

A.1. Since enough clients in the diversionary program have not yet terminated, it is assumed for the purposes here that all active clients will be successful

A.2. It is assumed that the proportions of clients in the diversionary program who would have gone to court, those found guilty, and sentences received are proportional to the comparison group. Although this would bias results somewhat in favor of the program, it does provide the closest rationale for proportional judicial handling.

A.3. Because of the dual nature of the program, it is assumed that the diversionary function accounts for 63 per cent of budgeted funds and the ROR function 37 per cent. This divison is based primarily on the funds expended for personnel costs.

1. Costs per client in project

Funds expended during this period amounted to $80,914 (not including in-kind match). Prorating the costs by function would mean that $50,976 is attributable to the diversionary function and $29,938 to the ROR function. The number of clients served under the diversionary function is computed to be 143 successful clients (154 minus 11 unsuccessful terminations). The number of successful ROR'd clients is computed at 1,433 (1,498 less those who missed court appearances and forfeited bond). Thus, hypothetically, the cost per client for each function was $356 for diversionary clients and $21 for each ROR'd client. It should be pointed out that this is hypothetical for two reasons: one, in-kind match is not included so this represents LEAA cash outlay only; two, although functionally separated, the ROR function acts as an initial screening and referral source for DADP. These functions will be combined later in this analysis to form an aggregate cost/benefit ratio for comparative purposes.

2. Costs of judicial processing

In order to determine the costs for normal judicial processing, it is necessary to arrive at separate costs for the various elements of the system and then combine them to form an aggregate or system costs. In the discussion below of each system element, the logic of arriving at a cost is explained. The methods for the most part are simplistic and in need of refinement. The proration of costs for DADPROR clients is based on the results of the processing for the comparison group previously discussed in Section V and in Tables 7, 8, and 9. One serious drawback for determining comparative costs for ROR is the lack of data on average cash bonds for similar charges and the percentage of bonds forfeited.

a. Costs to the District Attorney's Office[25]

The per capita costs for prosecuting was arrived at by dividing the District Attorney's operating budget by the number of terminations. This yielded a per capita cost of prosecuting at $220. Since the comparison group indicated that between 38 per cent to 66 per cent of those diverted would actually be prosecuted, an average of 52 per cent is used here. That is, 52 per cent of 143 successful clients would have actually been prosecuted, or 74 individuals would have faced a judge or jury trial. Since the comparison group indicated that about half of the defendants had a judge trial and half a jury trial, and since that is generally the breakdown for all cases tried, the costs for either to the District Attorney's

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[25]Source: Orleans Parish District Attorney's Operating Budget and Louisiana Criminal Justice Information System Report, Prosecutive Dispositional Summary, 1975.

Office would remain stable. This recognizes that there are costs differences for judge and jury trials; but by using the $220 as an average, some correction for biases in either direction should be ameliorated. By multiplying the average cost, $220, by the number of clients who would hypothetically have gone to trial, a cost of $16,280 is computed as prosecution costs.

b. Costs to the Criminal District Court[26]

The cost for the Criminal District Court for processing was computed in essentially the same manner as prosecution costs. An average of $1,921 per client was derived as a total cost to the court of $142,154.

c. Costs to the Orleans Indigent Defender Program[27]

The average cost for indigent defense per client was obtained by dividing its operating budget by the number of clients defended. To obtain the hypothetical program cost, it is suggested that 15 per cent of the program participants would have required indigent defense. This is based on an average of 10 per cent of the clients being unemployed at the time of program acceptance and an additional five per cent to account for

[26]Source: Orleans Parish Criminal District Court Operating Budget and Louisiana Criminal Justice Information System Report, Judicial Disposition Summary, 1975.

[27]Source: Orleans Parish Indigent Defender Program Operating Budget and Administrative Records.

low paying jobs held by the remainder. The cost to the Indigent Defender Program is computed as the average cost per client, $194 times the number of projected eligible clients, 11, or a total cost of $2,134.

d. Costs to the Clerk of Court[28]

Administrative costs were computed by dividing the operating budget by the number of transactions in the clerk's office. While the duties of the clerk assume a variety of forms, all of which are not related specifically to trials, it is felt that this method, at present, gives a low estimate of his costs. Costs for the clerk, then, amount to transactional costs, $52, times the number of eligible clients for a total of $3,848.

e. Costs to Orleans Parish Prison[29]

Costs to the Parish Prison as they relate to the diversionary program were computed by taking the average cost per day per inmate, $12, and multiplying this by the estimated number of days that would have been served by diversionary clients, 3,602. The number of days was calculated based on the length of sentences involving

[28]Source: Orleans Parish Clerk of Court Operating Budget and LCJIS District Attorney's Disposition Reports, 1975.

[29]Source: Orleans Parish Criminal Sheriff's Operating Budget, administrative records, and CJCC files.

confinement, less good time, for the comparison group. It is estimated, based on the comparison group, that nine per cent of those individuals going to trial would receive confinement, or a total of seven diversionary clients. Therefore, the total Parish Prison costs are calculated by multiplying the average daily costs, $12, times the estimated number of days (515 X 7) or 3,605, for a total cost of $43,260.

Costs for pre-trial incarceration are considerably more difficult to compute, mainly because of great time differences (for example, release within eight hours up to 90 days) for time spent in the Central Lock-Up and the Parish Prison. This, obviously, is a function of the seriousness of the charge. Keeping in mind that those released on ROR are minor offenders, costs for pre-trial detention were computed in the following manner. Costs for Central Lock-Up time were not computed because of difficulty in obtaining reliable data as to per capita costs and by the fact that most arrestees are released or transferred to Parish Prison within 8 to 24 hours of confinement. at the lock-up.[30] It is believed that cost differential is compensated for in the estimated costs for pre-trial time at Parish Prison. It is estimated that approximately 43 per cent[31] of those individuals ROR'd would have spent pre-trial time in Parish Prison. The average number of days spent by pre-trial inmates for offenses similar to those alleged to have been committed by ROR'd persons is 36.7 days.[32] Therefore, pre-trial detention costs are determined by multiplying the estimated number of ROR clients confined (43 per cent of 1,433) or 616 times the average number of days pre-trial confinement, 36.7, times the per capita cost per day, $12, and arriving at a pre-trial cost for those ROR'd of $271,286.

f. Costs to State Probation Office[33]

The average cost per probation to the State Department of Corrections is $245 per probationer. The per cent of the comparison group that was placed on active probation was 37 per cent. Therefore, it is estimated that 27 diversionary clients would have been placed on active probation for a total probation cost of $6,615.

g. Social costs and forfeited bonds

No attempt is made in this presentation to arrive at social costs for each of the programmatic functions. The lack of methodology and the non-quantifiable nature of these costs are more appropriately considered in a normative discourse rather than an empirical investigation. Without a doubt, some social costs could be quantified such as estimated value of property which might

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[30] Source: A Study of Correctional Design and Utilization in New Orleans - Years 1975/2000, prepared by Curtis and Davis, architects and planners, and SUA, Inc., April, 1975, particularly Part I, Section B.

[31] Ibid.

[32] Ibid.

[33] Source: Louisiana State Department of Corrections, Research and Statistics Section.

be stolen, lost income, welfare payments, etc., but the subjective estimation of these variables would extremely complicate an already tenuous and abstract empirical investigation. It is felt, however, by the evaluator, that some compensation for these costs is made in the over-estimation of system costs. This, in no way, is meant to detract from either the restitution provision of the diversionary function or the offsetting revenue generating capacity of the client's fee required. In terms of lost revenue as a result of bond forfeitures that the over-estimation of both the number of ROR'd clients suggested as receiving pre-trial detention and the average number of days confined helps to offset these related costs.

h. Lost revenues

As a result of diverting persons from the criminal justice process, revenue in the form of fines is lost. Although the resultant loss does not offset cost savings, it should be included as a deduction. By taking the average fine, $754, and multiplying by the number of individuals expected to receive a fine, 25 per cent, or 18, lost revenue is estimated to be $13,572. Lost revenue in terms of interest charged by bail bondsmen and attorney fees is not computed in this preliminary analysis because of non-available data. Hopefully, this can be included in later refinements of this method.

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[34]Source: Estimated from Orleans Parish District Attorney's fines and fees and from LCJIS Sentence Analysis, 1975.

3. Comparative cost summary

The cost for the diversion portion of the program was estimated to be $50,976 and for ROR, $29,938. This is a cost per client of $356 for diversionary clients and $21 for ROR'd individuals. System costs for diversion are computed as follows:

District Attorney's cost	= $ 16,280
Judicial cost	= $142,154
Indigent Defense cost	= $ 2,134
Clerk of Court cost	= $ 3,848
Parish Prison cost	= $ 43,260
Probation cost	= $ 6,615
Less lost revenue	= $ 13,572
DADP estimated processing costs	= $200,719

For the ROR function, the cost of normal processing is estimated at $271,286. Comparative costs for the two functions equal an actual cost of $50,976 for DADP versus an estimated normal judicial processing cost of $200,719 and an actual cost for ROR of $29,938 and an estimated normal cost of $271,286.

4. Comparative cost/benefit analysis

A cost/benefit ratio is derived by merely dividing the estimated cost of normal processing by project costs. In the case of the DADP function, this would be computed by dividing $200,719 by $50,976 for a cost benefit ratio of 1:3.93 normally expressed only as 3.93. In this type of analysis, the larger the number, the more positive is the cost/benefit ratio.

ROR, it is computed as 9.06. By combining the functions order to reach a cost/benefit analysis for the entire program, a figure of 5.83 is obtained. If the combined total is adjusted to include in-kind match funds, the resultant cost/benefit figure is 4.0.[35]

This estimated cost/benefit ratio compares favorably to other programs. The Dade County Pre-trial Intervention Project in Miami, Florida reports a cost/benefit ratio of 2.19;[36] and Project Crossroads in Washington, D. C. reports 1.2.[37] It is stressed here that differences in methodology may account for some variance as do the number of clients served by each program and the number of services performed. Comparison with Dade County is probably more realistic because of size, scope of services, and similar methodology. Because of the experimental nature of the method suggested here, it is stressed that based on this analysis no inference is made to the worth of one project over another. It is suggested, given the high cost of justice in Orleans Parish that it does give a point of departure through which, with modifications, it may be possible to assist decision-makers in choosing between alternative programs in criminal justice, and setting priorities.

In conclusion, it must be emphasized that cost/benefit analysis and comparative costs are not measures of cost savings. This is true for many reasons, but notably because cost comparisons, particularly in complex systems, are hypothetical in that they tend to imitate reality not mirror it. In addition, in order to assume cost savings, it is necessary to proceed from zero based budgeting formula which is impossible to assess in on-going systems. In addition, many assumptions are required to be made prior to structuring a benefit analysis and those assumptions are influenced to a large extent by the availability of data. The availablity of data limits actual cost information in that averages and estimates must be used. Lastly, in the preceeding analysis, the question of benefits was neglected for the same reasons as social costs were neglecte In further refinements of this technique, it should be possible to produce a useful tool to aid in the decision-making process. In terms of the program being evaluated, the preliminary evidence presented here indicates that the program is achieving cost effectiveness when compared to local processes and comparable programs.

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[35] For a review of a methodology similar to that used here, see "Pre-trial Intervention Program, Eleventh Judicial Circuit, Dade County, Florida," in Source Book in Pre-trial Criminal Justice Intervention Techniques and Action Programs, p. 21, published by the American Bar Association, June, 1975, and in the same volume, Daniel Glaser, "Routinizing Evaluation: Getting Feedback on Effectiveness of Crime and Delinquency Programs," p. 190.

[36] Ibid., p. 25.

[37] American Bar Association's Descriptive Profiles on Criminal Justice Intervention Programs, op. cit., p. 25.

85596

PRETRIAL SERVICES PROGRAM

DENVER, COLORADO

COST BENEFITS AND EFFECTIVENESS

LEAA FUNDED

Grant # 75-66 75-67

Colorado State Judicial Department

August 1976

CRM

PRETRIAL SERVICES PROGRAM
COST BENEFITS AND EFFECTIVENESS

The determination of the cost benefit and cost effectiveness of the Pretrial Services Program (PTSP) in Denver may be viewed in several areas. The first, and most important, is the immediate savings to the General Fund expenditures of the City and County of Denver. The second is the long-range cost savings to the City and County of Denver. The third is the savings to the individuals in the criminal justice system who, until adjudication, are presumed innocent.

The cost for each individual in the criminal justice system must be accounted for in the following areas:

- cost of adequate defense
- cost of prosecution
- cost of adjudication
- cost of court services
- cost of detention prior to adjudication
- cost of correctional facilities after adjudication
- cost to the accused

The operation of the Pretrial Services Program directly effects the cost of adjudication, cost of court services, cost of detention prior to adjudication, and the cost to the accused. In addition, various aspects of its operation indirectly effect the cost of adequate defense, prosecution, and the cost of correctional facilities after adjudication.

COSTS OF DETENTION PRIOR TO ADJUDICATION

According to information given to the Pretrial Services Program (PTSP) by the Denver Sheriff Department, it costs approximately $5.00 per day to maintain one individual in the County Jail. This daily rate is the expense for food, clothing, and supplies. The cost of maintenance of the facility, security, transportation to the courtroom, and fixed costs are in addition to the given $5.00 per day. Warden Patterson has stated to the PTSP that the program operation has reduced the average daily jail population of persons awaiting trial and case disposition by 75 to 100 persons per day. Projecting this statement for a year of operation at the given $5.00 per day, the PTSP operation saves costs of between $143,875 to $183,500 annually for pretrial detention, which currently are not reflected in the Denver Sheriff Department budget.

Pretrial Services Operation

The Pretrial Services Program operation for fiscal year 1977 has a budget of $168,046. The PTSP has two phases of operation 1) interview and bond report for persons arrested on felony matters in the County Court and 2) supervision of all persons released on PR bonds or ordered under supervision until case disposition.

The operation of the Pretrial Services Program has made it possible for release of qualified individuals on personal recognizance at the first advisement of rights which must take place within 24 hours of arrest. The release recommendation is based upon investigation of the background information provided by the arrestee and the preparation of an arrestee profile based on a point system drawn up in the District Court for use in determination of eligibility for release on a personal recognizance bond. At the first advisement of rights, bond decisions are made in 80% of the cases based on PTSP verified recommendation reports. Beside PR bonds and deposit bonds, the judge is able to determine the type and amount of bail which will ensure continued court appearances, but which would give the arrestee an ability to post such a bond.

Prior to PTSP operation in November, 1974, similar investigation and recommendation activities were performed by two officers of the Denver District Court Probation Department. This process started four days after arrest with recommended release taking place seven to fifteen days following arrest. In addition, not every individual was contacted or eligible for the interview, which thereby denied due process to those persons incarcerated prior to case disposition.

The present operation of the PTSP contacts every person arrested on a felony matter in the City and County of Denver. The report making a release recommendation is available to the Court at the first advisement of rights. The reports are later used for bond reduction hearings at the second advisement of rights and any subsequent bond reevaluation in the County Court and the District Court.

Due to PTSP operation, one change has been made in the operation of the County Court's handling of felony cases. Prior to PTSP operation, a bond reduction hearing was held separately several days after the second advisement of rights. This hearing took approximately 20 minutes and was scheduled for approximately 6 persons per day and required a formal written application to the County Court Clerk for the setting of the hearing date. Currently, at the second advisement of rights, a bond reduction hearing may be requested and heard at the same time, taking approximately five minutes. The bond reduction is based on the PTSP report and other information verified by counsel. The result of this combination of hearings has been to reduce the total processing time in the County Court for all cases by the elimination of the time-consuming bond reduction hearings. Instead, more preliminary hearings are being scheduled daily, leading to a reduction in the backlog of cases and a reduction in the time span between the various hearings in the County Court.

The PTSP recommendation activities at the first advisement of rights and the change in County Court procedure as a result of PTSP reports being available on demand for all persons incarcerated has had an impact on the costs of detention of persons awaiting case disposition.

The following analysis of cost benefits and savings is based upon the data collected during the past nine months of PTSP operation (November, 1975 to July, 1976) and is compared with a baseline study of the Processing of Felony Cases in the County Court, completed by the D.A.C.C. in 1973. Tables 1 and 2 outline the operation of the PTSP and the flow of cases in the County Court. Figures 1, 2, and 3 translate this information into graph form and illustrate areas of cost savings. Figure 4 makes a comparison of the time span between the various court hearings prior to and subsequent to PTSP operation and Table 3 gives comparative information on the case flow prior to and since PTSP operation.

TABLE 1

NUMBERS OF FELONY ARRESTEES ADVISED, FILED AND
GRANTED PR BONDS/AUTHORIZED CASH DEPOSIT
November, 1975 to July, 1976

		FIRST ADVISEMENT OF RIGHTS						CASES FILED			BOND REDUCTION HEARINGS		
		Advisements		P.R. Bonds		Cash Deposit Authorized							
Month	Arrests	Total	Wrts	PTSP	% of PR		% of PA	Filings & % of PA	In Jail & % Filed	72-Hr. PR	Bond Red. Hearing	PR Bond	Cash Dep. Author.
November	460	203 (221)	18	16* 26	12.8%	2	1.0%	----	----	7	74	6	10
December	486	250 (258)	8	29* 39	15.6%	13	5.2%	----	----	15	87	6	4
January	572	290 (306)	16	40* 55	19.0%	18	6.2%	----	----	21	94	10	7
February	503	258 (271)	13	37* 53	20.5%	23	8.9%	----	----	7	86	9	4
March	570	315 (362)	47	38* 53	16.8%	33	10.5%	315 87%	165 52.4%	0	90	14	20
April	512	240	30	41* 49	20.4%	40	16.7%	287 106%	134 46.7%	10	98	9	6
May	537	268 (280)	12	32* 47	17.5%	56	20.9%	264 94.3%	110 41.7%	6	92	4	20

Continued on following page

TABLE 1

NUMBERS OF FELONY ARRESTEES ADVISED, FILED AND GRANTED PR BONDS/AUTHORIZED CASH DEPOSIT
November, 1975 to July, 1976
(Continued)

		FIRST ADVISEMENT OF RIGHTS						CASES FILED			BOND REDUCTION HEARINGS		
		Advisements		P.R. Bonds		Cash Deposit Authorized							
Month	Arrests	Total	Wrts	PTSP	% of PR		% of PA	Filings & % of PA	In Jail & % Filed	72-Hr. PR	Bond Red. Hearing	PR Bond	Cash Dep. Author.
June	502	248 (276)	28	29* 38	15.3%	54	21.8%	255 92.4%	127 49.8%	9	102	8	32
July	584	279 (301)	22	28* 40	14.3%	37	13.3%	263 87.4%	132 50.2%	15	100	9	10
Total	4726	2351 (2545)	194	290 400		276		1384 94.3%	668 48.3%	90	823	75	108
Monthly Average	525	261 (283)	22	32 44		31		276 97.5%	134 48.6%	10	91 (67.9%)	8	12
Annual Projection	6300	3132 (3390)	258	387 533		276		3321 98.0%	1603 48.3%	120	1092	96	144

*PTSP recommended

TABLE 2
AVERAGE MONTHLY STATUS OF FELONY ARRESTEES
AT MAJOR COURT HEARINGS

FELONY ARRESTS - 525/MONTH

242 Released
22 Warrant/Post Bond
261 Investigations/First Advisement

FIRST ADVISEMENT OF RIGHTS - 261/MONTH - 1 DAY

44 PR Bonds 17% of Advised
30 Cash Deposit/Authorized and Posted 12% of Advised
74 Released at City Jail 29% of advised

CASE FILING - 276/MONTH (97.5% of Arrests) - 3 to 5 DAYS

133 Persons INCARCERATED (48.2%)
143 Persons BONDED (51.8%)

Bond Status	% Cases Filed (276)	% of Bonds (143)
38 PR Bonds	13.8%	26.6%
29 Cash Deposit	10.5%	20.3%
76 Surety Bond	27.5%	53.1%
143		

BOND REDUCTION HEARING - 91/MONTH (68.4% of Incarcerated) 4 to 6 DAYS

9 PR Bonds Granted
12 Cash Bonds Allowed
43 Bonds Reduced
27 Reduction Denied

BOND STATUS AFTER CASE FILING - 5 to 7 DAYS

110 Persons INCARCERATED 39.9% of filings
116 Persons BONDED 60.1% of filings

Bond Status	% Cases Filed (276)	% of Bonds (166)
44 PR Bonds	15.9%	26.5%
42 Cash Deposit	15.2%	25.3%
80 Surety Bonds	29.0%	48.2%

PRELIMINARY HEARING - 226/MONTH (82.2% of case filings) 32 DAYS

68 Persons INCARCERATED
158 Persons BONDED

TABLE 3
FELONY PROCESSING IN THE COUNTY COURT
IMPACT OF PRETRIAL SERVICES PROGRAM OPERATION
July 1976

PROCESS	BEFORE PTSP OPERATION	PTSP OPERATION, 7/76
RECOMMENDATIONS AND VERIFICATION		
Persons interviewed/felony arrestees	Selected	98% of felony arrestees
Time of bond investigation interviews	3 days after arrest at the County Jail after first advisement of rights	2-3 hours after arrest at the City Jail following the book-in process
Verification	Persons selected for interviews or by Court order	All persons advised in County Court
Verified reports at the first advisement of rights	None	82% of advisements
Rate of release on personal recognizance	15% of persons advised	37% of persons advised
Time span from arrest to release on PR bond	4-6 days	1.2 days
CASES FILED		
% of persons incarcerated at case filing	81.9%	48.2%
Number of days to Case Filing	8	4
BOND REDUCTION HEARINGS		
Time span to bond reduction hearing	15 days--special hearing	5.8 days--second advisement of rights
Verified reports at bond reduction hearings	selected or court-ordered	99% of hearings for all persons incarcerated
PRELIMINARY HEARING		
% of persons incarcerated at Preliminary hearing	+ 50%	30%
Time span from arrest to preliminary hearing	43-53 days	13-28 days
SUPERVISION		
Number of supervisors (probation officers)	one	three
Total caseload	150 clients	430 clients
Caseload per officer	150 clients	140 clients
Rearrest rate	6%	5.1%
Failure-to-appear rate	8%	7.8%

FIGURE 1

TIME SPANS BETWEEN COURT APPEARANCES
AND BOND RELEASE DATES
1974 - Pre-PTSP 1976 - With PTSP

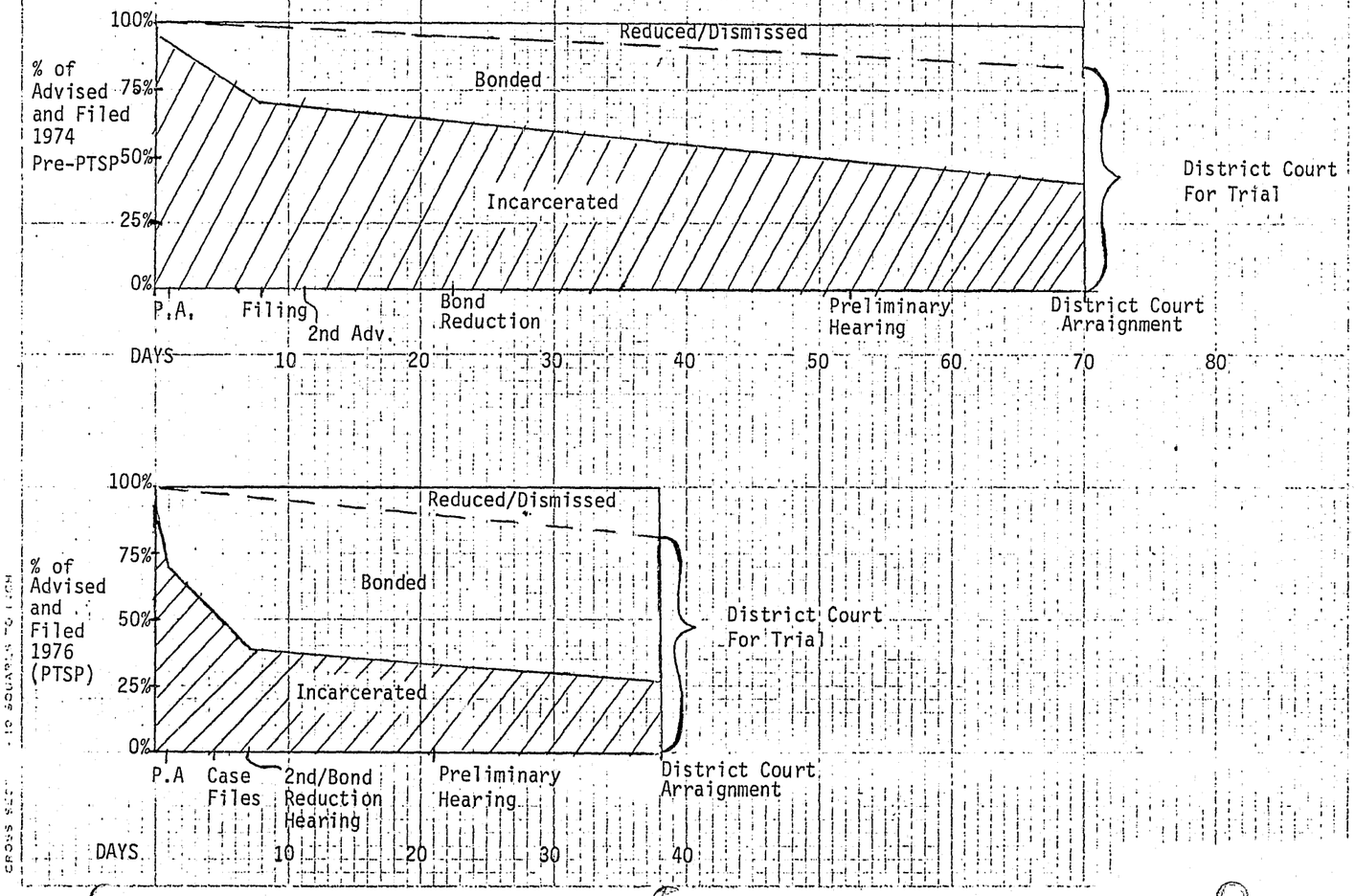


FIGURE 2

COMPARISON OF RELEASE RATES IN COUNTY COURT OF FELONY ARRESTEES PRIOR TO PTSP OPERATION IN 1974 AND AS OF PTSP OPERATION 1976 INDICATING AREA OF INCARCERATION COSTS SAVED

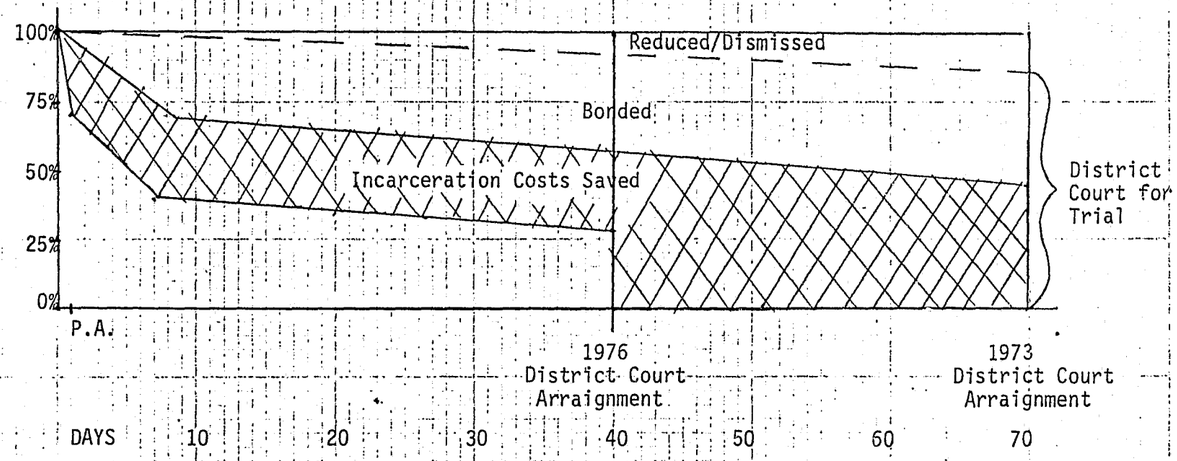


FIGURE 3

MONTHLY AVERAGE: TYPE OF RELEASE AND INCARCERATION RATES BETWEEN ARREST AND SECOND ADVISEMENT OF RIGHTS

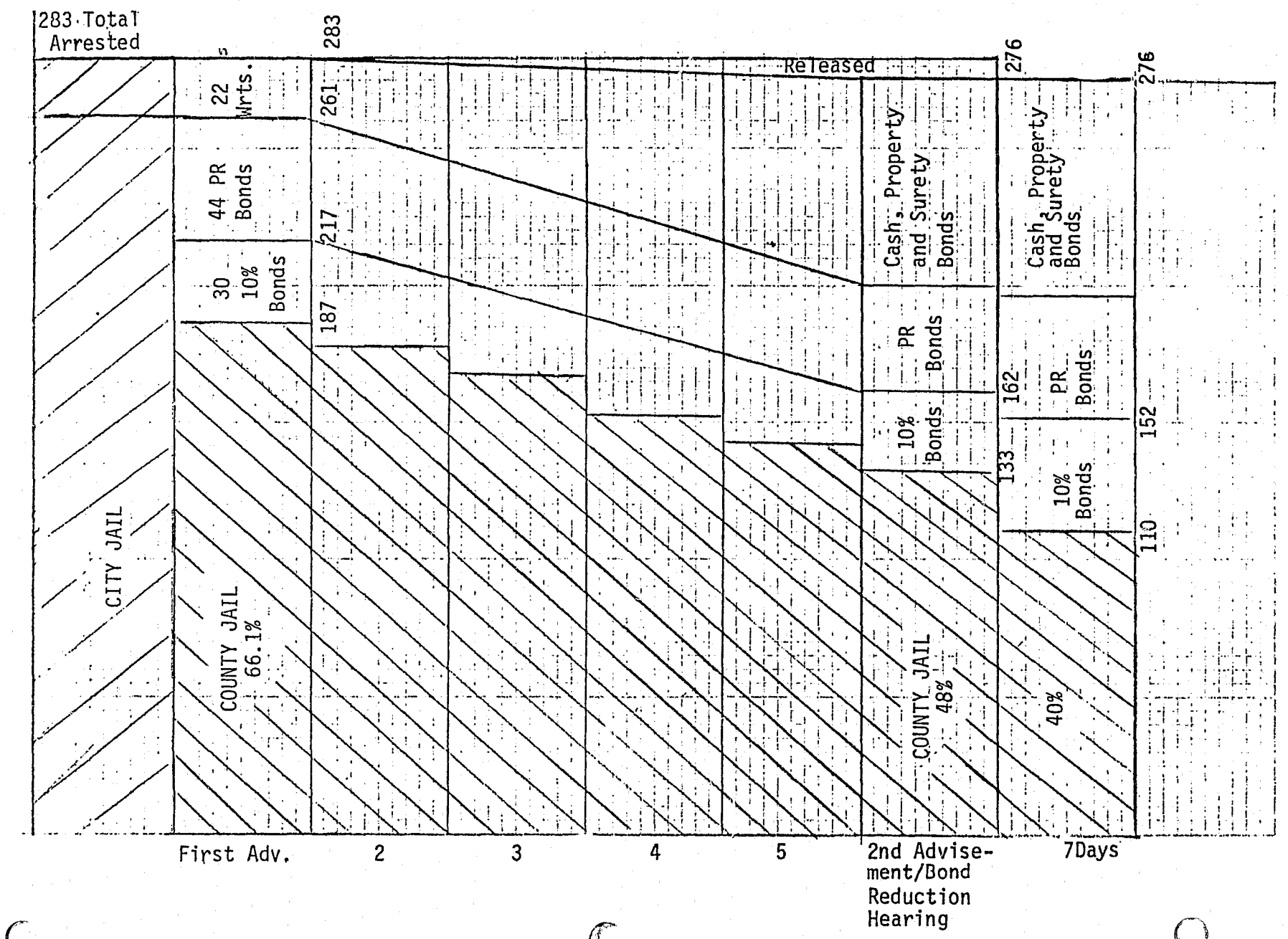
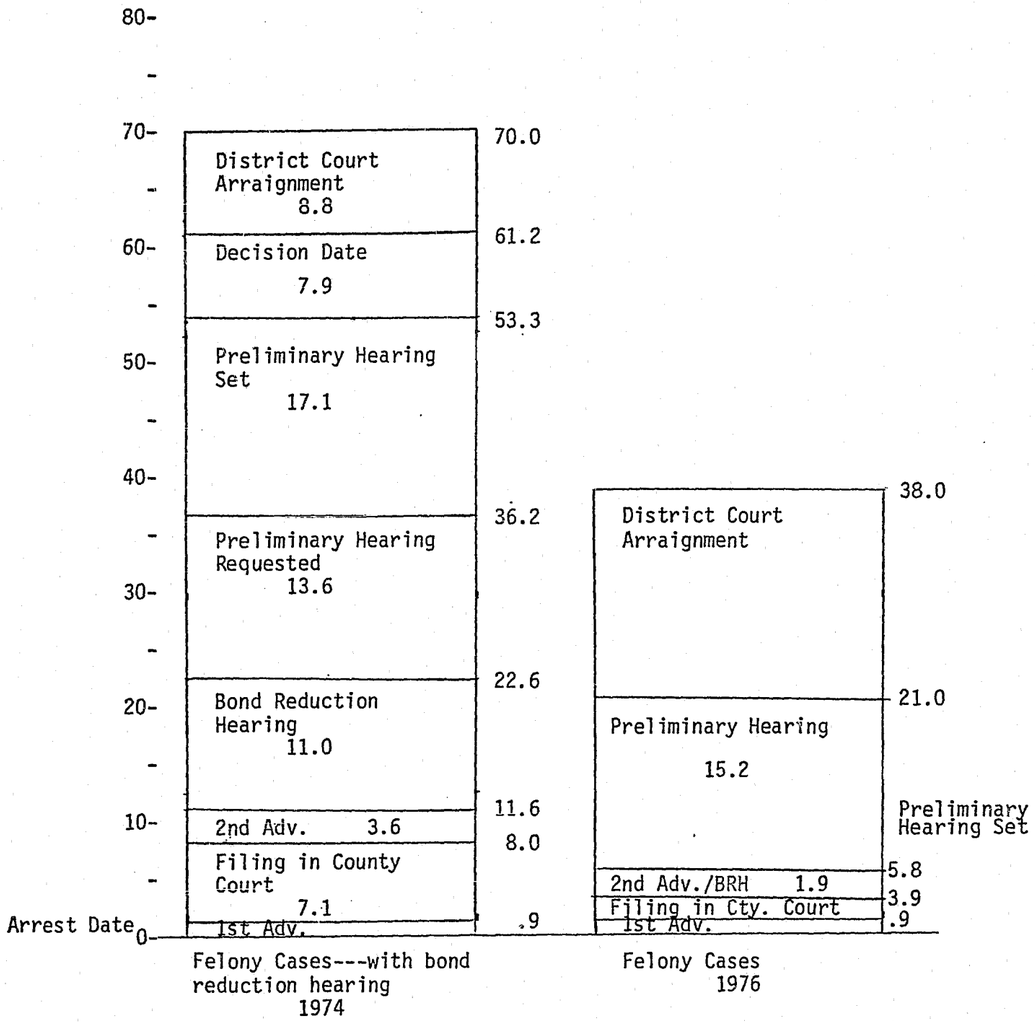


FIGURE 4

AVERAGE TIME SPANS BETWEEN MAJOR EVENTS
FOR INDIVIDUALS INCARCERATED AT CASE FILING
Pre-PTSP (1974) and with PTSP (1976)



COST ANALYSIS

The following information is based on a monthly average determined from the previous nine months of operation. The total figures represent a projection to an annual savings.

First Advisement of Rights:

There are 44 individuals released on personal recognizance bonds at the first advisement of rights monthly. These persons are released from the City Jail and do not require transport to or book-in at the County Jail. Release at the City Jail effects a daily saving of $5.00 per person, and a $220 monthly saving and an annual savings of.....$ 2,640

Based on the D.A.C.C. study, 32 of the above 44 individuals would have remained incarcerated up to 15 days with an average of 11 days. The current average of release one day after arrest means a savings of ten days incarceration time for the 32 persons at $5.00 per day for a monthly savings of $1,600 and an annual saving of.....$ 19,200

A total of 12 of the 44 would have been released approximately four days after arrest. Currently, release is 24 hours after arrest. Thus, a $5.00 savings for three days for 12 persons monthly totals $180 monthly and an annual savings of.....$ 2,160

The cost savings produced by PTSP recommendations and release of persons at the first advisement of rights on personal recognizance bonds thereby produces an annual cost saving of.....$ 24,000

Bond Reduction Hearing:

A reduction in the time span from arrest to the case filing and the second advisement of rights for persons incarcerated has been made from 11.6 days to 5.8 days, a reduction of six days. PR bonds were granted at bond reduction hearings 15 days after arrest. The second advisement of rights and the bond reduction hearings now are held concurrently six days after arrest.

An average of nine personal recognizance bonds are granted monthly at the bond reduction hearing six days following arrest. The previous average was 15 days. The cost savings produced for the nine persons at $5.00 per day for nine days is $405.00 per month and an annual savings of.....$ 4,860

The D.A.C.C. survey of case processing in the County Court found that 28.1% of persons with cases filed were on bond at the time of filing which took place approximately eight days following arrest. Currently, 51.8% of persons with cases filed are on bond at the time of case filing approximately four days following arrest. This is an increase of individuals bonded at the time of case filing of 23.7%. The time has been reduced by four days. See Figures 1 and 2. The increase in the number of individuals released on bond at the case filings are not due solely to the increase in the numbers of personal recognizance bonds granted. The number of persons able to post bond sooner is also a result of the PTSP reports being present at the first advisement that bond amounts may be set at an adequate amount to ensure court appearances, yet at a level where persons may exercise their right to post bond prior to case disposition.

