Bail in the United States: 1964

by

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TABLE OF CONTENTS

Introduction

The bail system in the United States determines whether an accused person in a criminal proceeding will be released or jailed in the period between his arrest and trial. In the typical case, the accused is brought by the police before a committing magistrate or judge who will set bail in a monetary amount. The legal theory underlying this procedure is that the bail will be sufficient to insure the appearance of the defendant at trial. If he is able to post bond in the bail amount, or to pay a bondsman to post it for him, the accused is released. If he is financially unable to make bail, he is detained in jail.

Each year, the freedom of hundreds of thousands of persons charged with crime hinges upon their ability to raise the money necessary for bail. Those who go free on bail are released not because they are innocent but because they can buy their liberty. The balance are detained not because they are guilty but because they are poor. Though the accused be harmless, and has a home, family and job which make it likely that—if released—he would show up for trial, he may still be held. Conversely, the habitual offender who may be dangerous to the safety of the community may gain his release.

The National Conference on Bail and Criminal Justice is designed to examine the bail system, review its criteria for pretrial release, consider the law enforcement stakes involved, assess the human as well as monetary costs of pretrial detention, and explore the available alternatives. Launched on June 1, 1963 with the assistance of a grant under Public Law 87-274 from the President's Committee on Juvenile Delinquency and Youth Crime, the Conference seeks to focus public attention on the defects in the bail system, the need for its overhaul and the methods of improving it. It plans to do this through a national and several regional conferences, through staff assistance to communities which request aid, and through publications dealing with various aspects of pretrial release and detention.

The Conference is co-sponsored by the Department of Justice, under the leadership of Attorney General Robert F. Kennedy, and the Vera Foundation, a non-profit organization created by Louis Schweitzer. The participation of the Justice Department, as the federal system's chief law enforcement agency, reflects the belief that a system which conditions the accused's liberty solely on the amount of money in his pocket, rather than on the likelihood that he will return for trial, denies equal justice and interferes with the proper functioning of our criminal process. The Vera Foundation's participation reflects its desire to make available to communities throughout the United States the techniques and experience it has developed in pioneering a new approach to the problem of bail through the Manhattan Bail Project in the courts of New York City.

Although the Vera Foundation's example paves the way for remedial action against bail abuses elsewhere, changes cannot be made overnight. The mechanics of reform require careful inquiries into the nature of existing bail practices and the factors which underlie current decisions to release or detain. A number of communities have already undertaken revisions of their local bail systems. Experiments are being conducted in many areas seeking ways to diminish unnecessary pretrial detention without impairing the effectiveness of the community's law enforcement efforts.

This handbook is designed to provide a guide to the present system and a working knowledge necessary to initiate improvements. It deals briefly with the history of bail, the way it operates today and the problems it creates. It then describes the range of alternatives which emerge from proposals for reform and projects already under way. The concluding chapter deals with the special problems created by the pretrial detention of children in juvenile court proceedings.*

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* Time did not permit this report to examine the significant problem of bail pending appeal. The issues involved in post-conviction bail differ from pretrial bail in several fundamental ways. The subject in the federal courts is dealt with in an unpublished Report of the Junior Bar Section Bail Committee (D. C. Bar Assn., May 1964), and in articles cited in the bibliography to this report.

Chapter I

THE HISTORY AND THEORY OF BAIL

A. *England*

Bail originated in medieval England as a device to free untried prisoners. Disease-ridden jails and delayed trials by traveling justices necessitated an alternative to holding accused persons in pretrial custody. At first sheriffs exercised their discretion to release a prisoner on his own promise, or that of an acceptable third party, that he would appear for trial. If the defendant escaped, the third party surety was required to surrender himself; hence he was given custodial powers over the accused. Bail literally meant the bailment or delivery of an accused to jailors of his own choosing. In time, sureties—who were usually required to be property owners—were permitted to forfeit promised sums of money instead of themselves in the event the accused failed to appear.

In 1275 the Statute of Westminster undertook to regulate the discretionary bail power of sheriffs by specifying which offenses were bailable and which were not.[1] Eventually, the sheriff's bailing functions were transferred to justices of the peace.[2] Common law rules for exercising their discretion were based upon the nature of the charge, the character of the accused and the weight of the evidence.[3] Later English statutes elaborated the procedure for obtaining bail.[4] And in 1688 the Bill of Rights established protection against excessive bail.[5]

In 17th century England few defendants were sufficiently mobile to flee, and the consequences of flight—outlawry and confiscation—were harsh enough to make it an uncommon

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[1] 3 Edw. 1 c. 15.

[2] 1360-1361, 34 Edw. III.

[3] Stephen, *A History of the Criminal Law of England* i, 233-4 (1883).

[4] 1 & 2 Philip and Mary c. 13 (1554).

[5] 1 Wm. & Mary 2, c. 2 sec. 1, 2 (10).

occurrence. In addition, most bailed offenders were known personally to the sheriff or justice of the peace and had reputations for trustworthiness, attested to by their ability to get third persons of local esteem as sureties.

In England today, the bail surety relationship continues to be a personal one. At the same time, the discretionary nature of bail is sufficiently flexible to permit denial in cases where the magistrate believes that the defendant is likely to tamper with the evidence or commit new offenses if released.[6]

B. *America*

The development of bail rights and obligations in America has followed a different course. The United States Constitution does not specifically grant a right to bail. The Eighth Amendment states only that "Excessive bail shall not be required." Prior to ratification of the Bill of Rights, however, Congress provided in the Judiciary Act of 1789 that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . ." It went on to make bail in capital cases discretionary, depending upon the "nature and circumstances of the offense, and of the evidence, and usages of law." [7] Substantially the same right was guaranteed by state constitution or statute in all but seven states.[8] This

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[6] Sullivan, Proposed Rule 46 and the Right to Bail, 31 Geo. Wash. L. Rev. 919, 922-26 (1963); Bail and Bad Character, 106 The Law Journal 22 (1956).

[7] 1 Stat. 73, 91 (1789); *Carlson* v. *Landon,* 342 U.S. 524 (1952).

[8] Thirty-nine states guarantee a right to bail before conviction in noncapital crimes: Ala. Const. art. I, §16; Ariz. Const. art. II, §22; Ark. Const. art. II, §8; Cal. Const. art. I, §6; Colo. Const. art. II, §19; Conn. Const. art. I, §14; Del. Const. art. I, §12; Fla. Declaration of Rights §9; Hawaii Rev. Laws §256-3 (1955); Idaho Const. art. I, §6; Ill. Const. art II, §7; Iowa Const. art. I, §12; Kan. Const. Bill of Rights §9; Ky. Const. §16; La. Const. art. I, §12; Me. Const. art. I, §10; Minn. Const. art. I, §7; Miss. Const. art. III, §29; Mo. Const. art. II, §24; Mont. Const. art. III, §19; N. H. Rev. Stat. Ann. §597:1 (1955); N. D. Const. art. I, §6; Nev. Const. art. I, §7; N. J. Const. art. I, §11; N. M. Const. art. II, §13; Ohio Const. art. I, §9; Okla. Const. art. II, §8; Pa. Const. art. I, §14; R. I. Const. art. I,

absolute right to bail in a country with a virtually limitless frontier called for the development of new techniques to supplement the private surety who would personally guarantee to produce his bailee. As a result, the institution of the bondsman arose to take over the function of posting bail. In return for a money premium, he guaranteed the defendant's appearance at trial. In the event of nonappearance, the bondsman stood to lose the entire amount of his bond. For this reason, bondsmen in many jurisdictions required indemnification contracts or collateral from the defendant or his relatives to protect themselves from forfeiture losses.[9] Selling bail bonds became a thriving commercial adjunct to the judicial function of setting bail.

In the everyday administration of criminal justice in American courts, the legal right of an accused person to bail can usually ripen into pretrial freedom only upon the consummation of a commercial bail transaction. As early as 1912, the Supreme Court recognized that the bondsman's "interest to produce the body of the principal in court is impersonal and wholly pecuniary." [10] At the same time the accused's absolute

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§9; S. C. Const. art. I, §20; S. D. Const. art. VI, §8; Tenn. Const. art. I, §15; Tex. Const. art. I, §11; Utah Const. art. I, §8; Vt. Const. ch. II, §32; Wash. Const. art. I, §20; Wis. Const. art. I, §8; Wyo. Const. art. I, §14; Alaska Comp. Law Ann. §69-5-1 (1948).

Four states limit the power to deny bail to treason and murder cases: Ind. Const. art. I, §17; Mich. Const. art. II, §14; Neb. Const. art. I, §9; Ore. Const. art. I, §14.

Three states grant an absolute right to bail only in misdemeanor cases: Ga. Code Ann. §27-901 (1953); Md. Ann. Code art. 52, §13(b) (1951); N. Y. Code Crim. Proc. §553. The Maryland Court of Appeals has adopted rules granting an absolute right to bail in noncapital cases. Md. Rules of Procedure 777a (1962).

Four states allow judges almost complete discretion, in accord with the common law: Mass. Ann. Laws ch. 276, §42 (1956); N. C. Gen. Stat. §15-102 (1953); Va. Code Ann. §§19.1-109-.1-124 (1960); W. Va. Code Ann. §6152 (1961).

[9] Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 967-8 (1961).

[10] *Leary* v. *United States*, 224 U. S. 567, 575 (1912).

right to bail in noncapital cases was steadfastly defended. The reasons are spelled out by Justice Jackson in *Stack* v. *Boyle*:[11]

> From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. 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 . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The American judge's discretion in setting pretrial bail in noncapital cases has consistently been interpreted to allow latitude only in determining the bail amount. The opinions in *Stack* v. *Boyle* make clear several points that underlie the theory of bail today. First, the sole consideration is to ensure appearance at trial:

> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty . . . Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.[12]

Second, the fact that some defendants are more likely than others to flee does not condone the denial of bail:

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk

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[11] 342 U.S. 1, 4 (1951).

[12] 342 U.S. at 4, 5.

> which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.[13]

Third, bail cannot be set excessively high:

> In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. But the judge is not free to make the sky the limit, because the Eighth Amendment to the Constitution says: "Excessive bail shall not be required...." [14]

American judges, unlike their English counterparts, are not authorized to use pretrial bail as a device to protect society from possible new crimes by the accused. Justice Jackson, sitting as Circuit Justice, expressly repudiated such a justification for denying bail or setting it high in *Williamson* v. *United States*:[15]

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

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[13] 342 U.S. at 8 (separate opinion of Jackson, *J.*). Rule 46(f) of the Federal Rules of Criminal Procedure outlines the procedures for forfeiture of bond in case of nonappearance.

[14] 342 U.S. at 8 (separate opinion of Jackson, *J.*).

[15] 184 F.2d 280, 282-3 (2d Cir. 1950). The *Williamson* case involved bail on appeal. Bail following conviction, whether pending sentence or appeal, is not a matter of right under Rules 32 and 46(a)(2) of the Federal Rules of Criminal Procedure. In *Leigh* v. *United States*, 82 S.Ct. 994 (1962), Chief Justice Warren stated that a denial of bail on appeal would be justified 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."

Standards for determining the amount of bail necessary to insure a defendant's appearance are often specified by statute or court rule. Rule 46(c) of the Federal Rules of Criminal Procedure provides that

> If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.[16]

State appellate courts have laid down comparable criteria:

> The factual matters to be taken into account include: the nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of the defendant and his general reputation and character, and the apparent nature and strength of the proof, as bearing on the probability of his conviction.[17]

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[16] For similar standards, *cf.* Illinois Code Crim. Proc. §110-5 (1964); Cal. Penal Code §1275; 15 La. Rev. Stat. §86 (1950); Mich. Stat. Ann. §28.893 (1954); Ohio Rev. Code Ann. §2937.23 (1954).

[17] *People ex rel. Lobell* v. *McDonnell,* 296 N. Y. 109, 111 (1947). See also—

Arizona: Gusick v. *Boies,* 72 Ariz. 233, 233 P.2d 446 (1951).

California: In re Newbern, 55 Cal. 2d 500, 360 P.2d 43; 11 Cal. Rptr. 547 (1961).

Colorado: Trujillo v. *District Court of Weld County,* 131 Colo. 428, 282 P.2d 703 (1955).

Illinois: People ex rel. Sammons v. *Snow,* 340 Ill. 464; 173 N.E. 8 (1930).

Missouri: Ex parte Chandler, 297 S.W.2d 616 (Mo. App. 1957).

Montana: State v. *McLeod,* 131 Mont. 478, 311 P.2d 400 (1957).

Nebraska: Application of Kennedy, 169 Neb. 586, 100 N.W.2d 550 (1960).

New Jersey: State v. *Bentley,* 46 N. J. Super. 193, 134 A.2d 445 (1957).

Such criteria, however, fail to take account of the fact that in most instances the bond for the defendant's appearance is furnished not by the defendant but by his commercial bondsman. This system has been challenged as undermining the whole purpose of bail:

> It is frequently urged that eligibility for release and the amount of the bond are intimately related, because the higher the bail the less 'likelihood [there is] of appellant fleeing or going into hiding.' This argument presupposes that an appellant with higher bail has a more substantial stake and therefore a greater incentive not to flee. This may be true if no professional bondsman is involved. But if one is, it is he and not the court who determines appellant's real stake. Under present practice the bondsman ordinarily makes the decision whether or not to require collateral for the bond. If he does, then appellant's stake may be related to the amount of the bond. If he does not, then appellant has no real financial stake in complying with the conditions of the bond, regardless of the amount, since the fee paid for the bond is not refundable under any circumstances. Hence the court does not decide—or even know—whether a higher bond for a particular applicant means that he has a greater stake.[18]

A second troublesome attack on the present system has been raised on behalf of the indigent defendant who, from lack of funds, cannot raise bail himself or obtain it from a professional bondsman. While the inability of a defendant to raise bail was held in 1950 to give him "no recourse but to move for trial," [19] the continuing validity of requiring financial bail from an impoverished defendant has recently been challenged:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable

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Ohio: Ex Parte Cremati, 99 Ohio App. 402, 117 N.E.2d 440 (1954).
Oregon: Delany v. *Shobe*, 218 Ore. 626, 346 P.2d 126 (1959).

[18] *Pannell* v. *United States*, 320 F.2d 698, 699 (D. C. Cir. 1963) (Wright, *J.* concurring).

[19] *United States* v. *Rumrich*, 180 F.2d 575, 576 (2d Cir. 1950).

> problems for the equal administration of the law . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?[20]

In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial. It may not be used to detain, and its continuing validity when the accused is a pauper is now questionable. From the law, we turn to the bail system in practice.

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[20] *United States* v. *Bandy*, 81 S.Ct. 197-8 (1960); see also 82 S.Ct. 11 (1961). Both opinions in *Bandy* were written by Justice Douglas, acting as Circuit Justice.