A monthly average of 66 more persons currently are on bond at case filing than prior to PTSP operation. Case filing also occurs four days earlier. The cost savings to the City of Denver for 66 persons on bond at an earlier date is $1,320 monthly and annually a savings of.....$ 15,840

Prior to PTSP operation, individuals incarcerated requested a special bond reduction hearing which was held after the second advisement of rights. This was an additional hearing and required transportation of the detainee from the County Jail to the Courts and return. With the combination of the second advisement of rights with the bond reduction hearing, this trip has been eliminated. Approximately 91 bond reduction hearings are held each month. Thus, the system of holding the two hearings at the same time has eliminated an average of 91 round trips for persons held in the County Jail, or 1092 trips annually. Due to fixed costs for the bus service from the jail to the Courts, no cost benefits can be analyzed, except in terms of security of transportation and a reduction in the administrative problems of transporting the correct person to the appropriate courtroom.

The cost savings produced by the PTSP reports available for second advisement/bond reduction hearings thereby produces an annual cost savings of.....$ 20,700

Preliminary Hearings

Prior to PTSP operation, the average time between the bond reduction hearing and the preliminary hearing was 30 days. At the preliminary hearing

decision date to bind over to the District Court for trial, 50% of those persons bound over were incarcerated. Of those reaching preliminary hearing, 82.2% were bound over for trial with the remainder having charges reduced (9.9%) or dismissed (7.9%).

Currently, 39.9% of individuals are incarcerated six days after arrest. This is an average of 110 persons each month. Prior to PTSP operation, 71.9% would be incarcerated six days following arrest, representing 198 individuals. From the sixth day onward at $5.00 per day, due to the PTSP operations, 88 persons formerly incarcerated at this time are on bond, a daily savings of $440. This identification of 88 persons on bond who previously would have been incarcerated substantiates Warden Patterson's contention that since PTSP operation, the daily population of persons awaiting trial has been reduced by 75 to 100 persons per day.

If one person bonded daily at this rate, between bond reduction hearing and preliminary hearing, the savings for the reduction in time would be $9021 x 12.....$108,252

In addition, 70 days after arrest, or 62 days after the filing of charges, 50% of those bound over to the District Court remained incarcerated--approximately 113 persons per month. Thus, between the 8th day and the 70th day, 85 individuals were released.

Currently, at the decision date after preliminary hearing, 30% of persons bound over to the District Court are incarcerated. This number of persons averages 68 per month. The time span for the transfer of the case from the County Court to the District Court has been reduced by 32 days (see Figure 3).

Thus, with PTSP operation, 45 individuals are bonded 30 days sooner on a monthly average. The cost savings for the release of 45 persons at $5.00 per day for 32 days is $7,200 per month or annually.....$ 86,400

The cost savings due to PTSP operation subsequent to the second advisement until the case being bound over to the District Court for trial is a total of.....$194,652

Trial

After the case is bound over to the District Court for trial, the average length of time for case disposition is 90 days. Previously, 50% of persons bound over for trial were incarcerated. The current rate is 30%, which represents approximately 45 persons released on bond who prior to PTSP would have remained incarcerated. The cost daily of incarceration would be $225.

If, as previously, these persons remained incarcerated for two months prior to posting bond (bond amounts are generally lowered or release on personal recognizance is granted when application for deferred judgment or probation is made--generally 60 days after the case is bound over to District Court) the additional cost savings for the 45 persons incarcerated at $5.00 per day for the two months would total $13,950 monthly, and annually.....$167,400

The total case processing time in the County Court and the District Court has been reduced by an average of 35 days. Thus, even those persons who remain incarcerated at the time of case disposition, approximately 13%, the case disposition occurs 35 days sooner, thereby producing a cost savings of approximately $175 per person incarcerated for the duration of the judicial process.

SUMMARY

The jail detention population is a function of both the number of defendants and the length of stay. The PTSP operation has reduced both the number of defendants being held and the length of time held. The fact of early intervention provides for earlier release than would otherwise be obtained. In addition, program operation effects the release of persons who otherwise would be detained for the duration of the pretrial period.

A compilation of cost benefits gained from Pretrial Services Program operation follows.

Pretrial Incarceration Savings

Release at First Advisement of Rights	$ 24,000
Bond Reduction Hearings	20,700
Preliminary Hearings	194,652
Subtotal	239,352
Incarceration During Trial	167,400
	$406,752

This is the total amount of incarceration costs saved during the projected fiscal year 1977, which will not be reflected in an increased amount of funds requested in the Sheriff Department budget for maintenance of pretrial felony detainees.

The PTSP budget operation for 1977 totals $168,046.

Total cost diverted	$406,752	$406,752	Cost diverted
Total PTSP budget	168,046	61,617	cash match (L.E.A.A. grant)
	$238,706		
		$345,135	Savings produced

COST OF COURT SERVICES/COST OF ADJUDICATION

The operation of the Pretrial Services Program (PTSP) has allowed for a change in the processing of felony cases in the County Court. The time that a case is in the County Court has been reduced and the number of required court appearances for each defendant has been reduced. This reduction has been due to a combination of the bond reduction hearing with the second advisement of rights within six days of arrest for those incarcerated. The increase of 23% in the number of persons posting bond between the first advisement of rights and the filing of the cases in the County Court has had the effect of reducing the number of bond reduction hearings requested.

COST ANALYSIS

Holding the bond reduction hearing at the second advisement of rights eliminates the prior system whereby the defendant's counsel made application to the Clerk of the County Court. The date for the bond reduction hearing was then set, at a minimum of three days ahead to allow for scheduling and notification procedures. With the bond reduction hearing taking place in the courtroom at the second advisement of rights, the formal application is made at the hearing and is heard subsequent to the advisement. This system also provides for equal justice for all defendants in the system as both private counsel and the public defender may request the hearing for clients. In some cases, the assignment of the public defender has taken place only shortly before the hearing takes place.

An average of 91 bond reduction hearings are heard monthly at the second advisement of rights. The benefits of this system relieve the Office of the County Court Clerk from scheduling and notification of appropriate agencies of the hearing. The annual number of hearings is 1092.

Prior to the adoption of the combined hearing, a bond reduction hearing took from 15 to 30 minutes, with an average of 20 minutes. Six hearings were scheduled daily. Currently, an average of five hearings are scheduled daily. The reduction is due to the increased number of persons released on bond. The time saving to the Court is 15 minutes on the average for each bond reduction hearing held. The monthly savings for 91 hearings averages 23 hours, with an annual saving of 273 hours or 34 eight-hour working days.

The result of this time savings has been to reduce the backlog of cases awaiting the setting of the date for the preliminary hearing.

The date for the preliminary hearing in most cases is now set at the second advisement of rights and ranges from 7 days to 21 days after the hearing. This is a reduction from the previous average of 34 days.

A new courtroom is being established in the County Court for the purpose of hearing felony cases. To comply with the time limits established in the "speedy trial act", an additional courtroom to the one currently being planned would have been required if the time savings achieved by PTSP operations did not provide additional court time for scheduling preliminary hearings. PTSP operation, thereby, has reduced the need from two to one additional courtroom during 1977.

The PTSP has had an effect of reducing the failure-to-appear (FTA) rate by 2%. This represents approximately 66 individuals, who without pretrial supervision annually would have missed scheduled court dates. The savings to the court in time required to issue warrants, etc., is saved, as is the cost of apprehension and adjudication for the failure-to-appear if the defendant is rearrested. The time saved as the result of an average 30-minute hearing regarding the issues related to the failure-to-appear for the 66 individuals equals 4.1 eight-hour working days annually of court time saved by PTSP supervision alone.

SUMMARY

Benefits

Elimination of bond reduction hearing requests for 91 persons per month or 1091 annually.

Court time savings at bond reduction hearings 15 minutes for 91 cases per month, 1365 minutes monthly or 273 hours annually, meaning 34 eight-hour working days.

Reduction in the length of time a case is held in the County Court prior to being bound over to the District Court for trial by 34 days.

Reduction in the necessity of an additional courtroom to handle felony advisements and case filings.

Reduction in the FTA rate eliminates 4.1 eight-hour working days annually used to consider matters of failure-to-appear.

COSTS TO THE ACCUSED

The economic costs to the accused should be considered in the determination of the cost benefits produced by the operation of the Pretrial Services Program (PTSP). According to statute, except in capital cases, the defendant has the right to bond and to post said bond.

The operation of the program provides the court with adequate information so that the bond set is appropriate for the alleged offense, is set high enough to ensure continued court appearances and is not so high that the defendant cannot afford the bond. The increase in the number of individuals on bond at case filing by 23% over 2 years indicates the success of the Court in setting appropriate bond amounts. At the same time, the failure-to-appear rate for all classes of releasees has not significantly increased.

The benefit of early release to the accused is the retention of employment. A total of 59% of persons authorized released on personal recognizance or placed under PTSP supervision as a condition of bond are employed at the time of arrest. This represents 84 individuals monthly who are employed and who are able to retain their employment due to early release. This represents an annual savings of 1,008 jobs.

The economic benefit of the retention of employment by these individuals is a savings in welfare costs required to support the family if the main family support is incarcerated due to insufficient economic ability to post a bond. In addition, the unemployment level of the City and County of Denver is not raised if the defendant loses the job.

In addition, approximately 6% of persons advised and bonded do not have charges filed and are advised of such within 24 hours of release. For those persons with personal recognizance bonds, no fiscal outlay is lost. For those persons with cash deposit bonds, the amount is returned. Those posting bond through surety lose the deposit to the bail bondsman. The average amount of bond set in the County Court is $4,500, with a range of $500 to $100,000. The mean is $1,500, which requires a minimum $150 deposit.

SAVINGS/LOSS TO DEFENDANTS
CHARGES DROPPED LESS THAN 24 HOURS
AFTER FIRST ADVISEMENT OF RIGHTS

6% of 44 PR releasees	=	2-3 monthly at $150 = $450 monthly or, a minimum of $5,400 saved annually and retained by defendant
6% of 31 cash deposit bonds	=	2 monthly at $150 = $300 monthly or, a minimum of $3,600 saved annually and retained by defendant
6% of 67 surety bonds posted	=	4 persons monthly at $150 + $600 monthly or, $7,200 lost annually and not retained by defendant though charges are not filed

The reduction in time spent and the numbers of persons incarcerated in the County Jail may also be calculated in man-days. Based on the annual cost savings of $106,752 due to earlier release, the man-days may be calculated by dividing by the $5.00 per day cost. The total man days of incarceration saved is 81,350 annually. Figure 3 above illustrates this savings.

CRM

The following tables contain the collected information on the bonding status of felony arrestees during the period of the cash deposit program, May 7, 1976 to July 27, 1976 and for a one month follow-up period, August, 1976, when the program was not in operation. The total numbers represent two different time spans, however, the percentages reflect the changes brought about in the system by the injunction against the authorization of cash deposit bonds.

During the approximately four months of monitoring of court records and bond information, the following information was obtained.

During the period of authorization of 10% cash deposit bonds, 46.5% of persons in custody with cases filed remained incarcerated in lieu of bail six sayd following arrest. During the months of August and September, 56.2% and 57.9%, respectively, of persons with cases filed were incarcerated in lieu of bail six days following arrest. This is an increase in the number of persons incarcerated by 24.5%, representing approximately 25 individuals. This increase in the number of individuals unable to post bail contradicts the contention that these persons would have availed themselves of the traditional bonding system.

During the time of the case deposit program and during August, the following types of bonds were posted between the first advisement of rights and the setting of the date for the preliminary hearing. The percentage totals should be viewed in light of the 24.5% reduction in persons posting bond during August and September.

	May-July	August
Surety bond	46.8%	72.6%
PR Bond	26.6%	24.8%
Cash deposit	17.6%	---
Property	8.2%	1.7%
Cash	0.8%	0.9%

Total Categories of Bonds Authorized May 7 - July 27, 1976

I. First Advisement of Rights	700 Total + 53 Warrants		
PR bonds	114		16.3%
Cash deposit	153		21.9%
Bond schedule	426		60.9%
No bail	11		1.6%
II. Bond Reduction Hearings	262		
PR bonds	9	18	6.9%
PR bonds (10% at P.A.)	9		
Cash deposit	70		26.7%
Bond increased	2		0.8%
Bail reduced	76		29.0%
Bail reduction denied	96		36.6%
Bond Status at Case Filing	380 Released		
PR bonds	101		26.6%
Cash deposit	67		17.6%
Surety	178		46.8%
Property	31		8.2%
Cash	3		0.8%
Total released	380		100.0%
Status at Case Filing			
Released	380		53.5%
Incarcerated	330		46.5%

* * * * * * * * * * * * * *

AUGUST, 1976

Case Filings Totaled	267	
150	56.2%	Incarcerated
117	43.8%	Bonded (released)
Bond Status of Those Released		
29	24.8%	PR bonds
85	72.6%	Surety
1	0.9%	Cash
2	1.7%	Property
117	100.0%	

TEN PERCENT BONDS AUTHORIZED AT FIRST ADVISEMENT OF RIGHTS AND BOND STATUS
September 30, 1976

	May 7 - May 31	June 1 - June 30	July 1 - July 27	TOTAL
	24 days	30 days	27 days	81 days
Advisements	204	248	248	700
Warrants (bonds)	9	28	16	53
	213	276	264	753
Bond Decisions				(700)
PR	39	38	37	114 (16.3%)
10%	64	54	35	153 (21.9%)
Other	97	156	173	426 (60.9%)
No Bail	4	4	3	11 (1.6%)
+ Warrants/Surety	9	28	16	+ 53
				(753)

TYPE OF BOND POSTED BY PERSONS AUTHORIZED 10% / % OF NUMBER AUTHORIZED

	(64)	(54)	(35)	(153)(100.0%)
Posted 10%	35	31	17	83 (54.2%)
Surety bond	4	1	1	6 (3.9%)
Property Bond	3	2	0	5 (3.3%)
Cash bond	1	1	0	2 (1.3%)
PR at 2nd Advisement	6	8	6	20 (13.1%)
Sentenced - no release	1	0	0	1 (0.7%)
Incarcerated 9-30-76	0	2	2	4 (2.6%)
Filed - current status unknown	4	1	0	5 (3.3%)
No charges filed	8	4	4	16 (10.5%)
Unknown	2	4	5	11 (7.0%)

TEN PERCENT CASH BONDS AUTHORIZED AT
BOND REDUCTION HEARING AND BOND STATUS
September 30, 1976

	' May 7 - ' May 31	' June 1 - ' June 30	' July 1 - " July 27	TOTAL
BOND REDUCTION HEARINGS				
Total filings	222	255	233	710 (94.3% of PA)
Incarcerated	90	127	113	330 (46.5%)
On bond	132	128	120	380
Bond Status at Filing				
10% bond	30	27	10	67 (17.6%)
PR bond	37	36	28	101 (26.6%)
Other	65	65	82	212 (55.8%)
				(79.4%)
Number Bond Reduction Hearings Requested				262 Incarcerated
PR bond PR	4		5	18 (6.9%)
10%		7	2	
10% authorized	30	32	8	70 (26.7%)
Increased	0	0	2	2
Reduced	19	32	25	76
Denied	22	31	43	96

TYPE OF BOND POSTED BY PERSONS AUTHORIZED 10% AT BRH / % OF NUMBER AUTHORIZED

	30	32	8	70 (100.0%)
Posted 10%	14	18	6	38 (54.3%)
Surety bond	4	1	0	5 (7.1%)
Property bond	1	3	1	5 (7.1%)
Cash bond	0	0	0	0
PR at PH or D/C	2	0	0	2 (2.9%)
Sentenced	--	--	--	--
Incarcerated	0	2	1	3 (4.3%)
Filed - Unknown	8	0	0	8 (11.4%)
No charges filed/dismissed	1	0	0	1 (1.4%)
Unknown	0	8	0	8 (11.4%)

Bond Status of Persons Authorized 10% Cash Deposit May 7 to July 27, 1976

Total 223 Cash Deposit Bonds Authoirzed — 31.9% of 700 persons advised in the County Court

Total Cash Deposit Authorized	223	100.0%
Posted 10% cash deposit	121	54.3%
Surety bonded	11	4.9%
Property bond	10	4.5%
Cash bond	2	0.9%
PR bond granted	22	9.9%
Sentenced - not bonded	1	0.4%
Incarcerated - 9-30-76	7	3.1%
Filed status unknown*	15	7.2%
No charges filed/dismissed	13	5.8%
Unknown*	19	8.5%

*Names do not appear on bond list as of 9-30-76, may be incarcerated or had felony charges dropped.

Failure-to-Appear

121 Persons authorized and posting 10% cash bonds from May 7, 1976 to July 27, 1976.

9 Failed to appear (as of 9-30-76) rate of 7.4% or an 92.6% appearance rate

1. Cora Rodriguez (5-12) FTA 6-3-76
2. Ann Jones(5-24) FTA 7-9-76
3. Robert Crouse (5-13) FTA 6-18-76
4. Timothy Ray Noon (6-1) FTA 8-27-76
5. Lank Thomas (6-14) FTA 8-6-76
6. Ray B. Robinson (6-15) FTA 7-27-76
7. Stephen Fox (6-22) FTA 7-23-76
8. Willie Butler (7-21) FTA 8-21-76
9. James Vegas (7-26) FTA 9-14-76

EVALUATION TECHNIQUES FOR

STATE-WIDE PRETRIAL RELEASE PROGRAMS

STEPHEN F. WHEELER

BURTON W. BUTLER

This paper is provided through the courtesy of the Commonwealth of Kentucky, Administrative Office of the Courts, Frankfort, Kentucky.

CONTINUED

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INTRODUCTION

The Commonwealth of Kentucky has recently established a state-wide pretrial services program. This program is the first centralized service unit to be operated by the state's judicial branch of government.

This paper will treat one important aspect of the program: its experience in conducting a continuous program of self evaluation. This experience can serve as a vehicle by which other criminal justice programs can learn to effectively evaluate themselves and adjust their programs to economically achieve their goals.

Effective program evaluation can come in a variety of forms, and does not demand the hiring of additional staff. This effort in the Kentucky Pretrial Services Agency has essentially been conducted by two persons, each of whom exercises additional responsibilities.

Further, continuous program evaluation can be conducted economically by instituting evaluation methods as integral parts of Agency procedure. Not a single dollar is earmarked in the current budget for program evaluation.

PRETRIAL SERVICES IN KENTUCKY

Because of the domination of the pretrial release process by the often corrupt practices of the bail bonding business, this Commonwealth has become the first state to adopt national criminal justice standards by eliminating the practice of bail bonding for profit. In its place Kentucky has substituted a system which places this decision back into the hands of the judiciary while providing each judge with the information he needs to make a knowledgeable release decision. This new system will benefit not only those who are accused of committing wrongdoings, but will also provide the community needed protection in this era of increasing criminal activity. While the amount of a bond must logically be commensurate with the nature of the alleged offense and cannot be oppressive, statutorily in Kentucky it must also be considerate of the past criminal acts and the reasonably anticipated conduct of the defendant.

Statutory Requirements

Legislation spells out those alternative methods of release available to the trial judge, while emphasizing that each accused individual shall be released on his own personal recognizance or upon the execution of an unsecured bail bond. If the trial judge feels that in a given case one of these two methods is not sufficient to insure the defendant's appearance, he may place restrictions on travel, place of abode, and associations; order the accused released into custody of a third person; require the execution of a bail bond; or impose any other reasonable condition of release. The bail bond may be secured by property, securities, or cash. In the discretion of the court, the defendant may post the full cash amount of the bond and when he appears his entire deposit will be returned. He may be required to post only 10% of the bond with the court, and when he completes all of his appearances he will receive 90% of his deposit back.

State-wide deposit bond systems have been enacted in Illinois, Oregon, and the District of Columbia. They have worked successfully. By having all or most of his deposit returned to him when he appears, the defendant is given a true financial incentive to appear.

This 10% deposit system has also been applied to common traffic offenses. The Kentucky Supreme Court, pursuant to KRS 431.540, has promulgated a uniform bail schedule for traffic offenses and minor misdemeanors. After his booking at a jail, a defendant can automatically post a 10% bond if he has been arrested on an offense listed on the uniform schedule. This procedure has minimized the time that people must stay in detention.

Goals and Objectives

In passing House Bill 254, the Kentucky General Assembly clearly identified the goal of the state's pretrial release program. This goal was stated in the preamble to the Act as follows:

. . .To provide for a uniform workable system for affording persons charged with bailable offenses their constitutional rights to pretrial release that will insure appearances as ordered by the courts without imposing undue hardships upon those persons.

In seeking to attain this goal, the Pretrial Services Agency has quantified the following objectives. These objectives form the basic unit of measurement against which collected information is applied.

1. To effectively implement the provisions of this Act throughout the Commonwealth,
2. To provide pretrial investigation and supervision services to all persons arrested and detained in local detention facilities,
3. To provide all trial courts in the Commonwealth verified bond setting information through which the judiciary can make knowledgeable release decisions,
4. To attain NAC standards and goals relating to pretrial release,
5. To provide the most qualified staff with which to operate the system,
6. To provide technical assistance to the local staff in order to implement the program,
7. To correctly assess the impact of the program through continuous evaluation,
8. To provide a 24 hour criminal history verification center in order to expedite the release of qualified defendants and insure the continued detention of those with a history of bail jumping or wanted by federal or other state law enforcement agencies, and
9. To relieve jail overcrowding and reduce jail costs.

Administration

The responsibility of administering this program rests with the judicial branch of government. Authority over the program has been statutorily placed in the Administrative Office of the Courts.

The Pretrial Services Agency has been structured along the lines of judicial circuits. The state's three major population centers (Louisville, Lexington, and Covington) have staffs adequate to provide 24-hour, 7-day-a-week service. In the rural areas, a single pretrial officer has been found adequate to service a two, three, or four county circuit. The state-wide program, while as decentralized as possible, is directed by a four-member central staff working out of Frankfort.

This central staff is able to coordinate the state-wide program and make reasonable adjustments when problems arise. It is the vehicle through which state-wide statistics regarding the program's operation are collected and evaluated. This staff also provides state-wide supervision and assistance to the local programs. For example, it recently conducted a personnel time utilization study for the Louisville program. That study will help the Agency in Louisville schedule its

personnel more effectively and follow more efficient office procedures.

A forum for the advancement of community ideas regarding pretrial release has been created in each county. Advisory boards composed of community leaders and justice officials regularly meet in each county to discuss policies, procedures, and any deficiencies existing in the local program. These boards result in a greater degree of operating flexibility within and among the local pretrial programs.

The agency administering pretrial services is basically assisting the trial bench in reaching a purely judicial decision. The agency serves as a neutral information gathering arm of the court. It does not serve as an advocate for either the defendant or the Commonwealth. The agency gathers verified information that is used by the trial bench in making a knowledgeable release decision.

Considerable executive department support has been rendered to the pretrial agency. For example, the Bureau of Kentucky State Police has cooperated in the areas of criminal history verification and fugitive apprehension. The Bureau has provided a 7-day-a-week, 24-hour service for pretrial officers across the state through which the records of the central depository are available by telephone. Further, the Bureau has established a uniform procedure for apprehending those who fail to appear for court hearings. This latter effort has resulted in very few individuals jumping bail and remaining at large in the community.

Operating Procedure

The basic procedure utilized by the agency is patterned after several recognizance projects operating throughout the United States. After an arrested person is booked by the appropriate law enforcement agency, he is given the opportunity to be interviewed by a pretrial officer. He may accept or decline this opportunity. The interviewer collects data pertaining to the family, community, and economic ties of the defendant. After the information is gathered from the arrestee, the pretrial officer verifies its validity, and checks the defendant's past criminal record. Once the information is verified, it is applied to an objective point scale and then given to the appropriate trial judge. He then makes the release decision.

Once the release decision is made, the pretrial officer routinely notifies each defendant of his court appearance date, and monitors his appearance. If an individual fails to appear, and if he cannot be located by the pretrial officer, law enforcement agencies are notified. In most instances, the pretrial officer will secure a bail jumping warrant against the defendant who fails to appear.

If the defendant declines his opportunity to be interviewed, is found ineligible by the program, or is rejected by the trial judge for recognizance release, he may be released by any of the alternative methods spelled out in the statute. He also has the statutory right (KRS 431.520 (7)) to have the release decision reviewed after 24 hours if he remains incarcerated.

Preliminary Results

This agency began operations on June 19, 1976. Since its beginning, roughly one-fourth of all incarcerated persons in the Commonwealth have secured their release prior to trial without having to place a monetary deposit. Jail populations have decreased throughout Kentucky. While accurate figures were not kept (or at least never reported) by the commercial bonding companies on the rate their clients jumped bail, testimony given during legislative hearings indicated a range of 2% to 25%. The pretrial agency recorded an appearance rate exceeding 98% during its first three months of operation.

NEEDS FOR EVALUATION

The Pretrial Services Agency is a publicly funded and decentralized part of Kentucky's newly unified court system. Because the program's goals and objectives are not easily attainable, continuous evaluation and monitoring of the program's progress is necessary in order to keep it moving toward the accomplishment of the stated objectives.

Because of the short time period allowed for program implementation, the need for evaluation was critical to quickly identify problem areas and make the necessary adjustments. Most of the program's one hundred employes were hired and its policies and procedures established only about two weeks prior to the effective date of the statute. The lack of sufficient planning time necessarily caused certain decisions to be made without the benefit of lengthy analysis. Only by establishing evaluation methods as integral parts of agency procedure could problem areas be adequately identified and adjusted.

The pretrial effort in Kentucky is operated by a public agency. Like any other governmental unit, it should provide its services in the most efficient and economical way possible. A need, therefore, exists for continuous program evaluation to prohibit uneconomical practices from developing early in the life of the program and becoming ingrained in the agency's operating procedures.

The Pretrial Services Agency is centralized administratively, yet decentralized procedurally to the greatest extent possible. Continuous program evaluation is necessary in

order to effectively operate within the rather diverse local criminal justice systems existing across the state.

Further, this agency is part of the state's newly unified court system. It is the only centrally operated judicial program in the state. In order to assure the success of the judicial article, and in order to pave the way for community acceptance of the district court system, it is necessary that anything undertaken by the Administrative Office of the Courts function properly and efficiently. Obviously, continuous program evaluation is necessary to insure that agency operation does not endanger the process of unifying the entire state court system.

Therefore, significant needs exist for continuous program evaluation to be maintained by the central staff. This process of evaluation must be methodologically diverse in order to assure that the agency gets off to a good start.

METHODS OF EVALUATION

Continuous, non-experimental methods of evaluating the pretrial program in Kentucky have been implemented in the system and have proven effective. The emphasis on program evaluation has been placed on pragmatic problem identification and appropriate recommendations to effectuate their resolve. This evaluation effort has taken several forms: 1) simple monitoring of statistics, 2) on-site field evaluations, 3) third party technical assistance, and 4) preplanned, comprehensive, methodological research.

Statistical Monitoring

Simple statistical monitoring is a routine task accomplished on a monthly basis. Each of the fifty-six (56) local programs supplies summary statistics reflecting total arrests, interviews, program releases, failures to appear, and methods of non-program release to the central office each month. The individual reports are screened and combined to produce a monthly statistical report detailing program activity on both a local and state-wide basis. The reports are used as a type of series analysis to view program (state-wide and local) progress on a monthly basis. Feedback is provided by mailing copies of each monthly statistical report to the state's circuit judges and local pretrial program directors.

Results have been achieved through this form of evaluation. For example, it became evident during the agency's second month that our local programs were not meeting the objective of providing pretrial services to all detainees.

Many arrestees were being taken before a court prior to the pretrial officers making contact with them. A memo was distributed and a series of regional meetings held to emphasize the need for local programs to concentrate on interviewing all possible detainees. As a result, more interviews were conducted and the state-wide contact rate rose from 29% in August to 42% in September. One urban program more than doubled its contact rate in September, while another reached 90% of those available.

These reports have also been used to acquire other information. Because the pretrial agency has staff located state-wide, it has been asked at various times by other agencies to collect information through which figures may be projected for unified court system activity. For example, pretrial officers were asked to break down their arrests by facility in order that the Administrative Office of the Courts and the Legislative Research Commission would know the cost of reimbursing local governments for prisoner care should all defendants become classified as state prisoners. Further, information for revenue projections and public defender caseloads has similarly been gathered.

On-Site Field Visits

A primary task of the central staff has been to conduct individual program field visits. These visits have served both as a form of supervision and as technical assistance to local programs. During each visit a comprehensive analysis of the entire local program is undertaken. Operating procedures, administration, data collection, and specific techniques such as interviewing are reviewed. The field supervisor identifies the strengths and weaknesses in the local program and provides the local program director with a list of recommendations.

A follow-up visit is then conducted roughly two weeks after the initial visit. This subsequent visit focuses on the steps taken to implement the recommendations given by the first supervisor, and is usually undertaken by a different member of the central staff. The local program director is informed as to the progress seen toward implementation of the recommendations. In each case, a written report is submitted to the state director.

This action oriented form of evaluation has also produced results. For example, an early September field visit to the Bowling Green Pretrial Services Agency produced five basic recommendations from the field supervisor; these were: 1) place more emphasis on interviewing defendants arrested for misdemeanors, 2) create a records system, 3) create a case tracking system, 4) provide better weekend coverage of the jail facility, and 5) implement a student internship program with Western Kentucky State University. Suggestions for the attainment of each recommendation were given to the local director by the field supervisor.

A subsequent visit to the program was undertaken at the end of September by a different field supervisor. That person's

written report stated:

> Mr. _____ has implemented several sound suggestions made by Mr. _____ (field supervisor). These suggestions have improved the coverage of the program. The program's interview rate will increase substantially in September . . . Neglect of the lower courts appears to have been corrected.

The follow-up report went on to address each previously identified problem area and the steps undertaken to accomplish their resolution. The Bowling Green program went on to record the second highest defendant contact rate in the state during the month of September.

Third Party Technical Assistance

The National Center for State Courts has provided technical assistance to the Pretrial Services Agency on two occasions. The National Center assisted the central staff initially in developing and designing the agency's structure and basic operating procedures. It was subsequently requested to evaluate the progress of the local programs serving the state's three major population centers. Again, problems were identified, recommendations were given, and steps were undertaken to implement the recommendations.

While the neutral third party form of evaluation has been useful to the extent that problems can be spotlighted in a different perspective, the technical assistance provided by the National Center has primarily shown that the in-house evaluations conducted by the central staff have been reasonably successful.

Time Utilization Studies

One recommendation resulting from the second National Center assistance visit was:

> A work analysis should be conducted (in Jefferson County - Louisville) for a two week period to show where the volume is and when the peak times are. This analysis would then be used to develop staffing patterns and levels.

A month long time utilization study was rapidly undertaken first in Louisville, and subsequently in Covington-Newport and Lexington, to effectuate this recommendation. The initial study, begun in the third month of the program, was the first piece of comprehensive, methodological research conducted by the central staff.

Study Objectives: The specific objectives of the personnel time utilization study were to identify the following:

1. The nature of each task performed, and the time required for its accomplishment,
2. The activity level of each employee on a daily and shift basis,
3. The lag time involved between the beginning of one's interview and his point of release from incarceration, and
4. The identification of procedural aspects needing adjustment.

Study Methodology: In a memorandum to the local program director, the methodology to be undertaken was stated as follows:

1. Identify a pilot circuit and initially conduct the study only in that location. Subsequent studies will be adjusted from information and experience gained from the pilot study,
2. Distribute Position Description Questionnaires (PDQ's) to ascertain individual job perceptions prior to the conduct of the study,
3. Institute time reporting tracking logs to identify the exact amount of time utilized by each person on each task, and
4. Manually check lapse time from times recorded on the interview forms.

Minimal Staffing Requirements: Before examining the results of the study or interpreting the data, certain minimum assumptions on the objectives and requirements of the Pretrial Services Agency in Kentucky had to be delineated. A common understanding was necessary if conclusions on staffing requirements were to be determined from the data collected from Jefferson County. The minimal requirements provide a basis on which to evaluate the results of the study. These requirements were defined as:

I Jail Coverage: Must be 7 days a week, 24 hours a day; contact to be made with every arrestee booked,

II Interview rate: Should range between 50-70 percent of the total detainees ("total detainees" was defined as all misdemeanants and felons, and excluded traffic violators).

III Services included:

A. Providing the trial bench with verified information on which to base a rational decision on releasing an arrestee within 12 hours, which consists of:
   1. Interviewing defendants,
   2. Verifying the information,
   3. Checking records, and
   4. 24 hour review activities.

B. Insuring the appearance of defendants in court, which consists of:
   1. Maintaining an adequate system of notification (i.e., reminding each releasee of his court date 2-3 days before each appearance),
   2. Providing to the court supervision services to insure appearances of higher risk defendants, which consists of:
      (a) Check-in by defendant at office, or
      (b) Call-in, or
      (c) If ordered by a judge, this may include tracking or monitoring for a drug, alcohol, mental or

vocational program; however, this does not include in-house counseling, or group therapy.

C. Court monitoring, which consists of:

1. Identifying instances of failures to appear and attempts to get people back to court. Most attempts to get people back in court should be accomplished by phone notification. Only if necessary should street notification be used,
2. Covering each court daily to the point of providing bail setting information on each person interviewed by the program, and if necessary, those screened out by the program, and
3. Keeping a record of all dispositions and all continued court cases.

IV Organizational maintenance, which consists of:

A. Supervision to insure uniformity and compliance with local operating procedures,

B. Proper allocation of personnel, supplies, space and equipment,

C. General planning,

D. Public relations and liaison activities with other criminal justice agencies and the central office, and

E. A filing system that:

1. Documents circumstances of each program contact,
2. Monitors or tracks all court appearances of each program releasee and all conditions placed on program releasees, and
3. Generates the monthly report.

Study Results: At the conclusion of the time utilization study in Jefferson County, a results and analysis document was written and presented to both the state and local program directors. Existing problems were identified, and recommendations were presented for their solution.

The program in Jefferson County was found to provide 24-hour, 7-day-a-week coverage with a staff of 32-33 employees. The program's contact rate with arrestees was close to 100 percent, and the interview rate was approximately 60 percent of the total detainees. Both figures were among the highest in the state. The program was also providing the trial bench with verified information for a rational decision on releasing an arrestee within 12 hours. The median time involved between an arrestee's interview and his release from custody was three hours, 45 minutes; the mean time was six hours. [1] Comparatively, median release times found in Covington and Lexington were 55 minutes and 27 minutes respectively.

1 These release times, when broken down by arresting jurisdiction, indicated that the Jefferson County trial bench was unavailable for making release decisions after 11 p.m. Late at night, city prisoners were being released in 3 hours, 30 minutes, as opposed to 8 hours and 4 minutes for county prisoners. This matter eventually was the subject of a legislative hearing. After a resolution was passed by the legislative committee requesting that the County Judge make his trial bench available at night, the matter was satisfactorily resolved.

In terms of staff time allocation, the balance of total time between the actual line-staff functions (56 percent), secretarial functions (12.5 percent), supervisory functions (8.1 percent), and non-case related activities (19.1 percent) indicates that the program was well organized and provided the essential services without extensive administrative overhead.

The activity level of each employe in the program suggested that it is neither grossly overstaffed nor understaffed. However, the data indicated the need for making some adjustments which would more effectively utilize the personnel currently employed. The most basic problem was found to be overscheduling on the second and third shifts. Overall, this study identified five problem areas in which adjustments might be made.

The following recommendations were presented to resolve these problems:

(1) Because of the large periods of unassigned time on certain days of the week, especially on the second and third shifts, decrease the number of interviewers scheduled on Monday - Thursday and on Sunday, and increase the number of interviewers on Friday and Saturday. Such a procedure should save 60 man hours a week,

(2) Hire an additional full-time person at an hourly wage to check records for each of the second and third shifts,

(3) Direct all incoming calls, inquiries, and check-ins to one phone number and one central desk,

(4) Delegate the responsibility of the 24 hour review process to a single line-staff individual in order to streamline and provide continuity in the procedures, and

(5) Establish a central control point for all program releases to report immediately before and after scheduled court appearances.

Implementing the Recommendations: Since the issuance of the report, the local director in Jefferson County has implemented the recommendations outlined above. More effective staff utilization has resulted; this was confirmed in a follow-up visit during late October undertaken by a central staff member not involved in the study.

The time studies conducted in Covington-Newport and Lexington had not been concluded when this paper was written. Plans exist for follow-up, two week time studies in each of the three cities to be undertaken for comparative analysis in early 1977.

FORMS OF FUTURE EVALUATION

Along with continued statistical monitoring and field visits the central staff of the Pretrial Services Agency plans two in-depth evaluation efforts to be undertaken in the first half of 1977. These efforts will take the form of analyzing the agency's objective point system to isolate reliable predictability indicators, and contracting for an independent third party evaluation of the state-wide program.

Isolating Indicators of Predictability

The objective point scale used by the agency in determining an arrestee's eligibility for a recognizance recommendation is liberally patterned after similar scales used in other programs. It stresses the family, economic, and community ties of the defendant. However, in the words of Barry Mahoney of the National Center for State Courts, "We do not now know what factors are most likely to be reliable indicators of future flight or future crime." [2]

The Administrative Office of the Courts will conduct a research project early in 1977 to isolate any existing common criteria from the point sheet that separates those who have failed to appear from those who have appeared for trial through the program. Sample programs will be selected, interview forms and point sheets examined, and selected criteria placed on tally sheets and entered into a computer. Computer analysis should result in the isolation and identification of reliable factors of predictability, if any do indeed exist.

2 An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs (Denver: National Center for State Courts, 1976.)

Third Party Evaluation

An application has been forwarded by the program to LEAA for temporary funding assistance. Included in the application is a request for a comprehensive program evaluation to be performed by a neutral third party.

This evaluation should be conducted by a neutral third party in order to insure its thoroughness and objectivity. The results of the evaluation will be of nation-wide interest to the entire criminal justice community. If the program is found not to be effective in the provision of services, it will be necessary to immediately correct the problems.

Because this program marks a nation-wide first in the area of pretrial release it is imperative that an in-depth evaluation be conducted for purposes of providing a feedback mechanism for program self-improvement and for technology transfer to other jurisdictions throughout the country. No other state has completely abolished commercial bail bonding and replaced it with a state-financed pretrial release program. The opportunity to gather meaningful data on a scale that heretofore has been unavailable should not be missed. Given the value of such an evaluation to other jurisdictions across the country, the need to provide a feedback mechanism for the project itself, and the innovative nature of the project, it has been determined that a significant portion of the requested grant will be devoted to this evaluation.

The Chief Justice of the Commonwealth will appoint an evaluation committee which will be charged with the general

oversight of the evaluation component of the grant. The evaluation will be conducted in two phases.