Chapter II

THE BAIL SYSTEM AND ITS CRITICS

Disenchantment with the operation of the bail system in the United States dates back many years. Public administrators and legal scholars began conducting intensive analyses of the bail situation in urban centers in the 1920's.[1] Today, four decades later, bail inquiries are still being made throughout the country. Though widely separated in time and place, the major findings of published studies reveal some striking parallels. Set forth below are capsules of the critical situations found in Chicago, Philadelphia, New York, Washington and the federal system, over the period of the last 37 years.

A. *Chicago*

The Bail System in Chicago is the landmark study published by Arthur Lawton Beeley and the Chicago Community Trust in 1927.[2] Examining the records of the Municipal Court and Criminal Court of Cook County, Beeley found, despite the minor nature of most offenses and the 60% probability that the accused would ultimately be discharged or acquitted, that nearly three-quarters of Chicago's criminal cases were being initiated by arrests. Police lockups, where arrested persons were jailed pending bail determinations, were described as places where "A person with any decency would feel that one night there had defiled him for life." Bail setting followed an arbitrary schedule geared to the

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[1] See Pound, Criminal Justice in Cleveland (1924).

[2] The Report of the Wickersham Commission in 1931 described Beeley's work as "so much more thorough a study of the bail problem than is contained in any of the surveys [of the administration of criminal justice], that the liberty has been taken of using it as the basis for this summary on that subject. Its conclusions are undoubtedly applicable to American communities generally, and its data consistent with and corroborative of the data contained in the surveys." National Commission on Law Observance & Enforcement, Surveys Analysis 89 (1931).

alleged offense, e.g., $400 for a city code violation, $10,000 for robbery. Nearly 20% of all defendants were unable to post bail, and remained in jail. Professional bondsmen were said to play too important a role in the local administration of criminal justice. Release on personal recognizance was allowed in only 5% of the cases, all minor infractions.

An analysis of several hundred case histories of prisoners awaiting trial in Chicago showed that most were detained on bail of between $5,000 and $20,000, with a large number being discharged after a month or two in jail. Nearly 90% of the entire unsentenced population had lived in Chicago over a year, 70% had families there, and over one-half had references from reputable persons in the community; only 50% had any record of prior convictions. The study found that 28% of the sampled detainees were needlessly imprisoned before trial, while many others, just as obviously undependable, were granted conditional release and never returned for trial. "In too many instances," concluded Beeley, "the present system . . . neither guarantees security to society nor safeguards the rights of the accused." It is "lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe." He recommended (1) greater use of the summons to avoid unnecessary arrests, (2) a constitutional amendment to permit denial of bail to hardened offenders charged with felonies and (3) the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual.[3]

B. *Philadelphia*

In 1954, a University of Pennsylvania Law School team under the direction of Professor Caleb Foote published a

[3] For a brief intervening bail study, see Weintraub, *Why in Kings County?* The Pleader 5-6 (March 1938). It reported a 1937 finding by the Judicial Council of the State of New York that while defendants in criminal cases in the New York City area had to remain in jail prior to trial in only 2½% of the cases in Queens, 14% in the Bronx and 16% in Manhattan, the rate in Kings County was 40%. The extraordinary detention figures in Kings County were attributed to unwarranted increases in bail by magistrates when defendants were arraigned after indictment.

detailed study of the administration of bail in Philadelphia.[4] It found little indication that committing magistrates gave any independent thought or inquiry to the amount of bail in individual cases. In two-thirds of the cases, bail was set in police stations on the basis of police evidence alone, i.e., the charge coupled with the name, address and occupation of the defendant. Some magistrates candidly admitted that they set high bail to "break" crime waves, keep the defendant in jail, cut him off from his narcotics supply, protect women, "make an example" of a particularly abusive defendant, make him "serve some time" even where acquittal was a certainty, or protect arresting officers from false arrest suits. In cases involving serious crimes, where bail hearings were conducted by judges rather than committing magistrates, defendants had to wait an average of 5 days before bail was set, the recommendation of the District Attorney was followed 95% of the time, and three out of four defendants ended up staying in jail between arrest and trial. As a result, the County Prison was chronically overcrowded at a cost to the City of Philadelphia of $300,000 per year for pretrial detainees alone. An analysis of the disposition of 1,000 jail cases showed that 528 defendants who were eventually released after trial had spent an average of 33 days in prison. Moreover, only 18% of the jailed sample were not convicted, compared with 48% of the bailed sample. Of those convicted, jailed defendants got prison terms over 2½ times as often as those who had been free. The study's recommendations included (1) increased releases on personal bond, (2) a statute to penalize nonappearance as a criminal offense and (3) lowering the standard amounts of bail.

C. *New York*

Prompted by reports of "serious overcrowding" of detention facilities, *A Study of the Administration of Bail in New York City* was undertaken in 1957, also under the guidance

[4] Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U.Pa.L.Rev. 1031 (1954) (hereafter cited as the Philadelphia Bail Study).

of Professor Foote.[5] Researchers, working as temporary correction officers in order to gain first-hand knowledge of detention facilities and courtroom procedures, again found evidence of high bail being set to give defendants a "taste of jail" or to "protect society." As in Philadelphia and Chicago, the nature of the accusation against a defendant, more than any other factor, determined the amount in which bail was set. Committing magistrates only occasionally checked information about a defendant's background and likelihood to appear for trial. Yet 78 out of 89 prisoners interviewed by the study in the Manhattan House of Detention for Men, the Women's House of Detention and the Brooklyn Adolescent Remand Shelter turned out to have relatives living in New York, and 49 of the 89 had resided in the city for over 10 years. Despite the fact that 25% of all defendants were unable to make $500 bail, 45% were unable to make $1500 bail and 63% could not raise bail set at $2500, no bail hearings inquired into how much bond defendants could afford.

In 1955, pretrial detention facilities cost New York City $5,000,000. Detainees were found to be held under restraints not much different from those of maximum security penal institutions. They were locked up for 18 hours a day, afforded no privacy for communications, allowed visits only from the immediate family, and given no work and few recreational opportunities. Comparisons of bailed and jailed offenders revealed that sentences were suspended for jail prisoners less than ¼ as often as for their bailed counterparts, 13.5% as against 54.2%.

In 1963, five years after the University of Pennsylvania study, the Judiciary Committee of the New York State Assembly conducted a special investigation into practice and procedure in the newly organized and unified Criminal Court of the City of New York.[6] Its observation of bail practices led to the conclusion that statutory and judicial rules

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[5] 106 U.Pa.L.Rev. 693 (1958) (hereafter cited as the New York Bail Study).

[6] Leg. Doc. No. 37 (1963) (hereafter referred to as the New York Assembly Report).

> are disregarded or are perverted in a disturbingly large number of cases. We believe that a large segment of the Bench and of the Criminal Bar (in which we include the staffs of district attorneys) have forgotten—or never really learned—that the only permissible function of bail is to assure reappearance.

To bolster this conclusion, the Judiciary Committee spelled out several areas of abuse and illustrative cases. First, it criticized the limitation of bail hearings to facts concerning the alleged offense or the defendant's criminal record, "in complete disregard of factors personal to the defendant which may tend to make him a good risk." It gave several illustrations:

> 1. H, W, & M (husband, wife and the latter's mother) and H & W's three children share an apartment. In a neighboring apartment live A & B (husband and wife) with two dependent children. M & B argued about garbage pails placed outside the apartment doors. H & A had a fist fight as a result. A complained of assault in the third degree by H, W, and M; and H cross-complained for the same offense against A and B.
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> All were taken to Night Court; all were arraigned without counsel; and bail was fixed in each case at $500, without any questions being asked by the Judge. M was at least 65 years old and visibly crippled; B was seven months pregnant. Only H had a previous criminal record—a twenty-year old gambling conviction. H and A both held jobs. As a result of the bail thus fixed, H, W, and M spent six hours in jail, and A and B spent three days in jail. All charges were subsequently dismissed by the court before trial.
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> 2. N was arraigned in Part 1A, Kings County, on a robbery charge. Request for bail in a modest amount was made by Legal Aid, counsel for defendant by reason of his indigence. The Judge said "I always fix bail for robberies at $2500 or more. Besides, bail is reviewed now every two weeks; so if he can't make it he can ask for a reduction then."

Second, the Committee found evidence

> that judges also use bail to give defendants 'a taste of jail' by arbitrarily setting bail beyond their financial means. Such a practice rests, of course, on the belief of the judge that the defendant is guilty, notwithstanding the fact that he has not been tried. Thus, it has been averred to us by an Assistant District Attorney in New York City that this practice is still in use, particularly with adolescent defendants.

Third, the Committee "observed judges engage in the misuse of the bail power to coerce defendants in some aspect of the case. Judges so inclined are evidently aware of the impact of unexpected incarceration and use it as a prod." It gave this illustration:

> F was released in $1,500 bail on a misdemeanor charge in Part IA, New York County. His case was adjourned several times. When it was called on an adjourned day in late November, F appeared without counsel and requested further adjournment. The Assistant District Attorney opposed the request. F said he had been unable to reach his lawyer, whose notice of appearance was on file. The Judge directed the defendant to locate his attorney and to get him to court that day. "If you don't," he said, "I will raise your bail to $2,500."

Fourth, the Committee "observed what appears to be a too great dependency by some judges on the recommendations of the District Attorney as to the bail amount. When it is borne in mind that the Assistant District Attorney is usually in possession, at this stage of the proceedings, of information not substantially greater than that possessed by the judge, this dependence seems an uncalled for abdication of judicial responsibility." This illustration was given:

> T, a government employee, was charged with accepting a bribe. T's lawyer pointed out, upon his arraignment in Part IA, New York County, that T was the sole support of his wife and minor children, that he had lived at the same address for many years,

> that he had no previous criminal record. T was already suspended from his job. The Judge set bail at $500. At this the Assistant District Attorney said, "The People feel that the seriousness of the charge warrants a higher bail"; whereupon the Judge increased bail to $1,500.

Finally, the Committee castigated the trial bar for its complicity in the bail system's poor performance. It stated:

> We have too frequently observed on the part of defense counsel inadequate comprehension of, or participation in, the bail-setting process. The need for a special appeal by counsel to the arraigning judge is just as important a function of a competent legal representative as is the appeal for leniency when sentence is about to be passed. Indeed, counsel's effort here is perhaps even more vital; because no probation report in depth is available, as at sentence; and because low bail probably means temporary freedom, and freedom means time and money for the preparation of a sound defense.
>
> . . . The simplest concept of the lawyer's duty to his client at arraignment should include a careful preparation of his application for modest bail or parole. The conclusion is inescapable that a large segment of the criminal bar is derelict in the performance of this duty.

As a measure of the system's failure to move in the direction of facilitating release, the Assembly Report noted Department of Correction statistics showing an 82.6% increase in the number of pretrial detainees since 1950, accounting for 45% of the City's total prison census.

D. *Washington*

In 1962 the D. C. Bar Association's Junior Bar Section made a preliminary study of bail in the District of Columbia by analyzing 250 consecutive bail cases on the docket of the United States District Court. The study found that of 285 defendants eligible for bail, only 97 posted it. The remaining two-thirds spent the entire period between arrest and trial in jail. When bail was set at $500, 17% failed to

make it; at $1000, 40% failed; at $2500, 78% failed. A total of 258 defendants were convicted. A study of the impact on their sentences of jail or liberty before trial revealed that of the 83 who had made bail, 25% received suspended sentences and were released on probation. Of the 175 who had been detained, 94% were remanded to jail and only 6% received probation.

This docket analysis led to the Junior Bar's comprehensive study of *The Bail System of the District of Columbia*, published in 1963.[7] Covering each phase of the bail-setting process, it found that "the one item invariably brought to the committing magistrate's attention—and often the only one—is the amount of bond recommended by the Assistant United States Attorney." This recommendation was accorded "very great weight." Minimum bail for a felony was $1000, even where the charge was minor, no violence was involved, the defendant had roots in the community, and "no reason appears to doubt that the defendant will appear as required." Interviews with prosecutors showed them to base recommendations mainly on the prior convictions of a defendant and his alleged offense; family ties were deemed unimportant, while length of residence, property ownership, employment and probation record were considered potentially significant but usually unavailable. Interviews with bondsmen, in contrast, showed that the commercial decision to put up bond for a defendant hinged on his ties to local employment, residence and family. A canvass of defense attorneys revealed the widely-held belief that an accused's jailing hampered preparation of an adequate defense and adversely affected the outcome of his trial. Reasons included inability of the accused to locate witnesses, greater pressure to waive a jury in order to secure an earlier trial, and the adverse effect on a jury of seeing the accused enter the courtroom from the cellblock, escorted by a marshal. Finally, a study of detention facilities showed that pretrial prisoners comprised 30 to 40% of the District Jail population; that 84% of these

[7] Hereafter cited as the D. C. Bail Study. The Junior Bar report, prepared by a committee under the chairmanship of James A. Belson, was submitted to the D. C. Circuit Judicial Conference on May 9, 1963.

had bail set but had been unable to post it; that the average detention period lasted 51 days and cost $200 per defendant; that pretrial detention cost $500,000 in 1962; and that pretrial jail conditions were at least as severe as confinement after sentence. The study recommended creation of a fact-finding project. Under the leadership of Circuit Judge John A. Danaher and the Judicial Conference Committee on Bail Problems, such a project was launched in the United States District Court for the District of Columbia in late 1963, modelled after the Manhattan Bail Project.

E. *The Federal System*

Bail practices in federal courts were carefully reviewed in the 1963 *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice.*[8] The Committee found that virtually the only facts considered in initial bail decisions by United States commissioners were the charge against the defendant and the circumstances of the alleged offense, as communicated by the prosecuting attorney. Most bail for indigent defendants was set without the presence of counsel, and there were usually no "investigative or fact-finding mechanisms available to commissioner or judge to secure reliable information relevant to the bail decision." A four-district survey showed that 23% of defendants could not make bail in the District of Connecticut, 43% in the Northern District of Illinois, 58% in San Francisco and 83% in Sacramento. In addition, those detained prior to trial pleaded guilty more often than those free on bail, secured less frequent acquittals and dismissals, and were more likely to receive prison sentences than probation. The Committee concluded that:

> The bail system administered in the federal courts, relying primarily on financial inducements to secure the presence of the accused at the trial, results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of non-appearance by accused persons.

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[8] Hereafter cited as the Attorney General's Committee Report.

As part of a "rational system of pretrial release in the federal courts," the Committee, under the chairmanship of Professor Francis A. Allen, recommended (1) increased use of the summons in cases where "the arrest is not required to protect the proper functioning of the criminal process", (2) institution of bail fact-finding investigations by an expanded Federal Probation Service, (3) announcement by the Department of Justice of a policy favoring the pre-trial release of arrested persons, to be implemented by the recommendations of United States Attorneys for greater use of release on the accused's personal recognizance, (4) the use of nonmonetary inducements, such as pretrial supervision by probation officers, and (5) authorization for the posting of cash or property of a value less than the bail amount, refundable upon the defendant's appearance at trial.