Phase one will be concerned with the operation of the program itself. It will investigate the methods and procedures employed by the program staff. It will provide a feedback mechanism for internal improvements. A report for phase one will be due by the end of February, 1977. Phase two of the evaluation will be concerned with an analysis of the impact of the program on Kentucky's entire criminal justice system. It will analyze such items as the cost impact on the public defender, the jailer, and the net reduction in welfare payments. A report on phase two will be prepared for presentation to the 1978 General Assembly.

Since it is the objective of the evaluation to determine the extent to which a particular result is attributable to a specific cause within the program, the RFP (Request for Proposal) as approved by the committee will insure that the evaluation design employed by the contractor will seek to identify other factors that might conceivably contribute to that result. The evaluation design will also be explicit in its definition of terms. Care will be taken in the selection of a contractor to make sure that the design used will insure that the program releasees and the individuals studied for purposes of comparison are equivalent in terms of relevant characteristics such as age, sex, race, employment status, current charge, and prior record.

The indices used to measure the effectiveness of the program will include release rates, speed of operations, equal justice, failure to appear rates, pretrial crime, and economic costs and benefits. Specifics as to the data collected and definitions used in these general indices will be determined by the evaluation committee.

CONCLUSIONS

The Pretrial Services Agency of the Administrative Office of the Courts in Kentucky has been engaged in a process of continuous program evaluation which has taken several forms since the beginning of the Agency on June 19, 1976. Several problems have been identified, and recommendations drafted to achieve their resolve. Significantly, in most every case the recommendations drawn from the various evaluation efforts have been implemented, and the state-wide program has been adjusted to minimize those problems.

Criminal Justice programs can learn from the Kentucky experience that practical program evaluation can come in a variety of packages, from the simple monitoring of summary statistical data to in-depth, planned, and methodological research. When program objectives have been quantified, practical evaluation can be undertaken and prove beneficial.

Further, the Kentucky experience should illustrate that it is not necessary to maintain a large in-house research staff to conduct program evaluations. Of the four members of the pretrial central staff, one assisted the third party consultants and engages in field supervision, one monitors statistics and also engages in field supervision, another conducted the time utilization studies and will be involved in the computerized study of predictability factors, and the fourth very rarely becomes involved in the research effort. Thus, just a few full-time staff members is all that is required to produce an effective in-house evaluation and research unit.

THE EFFECTIVENESS OF BAIL SYSTEMS
AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND RE-ARREST WHILE ON BAIL

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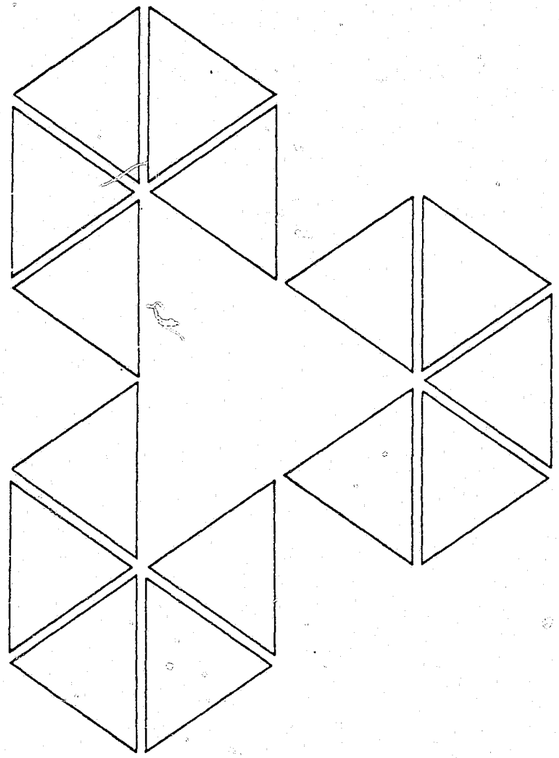
THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL



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ABSTRACT*

A random sample of 756 defendants released on bail in Charlotte, North Carolina, in 1973 was studied to determine the relative importance of various factors in determining the likelihood that a bailed defendant will fail to appear in court and/or be arrested for a new offense while on bail. The most important factors were found to be court disposition time (the amount of time between release on bail and court disposition), criminal record, and form of bail. The defendants' sex, race, income, age, and employment status all were shown to have either no significant effect on nonappearance and rearrest that could be measured in the data, or (in a few instances) a reverse effect from the one expected. The seriousness of the offense charged also had no measurable effect, although it may have had an effect that was counteracted by the standard practice of setting higher bond for more serious offenses. Court disposition time proved to have an important effect; the chance of avoiding nonappearance and rearrest dropped five percentage points for each additional two weeks the defendant remained free on bail. Criminal history, measured by prior arrest record, also had a strong effect.

Comparison of various forms of bail were made, adjusting simultaneously for criminal history and court disposition time. Forms of bail that rely solely on the threat of financial loss to ensure appearance in court proved to be the worst in terms of rates of nonappearance and rearrest. Post-release supervision, provided by the Mecklenburg County Pre-Trial Release program, had a significant and substantial effect in reducing bail risks and the deleterious effect of court delay. A sizable group of defendants--those without a serious criminal record whose cases do not take unusually long to dispose of--probably do not benefit from post-release supervision, as the successful releasing practices of Charlotte magistrates show. Post-release supervision should probably be allocated to defendants who need it most--those with substantial criminal records and those whose cases take unusually long to reach court disposition. Finally, nothing in the study suggests that it would be desirable to remove the financial disincentive of an unsecured appearance bond whose amount depends generally on the seriousness of the offense charged.

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INTRODUCTION

Bail, also called pretrial release, is a legal means of freeing a defendant before court disposition of criminal charges against him. Its purpose is to prevent the defendant from being jailed when still presumed innocent and to assure that he will appear in court when required. The right to bail is not absolute; it is conditional, in the sense that the court may set reasonable conditions intended to insure his appearance at the various stages of his trial. Failure to appear in court when required usually carries some penalty for the bailed defendant. The penalty may take the form of forfeiting a specific sum of money, additional criminal punishment, or loss of pretrial freedom. It reflects the risks that society takes when the defendant is released, including:

1. The risk that the government (and others, including witnesses) will be inconvenienced by a delay in prosecuting the case against the defendant due to his absence;

2. The risk that the policies of judicially resolving issues of criminal liability and of imposing criminal sanctions on those found liable will be frustrated by the defendant's fleeing the jurisdiction and avoiding recapture;

3. The risk that the defendant may commit crimes while on bail before his case can be disposed of.

Although the law in this area is not settled, the view on granting bail that may prevail[1] is that the decision whether to release a defendant constitutionally must be based only on the likelihood of nonappearance and (because he is presumed innocent) not on the likelihood that the defendant will commit crimes while released. However, a concern for public safety will not let us ignore the risk of new crimes. If it is correct that the initial decision to release must be based (legally) only on the risk of nonappearance and not on the risk of committing crime while on bail, it is good policy to use all lawful means after release to reduce the risk of nonappearance and the risk of committing crime.

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1. After careful consideration, the American Bar Association's Advisory Committee on Pretrial Proceedings recommended against permitting "preventive detention" (denying bail based on a prediction that the defendant will commit crime if released), not because that practice would violate the U.S. Constitution but because many state constitutions provide an absolute right to bail and because identifying which defendants would commit crime while released would be very difficult. See American Bar Association, Standards Relating to Pretrial Release, § 5.5, Commentary 65-71 (1968).

The administration of bail necessarily involves an estimation of the likelihood that the defendant will not appear in court or will commit a new crime while released. (The likelihood that one or both of these things will happen is called the "bail risk" in this study.) In the most common form of release, bail bond, the defendant obtains his freedom by promising to pay a stated sum, the "bond amount," if he fails to appear. In most cases the bond amount depends entirely on the nature of the charge or charges for which the defendant is being tried -- the more serious[2] the charge, the greater the bond amount. Relating the bond amount to the seriousness of the charge seems to be based on this reasoning: the more serious the charge, the more reluctant the accused is likely to be to appear in court and face the consequences; the greater the reluctance to appear, the greater the disincentive (threat of financial loss) needed to prevent nonappearance. (Nothing in this study suggests that this reasoning is false.) In some cases the bond amount is intentionally set beyond the defendant's likely ability to raise it or obtain a surety for it; such prohibitive bond-setting may be seen either as a judgment that the defendant cannot be relied on to appear in court under any circumstances or as a decision to impose "preventive detention" to protect the public from the defendant.

Since the Vera Institute of Justice initiated the Manhattan Bail Project in 1960 as an alternative to the conventional bail bond system, reformers have advocated a system of release in which the calculation of the risk of nonappearance depends not only on what the defendant is charged with but also on his characteristics and background. The American Bar Association has recommended that, in determining whether there is a "substantial risk of nonappearance," the following factors should be considered:

(1) The length of the defendant's residence in the community, his employment history and financial condition;

(2) His family ties and relationships;

(3) His reputation, character, and mental condition;

(4) His criminal record;

(5) Whether there are responsible persons who will vouch for his reliability;

(6) The nature of the offense charged and the likelihood of conviction ("insofar as these factors are relevant to the risk of nonappearance"); and

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2. In the system employed in Charlotte, "seriousness" in this context corresponds roughly to the maximum fine or prison term for an offense.

(7) "Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear."

The American Bar Association's position is that unless these factors indicate a "substantial risk" of nonappearance, the defendant should be released simply with an order to appear in court, or on his own promise to appear, without further conditions. If the degree of risk is "substantial," conditions of release may be set, including placing the defendant under care or supervision while released and imposing reasonable restrictions on his activities. In the ABA view, bail bond should be used only as a last resort, when nothing else "will reasonably assure the defendant's appearance in court." The bond amount--i.e., the degree of financial loss to the defendant if he fails to appear--must depend on all the factors listed earlier, not merely the charge against him, and thus "be the result of an individualized decision, taking into account the special circumstances of each defendant."[3]

Recent innovations in bail have usually been consistent with the ABA recommendations and have involved point systems for calculating risk of nonappearance in which length of residence and other "community ties" have positive values and criminal convictions have a negative value. Both conventional bail bond and forms of release consistent with the ABA's recommendations will be considered in the analysis that follows. This paper will report on what a set of data collected recently in Charlotte, North Carolina,[4] tells us about how various factors affect bail risk and which forms of bail are most effective in controlling bail risk. The specific questions addressed include the following:

- Which factors explain most of the variation in bail risk?
- How do these factors rank in importance?
- Do the factors commonly thought to influence bail risk have the expected effect?
- How do the bail bond and ABA-recommended forms of release compare with regard to control of bail risk?
- What improvements in present forms of release do the data suggest?

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3. American Bar Association, Standards Relating to Pretrial Release, §§ 5.1, 5.2, 5.3 (1968). The ABA recommends the prohibition of "compensated sureties" (professional bondsmen); id. at §§ 5.4.

4. For an earlier study of the same data, see S. H. Clarke, "The Bail System in Charlotte, 1971-73" (National Technical Information Service, Document Number PB-239 827/AS, Arlington, Virginia, 1974).

THE DATA

The source of the data is the police and criminal court records of Charlotte, North Carolina, reflecting criminal prosecutions begun by arrest during the first three months of 1973. The unit of data is the arrested defendant, who may have one or more specific charges filed against him. A total of 861 defendants were chosen by random sampling from the chronological police record of arrests from January through March 1973.[5] The fact that these defendants were randomly chosen from a particular defendant population in Charlotte does not make them representative of the statewide or nationwide defendant population, yet conclusions reached from the Charlotte data may apply to other communities, allowing for local differences.[6]

The 861 defendants in the sample amounted to about one-third of the defendants arrested in Charlotte during the first quarter of 1973. This third excludes those charged with public drunkenness, hunting and fishing offenses, and traffic and vehicular violations, but includes those charged with driving under the influence of alcohol. Of the 861, 756

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5. The sample was stratified on race (black or other) and offense type (one of eight categories). The original plan was to stratify the sample on all variables that were related to bail outcomes; among the many variables that at first were thought to have an effect on bail opportunity and bail risk, the only ones available in the police arrest records were race and offense. Later, we decided to use the selected defendants as a total population or "observational sample," even though the sampling fractions varied considerably among the sixteen race and offense subpopulations of defendants. To eliminate any bias introduced into the data in this way, race and offense were treated as independent variables (along with a number of others) in the analysis. The over-all sampling fraction was about a third (861 out of 2,578). The actual sampling fractions based on race and police offense category were as follows (the fraction for blacks is given first): serious crime against persons, 76/161, 59/62; serious crime against property, 40/82, 58/62; serious "vice" (mostly drug distribution), 14/15, 44/44; nonserious crime against persons (simple assault, drunken driving, etc.), 83/422, 84/429; nonserious crime against property, 89/456, 94/489; nonserious "vice" (simple drug possession, prostitution, gambling), 46/47, 65/130; nonserious family (nonsupport), 36/79, 31/62; nonserious "other" (mostly disorderly conduct), 21/22, 21/21.

6. These data are sufficient to allow some tentative conclusions about bail risks and forms of release. For general conclusions, confirmation is needed on the basis of data from other communities and national samples.

received some form of release before court disposition.[7] All information used here was captured by tracing the defendants and their charges through police and criminal court files. All court cases (specific criminal charges) were followed through until disposition--including sentence, if any--in the trial court. The cases of those few misdemeanor defendants convicted by a judge in the district (lower) court who exercised their right to a trial de novo by jury in the superior (higher) court were not considered disposed of until the superior court trial had concluded. For the 41 defendants whose cases were still undisposed at the end of 1973, an exception was made: January 4, 1974, was used as a cutoff date. When a defendant had more than one charge (about 19 per cent of the total did) and when these were disposed of on different dates, the disposition date recorded was that of the "principal case"--i.e., the one that received the most severe court disposition according to a weighting scheme. (Usually the "principal case" took longer to be disposed of by the courts than the defendant's other cases.)

FACTORS CONSIDERED BY THE STUDY

The study examined a number of factors, including the defendant's characteristics, the charge against him and his criminal record, the form of bail he received, and court disposition time--the number of days he was free on bail before his case was disposed of by the court. The percentage distributions of these various factors appear in Table 1. The primary interest of the study was in (1) whether the defendant failed to appear in court, and (2) whether he was rearrested for an alleged new offense after pretrial release and before court disposition. Failure to appear (also called "nonappearance" here) was determined by whether at least one capias (arrest warrant) was issued by a judge because of the defendant's absence at a scheduled court appearance. (Failure to appear resulted almost invariably in issue of a capias, except when the defendant was released on cash bond; this will be discussed later.) Rearrest, which we use here as an indication of whether the released defendant committed crimes while on bail, was determined from the police records of arrests throughout Mecklenburg County, in which Charlotte is located. If these records showed that the defendant had been arrested for a new offense other than public drunkenness, or hunting and fishing, traffic, or vehicular violations (but including driving under the influence) in the county between the dates of release and court disposition, the defendant was counted as having been rearrested. This definition can be criticized because it includes arrests in which the defendant had not in fact committed a crime and because it includes no information about offenses committed outside the county. The

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7. The actual total of released defendants was 762, but six were eliminated because of data collection errors.

criticism is countered by the fact that almost all of the 756 released defendants were present in the county at least often enough for their cases to be disposed of in court; only 19 fled the jurisdiction (i.e., had warrants for nonappearance still outstanding as of January 4, 1974).

Because nonappearance and rearrest are roughly equally important with regard to bail policy, most attention was focused on whether the defendant failed to appear or was rearrested or both. As Table 1 shows, 70 defendants (9.3 per cent) failed to appear, 75 (9.9 per cent) were rearrested while on bail, and 137 (18.1 per cent) either failed or were rearrested. (Eight defendants failed to appear and were also rearrested for new crimes; this explains why the last figure was 137 and not 145.) The probability of nonappearance or rearrest or both is referred to here as "bail risk" or "combined bail risk."

The study relied on information concerning defendants who were actually released. Some defendants (about 12 per cent of the total sample) were not released at all before court disposition of their charges. Exclusion of these defendants probably has not distorted the study's findings, even though there is reason to believe the unreleased defendants would have had higher-than-average nonappearance and rearrest rates if they had been released.

The factors first thought to be causally related to nonappearance and rearrest are listed below, followed by brief definitions and statements of the reasons for choosing them (as will be seen, most of these factors turned out to have either very little measurable effect on bail risk or an effect contrary to what we expected):

- Sex
- Age
- Race
- Income
- Local residence
- Family ties [not used in this study due to lack of data]
- Employment
- Criminal history
- Type of offense charged in current prosecution
- Court disposition time
- Form of pretrial release

The defendant's sex and age were included because of abundant evidence that males are more likely to commit crime than females and those in their teens and early twenties are more likely to commit crime than older people. Therefore, we supposed that bail risk would be greater for male defendants than for female defendants and greater for younger defendants than for those past their early twenties.

Race and income were included because of the possibility that the

Table 1
Description of Released Defendants in Terms of Factors Chosen for Study (756 = 100.0%)

	No.	Percentage
Sex		
Male	598	79.1%
Female	158	20.9%
Age		
14-24	314	41.5%
25-34	236	31.2%
Over 34	206	27.2%
Race		
Black	350	46.3%
Other	406	53.7%
Income		
Low	392	51.9%
High	304	40.2%
Unclassified (residence outside Charlotte)	60	7.9%
Employment		
Employed	466	61.6%
Student	68	9.0%
Unemployed	115	15.2%
Unknown	107	14.2%
Prior Arrests		
None or one	491	64.9%
Two or more	265	35.1%
Offense Seriousness		
Felony	161	21.3%
Misdemeanor	595	78.7%
Offense Category		
Felony-Persons	33	4.4%
Felony-Property	66	8.7%
Felony-Vice	62	8.2%
Misd.-Persons	212	28.0%
Misd.-Property	178	23.5%
Misd.-Vice	83	11.0%
Misd.-Family	77	10.2%
Misd.-Other	45	6.0%
Form of Release		
PTR	217	28.7%
Magistrate	69	9.1%
Cash	72	9.5%
Bondsman	346	45.8%
Other	52	6.9%
Failure to Appear		
Failed	70	9.3%
Did not fail	686	90.7%
Rearrest on New Charge		
Rearrest	75	9.9%
No Rearrest	681	90.1%
Combined Bail Risk		
Failed or rearrested or both	137	18.1%
Neither	619	81.9%
Time at Risk		
1 week or less	29	3.8%
1 to 2 weeks	74	9.8%
2 to 3 weeks	131	17.3%
3 to 4 weeks	74	9.8%
4 to 5 weeks	62	8.2%
5 to 6 weeks	61	8.1%
6 to 7 weeks	80	10.6%
7 to 8 weeks	32	4.2%
8 to 9 weeks	43	5.7%
9 to 10 weeks	30	4.0%
10 to 11 weeks	27	3.6%
11 to 12 weeks	17	2.2%
More than 12 weeks	96	12.7%

social disadvantages experienced by black and low-income defendants might make their bail risk greater than that of whites and higher-income defendants. Race was defined as (1) black or (2) other. Income was defined in terms of the median 1969 income of the census tract of residence. Originally, five income levels were used but seemed to provide no more information than the two that were eventually used: "low," meaning under $7,000, the approximate citywide median; and "high," meaning $7,000 and over. Because census tracts in Charlotte are relatively compact and homogeneous, we considered them an adequate, though indirect, measure of defendants' income.[8] About 9 per cent of the defendants resided outside Charlotte; most of these lived in Mecklenburg County, where rural postal route addresses prevented their assignment to census tracts. Since the median income of suburban Mecklenburg County as a whole exceeds $7,000, we included defendants who were not Charlotte residents in the high-income category.

We initially hypothesized that a defendant who was a local resident would have a lower bail risk than a nonresident and a defendant who was either employed or a full-time student would have a lower bail risk than one who was unemployed. Unfortunately, the present data do not provide an adequate test of the hypothesis that local residence is associated with bail risk, because so few of the defendants were not local residents; 91 per cent had Charlotte addresses and most of the others lived in the nearby suburbs.[9] Employment status (employed, full-time student, or unemployed) at the time of arrest was also included because of its presumed relationship to commitment to conventional values. Family ties--whether the defendant lived with parents, spouse, or other kin and the degree of contact and type of relationship he had with family members--were also thought to be indicators of commitment to conventional values; unfortunately, no data on family ties were available for most defendants.

The defendant's criminal history was thought to be related in general to his future criminal behavior, and thus to rearrest while on bail and perhaps also to nonappearance. Criminal history was measured by prior arrests in Mecklenburg County, which means that the measurement was incomplete for the relatively few defendants who had spent most of their adult lives outside the county. Criminal histories were grouped into two categories: (1) zero or one prior arrests, and (2) two or more prior arrests. Originally, zero and one were made separate categories, but since the analysis revealed little difference between the two in their effect on post-release behavior, they were combined. Arrests for public drunkenness, fishing and hunting violations, and traffic and vehicular offenses (except driving under the influence) were excluded.

The offense with which the defendant was charged was expected to be related to bail risk for the same reasons as criminal history, and also because those charged with serious offenses were presumed to be more reluctant than others to appear in court and face possible punishment. The type of offense was defined in two ways on the basis of the specific breach of North Carolina law alleged in the defendant's court record: (1) as a felony (carrying a maximum penalty of more than two years' imprisonment) or misdemeanor (carrying a maximum penalty of two years or less); and (2) as one of eight categories into which felonies and misdemeanors were divided. The eight offense categories are felonies against the person, felonies against property, "vice" felonies (mostly involving distribution of drugs), misdemeanors against the person (more than half of these were simple assaults and nearly all the rest were driving under the influence), misdemeanors against property, "vice" misdemeanors (mostly simple possession of marijuana and other drugs), "family" misdemeanors (such as nonsupport), and "other" misdemeanors (nearly all disorderly conduct). If more than one charge was filed against the defendant, offense information was taken from the principal case as defined on page 6.

Court disposition time (also called "court delay" here) is ordinarily defined as the amount of time between the defendant's arrest and his court disposition. Defining it that way would create a problem in this study. We hypothesized that court disposition time would directly affect the defendant's probability of failing to appear and/or being rearrested, in that the longer he was free before court disposition, the greater opportunity he would have to forget his obligation to appear in court, make plans to flee the jurisdiction, or become involved in illegal activity. In this sense, long court delays can cause failure to appear and rearrest. However, the reverse is also true; failure to appear (and sometimes rearrest while the original case is pending) can cause court delay. When the defendant does not show up in court, a delay of days or weeks occurs while he is found, arrested, and brought back to court. Rearrest on a new charge can also slow the trial of the original charge. In this study, we are interested only in the effect of court delay on failure to appear and rearrest, not the effect of failure to appear and rearrest on court delay. To avoid confusing the two effects in the study, court disposition time has been defined as the number of days from the defendant's first pretrial release date (for most defendants this was within five days after arrest) until (1) his case or cases were disposed of by the court, (2) he failed to appear in court as scheduled, or (3) he was rearrested on a new charge, whichever occurred

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8. For a defense of a nearly identical method of determining income, see M. E. Wolfgang, R. M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972), pp. 47-52.

9. Most defendants counted as Charlotte residents actually had an address in Charlotte at the time of arrest that caused them to be included in this study. However, some were past but not present residents of the city. Our definition of local residence is not an ideal one, because relying on police arrest records does not provide a full picture of an arrested person's residential history.

first. Thus, when the terms "court delay" and "court disposition time" are used here, they do not include any period of time after failure to appear or rearrest in cases in which the defendant fails to appear or is rearrested.[10]

The procedure by which the defendant obtained his pretrial freedom--here called "form of release"--was thought to be of major importance in determining bail risk. Releasing procedure includes not only the method of selecting those to be released but also the supervision (if any) of the releasee until court disposition. Forms of release available in Charlotte are explained in the next section.

FORMS OF PRETRIAL RELEASE IN CHARLOTTE

There are six distinct forms of pretrial release in Charlotte. Among them are conventional bail, in which sole reliance is placed on the threat of financial loss (bond forfeiture) to insure appearance of the defendant, the bond amount being determined by the seriousness of the charge against the defendant, and release that generally follows the American Bar Association standards stated earlier, in which the decision to release is based on a variety of factors.

In conventional bail, the bond amount is usually set according to a schedule of minimum amounts prescribed by the chief district court judge. These depend solely on the seriousness of the offense charged and, in 1973, ranged from $15 for minor offenses such as failure to pay cab fare to $5,000 for safecracking. One form of conventional bail is "cash bond," in which the defendant simply deposits the full bond amount in cash with the court, to be refunded if he appears as required and forfeited if he does not.[11] Of the 72 defendants in the study who were released in this fashion, most were charged with misdemeanors such as drunken driving, passing worthless checks, disorderly conduct, and domestic nonsupport. Apparently, if the defendant on cash bond was charged with a minor offense and did not have a substantial criminal record, he was often permitted to escape further prosecution merely by forfeiting bond--as if he had pled guilty and paid a fine. Because nonappearance in this study was determined by whether the judge issued an arrest warrant for failure to appear, and because judges were probably reluctant to issue such warrants when the defendant was released on cash bond and charged only with a minor offense, the actual nonappearance rate among cash bond releasees is probably much higher than the rate as we measured it. A variant of cash bond is "property bond," in which the defendant or some benefactor pledges property of sufficient value to cover the bond amount. Only thirteen defendants in the study were released on property bond; they are included in the "Other" category in the tables.

The most common form of bail, here called "bondsman release," is obtained by paying a professional bondsman's fee in return for the bondsman's acting as surety for the bond amount. At the time of the study, the nonrefundable fee might range from 15 to 30 per cent of the bond amount and was not subject to any legal maximum.[12] As businessmen, bondsmen must be concerned about the risk of the defendant's nonappearance because they may have to forfeit part or all of the bond amount if he does not appear. Total forfeiture is not automatic, however; a sympathetic judge may entertain motions to delay forfeiture when the bondsman says he is trying to locate the missing defendant, or he may reduce the amount forfeited. Bondsmen probably calculate the relative reliability of their clients and maintain some sort of surveillance of those they consider most risky. So much can be assumed as a matter of good business practice, although we made no detailed investigation of bondsmen's operations. However, the bondsman and the defendant have no regular contact after release in most cases.

Three other forms of pretrial release that are consistent with the American Bar Association standards have resulted in Charlotte from North Carolina's enactment of a new law providing for release "other than on bail" of all defendants except those charged with capital crimes (for whom there is no constitutional or statutory right to bail). This legislation, passed in 1967, authorizes release "if it appears likely that [the defendant] will appear . . . at the proper time." In determining the risk of nonappearance and the conditions of release, the releasing officer (a magistrate or judge) is required to take into account

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10. Court disposition time presented a special problem in the analysis because it is not stochastically independent of the dependent variables, failure to reappear and rearrest. The occurrence of nonappearance or rearrest will "stop the clock" and make the disposition time shorter than it would be if the defendant behaved himself until normal court disposition. To solve this problem, disposition time was handled as a co-dependent variable.

11. In some jurisdictions bail can be obtained by posting some fraction of the bond amount, such as 10 per cent. A proposal to allow this in North Carolina was considered by the General Assembly's Criminal Code Commission in 1973, but was ultimately defeated by the professional bondsmen's lobby.

12. Legislation passed in 1975 limits the bondsman's fee to 15 per cent of the bond amount (Ch. 619, 1975 Session Laws, N.C. Gen. Stat. Ch. 85A). Despite the expense of the bondsman's fee, the majority of low-income defendants evidently preferred bondsman release to a form of release not involving any cost to them. In 1973, the ratio of bondsman releasees to releasees of the PTR program (described later in the text) was 1.6 to 1 for the low-income group. Perhaps low-income defendants feared the half-hour interview by PTR staff, or perhaps they were willing to pay for the quicker release procedures of bondsmen.

> . . . the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[13]

The law further provides that release of this type may be either (1) by "unsecured appearance bond," whereby the defendant signs a promise to pay a stated sum if he fails to appear but is not required to secure the bond with any cash deposit, property pledge, or surety; or (2) upon the defendant's "own recognizance," whereby he simply signs a promise to appear with no financial penalty.[14] The statute makes failure to appear in these circumstances a criminal offense subject to up to two years' imprisonment; in contrast, the only penalty[15] for nonappearance in conventional bail bond is forfeiture of the bond amount.

The criminal courts in Mecklenburg County have developed three forms of pretrial release on the authority of the 1967 law: magistrate release, PTR release, and "own recognizance" release. (Magistrates are judicial officials of limited jurisdiction before whom defendants are brought immediately after arrest; their office in Charlotte is staffed around the clock daily.) In December 1970, the chief district judge issued rules permitting magistrates to release on "unsecured appearance bond" defendants who are:

1. Residents of the state;

2. Not charged with drunken driving, driving with a revoked or suspended license, assaulting or resisting a public officer, any drug law violation, racing in an automobile, or speeding over 80 mph;

3. Able to qualify under the point system (described below); and

4. Not charged with a felony (in practice, this criterion has been relaxed; magistrates are evidently often authorized or requested by higher-ranking judges to release felony defendants, and 26 per cent of their releasees in our 1973 sample were charged with felonies).

An additional restriction was imposed on magistrate release by Mecklenburg County's chief district court judge in July 1972: magistrates were not allowed to release defendants who were eligible for release by the PTR program (described below). This was done because the magistrates were perceived as competing with the PTR program, which was thought to be a better form of release. Despite this restriction, magistrates continued to release defendants. The defendants they released included (1) those charged with misdemeanors but ineligible for PTR release, often because of residence outside the county; (2) those charged with felonies when judges requested release; and (3) (possibly) some defendants who were eligible for PTR but whom magistrates released despite the instruction not to do so.

In the magistrates' point system, points are assigned on the basis of how long the defendant has lived in the county, how long he has worked for the same employer, whether a family member or employer will co-sign the bond, whether he owns real property in the county, whether he is known by the magistrate or arresting officer to be reliable and likely to appear in court, whether he is married and living with his spouse or children, and whether he is represented by an attorney. (Clearly at least two of these criteria--owning property and having a privately paid attorney--discriminate against the low-income defendant.) Magistrates are not formally required to take the defendant's criminal record into account, but it is safe to assume that they often do. An arresting officer may recognize an arrestee who has been arrested or convicted several times before and can check police arrest records without much trouble if he is in doubt. If he believes the defendant had a substantial record, the arresting officer will probably tell the magistrate. That magistrates do consider criminal record is supported by the fact that in our study the proportion of defendants with two or more prior arrests was about the same (approximately one-fourth) among those released by magistrates and among those released by the PTR program (described below). The PTR program is formally required to take prior convictions into account. In any event, a defendant with a sufficient point score who meets the other criteria (including whatever subjective criteria the magistrate chooses to apply) is released without any pledge of property, cash deposit, or surety when he signs a promise to pay the usual bond amount for his alleged offense if he fails to appear. After release by the magistrate, the defendant is on his own; no reminder of court dates o ther supervision is provided.

The second form of release based on the 1967 law, here called "PTR release," is similar to magistrate release with regard to releasing procedure,; it differs in using a specialized staff and post-release supervision. The Mecklenburg County Pre-Trial Release ("PTR") Progra

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13. N.C. Gen. Stat. § 15-103.1(b) (1974 Supp.). Although not repealed, this section is superseded by N.C. Gen. Stat. Ch. 15A, Art. 26, effective September 1, 1975, which has generally similar provisions.

14. N.C. Gen. Stat. § 15-103.1(a) (1974 Supp.).

15. N.C. Gen. Stat. § 15-103.1(c) (1974 Supp.). N.C. Gen. Stat. § 15A-543 (effective September 1, 1975) makes all failure to appear a crime, regardless of type of release, a misdemeanor if the original charge was a misdemeanor and a felony if the original charge was a felony.

which began operating in July 1971 on federal funds, is authorized to consider for release any defendant who resides in the county and is not charged with certain offenses. In 1973, these excluded offenses were public drunkenness, first-degree murder, rape, first-degree burglary, safecracking, being a habitual felon, assault upon a public officer, kidnapping, malicious use of explosives, and narcotics felonies. (Aside from public drunkenness, which is excluded from this study, all of the excluded offenses were rare except for drug felonies; the latter constituted about one-fourth of all felony charges filed in 1973. After the period of the study, the rule barring those charged with drug felonies began to be relaxed in some instances.) After his appearance before a magistrate, an eligible defendant has an opportunity to be interviewed by a PTR investigator; investigators, like magistrates, are available 24 hours a day. The interview usually takes about half an hour--more time than the typical magistrate or bondsman release requires--and concerns a number of factors thought to be related to the defendant's likelihood of appearing in court, including all of those considered in the magistrates' point system (see preceding paragraph) and these additional factors:

1. Whether the defendant has ever failed to appear in court,
2. Whether he is a drug addict or alcoholic,
3. Whether he has been convicted of crimes in the county, and
4. The recency and seriousness of his convictions, if any.

The PTR staff is prepared to check all the defendant's responses, if this is thought necessary. Prior convictions are routinely checked in court records (because these records are accessible only on weekdays, a defendant arrested at night who admits to, or is suspected of, a serious criminal record may have to wait overnight or over the weekend for the record check to be completed). On the basis of the defendant's point total, the PTR program recommends for or against his release (the recommendations have been about 85 per cent favorable). A favorable recommendation is nearly equivalent to release, although approval by a magistrate is formally necessary for a misdemeanor defendant and by a judge for a felony defendant. This requirement sometimes means an overnight or over-the-weekend delay for felony defendants arrested when the court is closed. Like the magistrate-released defendant, the PTR-released defendant is required to sign an unsecured appearance bond and is subject to a misdemeanor penalty for failing to appear.

The PTR staff's initial interview, besides serving as a means of selection, may have another function. As this study will suggest, the pre-release interview of the defendant by a person in authority (the PTR staffer), who expresses his concern that the defendant appear in court as required and stay out of trouble in the meantime, may serve the same purpose as post-release contact and supervision.

PTR release is the only form of bail in which the defendant is supervised after release and has regular contact with releasing authorities. All PTR releasees are required to agree in writing to telephone the PTR office at a specified time each week and to report there at 8:15 a.m. on any day of a scheduled court appearance to indicate their readiness to go to court. Before each court date, PTR releasees receive a mailed reminder. In addition, a PTR releasee who seems irresponsible may be warned that his release will be terminated if he does not cooperate (though termination has been rare).

One other form of bail in Charlotte, used infrequently, is release by a judge on "own recognizance"--i.e., on the defendant's unsecured promise to appear in court. According to the 1967 law cited earlier, the judge is required to consider not only the defendant's charge and criminal convictions but also his community ties. Normally no post-release supervision is provided in "own recognizance" release. Failure to appear on "own recognizance" release, as on magistrate and PTR release, is punishable as a misdemeanor, although it involves no forfeiture of money.[16]

Because so few defendants were released on "own recognizance" (39) and property bond (13), the analysis gives little attention to these forms of bail; the 52 defendants released on "own recognizance' and property bond are grouped in the "Other" category in the accompanying tables. (See Table 2 for the relative frequency of the various forms of release among the defendants in the sample.[17])

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16. As Table 3 shows later in the text, defendants released on "own recognizance" were much more likely than others to have been charged with felonies and thus probably had difficulty obtaining other forms of release. Their performance while released is discussed in a later section concerning possible bias in the study as a result of excluding those defendants who obtained no release at all.

17. The analysis in Clarke, op. cit. supra note 4, indicated that when the PTR program's operation went into full swing early in 1972, most of its clients were defendants who would have been released by magistrates on unsecured bond had the PTR program not existed, although some would have become bondsmen's customers and some would not have been released at all. Professional bondsmen steadily lost clients after magistrate and PTR release were introduced, not only to those two forms of release but also to "own recognizance" and cash bond release. The gain in the latter form of release may have been indirectly due to the PTR program, because the PTR staff sometimes made defendants aware of their right to cash bond (even though they might have been ineligible for PTR release). The advent of the PTR program produced only a slight reduction in the proportion of defendants who obtained no release at all.

Table 2
Defendants Released on Various Forms of Bail

Form of Release	Number	Percentage
No Release (Jail)	99	11.6
Bondsman	346	40.5
Cash Bond	72	8.4
Magistrate	69	8.1
PTR	217	25.4
Other (Property Bond and "Own Recognizance")	52	6.1
Total	855	100.0

We can now review briefly some of the main features of the various forms of bail in Charlotte. (1) PTR and magistrate release are consistent with the principles of the ABA in most respects, except that both use the threat of financial loss in all cases by requiring the defendant to sign an appearance bond. All of the four most common forms of release involve an appearance bond whose amount depends on the seriousness of the offense charged. (In cash bond and bondsman release, the bond is secured; in PTR and magistrate release, it is unsecured.) This means that the nonappearing PTR or magistrate releasee in our study had as much reason to fear financial loss as the cash bond or bondsman releasee (in fact, perhaps more; one judge commented that PTR releasees would be dealt with more strictly when the question of enforcing bond forfeiture came up because they had "already had one break"). (2) Only PTR release used post-release contact with and supervision of the defendant. This probably reduces the likelihood that the releasee will forget his court date. It also may make the releasee feel that his actions are visible to the authorities, and therefore may tend to discourage not only making plans to avoid appearing in court but also becoming involved in new crimes. (3) Failure to appear while released by the PTR program or magistrates constitutes a separate criminal offense, but failure to appear while on bail bond was not a crime at the time of the study. We do not think this is an important difference, because prosecution for failing to appear is evidently rare.[18]

18. Another disincentive to failure to appear is stiffening of conditions of release after the failed defendant is reapprehended. For example the bond amount can be raised or the defendant, if a PTR client, may (rarely) be rejected by PTR. This disincentive affects defendants on all forms of bail more or less equally. Also, if a released defendant merely behaves so as to arouse suspicion that he may fail, it is theoretically possible to revoke his release. The bondsman or the PTR program can be absolved of responsibility and the defendant can be rearrested. This sort of "anticipatory" revocation almost never occurs.

Table 3 shows that defendants released in various ways differed in their characteristics. For example, magistrate and PTR releasees were somewhat less likely than bondman releasees to be of low income. Of the characteristics in which the various releasee groups differed, none had much effect on bail risk that we could measure, except for time at risk and prior arrests. When these factors are adjusted for statistically, some tentative conclusions can be made about the relative effectiveness of various forms of release.

MEASURING THE EFFECT OF COURT DISPOSITION TIME

A full explanation of the statistical method used in the study is beyond the scope of this report, but something needs to be said about the method of measuring the effect of court disposition time in conjunction with other factors.[19] The method involved the use of "survival rates" and "survival curves."[20] Survival curves, represented by the various graphs shown later, represent bailed defendants' dwindling chances of staying out of trouble as time goes by. As one reads the graphs from left to right, the number of weeks that the defendants are free on bail with their cases still not disposed of by the court increases. The height of the graph at any point in time indicates the "survival rate" at that time--the probability that a defendant will "survive" (remain free

19. The statistical theory for this approach is explained in G. G. Koch, W. D. Johnson, and H. D. Tolley, "A Linear Models Approach to the Analysis of Survival and Extent of Disease in Multidimensional Contingency Tables," Journal of the American Statistical Association, 67 (1972), 783-96.

20. Our statistical method implicitly assumes that each new day of freedom before court disposition, or each new time period, brings with it a new risk of failing to appear in court. This is a simplification of reality, of course. Defendants are not required to appear in court each day. Data collected in Charlotte in 1972, similar in relevant respects to the present data, indicate that among defendants charged with misdemeanors, 62 per cent had to appear only once in court for a final disposition, 22 per cent had to appear twice, 10 per cent had to appear three times, and 6 per cent had to appear four, five, or six times. For those charged with felonies, the corresponding figures were: one appearance, 12 per cent; two appearances, 27 per cent; three appearances, 16 per cent; four appearances, 23 per cent; and more than four appearances, 22 per cent. The average amount of time elapsing between successive appearances was 23 days for those charged with felonies and 25 days for those charged with misdemeanors. The scheduling of these court appearances varied with each defendant. The method used in this paper assumes that the exposure to the risk of nonappearance is uniformly distributed over time.

Table 3
Characteristics of Defendants on Various Forms of Bail
(Figures are Percentages*)

	No Release (Jail)	Bondsman	Cash Bond	Magistrate	PTR	Other[5]	All: Released and Not Released
Sex							
Male	91%	83%	85%	62%	73%	92%	81%
Female	9	17	15	38	27	8	19
Age							
14-24	57	38	35	49	43	58	43
25-34	19	32	32	28	32	23	30
Over 34	24	29	33	23	24	17	26
Race							
Black	53	49	21	27	58	42	47
Other	47	51	79	73	42	58	53
Income							
Low	60	59	39	30	50	60	53
High	25	31	53	62	46	29	39
Unclassified[1]	15	10	8	7	4	12	9
Employment							
Employed	43	62	67	57	66	42	60
Student	4	6	10	12	14	4	8
Unemployed	30	15	15	13	10	23	16
Unknown[2]	22	17	8	19	10	31	16
Prior Arrests							
None or one	44	58	76	70	75	50	63
Two or more	56	42	24	30	25	50	37
Offense Seriousness[3]							
Felony	51	22	12	26	12	60	25
Misdemeanor	49	78	88	74	88	40	75
Offense Category[4]							
Felony-Persons	21	5	0	3	1	20	6
Felony-Property	27	8	3	12	8	22	11
Felony-Vice	8	9	10	12	2	20	8
Misd.-Persons	15	31	32	19	28	17	26
Misd.-Property	11	19	19	26	35	8	22
Misd.-Vice	13	12	14	7	12	2	11
Misd.-Family	0	10	13	17	8	10	9
Misd.-Other	9	6	10	4	6	2	6

*Percentages may not add to 100 because of rounding

1. "Unclassified income" refers to all defendants who resided outside Charlotte at the time of arrest and had no past Charlotte address in police arrest records.

2. No entry as to employment appeared on these defendants' police arrest forms; presumably, the majority were unemployed.

3. Felony carries maximum sentence of more than two years in prison; misdemeanor, two years or less. Two cases with this information missing were included under "misdemeanor."

4. Categories explained in text.

5. Includes 39 defendants released on "own recognizance" and 13 released on property bond.

without either failing to appear in court or being rearrested on a new charge) up to that time. The steeper the slope downward from left to right, the greater is the effect of court disposition time on bail risk.

Survival rates and curves were computed[21] for various groups of defendants, grouped according to whether they had an arrest record and what type of release they received (bondsman, cash bond, PTR, etc.); by sex, age, race, income, local residence, employment status, and type of offense charged; and also by certain combinations of these factors. (The survival curves for prior arrests and type of release are shown here; the others are not.) To determine the effects of these factors on bail risk, the corresponding survival curves were compared. If the survival curve of one group of defendants is significantly lower and slopes downward to the right more steeply than the survival curve of another group, the first group of defendants has generally higher bail risks than the second group, or--to put it another way--the bail risk of the first group is increased more by court delay than the bail risk of the second group.

It should also be pointed out that an apparent difference in survival rates or curves is not always a statistically significant one. When a difference in rates could have been an accidental result of selecting sample data, the difference is said to be "not significant"; when the difference and/or the amount of data are large enough so that the difference is unlikely to be the accidental result of selecting the sample and instead probably reflects a true difference in the populations studied, the difference is said to be "significant." Certain mathematical quantities, called "significance statistics," are computed to determine whether observed differences in rates are significant.

FINDINGS

Table 4 shows the relationship to bail risk of each factor studied. The 756 defendants studied are grouped according to sex, age, etc., and for each group the percentage is indicated of those who failed to appear, those who were rearrested for a new offense, and those who failed or

21. Our method of computing survival rates was to estimate them, assuming that (1) those whose cases were disposed of in the nth week can be considered equivalent to those who survived past the nth week; and (2) defendants exposed to longer periods of risk behaved generally in the same way as defendants exposed for shorter periods would have if they had been exposed for longer periods. These assumptions are more acceptable if we remember that other factors relevant to bail risk were taken into account in the analysis of survival curves.

were rearrested or both. These percentages can be interpreted as the likelihood (probability) that a defendant in a particular group had of failing to appear or being rearrested.

1. Factors That Had Little or No Effect

The data suggest that sex, age, race, and income had little or no effect on the defendant's probability of failing to appear and being rearrested. This is shown by the various bail risk percentages, which are close in value for defendants of different sex, age, race, and income, and also by the significance statistics ("Pearson Chi-Square") in the rightmost column of Table 4. The bail risk percentages are slightly different for males and females, for blacks and others, for the three age groups, and for the three income groups, but the differences are not significant.

When prior arrests--which turned out to be more important than any other factor except court disposition time in influencing bail risk--are taken into account, sex, income, and race do appear to have an effect. Among defendants with two or more prior arrests, the combined risk rates were nearly twice as high for females as for males (45.5 versus 25.4 per cent); one and a half times as high for high-income defendants as for low-income defendants (35.0 versus 23.5 per cent), and one and a half times as high for whites and others as for blacks (33.1 versus 23.2 per cent). We originally thought that bail risk would be higher for males than for females, higher for low-income defendants than for high-income defendants, and higher for black defendants than for white defendants. Among defendants with two or more prior arrests, statistically significant differences with regard to sex, income, and race were found; however, these differences were all in the opposite direction from what was expected. When court disposition time was taken into account by comparing survival curves of defendants of different sexes, ages, races, and incomes, no significant differences in bail risk were found. We must conclude that our data provide no support for our initial expectations regarding the effects of the defendant's sex, age, race, and income on his likelihood of nonappearance and rearrest.

The data also suggest that whether the defendant was employed or a full-time student had no effect on bail risk, as the figures in Table 4 show. Adjusting for prior arrests did not reveal any effects of employment, nor did comparison of survival curves. This finding is somewhat surprising, because employment status is generally believed to be related to bail risk and is among the criteria approved by the ABA.

2. The Type of Offense Charged

The study also raises some doubt about the relation of the type of

Table 4
Relationships of Factors Studied to Bail Risk
(Percentage bases are totals in each row.)

	Failed to Appear	Rearrested for New Offense	Combined Bail Risk: Failed or Rearrested or Both	Total	Pearson Chi-Square for Combined Bail Risk
Sex					
Male	58 (9.7%)	55 (9.2%)	108 (18.1%)	598	.01
Female	12 (7.6%)	20 (12.7%)	29 (18.4%)	158	(df=1)
Age					
14-24	29 (9.2%)	34 (10.8%)	59 (18.8%)	314	.50
25-34	23 (9.7%)	23 (9.7%)	44 (18.6%)	236	(df=2)
Over 34	18 (8.7%)	18 (8.7%)	34 (16.5%)	206	
Race					
Black	33 (.4%)	33 (9.4%)	64 (18.3%)	350	.01
White and Other	37 (9.1%)	42 (10.3%)	73 (18.0%)	406	(df=1)
Income					
Low	42 (10.7%)	35 (8.9%)	74 (18.9%)	392	1.08
High	22 (7.2%)	36 (11.8%)	55 (18.1%)	304	(df=2)
Unclass. (not local resident)	6 (10.0%)	4 (6.7%)	8 (13.3%)	60	
Employment					
Employed or Student	47 (8.8%)	53 (9.9%)	94 (17.6%)	534	.33
Unemployed or Unknown	23 (10.4%)	22 (9.9%)	43 (19.4%)	222	(df=1)
Prior Arrests					
None or One	36 (7.3%)	31 (6.3%)	63 (12.8%)	491	26.43
Two or More	34 (12.8%)	44 (16.6%)	74 (27.9%)	265	(df=1)
Offense Seriousness					
Felony	14 (8.7%)	22 (13.7%)	35 (21.7%)	161	1.75
Misdemeanor	56 (9.4%)	53 (8.9%)	102 (17.2%)	595	(df=1)
Offense Category					
Fel-Persons	3 (9.1%)	6 (18.2%)	9 (27.3%)	33	8.13
Fel-Property	7 (10.6%)	10 (15.2%)	16 (24.2%)	66	(df=7)
Fel-Vice	4 (6.5%)	6 (9.7%)	10 (16.1%)	62	
Misd-Persons	19 (9.0%)	18 (8.5%)	33 (15.6%)	212	
Misd-Property	17 (9.7%)	22 (12.5%)	38 (21.6%)	178	
Misd-Vice	10 (12.2%)	4 (4.9%)	14 (17.1%)	83	
Misd-Family	6 (7.8%)	5 (6.5%)	10 (13.0%)	77	
Misd-Other	3 (6.7%)	4 (8.9%)	6 (13.3%)	45	
Form of Release					
PTR	3 (1.4%)	16 (7.4%)	19 (8.8%)	217	28.30
Magistrate	7 (10.1%)	4 (5.8%)	11 (15.9%)	69	(df=4)
Cash	3 (4.2%)	5 (6.9%)	8 (11.1%)	72	
Bondsman	50 (14.5%)	42 (12.1%)	84 (24.3%)	346	
Other	7 (13.5%)	8 (15.4%)	15 (28.8%)	52	

offense charged to bail risk. Among these defendants, the nonappearance, rearrest, and combined risk rates of those charged with misdemeanors differ little from the risk rates of those charged with felonies (see Table 4). The combined bail risks were 17.2 per cent for misdemeanor defendants and 21.7 per cent for felony defendants. The survival curves of these two groups were not significantly different at two, four, six, or eight weeks, and there were no differences when criminal history was taken into account.

A breakdown of the charges into eight offense categories (see Table 4) also showed little difference in bail risk among defendants charged with different types of offenses, and this remained true when criminal history was controlled for. The offense categories with the highest combined bail risk (Table 4) are felonies against persons and felonies against property. Comparing defendants accused of those offenses with all other defendants, the combined bail risk percentages are 25.3 per cent for those charged with felonies against persons and property and 16.9 per cent for all others. Although statistically significant, this difference probably results from the fact that felony defendants are more likely than others to have substantial criminal experience. For defendants with zero or one prior arrests, the risk rates are 16.3 for those charged with felonies against persons and property and 12.4 per cent for others; for those with two or more prior arrests, the respective rates are 34.0 and 26.5 per cent. Neither difference is significant. In other words, when differences in criminal history are taken into account, the apparent bail risk difference disappears.

Our data do not support the common belief that the seriousness of the offense charged is strongly related to bail risk, because the apparent effect of seriousness of offense is attributable to criminal history. (As explained earlier, this belief is fundamental to the conventional bail bond system, in which the bond amount is directly related to the seriousness of the charge.) But neither do the data disprove the belief. The fact that the data do not indicate that offense seriousness had an important influence on bail risk may simply indicate that the bail bond system functioned as it was supposed to. Since bond amounts were generally higher for felony defendants, and since almost all of those released were released after signing a bond (even those released by magistrates and the PTR program, as noted earlier), it may be that the threat of bond forfeiture kept the felony defendants' risk down and compensated for the difference between felony and misdemeanor defendants' bail performance. This possibility is somewhat supported by comparing those released on "own recognizance"--the only releasees in the study who were not subject to bond forfeiture--with those released by bondsmen. Adjusted for prior arrests, the survival rates of the "own recognizance" releasees were sometimes lower than those of bondsman releasees, although the very small size of the former group makes the difference nonsignificant. If these apparent differences are real, they may be attributable to the fact that the "own recognizance" releasees were inherently poor risks, as indicated by the large proportion who were charged with felonies, and that their relatively greater propensity for getting into trouble while on bail was not counteracted by any financial disincentive to nonappearance. (As Table 3 indicates, the "own recognizance" releasees, comprising most of the column labeled "Other," were usually charged with felonies, and often with felonies against the person.)

Thus, the seriousness of the defendant's offense may have had a substantial effect on bail risk that was obscured by the counter-effect of the bond. This possibility should be kept in mind when considering reform proposals like the ABA's. Even if release like Charlotte's PTR program becomes the standard form of bail, replacing the bondsman system, perhaps it would be wise to retain--as the PTR program did--the threat of financial loss in the form of an unsecured bond, with a higher amount set for those charged with serious crimes.

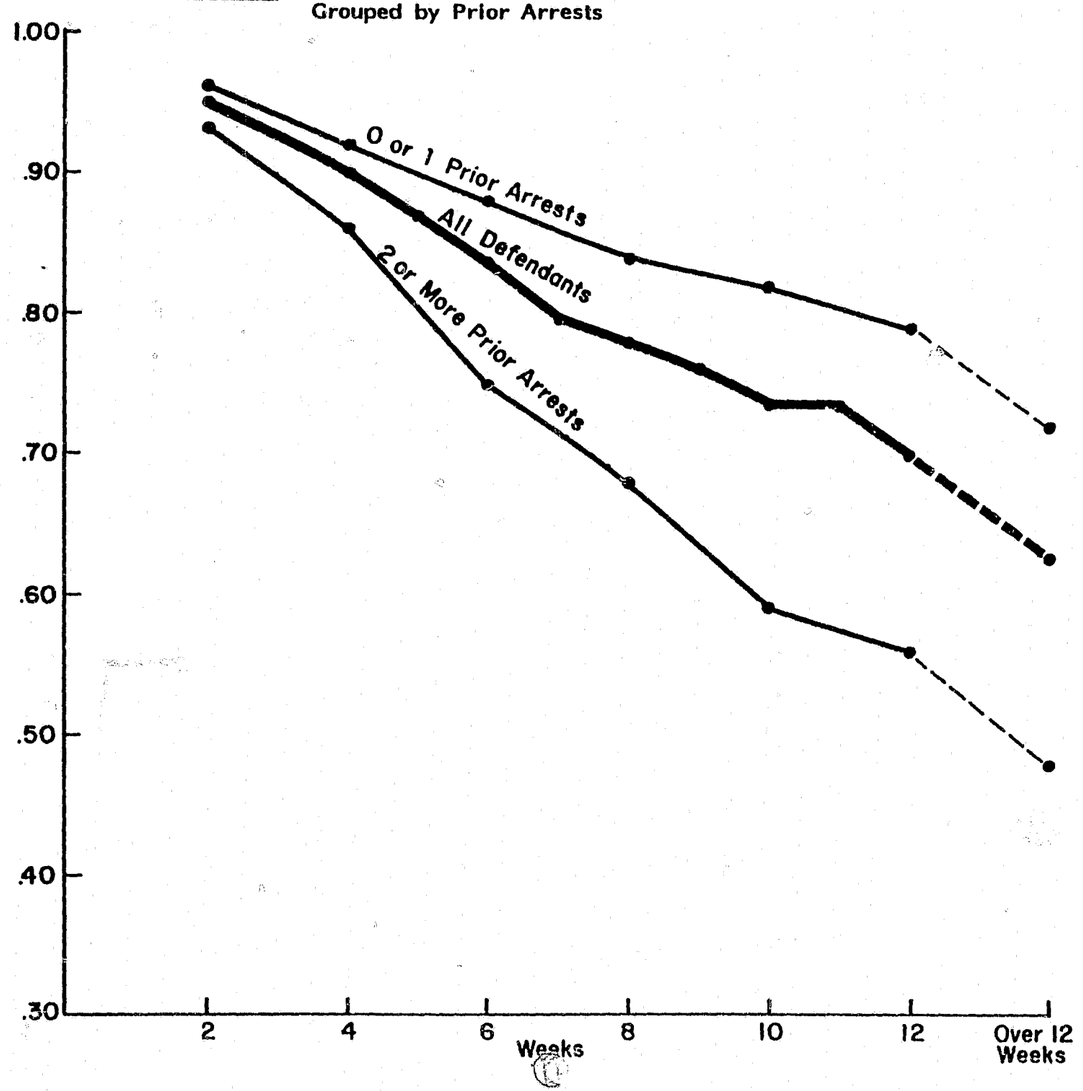
3. Court Disposition Time

The effect of court disposition time on bail risk without adjusting for other factors is shown by the "all defendants" portion of Graph 1, a nearly straight line from a survival rate of .95 at two weeks to .70 at twelve weeks, and .63 for periods over twelve weeks. In other words, during the first twelve weeks after release, the likelihood that defendants would appear and would not be rearrested dropped about five percentage points for each two weeks their cases were open--a clear display of the powerful influence of court delay on bail risk.

4. Criminal History

Criminal history, measured here by prior arrests, has a very important relationship to bail risk. To assess the relative importance of the various factors in influencing bail risk (see Table 4), we can use the value of the significance statistic ("Pearson Chi-Square") divided by its degrees of freedom ("df"). For prior arrests, this value is 26.43, a much higher value than that of any other factor. The next highest is form of release, with a value of 7.08 (28.30/4). Table 4 does not take court disposition time into account, of course, but Graph 1 shows that criminal history has an important effect when court disposition time is considered. The survival rate of defendants with two or more prior arrests is significantly lower than that of defendants with one or zero prior arrests at two, four, six, eight, ten, and twelve weeks. Court disposition time has a much worse effect on defendants with two or more prior arrests than on those with zero or one prior arrests. At twelve weeks, only 56 per cent of the former avoid nonappearance and rearrest, compared with 79 per cent of the latter.

Graph 1. "Survival Rates" for All Defendants and Defendants Grouped by Prior Arrests



5. Form of Pretrial Release

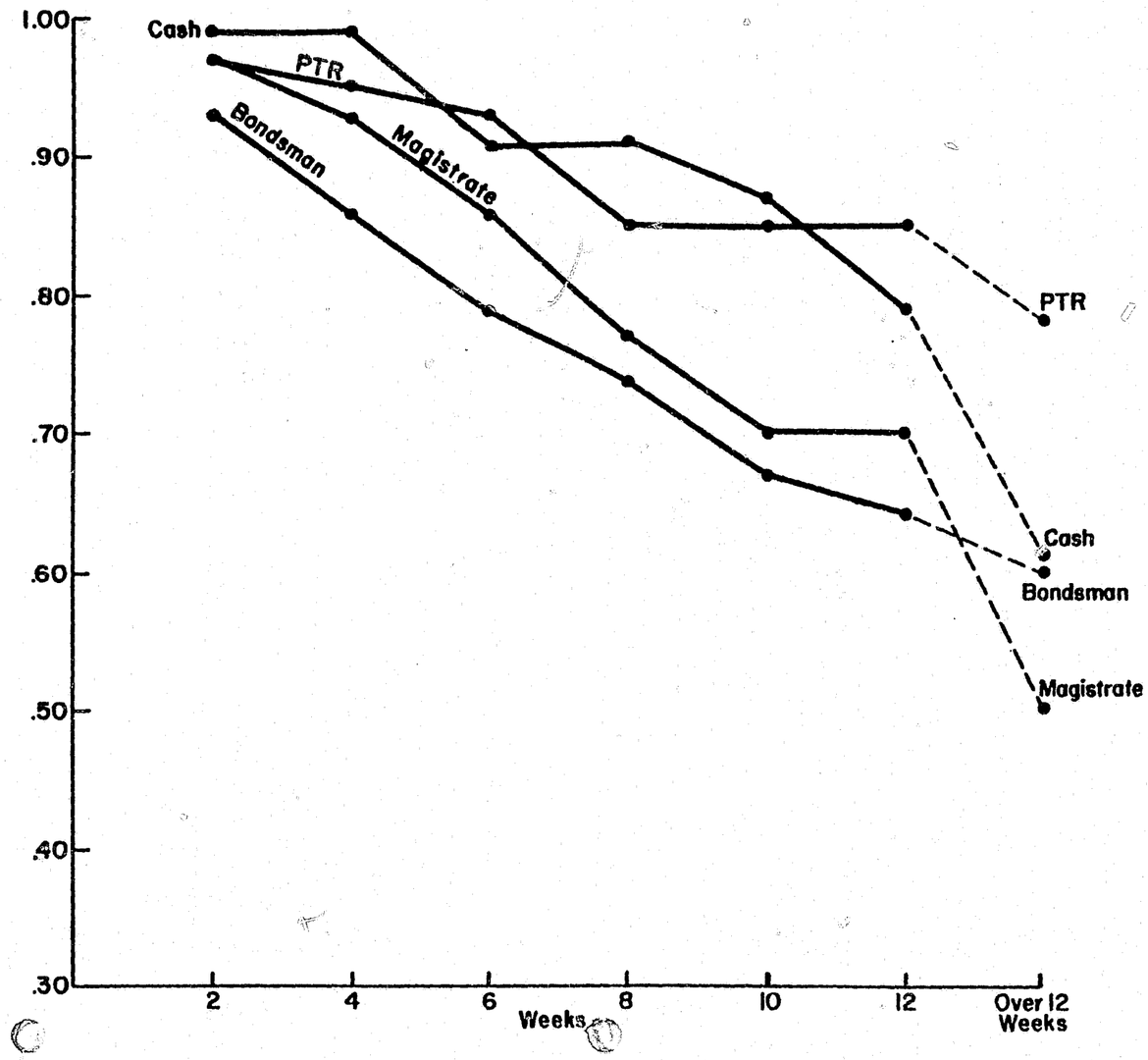
Graph 2 compares the survival rates of defendants on the four most common forms of bail. These rates are fairly close at two weeks, ranging from 93 to 99 per cent. Thereafter, some fairly clear relationships emerge. The survival rates of PTR and cashbond releases are consistently similar and relatively high. Sharp, significant differences in survival rate are consistently evident between PTR and cash bond releasees, on the one hand, and bondsman releasees, whose survival rate is relatively low and is evidently affected more adversely by the passing of time. Magistrate and bondsman releasees differ in survival rate at two and four weeks, but show no significant differences from the sixth week onward. PTR and magistrate releasees' survival rates are not significantly different in any time period but a diverging trend is evident, with the PTR rates staying higher. Magistrate and cash bond releasees' survival rates are not significantly different at any point.

Court disposition time is somewhat different for defendants on different forms of pretrial release. In general, as Table 5 shows, PTR and magistrate releasees were exposed to risk for a somewhat shorter time than cash bond, bondsman, and other releasees, because the cases of PTR and magistrate releasees--for some reason--required more time to be disposed of by the court. This fact makes it important to adjust for the effects of time, as well as criminal history, in comparing forms of release.

Table 5
Distribution of Court Disposition Time for Defendants on Various Forms of Release

Distribution of Court Disposition Time	Form of Release					
	PTR	Magistrate	Cash	Bondsman	Other	Total
4 weeks or less	46.6%	47.7%	38.9%	37.3%	32.7%	40.7%
4 to 8 weeks	32.6	33.3	25.0	30.0	36.5	31.1
8 to 12 weeks	10.2	8.6	23.6	18.2	17.2	15.5
More than 12 weeks	10.6	10.1	12.5	14.5	13.5	12.7
Defendants who failed to appear or were re-arrested or both	19	11	8	84	15	137
Proportion of failed and/or rearrested defendants whose failure or rearrest occurred within 12 weeks of release	89.5% (17/19)	81.8% (9/11)	75.0% (6/8)	96.4% (81/84)	93.3% (14/15)	92.7% (127/137)

Graph 2. "Survival Rates" for Defendants on Various Forms of Release



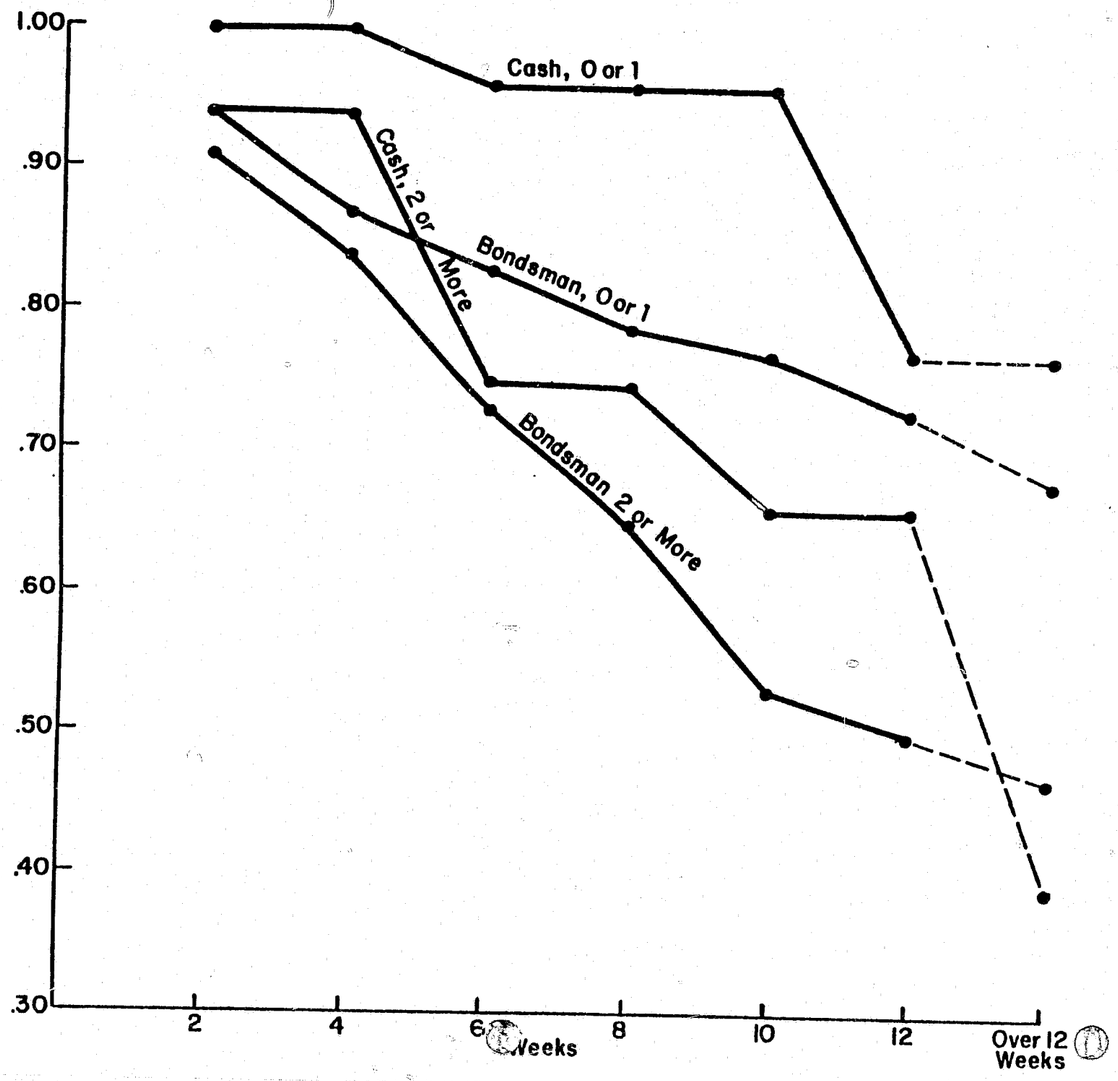
6. Form of Release, Criminal History, and Court Delay

The analysis so far indicates that, except for court delay, the factors with the strongest relationship to bail risk are the defendant's criminal history and the form of pretrial release he receives. We will now consider the effects of form of release, adjusting for the effects of prior arrests and court delay.

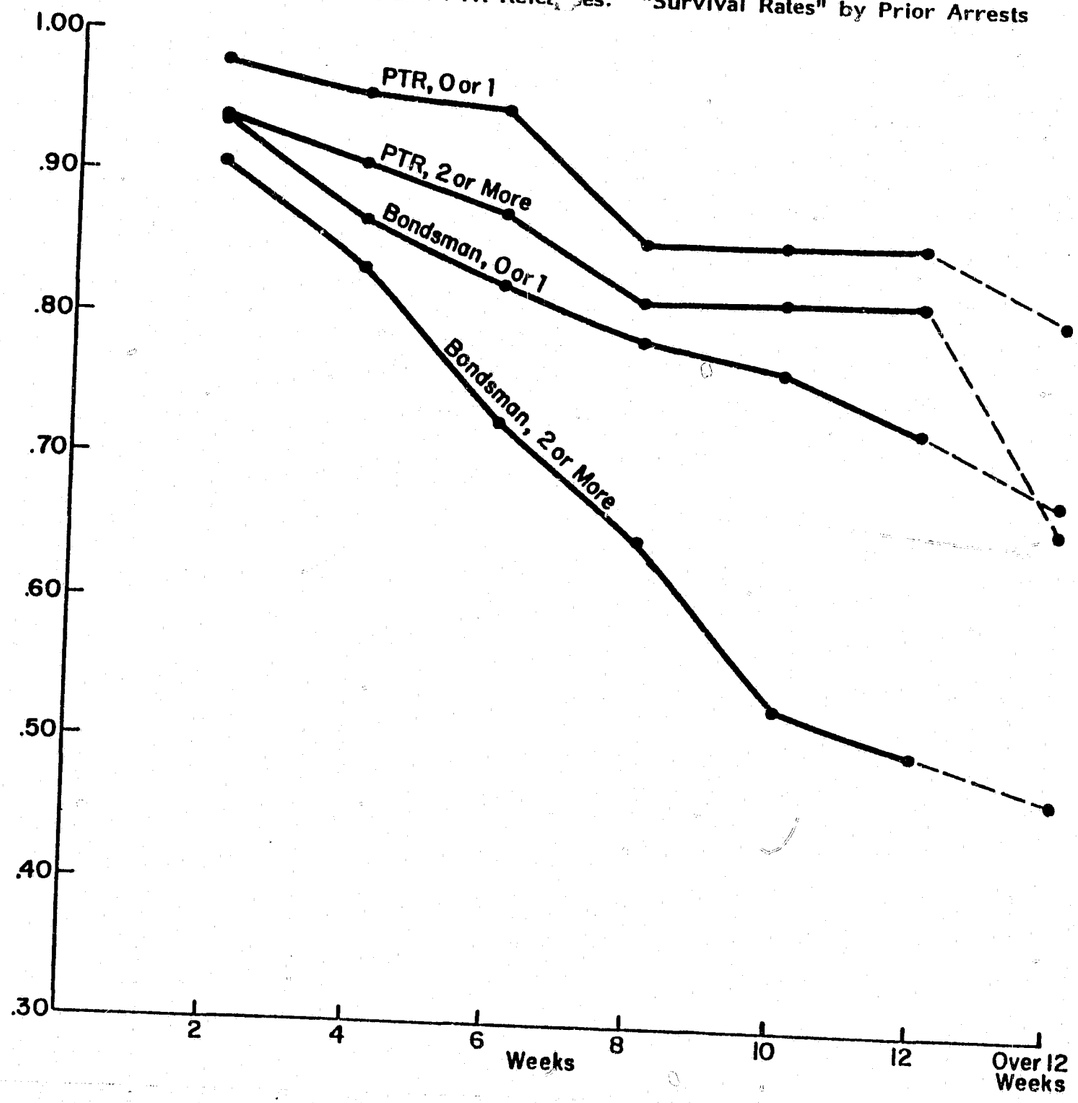
Let us first compare the two conventional forms of bail, cash bond and bondsman release. Cash bond releasees with zero or one prior arrests had significantly higher survival rates for the first eight weeks of release than bondsman releasees with zero or one prior arrests (see Graph 3). For defendants with zero or one prior arrests released by cash bond and bondsmen, the over-all risk rates, respectively, were: failure to appear, 0.0 and 13.6 per cent; rearrest, 3.6 and 8.0 per cent; combined bail risk, 3.6 and 19.6 per cent. Apparently, cash bond releasees with zero or one prior arrests never failed to appear; this is explained by the fact that (as noted earlier) nonappearance of cash-bond releasees tended to be overlooked by judges and prosecutors, with bond forfeiture serving as a sort of "fine paid in advance," and thus did not show up in the court records (the actual cash bond nonappearance rate was probably higher than our data indicate). The relatively few (17) cash bond releasees who had records of two or more prior arrests did not differ significantly in bail risk from bondsman releasees with comparable arrest records, as Graph 3 shows. Judges and prosecutors were probably less willing to overlook nonappearance when cash bond defendants had a substantial criminal history. The cash bond releasees' survival rate decreased rapidly with the passage of time, just as bondsman releasees' survival rate did. Our conclusion is that there is probably little difference in failure to appear and rearrest between cash bond and bondsman releasees if prior arrests and court disposition time are taken into account.

The comparison of PTR and bondsman releasees (Graph 4) indicates that the PTR releasees were much less likely to fail to appear in court or be rearrested, controlling for criminal history and court disposition time, than the bondsman releasees. Although the differences in survival rate were not significant at all times, the consistent level and slope of the survival curves, plus the significance of some of the survival rate comparisons, support this conclusion. In what ways did PTR release and bondsman release differ? Not with regard to the threat of financial loss if the defendant failed to appear. As noted earlier, all the major forms of release required the signing of a bond. The principal differences were in (1) selection of releasees, and (2) post-release contact and supervision. The PTR program selected its clients from among those who chose to be interviewed by it, applying criteria described earlier, while bail bondsmen presumably accepted anyone who could pay the fee unless he was not a county resident or had unusually serious charges or a notorious criminal history. Our comparison has adjusted for what may be the most important criterion used by PTR, criminal history, but the

Graph 3. Cash Bond and Bondsman Releasees: "Survival Rates" by Prior Arrests



Graph 4. Bondsman and PTR Releases: "Survival Rates" by Prior Arrests



PTR staff considered other criteria, such as family ties and the length of local residence and current employment, that could not be adjusted for in the present study because the necessary data were not available for most defendants. The study did investigate local residence and current employment status (although not their length), and neither seemed to have a substantial effect on bail risk even when criminal history and court disposition time were controlled for. Nevertheless, it is possible that other objective criteria employed by PTR, and also the PTR program staff's subjective assessments, may have resulted in the selection of clients whose bail risk was inherently low.

PTR's selection criteria also excluded defendants charged with certain very serious offenses. As explained earlier, all of these were rare except for drug felonies--principally illegal distribution of drugs and possession for the purpose of distribution. Those charged with drug felonies were not a group with high bail risk; in Table 4 in the section labeled "Offense Category," we see that defendants charged with "Felony-Vice" offenses (mostly drug felonies) have only average rates of nonappearance and rearrest.

Our tentative conclusion is that selection may explain some but not all of the difference in nonappearance and rearrest between PTR and bondsman releasees. Post-release supervision was probably a more important factor in keeping the PTR releasees' survival rate high. The PTR staff maintained regular telephone contact with the releasee, and the PTR releasee was required to report to the program office before each court appearance. It is reasonable to suppose that this had the effect of keeping the releasee aware that someone in authority, acting in his interest, was concerned about his showing up in court as required and staying out of trouble in the meantime. The awareness, in turn, could be expected to increase the likelihood that the releasee would appear in court as required, and perhaps also--to a lesser extent--that he would not commit a new offense for which he could be rearrested. (PTR and bondsman releasees differed less in rearrest rates than in nonappearance rates; see Table 4.) The regular reminders also probably helped to overcome the deleterious effect of court delay on the survival rate, since releasees were not allowed to forget their court dates. In contrast, bondsmen maintained no regular contacts, meetings, or reminders. If they had, their clients might have done considerably better.[22]

Comparisons of PTR and magistrate releasees (Graph 5) give further

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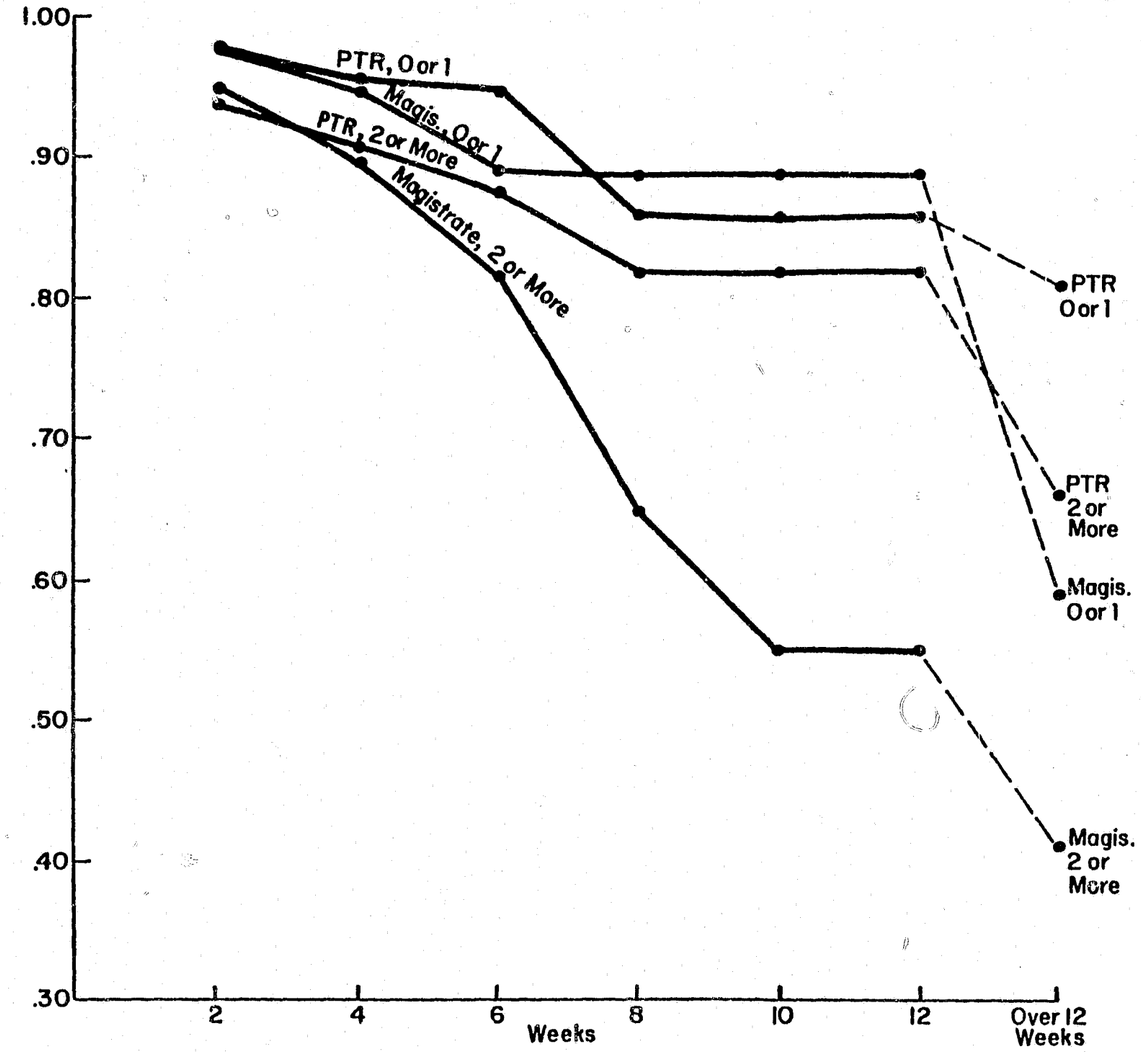
22. When a community is concerned about the poor performance of its bail system but cannot introduce reforms of the ABA-approved type because of lack of funds or political resistance, it may be worthwhile to induce bondsmen to maintain regular post-release supervision, or to provide a minimal staff of court employees to supervise bondsman-released defendants. The conclusion to this report suggests how those most in need of such supervision can be identified.