F. *The National Pattern*

A review of the bail reports on Chicago, Philadelphia, New York, Washington and the federal courts shows that neither time nor location has altered the face of the system: the patterns revealed by Beeley's study of Chicago in 1927 remain largely unchanged today in other great metropolitan areas. Surveys conducted within the past year by the National Bail Conference staff and others confirm a similar picture in smaller communities as well. The theory that bail serves solely to insure appearance for trial may be universally expounded by appellate courts, but the practice of trial courts tells quite another story. Committing magistrates usually know only the charge against the defendant, and perhaps his police record. The recommendations of prosecutors, though accorded great weight, are based on little if any additional information. In many localities, the police, prosecutor and judge simply adhere to a fixed schedule geared to the nature of the offense. As a rule, little or no inquiry or allowance is made for individual differences between defendants based on their likelihood to appear at trial.

One of the most prevalent forms of mechanical bail setting is known as station house bail. Designed to assure appearance at the preliminary hearing or arraignment, it is typically posted at the police precinct station. The District of Colum-

bia Code, for example, allows bail to be posted at the police station immediately upon arrest, in accordance with a schedule approved by the Court of General Sessions.[9] The schedule authorizes police officers to set bail only at the figure stipulated, e.g., simple assault, $500; attempted robbery, $3,000; robbery, $5,000.[10] In Dayton, Ohio, station house bail for simple assault is only $25; and for most misdemeanors is less than $100.[11] In New York, on the other hand, station house bail for most misdemeanors is $500; in San Francisco in 1959, bail for petty theft was $50; across the bay in Oakland it was $200; in Atlanta it is $500 for shoplifting and $100 for assault; in Illinois it is $200 for most misdemeanors.[12] A variation is found in cities like Birmingham, Tucson, and St. Louis, and in some federal districts, where the required amount of bail is endorsed on the arrest warrant so that the defendant and his bondsman can appear at the police station, or before the magistrate, post bail and gain immediate freedom.[13]

Station house bail has the virtue of enabling an arrested defendant with means to secure immediate release. It spares him the degrading experience, recently reported in Toronto, of a respected union president, father of three children, who spent 14 hours in a cell, slept on a "steel sheet," was subjected to abuse, transferred "handcuffed" to a second jail for a breakfast of cold pea soup, refused permission to make more than one phone call to his wife who was not home when he first called, and all the time had $100 in his pocket. His arrest

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[9] 23 D. C. Code §610.

[10] D. C. Court of General Sessions Criminal Division Bond Schedule (1963).

[11] Dayton Police interview.

[12] N. Y. Code Crim. Proc. §554; Treuhaft, Abolition of Bail in Misdemeanor Cases, 19 Law Guild Rev. 55, 57 (1959); *Springfield, Ill. State Register*, Jan. 23, 1964. Where not otherwise specified, most of the data on bail practices in particular communities cited throughout this volume were gathered through surveys conducted for the National Conference on Bail and Criminal Justice.

[13] *Philadelphia Inquirer*, October 22, 1963 ($100,000 bail fixed by U. S. Commissioner in advance of arrest of Cosa Nostra defendant).

was for a driving offense, for which he was ultimately fined $50, but no magistrate was available in all of Toronto to take his bail between Saturday night and Sunday afternoon.[14] Station house bail, however, raises problems of fairness. Set automatically on the basis of the offense, it bypasses any effort to determine the accused's likelihood to return and discriminates most forcefully against defendants without money. It can be changed by the court at arraignment, but the tendency is to retain the same amount.

The promptness with which bail hearings are held is vital to arrested persons. Yet in some places, bail may not be set by a judge until several days after arrest, e.g., California, 48 hours; Birmingham, up to 3 days; Denver, 2-7 days; St. Louis, 3-5 days; Jackson, Mississippi, 3-10 days.[15] In Passaic, New Jersey bail for some offenses will be set only upon application of the defendant; if unrepresented by counsel, he may be ignorant of his right or not know how to implement it.

Other jurisdictions provide immediate judicial determinations of bail. Night Court operates until midnight in New York City for misdemeanors; Philadelphia permits release on a "copy of the charge" signed by a magistrate at his home;[16] magistrates are available at some precinct stations at night to fix bail in Illinois;[17] and Boston police stations provide a list of bail commissioners who may be called by defendants at any time.

In smaller communities, information about defendants is usually readily accessible and easy to verify. As a result, bail might logically be expected to be set on an individualized basis, according to the accused's standing in the community. This was found to be the case, for instance, in Cranbury, New Jersey, in Torrington, Connecticut and in Long Beach, New York. But in Marshalltown, Iowa, a town of less than 25,000, a survey indicated that no attempt is made initially to assess the defendant's roots in the community, and 75% of a small sample of arrested offenders were detained before trial.

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[14] Haggart, "A Weekend of Abuse," *Toronto Star.*

[15] Bail surveys and CBS Los Angeles interview, Dec. 26, 1963.

[16] Philadelphia Bail Study, p. 1044.

[17] *Champaign-Urbana News Gazette,* Jan. 9, 1964.

In Baltimore, a Municipal judge was recently reported to have announced the first revision in the court's bail schedule in 25 years to meet "inflation." [18] Deviations were to be authorized only on specific recommendation by the state's attorney. All bails were increased, usually doubled, and for some offenses the increase was sevenfold, e.g. from $500 to $3500 for assault on a policeman. Although 75% of all accused persons in Baltimore were reportedly being detained for failure to raise bail,[19] the judge was said to believe that hardship cases would be the exception.

All available studies confirm two dominant characteristics in the national bail pattern: In a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot, stay in jail. To examine the price paid for freedom, and the services rendered in return, we turn to the role of the bondsman.

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[18] *Baltimore Sun*, February 18, 1964.

[19] Porter, Bail System Needs Reform, *Washington Evening Star*, Nov. 21, 1963.

Chapter III

THE ROLE OF THE BONDSMAN

A study conducted by the United Nations recently disclosed that the United States and the Philippines are the only countries to allot a significant role to professional bail bondsmen in their systems of criminal justice. Commercial bondsmen emerged in this country to meet the needs of accused persons whose right to bail would otherwise be thwarted by the lack of a personal surety, real estate or adequate cash. For the vast numbers of defendants unable to raise the bail amount themselves, the bondsman is on tap 24 hours a day to secure their freedom for a price. It is the bondsman to whom courts turn if the defendant fails to appear, and who is supposed to go to great lengths to apprehend an escapee to avoid forfeiture of his bond. As a bailor, he enjoys a private power to arrest his bailee.[1] He can even surrender him to the court before trial if he suspects that flight is imminent. The bondsman notifies the accused of the trial date and personally accompanies him to court. The profit motive is presumed to insure diligent attention to his custodial obligations.

A New York judge described the bondsman's role as follows:

> There is a general misconception . . . that solicitation of business by bondsmen is illegal. It is entirely lawful—just as lawful as solicitation by life insurance agents. And the solicitation under the law may take place in the courthouses, police stations and places of detention.
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> It is even necessary and desirable that this should be so—under proper regulation. Otherwise the casual offender, the inexperienced offender, the offender charged with minor crimes, would be confined in jail while the professional criminal with his outside contacts, experienced little difficulty in arranging bail. In this Court, even after the cases have been examined below, I have found many defendants ignorant of the fact that bail has been fixed by the

[1] *Taylor* v. *Taintor*, 83 U.S. 366, 371 (1872).

> magistrate, ignorant of the amount of bail fixed and the method and cost of obtaining release on bail. And it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself in that predicament. It is most desirable that this class of offender should be solicited and bailed.[2]

A. *Bail Bond Costs*

Since its inception, the institution of commercial bail has enjoyed a hybrid status, somewhere between a free enterprise and a public utility. Some states regulate the premiums bondsmen may charge; others allow whatever the traffic will bear. Some regulate only insurance surety company bonds; others control the fees charged by individual bondsmen as well.[3]

Premium rates differ markedly throughout the country. New York bondsmen charge 5% on the first $1,000, 4% on the second $1,000, and 3% on the balance.[4] Philadelphia bondsmen charge 8% plus a service charge, but in the rest of Pennsylvania the rate is 10% on the first $100, and 5% on the balance. Baltimore's rate is 7% up to $2,000, and 6% thereafter; while in New Jersey it is 10% on the first $2,500, then 6%. Des Moines' rate is 5%;[5] Boston's is 10% across the board without collateral, 5% with. The District of Columbia allows 8% on the first $1,000 and 5% on the rest. The standard premium rate in the United States seems to be 10%, known to prevail in Atlanta, Cincinnati, Detroit, Denver, St. Louis, Illinois, California, and most federal courts. Rates as high as 12% have been reported in Wisconsin[6] and

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[2] *People* v. *Smith*, 196 Misc. 304, 307, 91 N.Y.S.2d 470, 494 (1949) (Sobel, *J.*).

[3] Regulation of bondsmen is discussed in part I, *infra*.

[4] Except as indicated otherwise, data on premium rates in this section come from bail surveys conducted in the listed cities and interviews with bondsmen.

[5] *Des Moines Register*, Pretrial Liberty Without Bond, October 31 and November 1, 1962.

[6] *Milwaukee Journal*, March 13, 1964.

20% on some offenses in Birmingham. Within the legal maximums, however, bondsmen frequently bargain for special rates, particularly in high volume, low risk offenses like gambling.[7] Disputes between bondsmen over price cutting are not uncommon.[8] Neither are allegations of illegal overcharging.[9]

Premium rates do not tell the whole story on the cost of commercial bail. Service charges are added in many jurisdictions. Bondsmen in Baltimore charge a minimum fee of $25 no matter how small the bond, and in California a standard $10 fee is added to the premium.

In some states, bonds written at the time of arrest must guarantee the presence of the accused until the case is finally disposed of by the trial court.[10] In every state, a new bond may be required on appeal. In some places, a defendant may be forced to pay premiums on four different bonds in the course of a criminal proceeding: from arrest to preliminary hearing, preliminary hearing to indictment, indictment to trial, and verdict to appeal. In such cases, the defendant may be amenable to a "deal" for a single bond at a higher premium rate to carry him through the case. The bondsman's legal right to cancel a bond (and keep the premium) any time he surrenders the defendant to court may sometimes be used as a lever to collect additional fees just to keep the original bond in force.[11]

B. *Bonds on Credit*

Most bondsmen write bonds on credit, or allow premiums to be paid on an installment basis. Where the risk is low, and the defendant apparently has funds, bondsmen feel that it is

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[7] *E.g.*, Baltimore, Washington, D. C. and New York.

[8] *Rocky Mountain News*, Feb. 20, 1964; *Des Moines Register*, March 2, 1963.

[9] *E.g.*, *Milwaukee Journal*, July 1, 1963; Philadelphia; Cincinnati.

[10] *E.g.*, Ill. Code Crim. Proc. §110-10 (1964).

[11] *Des Moines Register*, Pretrial Liberty Without Bond, October 31 and November 1, 1962. Wisconsin is about to require bondsmen to refund premiums to defendants whose bail is reduced. *Milwaukee Journal*, Apr. 30, 1964.

more profitable to take the business, even if there is only a partial payment. In addition, bonds are sometimes written on credit to accommodate lawyers who are a vital source of business. One Chicago bondsman estimated that 75% of his bonds were issued on credit;[12] another in Greenville, South Carolina, gave a 90% figure. Boston bondsmen are occasionally requested by courts to take "charity" cases,[13] and Worcester, Massachusetts bondsmen are reported to take non-paying clients in the hopes of future paying business. Credit practices are unsystematized, and vary from bondsman to bondsman. Reports from some cities indicate that some defendants who owe bondsmen money commit further crimes, especially burglaries, to pay bond premiums.[14]

C. *The Surety Company*

Most bondsmen are backed by surety companies. These companies are licensed under state insurance laws, which require them to maintain funds sufficient to satisfy all forfeitures. Either by statute, court rule or practice, it is common to find that only bonds backed by surety companies will be accepted by the courts. This insures that payment of forfeitures will not depend on the financial condition of the individual bondsman.

But surety companies for the most part have been extremely successful in avoiding losses. In addition to the 2% which each company receives out of every bond written by its agents, the company extracts an additional ½% or 1% of the bond premium to be placed in a "build-up fund." The fund is drawn upon whenever a forfeiture occurs, and the amount each agent has in his build-up fund determines the amount of bonds he may write. If a forfeiture exceeds the build-up fund, the company takes the balance out of future premiums. This system enables the surety company to do a large business with little risk. Examination of one New York

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[12] *Chicago Tribune*, Aug. 19, 1963.

[13] *New York Times*, July 15, 1961.

[14] *E.g.*, *Rock Island Illinois Argus*, July 18, 1963; *Philadelphia Sunday Bulletin*, Aug. 8, 1963; Denver, Colo. and Greenville, S. C. bail surveys.

company's books showed that from 1956 to 1958 it wrote bonds in the face amount of $70,000,000, received $1,400,000 in surety premiums, and suffered no losses.

Surety companies assign the management of their bail bond business to general agents, who take charge of different geographical areas. The general agent controls the amount of bonds written by bondsman agents in two ways. First, state statutes or court rules frequently require each bondsman to fill out a power of attorney from his surety company to show authorization for each bond he writes; the general agent may limit issuance of these powers. New ones are usually issued only as outstanding powers of attorney are disposed of through termination of the bail obligation, although it is not uncommon for a large number of powers to be outstanding simultaneously. Secondly, most companies limit the agent's discretion in writing large bonds, and require specific authorization before each one is issued. Depending upon the company and the agent, a large bond may be one which exceeds $1,000; certainly most bonds over $5,000 require approval from the general agent.

D. *Collateral*

To hedge against inadequate premiums and the ever present threat of forfeiture, many bondsmen require a defendant or his relatives to furnish collateral equal to all or part of the bond. Because collateral and indemnity agreements are usually not regulated by statute, the bondsman may "insist on the deed to the home of the accused or require a relative to put up his home or act as co-signer before posting bond." [15] In cities like Baltimore, Chicago and Detroit, bondsmen attempt to secure full collateral, reportedly because of strict forfeiture enforcement policies.[16] In Nassau County, New York, one bondsman reported that "the indemnifiers mean everything, the defendant nothing." Washington, D. C. bondsmen ordinarily do not require collateral, but decide on a case by case basis. The criterion used by one New York bondsman

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[15] *Des Moines Register*, October 31 and November 1, 1962.

[16] Detroit reports no uncollected forfeitures since 1931. 1961 Annual Report, Detroit Recorders Court.

is: "If a person comes in and I don't know him or his lawyer, we look for collateral; if they don't have it, we don't bother with them." [17]

The amount of security which the bondsman is able to obtain from accused persons varies. 100% collateral is rarely obtainable, and is required only in cases the bondsman considers to be very bad risks, such as narcotics, or where the bond is unusually large. Some efforts to obtain collateral serve not to assure indemnification against monetary loss, but as a psychological deterrent to flight by the accused. A D. C. bondsman has even taken a lap dog as collateral. A story current among bondsmen in Florida is that one of their number used to carry a collateral box in which he collected items of sentimental value, such as wedding rings, or of practical value, such as false teeth. On one occasion he is supposed to have kept the child of the accused.