Graph 5. PTR and Magistrate releasees: "Survival Rates" by Prior Arrests



support to the hypothesis that post-release supervision reduces the likelihood of nonappearance and rearrest. As explained earlier, the PTR program and the magistrates used, in some respects, the same criteria in selecting releasees. The releasees they selected (see Table 3) were similar with regard to criminal history, sex, age, and employment, although not with respect to race, income, and type of offense. If subjective assessments entered into the selection of releasees, the assessments made by magistrates were probably more like those made by PTR staff, and vice versa, than like those of bail bondsmen. Since PTR and magistrate selection procedures were more like each other than like the bondsman's procedure, the selection process probably had less to do with bail risk differences between PTR and magistrate releasees than with bail risk differences between PTR and bondsman releasees. Perhaps because of the similarity in selection procedures, survival curves of PTR and magistrate releasees who had zero or one prior arrests were similar (Graph 5). However, among defendants with two or more prior arrests, a diverging trend seems to have begun after the fourth week of release; by the tenth week, the PTR releasees' survival rate was .82 compared with .55 for magistrate releasees. The differences between the rates were not significant for these two groups, perhaps because the groups were so small (54 and 21, respectively).

These results suggest that post-release supervision of the type provided by PTR counteracted the deleterious effect of court delay on the survival rates of defendants with two or more prior arrests, and that the longer the defendants were exposed to risk, the greater the effect of supervision became (in other words, supervision had a cumulative effect over time). For defendants with zero or one prior arrests, the results are somewhat less clear. Bondsman releasees with zero or one prior arrests had significantly lower survival rates at four and twelve weeks than PTR releasees did. However, magistrate releasees with zero or one prior arrests seem to have done fairly well without post-release supervision, maintaining a survival rate not significantly different from that of PTR releasees. We conclude that defendants with very little or no criminal record probably do not benefit from post-release supervision as much as those with longer records. This suggests that in planning pretrial release programs, supervision manhours should be allocated first to defendants with longer criminal records and then, if resources permit, to others.

We have noted that survival rates dropped rapidly as time before court disposition increased, especially for defendants with two or more prior arrests--except for the PTR group, which received post-release supervision. This indicates that reducing court delay, when this is possible consistent with the defendant's procedural rights and other purposes of the criminal court, is an important task for those concerned with improving bail systems. It also suggests that, where post-release supervision is used, more intensive supervision may be desirable if it appears that the court will take a long time to dispose of the defendant's case.

SUMMARY AND CONCLUSIONS

The principal subjects that have been addressed in the study are: (1) the relative importance of various factors in influencing bail risk, defined as the likelihood of failure to appear in court while on bail and/or rearrest on a new charge; (2) the relative effectiveness of various forms of bail in controlling bail risk; and (3) improvements in bail systems suggested by the data. Interpretation of the findings must be cautious because the study was not a scientifically controlled experiment. The following general conclusions seem warranted.

Most important factors. Court disposition time, defined here as the amount of time elapsing from the defendant's release until the disposition of his case by the court (or until he fails to appear or is rearrested, if either of those events occurs before disposition) must be considered the variable of greatest importance. Among the defendants studied, the likelihood of "survival"--avoidance of nonappearance and rearrest--dropped an average of five percentage points for each two weeks their cases remained open. This suggests that reducing court delay should be high on the agenda of those who would reform the bail system, and also that court disposition time should be taken into account in supervising released defendants (see suggestions below).

Criminal history, here measured in terms of prior arrests, was also of major importance. Without adjusting for court disposition time, the rate of nonappearance and/or rearrest for defendants with two or more prior arrests was twice as great (27.9 per cent) as for those with one or none (12.8 per cent). Criminal history continued to show an important effect when court disposition time and form of release were taken into account.

The particular form of release by which defendants obtained their pretrial freedom was also of great importance in determining their bail risk. The effect of form of release persisted when both criminal history and court disposition time were adjusted for. (More is said below about the relative merits of various forms of release.)

Factors of little or no importance. We had hypothesized that the likelihood of failing to appear or being rearrested would be higher for male defendants than for female defendants, higher for defendants under 25 than for older defendants, higher for low-income defendants than for high-income defendants, and higher for blacks than for whites. We were wrong. The data showed the relationships of these variables to nonappearance and rearrest to be nonsignificant, even after adjusting for court disposition time. There were significant relationships of sex, income, and race (but not age) to bail risk among defendants with two or more prior arrests, without adjusting for court disposition time, but these relationships were the reverse of those originally expected--female, high-income defendants, and white defendants with two or more prior arrests had higher risk rates than males, low-income defendants, and black defendants, respectively.

The defendant's employment status, a factor included among the American Bar Association's recommended criteria, was not shown by these data to have had any relationship to bail risk among the defendants studied. Because of lack of data, no conclusions were reached about the effects of some related factors also on the ABA's list: the length of local residence, employment history, and family ties.[23]

Type of offense charged. These data showed no significant relationship between the type of offense charged and bail risk, and none emerged when criminal history and court disposition time was controlled for. (Two definitions of type of offense were used: one was simply felony or misdemeanor; the other subdivided felonies and misdemeanors into eight offense categories.) However, a relationship of the seriousness of the offense charged to bail risk may have been concealed by another factor. All defendants released on the four major forms of bail were subject to forfeiture of an amount of money if they failed to appear. In most cases, this bond amount was based on the seriousness of the offense charged, by reference to a standard schedule used for all forms of bail. This financial disincentive may well have counteracted an effect of the seriousness of the offense charged on bail risk. The relationship between offense and bail risk is also indicated by our data concerning the thirty-nine defendants who were released by judges on "own recognizance," with no financial disincentive or post-release supervision. The concentration of felony charges was much higher in this group than in other releasee groups, and the proportion of those who failed to appear and/or were rearrested was the highest of any releasee group.

Relative effectiveness of forms of release. The study centered on the four most common forms of release in Charlotte at the time of the study: bondsman release, cash bond release, PTR release, and magistrate release, described in detail earlier in this paper. The first two forms provided release upon a promise to pay the bond amount upon failure to appear in court, with the promise secured by a professional bondsman (bondsman release) or by a deposit of the bond amount in cash (cash bond release). These forms of release were generally available to those who could raise the necessary bondsman's fee or cash amount. PTR and magistrate release involved generally similar selection procedures using criteria of the ABA-approved type, such as local residence, employment history, family ties, and criminal record. The PTR staff supervised their releasees after release; the magistrates did not. Both PTR and magistrate release required forfeiture of the standard bond amount for the defendant's offense if he failed to appear, although the bond was not secured.

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23. It is possible, of course, that a larger sample might have permitted substantial relationships to be found between bail risk and any of the factors tentatively treated here as having little or no importance--sex, income, age, race, employment, and local residence. We can only say that the present data indicate no such relationships.

We concluded that cash bond releasees probably differed little from bondsman releasees with regard to nonappearance and rearrest; the apparently lower rate of nonappearance and/or rearrest for cash bond releasees with zero or one prior arrests was probably due to the criminal court's overlooking nonappearance and allowing the case to be disposed of by bond forfeiture. PTR and magistrate releasees had generally lower bail risks, adjusting for prior arrests and court disposition time, than cash bond and bondsman releasees, although the observed differences were not always significant. PTR and magistrate releasees performed similarly, although the data suggested that magistrate releasees with two or more arrests might have somewhat higher risks than PTR releasees with two or more arrests.

The different selection procedures used in conventional bond release and in PTR and magistrate release meant, of course, that the groups of defendants released in these ways differed in a number of characteristics that were measured in the study. Some of these characteristics, such as employment status and local residence, had little or no effect on bail risk that could be measured by our data. Criminal history, an important criterion in the PTR screening system, was an important determinant of bail risk; however, even adjusting for court disposition time, defendants with two or more prior arrests released by PTR had lower risk rates (but not significantly lower) than those with equally extensive criminal histories released by bondsmen. If our measurement of the difference in risk rates between PTR and bondsman releasees is reliable, the difference may be explained, in part, by selection criteria employed by the PTR program staff that were subjective in nature or otherwise could not be measured by the study. However, if defendants released by bondsmen had instead been released by the PTR program, using all of the usual PTR procedures except selection, their likelihood of not appearing or of being rearrested would probably have been much lower because of the contact and supervision that the PTR program maintained with its clients.

Forms of release can also be compared with regard to the kinds of controls that operate to reduce bail risk after release. All four major forms of release use the threat of financial loss (bond forfeiture) for failure to appear; the bond amount is usually set according to the seriousness of the offense the defendant is charged with, based on the standard schedule. This practice conflicts with the ABA recommendation that the threat of financial loss be used only as a last resort. However, the Charlotte practice of requiring a bond to be signed in all cases may account for the fact that the chance of nonappearance was not significantly different for defendants charged with different types of offenses, if criminal history is taken into account. Our tentative conclusion is that it may be unwise to do away with the requirement that all defendants sign a bond whose amount depends on the offense charged. This does not seem a great hardship for defendants; if the bond is an unsecured one, no bondsman's fee need be paid.

The post-release supervision of its clients maintained by the PTR

program substantially reduced the likelihood of nonappearance and (to a somewhat lesser extent) the likelihood of rearrest. Post-release supervision was probably responsible to a large extent for the fact that the nonappearance and rearrest rates of PTR releasees were generally lower than those of defendants released in other ways, adjusting for court disposition time and criminal history. Post-release supervision was evidently more effective with defendants who had a record of two or more prior arrests and therefore presented higher bail risks than others. This finding suggests that in any bail program, priority in supervision should be given to releasees with longer criminal records.

The study indicated that defendants with little or no criminal record who were selected for release by magistrates, using the simple screening procedure described in detail earlier, probably would not have benefited from post-release supervision if they had received it. We think it likely that a great many defendants have an acceptably low probability of nonappearance and rearrest without any post-release supervision whatever. In general, these low-risk defendants are those with little or no criminal record whose cases are not likely to take unusually long to reach court disposition. The releasing procedure used by Charlotte magistrates, which was quite successful in selecting such low-risk defendants, could probably be adapted for use in similar cities at a rather low cost.

The "survival curves" developed in the study suggested that post-release supervision tended to counter the bad effects of court delay on nonappearance and rearrest. This suggests that it is desirable to provide more intensive post-release supervision to defendants whose cases are likely to require an unusually long time to dispose of.

VOLUNTARY PRETRIAL DIVERSION AND THE QUESTION OF COMPLIANCE

By Diane L. Gottheil

This paper is provided through the courtesy of Paul Wahrhaftig and the American Friends Service Committee, Pittsburgh, Pennsylvania.

VOLUNTARY PRETRIAL DIVERSION AND THE QUESTION OF COMPLIANCE

by--Diane L. Gottheil

Excerpted from a Preliminary Evaluation paper delivered at the National Conference on Criminal Justice Evaluation, February 22-24, 1977.

Many of the more serious criticisms of pre-trial diversion programs that appear in the literature are related to the maintenance of control over program participants by legal authorities. Customarily, criminal charges against participants are pending and dismissal occurs only after favorable termination by program personnel. The exercise of control over participants is behind the criticism that diversion programs may just be mirrors of probation. Minimally, they require a period of supervision-rehabilitation; at the most extreme, they delay prosecution to a later time, after some participation in rehabilitative services and perhaps followed by conviction and probation or incarceration. In sum, diversion programs, it is charged, do not truly divert people out of the criminal justice system.

This paper describes a pre-trial diversion program that avoids many of these criticisms by enabling client participation that is genuinely voluntary. The Adult Diversion Program of Champagne County, Illinois, began operation on October 1, 1975. Individuals arrested for criminal offenses who are eligible for diversion are referred to the Program by the Champagne County State's Attorney. Referrals are made before formal charges are filed and if the individual is accepted into the program no charge is filed. Furthermore, once accepted into the program, the participant's behavior in carrying out the agreed upon terms of participation, and specification of the terms themselves, is completely voluntary. That is, there are no legal consequences of unfavorable termination and thus no means of coercion or compulsion. The prosecutor has agreed that under no

circumstances will charges be filed against individuals accepted by the Program for the offense for which they were referred. The accused is genuinely diverted out of the criminal justice system.

A crucial feature of the program is the participation of citizens. For instance the decision to accept an individual into the Program is based on a recommendation from a three person citizen screening panel which interviews each client. These panels are drawn from approximately thirty-five Citizen's Advisory Committee members who have volunteered and are trained to serve on the panels on a rotating basis. This direct participation of citizens is a crucial feature, and is perhaps necessary for gaining acceptance for a voluntary program. It provides potential support to the prosecutor for his decision not to prosecute a set of individuals for whom, unlike those customarily screened out, there is evidence of an offense. Impressionistic evidence suggests that volunteers from the community appear more likely to accept higher risk participants than do staff.

Upon acceptance, participants meet with a Diversion Counselor to develop a program agreement. The terms are not unusual for pretrial diversion programs--training, schools, restitution and the like.

Goals for most diversion programs are: 1) cost of savings in comparison to traditional prosecution; 2) reduction in the rate of recidivism; 3) effective delivery of services; 4) a high percentage of favorable terminations--ie. prosecution was not reinstated, or charges were dismissed for most program clients. This paper focuses on a variation of the fourth goal.

The obvious drawback to any voluntary diversion program is an expected higher probability of non-compliance. A "favorable termination" in diversion customarily requires the client to avoid subsequent law violation and to carry out the terms of the agreement. Lacking a means of compelling compliance, can a program that in effect offers clients "a free ride" demonstrate an acceptable level of favorable terminations?

The data covers the first year of program operations. During that year 200 people were accepted into the program. Of those cases terminated by the time of the study 55% had carried out all the terms of their program agreements. It should be pointed out that participants who are favorably terminated tend to remain active longer than those in other categories. We would expect, therefore, a somewhat higher proportion of the currently active cases to be favorable terminations, in comparison to those already terminated.

Other Categories

Thirty-six cases (23%) did not complete all the terms. Rarely has a participant failed to pay restitution to the victim, even when this was the only program goal they succeeded in carrying out. Seventeen cases (12%) voluntarily withdrew. Generally this involved an unwillingness to cooperate in a counselling relationship rather than an unwillingness to carry out other types of program terms. This category is not completely dissimilar from the previous one, but indicates that the termination decision was made rather explicitly by the client. In other diversion or deferred prosecution programs where prosecution is a consequence of unfavorable termination, this distinction is more significant.

Thirteen (9%) abscounded and only five cases (4%) were terminated by an offense committed subsequent to acceptance in the program. (Rearrest does not reinstate the old charges. The arrestee is dropped from the program and prosecuted on the new charges.

Comparison to Other Programs

Other diversion programs tend to report favorable terminations in the eighty to ninety-five percent range. Were the Adult Diversion Program to eliminate its voluntary structure, the percentage of favorable terminations would no doubt be within this range. The various criticisms of diversion discussed earlier, however, suggest that it may not be desirable to sacrifice the voluntary structure of the program for a higher percentage of favorable terminations.

With this in mind, it should be emphasized that in placing individuals in categories of termination, a voluntary program can very rigorously apply the category definitions without concern for the participants. Where prosecution is a consequence of all terminations other than favorable, it is improbable that many of the cases in the "Did Not Complete" category would indeed be returned for prosecution. Many of these clients have carried out some of the terms of their program agreement and few show evidence that they are unlikely to be involved in a further law violation. In other words, in evaluating over-all program performance, some portion of the drop-outs might be considered "successes." Moreever, a voluntary compliance rate of over fifty percent may be considered high by some standards. Rather than comparing this figure with compulsory diversion programs a more appropriate comparison may be with data from other voluntary social service organizations such as community mental health clinics. The proportion of clients who continue to follow-up on counselling or therapy is closer to the fifty-five percent favorable terminations of the Adult Diversion Program.

The integrity and credibility of a diversion program is perhaps less threatened when compliance rates are high. This may be an important consideration for gaining community acceptance and staff morale. Nevertheless, in a coercive setting, program personnel are likely to be perceived as authority figures and overt compliance is not likely to go beyond what is judged by the client as minimally acceptable. Overt compliance may often also be accompanied by covert resistance as a result of resentment or hostility to authority. In a voluntary program motivation to comply that exists or is developed tends to be based on self interest rather than a response to authority.

Client Characteristics

In a voluntary program there may be an even greater temptation to screen-out those clients whose current offense, prior record and attitudes or life situation suggest a higher risk of non-compliance. That does not appear to be the case in this program since its citizen-volunteers are very willing to accept higher risk participants into the program.

The data suggests applicants accused of misdemeanors or felonies with no prior criminal record are almost twice as likely to receive favorable terminations than those who have some prior offense or conviction record. Subjective estimates of risk appear to have been even better predictors. The figures do suggest that a change in screening and acceptance policy might be an effective method of reducing the rate of non-compliance without changing the voluntary structure. The trade-off however would be that by eliminating from diversion those least likely to succeed, a large portion of people most in need of program services are also eliminated. What may be more significant is that approximately one-third of those in the high risk category do in fact voluntarily carry out the terms of their program agreement.

Complaince--Redividism

In the eyes of the Citizen's Advisory Committee, compliance is a low level priority. Other values such as reducing court backlog and providing a more humane non-punitive alternative rank higher. It is noted that the acceptance of higher risk clients, rather than the voluntary structure, is more likely to affect that rate of recividism. There is no absolute measure of what is an acceptable rate of recividism. In the absence of an experimental design, community acceptance with respect to both the rate of recividism and level of compliance may be a legitimate criterion of success.

* * * * * * *

Copies of the study are available from Diane L. Gottheil, Director, Adult Diversion Program, 110 South Race St., Urbana, Ill. 61801.

FOREWORD

This segment includes articles and essays on or by the communities served by pretrial agencies.

A reflection on these communities:

- Hoe Avenue

introduces this section and is followed by comments from a prosecutor:

- Justice for Whom

views from a judge on the diversion process:

- Diversion from the Criminal Process

a general essay on community approaches:

- A Community Perspective on Change in the Criminal Justice System

a District Attorney's opinion of the diversion process:

- Opinion No. CR 76/6 IL

and a bill on diversion in the same state:

- Assembly Bill, California Legislature

as well as a series of briefs or decisions related to the rights of the accused and other issues affecting defendants in the pretrial process:

- Protecting Confidential Communications of Substance Abusers in Pretrial Programs
- People v. Rodriguez, New York State
- United States of America vs Zvonko Busic, Et Al.
- New Jersey's PTI Cases: Institutionalization in Process

HOE AVENUE

By Rosalind S. Lichter

This essay is reprinted with the permission of Ms. Lichter, Project Director of the Presentence Service Group, Legal Aid Society, New York.

HOE AVENUE*

By Rosalind Lichter

Frank Jones, 16 years of age, was sentenced to a maximum of three years in prison for robbing an old person with a 50 cent toy gun. I wanted to meet Frank's mother and see his home. On the morning after a small snowfall I walked through streets devastated by indifference; streets whose existence is only occasionally noted in the "metropolitan briefs" of the New York Times. On Hoe Avenue we found the apartment of Mrs. Jones, forty-two years old, mother of Frank and six others. She was nightgowned and robed; swollen and sluggish. Her last apartment on Fox Street crumbled in a fire and in October, 1976 she moved to Hoe Avenue. She pays $250 for these small six rooms which qualify as a "relocation" unit by the New York City Department of Rent and Relocation.

I walk into the apartment and I think of the Egyptian mosaics in the Metropolitan Museum of Art - the apartment is worn and faded and depressingly pastel, but the Egyptian displays in the museum are more preserved, better looked after than Hoe Avenue. I think of my grandparents - immigrants from Poland and Austria. I want very much to say that Mrs. Jones is one of this decades' immigrants whose children and grandchildren will make it like we did. But my thoughts are jarred by the noise of paper. Mrs. Jones takes out letters from the Department of Relocation.

*Hoe Avenue - the South Bronx

It is clear to me that the government of the 1970's has a greater role in fostering Mrs. Jones' deprivation - a way my grandparents never experienced. And then Mrs. Jones says, "I don't know what keeps me going. I make sure the kids go to school. Kim is not in school today because of the snow. She has no shoes. I'm scared to go out at night, I'm scared for my kids. I want to fix this place up good for Frank when he comes home from jail. I have no social life."

'I don't know what keeps me going' rings through me on and on. I look at the caved-in ceilings, at Kim washing the few dishes, and the clothes lying on top of the water in the bathtub. They look like water lilies but they are clothes that someone is just trying to get clean. The cracked plaster joins the floating clothes in the bathtub.

Two hours later I am on the Grand Concourse in the Bronx and I see two white elderly ladies walking arm in arm, their pocketbooks clutched as if out of a lesson from the crime prevention campaigns and I think of my grandmothers in their retirement and I think of Frank, sixteen years old, going to Hoe Avenue after prison and I wonder why no one wants to know that those elderly people and Frank have a lot in common - they are the victims of an economic order whose main goal is to enrich a class of people of which neither Frank nor my grandmothers are a part.

Can it be that old ladies' pocketbooks are America's symbols of just desserts?

Justice for Whom?

Plea bargaining, the latest scapegoat in the justice game, can often be the human side of the law, particularly when it comes to weighing a life against a death.

by Steven Phillips

HE WAS ON HIS WAY HOME from a schoolyard pickup basketball game, dribbling his ball down Arthur Avenue in the Bronx, when a white teenager walked up and stabbed him once in the abdomen. The black boy was dead before he hit the ground. The assailant turned and fled, leaving his victim sprawled face upward on the sidewalk. From start to finish, the killing took no more than five seconds.

It took the detective almost a month before he broke the case. At first it was a total mystery, with no apparent motive for the killing and no decent leads to work on. In fact, several days passed before the detective even learned the victim's identity.

When they undressed the boy at the morgue, all the detective found were a set of keys and a dollar and a half in change. There was no wallet and no identification cards. He fingerprinted the corpse and ran the prints through the computer, but drew a blank. The dead boy had never been arrested. Finally, the detective took photographs of the victim's face, and distributed copies to the desk officers and detective squads of all the neighboring precincts. He hoped someone reporting a missing person would identify the photo. As it happened, the boy's parents had reported him missing on the day of his death. Four days had passed, however, before anyone remembered to show them a copy of the morgue photo. He was 17 when he was killed, a senior in high school.

For two weeks the detective got nowhere. The boy had no enemies, he had not been robbed, and no clues had been found at the scene of the crime. A canvass of the scene had produced only one eyewitness, a middle-aged black gas-station attendant who had seen the killing from about half a block away. He described the assailant as a white teenager of about average height and weight, with dark hair. He did not remember what the youth was wearing, or anything else about him.

The detective interviewed students at the dead boy's high school, where he had been an honor student. He also questioned members of the local youth gangs. But he made no progress. As the investigation stretched into its third fruitless week, the detective's squad commander began to talk about pulling him off the case. Summer was approaching, the homicide rate was climbing as fast as the temperature, and vacation schedules were cutting into available police manpower. The commander figured it made no sense to waste a good man on what appeared to be a hopeless task. They talked it over and decided to give the case one more week.

A lead on the killer. On the final day of the third week a lead finally developed. The gas-station attendant called and told the detective that a kid driving an old souped-up Thunderbird had been around the gas station several times asking what he knew about the homicide. The attendant decided these questions were suspicious. Although the driver did not resemble the killer, he took down the license-plate number and passed it along to the detective.

It took the detective a day and a half to track down the driver of the Thunderbird. He was the kind of street tough who had been in and out of minor trouble since he was 13. The youngster denied all knowledge of the killing. In a whining, plaintive voice he asked why he had been brought in. The detective then took his cigar out of his mouth, put his face close to the boy's and grabbed him by the shirt front with both hands. Like the Marine noncom he had once been, he told the boy the facts of life. "Now you listen to me, you punk. This isn't an auto larceny of a burglary I'm investigating, it's a goddamn murder. And I know that one of your punk friends did it! You're going to tell me who did it, 'cause if you don't I'm gonna lock your ass up for hindering prosecution! And you'd better believe I'm gonna make it stick! I'm gonna send you upstate for sure. You understand?"

The detective left the boy alone in the squadroom to think that over. Within an hour, he told the detective everything he knew. He had not been an eyewitness to the killing, and his knowledge was second-hand. The killer was an 18-year-old who worked as a delivery boy for a local pastry shop. The detective also learned the names of a number of youngsters who had actually witnessed the stabbing.

There was no need to run right out to arrest the suspect. The detective knew from long experience that if the boy had not already vanished after three weeks, he was not about to. Instead, the detective rounded up all the eyewitnesses (an easy task, since they were all attending local high schools), and brought them back to the station house. He kept them separated, and spoke to each one individually. A half hour later he had six signed eyewitness statements identifying the killer. The time had come to make the arrest.

The suspect lived with his aged parents in a two-bedroom apartment over a shoemaker's shop, not four blocks from the scene of the killing. The apartment was immaculate, and had a warm, old-

world immigrant flavor the detective knew all too well. He had grown up in such a home himself. In the entrance hallway were framed pictures of Pope John, John Kennedy, and the Virgin Mary.

"I didn't mean to do it." The boy's father answered the door. He was a frail but intense white-haired man in his 60s, and he spoke with a heavy Italian accent. Asked what he wanted, the detective said, he had to speak to the boy about a crime that had been committed. As he stood there, the detective was embarrassed by the old man. He could see that the boy's father did not have the slightest inkling of what this was all about, and the detective had little stomach for what he knew was about to happen. Grimly he pushed on.

"Where is the boy?"

"He's in his bedroom, studying," the father replied. "I'll call him, but first you tell me what crime this is you want to talk to him about."

"It's a murder. A black kid was killed up on Arthur Avenue three weeks ago. I've got to talk to him about it."

"Are you here to arrest my boy?"

"Yes, I am," the detective said softly.

The old man looked hard at the detective, and began to shake. His eyes widened, and he began to look a little wild. But then, just as suddenly, he seemed to regain control of himself. He called out the boy's name.

The boy emerged from his bedroom and walked up to his father and the detective. He was short and slender, almost fragile in build, dressed in blue jeans and a white T-shirt. He was smooth-cheeked, and the detective was struck by the boy's eyes. They were large and dark and liquid, the sort of eyes you would expect to see on a beautiful woman. The boy looked straight at the detective and then lowered his eyes. He knew what this was all about.

The old man spoke first.

"This man says you killed a black kid up on Arthur Avenue three weeks ago."

The boy hung his head and began to cry. "Papa, I did it. I didn't mean to do it, and I wanted to tell you, but I couldn't. It just happened, and I'm sorry." The old man was in a state of shock. The three of them stood silently, and then the old man too began to cry. The detective waited a minute and then put the boy in handcuffs and led him away.

It was almost 24 hours from the time of arrest until the boy was arraigned. They spent it waiting for transportation, waiting for the Correction Department red tape at Central Booking, and finally, waiting for the court. The boy and the detective chatted to kill the time. The detective found that he liked his prisoner, and it bothered him. As he reflected upon what was in store for the boy in prison he felt sick. For the first time in his career he found himself wishing he had not broken a case.

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By the time the boy was arraigned, his father had spoken to his neighbors, and a delegation of them went with him to the Bronx Criminal Court Building on Washington Avenue and 161st Street. When his case was called, they all stepped forward to vouch for the boy, his character, and his family. Impressed by this unusual show of neighborhood solidarity, and by the impeccable character of the local merchants who spoke up for the boy, the judge set bail at the modest sum (for a murder) of $15,000. It was raised within the hour. The boy walked out of the court after spending only one night in jail, and the case was referred to the grand jury.

There were over 400 homicides in Bronx County that year. Almost 350 were solved by the police, leading to arrests that were turned over for prosecution to the 12 of us in the Homicide Bureau of the District Attorney's office. The death of the black boy on Arthur Avenue was only one of these homicides.

An airtight case. It was bound to be a low-priority case, with the defendant out on bail at a time when we had prisoners who had been languishing in jail for up to two years awaiting trial. This case had to be put on a back burner. Besides, with six eye-witnesses, an oral confession, and a vicious, senseless crime to work with, any trial of the case was bound to result in a murder conviction and a mandatory life sentence.

From the very beginning, when I was first assigned the case, I knew no defense attorney would risk taking it to trial. It was foreordained to result in a plea bargain. The grand-jury presentation took a little less than 15 minutes. Two of the eyewitnesses and the detective testified, and I read from the medical examiner's report. The grand jury deliberated about 30 seconds before handing up a murder indictment.

It was two months or so before I heard from the boy's defense attorney, a man I had dealt with before and respected. Late one afternoon, several days later, we met in my office. Although I was eager to avoid a trial, there wasn't much I could offer the boy as a plea bargain and I said so. I had close to an airtight case, one that was bound to lead to a murder conviction. The crime itself was both shocking and senseless, and the defendant, then 18 years old, would be treated as an adult rather than a juvenile. I saw no reason why I should not take a very hard position.

The defense attorney listened, and then asked me what I would offer the boy. I thought for a minute, and told him I would agree to a plea to manslaughter in the first degree. I added that at the time of sentence I would ask the judge to impose a very lengthy jail term with a fixed minimum to guarantee that substantial time would actually be served.

The defense attorney was candid in his response. He acknowledged right away that his client was guilty and admitted he didn't dare take the case to trial. He had to plead his client guilty, and did not care what particular crime he pleaded to so long as it was not murder, which carried with it a mandatory life sentence. What he did care about was the sentence his client would receive, and in this regard he had two requests. Before discussing the question of sentencing he asked me to read a report on his client prepared at his family's request by a forensic psychiatrist. Then he asked me to meet the boy myself and size him up. I agreed.

Killer on the couch. The psychiatrist's report read, in part, as follows:

... Although I am unable to state that [this young man] was unaware of the nature and consequences of his actions, or that he was unaware of the fact that his conduct was morally wrong, I do believe that there are circumstances that should weigh heavily in determining the disposition of his case.

... [he] is the only son of immigrant parents and was born at a time when his parents were already on the brink of middle age. Since early childhood he has been overprotected and overindulged by his mother who has made him the central focus of her life. His father, a stern disciplinarian, has always attempted to instill in [this young man] his own rather rigid set of values. Needless to say, this interparental conflict over the nature and style of his rearing, has left [the boy] with an ambivalent and deeply troubled attitude toward his parents.

This ambivalence was exacerbated by a phenomenon that is rather common in the first general offspring of newly arrived immigrants. [The boy], whose English is, of course, fluent and unaccented, and who is very much a product of this society, is ashamed of his parents' heavy accents, and what he described as their "foreign ways." He is reluctant to bring friends into the house for fear that his parents might embarrass him, and is equally reluctant to share his "American" school or "street" life with his parents, for fear that they would misunderstand or disapprove of things he has come to cherish as he struggles to find his own identity. On the other hand, [the boy] loves his parents deeply, and has great difficulty coping with this shame over their "old fashionedness."

... [He] has also had serious trouble in coping with peer-group pressure which is, of course, a particularly intense force in late adolescence. The young people in [his] neighborhood place great emphasis upon a young man's having "machismo," e.g., on being both sexually and physically powerful. These values directly conflict with the overprotected and unyielding values the boy has learned at home. In addition, [the boy] has gone through a relatively late puberty, and to this day is relatively small and frail for his age. He does not yet need to shave frequently, and his boyish appearance makes him the butt of a considerable amount of peer-group teasing. He has had considerable difficulty dealing with these pressures both in school and at play in the streets. In view of this it is quite remarkable that he has done as well as he has in his studies. He is a B student, a fact that reinforces my own impression that he is both a sensitive and an intelligent young man.

... There is no gainsaying the fact that he has committed a most horrible crime, and it is not my purpose to in any way diminish or make light of his offense. Nevertheless, it must be understood that [the boy] acted as he did out of a kind of neurotic desperation, from a terrible need to win acceptance from his peers, and to rebel against the strict morality of his parents. In [his] mind, the grotesque action of taking a baking knife and stabbing a strange black boy in the presence of his friends became a means of showing them, and himself, that he could outdo any of them in both violence, and at least symbolically in sexuality. The use of the knife as a chosen weapon is significant, for it is phallic substitute, and was used to assuage doubts that he had developed about his own masculinity. I am not suggesting that [he] did not know that what he was doing was wrong. What I do find though, was that [his] actions were not wholly voluntary, but were precipitated by conflicts between intense psychological forces over which he ultimately lost control.

... I have been seeing [him] for two months now on an intensive basis, and even in this short time there has been extraordinary progress. He has begun to discuss his feelings and has begun to face directly the ambivalences that have so deeply disturbed him. His parents, who are deeply concerned, have cooperated fully in his therapy, and my sessions with them and the boy have been particularly fruitful.

While no one can ever pretend to predict these things with certainty, it is my strong feeling and my professional judgment that with continued care [this young man] will become a well adjusted and valuable member of society. I view with horror the prospect of his going to prison. Such an eventuality would hopelessly undermine all hopes of effective treatment, would exacerbate his problems, and would most likely destroy him as an individual. Sending this young man to prison in his present psychological state would be a tragedy...

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> He looked terribly
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As I read the report, I realized it was a partisan document prepared at the defendant's expense. Nevertheless, I could not completely discount what it contained. The psychiatrist's comments seemed both thoughtful and sincere.

"A pretty good kid." Two weeks later the lawyer brought the boy and his parents to my office. They were dressed in their Sunday best and obviously ill at ease. Their discomfort made me feel uncomfortable too. The defense attorney's purpose in arranging this meeting was not hard to divine. He wanted me to meet his client so that I might develop some sympathy for him and his family. He knew his only real hope for obtaining lenient treatment for the boy lay in winning my acquiescence.

I did find myself feeling sorry for the boy. He looked so terribly frail, young and insecure, completely unlike what I had expected. He was polite, and had soft, almost effeminate features that could not be squared with the conventional image of the vicious killer. In talking to him, I came to understand what the detective had meant when he had told me the boy was "a pretty good kid, who shouldn't get hit too hard."

The boy asked me for permission to go see the parents of the boy he had killed. He wanted to seek their forgiveness, to tell them how terribly sorry he was for what he had done. It was a pathetic request. The whole thing was pathetic. But I believed he was sincere. I kept reminding myself that I was talking to a vicious killer who had taken a human life for no reason at all and then calmly gone about his business for three weeks. He had come very close to getting away with murder. I knew it was possible that he was trying to con me into feeling sorry for him, but somehow I just did not believe it. The boy was not putting on an act.

I talked to the boy's parents briefly. They were restrained and subdued, and seemed to be good people. I could see that the prospect of losing their only child to prison was taking a terrible toll on them, and it was impossible not to sympathize with their plight. I thought about the boy's request, and then told them that it would be unwise for him to try to see the dead boy's family.

That afternoon I spoke to the dead boy's father on the telephone, and arranged for him to come to my office the

following day. When I arrived that morning at 9:00 I found him already waiting for me. He was a dark-skinned, hefty man with a receding hairline. We shook hands firmly and he met my gaze with unwavering eyes. I ushered him into my office, and he sat down in the same chair where 24 hours earlier the other boy's father had sat.

I offered my condolences, and then, before asking him the questions that were on my mind, I tried to make my position clear. I was not his lawyer. I worked for the State of New York and my responsibility was to the people of the state and not to any particular individual. I wanted to talk to him about his son's death and I wanted his opinion about the treatment his son's killer should receive. But in the end, he had to understand that whatever he might feel and whatever he might think, I had to be the one to decide how the case was handled. When I asked him if he understood, he continued to look levelly at me, and answered, "Yes, I do."

I went on to outline in some detail the results of the detective's investigation. He learned that I had a powerful case, and that a trial was almost certain to result in a murder conviction with a mandatory life sentence for his son's killer. I also told him what I had learned from the psychiatrist's report and described the interview in my office the preceding day. I described my problem to him. In about a week the case was scheduled to come up on the court calendar, and I would be obliged to make a recommendation to a judge on the question of plea and sentence. The judge would most likely follow my recommendation. The defense would have no choice but to go along with my offer, and in the final analysis I would bear a heavy responsibility for what would happen. I asked the man for his help in reaching a decision. He sat silently, pondering what I had said.