A report by the Criminal Court Committee of the Association of the Bar of the City of New York, entitled *Bail or Jail,* recently summed up the importance of collateral in the bail system as follows:

> The ultimate decision as to detention is therefore left with the bondsman—not by virtue of the legally fixed premium, but through an unfettered decision as to the amount of collateral he will demand. It has even been intimated that hostile action by the Judges or others, particularly with respect to the vacating of forfeitures and stricter supervision of bondsmen, might result in their refusal to write bonds, a strike which under today's statutory scheme would have a genuinely chaotic effect upon the City prisons in very short order.[18]

Bondsmen "strikes" were in fact reported in Brooklyn and New York City in 1961 and 1964, taking the form of actual or threatened concerted refusals to write bonds except on 100% collateral in bankbooks or real estate.[19] The 1961

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[17] *New York Times,* December 22, 1961.

[18] 19 *The Record* 11, 13 (Jan. 1964) (hereafter cited as New York City Bar Report).

[19] *New York Times,* December 22, 1961 and January 21, 1964.

strike resulted in overcrowding the city's detention facilities and jailing numerous minor offenders for want of small bonds, on which collateral is not usually required. Both strikes were said to be in retaliation for tighter enforcement policies on forfeitures instituted by "uncooperative" district attorneys.

E. *Forfeitures*

The alleged connection between collateral demands and enforcement policies on bond forfeitures is traceable to the fact that a bondsman who fails to produce his bailee on the appointed date is liable for the amount of the bond. In practice, automatic enforcement of such liability is rare. In most jurisdictions, bondsmen have a "reasonable" arrangement with the court or prosecutor for relief from liability if the accused is returned to custody within 30 days. The period of "grace" in Florida is 10 days; in Pennsylvania—21 days; under the new Illinois bail law—30 days; and in New Jersey a 90-day extension is "customary."[20] Bondsmen in Des Moines have 70 days in which to vacate any forfeitures.[21] Even after forfeiture, the bail amount may be remitted upon producing the defaulter, e.g. up to two years in Florida, three years in Illinois and four years in New Jersey.[22]

The grace privilege is occasionally abused. A New York City report found that some defaults were intentionally planned in order to avoid or secure particular judges. "They walk into the courtroom, see who the judge is and walk out again."[23] In Buncombe County, N. C., the failure of an estimated 40% of defendants to appear was attributed to the periodic rotation of "tough and easy judges."[24]

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[20] *New York Times*, January 17, 1964; *Springfield, Illinois Star Reporter*, January 23, 1964.

[21] *Des Moines Register*, Pre-Trial Liberty Without Bond, October 31 and November 1, 1962.

[22] *Chicago Tribune*, August 19, 1963.

[23] *New York Mirror*, December 22, 1961.

[24] Asheville, North Carolina, bail survey.

The overall rate of default among bailed defendants is not high. The Surety Association of America reports that losses from bond forfeitures among all companies are less than 2.4%.[25] Although no comprehensive studies have been made into the magnitude of the risk that bondsmen take, the following figures from recent bail surveys may be indicative. Bond forfeitures in the district court in Des Moines come to six a year, and in its municipal court, one or two. Denver's criminal court had 9 forfeitures in 1961. A Birmingham, Alabama study estimated a 10% default rate. Over a five-year period Detroit had 131 forfeitures out of 21,260 bonds, or .6%; Minneapolis forfeited bonds "2 or 3 times" in 12 years and Schenectady once in 11 years. The rate in New York in 1960, for both bail and parole cases, was 101 out of 1395, or 4%.[26]

Perhaps the most careful study was made in Philadelphia, whose forfeiture rate in 1950 was 264 out of 10,749 bonds, or 2½%. Most of the forfeitures were found to be for minor violations like gambling, liquor or traffic violations; very few were for defendants charged with serious crimes. Two significant conclusions reached by the study were that (1) a comparison between cities with lax and strict enforcement policies showed many fewer defaults in appearances in strict jurisdictions; and (2) that the forfeiture rate on commercial bail was more than double that on privately supplied bail.[27]

Turning to the federal courts, the Eastern District of Michigan reported 8 defaults among 553 defendants released on personal and surety bonds in 1962. Bondsmen in the District of Columbia reported bail jumping in "a very small proportion" of cases, and forfeitures were usually vacated in whole or in part. The four-district survey conducted by the Attorney General's Committee found that the number of failures to appear at any stage in the proceedings ranged from 1 to 7%, including both technical defaults and intentional flight to avoid trial. In the Committee's view, "these

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[25] *Milwaukee Journal*, March 11, 1964.

[26] The Manhattan Bail Project: An Interim Report, 38 N. Y. U. L. Rev. 67, 82 (1963).

[27] Philadelphia Bail Study, pp. 1060-64.

'failure' figures may be thought to raise a question whether pretrial liberty involves a substantial practical enforcement problem." [28]

Collection of forfeited bonds has often been found lax or tinged with scandal. In the 3-year period from 1956-59, the Municipal Court of Chicago recorded only one forfeiture payment, of $5,955.[29] A 1960 investigation disclosed that $300,000 in forfeitures had been set aside by one judge. Their reinstatement caused five bonding companies to go out of business.[30] A 1962 investigation in Cleveland disclosed an estimated loss to the city of $25,000 from failure to collect personal bonds.[31] Milwaukee discovered an $18,000 loss.[32] Bond collections may also be thwarted by companies inadequately financed to pay up when the time comes. North Carolina has lost an estimated $10,000,000 in uncollected forfeitures over the last ten years from small surety companies gone bankrupt. Philadelphia's collection rate in 1950 was only 20% on forfeited and unremitted bonds. A recent crackdown in Houston produced $70,000 on "bad bonds" in less than a year.[33]

F. *Recaptures*

The relatively low default rate has been attributed by some to the bondsman's deterrent influence in preventing flight. In the words of one Nebraska official:

> . . . personal bondsmen in our country are a very aggressive group and relentlessly pursue the defendant who skips bail on which they have surety and bring them back in very many instances. We have had examples where they have gone out of the country in order to effect the production of a person who has skipped bail. This hard attitude on the part of

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[28] Attorney General's Committee Report, pp. 129-30, Table VI.

[29] Statement of Carl M. Chatters, Comptroller of Chicago, cited in Wexler, First Report of *Amicus Curiae* on investigation of bond forfeitures in Municipal Court of Chicago (April 8, 1959).

[30] *Chicago Sun Times*, February 2, 1960; April 28, 1960.

[31] *Cleveland Plain Dealer*, March 3, 1962.

[32] *Milwaukee Sentinel*, July 2, 1963.

[33] *Houston Press*, July 21 and September 3, 1963.

> some of these sureties has put the fear of God into a lot of defendants who know what to expect in the event that they skip bail; so we do not have any particular problem in this regard.[34]

Other sources, however, doubt that bondsmen are any better able to locate and return fugitives than are law enforcement officials with their communications networks, interstate cooperation arrangements and scientific apparatus.[35] Bondsmen have been known to take advantage of these official facilities to track down their own fleeing clients.[36] Bondsmen have occasionally abused their arrest powers by impersonating police or federal enforcement officials in making such arrests, or by brandishing pistols to recover defaulters or

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[34] Quoted in Philadelphia Bail Study, p. 1067. Bondsmeu and sheriffs in Illinois object to the 10% cash deposit system on the ground that it will cost $500 to bring back someone who deposited only $300 to begin with. Some predict that Illinois' new cash deposit statute will cause forfeitures to increase four to five times over their present rate. *Chicago Tribune*, August 19, 1963; *Peoria, Illinois Journal Star*, January 27, 1964.

[35] Philadelphia Bail Study 1065-66; *cf. Chicago Heights, Illinois Star*, August 22, 1963 Editorial:

> Opposition to the new law came chiefly from the professional bondsmen. They argued that they have a special ability and incentive to shepherd potential bond jumpers into court, in order to protect their investment.
>
> There arises the suspicion that their methods of persuasion can be something other than a gentle art.
>
> Apprehending suspects who skip their bond is a job for policemen. Law enforcement authorities able to track down offenders in the first place should be no less able than bondsmen to recapture those who fail to appear in court.
>
> In addition, it is intolerable to perpetuate an unwholesome situation simply because the objective of professional bondsmen sometimes coincides with that of the law.

[36] See, *e.g., Bristol, Va. Virginian-Tennessean*, March 28, 1964 (bondsman got capias from local court; FBI caught fugitive and put him in Orlando jail; county parole officer accompanied bondsman to Florida to bring fugitive back); *Baltimore Evening Sun*, April 28, 1964 (bondsman paid two Baltimore detectives to arrest and bring back a client who fled to California).

ascertain their whereabouts.[37] Although it is the bondsman's duty to keep track of the defendant, most bondsmen rely on an occasional phone call, letter or "grapevine" rumor. Personal acquaintanceship is seldom involved. Considering the rarity of defaults, it would not be worth the bondsman's expense to maintain close surveillance on all clients.[38]

G. *Refusals to Deal*

As independent businessmen, bondsmen are free to reject prospective clients for any reason, without regard to the consequences to the accused. A recent concurring opinion by Circuit Judge J. Skelly Wright commented on this situation in the District of Columbia:

> Certainly the professional bondsman system as used in this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[39]

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[37] See *Kansas City Times*, December 7, 1963; *United States* v. *Trunko*, 189 F. Supp. 559 (E. D. Ark. 1960); *Toledo, Ohio Blade*, June 21, 1963 (bondsmen impersonate FBI and use guns to hold pair captive to question them about clients' whereabouts). A forthcoming Yale Law Journal note challenges the bondsman's unregulated right of arrest as being in conflict with Uniform Extradition Act procedures.

[38] Philadelphia Bail Study, 1065; 70 Yale L.J. 972; D. C. Bail Report, p. 13. Many individual bondsmen, however, claim to have lost substantial amounts because of forfeitures. September 20, 1962 *N. Y. Times* ($60,000 in 10 years); Breslin, Best Bet for Bail: A Good Crook, *Life*, March 24, 1963 ($40.000 in one year). *Cf. St. Petersburg Times*, March 2, 1964 (bondsmen estimate 2½-5% "jump").

[39] *Pannell* v. *United States*, 320 F.2d 698, 699 (D. C. Cir. 1963).

Bondsmen often evaluate "good" and "bad" risks on grounds quite similar to judicially approved criteria, e.g., community ties, local residence, family and employment.[40] In New York, Philadelphia and D. C., bondsmen generally avoid narcotics defendants ("they usually don't wake up on time to get to court"), prostitutes ("they have no roots"), forgers ("they travel too much"), scofflaws, and alleged subversives ("bad publicity").[41] Because of the speed with which the bondsman's decision is made, it is often based on pure intuition. Other reasons for rejection illustrate basic defects in the bail system. For example, a "nominal" bail amount may be too small for the bondsman to bother with;[42] and some bondsmen prefer professional criminals, who know the rules, over amateur offenders who may panic.[43] Bondsmen have been charged with conditioning their services on the accused's hiring a particular lawyer, or paying illegal overcharges, or giving favorable treatment to criminal syndicates.[44] On occasion bondsmen have also been charged with denying bail in order to embarrass unpopular judges or prosecutors,[45] and with refusing to post bail for unpopular minority groups.[46]

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[40] D. C. Bail Study, p. 12.

[41] *New York Times,* December 22, 1961; D. C. Bail Study, p. 13; *New York Daily News,* July 12, 1962.

[42] See *People* v. *Smith,* 196 Misc. 304, 307, 91 N.Y.S.2d 490, 494 (1949): "It is most desirable that this class of offender [minor or low bail offender] should be solicited or bailed. Unfortunately, he is not solicited. He is not solicited because his low bail is unprofitable . . . This is a matter of everyday observation and concern to the conscientious judges of our criminal courts."

[43] *Life,* March 24, 1963.

[44] New York City Bar Report, p. 16; Report, Third February 1954 Grand Jury, Gen. Sess. p. 4; Report, March 1947 Grand Jury, Kings County, p. 1; Report, Fifth March 1960 Grand Jury, New York County; *New York Mirror,* December 22, 1961.

[45] See note 19, *supra,* on bondsman strikes against forfeiture policies.

[46] A Philadelphia bail survey reported that some bondsmen shy away from posting bonds for Puerto Ricans. Civil rights demonstrators have reported extraordinary difficulties in finding bondsmen to bail them out in some southern cities. Estimates by individual bondsmen respecting the percentage of cases they reject vary from 5%

H. *Abuses*

The professional bail bond business is plagued by charges of corruption and collusion between bondsmen and court officials, police, lawyers, and organized crime. Regular payoffs by bondsmen to police have sometimes been described as essential to survival in the bonding business.[47] One effect was noted in 1950 by a California committee on organized crime:[48]

> In some instances court orders admitting arrested persons to bail were presented to the police at the moment of their arrival at headquarters with prisoners who had been arrested only a half an hour or less before.

In Pittsburgh, a recent investigation disclosed that certain jail officials get part of every premium written; in another city, it was admitted that desk sergeants get $2.00 per bond, and that policemen are "hired" by bondsmen to arrest defendants who fail to appear. In Illinois, bondsmen were investigated for bribing process servers to avoid immediate arrests of indicted clients.[49]

Since 1939, local courts in and around New York City have conducted four full-scale grand jury investigations of bondsmen;[50] Chicago's 1959 scandal involving collusive vacation of bond forfeitures resulted in the indictment of a municipal

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in Baltimore and Greenville, South Carolina, 25% in Denver, Colorado, Champaign-Urbana, Illinois and Jackson, Mississippi; 45% in Asheville, North Carolina, and 50% in Philadelphia, Elizabeth City, North Carolina and Atlanta, to 60-85% in Birmingham. These figures presumably do not include indigents who cannot raise the money to call a bondsman in the first place.

[47] Florida bondsmen interview.

[48] Special Criminal Study Commission against Organized Crime (California) January 1950.

[49] *Pittsburgh Press*, March 29, 1964; *Chicago American*, November 29, 1963.

[50] Report of March 1947, Grand Jury, Kings County dated March 8, 1948; Report of Special Extraordinary Grand Jury, Kings County, convened Jan. 1939, dated June 1941; Report of 3rd Feb., 1954, Grand Jury, General Sessions; Report of Fifth March, 1960, Grand Jury of General Sessions.

judge;[51] and Cincinnati ran a 1962 investigation into kickbacks by bondsmen to municipal court clerks.[52]

The 1964 New York City Bar Report contains a catalogue of abuses involving bondsmen. These include the "frequent" requirement by the bondsman that a particular attorney be selected to defend the case, coupled with kickbacks by attorneys to bondsmen. Also described is the "revolving door effect, completely divorced from considerations of individual responsibility to the court," under which "the defendant who is part of an organized criminal activity, such as policy," goes free as part of "the smooth operation of the criminal enterprise" (14):

> What happens is that the operator of the policy game as a condition of employment of runners and others will contract for "legal" service, including the release from detention. When an employee is apprehended and brought before the Judge, there appears at his side a bondsman and an attorney, both unknown and unbidden, by the defendant at least. The defendant is granted bail and released and reports back to his employers. So evident is this system that "frequently collectors are back on the street taking bets again a few hours after being arrested. Not only is the inconvenience to the collector minimized, but also there was hardly any interruption of his service on behalf of the controller. . . ."
>
> The security for the bondsman in this situation is not the undertaking of the defendant or a member of his family that the accused will appear on time, but rather the understanding reached between controller or the operator of the policy ring and the bondsman. In the event of a forfeiture resulting from the failure of the defendant to appear, the bondsman will turn, not to the defendant, unless such a recovery is immediate and easy, but rather to the organizer of the criminal activity.[53]

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[51] *Chicago Sun Times,* February 2 and April 28, 1960.

[52] *Cincinnati Inquirer,* January 1962 series.

[53] See also May 1960 Report County Grand Jury of the Circuit Court of Jackson County, Missouri (interstate criminals were able to raise $200,000 in bonds locally within a matter of hours).

I. *Regulation*

Regulation of the bail bond business varies widely among states. Present rules governing surety companies and professional bondsmen fall into two categories: (1) those that seek to protect the state against loss due to uncollectible forfeitures, and (2) those that attempt to regulate the practices of bondsmen.

1. *Finances*

In most states, and especially in large metropolitan areas the bail bond business is dominated by surety companies, which back the bonds written by their bondsmen-agents. As a rule, these companies are regulated as part of the insurance business: they are subject to the jurisdiction of insurance commissions, and must abide by rate and solvency regulations. Rate changes must be approved, minimum cash reserves maintained and periodic financial statements submitted.[54] The federal scheme is similar, and a certificate of authority is required to write bonds in federal court.[55]

Individual bondsmen may or may not be affiliated with a surety company. Some states treat the bondsman the same as the surety company. He must be licensed, maintain records and meet solvency standards.[56] At the other extreme are states that do not impose any regulation on bondsmen, even where they are unaffiliated with a company. In these, the bondsman need only satisfy the court in which he operates that he is solvent.[57]

The unbacked bondsman may create difficult collection problems when a bond is forfeited. To guard against loss, some jurisdictions require all forfeitures to be paid before any new bonds are written.[58] Others grant considerable

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[54] E.g., 40 Penn. Stat. §831 *et seq.*

[55] 31 CFR §221 *et seq.*

[56] E.g., Chapter I, Rules and Regulations on Bail, Bondsmen and Runners, State of Florida Insurance Commission, §5-1.01.

[57] E.g., 56 Iowa Code §763.11-.13; *Des Moines Register*, Oct. 31, 1962.

[58] Interview with D. C. bondsman.

leeway.[59] New York has eliminated the problem of uncollectible forfeitures by requiring that all professional bondsmen be backed by surety companies.[60]

Apart from statutory regulation of bondsmen, the surety companies themselves attempt to limit their bondsmen, both as to volume of business and the amount of particular bonds. Some surety officials consider such supervision necessary to guard against bondsmen who post their own collateral, and thereby avoid paying any premium to the company, or who alter power of attorney forms submitted to the company, making it appear that a smaller bond carrying a smaller premium was written. A company cannot overregulate, however, or its bondsmen may switch to a competitor.

2. *Competitive Practices*

Attempts by state or local regulation to eliminate bondsman abuses are even more disparate. In most states, regulation is non-existent; in a few, comprehensive legislation has been enacted.[61] The prototype is the Uniform Bail Bond Act, adopted by the National Association of Insurance Commissioners in December 1962. It requires all bondsmen and their employees to be licensed. Licensing must be preceded by service of an apprenticeship and satisfactory performance on a state examination. Applicants must prove good character, be fingerprinted and photographed. They must agree to keep their records public and remain solvent. Bond rates are prescribed, and only reasonable collateral may be obtained. Most of the common abuses are explicitly prohibited: fees paid to public officials, rebates to attorneys, solicitation in court rooms, and filing false papers with courts. State insurance department inspectors police the bondsmen, and

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[59] Interview with Florida bondsman.

[60] New York Code Crim. Proc. §554(b).

[61] California Insurance Code §1800 *et seq.*; Florida Code §903.01 *et seq.*; 38 Illinois Code §619 *et seq.*; 9 Indiana Stat. §3701 *et seq.*; New York Insurance Law §331. Similar legislation was reportedly passed in 1963 in Colorado, cf. *The Denver Post*, Feb. 28, 1964. See also D. C. Code §23-601-612 (1961).

the commissioner is authorized to suspend or revoke licenses. Violation of any provision of the act is a misdemeanor.[62]

The Uniform Bail Bond Act represents a salutary effort on the part of participating states to deal with abuses by unscrupulous bondsmen. But at least two state legislatures have considered and rejected it.[63] And even where passed, abuses have not disappeared.[64] The question remains whether the apathy and collusion which have plagued municipal and court regulation,[65] will now be replaced by effective enforcement by states.

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[62] The constitutionality of this legislation is being challenged by bondsmen. *The Denver Post,* April 25, 1964.

[63] *Columbus Citizens-Journal,* June 21, and July 4, 1963; *Milwaukee Journal,* March 13, 1964; *Milwaukee Sentinel,* July 4, 1963.

[64] See e.g., *Denver Post,* Feb. 18, 20, 1964 and April 18, 1964; *Rocky Mountain News,* Feb. 20, 1964 (State Insurance Commissioner resigns after failure to take action against bondsmen who gave gifts to court employees in alleged violation of statute).

[65] See e.g., *Pittsburgh Press,* March 29, 1964 (Internal Revenue Service investigation into kickbacks by bondsmen to police and prison guards); *Indianapolis Star,* August 29, 1960 (Ohio general agent found to have criminal background and convicted for FBI impersonation and false arrest); *Kansas City Times,* April 20, 1963; *Akron Beacon Journal,* August 4, 1963; *Toledo Times,* February 19, 1964 (anti-soliciting regulations proposed to curb abuses).

Chapter IV

THE COSTS OF DETENTION

Those who cannot afford a bondsman generally go to jail. They lose their freedom not on any rational criteria for separating good risks from bad, but because they are unable to raise a cash premium as low as $25 or $50, or to furnish the required collateral. A resolution adopted by the National Association of Attorneys General on July 3, 1963 declared:[1]

> Many persons accused of crime are incarcerated for various periods of time because of their inability to post bail, although often not indicted for the crime or later found not guilty after trial, resulting in loss of liberty, separation from families and loss of employment as well as expense to the state in the cost of confinement (and) relief for dependents . . .

These costs of pretrial imprisonment in the United States, in terms of time, money, human suffering and justice are staggering.

A. *Days and Dollars*

In fiscal year 1960, 23,811 persons accused of federal offenses were held in custody pending trial. The average length of their detention was 25.3 days.[2] Detention ranged from a low average of 2 days in some districts to a high average of 110 days in others.[3] In 1963 federal detainees spent an estimated 600,000 jail days in local prisons, at a cost to the

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[1] Similar resolutions were adopted by the American Bar Association on August 15, 1963, The National Legal Aid and Defender Association on October 25, 1963 and the National District Attorneys' Association on March 5, 1964.

[2] Advisory Committee's Note to Rule 46, Second Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure (1964).

[3] Survey of United States Attorneys (1964); Attorney General's Committee Report p. 65.

federal government of $2 million.[4] In the same year, 30 to 40% of the inmates of the District of Columbia jail were detainees awaiting trial or sentence; 84% were eligible for release on bond but couldn't raise it. In 1962, they averaged 51 days in jail at a cost of $200 per defendant for a total of almost $500,000.[5] In Philadelphia in 1954, the average was 33 days in jail for a total of 131,683 jail days. Today, ten years later, detainees account for 20% of Philadelphia's jail population and average 26 days at a cost of $4.25 per day or $1,300,000 a year.[6] In Los Angeles pretrial detainees average 78 days before disposition of their cases. On a single day in December 1963, there were 1300 such prisoners in the Los Angeles County jail.[7] On September 30, 1963, 1286 of 2057 Cook County jail inmates were awaiting trial.[8] Denver jails ⅓ to ½ of accused persons, whose period of detention from arrest to trial may be eight months.[9] 79% of St. Louis defendants, or 900 per year, cannot raise bail; each detainee averages a six weeks' stay and costs the taxpayer $2.56 for each day in jail.[10] Approximately 75% of the defendants in Baltimore are detained,[11] while ABA sample surveys of 1962 felony cases show 71% detained in Miami, 57% in San Francisco, 54% in Boston, 48% in Detroit and 44% in New Orleans. A recent Cleveland survey showed that 400 defendants were

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[4] Letter from John J. Galvin, Ass't Director of Bureau of Prisons to Mr. Herbert Sturz, November 6, 1963.

[5] District of Columbia Bail Study, p. 29.

[6] Philadelphia Bail Study, p. 1059: Defender Association of Philadelphia, Proposal for the Establisbment of a Pre-trial Release Court Serviee Program in Philadelphia (1964).

[7] Statement of Los Angeles County Supervisor Kenneth Hahn to CBS Correspondent Charles Kuralt. In Orange County, California, detention prisoners eonstitute 60% of the jail population, while in Oakland, 358 out of 587 prisoners, or 61%, were being detained for want of bail in March 1963.

[8] *Chicago Daily News,* Oct. 28, 1963.

[9] Denver Bail Survey.

[10] Schultz, Bail for the "Have Nots": The Recognizance Program of the St. Louis Circuit Court for Criminal Causes (1963).

[11] Sylvia Porter—Bail System Needs Reform, *Washington Evening Star,* Nov. 11, 1963.

detained in the local jail awaiting trial, and stayed there for periods of between six weeks and six months.[12]

Smaller communities show considerably lower percentages of detained defendants but often longer periods of detention. For instance, 31% or 342 out of 1086 grand jury defendants in Passaic, New Jersey in 1961 were detained an average of 4 months in jail if indicted; 4 to 5 weeks in jail if no indictment was returned. In Essex County, New Jersey, 71% are detained for a 54 day average.[13] In upstate New York, detainees may spend months awaiting action by grand juries, which meet only 3 or 4 times a year.[14] In Pennsylvania, a defendant accused of driving without a license, and unable to raise a $300 bond, recently spent 54 days in jail awaiting trial, even though the offense carried a maximum penalty of 5 days.[15]

The most complete figures on the costs of detention for want of bail come from New York City. In 1962, 58,458 persons spent an average of 30 days apiece in pretrial detention, or a total of 1,775,778 jail days, at a cost to the city of $6.25 per day, or over $10,000,000 per year.[16] In 1961 detainees accounted for 45% of the 9,406 daily census of city prisoners. The Women's House of Detention, 40% of whose present inmates are held for want of bail, is so overcrowded that a new $24,000,000 detention facility is being planned. Women are confined there an average of 13 days prior to trial; one out of four is ultimately acquitted. The 58,458 figure also includes 12,955 adolescents in the 16-21 age group who, in 1962, spent 396,025 days in pretrial detention. In the Brooklyn House of Detention, the average pretrial confinement of adolescent boys

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[12] *Cleveland Plain Dealer*, March 26, 1964.

[13] *Asbury Park Evening Press*, Mar. 9, 1964; Preliminary Report on Pretrial Detention Practices in New Jersey, p. 11 (Mar. 1964).

[14] Correctional Association of New York, 117th Annual Report (1963).

[15] *Philadelphia Inquirer*, Feb. 21, 1964.

[16] Botein, Shifting the Center of Gravity of Probation (Oct. 22, 1963) (hereafter cited as Botein).

is 32 days; 70% are ultimately found not guilty or otherwise released.[17]

The direct per capita costs of pretrial detention run high. Recent surveys showed averages of $2.56 per day in St. Louis, $2.61 in Atlanta, $3.82 in Washington, D. C., $4.25 in Philadelphia, $4.28 in Chicago, $6.25 in New York and $6.86 in Los Angeles. Because these figures include both fixed and variable costs, they do not furnish an accurate measure of the poteutial savings to each community from broader pretrial release. Operational items such as custodial salaries, building maintenance and utilities apply regardless of the number of prisoners detained, and would remain fixed unless a sizable decrease in inmate population would close down an entire unit of the holding facility. Variable costs, however, which relate to the personal maintenance of the prisoner, e.g., his food, clothing and medical care, would be reduced by the extensive use of pretrial release. These constitute about 20% of the total.[18] The D. C. Bail Project recently estimated that substantial elimination of pretrial detention for bailable offenses would save the District of Columbia nearly $100,000 a year.

But the costs of detention include far more than jail expenses. Eligible defendants who do not make bond are often unemployed or in low paying jobs at the time of arrest. If the accused is the wage earner of the household, his incarceration deprives his family of its means of subsistence. In most jurisdictions, dependents immediately become eligible for public assistance if they have no other income or resources. In at least one state, dependents do not become eligible unless their breadwinner has been actually sentenced. In either case, welfare departments require an investigation of new cases to determine eligibility. During this period, the defendant's family must either look to private welfare agencies or friends for support. The cessation of income may well mean a loss of household necessities through repossession and the accumulation of debts. If welfare aid is forthcoming, it runs from $170 a month in Philadelphia to $262 in Des

[17] 1963 Report of the City Administration of New York on the House of Detention for Women, pp. 9, 11; New York City Bar Report, pp. 14-15.

[18] D. C. Bail Study, p. 31.

Moines for a mother and four children. Children rendered homeless by parents' detention may, as in the case of D. C.'s Junior Village, add as much as $8.00 a day to the community's costs.

The loss of personal income to the defendant also results in loss of spending power in the community and concomitant tax revenue. The defendant's employer loses his services and may also have to pay to train a replacement. Finally, loss of employment imposes on the bar or the community the expense of providing the accused with an adequate defense in his case. Estimates prepared in connection with the proposed Criminal Justice Act now pending before Congress indicate that this may run to several hundred dollars per case.

B. *Human Costs*

> The wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars.[19]

More important than the economic burden is the personal toll on the defendant. His home may be disrupted, his family humiliated, his relations with wife and children unalterably damaged. The man who goes to jail for failure to make bond is treated by almost every jurisdiction much like the convicted criminal serving a sentence. In the words of James V. Bennett, Director of the United States Bureau of Prisons:

> When a poor man is arrested, he goes willy-nilly to the same institution, eats the same food, and suffers the same hardships as he who has been convicted. The well-to-do, the rich, and the influential, on the other hand, find it requires only money to stay out of jail, at least until the accused has had his day in court.[20]

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[19] Botein, p. 17; Attorney General's Committee Report, pp. 68-71.

[20] Address, February 24, 1939.