When he spoke, it was with great force. There was a lot bottled up inside him and he had come to my office to get it off his chest. He was blunt. He said he was not about to make things easy for me by telling me not to go hard on the white boy. As far as he was concerned "that white boy" had to go to jail for a long time and the longer the better. He told me his wife had planned to come with him to my office, but at the last moment she had broken down and couldn't come. Their son's death had just about killed his wife. The death had made her old before her time and he knew she would never be the same again.

And then there was their younger son. He had been doing really well in school, almost as well as his dead brother had been doing. But ever since the murder, the knowledge that his brother's killer was free had been eating at him. The parents did not know what to say to him. He was turning bitter, neglecting his studies, and for the first time had begun to get into trouble with the law. Was it right that their only remaining child be condemned to grow up with such hatred?

Then there was the question of race. He asked me whether a black kid who had senselessly killed a white honor student would be out on bail receiving such gentle treatment. It was a rhetorical question, and he supplied his own answer. He knew damn well that if the tables were turned his son, or any black boy, would be rotting in jail facing a certain life sentence. I listened quietly and didn't argue. I let the man talk himself out and then thanked him for coming to see me and for speaking so candidly. Then we parted.

The case got some minor press coverage, especially in the local newspapers serving the black community. We had received some mail on the case and there was one editorial highly critical of the way the criminal justice system was handling it. Here was an extraordinary young black senselessly cut down by a youthful white racist, and nobody was doing anything about it. There were letters calling for the defendant's head, and many of them were rational and forceful. It was reasoned that the failure to punish the white killer severely was a clear signal to other white youths with similar inclinations that black life was cheap and could be taken with impunity. Similarly, it told someone in the black community that there was no justice in the courts, and that recourse to justice in the streets was a wiser alternative. The newspaper clippings, the editorial, and the letters all found their way into the file. I read them, and found that I could not ignore the message they contained.

By the time the case came up for a pretrial conference I had decided unheroically to pass the buck. The judge, I thought to myself, was elected by the people, and is paid about three times as much as I am to make these tough sentencing decisions. I decided to recommend a plea to manslaughter one and take no position on the question of sentence. This would give the judge latitude to choose anything from a 25-year sentence down to no sentence at all. Let him read the presentence report, talk to both sets of parents, and decide what to do with the boy. That's his job really, not mine.

It did not work out that way, and deep down I had known it wouldn't. The judge listened courteously enough while the defense attorney and I outlined the facts of the case. Then I proposed the open plea to manslaughter in the first degree with the question of sentence left entirely in the judge's hands. The proposal was turned down on the spot.

"What, are you out of your mind?" the judge asked. "You want me to stick my neck out all alone on a case like this? No way! Here's what I'll do. I'll adjourn the case for one week. If, at that time, the district attorney's office is prepared to make a recommendation on sentence, I will accept the plea and follow that recommendation. If not, I will set the case down for trial."

As we were leaving the courtroom the defense attorney called me inside. He was angry and spoke harshly. Again I was asked rhetorical questions. Didn't I know what was going to happen to the boy in jail? A soft, good-looking kid like that would certainly be gang-raped by homosexuals in prison. He would almost certainly end up becoming a homosexual himself, and probably would become the "wife" of some stronger inmate just to obtain protection. Hadn't I read the psychiatrist's report? Didn't I know what the prisons were like?

I did not reply to the defense attorney's outburst. There was nothing I could say. I did know what the prisons were like and I had read the psychiatrist's report. I didn't need the defense attorney to remind me of these realities. They had been nagging at me all along. The defense attorney paused a minute waiting for an answer. When I said nothing, he went on. Didn't I know that 80 percent of the prison population was black or Hispanic? Once they find out what the boy is in jail for they would probably cut his throat. He said his client would never survive a lengthy jail term.

I did not argue with the defense attorney as he said this. I too had considered this possibility, and frankly, I just did not know whether he was right or wrong. I heard him out, and then excused myself. It was a bad week for me. The case would not leave my mind, and the more I thought about it, the more impossible it seemed to reach a sentencing decision. I would have liked to have had more information about the boy before making a decision. But with our crushing caseloads, neither I nor the detective could possibly devote more time to this particular case.

I turned to my colleagues for advice, but, as I expected, they showed no inclination to make the decision for me. This was only one case among many, and only I had any knowledge of its complexity. The advice I got was both wise and useless. "Do the right thing, and don't worry," I was told.

The trouble, of course, was that I did not know what the right thing was, and I could not stop worrying. I wanted to reach a just result, but justice, I quickly came to realize, was a relative thing. It all depended upon your perspective. Justice for an emotionally disturbed boy, gripped by psychological forces partially beyond his control, or for his aged parents, faced with the loss of their only son? Justice for the dead boy, senselessly cut down in his youth, or for his family, grief-stricken and embittered by their loss, and by the seeming indifference of the judicial process? Society needed justice too. But what kind? Stern justice to clearly show that racial violence would not be tolerated? Or a more humane justice that sought to heal and rehabilitate rather than punish?

There was no end to the conflicting values at stake, and the conflicts, such as they were, would not resolve themselves in my mind. I had no difficulty articulating the arguments to justify either harsh or lenient treatment. But in the end, I came to realize that the arguments were pointless. Each one was based upon a different assumption about the purpose of punishment; and in effect, in making the argument, the unspoken assumption would dictate the conclusion reached. For example, if the purpose of punishment was retribution, then the very seriousness of the boy's offense, independent of all other considerations, required harsh punishment. But if the idea was rehabilitation rather than retribution, then I had a boy who most probably could be transformed through sympathetic and therapeutic, i.e., lenient, treatment into a valuable member of society.

If, on the other hand, punishment was designed to be exemplary, if it was to teach and to deter, then harsh treatment was necessary to demonstrate that racial violence would not be tolerated.

Retribution, rehabilitation, and deterrence, they all have a certain validity, and I could not easily choose between them. Besides, I was haunted by the images of the two families, and concerned about the impact of my decision upon all of these decent and innocent people.

I tried to take a pragmatic approach and asked myself what was to be gained by sending the boy to prison. It wasn't going to bring the dead boy back, and it wasn't really going to end racial violence or make the streets of the Bronx any safer. In one way or another, prison would probably destroy the boy, and in the final analysis, wasn't it more important to save this life, then to bow to the imagined dictates of abstract social justice? The boy was so young, and in a sense he was the victim of powerful social and psychological forces that were beyond his control. Was it right to make him pay as an individual for a crime that found its origins, at least in part, in peer-group pressure and the collective racial attitudes of society in general? I toyed with all these arguments, but I could not escape the idea that the boy, however young, bore an individual responsibility for his actions, and had to answer for that responsibility.

A decision had to be made, and one week later I made a sentencing recommendation. Later, at the time of sentence, the judge followed it. Whether or not I did the right thing I shall never know. No doubt reasonable people will differ about the rightness of my decision and what ought to have been done.

The boy is currently serving a 15-year term in state prison. He will be eligible for parole in three years. Two months after sentence, the white youth's father suffered a stroke. He is now an invalid. The dead boy's brother is now under indictment, charged with armed robbery. There has been no noticeable decrease in the amount of crime or racial violence in the Bronx.

Steven Phillips graduated from Williams College and received his law degree from Columbia Law School in 1971. For the next five years

he served as an assistant district attorney in Bronx County, New York, where he specialized in the investigation and trial of homicide cases. Now employed by a New York City law firm, he is the author of No Heroes, No Villains, an account of a murder trial, to be published in April by Random House.

DIVERSION FROM THE CRIMINAL PROCESS

BY HAROLD BIRNS

Diversion from the Criminal Process

by Harold Birns

Diversion is a new name for an old process by which certain defendants are not prosecuted but given a chance to return to society under specified conditions. It offers hope, if properly used, of making substantial inroads on the problems of recidivism, congested court calendars, and overcrowded prisons.

DIVERSION in its present form originated in 1967 in New York City with the establishment of the Manhattan Court Employment Project, sponsored by the Vera Institute of Justice. That program was designed to offer individual and group counseling and job or academic placement to defendants selected with the consent of the district attorney and judge. Charges against the defendants were adjourned to allow their participation in the program, and on successful completion of the program, the charges were dismissed. By 1973 diversion was included as a proposed element of a model system of criminal justice in the reports of the National Advisory Commission on Criminal Justice Standards and Goals. The staff director of the American Bar Association Commission on Correctional Facilities and Services has forecast that by 1978 there will be as many as a hundred and fifty formal pretrial diversion projects operating in the United States processing approximately a hundred and fifty thousand defendants a year. And in his 1975 message to Congress on crime, President Ford stated: "Experimentation with pretrial diversion projects should continue and expand."

What is diversion—this idea that is rapidly becoming a major institutional alternative to the traditional arrest-trial-incarceration route? Although the term is relatively new to criminal procedure, it describes a practice long an integral part of the process of criminal justice: the exercise by police and prosecutors of discretion not to arrest and prosecute.

Diversion in its most recent, formalized version (and as the term will be used here) refers to the legal pretrial exercise by the police, probation personnel, the prosecutor, or the judge of discretion to suspend or otherwise hold in abeyance charges against selected defendants for a specified period of time, on condition that the defendant participate in a prescribed program of rehabilitative activity or refrain from activity of a criminal nature, and on the stipulation that if the accused fulfills the condition, the charges will be dismissed.

By and large, diversion projects are structured according to the particular class of defendant the project is designed to serve. Generally there have been four main "target populations": (1) unemployed or underemployed minor offenders; (2) drug addicts or drug abusers; (3) alcoholics; and (4) juveniles.

Despite the proliferation of diversion projects, the conceptual and legal problems raised by diversion had been the subject of little research or analysis prior to the winter of 1973, when the Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction, one of a number of subcommittees of the Advisory Committees on Court Administration in New York City, undertook an in-depth study of the diversion process. The subcommittee identified and analyzed fifty-four operational diversion projects in twenty-two states. It then held a series of meetings with representatives from a broad range of public and private agencies and organizations involved in the operation of the system of criminal justice in New York City.

Recommendations Have Nationwide Relevance

While the primary focus of the study was diversion in New York City, the subcommittee's findings and recommendations are relevant nationwide. Listed below are some of the major recommendations, followed by the findings which gave rise to them:

1. Council on diversion. *There should be established a centralized council on diversion composed of representatives from the judiciary, the offices of the district attorneys, probation, legal aid, and the private criminal defense bar.*

Diversion is in effect a form of negotiated disposition involving the relinquishment of certain rights and opportunities by each participant in the system of criminal justice in order to gain certain advantages. The defendant avoids the ordeal of trial and the stigma of criminal conviction and obtains immediate rehabilitative services. But he must waive his right to a speedy trial and submit to a program of counseling designed to alter his life style without assurance that the charges against him will be withdrawn. The prosecutor can marshal his resources for more serious cases, but while he may resume prosecution of a diverted defendant who fails to perform

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satisfactorily, he risks compromising successful prosecution of his case because in the time between diversion and resumption of prosecution witnesses may become either unavailable or reluctant to reappear, their memories may falter, or the case may become stale in the eyes of the jury. The development of diversion practices to the satisfaction of all concerned parties should be substantially enhanced by the formation of a permanent council on diversion, which would meet regularly to consider and establish guidelines for the diversion process and to exchange information and points of view.

2. Centralized screening. *A centralized unit should be established to screen each defendant entering the system of criminal justice for preliminary determination of his eligibility for diversion and to recommend appropriate rehabilitative programs to which eligible defendants could be referred.*

In theory each diversion project serves a particular segment of the defendant population, but in fact there is substantial overlap. As each project maintains its own staff of screeners, costs and effort are inevitably duplicated. There also appears to be some degree of competitiveness among projects, which has resulted in instances of overaggressive recruitment of divertees. These problems would be substantially eliminated by the centralization of the preliminary screening and referral functions.

3. Formal guidelines. *A publicly enunciated set of formal guidelines should be developed presenting uniform criteria governing the diversion process.*

With the proliferation of diversion, there are or will be several projects operating in major metropolitan jurisdictions. In New York City, for example, there are at least ten major diversion projects. Each may have its own special eligibility criteria, its own screeners and counseling staff, and operate pursuant to its own agreement with the district attorney. While it probably would be unwise to make the procedures by which diversion operates unduly rigid, guidelines are necessary to protect the rights of the defendant and the interests of the public, to promote diversion beyond its developmental, innovative stage, and to institutionalize it within the system of criminal justice.

4. The role of the judge. *The judge should actively participate in the decision to divert or not to divert, to dismiss the original charge following successful completion of the diversion program, or to terminate involuntarily the divertee's program participation and reinstitute prosecution.*

Although variations exist, the typical diversion project operates by a more or less formal agreement involving the project, the prosecutor, and the courts. The most common pattern is for project staff members to do initial screening and then to make a recommendation to the prosecutor regarding a specific defendant. If the prosecutor accepts the recommendation, he then moves for an adjournment of the case to allow the defendant to participate in a program. In effect, the "hearing," if it can so be termed, amounts to little more than the judge's granting of an adjournment during the course of a calendar call. If the prosecutor rejects the screener's recommendation, that usually is the end of the matter.

A decision by the Supreme Court of California casts some doubt on the legality of control by prosecutors over the diversion process. In *California* v. *Superior Court*, 520 P. 2d 405 (1974), it was held that a provision of the California Penal Code requiring the consent of the prosecutor before the trial court may order an eligible defendant to be diverted constitutes an illegal usurpation of judicial power, violating the separation of powers doctrine. Although this ruling was based on a statutory diversion scheme, similar principles can be applied to nonstatutory programs established pursuant to agreements among courts, prosecutors, and project screeners.

One alternative would be to have the court review the prosecutor's approval or rejection of a project screener's recommendation. It might be sufficient for the court to review summarily affirmative decisions to divert and reserve more detailed review for contested rejections of the screener's recommendation.

Under another alternative, suggested by the American Law Institute, diversion would be conducted under a formal written agreement between the defendant and prosecutor, which would take effect only after it had been reviewed and approved by the court having jurisdiction to try the case. The judge would approve the agreement only after he had examined the defendant and made certain that the defendant was aware of the alternative courses available, understood the terms and consequences of the agreement, and had given informed and voluntary consent. The judge also would determine whether the terms of the agreement were not more burdensome to the defendant than the penalties that could be imposed on probation after conviction of the crime and whether certain other limitations of the terms of the agreement had not been exceeded. Finally, the judge would determine whether the rehabilitation program agreed on was suitable to the defendant's particular needs, whether the terms of the agreement or the program would unduly restrict the defendant's freedom, and whether the safety of the public would be protected

adequately. Should the judge disapprove the agreement, his decision would not be subject to appeal, but the parties would be allowed to modify the agreement. Under this plan, however, the judge would see only defendants selected by the district attorney's staff, and there would be no built-in safeguards against discriminatory exclusion of eligible defendants.

While the A.L.I. proposal represents a step in the proper direction, it is preferable that the ultimate decision both with respect to those accepted for diversion and those rejected be the responsibility of the court.

The final stage of the diversion process is the disposition of charges after the defendant's successful completion of the program or termination from the program for unsatisfactory performance. As in the procedure for admission into a program, the typical pattern is for the project staff to recommend dismissal to the prosecutor who, if he consents, moves the court for dismissal, which is usually granted summarily. In several jurisdictions the prosecutor's review and approval of the project staff's recommendation appears to be largely *pro forma*. It has been suggested that this routine dismissal of charges probably reflects the prosecutor's prior decision not to prosecute at the time the defendant entered the program.

Although prosecutors are particularly concerned with maintaining the power to resume prosecution, participation in the program is usually terminated at the request of project staff. Prosecutors point out, however, that there are cases in which they learn of continued criminal behavior by the diverted defendant of which those supervising the rehabilitative program are unaware. They feel they must have the unilateral power to resume prosecution or they would be less agreeable to diversion in the first place.

The extent of the involvement of the judge in the final disposition of the charges may properly and in the interest of expediency be minimal if the project staff and the prosecutor agree on the dismissal of charges. In the event of disagreement, however, the judge should play an active role in the disposition.

5. The role of counsel at diversion intake. *Defense counsel should be notified at the intake stage before any overture concerning diversion is made to the defendant by either the prosecution or project screeners, and an adequate opportunity should be afforded to the defendant for legal consultation on the nature and consequences of the diversion option before he is required to make his decision.*

Advice of counsel is most critical when the defendant must decide whether to accept the diversion offer. As the diversion intake proceeding involves the waiver of fundamental rights and in effect may be the most important stage of the defendant's case, it should be regarded as a "critical stage" of the prosecution at which the defendant is entitled to the assistance of counsel. Nevertheless, only 40 per cent of the responding projects in the surveyed group reported affirmative requirements that defendants consult defense counsel before consenting to participation in the program.

Besides fully explaining the nature and consequences of the diversion option, the defense attorney's primary responsibility at the first stage is to determine whether acceptance of the diversion option is appropriate under the particular circumstances of the defendant's case and, if so, to act as an advocate in securing his client's admission into a suitable program.

6. Resumption of prosecution: due process rights. *Before unfavorable termination of a diversion program and resumption of prosecution, the defendant, as fairness and due process require, should be afforded (a) written notice of the alleged violation of the terms of the diversion; (b) disclosure of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine witnesses; (e) a neutral hearing officer; and (f) a written statement of the grounds for the hearing officer's decision and the evidence he relied upon.*

Formal procedures for termination of participation in the program and resumption of prosecution appear to be rare. Only four of the programs surveyed reported that participants had a right to a judicial hearing prior to resumption of prosecution. The most common practice is to mail the defendant a form letter notifying him that his participation in the program has been terminated and that his prosecution will be resumed.

The United States Supreme Court has held that procedural due process requires that a hearing be held before a convict's parole can be revoked (*Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973)). Although there is no known case

• For this article Justice Birns has drawn on the research and findings of the Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction, one of several subcommittees of the Advisory Committees on Court Administration in New York City. The subcommittee's study began in 1973 under the chairmanship of Bernard Botein, a former presiding justice of the Appellate Division, First Department. After Justice Botein's death in 1974, Justice Birns was appointed acting chairman of the subcommittee and supervised the completion of the study and the preparation of the report.

Other members of the subcommittee are M. Marvin Berger, judge of the New York City Criminal Court; Frank P. Grad, professor of law at Columbia Law School; Judah Gribetz, now counsel to Governor Carey of New York; Herman Meltzer, a practicing attorney; Louis Otten and Richard M. Palmer, judges of the New York City Family Court; William E. Ringel, a former judge of the New York City Criminal Court; Alvin H. Schulman, a practicing attorney; and Beatrice Shainswit; a judge of the New York City Civil Court.

law directly on point, it has been persuasively argued that the reasoning in those decisions would likewise compel the conclusion that a diverted defendant must receive a hearing before his participation in the program may be terminated and his prosecution resumed.

The Court characterized the convict's conditional liberty as a "great interest" that could not be terminated except through a fair and orderly process. When a diverted defendant's participation is a condition of his release from pretrial detention, the analogy is extremely strong. But even when resumption of prosecution would not result in pretrial confinement, the diverted defendant has a "great interest" in remaining in the program. Not only has the defendant presumably invested time and some energy in the program, but continued participation may provide the only pretrial access to rehabilitative services and the best chance of obtaining dismissal of the charges, while termination will most likely result in an unfavorable presentence report if the defendant is convicted or pleads guilty.

The responsibility for hearing applications to terminate participation and resume prosecution should belong to the judge. The project staff and prosecutor are disqualified from this role for two reasons. First, in virtually every case the prosecutor or project staff or both will initiate termination proceedings. If these parties were to serve as hearing officers, the defendant would be judged by his accusers, thus violating the requirement that the hearing officer be neutral. Second, if one accepts the rationale of the California decision that diversion is essentially an alternative method for disposing of the original charge, then the court should be the ultimate authority in determining the final outcome of participation in the diversion program.

The A.L.I.'s model code proposes that if the prosecutor determines that resumption of prosecution may be required, he should offer the defendant a hearing before a member of his staff to determine whether grounds for resumption of prosecution exist and, if so, whether prosecution should be resumed. The rules of evidence would not apply, but the defendant would have the right to counsel and the right to confront and cross-examine witnesses. The defendant would be entitled to judicial review of an adverse decision, but the decision could be attacked only on the ground that it was not supported by the record of the hearing.

In effect, the A.L.I. proposal represents a compromise between unlimited exercise of prosecutorial discretion and judicial responsibility to oversee and determine the ultimate disposition of criminal charges. The procedure is relatively streamlined so as to impose minimum procedural restrictions on the prosecutor's discretion consistent with the defendant's right to due process.

7. Confidentiality and expungement. *Records of defendants who successfully complete participation in diversion programs should be expunged, and the confidentiality of the records of the diversion projects, with careful limitations as to access and privacy, should be preserved.*

Many of the projects in the surveyed group require diverted defendants to participate in group or private counseling sessions. Great emphasis is placed on the defendant's candor and openness in discussing the social and personal background that led to his criminal involvement. Drug addiction treatment programs in particular rely heavily on "confrontation" or "encounter" therapy techniques, and some programs operate on the premise that the defendant must directly acknowledge his moral responsibility for the charged offense before he can be rehabilitated effectively. Thus, from a legal standpoint, the effect of the therapeutic approach may be to encourage and in some cases require the diverted defendant to make incriminating statements concerning himself.

Of the projects surveyed, forty-two indicated that their records were "confidential," but in several instances the confidentiality provision apparently consisted merely of an informal understanding between the prosecutor and the project rather than a formal guarantee by the court and prosecutor to the defendant. Several projects that described their records as confidential nevertheless indicated that a relatively large number of persons or agencies had access to them. Twenty-two projects provide for the expungement or sealing of records on one who successfully completes the program.

In a strictly legal sense, statutory privileges covering confidential relations between physicians, psychologists, social workers, and their clients may ensure the confidentiality of diversion project records. For purposes of reassuring the diverted defendant and encouraging candor, however, it would be advisable to include in the project's charter and the individual defendant's "diversion agreement" a formal guarantee that records will be maintained in strict confidence and expunged or sealed at the end of the defendant's participation in the program regardless of whether charges are ultimately dismissed or prosecution is resumed.

Diversion Is a Promising Alternative

Although some commentators question the effectiveness of diversion, it is the view of our committee that it has developed into a promising alternative to traditional criminal justice. It offers hope of making substantial inroads on the problems of recidivism, congested court calendars, and overcrowded penal institutions. Its ultimate success, however, will depend not only on quality diversion projects and programs but also on the development of satisfactory procedures and eligibility criteria and the application of appropriate due process safeguards. ▲

A COMMUNITY PERSPECTIVE ON CHANGE IN THE CRIMINAL JUSTICE SYSTEM

BY PAUL WAHRHAFTIG

This paper was prepared for the participants of the 1977 National Conference on Pretrial Release and Diversion

CONTINUED

3 OF 4

A COMMUNITY PERSPECTIVE ON CHANGE IN THE CRIMINAL JUSTICE SYSTEM

by Paul Wahrhaftig

At previous NAPSA annual meetings there have been some interesting exchanges between agency directors and the few representatives of the community or community based groups. Agency directors view themselves as being on the cutting edge of social change. They are increasing the numbers of people released or diverted, are reducing jail populations and are seeking ways of "Institutionalizing change." They appear baffled and hurt when confronted by "community types" whose questions and comments carry an assumption that the agency directors are part of the establishment and are not in any way bringing about "real change." What is going on? I suggest that the confusion results from a lack of definition of what are the necessary elements of real change in the criminal justice system.

In this paper I will try to clarify what "real change in the criminal justice system" means from a community perspective. I will leave it to the reader to define change for the majority of NAPSA's membership. In the American Friends Service Committee which has eighteen justice programs spread across sixteen states, the key concept is EMPOWERMENT. In short, we feel that ends such as increased pretrial release and reduction of jail populations are good, but the means by which those ends can be achieved is through changing the power relationships between the victimized communities and the institutions that operate in them. Until those relationships are changed, the gains in release rates are likely to be short term and often illusory.

The concept of empowerment, if it is to be more than a cliche, must be carefully examined. For this reason, I am sharing with you sections of a draft position paper that was prepared by some staff and committee people within the AFSC to promote discussion of our future directions. I would like to stress that this is a discussion draft only and not a position paper adopted by the AFSC or any of its subdivisions. Tentative as it is, it is an important contribution to understanding the confusion underlying debates on NAPSA conference floors.

EMPOWERMENT AS A COMMON THEME FOR AFSC JUSTICE PROGRAMS

We suggest enpowerment as a common theme for AFSC justice programs for several reasons. It clearly affirms the common humanity of all people, it offers the most promising way of fighting oppression, it allows flexibility of program form, and it focuses the use of scarce AFSC resources.

DEFINITION OF EMPOWERMENT

In this context, when we use the word "empowerment" we are referring to the process of increasing the influence of people in organized groups over the forces which oppress them. Obviously the AFSC does not in itself give power to people, it promotes empowerment. We help provide the tools, skills and avenues that people may not have.

The process of empowerment can be threatening even to those who promote it. For example, prisoner participation in decision making means for the AFSC that we must be the first to relinquish some power--AFSC cannot dominate the prisoners it seeks to empower. We have to agree before talking with the first prisoner that we will work collectively with them. If we do not relinquish power we become an extension of domination, dictating middle class values to the poor and demanding that they conform.

Helping people gain confidence, ability, and recognition as a legitimate group is the beginning of empowerment. In work with prisoners or ex-prisoners, providing access for their voice to the community, to legislators, and to the public is part of the empowerment process. Speaking of empowerment in prisons, STRUGGLE FOR JUSTICE said:

> Finding the only channel open to it, the thrust for self-determination within prisons has taken the form of resistance and strikes. We note the courage of prisoners all over the nation who, at great risk to themselves, point to the barbarity and inhumanity of their confinement, demanding that its causes, not merely its present misery, be changed. A new commitment and awareness flourishes among these men and women. We stand beside them in their struggle.

While using prison activities as examples of empowerment, we realize that there are absolute limits to the amount of power that can be exercised by one who is imprisoned. To believe that prisoners will attain absolute power is very simplistic. Even a take-over by prisoners is not taking power, for the real power is out in our society, and any insurrection of prisoners can be easily suppressed, as proven in Attica. But all power is relative, and it is possible for prisoners to increase their control over their environment within certain limits. Even this limited increase is empowerment and should be encouraged.

IMPLICATIONS OF EMPOWERMENT

The theme of empowerment clearly affirms the common humanity of all persons, in a manner reflecting our basic concept that all persons have worth and value and should be treated with dignity. It also aids us in understanding the aspirations of the oppressed. With the criminal justice system being so isolated from our society at-large, much of the public does not conceive of the men, women, and children caught up in that system as people like themselves. They rather view them as vague and faceless misfits "deserving any treatment dished out to them." If the public cannot envision those enmeshed in the criminal justice system as persons like themselves, then all efforts and approaches to change that system are subject to sabotage, misrepresentation, and misunderstanding. In the process of changing this public image, we must resist efforts to appease or mold prisoners to the needs of institutions and recognize that prisoners, as a class of people, are mentally and emotionally capable of speaking for themselves. We must assist in providing the resources and developing the expertise that would enable the leaders to rise to their proper place in representing their constituency.

Empowerment is an approach which offers to the oppressed in this society the greatest opportunity to throw off their oppression and promote their own interests. Given the proper resources and assistance, the victims of injustice can make dramatic and effective changes in their own lives. As we stated in STRUGGLE FOR JUSTICE:

> Intractable racism, a stratifying culture of poverty, and a growing despair in the ability of American society to change and respond to crisis require decisive change. Racial minorities, the poor, and the young must achieve a proportionate voice in our society's political decision making and an equitable share of its economic rewards. Paternalistic trickle-down methods are neither practical nor acceptable. The fundamental reallocations of power and resources that are required can only occur through rapid development by the oppressed and intimidated of their political power so that they can promote and defend their own interests. This in turn requires pride, hope, and organization.

The theme of empowerment has the flexibility of being expressed in many program forms. Programs providing direct service or public education, for example, may share with the victimized the resources and skill to themselves conduct the programs. The "haves" giving to the "have nots" satisfies the best needs of human nature, but service programs in themselves seldom benefit the majority of people who need help and are unable to help themselves. However, a program of social services designed or operated by ex-prisoners may be a first step in their recognition of their power to affect the world around them. The leaven of empowerment may change a reform effort from an end in itself, perhaps perpetuating the present justice system, into a means toward a progressive shift in basic power relationships. The REPORT OF JUSTICE TASK FORCE spoke of how the theme of empowerment can cut across program types:

> A strategy for change based on empowerment gives us a meaningful way in which to view our various program approaches. When we tried to divide them by service vs. institutional change, we kept running into binds. We would comfortably generalize that service by itself was not an adequate goal for AFSC programs, because it wouldn't change anything. But that generalization short changed, for example, prisoner-run service programs, or Chicano community organizations which add important justice information resources to their communities. Self-determination in previously totally powerless communities is change. Likewise a service vs. change breakdown might give too much "change" credit to, say, some types of public education, which might be mere exhortation.

When we speak of empowerment as a common theme for AFSC justice programs, we are clearly not suggesting uniformity of programs, but a diversity of approaches toward our common objectives, with all of them involving the oppressed in a meaningful way.

OPINION NO. CR 76/6 IL

BY ATTORNEY GENERAL EVELLE J. YOUNGER

AND

DEPUTY ATTORNEY GENERAL DON JACOBSON

STATE OF CALIFORNIA

EVELLE J. YOUNGER
ATTORNEY GENERAL

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL
Department of Justice
STATE BUILDING, SAN FRANCISCO 94102

August 20, 1976

(415) 557-1916

Honorable John M. Price
District Attorney
County of Sacramento
P. O. Box 749
905 G Street
Sacramento, CA 95804

Dear Mr. Price:

Re: Our Opinion No. CR 76/6 IL

By letter dated February 6, 1976, you have requested the opinion of this office on the following questions:

1. "The legality of implementing a diversion program of selected misdemeanants in the Sacramento courts."

2. "What is the legal reason for requesting a dismissal in the case of an individual who has successfully completed a program as described in the application and what will be the court's legal reason for granting that motion to dismiss?"

Our conclusion is:

1, 2. The proposed program may not be implemented because the Legislature has pre-empted the area of criminal prosecutions, punishments, and the procedures appropriate thereto. Accordingly, absent statutory authorization from the Legislature, local jurisdictions may not divert properly charged defendants out of the criminal justice system.

ANALYSIS

A. The Proposed Diversion Program

Under the proposed program the Sacramento Municipal Court, with the Sacramento District Attorney's concurrence, would permit 350 first-time offenders against whom have been filed misdemeanor complaints not involving narcotics, deadly weapons, assaults and batteries upon peace officers, Vehicle Code violations, or morals charges, to participate in a pretrial diversion program. The practical effect of the program is to remove these offenders entirely from the criminal justice system, except that upon successful completion of the diversion program, which includes restitution where appropriate, the defendant would return to the Municipal Court at which time the District Attorney will move to dismiss the pending charges with the approval and concurrence of the court.

B. Pre-emption By State Law

If the Legislature has adopted a general scheme for the regulation of a particular subject, no local legislation on that subject is permissible. Cal. Const., art. XI, § 7. Galvan v. Superior Court, 70 Cal.2d 851, 859 (1969). See also, In re Hubbard, 62 Cal.2d 119, 127 (1964); In re Lane, 58 Cal.2d 99, 102-103 (1962). A policy followed by the Municipal Court like a county or city ordinance, is also subject to overriding state law. See Turlock Golf Etc. Club v. Superior Court, 240 Cal.App.2d 693, 700 (1966); and Wisniewski v. Clary, 46 Cal. App.3d 499, 506 n. 7 (1975). A local regulation of matters of statewide concern is void if it conflicts with general state law which was intended by state law to occupy the field to the exclusion of municipal regulation. Younger v. Berkeley City Council, 45 Cal.App.3d 825, 830 (1975). In determining whether the Legislature intended to pre-empt the particular field to the exclusion of all local regulation

> ". . . it is essential to review the whole purpose and scope of the legislative scheme. 'The task is . . . to determine whether the State has occupied . . . an area of legislation which . . . is sufficiently logically related so that a court . . . can detect a patterned approach to the subject.' Galvan v. Superior Court, supra, 70 Cal.2d 851 at p. 862. Such a 'patterned approach' to the whole field becomes apparent from examination of the relevant statutes." Younger v. Berkeley City Council, supra, 45 Cal.App.3d 825, 831 (1975);

> see also, Abbott v. City of Los Angeles, 53 Cal.2d 674, 682-684 (1960); Madsen v. Oakland Unified School District, 45 Cal.App.3d 574, 581 (1975).

Application of the foregoing principles to the present proposal compels the conclusion that its implementation is unlawful. Examination of the Penal Code alone discloses that the Legislature has prescribed in definitive terms the precise procedure to be followed in the prosecution and punishment of crimes -- be they felony or misdemeanor. Accordingly, it is clear that the Legislature has intended to occupy, exclusively, this field of law. By contrast, the present proposal conflicts directly with the procedures prescribed in the Penal Code. In short, this proposal removes the criminal defendant from the arraignment, bail, trial, sentencing, and punishment processes, all of which have been expressly prescribed by the Legislature.

Although the Legislature has not specifically proscribed the establishment of pretrial diversion programs, its intent to occupy that field is further manifested by its pronouncements in the area. In this respect it must be noted that the Legislature has permitted pretrial diversion of only certain drug offenders. Pen. Code §§ 1000, et seq. Cf. Pen. Code §§ 647(ff), 849(b)(3); Veh. Code §§ 13201.5(a), 13352.5(a). It would therefore appear to be the Legislature's intent that all other criminal offenders be prosecuted and if convicted punished as otherwise provided by the law.

Our conclusion that this proposal is inconsistent with and pre-empted by the statutory schemes is further buttressed by the following cases:

> "Sincere though an individual judge's belief may be that a guilty defendant's rehabilitation would be facilitated by avoiding conviction, we are convinced society's interest that justice be dispensed with an even hand and in accordance with statutory authority precludes use of the dismissal statute to avoid conviction.
>
> "After conviction, the Legislature has wisely provided the judges with alternatives which they may properly consider in the sentencing process. . . . Among other things, the statutes are concerned with rehabilitation and the limits within which courts may

properly act to effect it. Under the circumstances of this case, we are convinced the dismissal provisions of Penal Code section 1385 cannot be used for rehabilitative purposes. To hold otherwise would completely stultify the statutory scheme and would exalt the rule of men above the rule of law." People v. McAlonan, 22 Cal.App.3d 982, 987 (1972). See also, People v. Smith, 53 Cal.App.3d 655, 657-659 (1975); People v. Mack, 52 Cal.App.3d 680, 684 (1975).

The Supreme Court has further commented on this issue as follows:

"Permitting trial judges to make liberal use of section 1385 to avoid criminal prosecutions where probable cause exists to believe conviction is warranted would be contrary to the adversary nature of our criminal procedure as prescribed by the Legislature. [Citations omitted.] Under the statutory scheme which has been established for the prosecution of crimes, the district attorney is required to 'institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed.' (Gov. Code, § 26501.) The committing magistrate must hold the defendant to answer 'if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.' [Citations omitted.] Under ordinary circumstances, it would frustrate the orderly and effective operation of our criminal procedure as envisioned by the Legislature if without proper and adequate reason section 1385 were used to terminate the prosecution of defendants for crimes properly charged in accordance with legal procedure. [Citation omitted.]" People v. Orin, 13 Cal.3d 937, 947 (1975).

Notwithstanding the laudatory purposes underlying the present proposal, were it to be upheld, the net effect is creation of an avenue by which any local jurisdiction can avoid the legislatively mandated procedures of prosecution, trial, and punishment of criminals, merely through the adoption of such "diversion" programs. In sum, it is the opinion of this office that because this proposal operates in a field pre-empted by the Legislature, and is in direct conflict with and in fact nullifies clear legislative intent, its implementation at this

time is unlawful.

It is hoped that this answers your questions. If this office may be of further assistance in this matter, please do not hesitate to contact us.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

Don Jacobson

DON JACOBSON
Deputy Attorney General

DJ:rms

ASSEMBLY BILL

CALIFORNIA LEGISLATURE

1977-78 REGULAR SESSION

AMENDED IN ASSEMBLY APRIL 12, 1977

AMENDED IN ASSEMBLY MARCH 29, 1977

AMENDED IN ASSEMBLY MARCH 21, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL **No. 533**

Introduced by Assemblyman Berman

February 16, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to amend Section 432.7 of the Labor Code, and to add Chapter 2.7 (commencing with Section 1001) to Title 6 of Part 2 of the Penal Code, relating to pretrial diversion, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 533, as amended, Berman (Crim.J.). Crimes: pretrial diversion.

Existing law provides pretrial diversion programs for certain accused drug offenders, and postconviction treatment programs for persons driving under the influence of liquor or drugs.

This bill would provide a general authorization for cities and counties to establish pretrial diversion programs, which comply with specified provisions of this bill, and would state that the laws do not preempt posttrial programs. The provisions would be repealed on January 1, 1980.

Existing law makes various limitations respecting inquiries by employers about arrests or detentions.

This bill would apply such limitations to inquiries about

Corrected 4-13-77

specified pretrial and posttrial diversion programs.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 432.7 of the Labor Code is amended to read:

432.7. (a) No employer whether a public agency or private individual or corporation shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention which did not result in conviction, or information concerning a referral to and participation in any pretrial or posttrial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention which did not result in conviction, or any record regarding a referral to and participation in any pretrial or posttrial diversion program. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

(b) In any case where a person violates any provision of this section, or Article 6 (commencing with Section 11140) of Chapter 1 of Title 1 of Part 4 of the Penal Code, the applicant may bring an action to recover from such person actual damages or two hundred dollars ($200), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section shall entitle the applicant to treble actual damages, or five hundred dollars ($500), whichever is greater, plus

costs, and reasonable attorney's fees. An intentional violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(c) The remedies under this section shall be in addition to and not in derogation of all other rights and remedies which an applicant may have under any other law.

(d) Persons seeking employment as peace officers or for positions in law enforcement agencies with access to criminal offender record information or for positions with the Division of Law Enforcement of the Department of Justice are not covered by this section.

(e) Nothing in this section shall prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment either of the following:

(1) With regard to an applicant for a position with regular access to patients, to disclose an arrest under any section specified in Section 290 of the Penal Code.