Some jurisdictions even impose more stringent conditions on the detained than on convicted offenders. In New York's Nassau County Jail, an official reported that detained prisoners need more security regulations and supervision than convicted persons because they are more "nervous" about the outcome of their cases. In the District of Columbia,

> Although these defendants have not yet been found guilty, their conditions of detention are in many regards more stringent than those of prisoners already convicted. Department of Correction officials noted that it costs more to maintain a prisoner at the Lorton Reformatory, where convicted and sentenced prisoners are held, because of the extensive educational and training programs underway there.[21]

Conditions of overcrowding, bad sanitation, indiscriminate mixing of offenders, and lack of recreational facilities are notorious in many jails.[22] Dirt floors and cells without flush toilets are not uncommon. An arrested man is "given a bunk and a pail and he cleans up for himself."[23] Rarely are detained prisoners segregated from convicted ones, even when youthful offenders are involved. Jailing a youthful defendant for want of bail, said Justice William O. Douglas, "is equivalent to giving a young man an M. A. in crime."[24] A recent report told of a 17 year old boy, charged with theft of tools, who died following homosexual abuse and sadistic beatings at the hands of other inmates in an unsupervised rural Missouri jail.[25]

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[21] D. C. Bail Study, p. 32.

[22] Bail surveys in Baltimore, Denver, Nassau County, N. Y., Greenville, S. C. In contrast, Philadelphia in 1963 opened a $6 million facility to accommodate 815 detainees. It is reported to have adequate recreational, social service, and physical features.

[23] Bail Survey in Worcester, Mass.

[24] *New York Times*, April 4, 1963. See Goldman, Differential Selection of Juvenile Offenders for Court Appearance 102 (1963) (38% of Allegheny County policemen interviewed considered institutions for the care of juvenile delinquents to be "training grounds for further criminal activities").

[25] *St. Louis Post-Dispatch*, Aug. 1, 1963; *St. Louis Globe-Democrat*, July 29, 1963.

Overcrowding is almost always found in metropolitan areas. In 1962, the Women's House of Detention in New York housed 721 in a building built for 461; in 1961, the Manhattan House of Detention had an average daily census of 1407 inmates in a 950-man facility.[26] Rarely can pretrial prisoners work: "for most prisoners, detention is a period of oppressive inactivity."[27] The New York Correction Law prohibits work assignments.[28] In the District of Columbia,

> Defendants being held for trial are detained in four cell blocks. Each cell block has four tiers of cells. Defendants are confined two to a cell originally designed to hold one person . . . In a typical day, detained defendants spend all but 3 or 4 hours in their cells . . . There is no program of training or rehabilitation designed for the jailed defendants . . . The only jailed defendants who work are the clerks (the trustees) in each cell block who handle certain administrative chores.[29]

The impact on the detained offender was recently described in the New York Assembly Report:

> . . . we doubt whether any innocent person (as all before trial are presumed to be) can remain unscarred by detention under such a degree of security as New York's detention houses impose. The indignities of repeated physical search, regimented living, crowded cells, utter isolation from the outside world, unsympathetic surveillance, outrageous visitors' facilities, Fort Knox-like security measures, are surely so searing that one unwarranted day in jail in itself can be a major social injustice.

C. *The Impact on the Defense*

The effect of pretrial detention on an accused's ability to vindicate himself at trial, or secure probation or leniency at

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[26] House of Detention for Women, 1963 Report, p. 9; New York Assembly Report, p. 44.

[27] New York Bail Study, p. 725.

[28] New York Assembly Report, p. 33.

[29] D. C. Bail Study, pp. 32-33.

sentencing, may be substantial. Usually unable to retain a lawyer, he must rely on the court to make a timely appointment of competent counsel for him.[30] He contributes neither money nor labor to pretrial investigation. He cannot help locate witnesses or evidence which may be more accessible to him than to any outsider. His contacts with counsel may be impeded by having to plan a defense in cramped jail facilities within the limited hours set aside for visitors.[31] The pretrial prison experience may adversely affect his demeanor and attitude in the courtroom or on the witness stand. If convicted, the defendant who has lost his job and been removed from his family will stand a far poorer chance for probation than the one who has earned money, kept his job, and maintained strong family ties. His detention may well obstruct the very purposes of probation:

> Probation is often granted to first offenders on the assumption that rehabilitation is more likely to be achieved by sparing defendant a prison experience. A defendant who has been confined prior to trial under the conditions prevailing in many detention facilities may already have been subjected to contacts and influences which are at war with the rehabilitative objectives of the probation disposition.[32]

Available data indicates that free defendants in fact enjoy a considerable advantage over those who have been detained. In the District of Columbia, a study of 258 convicted defendants showed that 25% of the 83 who had been bailed were released on probation, compared with probation given to only 6% of the 175 who had been jailed.[33] A Philadelphia study of 946 cases produced similar results: only 52% of the bailed defendants were convicted compared with 82% of those jailed.

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[30] In the District of Columbia, 90% of detained defendants require assigned counsel. *Pannell* v. *United States,* 320 F.2d 698 (D. C. Cir. 1963) (concurring opinion).

[31] Some visitors quarters have reportedly been "bugged." Harvard Law Record, March 28, 1963; Schultz, Bail For the Have-Nots: The Recognizance Program of the St. Louis Criminal Court for Criminal Causes (1963).

[32] Attorney General's Committee Report, p. 72.

[33] D. C. Bail Study, p. 40.

Among the convicted, only 22% of the bailed defendants got prison sentences compared with 59%—almost triple the number—of jail terms for those who had been detained.[34] New York City's 1960 records, as analyzed in the Manhattan Bail Project's Interim Report, found the following comparisons in the felony conviction rate of those at liberty and those in detention prior to trial:[35]

	Convictions	
Offense	*Bail*	*Jail*
Assault	23%	59%
Grand Larceny	43%	72%
Robbery	51%	58%
Dangerous Weapons	43%	57%
Narcotics	52%	38%
Sex Crimes	10%	14%
Others	30%	78%

In sentencing, the study found these contrasts in the prison terms given to bailed and jailed defendants:

	Prison Sentences	
	Bail	*Jail*
Assault	58%	94%
Larceny	48%	93%
Robbery	78%	97%
Dangerous Weapons	70%	91%
Narcotics	59%	100%
All Other Offenses	56%	88%

The Manhattan study showed that in misdemeanor categories, prison terms were given to 87% of the jailed defendants but to only 32% of those on bail. In a Women's House of Detention survey, there was a 77% rate of conviction among detained women compared to a 40% rate among those bailed.[36]

The outcome of an accused's case is obviously affected by many factors apart from his pretrial freedom or detention.

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[34] Philadelphia Bail Study, pp. 1051-2. The categories of crimes were rape, robbery, arson, burglary, assault and battery, auto theft, property crimes, sex crimes, narcotics offenses.

[35] 38 N.Y.U.L.Rev. 67, 84-6 (1963).

[36] House of Detention for Women: A Plan to Reduce the High Census, p. 6 (1963).

Prior record and probable guilt, for example, influence not only the amount of bail set by the judge, but the accused's chance of making that bail, the likelihood of his conviction and the severity of his sentence. An accused against whom the evidence is strong may have high bail set for the purpose of detaining him; the same evidence will increase his chances of conviction and jail sentence. But the significance of detention has stood out like a beacon in every analysis to date. Recent analyses of Manhattan Bail Project data have disclosed, for example, that a defendant's prior record does not account significantly for the difference in case results between free and detained offenders. Among defendants with no criminal record at all, a recent tally showed acquittals of 56% of those on bail but only 25% of those detained. Preliminary analyses of other factors, such as private or assigned counsel, and social background, also fail to account for the disparity in disposition between bailed and jailed persons.[37] With mounting evidence the conclusion is forming that the man who is jailed for want of bail is less likely to get equal treatment in court.

[37] Rankin, Exploration of Relationship Between Detention and Unfavorable Disposition in Criminal Cases, 39 N.Y.U.L.Rev. (June 1964).

Chapter V

THE EFFICACY OF HIGH BAIL

Courts intentionally impose high bail for a number of reasons. Among them are to prevent release where flight is likely; to prevent a recurrence of criminal conduct by an accused believed to be dangerous to the community; and to punish the accused by giving him a "taste of jail." Sometimes there is present in a bail-setting decision the court's emotional response to a particular crime or criminal. On other occasions, a prosecutor may recommend high bail for tactical reasons, such as the impact it may have on the trial judge, jury or public. Most of these considerations involve, in theory, improper uses of bail. But perhaps of equal significance is the experience which shows that while high bail achieves the desired result in some cases, it often proves ineffectual in others. This can be seen from a brief review of the four types of criminal cases in which high bail is most frequently imposed: organized crime, internal security, civil rights and offenses involving crimes of violence.

A. *Organized Crime*

In no area are high bonds more uniformly set than in cases involving the prosecution of major racketeers. In no area, also, does high bail seem more ineffective. Judges are likely to set high bail in organized crime cases not only to deter flight, to prevent new crime and to punish, but sometimes also out of the instinctive feeling that a major criminal deserves a major bail. The following bails were set for some well-known defendants in the Apalachin case: $100,000, $40,000, $40,000, $30,000 and $25,000. Not one of these defendants failed to make the bond; one bondsman alone wrote at least $273,000 in bonds in this case. All of the defendants appeared for trial. In a subsequent narcotics case, one of the Apalachin defendants secured a $100,000 bond from a bondsman, at no charge, "as a favor." Even the most wealthy and powerful racketeers, like Vito Genovese and Anthony Accardo, who presumably could well afford to forfeit a high bond, have been indicted, released on bails of $75,000 and $25,000, and tried without incident. One defendant recently returned from

Italy after being indicted, was duly met at the airport by his bondsman, posted a $75,000 bond, and went about his business.[1]

In contrast, equally high bails have been set for other defendants in organized narcotics conspiracy cases in the amounts of $25,000, $35,000 and $100,000. All three of these men jumped bail. For one of them, the bondsman wrote the bond without receiving any collateral, without having met the defendant previously, and without making any background investigation. Racketeer bonds are typically written without collateral in amounts certain to bankrupt most bondsmen. Such tie-ins between bondsmen and racketeers are well known to law enforcement agencies, and account in part for the ease with which the racketeer finds a willing bondsman. Racketeers offer a good source of income to the bondsman from the frequency of their other, more routine brushes with the law, in activities such as gambling. In addition, racketeers may not be safe clients to turn down.

The observation that racketeers who are going to flee will do so even in the face of high bail is supported by Commissioner of Narcotics Henry L. Giordano:

> "Another graphic example of the mob's desperation is the epidemic of bail jumpings. In some cases, the bonds forfeited are astronomical—$20,000, $50,000 and even as high as $97,000. As a matter of fact, in a recent survey of our New York Office, we found that one-third of our fugitives are men who have forfeited substantial bail rather than face trial."[2]

While an organized crime bond forfeiture means a sizable payment to the court, if collected, the high bail accomplishes little else. It appears to bear no significant relationship to whether the defendant will return, and it does not keep him in jail.

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[1] *Philadelphia Inquirer*, December 14, 1963.

[2] Giordano, Organized Crime, *The Police Chief*, pp. 42, 45 (Dec. 1963).

B. *Internal Security*

High bail or no bail has been the general rule in cases involving espionage and internal security. Unless a capital offense is involved, the accused has an absolute right to bail. But the danger of flight is often great. The case of Gerhardt Eisler, who was released on bail after conviction, stowed away on a ship and made his way to East Germany, demonstrates this danger. Indeed, if the accused is a foreign agent, the act of setting any bail may be futile; foreign funds can be made available and he can be spirited away.

But high bail is often set in security cases, not only because of the danger of flight, but also because of popular abhorrence of the crime. Many bondsmen may thus refuse to write what otherwise might be considered a low risk bond.[3] Illustrative is the case of Dr. Robert Soblen, arrested in New York for espionage. No bondsman would write his $100,000 bond because of possible adverse publicity; yet the defendant had full collateral in the form of cash and the family home, and was suffering from terminal cancer. Ultimately Soblen's wife and some private sources posted the bond. Despite the fact that he was near death, Soblen fled the country. High bail neither kept him in jail nor deterred flight. On the other hand, the Supreme Court reversed a $50,000 bail in a Smith Act case as excessive, on the ground that there was no evidence that the defendants intended to flee.[4]

The Department of Justice has long recognized the inadequacy of bail alone as a deterrent to flight in internal security cases. In support of a federal bail jumping statute, Kevin T. Maroney of the Criminal Division stated:

> We feel that the forfeiture of money alone is often insufficient to guarantee the appearance of a defendant and that a statute such as S. 3232 is necessary and desirable.[5]

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[3] *N. Y. Daily News,* July 12, 1962.

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

[5] House Committee on the Judiciary, Making Bail Jumping a Separate Crime, 83rd Cong., 2d Sess. (1954).

Specifically brought to the Committee's attention was the *Dennis* case, in which Communist leaders were convicted in 1949; four defendants in that case had jumped appeal bonds of $20,000 each. Congressman Poff pointed out that since persons like these have organizational backing, the amount of the bond is not of great consequence. Consistent with Maroney's testimony, Congress enacted 18 U. S. C. §3146, providing for up to $5,000 fine and 5 years' imprisonment for bail jumping in felony cases.

C. *Civil Rights*

The outburst of civil rights demonstrations has led to a vast amount of criminal litigation. High bail has often been set for demonstrators. Some of the most striking cases have taken place in Atlanta. In one case, involving a 67-year old California minister convicted of disturbing public worship, bail on appeal was set at $20,000. The Georgia Supreme Court reduced it to $5,000, but the minister spent seven months in jail because his tender of $5,000 in cash was refused and he was unable to post that amount in unencumbered real estate as required by the court. In other cases, bail was set at $15,000 for an 18-year-old college girl in a trespass case; $5,000 on a perjury charge growing out of a civil rights boycott; and a $5,000 property bond for the charge of keeping a minor out of school to demonstrate.[6]

But high bail is neither uniformly required in Southern civil rights cases, nor is the practice confined to the South. Birmingham, Alabama, last year released 790 demonstrators, including their leaders, on $300 bonds each. Yet Chester, Pennsylvania, a site of recent tension, appears to have established a $1,500 rate for demonstrators. And only a few weeks ago, $26,500 bail was set for a minister in Chester on charges of unlawful assembly and inciting to riot.[7]

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[6] See *Washington Post*, October 29, 1963 ("Some Misusing Law in Rights Conflict"); *Washington Post*, September 3, 1963 ("Area Student Jailed for 49 Days in Georgia After Aiding a Vote Drive"); *New York Times*, February 23, 1964.

[7] *Philadelphia Evening Bulletin*, May 1, 1964.

Because the defendants in civil rights cases often welcome litigation, and their offenses carry comparatively small penalties, the danger of flight is small. A recent study of forfeitures bears this out. As a result, high bail in these cases can be explained only as punishment or to deter continued demonstrations.

D. *Crimes of Violence*

High bail is often used to safeguard society from accused criminals who are believed likely to commit new crimes of violence if free on bail.[8] Aside from the departure from legal standards governing bail, a fundamental difficulty lies in identifying potential repeaters.

In Philadelphia, a defendant free on bond for a razor slashing charge was accused of killing a policeman.[9] In Baltimore, a defendant free on two bonds for robbery, larceny, burglary and making indecent telephone calls, was picked up a third time on charges of kidnapping, robbery and rape.[10] Such cases give rise to widespread reactions in the press, as well as among judges, prosecutors and others, that bail must be set high to protect the community. A Clayton, Missouri magistrate, upon learning that a defendant who was already out on two $8,500 bonds had been released on a third $1,500 bond and was thereafter charged with still another offense, stated:

> Yesterday we notified various bondsmen that in the future we would set bond of at least $5,000 if the applicant is a well-known police character and has been through the mill before. We are going to make more of an effort to check the background than we have in the past.[11]

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[8] Philadelphia Bail Study, pp. 1038-39.

[9] *Philadelphia Inquirer*, October 15, 1963 ("He Was Free On Bail"); see also March 24, 1964.

[10] *Baltimore Sun*, March 13, 1964: see also March 25, 1964.

[11] *St. Louis Post-Dispatch*, March 3, 1964 ("Clayton Court Will Tighten Bail Procedure").

A Springfield, Missouri sheriff observed:

> I'm opposed to low bails due to the fact that many defendants in burglary and larceny cases may still carry off the county while they're out on bond.

He noted that high bond, by keeping the defendant in jail, makes it easier for the police to question him. Others believe that high bail is salutary for a youthful offender because "sitting in jail often helps him."[12] One Montreal judge summed up the bail-crime relationship as follows:

> I rather consider that the granting of bail for serious crimes in such a period as we now are going through, is an invitation to commit "more crimes" and intimidate witnesses.
>
> The sole duty of the courts is not to assure the presence of an accused. Far from it. The main duty is to stem crime in all its facets and not to permit the accused to make a mockery of justice by getting out on bail and starting "their crimes" all over again.[13]

But there is a basic defect in the reasoning which underlies the setting of high bail in such cases: the defendant still can go free if he posts it. Even if the court has correctly sized up the defendant, all high bail does is discriminate between the dangerous rich and the dangerous poor. Perhaps the most remarkable example was the case of a Denver defendant who, in January 1962, was charged as a fugitive from California on forgery offenses. Bail was set at $10,000 and posted. While out on bond, he was arrested for armed robbery and conspiracy, and another $10,000 bond was posted. In February 1962, new charges of burglary, larceny and receiving stolen goods were brought against him. A third $10,000 bond was posted. In January 1963, still another case of burglary, larceny and receiving stolen goods was filed. For the fourth time, bail was set at $10,000 and in November 1963, defendant posted it. His release was held up, however,

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[12] *Springfield, Missouri, Leader and Press,* March 12, 1964.

[13] *Montreal Star,* November 19, 1963.

because two other states had "holds" on him. If and when he is charged with these crimes, the District Attorney has indicated, $10,000 will be asked on each:

> If he posts those, then I guess there's nothing we can do about it and he'll be free—for a while.[14]

Cases like these indicate that high bail is an inadequate tool for shielding society from the recidivist. It often delegates to the bondsman the decision whether or not an accused will be released, thereby making society's interest in keeping the dangerous man in jail depend on the accused's financial resources and the bondsman's profit motivation. On the other hand, it often subjects the accused to an inevitably hurried, unscientific and unreviewable conjecture by prosecutors and magistrates about his proclivities for crime. In addition, by resting on the assumption that the accused is a menace to society, high bail overrides the basic presumption of innocence and prejudges guilt before any trial, without a jury, and without an opportunity for the defense to be heard.

Reconciling the ancient right of an accused to bail with the vital need of the community for safety is a major task. Reliance on high bail, which may detain the harmless and release the dangerous, is the wrong way to tackle it. By condoning the manipulation of bail to achieve a purpose for which it was never designed, the administration of criminal justice is failing to come to grips with the problem of identifying and dealing with the man who is feared likely to commit crime tomorrow.

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[14] *The Denver Post*, November 30, 1963.

Chapter VI

ALTERNATIVES TO THE BAIL SYSTEM

Bail, devised as a system to enable the release of accused persons pending trial, has to a large extent developed into a system to detain them. The basic defect in the system is its lack of facts. Unless the committing magistrate has information shedding light on the question of the accused's likelihood to return for trial, the amount of bail he sets bears only a chance relation to the sole lawful purpose for setting it at all. So it is that virtually every experiment and every proposal for improving the bail system in the United States has sought to tailor the bail decision to information bearing on that central question. For many, release on their personal promise to return will suffice. For others, the word of a personal surety, the supervision of a probation officer or the threat of loss of money or property may be necessary. For some, determined to flee, no control at all may prove adequate.

Recognizing the unfairness and waste entailed by needless detention, a number of authorities have already taken steps to restore to bail its historical mission. Attorney General Robert F. Kennedy, on March 11, 1963, issued instructions to all United States Attorneys "to take the initiative in recommending the release of defendants on their own recognizance when they are satisfied that there is no substantial risk of the defendants' failure to appear at the specified time and place." The Advisory Committee on Criminal Rules has recommended that Rule 46, governing "Bail" in federal courts, be replaced by a rule entitled "Release on Bail," specifying that among the facts to be considered in determining the terms of bail shall be "the policy against unnecessary detention of defendants pending trial." Programs to secure the same objective are now under way in state or federal courts in New York, Washington, Detroit, Des Moines, St. Louis, San Francisco, Los Angeles, Chicago, Tulsa and Nassau County, New York. Reported to be in the planning stage are projects in Seattle, Syracuse, Reading, Akron,

Cleveland, Atlanta, Boston, Milwaukee, Newark, Iowa City, Oakland, New Haven, Philadelphia and Syracuse, as well as the states of New Jersey and Massachusetts. The emphasis in all projects is on identifying the good risks; none undertakes to release defendants indiscriminately. The sorting of the good from the bad enables the system to pay closer attention to the handling of the accused whose release poses problems of flight or crime.

This chapter describes a variety of experiments and proposals to improve the bail system, or to substitute alternatives which will diminish its accent on money.

A. *Improved Fact-Finding Mechanisms*

To set bail on the basis of the criteria laid down in appellate decisions, statutes and rules, a judge or magistrate needs to have verified information about the defendant's family, employment, residence, finances, character and background.[1]

[1] Perhaps the best judicial outline of factors relevant to bail setting was given on February 27, 1964, in the *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit in *Fletcher* v. *United States*, denying without prejudice a motion for release on recognizance or reduction of bail pending appeal. As amended for broad use in appeal cases, the court has indicated that motions should furnish the following particulars:

1. Appellant's place of birth, length of time a resident of the District of Columbia area, previous places of residence within the last five years and for what periods, and where living at time of arrest.
2. Marital status:
   (a) If married, for how long, wife's name, and whether living with her at time of arrest, and, if so, where;
   (b) Children, if any, their ages.
3. Employment:
   (a) by whom, at time of arrest, nature of work, and how long so employed;
   (b) former places of employment within the past year, nature of work performed, and for what periods of time.
4. Names and addresses of relatives, if any (or other persons who may be helpful), in the District of Columbia area with whom appellant has kept close contact.

If the defendant is promptly arraigned the interval between arrest and the initial bail decision will be too short to permit elaborate investigation into these questions. But several jurisdictions have already found that a simple and speedy procedure can be devised to produce all the facts that are needed.

1. *Variations*

Limitations of space preclude an account of the many methods employed or proposed to gather pertinent facts about the background of each accused. Suffice it to say that, taken together, the fact-finders who are already at work or in the planning stage cover a wide range. As of May 1964 they included:

(1) law students (Manhattan Bail Project, D. C. Bail Project, Des Moines Pre-trial Release Program);

(2) probation officers (St. Louis, United States District Court for the Northern District of California, Oakland, Nassau County, Baltimore, Boston, New York City);

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5. Whether appellant has previously been admitted to bail in any criminal case; if so, in what court, for what offense, and the amount of bail; and if such bail was ever forfeited, the date.
6. Whether appellant was ever on probation or parole; if so, in what court, and if either was ever revoked, the date of such revocation.
7. (a) What is appellant's present state of health?
   (b) Has appellant ever been hospitalized for a mental illness, and, if so, give details relating to hospitalization, the dates and places.
8. What means of support the appellant had prior to his arrest in this case.
9. (a) If admitted to bail, what plans, if any, does appellant have.
   (b) If appellant expects employment, by whom he is to be employed.

(3) prosecuting attorneys (United States District Court for the Eastern District of Michigan, Seattle);

(4) defense counsel (Tulsa);

(5) public defenders (Chicago, Philadelphia);

(6) court staff investigators (Los Angeles); and

(7) police (New York City Bar Association proposal).

Set out below, as a model, is a brief description of the Manhattan Bail Project, whose enterprising methodology created the current interest in bail fact-finding projects throughout the country.

2. *Manhattan Bail Project*

In the fall of 1961, the Vera Foundation's Manhattan Bail Project pioneered the fact-finding process in New York City by launching a program in the Felony Part of Magistrates Court (now Criminal Court). Assisted by a $115,000 grant from Ford Foundation and staffed by New York University Law students under the supervision of a Vera Foundation director, the project interviews approximately 30 newly arrested felony defendants in the detention pens each morning prior to arraignment. The interviews are conducted in a cell set aside by the Department of Correction, and consume about 10 minutes. The accuseds for the most part are indigents who will be represented by assigned counsel. Although the project excluded a variety of serious offenses at the outset, only homicide and some narcotics and sex charges are now excluded.

In evaluating whether the defendant is a good parole risk, four key factors are considered: (1) residential stability; (2) employment history; (3) family contacts in New York City; and (4) prior criminal record. Each factor is weighted in points. If the defendant scores sufficient points, and can provide an address at which he can be reached, verification will be attempted. Investigation is confined to references cited in the defendant's signed statement of consent.

Verification is generally completed within an hour, obtained either by telephone or from family or friends in the courtroom; occasionally a student is dispatched into the field to track down a reference. The Vera Foundation staff then reviews the case and decides whether to recommend parole. The following factors are weighed:

EMPLOYMENT

Was defendant working at time of arrest?
How long has he had this job, or any other job?
Was he in a position of responsibility?
How does his employer feel about his reliability?
Will his job remain open if he is quickly released?

FAMILY

Does accused live with his family?
Does he support wife, children, parents, or others?
Are there any special circumstances in family such as pregnancy or severe illness?
Does there appear to be a close relationship between accused and his family?

RESIDENCE

How long has defendant resided in the United States, if he is foreign born?
How long has he lived in New York City or its environs?
How long has he lived at his present address and prior residences?

REFERENCES

Will someone vouch for accused's reliability (e.g., his clergyman, employer, probation or parole officer, doctor)?
Will someone agree to see that he gets to court at the proper time?

CURRENT CHARGE

What is the possible penalty if defendant is convicted?

Are there mitigating factors that are relevant to parole?

For example, if the charge is felonious assault, has the victim been only slightly injured? In husband-wife assault cases, will the wife permit her husband to return home?

PREVIOUS RECORD

Is the defendant a first offender?
If not, when was he last convicted?
Of what types of crimes has he been convicted?

OTHER FACTORS

Is defendant a recipient of unemployment insurance or other government checks that tie him to a particular locality?
Is he under medical care which ties him to a hospital or doctor?
Has he previously been released on parole or bail and, if so, has he appeared on time?

For each defendant determined by the project to be a good parole risk, a summary of the information is sent to the arraignment court, and copies of the recommendation and supporting data are given to the magistrate, the assistant district attorney and defense counsel. Counsel reads the recommendation into the record.

Since notification is so essential to a successful parole operation, Vera sends a letter to each parolee telling him when and where to appear in court. If he is illiterate, he is telephoned; if he cannot speak or understand English well, he will receive a telephone call or letter in his native tongue. Notification is also sent to any reference who has agreed to help the defendant get to court. The parolee is asked to visit the Vera office in the courthouse on the morning his appearance is due. If he fails to show in court, Vera personnel attempt to locate him; if his absence was for good cause, they seek to have parole reinstated.

B. *Release on Recognizance*

Once the facts about the accused's community roots are known, the court is in a position to individualize the bail

decision. Increasing attention has been given in recent years to opportunities for the widespread release of defendants on their own recognizance (r.o.r.), i.e., their promise to appear without any further security. A great many state and federal courts have long employed this device to allow pretrial freedom for defendants whom the court or prosecutor personally know to be reliable or "prominent" citizens. But the past three years have seen the practice extended to many defendants who cannot raise bail. The Manhattan Bail Project and its progeny have demonstrated that a defendant with roots in the community is not likely to flee, irrespective of his lack of prominence or ability to pay a bondsman. To date, these projects have produced remarkable results, with vast numbers of releases, few defaulters and scarcely any commissions of crime by parolees in the interim between release and trial.

Such projects serve two purposes: (1) they free numerous defendants who would otherwise be jailed for the entire period between arraignment and trial, and (2) they provide comprehensive statistical data, never before obtainable, on such vital questions as what criteria are meaningful in deciding to release a defendant, how many defendants paroled on particular criteria will show up for trial, and how much better are a defendant's chances for acquittal or a suspended sentence if he is paroled.

1. *New York*

The results of the Vera Foundation's operation show that from October 16, 1961, through April 8, 1964, out of 13,000 total defendants, 3,000 fell into the excluded offense category, 10,000 were interviewed, 4,000 were recommended and 2,195 were paroled. Only 15 of these failed to show up in court, a default rate of less than 7/10 of 1%. Over the years, Vera's recommendation policy has become increasingly liberal. In the beginning, it urged release for only 28% of defendants interviewed; that figure has gradually increased to 65%. At the same time, the rate of judicial acceptance of recommendations has risen from 55% to 70%. Significantly, the District Attorney's office, which originally con-

curred in only about half of Vera's recommendations, today agrees with almost 80%. Since October 1963, an average of 65 defendants per week have been granted parole on Vera's recommendation.

In order to study the influence of its own recommendations, Vera initiated the project with the use of an experimental control procedure. Out of all defendants believed by the project to be qualified for release, half were in fact recommended to the court, while the other half were placed in a control group, and their recommendations withheld. In the project's first year, 59% of its parole recommendations were followed by the court, compared to only 16% paroled in the control group. In short, recommendations based on facts nearly quadrupled the rate of releases.

The subsequent case histories of defendants in both groups were thereafter analyzed. They showed that 60% of the recommended parolees had either been acquitted or had their cases dismissed, compared with only 23% of the control group. Moreover, of the 40% who were found guilty out of the parole group, only one out of six was sentenced to prison. In contrast, 96% of those convicted in the control group were sentenced to serve a jail term.

With Vera's assistance a demonstration release program was also carried on in New York City in the Women's House of Detention. Interviews were conducted with women detainees who had not posted bail. In approximately one-fourth of the cases, recommendations to reopen the bail decision and grant parole were made. The response of the court was favorable and the experiment resulted in decreasing the detention population of that overcrowded facility, in a six month period, from 327 to 164.