(2) With regard to an applicant for a position with access to drugs and medication, to disclose an arrest under any section specified in Section 11590 of the Health and Safety Code.

(f) (1) No peace officer or employee of a law enforcement agency with access to criminal offender record information maintained by a local law enforcement criminal justice agency shall knowingly disclose, with intent to affect a person's employment, any information contained therein pertaining to an arrest or detention or proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any pretrial or posttrial diversion program, to any person not authorized by law to receive such information.

(2) No other person authorized by law to receive criminal offender record information maintained by a local law enforcement criminal justice agency shall knowingly disclose any information received therefrom pertaining to an arrest or detention or proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any

pretrial or posttrial diversion program, to any person not authorized by law to receive such information.

(3) No person, except those specifically referred to in Section 1070 of the Evidence Code, who knowing he or she is not authorized by law to receive or possess criminal justice records information maintained by a local law enforcement criminal justice agency, pertaining to an arrest or other proceeding which did not result in a conviction, including information pertaining to a referral to and participation in any pretrial or posttrial diversion program, shall receive or possess such information.

(g) "A person authorized by law to receive such information", for purposes of this section, means any person or public agency authorized by a court, statute, or decisional law to receive information contained in criminal offender records maintained by a local law enforcement criminal justice agency, and includes, but is not limited to, those persons set forth in Section 11105 of the Penal Code, and any person employed by a law enforcement criminal justice agency who is required by such employment to receive, analyze, or process criminal offender record information.

(h) Nothing in this section shall require the Department of Justice to remove entries relating to an arrest or detention not resulting in conviction from summary criminal history records forwarded to an employer pursuant to law.

(i) As used in this section, "pretrial or posttrial diversion program" means any program under Chapter 2.5 (commencing with Section 1000) or Chapter 2.7 (commencing with Section 1001) of Title 6 of Part 2 of the Penal Code, Section 13201, 13201.5 or 13352.5 of the Vehicle Code, or any other program expressly authorized and described by statute as a diversion program.

SEC. 2. Chapter 2.7 (commencing with Section 1001) is added to Title 6 of Part 2 of the Penal Code, to read:

CHAPTER 2.7. DIVERSION

1001. (a) It is the intent of the Legislature to authorize counties and cities to establish, or continue existing, pretrial diversion programs ~~which~~ *for persons accused of committing misdemeanors which programs* comply with the requirements of this chapter. Neither Chapter 2.5 (commencing with Section 1000) of this title nor any other provision of law is intended to preempt other current or future pretrial diversion programs which comply with this chapter.

1001.1. The governing body of each county or city may, by resolution, designate and contract with one or more community based organizations to function as a diversion organization. The governing body may, in addition, or instead, designate, by resolution, the county adult probation department, or any other county, city or local agency as a diversion organization.

1001.2. Except as provided in this chapter, eligibility criteria *shall be established by the prosecuting attorney* and other requisite standards for diversion programs may be developed by the applicable county, city or its designated diversion organization, or both.

1001.3. At no time shall a defendant be required to make a formal or informal admission of guilt as a prerequisite for placement in a pretrial diversion program.

1001.4. A divertee is entitled to a hearing by a neutral body before his or her diversion can be terminated for cause. The hearing shall include all of the following: a written notice of the violation; disclosure of the evidence against the divertee; an opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; a written statement by the fact finder as to the evidence relied on and the reason for the termination.

1001.5. No statement, or information procured therefrom, made by the defendant in connection with

the determination of his or her eligibility for diversion, and no statement, or information procured therefrom, made by the defendant subsequent to the granting of diversion or while participating in such program, and no information contained in any report made with respect thereto, and no statement or other information concerning the defendant's participation in such program shall be admissible in any action or proceeding, including any subsequent sentencing proceeding. However, if a divertee is recommended for termination for cause, information regarding his or her participation in such program may be used for purposes of the termination proceedings.

1001.6. At such time that a defendant's case is diverted, any bail bond or undertaking, or deposit in lieu thereof, on file by or on behalf of the defendant shall be exonerated, and the court shall enter an order so directing.

1001.7. If the divertee has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion.

1001.8. Any record filed with the Department of Justice shall indicate the disposition of those cases diverted pursuant to this chapter. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for such offense. A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, be used in any way which could result in the denial of any employment, benefit, license, or certificate.

1001.9. Nothing in this chapter or any other provision of law shall be construed to preempt current or future city or county posttrial diversion programs.

1001.10. A county or city which operates a diversion program, pursuant to this chapter, shall report to the Legislature annually regarding the administration and operation of such program. Such report shall include but

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not be limited to the following: the program's general eligibility criteria for divertees; the offense charged against the divertee; the number of individuals referred to the program; the number of individuals accepted by the program; the reasons for not accepting individuals referred to the program; the specific program completed by each successful divertee; the number of successful and unsuccessful terminations; the reason for unsuccessful termination; and the funding sources for the diversion organization. At no time shall the names, addresses, or other identifying information of the referred or participating divertees be used in these reports.

1001.11. This chapter shall remain in effect until January 1, 1980, and on such date is repealed. However, if at the time this chapter is repealed a defendant has already been referred to and accepted by a diversion program or if a defendant is then participating in such a program, that defendant shall be allowed to continue in and complete such program.

1001.12. This chapter shall not apply to any pretrial diversion programs for the treatment of problem drinking or alcoholism utilized for persons convicted of one or more offenses under Section 23103 of the Vehicle Code.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The status of existing local pretrial diversion programs has been placed in doubt by an Attorney General opinion stating that these programs have no statutory basis for existence and that the Legislature has preempted the subject. Consequently, some programs have had their funding held up and for others the district attorney's office is hesitant to cooperate with proposed or current programs.

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"PROTECTING CONFIDENTIAL COMMUNICATIONS OF SUBSTANCE ABUSERS IN PRETRIAL PROGRAMS: THE BROAD MANDATE OF FEDERAL LAW"

By John P. Bellassai, Esq.

This paper was prepared for the participants of the 1977 National Conference on Pretrial Release and Diversion.

FOREWORD

At the Second Annual NAPSA Conference, held in San Fransisco in June, 1974, the writer participated in a panel discussion on legal issues in pretrial diversion. During the course of that discussion, he addressed the issue of confidentiality of the records of defendants in diversion programs. He pointed out that there were few statutorily-created privileges in this area for programs to rely upon; however, there were on the books broad federal regulations mandating privacy of records for clients of drug treatment programs, and that this necessarily extended to drug diversion programs. It was stressed that the federal regulations in question, moreover, were drafted so broadly that they clearly applied as well to all federally-funded pretrial release and federally-funded non-drug diversion programs which interview or enroll defendants who incidentally are drug-dependents, provided that the fact of the defendant's drug abuse is made known to or discovered by program personnel during the course of the routine bail interview or during the course of regular diversion processing.

In the three years since that panel discussion--which, incidentally, sparked much discussion and many questions from pretrial program personnel previously unaware of the law in this area--federal regulations governing confidentiality of records of drug abusers have been considerably expanded and re-issued. They now apply equally to the records of alcohol abusers and govern the practices of all programs--state and local, as well as federal --which perform any drug or alcohol abuse "prevention function", whether or not the program or agency itself is receiving federal funds.

More than ever it is essential that all pretrial service agencies and programs, as well as other service organizations which come into contact with drug-dependent persons, understand what federal law requires of them in

this area. In addition, it is important for programs servicing the pretrial accused to fully appreciate the value of the confidentiality "shield" which federal law provides them against obtrusive demands by local judges and prosecutors for internal program records or communications concerning those of their clients who happen to display a drug or alcohol abuse problem. Perhaps most importantly, the existence of these federal regulations makes it incumbent upon pretrial services programs to think through and implement policies on the release of program information about substance abusers which, on the one hand, is legitimately needed by CJS officials making release and diversion decisions and which, on the other hand, is closely circumscribed by federal law. It is in the hope that what follows may be of use to program personnel charged with decision-making in this area that this paper has been prepared.

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April, 1977

PROTECTING THE CONFIDENTIAL COMMUNICATIONS OF SUBSTANCE ABUSERS IN PRETRIAL PROGRAMS: THE BROAD MANDATE OF FEDERAL LAW

John P. Bellassai *

Any community-based social service program which works with clients referred thru the criminal justice system (CJS) must constantly cope with the dynamic tension which exists between, first, the need to provide CJS officials--judges, prosecutors, defense attorneys--with basic information about a defendant's progress in the program and, second, the need to insure that the defendant will at the same time trust and confide in his counselor and other program personnel sufficiently for the rehabilitative process to function. This delicate balance is perhaps hardest to achieve where the defender in question is a drug abuser or alcohol abuser. Not only is the treatment process for such persons often more complex and extended, with successes fewer in number and harder to achieve, but such persons tend to be viewed by the CJS as uniformly higher risks--in terms of recidivism, relapse and failure to return for trial--for release back into the community.

While the nature of their substance abuse problems makes it most important for the rehabilitation program to guard against the unauthorized release of sensitive personal information about substance abusers to the "straight" community, which invariably stigmatizes them upon learning of their status, still it is in these very cases that CJS officials, public and private employers and others are most insistent about receiving detailed reports on treatment progress. This paper will not presume to offer solutions for this ongoing tension--indeed, there exists no satisfactory way to wholly reconcile the competing interests--but rather will stress the need for pretrial programs and the CJS officials with whom they interface to find workable compromise approaches which can be lived with at the local level but which also meet the rigorous demands of new federal law in this area.

Keeping in mind this purpose, it is not the intention of the writer to foster the view, held by some, that federal law governing the confidentiality of records of drug and alcohol abusers is merely another bureaucratic obstacle to surmount before programs can get on with the business of servicing the client. Rather, the law when properly understood should be viewed as a welcome framework within which programs can better work to protect their own integrity and the privacy of their clients while at the same time striving to satisfy the CJS's legitimate need to know.

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In 1972, Congress enacted Public Law 92-255, The Drug Abuse Office and Treatment Act, whose declared purpose was

> to focus the comprehensive resources of the Federal Government and bring them to bear on drug abuse . . . and develop a comprehensive, coordinated long-term Federal stategy to combat drug abuse. 1/

While observers may disagree about the extent to which the Act has fallen short of achieving its stated goal, one provision will have enduring national impact: Included in the Act as Section 408 is a broad statutory guarantee of privacy for drug abuse patient records, which provides in pertinent part that

> records of the identity, diagnosis, prognosis or treatment of any patient maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under . . . this section. 2/

The 1972 Act created the Special Action Office on Drug Abuse Prevention (SAODAP), in the Executive Office of the President, in order to coordinate federal treatment strategies and research efforts in the drug abuse field. Before its statutorily-mandated expiration in 1975 and the transfer of its authority and functions to the National Institute of Drug Abuse (NIDA) in the Department of HEW, SAODAP issued, pursuant to its rule-making power, three successive sets of extremely detailed federal regulations, each set more encompassing that its predecessor, to interpret Section 408 of the Act. This paper will demonstrate the applicability of these provisions (hereinafter referred to as "the Regulations") of federal law--not only to drug treatment programs per se, but, much less obviously, to all agencies or groups, public or private sector, which themselves provide rehabilitative services to substance abusers or which interview or refer such persons for treatment elsewhere. This pretty plainly includes all pretrial release and pretrial diversion programs which, however incidentally, identify substance dependency problems during the course of otherwise routine interviewing or counseling, as well as to other community-based social service groups which counsel or treat for drug or alcohol abuse problems. In addition, probation departments, prosecutor and defender offices, and criminal courts which during the course of regular case processing identify a substance abuse problem displayed by a criminal defendant and recommend or take some action in response are bound by federal confidentiality law regarding drug and alcohol abuser records.

Not only is the law in this area quite specific on what information developed by the program or agency processing the substance abuser may be divulged and to what outside parties; the conditions and requirements for a valid consent by the substance abuser to the release of such information are also specified, as are the procedures to be followed when divulgence is sought, whether by virtue of a subpoena or otherwise, in the absence of such a release. Stringent penalties--a $500 fine for the first offense and $5,000 fines for each subsequent offense--are provided for violation

of the Regulations, which have force and effect equal to an act of Congress or other statute.

General Rules Governing Release of Information

The most recent amended Regulations, issued jointly by SAODAP and HEW and published in the Federal Register for July 1, 1975, constitute the cutting edge of the law on this area and will be the edition of the Regulations hereinafter referred to in this paper. Tho the Regulations are extensive and many of the provisions are of limited relevance for our purposes, Section 2.13, General Rules Regarding Confidentiality, is of fundamental importance.

Subsections (a) and (b) of § 2.13 are exceptionally rigorous and provide

> (a) In general. Records to which this part applies shall be confidential and may be disclosed only as authorized by this part, and may not be divulged in any civil, criminal, administrative or legislative proceeding conducted by any Federal, State, or local authority, whether such proceeding is commenced before or after the effective date of this part.
>
> (b) Unconditional compliance required. The prohibition upon unauthorized disclosure applies irrespective of whether the person seeking disclosure already has the information sought, has other means of obtaining it, enjoys official status, has obtained a subpoena, or asserts any other justification or basis for disclosure not expressly authorized under this part.

Perhaps the most important thing to realize about § 2.13 is that it does not tell programs to be careful in exercising their discretion as to what information should be released and to whom. Rather, it makes it absolutely clear that no information can be released to anyone unless the party seeking the information is expressly permitted by the Regulations to request its release. This effectively shifts the burden away from the program to justify why information should not be released as requested and, instead, onto the requesting party, which must justify its request by reconciling it with some specific allowance under the Regulations. As will be made clearer below, not even the program participant--the substance abuser himself--can authorize unrestricted disclosure by the program to a party not otherwise allowed under these Regulations to seek information about him. This works to take the sometimes subtle, sometimes blatant pressure off the client to press his treatment program to release information which he would personally prefer to keep confidential but which he fears will prejudice his interests with the seeking party if the information is not released as they wish.

Provided the requesting party is one which under the terms of the regulations is authorized to request information, in all but a few situations the substance abuser in question must first specifically consent in writing to the release of the information sought before it can be divulged. Section 2.31, Written Consent Required, makes this point directly and then

goes on in subsection (b) to specify the necessary elements which must be contained in the body of any consent document in order for the release to be operative.

Subsection (c) of this Section then prohibits disclosure by the program if a consent form is deficient on its face, and subsection (d) prohibits persons from knowingly submitting a deficient consent form to a program when seeking release of information. This Section, then, like § 2.13 already discussed, works as a safeguard for both the program and is client: The elements for a knowing and voluntary release of information are specified and compliance by all parties with the requirements for drafting a valid consent form should work to relieve the program of any uneasiness about the bona fides of a particular request for information.

Of equal importance, for our purposes, with §§ 2.13 and 2.31 is § 2.39, Criminal Justice Referrals-Rules, which speaks directly to the release of information in the context of pretrial release or diversion. Subsection (a) of that Section states in pertinent part that

> where participation . . . in a treatment program is made a condition of such individual's release from confinement, the disposition or status of any criminal proceedings against him, or the execution or suspension of any sentence imposed upon him, such individual may consent to unrestricted communication between any program in which he is enrolled and . . . the court granting . . . pretrial conditional release . . ..

Tho at first glance extremely broad, § 2.39 (a) must be read in conjunction with § 2.18, which provides that " any disclosure . . . shall be limited to information necessary in the light of the need or purpose for the disclosure." Thus, § 2.39 (a) is not a license for pretrial programs to throw open a client's entire casefile to the court or prosecutor nor are such officials by this Section given a go-ahead to demand wide open disclosures from programs. Instead, CJS officials are required by § 2.18 to be responsible and discriminating in deciding how much and what kind of data they require in order to make intelligent release and diversion decisions. In this regard, § 2.39 (d) hits upon an important point when it reminds programs accepting criminal justice referrals that

> There is. . . nothing in these regulations which precludes treatment programs from entering into agreements or arrangements with agencies or institutions of the criminal justice system to regulate or restrict the subject matter or form of communications of information about patients. For example, such an arrangement might provide for free oral communications between counsellors and probation officers, while restricting formal written reports by the program to specified types of so-called hard data such as attendance and urinalysis results.

On the necessity of first obtaining written consent from criminal justice referrals as from other substance abusers, subsection (f) of § 2.39-1 emphasizes that "§ 2.39 in no way reduces the necessity to obtain written consent from patients, whether or not referred by the criminal justice system, before disclosures for the purposes here involved can be made by programs."

Very often the drug diversion process or the release of substance abusers to community treatment programs as a condition of pretrial release will extend for many months. An initial consent for the release of confidential information, signed by the defendant at the time he enters such a program, will if properly drafted be able to remain in effect for the duration of the defendant's term of pretrial release or diversion. (For a suggested model release form, see Appendix A.) In this regard, § 2.31 (b) specifies that "any consent given . . . shall have a duration no longer than that reasonably necessary to effectuate the purpose for which it is given." Section 2.39 gets more specific with regard to criminal justice referrals when it provides in subsection (b) that

> Where consent is given for disclosures described in paragraph (a) of this section, such consent shall expire sixty days after it is given or when there is a substantial change in such person's status, whichever is later. For the purposes of this section, a substantial change occurs in the status of a person who, at the time such consent is given, has been-
>
> (1) Arrested, when such person is formally charged or unconditionally released from arrest;
>
> (2) Formally charged, when the charges have been dismissed with prejudice or the trial of such person has been commenced.

The first of these eventualities described in § 2.39 (b) obviously covers the release of information which was given to a bail or ROR interviewer, while the second applies to the ongoing conditional release and pretrial diversion situations. Of considerable import to release and diversion programs as well as to third party custodians and other groups who accept criminal justice referrals is subsection (c) of § 2.39, which requires that

> an individual whose release from confinement . . . is conditioned upon his participation in a treatment program may not revoke a consent which has already given by him in accordance with paragraph (a) of this section until there has been a formal and effective termination or revocation of such release. . ..

Thus, substance abusing defendants who sign release of information forms at entry into diversion programs or programs to which referred as conditions of pretrial release may not revoke such consents once they have entered into such programs, because the program and the CJS has extended them benefits in reliance upon receipt of information in return.

What Constitutes "Confidential Records" Within The Meaning of The Law?

It is important to note at this juncture that records confidentiality for substance abusers does not, as might at first be expected, apply only to counseling notes or other written reports or documents generated by a program. Subsection (c) of § 2.13, General Rules Regarding Confidentiality, states

> The prohibition on unauthorized disclosure covers all information about patients, including their attendance or absence, physical whereabouts or status as patients, whether or not recorded, in the possession of program personnel . . ..

The definition of "Records" as contained in § 2.11 (o) of the Regulations clarifies matters further when it states that Records is defined to mean " . . . any information, whether recorded or not, . . . received or acquired in connection with the performance of any drug abuse or alcohol abuse prevention function." (Emphasis added.) This effectively extends the purview of the Regulations to any and all communications between the client and program personnel, whether or not written down.

Reading these two provisions together, it is apparent that not only statements by defendants to bail or diversion interviewers which are written up and forwarded to the judge or prosecutor are covered, but also covered are oral representations to judges or prosecutors by the bail or diversion interviewers themselves re remarks made to them by the defendant during the interview but not recorded and/or nonverbal communications such as impressions gained from demeanor, physical appearance, etc. And, of course, any statements, conversations or impressions which occur after the defendant is actually released or accepted for diversion and reports to a program are covered, whether or not written up in counselor's notes or progress reports back to the CJS, etc. In short, everything communicated verbally and nonverbally by the substance abuser which bears on his status or condition as a substance abuser is covered by the disclosure prohibitions of the Regulations.

What Constitutes A Disclosure Under The Law?

On the basis of the foregoing it should be apparent that any oral or written communication by program personnel to an outside party which serves to identify a given individual as a substance abuser is a disclosure within the meaning of the law. With regard to drug diversion programs or community-based drug treatment programs which accept criminal justice referrals as a condition of pretrial release, the mere identification by name of a given defendant by implication states he is a substance abuser. For non-drug diversion programs and other service organizations not dealing solely with substance abusers, further specifics about the nature of the client's needs or problems or details about his course of treatment would have to be divulged before a disclosure of confidential information within the meaning of the Regulations occurs.

Regardless, any bail or ROR interview which asks questions concerning present drug or alcohol use or any diversion eligibility screening interview or periodic reports about a divertee's progress, once diverted, necessarily come within the meaning of a "disclosure" so long as the defendant in question happens to display a substance abuse problem and this fact is made known to or discovered by the program. Affirmative disclosures of this sort, however, are not the only kind of communications by programs which are prohibited by the Regulations, in the absence of a written release from the client. Section 2.13 (e) states that

> the disclosure that a person (whether actual or fictitious) answering to a particular name, description, or other identification is not or has nor been attending a program, whether over a period of time or on particular occasions, is fully as much subject to the prohibitions and conditions of this part as is a disclosure that such a person is or has been attending such a program. Any improper or unauthorized request for any disclosure of records or information subject to this part must be met with a noncommittal response.

The only exception to the above requirement is for residential or inpatient facilities, and even in these situations, the limit on what may be divulged to callers is simply whether a person by such a name is in residence on the premises. No indications may be made that the resident displays a drug or alcohol abuse problem or is being treated for such. (See § 2.13 (f) in this regard.)

Parties Who May Request Disclosure of Confidential Information

As noted earlier, the Regulations specify which outside parties may make requests for confidential drug or alcohol abuser information. In each instance, the request must be preceded by a written, signed release from the substance abuser, according to the format specified in § 2.31 (a). Parties who are not permitted by specific mention in the Regulations are left without a legal basis on which to request information, and programs apparently may not honor their requests, regardless if such are accompanied by properly executed release forms.

Parties who may seek confidential information, to the extent they have a legitimate need to know such, are legal counsel (§ 2.35), the client's family and others "with whom the patient has a personal relationship" (§ 2.36), employers and employment agencies (two in specially circumscribed ways) (§ 2.38), and third party payers for the services or treatment the client is receiving (i.e. medical insurance company, etc.) (§ 2.37). Section 2.39, as described earlier, also extends the privilege to criminal justice officials--judges, prosecutors, probation or parole officers--depending upon the stage of the criminal justice process at which the substance abuser's case is pending. In all these instances, a valid release from the client must have first been executed.

There are, in addition, two broad areas where parties seeking confidential information do not need to seek a written release from the substance

abuser and where programs are permitted--in some circumstances, required--to furnish the information absent a release. These are bona fide medical emergencies, covered by § 2.51 of the Regulations, and instances of research, audit or evaluation which have otherwise been properly ordered or authorized. Section 2.52 covers the latter. With regard to researchers, auditors and evaluators, the Regulations prescribed strict security measures which must be taken to insure that "patient identifiers", i.e. names, social security numbers, etc. are deleted from any statistical or other tabulations or reports.

Lastly, in a category completely separate, fall what are termed under the Regulations "Qualified Service Organizations." Section 2.11 (n) defines this term as

> a service organization which has entered into a written agreement with a program pursuant to which the service organization -
> (1) acknowledges that it is receiving . . . or otherwise dealing with . . . information from the program about patients in the program . . .; and
> (2) undertakes to institute appropriate procedures for safeguarding such information, with particular reference to patient identifying information; and
> (3) undertakes to resist in judicial proceedings any efforts to obtain access to information pertaining to patients otherwise than as expressly provided for in this part.

For an understanding of the sorts of organizations which may be viewed as Qualified Service Organizations, reference must be made to the added definition of "Service Organization", which § 2.11 (m) defines as "a person which provides services to a program such as data processing, dosage preparation (of methadone), laboratory analyses (i.e. urinalyses), or legal, medical, accounting or other professional services." Thus a Qualified Service Organization is such an auxiliary technical person or group which has entered into a written agreement guaranteeing to protect confidential substance abuser information, as required by § 2.11 (n). Qualified Service Organizations are not required to obtain prior written releases from program clients before receiving confidential information needed by them to carry out their program support functions.

Restrictions on Re-Disclosure of Confidential Information by Recipients

Of very fundamental importance to the effectiveness of these Regulations is the prohibition on re-disclosure of confidential information which has already once been properly divulged--by the program to the original requesting party. A literal reading of the Regulations on this point would seem to prohibit, for example, the Assistant District Attorney who screens or interviews defendants for diversion, or who receives periodic reports on divertee progress from the diversion program, from divulging any of the details of what he has learned about a given substance abuser to fellow prosecutors not involved in the special assignment (i.e. liaison to the diversion program). At very least, it is clear than the Assistant DA performing such functions and legitimately receiving such confidential information from a program is prohibited from turning to his colleague,

who is investigating the same substance abuser or preparing to prosecute him on another case, and divulging anything which the program has released to him.

Likewise, a judge who receives a bail report on a substance abuser while sitting as a releasing magistrate is prohibited from disclosing such information to another judge who later tries the same defendant on that or another case, or to another judge who imposes sentence on the defendant. Sections 2.32 and 2.39 of the Regulations make the point that criminal justice officials and other individuals who have been legitimate recipients of confidential information about a substance abuser from the treatment program may not short circuit the legally-prescribed procedure for disclosure, which is for each and every party seeking information to request such directly from the treatment program, having first secured the written and signed consent to release from the substance abuser himself.

While § 2.32 is the primary provision on this point, § 2.39 (d) goes beyond it to note a special caveat for CJS recipients of confidential information. It provides in part that " . . . such recipients may not make such information available for general investigative purposes, or otherwise use it in unrelated proceedings, or make it available for unrelated purposes."

Scope and Applicability Revisited: Who Is Protected and Who Must Comply?

As noted earlier, any person or program which interviews, refers for treatment, or provides treatment to substance abusers is governed by the provisions of these Regulations. Key definitions in the Regulations which mandate this broad applicability are to be found in § 2.11, subsections (e), Diagnosis and Treatment; (f) Program; (i) Patient; and (k) Alcohol Abuse or Drug Abuse Prevention Function. As subsection (k) states, " . . . the term 'alcohol abuse or drug abuse prevention function' means any program or activity relating to alcohol abuse or drug abuse. . . treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of law enforcement or is unrelated to alcohol or drugs."

Section 2.12 (a) - (d), moreover, leaves no room for doubt that virtually every program or individual at the state and local level, whether in the public sector or in the private sector as profit-making or non-profit entity, is bound by these regulations so long as any drug or alcohol abuse "prevention function" is being carried out. Handles used to gain jurisdiction under § 2.12 are many and varied, including programs which are now or in the past have been recipients of federal grants or contracts or which have benefitted directly or indirectly from federal revenue sharing funds (or whose states and locales within which located have received revenue sharing funds, even if the specific program has not),or who enjoys tax exempt status or has been allowed by IRS to claim contributions as tax deductions.

Court Orders to Compel Disclosure

The Regulations conclude, in Subpart E, by strictly prescribing the situations in which court orders to compel release of records in the absence of a consent from the client will lie. This area of the Regulations is as involved and extensive as the entire rest of the provisions put together, and will not be dealt with in great detail here. Salient points will be made for the benefit of program administrators and other interested parties, who are referred to the body of the Regulations, as well as to knowledgeable legal counsel, for answer to specific concerns.

Suffice to say that § 2.64 requires that a substance abuser about whom a subpoena seeking release of information has been issued has a right to notice of that fact and the right to be heard before the order is granted. Further, programs whose records are being subpoened have a right to be heard, represented by counsel independent of counsel for the party seeking release, before any court order requiring release may issue. In addition, programs are not permitted to comply with mere subpoenas for release of information without first testing such subpoenas in court and having a judicial order issue, after an in-court hearing on the appropriateness and necessity for the release.

Section 2.64 specifies a balancing test which federal judges must apply when deciding whether to order release of confidential information. In addition, § 2.65 lays down criteria to be applied in the case where a substance abuser is being prosecuted directly and that is the situation giving rise to the subpoena for confidential information. The court may not out of hand grant orders compelling release simply because a crime has been alleged to have been commited by the substance abuser and information relevant to his prosecution can only be obtained from the program. A much higher standard of proof, taking into consideration seriousness of the crime, etc. must be applied by the court when deciding whether to issue the order sought by the prosecution. Lastly in this area, § 2.65 (d) bars any order from issuing which directs that records or other information be furnished to a grand jury or prosecutor's office for general investigative purposes. Only specific elements of information may be ordered divulged, and the entirety of treatment records may not be compelled to be handed over.

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FOOTNOTES

1/ Codified as Title 21 United States Code, Section 1175.

2/ Codified as Title 42, Code of Federal Regulations, Part 2.

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

EFRAIN RODRIGUEZ

APPELLANT'S BRIEF FILED WITH THE

STATE OF NEW YORK, COURT OF APPEALS

AND

COURT OF APPEALS MEMORANDUM

STATE OF NEW YORK : COURT OF APPEALS

- -x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

EFRAIN RODRIQUEZ,

Appellant.

- -x

APPELLANT's BRIEF

STATEMENT OF FACTS

The first witness for the prosecution was Sgt. William Allee, who testified as follows: S.M.P. 29*

That he was a police officer for a period of eleven (11) years and had been assigned to the Narcotics Division for a period of one year. (S.M.P. 30) That on September 6, 1973 he was supervising a "buy" operation (S.M.P. 33). That on that day he went with an undercover police officer, Police Officer Lopez, and Police Officer Frommer to the vicinity of DeWitt and Van Sinderen Streets in the County of Kings. (S.M.P. 34) That at that time they met a confidential informant (S.M.P. 35). That they then went to a second location in the vicinity of Riverdale Avenue and Snediker Avenue in the County of Kings (36). That

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*S.M.P. refers to page number of Stenographers Minutes of Trial

at that place they met an individual named Carmello (37). The undercover officer, the confidential informant and Carmello all got into the undercover officer's car and drove to Junius Street (37). That at that time the undercover officer and Carmello went into a building at 480 Junius Street (38-39). A period of 10 to 20 minutes elasped and the undercover officer came out of the building and drove away (39). The witness then met with the undercover officer at DeWitt and Van Sinderin by pre-arrangement (39). That at that time the undercover officer showed the witness a clear plastic bag with a white powder inside and advised the Sergeant that he had paid for it (40). The package was brought by the undercover officer to the police office, where it was tested and put in a property clerk's envelope and sealed (41).

That the witness did not see the appellant, Efrain Rodriquez on September 6, 1973 (41). That the confidential informant did not make any introduction of any of the police officers to the appellant (42).

Cross-examination of Sgt. Allee was as follows (42):

That the Sergeant saw the defendant for the first time in Court on the day that he gave the testimony (42). The first time that the Sergeant was with Carmello was on September 6, 1973 (42). That he thereafter saw Carmello on the day that he arrested him (43).

The next witness for the People was Patrolman Michael Lopez who testified as follows: (45)

That he was a police officer for a period of five years and assigned to the Narcotics Division for a year and a half (46). That he was known as what is commonly called a "backup" for undercover officers (46). That on September 6, 1973 at about 4:45 p.m. he met Ptl. Frommer and Sgt. Allee (47-48). That thereafter he met with the undercover officer and the informant (50). That they proceeded to Snediker and Riverdale to backup the undercover agent (50). That the undercover agent met with Carmello. That Carmello and the undercover agent met with the confidential informant. That they then went to 480 Junius Street (53). That the undercover agent left the building some twenty minutes later and again met with the witness (54). That the undercover agent showed the witness a plastic package and advised him that he paid money for it (56). That the witness never saw the appellant (57).

The next witness for the People was William J. Ringle, who testified as follows: (61)

That he is a chemist (62). That he examined the evidence in this case and performed the standard chemical tests and found the powder contained excess of 3/8 of an ounce of cocaine (61-74).

The next witness for the prosecution was Police Officer Paul Frommer who testified as follows: (80)

That he was a police officer for approximately eight (8) years and assigned to the Narcotics Division for two years (81).

The witness then essentially testified as to observing the same meeting among the undercover agent, the confidential informant and Carmello on September 6, 1973 (80-89).

That the first time that the witness met the appellant was on the date of arrest on September 19, 1973 at the 5th Precinct in Manhattan (90). That he had been informed that the appellant had a tattoo of a large black panther on his right arm (92).

The next witness for the People was Detective Nicholas Molfetta who testified as follows: (104)

That he was the undercover officer in the within case and was a member of the Police Department for four (4) years and assigned to the Narcotics Division for two and a half years (104-105). That he made over 200 purchases of drugs, of which half were of cocaine (105).

That on September 6, 1973, he met with his back-up officers and Carmello (108). That Carmello took the officer to Carmello's brother's house at 480 Junius Street (108). That the time was approximately 6:20 p.m. (111). That Carmello knocked at the door, said something in Spanish and was admitted to the apartment by an individual known as Frank (111). That Frank was the appellant in this case (112).

The officer then testified that in the living room of the apartment Frank said "What do you want?" (113).

That at this time defense counsel objected to any statement allegedly made by the appellant on the grounds that the Bill of Particulars showed that no statements were made. The Court reserved decision on defense counsel's motion.

The prosecution then continued to examine the witness who stated that he said to the appellant, "What are you doing?" The appellant then said, "I got some cocaine". The officer then stated "How much do you have ?" The appellant then left the room and came back with a plastic bag with approximately two ounces of cocaine (116).

The officer then continued to relate the conversation between himself and the appellant which related that he and the appellant agreed on a price of $350 for a half ounce of cocaine (117). The officer then gave him $350 (118).

The officer then left the appellant's apartment with Carmello, who stayed in the building, going to his brother's apartment (118).

The officer then sealed and vouchered the drug (118).

Further direct examination of the officer with reference to the transaction in the apartment showed that the appellant had his pants and shoes on but was not wearing a shirt (119). The officer stated that the appellant had a tattoo on his right upper arm of a black panther (121). At

this time the District Attorney requested that the Court direct the appellant to roll up the sleeve of his shirt and present his arm, bared, before the Jury (121-122). This was objected to by defense counsel. The Court directed the appellant, he complied and the description of the panther was read into the record (123).

That the next time the witness saw the appellant was after he was placed under arrest on September 19, 1973 (125).

That on September 6, 1973, the officer was with a confidential informant. That the confidential informant did not introduce the officer to the appellant. That Carmello was not an "informant" (127). That Carmello was approximately 16 or 17 years old (128).

That in the apartment the appellant and Carmello were smoking marijuana (128).

That at this stage of the proceedings, the Court offered to grant the appellant a mistrial on the grounds that the Bill of Particulars had stated that no statements were made by the appellant (131). That oral argument then took place. Defense counsel declined the Court's offer; but moved to strike Det. Molfetta's testimony (133). That defense counsel argued that the question is directed to the fact that Carmello was a witness to the alleged transaction (134).

After the oral argument, the Court stated as follows:

"THE COURT" All right. On the motion of the Court in the interest of justice I declare a mistrial on this case". (137-138)

The Court then retracted the granting of a mistrial and granted a continuance (140).

On the continuance of the trial, oral argument was then made to the presiding justice (144-159).

The Court then denied the mistrial (159-162).

Cross-examination of Det. Molfetta was as follows: (165)

That the Detective did not know where Carmello was at the present time (178). That the last time he saw him was when he was arrested on September 6, 1973 (178). This statement was then corrected by the officer to show that Carmello was arrested on December 6, 1973 (180). That the officer has not seen Carmello since that time (181). The people then rested (182).

The appellant then took the stand in his own behalf and testified as follows: (184). That he had been in the United States for twelve (12) years (185). That he understood English, but did not speak it well (185).

That he worked for the Coca Cola Company for a period of five years; was married and had three children (186).

That he met Police Officer Molfetta in his home. That the Police Officer came to his home with Carmello (187).

The witness denied ever selling any narcotics to the officer (187).

Cross-examination of the appellant was as follows (187): The District Attorney then cross-examined the witness about a conversation the appellant had with a man from the probation department about bail (sic) (188).

Cross-examination continued with reference to many of the answers given by the witness at the time of his arrest. It is respectfully submitted that this type of cross-examination is error, the information being of a confidential nature.

The witness stated that he knew Carmello for a year and a half. That Carmello came and knocked at the door and said he was with a friend (190). The witness then again denied possessing or selling any drugs (190-191).

The defense then gave its summation (202-206).

The prosecution then gave its summation (206). In its summation, the prosection again referred to the information allegedly given to the "probation man" (sic) at the time of his arrest (210-211). The prosecution concluded its summation(213).

The Court then charged the Jury (216). Defense counsel excepted to various portions of the charge (230).

The appellant was then convicted by the verdict of the Jury (234-236).

POINT I

THE FAILURE TO REVEAL THE WHEREABOUTS OF THE WITNESS, CARMELLO OR TO ADVISE THE DEFENSE THAT CARMELLO WAS A WITNESS TO THE ALLEGED SALE WAS REVERSIBLE ERROR.

The case at bar is a classic example of the undercover sale. That is, the undercover officer, Patrolman Molfetta, testified to making one buy of cocaine in the defendant's apartment on September 6, 1973. Portions of his testimony are corrorborated by Sergeant Allee and Patrolman Lopez.

The appellant then took the stand in his own behalf and admitted being present in his apartment on September 6, 1973. He further stated that the undercover officer was present with an individual named Carmello, but, categorically denied selling any narcotics to the officer (187).

The appellant has no prior criminal record.

The crucial issue now present in the case at bar, clearly is the testimony of Carmello. Defense counsel recognized that the issue of Carmello's testimony was crucial to his case. The officer testified as to an entire conversation concerning the price of the cocaine, the amount of the drug and to various negotiations with reference to the entire sale including the actual transaction (116-117). All of these conversations took place in the resence of Carmello (118, 127).

Defense counsel, upon his motion to strike the testimony of the undercover officer, clearly raises the issue of prejudice on the question of the non-revelation of the

identity of Carmello. The colloguy with the Court was as follows:

> "THE COURT: How does that prejudice your defendant's case?
> Mr. ZWEIBON: We don't have the witness to that conversation to what went on in that apartment, Carmello is no longer available. Had they given any timely warning as to what they were going to produce under the Bill--under the order, then we would have been able to seek out another witness.
> THE COURT: Is it a matter of time that you want?
> Mr. ZWEIBON: Not a matter of time. We no longer know --
> THE COURT: Is it preparation or time?
> Mr. ZWEIBON: We no longer know where this witness is. We don't know how much time we would need to find him. Had the district attorney acted timely and promptly we would have had time. We came here. We asked a specific question. Based on this, the affirmance of the district attorney's office, we are ready. If not we would have asked for an adjournment. We have now jeopardy attached to this defendant. And we ask--
> THE COURT: You will have an opportunity at this point for an adjournment, reasonable adjournment for preparation of your case in reference to the testimony made by the undercover agent. And I will grant you an adjournment for further preparation in exploring the testimony that's been adduced here at the trial.
> Mr. ZWEIBON: Your Honor, I know of two cases in which an adjournment was granted to when a jury was empaneled.
>
> One was the Ellsberg case in California. And the other was Hurock Bom case, Southern District at New York. The situations obtain in both cases and was frowned upon by the solicitor general of the United States, the business of adjourning while we have an empaneled jury. Will the Court sequester the jury: What assurance does the defendant have that this jury will be maintained? We don't know where this Carmello went. He could be in Puerto Rico, Mexico. We are prejudiced by this and by the conduct of this case by the prosecution. And we ask that the testimony of the undercover officer with with regard to all conversations with the defendant be striken." (134-135)

The prosecution attempted to convince the Court that the motion of counsel was directed merely at the procedural issue of the failure to set forth whether any"statements" made the appellant during the transaction with the undercover agent should have been a part of the Bill of Particulars (136-137).

It is interesting to note that during the course of this oral agrument, the prosecutor inadvertently let the cat out of the bag. For on page 138 of the Minutes, the prosecutor, for the first time reveals that the individual known as Carmello to the defense, is, in fact, one Carmello Pagan. That he was known to the prosecution since the inception of the case.

Furthermore, the undercover officer, Patrolman Molfetta testified that not only did he know the witness,(to the sale) Carmello, he was present and identified him at the time that Carmello Pagan was arrested by a brother police officer of the City of New York on September 19, 1973 (178).

The prosecution further tries to confuse the issue by showing that the undercover officer was with a confidential informant who introduced the officer to Carmello (127) and that the confidential informant never participated in any transaction with the police. Clearly, this argument is specious. For, in the case at bar, it is Carmello who is the confidential informant and it is Carmello who is under direct control of the

prosecution.

The Court of Appeals has stated the law with reference to disclosure of confidential informants in the leading case of People v. Goggins, 34 N.Y.2d 163. In the Goggins case, supra, the Court of Appeals held as follows:

> "Undoubtedly the strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime. (Roviaro v. United States, supra). But disclosure of the informant's identity may also be appropriate when, by introducing the parties to each other or performing some other preliminary function he may be considered to have been "an active participant in setting the state". (Gilmore v. United States, 256 F.2d 565, 567; see, also United States V. Roberts, 388 F.2d 646, 647, 649; Price v. Superior Ct., 1 Cal. 3d 837)". id at page 169-170.

Again, in the case at bar, the evidence is clear that it is Carmello who is the confidential informant and not the individual labeled "confidential informant" who introduced Carmello to the undercover officer. It is Carmello who was the witness to the alleged transaction. The deliberate concealing of the existence of the witness Carmello was a violation of the defendant's constitutional rights. In the posture of the case at bar, it is respectfully submitted that said suppression of the name, conversation and availability of Carmello is reversible error.

As the Appellate Division has held in the case of People v. Pena, 45 A.D. 2d 1038:

> "In view of the undisputed fact, as testified to by the police officer, that he was introduced to the defendant by the informer, the words of Judge Wachtler in People v. Goggins (34 NY 2d 163, affg. 42 A.D.2d 227) apply. He there said (pp. 169-170): "On this point the nature of the informant's role is of some significance. Undoubledly the strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime. (Roviaro v. United States, supra.) But disclosure of the informant's identity may also be appropriate when, by introducing the parties to each other or performing some other preliminary function he may be considered to have been 'an active participant in setting the stage'." id at page 1039.

In the Pena case, supra, the defendant did not even take the stand; but, offered an aunt as an alibi witness. Clearly in the case at bar, the appellant, who did take the stand, has a clearer right to the revelation and production of Carmello.

POINT II

THE GRANTING OF THE MISTRIAL BY THE TRIAL COURT ON ITS OWN MOTION EFFECTIVELY TERMINATED THE PROSECUTION. THE COURT IN REVERSING ITSELF ON THAT ISSUE COMMITTED ERROR.

After oral argument by both counsel with reference to the failure of the Bill of Particulars to set forth the statement made by the appellant, the Court made the following statement:

> "THE COURT: All right. On the motion of the Court in the interest of justice I declare a mistrial on this case." (137-138)

After further oral argument, the Court then retracted

the granting of a mistrial (140).

Defense counsel did not request a mistrial. In fact, he clearly stated that his motion was to strike the testimony of Patrolman Molfetta on the grounds that the Poeple suppressed the evidence with relation to the witness Carmello and failed to comply with the order granting the Bill of Particulars in the instant case (139).

In the Matter of Kim v. Criminal Court, 77 Misc 2d 740, Mr. Justice Sarafite, held that the granting of a mistrial ended the prosecution, and this result is equivalent to discharge which is as if there had been an acquittal or conviction. That the granting of the mistrial by the Court on its own motion is not subject to revocation. (id at page 742-743).

POINT III

THE CROSS-EXAMINATION BY THE PROSECUTOR ON THE R O R STATEMENT OF THE APPELLANT WAS ERROR AND IN THE POSTURE OF THE INSTANT CASE WAS REVERSIBLE ERROR.

It is respectfully submitted that this is a case in which the testimony of the undercover agent is crucial. That is, a defendant being accused of selling a narcotic drug to an undercover agent in the defendant's own home; and professing his innocence; and taking the stand in his own behalf cannot do much more than deny the event. That is exactly what the appellant did in the case at bar.

On cross-examination of the appellant, the prosecutor committed error in cross-examining him as to statements made by the appellant which were given to an unknown individual who was taking information with reference to having the bail of the defendant fixed. This procedure, erroneously referred to by the prosecutor as a "probation department man" (188), is commonly known as a R.O.R. statement. It is respectfully submitted that this statement is confidential and could not be used as a basis of cross-examination for, in the alternative, no defendant should talk to an R.O.R. individual without first consulting with an attorney. Clearly, the procedure used in the case at bar violated the 6th Amendment rights of the appellant.

The learned Appellate Division condemns the use of the R.O.R. statement in the instant case, as appears from the full decision set forth in the additional papers to this brief at page Nevertheless, the said Appellate Division did not reverse based on the rule enunciated in People v. Crimmins, 36 N.Y. 2d 230.

It is respectfully urged in this court, that not only was the examination by the district attorney on the R.O.R. statement of the appellant in error, but that under the fact pattern of the within case, it was clearly reversible error.

One cannot think of a more likely case then the case at bar for saying that the error set forth above was crucial and would have had a bearing on the jury verdict. In a "direct sale " case, it is only the appellant and his credibility which can sway the jury on the crucial issue of fact:

i.e.: whether or not the appellant made the sale. Anything that reflects on the appellant's credibility would therefore carry greater weight with the jury. Can this court say, that had not the appellant been impeached by his own R.O.R. statement, that the jury would not have found in his favor?

Other authority for the proposition that the R.O.R. statement can not be used to impeach the appellant's testimony can be found in State v. Winston and Douglas, 219 N.W. 2d 617 (Minn. Sup. Ct. 1974).

Clearly, the use of the R.O.R. statement to impeach the appellant was reversible error.

POINT IV

THE PROSECUTORIAL AND INFLAMMATORY SUMMATION OF THE PROSECUTOR DEPRIVED THE APPELLANT OF A FAIR TRIAL.

To further accentuate the harm done by the cross-examination of the prosecutor with reference to the R.O.R. statement as set forth in Point III of this brief, the prosecutor in his summation goes into great detail as to the discrepancy of the appellant's testimony with reference to the statement made to the R.o.R. man.

If this was the only prejudicial remark made by the prosecutor in his summation, then, it would be fair to state that this would not be sufficient error to warrant the reversal. But, the prosecutor goes on to say:

> "...because if you let sympathy interefere with your deliberations, if you enter a conclusion, facts not in evidence, you have condemned every man, woman, and child to be at the mercy of every addict and pusher." (212-213)

The prosecution then concludes its summation with the following statement:

> "I ask you to convict this defendant. I ask you to vote him guilty. I'm asking you for justice because where is the People's justice? Where is the justice of society against those individuals who sell drugs? It's in seeing that they get convicted. I'm asking you for justice not because of what type of an individual a man is, because of what he did. When the evidence cries out for that verdict, you have got to have the courage, the decency, the intelligence to bring forth that verdict.
> I'm sure, Miss Byrd, and gentlemen, that you'll bring forth a proper verdict. There can be only one verdict in this case and that verdict on the basis of the evidence. And after hearing the evidence I'm sure you'll conclude there is no other verdict but guilty."(213)

The issue of prosecutorial and inflammatory summations has always been a troublesome one for Appellate Courts. A reading of the cases does show that one of the guidelines to be used by an Appellate Court on the issue of prosecutorial misconduct is the closeness of the case. That is, whether the evidence in fact is overwhelmingly against the defendant or is the issue balanced except for the inflammatory summations of the prosecutor.

It is respectfully sumbitted that in the case at bar the appellant put into issue by his taking of the witness stand, the entire issue in the case. The appellant denied making the sale. This Court held that if there is a showing of overwhelming proof of defendant's guilt, coupled with a

failure to except by defense counsel, the judgment of conviction would be affirmed even though the action of the prosecutor is deplorable. People v. Blackman, 43 A.D. 2d 742; People v. Brown, 43 A.D.2d 743. On the other hand, where the issue of the defendant's guilt is a close one and the improper summation is coupled with impermissable cross-examination, the Court has no hesitancy in reversing the conviction. People v. Thomas, 43 A.D. 2d 547.

Other recent cases of reversal by the Appellate Division in similar circumstances are found in People v. Causer, 43 A.D.2d 899 and People v. Wilkinson, 43 A.D. 2d 565.

CONCLUSION

1. The judgment of conviction should be reversed and a new trial granted for the reasons set forth in Points I, III, and IV of this brief.

2. The judgment of conviction should be reversed and the indictment dismissed for the reason set forth in Point II of this brief.

Respectfully submitted,

HARVEY L. GREENBERG

COURT OF APPEALS : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

EFRAIN RODRIGUEZ,

Defendant-Appellant.

STATEMENT UNDER RULE 5531

1. The Indictment Number in the Supreme Court, Kings County is 5702/1973.

2. The full name of the original parties is as above.

The appellant was represented at the trial by BERTRAM ZWEIBON, ESQ.,. The appellant retained HARVEY L. GREENBERG, ESQ., for the appeal in the Appellate Division, Second Judicial Department. HARVEY L. GREENBERG, ESQ., was assigned, pro bono, for the appeal in the Court of Appeals.

The People of the State of New York are represented by the Honorable Eugene Gold, District Attorney, Kings County.

3. The action was commenced for the filing of an Indictment upon which the defendant was arraigned on October 5, 1973.

4. This is an appeal from an affirmance by the Appellate Division, Second Judicial Department, of a judgment

of conviction after a trial before the Honorable Max Cooper, and a jury, of the following charges:

1. Criminal sale of a controlled substance in the second degree;

2. Possession of a controlled substance in the third degree;

3. Possession of a controlled substance in the fifth degree.

That the defendant was thereupon sentenced on April 3, 1974 by the Hon. Max Cooper to the following:

1. Criminal sale of a controlled substance in the second degree - 6 years to life;

2. Possession of a controlled substance in the third degree - one year to life;

3. Possession of a controlled substance in the fifth degree - three years.

All sentences to run concurrently.

5. The within Appeal to the Court of Appeals is made pursuant to Order Granting Leave dated July 8, 1975, by the Hon. Domenick L. Gabrielli.

6. The appendix method of Appeal is not being used.

7. The Appellant is presently incarcerated pursuant to the within Judgment of Conviction.

State of New York
Court of Appeals

2 No. 357

The People &c.,

Respondent,

vs.

Efrain Rodriguez,

Appellant.

MEMORANDUM

(357)

Harvey L. Greenberg for appellant.

Eugene Gold, District Attorney(Alan D. Rubenstein of counsel) for respondent.

MEMORANDUM:

Order of the Appellate Division affirmed.

The identity, description and address of the civilian who was with the undercover police officer when defendant first sold the narcotics was disclosed before trial in the People's bill of particulars. The civilian was not a confidential or cooperating informant but was himself a police suspect. Thus, the People were under no obligation to produce him at trial.

Defendant's remarks made in the course of the criminal transaction were not historical narrative; they were instead part of the corpus delicti. Hence, they need not have been disclosed in the bill of particulars (CPL 200.90, subd 3).

Since no order of mistrial had been entered and the jury had not been discharged, the trial court's purported declaration of a mistrial obviously was a statement of intention rather than a completed act, despite its declarative form. It was rescinded almost immediately.

Hence, there is no basis for the assertion of double jeopardy.

Defendant was not entitled to pre-interrogation warnings before being asked pedigree information in an interview in connection with his possible release on his own recognizance (cf., People v. Rivera, 26 NY2d 304, 309). In any event, even if the taking of the information without first having given the warnings violated defendant's constitutional rights, its use to impeach defendant's credibility on cross-examination was permissible (People v. Harris, 25 NY2d 175, 177, affd. 401 US 222; People v. Kulis, 18 NY2d 318, 323).

* * * * * * * *

Order affirmed in a memorandum. All concur.

Decided July 6, 1976

UNITED STATES OF AMERICA v. ZVONKO BUSIC, ET AL.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR REDUCTION OF BAIL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

LAW OFFICES
WILLIAMS, CONNOLLY
& CALIFANO
1000 HILL BUILDING
WASHINGTON, D.C. 20006
AREA CODE 202
331-5000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC, Defendants.	76 Cr. 602 (JRB) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REDUCTION OF BAIL

Defendant Zvonko Busic, by undersigned counsel, has moved this Court, pursuant to Rule 46 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3146, for an order reducing defendant's bail and releasing him from confinement pending trial. This Memorandum of Points and Authorities is submitted in support of the Motion for Reduction of Bail. Counsel have also offered nine supporting affidavits of counsel, the defendants' friends and responsible leaders of the community. We respectfully submit that, based on the information contained in these affidavits and the standards for pretrial release, the defendant should be released pending trial on the following conditions:

(1) placement in third-party custody of a designated person;

(2) residence at a designated place of abode;

(3) restrictions on travel and limitations on the amount of time away from his residence;

(4) obtaining employment in New York City;

(5) daily reporting requirements; and

(6) execution of a bail bond in the amount of Fifty Thousand Dollars ($50,000).

I.

INTRODUCTORY STATEMENT

The accompanying affidavits of Michael E. Tigar, Father Mladen Cuvalo, Zdravka Logarusic, Anthony Barulich, Zvonko Crnogorac, Marijan Gabelica, Stjepan Galic, Ante Gojceta, and Steven Ivkosic disclose the following facts pertinent to the pretrial release of Zvonko Busic on the conditions outlined above.

Zvonko Busic has firm community ties in the New York area. He has resided in Manhattan for the past one and one-half years. During that time, he has established solid roots. Until he was laid off, he worked steadily as an elevator operator at 7 West 96th Street. He won the confidence and admiration of his employer and the tenants as an honest, reliable, and trustworthy person. While living in Cleveland and Portland, he likewise found full-time employment and supported his family.

The defendant's ties to this area extend to the religious and cultural life of the community. He is a faithful parishioner at Sts. Cyril and Methodius and St. Raphael's Roman Catholic Church. He regularly participates in social, political and educational activities of the Croatian Center adjacent to the church and the Croatian radio station.

From all accounts, Zvonko Busic is an acknowledged leader in the community--a man to whom others look with respect and admiration. The most frequent description of him is that he is a man of integrity who appreciates the meaning of a promise and would do nothing to bring dishonor to those who placed their faith in him. All affiants have no doubts that he will abide by any release conditions established by the Court and that he will faithfully appear in court as required.

Zvonko Busic has never been convicted of a crime of violence. His brief encounters in 1971 with the criminal justice system in Cleveland did not result in any convictions for violent offenses. The charges stemming from an altercation among Yugoslavians were dismissed. The disorderly conduct charge was promptly dismissed once it was learned that he had not provoked the sudden attack in a Cleveland bar.

The defendant was released on a nominal bail of $200 in connection with both Cleveland charges. He appeared as required on five occasions, and his bail was returned to him both times. Zvonko Busic's unblemished record of appearance at court proceedings further demonstrates that he will appear as required in this case.

The defendant's friends, as well as religious and civic leaders in the community, have no reservations about his peaceful, nonviolent behavior if released pending trial. They do not consider him a danger to any particular person or to the

community. Nor do they have any qualms about vouching for his conduct as third-party custodians.

The restrictive conditions of release recommended by counsel are carefully tailored to minimize any risk of flight and to guarantee the defendant's presence at trial. Those who have volunteered to assume custody, to provide living accommodations and to furnish employment are fully aware of the important responsibilities that they are assuming. They have expressed their willingness to cooperate with the Court in any reporting and supervision requirements established as a condition of release.

In addition to the close scrutiny that the defendant will receive from his custodian, the proposed release conditions contemplate even more rigorous restrictions on his freedom of movement. Defendant is willing to submit to restrictions on travel and on the amount of time away from his residence. The requirement of employment, in addition to assuring that the defendant will not be a financial burden on society, also curtails his ability to travel and adds another protective device for assuring his presence at trial. Likewise, the obligation to report daily to a designated official further minimizes the likelihood of flight. Finally, the requirement of posting a bail bond of $50,000 demonstrates that the defendant, far from absconding and disappointing his friends and supporters, will honor the faith placed in him.

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...
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II.

ARGUMENT

A. The Right to Nonexcessive Bail.

The Eighth Amendment's guarantee against excessive bail is a fundamental right afforded criminal defendants. It is "basic to our system of law, Stack v. Boyle, 342 U.S. 1 (1951); Herzog v. United States, 75 S. Ct. 349, 351, 99 L. Ed. 1299, 1301 (1955) (opinion of Douglas, J.)." Schilb v. Kuebel, 404 U.S. 357, 365 (1971). Protection against confinement prior to trial serves to promote other cherished rights of the accused. As the Supreme Court has declared:

> "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. See Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, supra, 342 U.S. at 4.

Pretrial release from confinement is an indispensable prerequisite for the effective assistance of counsel and the unimpeded investigation of the facts necessary for the preparation of defense. Cf. Bitter v. United States, 389 U.S. 15 (1967) (conviction reversed because defendant was improperly confined during trial). As the Ninth Circuit stated in ordering the pretrial release of a minor defendant to the custody of his parents or counsel,

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"The ability of an accused to prepare his defense by lining up witnesses is fundamental, in our adversary system, to his chances of obtaining a fair trial. Recognition of this fact of course underlies the bail system. Stack v. Boyle, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L. Ed. 3 (1951). But it is equally implicit in the requirements that trial occur near in time, Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), and place (U.S. Const. Amend. VI) to the offense, and that the accused have compulsory process to obtain witnesses in his behalf. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Indeed, compulsory process as a practical matter would be of little value without an opportunity to contact and screen potential witnesses before trial.

"This is not a case where release from detention is sought simply for the convenience of the appellant. There is here a strong showing that the appellant is the only person who can effectively prepare his own defense. We may take notice, as judges and lawyers, of the difficulties often encountered, even by able and conscientious counsel, in overcoming the apathy and reluctance of potential witnesses to testify. It would require blindness to social reality not to understand that these difficulties may be exacerbated by the barriers of age and race. Yet the alternative to some sort of release for appellant is to cast the entire burden of assembling witnesses onto his attorneys, with almost certain prejudice to appellant's case." Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970)

The historical purpose of bail has been to assure the defendant's presence in court and his submission to the judgment of the court. See, e.g., Stack v. Boyle, supra, 342 U.S. at 4-5; Reynolds v. United States, 80 S. Ct. 30, 4 L.Ed.2d 46, 48 (1959) (opinion of Douglas, J.); United States v. Foster, 278 F.2d 567, 570 (2d Cir. 1960). As Judge Pollack has cautioned:

"[T]he function of bail is not to purchase freedom for the defendant but to provide assurance of his reappearance after release on bail; a guarantee of the obligation of the defendant to appear. The bail is not for the purpose of providing funds to the government to seek the defendant should he go underground or flee the jurisdiction. Bail is intended as a catalyst to aid the appearance of the defendant when wanted." United States v. Melville, 309 F.Supp. 824, 826-27 (S.D.N.Y. 1970).

The amount of bail and conditions of release "must be based upon standards relevant to the purpose of assuring the presence of the defendant." Stack v. Boyle, supra, 342 U.S. at 5. "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit)." 342 U.S. at 5; see also United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946). Bail may not be denied, or set at an unrealistic level, because the defendant's presence cannot be conclusively guaranteed. "The law requires reasonable assurance but does not demand absolute certainty, which would be only a disguised way of compelling commitment in advance of judgment." United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969). Doubts about granting bail "should always be resolved in favor of the defendant." Herzog v. United States, supra, 99 L.Ed. at 1301

With the passage of the Bail Reform Act (18 U.S.C. §§ 3146-52), Congress sought to halt abusive bail practices and

"to give meaning to some of our highest ideals of justice." United States v. Leathers, 412 F.2d 169, 170 (D.C. Cir. 1969). By its terms the Act creates a strong policy in favor of pretrial release. See, e.g., United States v. Edson, 487 F.2d 370, 372 (1st Cir. 1973); Wood v. United States, 391 F.2d 981, 983 (D.C. Cir. 1968); United States v. Leathers, supra, 412 F.2d at 171; cf. United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972) (presumption in favor of release even after conviction). Congress repudiated the notion that the key to the jailhouse door can be purchased only by those defendants affluent enough to pay money bail. See Russell v. United States, 402 F.2d 185, 186 (D.C. Cir. 1968); cf. Bandy v. United States, 82 S. Ct. 11, 12-13 (1961) (opinion of Douglas, J.). Likewise, the federal bail law categorically rejects preventive detention pending trial in fav of "the release of an accused on the least restrictive alternative conditions which will provide reasonable assurance that the accused will appear in court." United States v. Cowper, 349 F.Supp. 560, 562 (N.D. Ohio 1972); see also United States v. Melville, 306 F.Supp. 124, 125-26 (S.D.N.Y. 1969); United States v. Erwing, 268 F.Supp. 879 (N.D. Cal. 1967).

> "The low priority given by Congress to monetary conditions was enacted into the statute in order to prevent pretrial detention resulting from indigency. The authors of the Act were fully aware that the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all. Conditions which are impossible to meet are not to be permitted to serve as devices to thwart the plain purposes of the Act, nor are they to serve as a thinly veiled cloak for preventive detention." United States v. Leathers, supra, 412 F.2d at 169.

B. Standards for Pretrial Release.

The Bail Reform Act provides that in noncapital cases the defendant

> "shall . . . be ordered released pending trial on his personal recognizance or upon the execution of an appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required." 18 U.S.C. § 3146(a).

If the court makes such a determination, it must then consider imposing as substitute or additional methods of release a single condition or combination of conditions in the following order: (1) third-party custody; (2) restrictions on travel, association or place of residence; (3) execution of an appearance bond and a maximum 10% cash deposit; and (4) execution of a bail bond with sureties or the deposit of cash as bail. Id. In determining the appropriate release conditions, the court may consider, among other things, the offense charged, the weight of the evidence, family ties, employment, financial resources, character and mental condition, community ties, record of convictions and prior record of appearances at court proceedings. 18 U.S.C. § 3146. These factors, however, do not affect whether the accused shall be

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placed on bail--the statute clearly requires release--but rather relate to the conditions of release.

The Bail Reform Act establishes "a hierarchy of conditions, one of the least favored of which is a requirement of bail bond." Wood v. United States, supra, 391 F.2d at 983. As Judge Frankel observed in setting bail in a prosecution for conspiracy to explode bombs in federal and other buildings in New York City:

> "'The Bail Reform Act creates a strong policy in favor of release on personal recognizance, and it is only if "such a release would not reasonably assure the appearance of the person as required" that other conditions of release may be imposed.' Wood v. United States, supra, 391 F.2d at 983. Those words, fairly characterizing the terms of the statute, seem to tell the whole story in terms of release--on selected conditions in progressive degrees of onerousness, but release on some conditions in any event." United States v. Melville, supra, 306 F. Supp. at 127.

In capital offenses and pending appeal, the defendant

> "shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." 18 U.S.C. § 3148.

In capital cases, therefore, the defendant is bailable as of right, with the added requirement of no reasonable likelihood of danger to the community. Indeed, the same presumption of releasability applies in capital prosecutions. See, e.g., United States v. Harrison, 405 F.2d 355 (D.C. Cir. 1968) (felony murder); Stinnett v. United States, 387 F.2d 238 (D.C. Cir. 1967) (first-degree murder); Drew v. United States, 384 F.2d 314 (D.C. Cir. 1967) (first-degree murder). As one court held in reversing the denial of bail in a murder prosecution:

> "The District Judge apparently rested his finding of a risk of flight upon the severity of the sentence that could be imposed on appellant if she were convicted on the murder charge. If this factor alone were determinative, however, release would never be possible in a capital case, and the statutory scheme that Congress so carefully established for such cases [18 U.S.C. § 3148] would be nullified completely. . . . Though charged with a capital offense, appellant is presumptively releasable . . . ." White v. United States, 412 F.2d 145, 146-47 (D.C. Cir. 1968).

Federal bail law, both before and after the Bail Reform Act, has not recognized any category of offense for which, or types of offenders for whom, bail can be automatically or even routinely denied. For example, bail has been granted for "the most heinous case" such as treason, Carbo v. United States, 82 S. Ct. 662, 7 L.Ed.2d 769, 775 (1962) (opinion of Douglas, J.); for rape, robbery and sodomy, Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968); and piracy, United States v. Jones, 26 F.Cas. 658 (No. 15495) (C.C. Pa. 1813). Bail cannot be denied "merely because of the community's sentiment against the accused nor because of an evil reputation." Carbo v. United States, supra, 7 L.Ed.2d at 772; see also Cohen v. United States, 82 S. Ct. 8, 7 L.Ed.2d 13, 14 (1961) ("equal justice under law requires that

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bail not be denied even a notorious law-violator"). Nor may bail be denied because the accused is not a United States citizen. United States v. Honeyman, 470 F.2d 473 (9th Cir. 1972); United States v. Bobrow, 468 F.2d 124 (D.C. Cir. 1972).

The function of bail is to assure the accused's presence in court as required. The bail hearing cannot be transformed into a mini-trial on the defendant's guilt or innocence.

> "It is true, of course, that 18 U.S.C. § 3146(b) requires the court to take into account 'the nature and circumstances of the offense charged [and] the weight of the evidence against the accused,' but the statute neither requires nor permits a pretrial determination that the defendant is guilty. It is important to observe rather than obliterate the fundamental precepts of our jurisprudence. This is not merely a matter of proprieties, though that is itself not unimportant for judicial actions. If one bears in mind that one is examining only the evidence against the accused, for purposes of considering prospect of flight, one is more likely to guard against the impermissible course of reaching some kind of partial determination of guilt and of beginning what is in substance a mandate of punishment." United States v. Alston, supra, 420 F.2d at 180; see also United States v. Edson, supra, 487 F.2d at 372; United States v. Honeyman, supra, 470 F.2d at 474.

Under both § 3146 and § 3148, the burden is on the government to establish that one or more recommended release conditions will not reasonably guarantee the accused's presence or minimize any threat to the community. Leary v. United States, 431 F.2d 85, 89 (5th Cir. 1970); Ward v. United States, 76 S. Ct. 1063, 1 L.Ed.2d 25 (1956). Bail may be denied only for "the strongest

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of reasons", Sellers v. United States, 89 S. Ct. 36, 21 L.Ed.2d 64, 66 (1968); and "only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release." Leigh v. United States, 82 S.Ct. 994, 8 L.Ed.2d 269, 271 (1962) (opinion of Warren, C.J.). "Danger" for purposes of bail cannot encompass the constitutionally protected exercise of speech, press, and associational freedoms. Williamson v. United States, 184 F.2d 280 (2d Cir. 1950) (opinion of Jackson, Jr.); Leary v. United States, supra, 431 F.2d at 89.

The requisite showing of dangerousness must relate "to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail." Sellers v. United States, supra, 21 L.Ed.2d at 67 (emphasis supplied). Any evidence concerning flight or dangerousness must be offered by the government at a hearing at which the accused's counsel may refute the government's allegations. See United States v. Wind, 527 F.2d 672, 675-76 (6th Cir. 1975); United States v. Melville, supra, 306 F.Supp. at 128 n.4. In setting bail for defendants charged with the "grave and alarming" offense of conspiracy to bomb numerous buildings in New York City, Judge Frankel stressed that, although the government's evidence "is seemingly substantial" and "[t]he objectives of the alleged conspiracy are . . . terrifying", the defendants are presumed innocent and bailable. United States v. Melville, supra, 306 F.Supp. at 125, 128.

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The court must make "a particularized determination" as to each defendant and may not order confinement on "an undiscriminating wholesale basis." Fernandez v. United States, 8. S. Ct. 642, 644 (1961) (opinion of Harlan, J.). Because "[e]ach defendant stands before the bar of justice as an individual", Stack v. Boyle, supra, 342 U.S. at 9 (separate opinion of Jackson, J.), the Second Circuit has emphasized that "the setting of bail is a highly individualized process and does not lend itself to slide rule resolution." People of State of New York v. Hutchinson, 360 F.2d 759, 762 (2d Cir. 1966); see also United States v. Briggs, 476 F.2d 947, 948-49 (5th Cir. 1973). In ruling on bail, the court must set forth its findings in writing and with particularity. See 18 U.S.C. § 3146(d); Rule 9(a), Federal Rules of Appellate Procedure; United States v. Fields, supra, 466 F.2d at 121.

C. Applicability of 18 U.S.C. § 3148.

In Count I of the indictment, the government has charged a violation of 49 U.S.C. § 1472(i), which provides in pertinent part:

> "Whoever commits or attempts to commit aircraft piracy . . . shall be punished--
>
> * * *
>
> (B) if death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life." (Emphasis supplied).

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The offense of aircraft priacy is defined in § 1472(i)(2) in pertinent part as "any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft . . . ."

As the accompanying affidavit of Michael E. Tigar shows, it is highly doubtful that the defendant is subject to the death penalty provisions of § 1472. Counsel know at this time of no evidence indicating that the defendant placed a live explosive device in connection with the events recited in the indictment. The state prosecutor, Robert Tanenbaum, has told counsel that he is convinced that the defendant had no intent to kill anyone.

The language of the statute under which the defendant is charged convincingly refutes any suggestion that this is a capital case. Counsel knows of no evidence indicating that the death of New York City Police Officer Brian Murray "result[ed] from . . . [the] seizure or exercise of control" of the Boeing 727. Moreover, 49 U.S.C. § 1473(c)(6) precludes the imposition of the death penalty if the accused "could not reasonably have foreseen that his conduct in the course of commission of the offense . . . would create a grave risk of causing death to another person." (Emphasis supplied). This statutory language clarifies the meaning of "if death . . . results from the commission . . . of the offense" in § 1472(i) and rules out the imposition of the death penalty.

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The defendant may require that the Court look behind the indictment. Under 18 U.S.C. § 3148, the government must shoulder the burden of establishing that this is a capital case and that the defendant poses a serious risk of flight and danger that cannot be reasonably mitigated by appropriate release conditions. As the New Jersey Supreme Court held in the context of bail under its state constitutional provision barring bail in capital cases "where the proof is evident, or the presumption great":

> "The first matter to be appraised in a proceeding for bail is the indictment. In the light of the Constitution and the traditional methods of administration of the criminal law in New Jersey [,] the indictment, representing as it does only a formal charge, should not be regarded as sufficient to demonstrate that proof of a capital offense is evident or the presumption great. Nor do we believe it should be vested with sufficient prima facie force to bring the charge within the reservation of the Constitution. . . .
>
> "Bail, then, being the right of every citizen charged with any crime excepting only the type of capital offense when the proof is evident or the presumption great, who should have the onus of establishing that conditional freedom should be granted or denied? The answer is not difficult. The burden should rest on [the government,] the party relying on the exception. That is the logical and natural rule and the one which conforms with the pervasive presumption of innocence attending all criminal charges. In fact, there is an indissoluble connection between that presumption and the right to liberty before conviction." State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 743, 744 (1960).

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Defendant submits that based on the language of the statute and the evidence, this is not a capital case and the dangerous propensities standard of 18 U.S.C. § 3148 is inapplicable. The sole issue before the Court, therefore, is whether the proposed release conditions, patterned after 18 U.S.C. § 3146(a) and discussed in detail infra, will "reasonably assure the appearance of the [defendant] as required." In the event that the Court concludes that the defendant is charged with a capital offense, we submit that the overwhelming evidence--from friends, relatives, clergymen, and community leaders--conclusively confirms that not only will the defendant faithfully attend all court proceedings, but that he does not pose a danger to any person or the community.

D. Proposed Release Conditions.

Counsel propose that the Court establish the following release conditions:

(1) placement in the third-party custody of a designated person;

(2) residence at a designated place of abode;

(3) restrictions on travel and limitations on the amount of time away from his residence;

(4) obtaining employment in New York City;

(5) daily reporting requirements; and

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(6) execution of a bail bond in the amount of Fifty Thousand Dollars ($50,000).

These conditions are designed in response to the mandate of the Eighth Amendment and the Bail Reform Act that release conditions be flexible, imaginative, and individualized. See, e.g., United States v. Fields, supra, 466 F.2d at 121; United States v. Bronson, 433 F.2d 539 (D.C. Cir. 1970); Banks v. United States, 414 F.2d 1150, 1154 (D.C. Cir. 1969); People of State of New York v. Hutchinson, supra, 360 F.2d at 762. We should recall that absolute certainty of the defendant's appearance is not the standard for setting bail.

> "[This] plan would involve risk. But this is not decisive; for any release plan--however partial or limited--necessarily involves risk. Congress understood this very well, and only asked that the risks taken be not excessive, that the conditions be such as 'to reasonably assure that [the person] will not flee . . . .'
>
> "The question, then, is the assessment of the extent of the risk." Banks v. United States, supra, 414 F.2d at 1154 (Levanthal, J., dissenting).

The recommended conditions have received widespread acceptance in the federal courts as realistic safeguards for the release of a defendant pending trial.

The restrictions involving third-party custody, residence and employment establish, as well as take advantage of, Zvonko Busic's close community ties. See Ball v. United States, supra, 402 F.2d at 207-08; cf. United States v. Bronson, supra, 433 F.2d at 540 (a serviceman's "lack of close family and community ties is not an insurmountable obstacle to pretrial release [and can be overcome] by the imposition of carefully chosen conditions"). The defendant's

> "stability and ties to the community are further demonstrated by the concern manifested by several members of his church, [several] of whom offered [him] . . . a home to live in should he gain release." Banks v. United States, supra, 414 F.2d at 1153.

A requirement of reporting by the defendant, his custodian, and employer is an established means for assuring the defendant's presence. See, e.g., Sellers v. United States, supra, 21 L.Ed.2d at 68; Ball v. United States, supra; United States v. Alston, supra.

> "Well-designed reporting procedures can reduce the temptation to flee by providing prompt communications with judicial authorities if the individual departs from his usual routine. If conditions of release are violated, such a report can lead to prompt apprehension and possible prosecution under the criminal bail-jumping provision. All conditions of pretrial release have as their goal the close supervision of the defendant in order to curtail his opportunity to flee. A desirable by-product is that often any danger to the public presented by the release can also be minimized." United States v. Leathers, supra, 412 F.2d at 172-73.

The prophylactic effect of a reporting procedure is appreciably enhanced by the recommended requirement that the defendant make a daily report. See United States v. Melville, supra, 306 F.Supp. at 129.

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Defendant no longer possesses the legal documents for foreign travel. United States v. Cook, 442 F.2d 723, 724 n.1 (D.C. Cir. 1970). Territorial limitations as a condition of pretrial release are effective and well-established. United States v. Foster, supra, 278 F.2d at 570. To further minimize the likelihood of flight, the defendant is willing to submit to restrictions concerning the amount of time away from his residence.

We have also requested that the Court substantially reduce the cash bail of One Million Dollars ($1,000,000) to a realistic and attainable amount. "There is . . . no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set." United States v. Melville, supra, 306 F.Supp. at 127. The posting of a $50,000 bond will require considerable sacrifice on the part of the defendant and others and will supply an added measure of assurance that the defendant will appear as required.

Finally, the alarming disclosures in the affidavit of state prosecutor Robert Tanenbaum--concerning the intrusion of a government agent, James O'Brien, into the deliberations of counsel and the defendants in this case--is a weighty factor in determining the conditions of release. If the defendant remains confined pending trial, this experience, at the very outset of the preparation of a defense, can serve only to instill in his mind ths justifiable fear that he cannot meet and communicate with his counsel in privacy and away from eavesdropping government officials and undercover agents. Only release from confinement will begin to restore the defendant's confidence and assure that he receives an unhampered defense. Bitter v. United States, supra; see Kinney v. Lenon, supra.

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III.

CONCLUSION

The defendant stands charged of serious offenses. But he also stands before this Court and the community as an innocent man. As such he is entitled to the full panoply of rights and privileges historically accorded the criminally accused. One such protection--pretrial release on bail--is essential in consulting counsel, searching for evidence and witnesses and mounting a defense. While the release of any defendant entails a risk of flight, "[t]hat is a calculated risk which the law takes as the price of our system of justice." Stack v. Boyle, supra, 342 U.S. at 8 (separate opinion of Jackson, J.).

In this case, however, the likelihood of flight is negligible. Zvonko Busic is a well-regarded, conscientious member of the community. His ties run deep and include a good record of employment, close personal friends, regular religious devotion, and extensive social and political activities. In the face of these grave charges, the community has responded by offering him a home, a job, and a helping hand.

The proposed release conditions are specially tailored to strike a balance between the defendant's need to be free from the constraints of incarceration to assist in the preparation of his defense and the Court's obligation to minimize the prospect of flight. Moreover, if this be deemed a capital case, these conditions are designed to allay the Court's concerns that the defendant poses a danger to the public.

We respectfully request that the Motion for Reduction of Bail be granted and that the defendant Zvonko Busic be released from confinement pending trial on the conditions outlined by counsel.

Dated: Washington, D.C.
October 27, 1976

Respectfully submitted,

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