The interest and confidence generated by the Manhattan Bail Project led Mayor Wagner to announce in 1963 that New York City would take over and run bail fact-finding services on an extended scale through its Office of Probation. In January 1964, the New York City Board of Estimate allocated $181,600 for the operation of these services in the five boroughs. And the 1963 Report of the New York Assembly Judiciary Committee advocated an extension of Vera-type operations into other counties of the state. The same

report also proposed a statute to require every arraigning judge, in court or through probation officers, to ascertain prior to bail-setting all data pertinent to the defendant's likelihood to return for trial. In order to encourage such inquiries the statute would provide that, absent waiver by the defendant, the failure of the judge to ascertain these facts would result in automatic parole.

2. *Washington*

The impact of the Manhattan Bail Project has been felt far beyond New York City. On the basis of a survey conducted by the Junior Bar and a Committee of the Judicial Conference of the District of Columbia Circuit, the Conference voted overwhelmingly in May 1963 to recommend that a recognizance pilot project be conducted in the federal district court. Financed by the Ford Foundation, the project began operation on January 20, 1964. It covers only felony cases and no offenses are excluded from consideration.

The D. C. Bail Project operates somewhat differently from its predecessor in Manhattan. The interview and verification process begins immediately after the defendant makes his initial appearance before the U. S. Commissioner or is bound over to the Grand Jury by other committing magistrates. Recommendations for release, where deemed appropriate, are made by the staff and communicated through retained or assigned counsel to the United States District Judge sitting in "bail reevaluation."

In its first 3½ months of operation, the project recommended release in 94 out of 367 cases. In 54 cases the defendant was released on his own recognizance, 10 bonds were lowered and 30 motions were denied. In several cases, defendants charged with homicide or murder have been released as the result of project recommendations. To date no released defendant has failed to appear. Prior to the project's inception, virtually no defendants were ever granted r.o.r.

3. *Des Moines*

On February 3, 1964, a year-long pretrial release project began operations in Des Moines, Iowa. Drake University

law students interview defendants prior to arraignment, investigate and verify the information thus obtained, and recommend release without bail where the defendant has roots in the community. The advisory committee which serves as the project's board consists of representatives of the city and county attorneys' offices, the city police department, the sheriff's office and the Municipal and District Court, as well as the law school faculty, the bar association and the Hawley Welfare Foundation, which sponsors the program. The staff follows up each release by notifying defendants when they are due to appear in court. In its first three months the project made 180 recommendations for release, and 178 were granted. The project covers all offenses except capital cases, forcible rape, heavy narcotics and sex offenses against children. Unlike New York and the federal courts, Iowa has no bail-jumping statute. Yet 121 voluntary appearances have been made by parolees to date and only three defendants have failed to appear. Two of these, involved in traffic cases, showed up voluntarily one day late. The third was arrested on a forgery charge. During the week of May 4, the amount of bonds which otherwise would have been required of defendants given r.o.r. totalled $11,200.

4. *St. Louis*

In February 1963 the Circuit Court for Criminal Causes in St. Louis, Missouri adopted a recognizance release program for indigent criminal defendants. Unlike the programs previously described, background investigations and release recommendations in St. Louis are made by the court's Probation Office, which is notified by the Circuit Court Attorney whenever a warrant is issued. Information about the accused is secured by questionnaire and interview, verified by phone and public agencies, and passed on to the court at arraignment. The whole process consumes less than 24 hours. If released, the accused will be supervised during the pre-trial period by a probation officer, who keeps track of him through weekly check-ins and arranges any necessary casework. Prior bail jumpers, recidivists, sex and narcotic cases and offenses involving extreme physical violence have thus far been omit-

ted from the experiment. Of 1469 felonies in the last 10½ months of 1963, 656 were ineligible for release because of prior convictions or the nature of the charge; 330 were released by professional bail bondsmen and 71 were released on probation office recommendations. In the first four months of 1964, 46 out of 400 felony defendants were released without bail, including several involved in robbery, arson and narcotics cases. None failed to appear; three were arrested on car theft or burglary charges. Of 23 cases disposed of so far this year, 20 defendants were given probation, one was fined, one was sentenced to jail and one juvenile was certified to the juvenile court.

5. *Chicago*

In March 1963, Chicago's Municipal Court inaugurated a release program through the efforts of its Chief Justice. Only misdemeanors are covered. Public defender staff members interview indigent prisoners in county jail for two hours three days a week, inquiring into the charge, the prisoner's police and employment record, his length of residence in Chicago, family ties and background. Information on employment and family relationships is verified. Recommendations for release are reported to be made for about 50% of those interviewed. Nearly 90% of the recommendations, at the rate of 4 to 8 a day, are accepted by the court. Released defendants are given a card verifying the time, date, and place of their next required appearance. The number who have failed to appear has been termed "negligible."

6. *The Federal System*

a. *Federal policy*

The Attorney General's Committee defined release on recognizance in the federal system as "the procedure whereby the accused is granted liberty upon his execution of a personal bond in the bail amount without being required to supply additional assurances of his presence at trial in the form

of a surety bond or other acceptable securities." [2] Examining r.o.r. practices in various federal districts the Committee found a "remarkable range of differences in r.o.r. policy." The District of Connecticut, for example, estimated that 65% of all defendants in the period 1958-60 were so released. Large numbers of releases were also reported in the Western District of Texas, the Eastern District of New York and the Northern District of Illinois. In none of these districts was there any significant incidence of r.o.r. defaults. In the same period, however, no r.o.r. releases were reported in the District of Columbia, the District of Delaware, the Middle District of Georgia and the Eastern District of Washington. While some variations, particularly in border areas, could be attributed to local circumstances, no general explanation seemed valid to the Committee, which concluded that r.o.r. practice proceeds in federal courts "with little or no reference to any national policy in this matter." The Committee strongly urged the Department of Justice to adopt a policy favoring the pretrial release of accused persons:

> Release of the accused on his own recognizance without additional financial securities, in proper cases, contributes importantly to solution of the problems of pre-trial release. The use of this procedure should be enlarged in the federal district courts.
>
> The Department of Justice should inform all United States Attorneys that, in the interests of pre-trial liberty of accused persons, it is the policy of the government that prosecuting officers recommend the release of accused persons on their own recognizances when the circumstances warrant.

The Committee further urged that prosecuting attorneys regularly furnish statistics to the Department relating to bail and r.o.r. recommendations and dispositions.

Following these recommendations, all United States Attorneys were instructed on March 11, 1963, to adopt a liberal policy on recommendations for r.o.r. The directive provided as follows:

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[2] Attorney General's Committee Report, p. 74.

> It is the view of the Department that the use of r.o.r. should be broadened in order to preserve the traditional right to freedom before conviction and thereby to insure that a defendant is able to provide financially for his family and his defense and to take an active part in the preparation of that defense.
>
> While recognizing that the granting of release on recognizance is the prerogative of the courts, the Department at the same time feels that, to the extent that United States Attorneys can be instrumental in effecting a more extensive use of the practice in appropriate cases, they should do so. United States Attorneys and their assistants are therefore urged to take the initiative in recommending the release of defendants on their own recognizance when they are satisfied that there is no substantial risk of the defendants' failure to appear at the specified time and place.
>
> A determination as to whether there is a substantial risk of non-appearance will necessarily rely on the sound judgment of the United States Attorney and his assistants and their consideration of the particular circumstances of each case. Some of the circumstances to be assessed are the nature and seriousness of the offense charged, the weight of the evidence, the defendant's character, prior record, family situation, residence or ties in the district, and any other circumstances peculiar to the district or to the offense.

A follow-up survey was conducted by the Department of Justice in March 1964, to determine the new policy's impact after one year. For the federal system as a whole, it showed that (1) district courts usually follow the United States Attorney's recommendations for r.o.r.; (2) the rate of r.o.r. recommendations and releases had nearly tripled between 1960 and 1964, from 6.4% to 17.4%; and (3) over 6,000 defendants in federal criminal cases had been released on personal recognizance within the past year, with a default rate of only 2.5%. Although wide variations continue to prevail in the federal system, sixteen districts now release more than 30% of all defendants on r.o.r., with the Districts

of Alaska (72.4%), Eastern Michigan (71.7%), Connecticut (71.1%) and Massachusetts (66.7%) topping the list.

Broadened executive recommendations for r.o.r. in federal courts will, in all likelihood, soon be bolstered by judicial and legislative rule-making action. On March 31, 1964, the Committee on Practice and Procedure of the Judicial Conference of the United States promulgated the Second Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure. Proposed new Rule 46.1 would provide as follows:

> The commissioner or court or judge or justice may release a defendant without bail upon his written agreement to appear at a specified time and place and upon such conditions as may be prescribed to insure his appearance.

On May 14, 1964, Senator Sam Ervin (N. C.), for himself and Senators Hruska (Neb.), Fong (Hawaii), Bayh (Indiana), Williams (N. J.) and Johnston (S. C.), introduced S. 2838 to

> assure that no person charged with an offense against the United States . . . shall be denied bail solely because of his financial inability to give bond or provide collateral security.

b. *Eastern District of Michigan*

In the vanguard of pre-trial release practice for many years has been the United States District Court for the Eastern District of Michigan. In the late 1940's it abandoned reliance on United States Commissioners for bail setting. District court judges assumed the functions of committing magistrates and inaugurated a policy of extensive r.o.r. release. Hearings are held daily, and on Saturdays where necessary to avoid weekend custody. The judge who conducts the bail hearing considers a summary of information about the defendant's background submitted by the United States Attorney. Serious crimes, mandatory sentence offenses, and even guilty pleas are included among those eligible for release. In 1963, 773 defendants were released on personal bond, 80 on bail and 120 were detained. Forfeitures on personal bonds

have been extraordinarily low; in 1962 three were cancelled for nonappearance and the defendants were apprehended. None of the failures to appear were found to be deliberate. Bond forfeitures in 1963 totalled 15, 6 bail and 9 personal. The default rate was thus 7½% on bail bonds compared to only 1.1% on personal bonds.

C. *Summons in Lieu of Arrest*

By definition, release on recognizance is a device to restore the liberty of an accused who has been arrested and brought before a committing magistrate. To the extent that such releases can be granted in large numbers and with small risk of default, they suggest that—in certain offenses and for appropriate defendants—the arrest process might be avoided altogether.

To bypass arrest and bail in less serious offenses, extended use of the summons or citation has long been urged. Basically, these devices are orders issued by a judge or police officer to the accused, directing him to appear in court at a designated time for hearing or trial. The Wickersham Commission of 1931 scored the "indiscriminate use of arrest" as "one of the most reprehensible features of American justice." More recently, the Attorney General's Committee endorsed the summons for "those cases in which an arrest is not required to protect the proper functioning of the criminal process." [3]

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[3] Attorney General's Committee Report, p. 74; Report of the National Commission on Law Observance and Enforcement, Report on Prosecution, p. 31. Cf. Justice Arthur J. Goldberg, Justice for the Poor, Too, *New York Times Magazine*, March 15, 1964:

> In some parts of the world—indeed, in many parts of this country when men of means are involved—arrests are made whenever possible in a dignified manner. The accused is notified that he is being investigated, and he is called to police headquarters by a summons rather than bodily arrest. I am not suggesting that this can be done in every case, but it certainly can and should be done in many.

In 1955, 6,342 summons were issued in Great Britain for serious crimes (other than homicide), compared to 14,408 arrest warrants. Crime Statistics, England and Wales 23 (Cmnd 9884) 1955.

Although approximately 28 states and the federal courts have statutory provisions for judicially issued summonses in lieu of warrants, or for police citations in lieu of sight arrests, their use is presently limited largely to traffic offenses and violations of municipal codes and county ordinances.[4] Yet, in a variety of situations involving minor crimes or misdemeanors, estimated to constitute over 90% of all American crime, the comparatively small likelihood that the defendant will flee suggests little need to invoke the arrest process with its consequent reliance on bail.

Freeing the accused on a police citation to appear for arraignment or trial in simple misdemeanors can avoid jail altogether for a significant number of defendants who are arrested on the spot without a warrant.[5] It also frees the police officer to remain on his beat. In the case of a station

[4] A questionnaire to municipal courts and police departments in these states showed that even where authorized for all misdemeanors, summonses were often used for traffic offenses only. Letters from Municipal Court, Miami; Chief of Police, Providence, Rhode Island. In Chicago, the Municipal Court issues approximately the same number of summonses for the same minor offenses that Beeley reported in 1927. Arizona municipal courts, on the other hand, employ summonses for all kinds of misdemeanors, including prostitution and petty theft. Letter from Chief Magistrate, Tucson. Under the new Illinois Code of Criminal Procedure, effective January 1, 1964, police citations and summonses may be issued for all crimes.

In the federal system, a summons may be issued for any crime, on recommendation of the United States Attorney under Rule 4 or by a judge under Rule 9. A nationwide survey disclosed that a few districts use the summons a great deal. In the Northern District of California, 257 summonses were issued in 1963 compared with 364 warrants. Over 60 districts used the summons or informal letters for misdemeanors or violations of regulatory statutes. No district reported any default problem. All defaults on summonses in the federal system in 1963 totalled 44.

[5] Percentages of arrests made without warrants have been estimated by city officials or docket surveys as follows: Philadelphia, more than 97%; Phoenix—99%; Miami—93%. On the other hand, Boston reported for 1962 15,819 warrants, 31,476 without warrant and 45,523 summoned by the courts. In the federal system in February 1964, 2620 warrants were reported compared to only 434 arrests without warrant.

house summons, it saves him time from personally carrying through the arrest to court arraignment. For a first offender, the summons is a means to avoid the stigma of arrest and booking, particularly where he is ultimately acquitted or the case is settled out of court.[6]

The effectiveness of the summons has been demonstrated in many situations. For example, prosecutors in Washington, D. C. and a number of other areas use an informal summons to bring defendants and witnesses together for pre-court conferences to eliminate the issuance of warrants whenever possible. Although this type of notice to appear carries no legal sanctions, the compliance rate is reportedly high. The formal summons, based upon statutes which contain financial or penal sanctions, presumably would evoke an even higher percentage of returns. In Cincinnati and Dayton, summonses or notices to appear are used widely in warrant misdemeanor cases. After a warrant is issued and the defendant's background has been investigated, the police are allowed to suspend its execution and issue a summons for appearance instead. Philadelphia recently passed a compulsory summons law applicable to all misdemeanors except sight arrests which carry penalties of less than two years' imprisonment. Restrictive interpretations, however, have confined its application to private warrant offenses and blue law cases. Juvenile court laws throughout the country instruct police officers in all but the most serious on the spot arrests to discharge the juvenile in the custody of his parents, with a notice to appear before the judge or court social workers. Very few parents fail to appear or produce the child at the requested time.[7]

Sound extension of the summons in criminal cases requires at least a brief preliminary investigation into each defendant's background. A landmark experiment to this end was recently launched in 14th police precinct of New York City

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[6] A 1960 California study showed the police or prosecutors informally released 28.5% of those arrested. Barrett, Police Practices and the Law From Arrest to Release or Charge, 50 Cal. L. Rev. 11 (1962).

[7] *Springfield, Missouri, Leader and Press,* March 12, 1964 ("We have never lost a boy on this"—Juvenile Judge Collinson).

through the joint efforts of the Police Department and the Vera Foundation. Known as the Manhattan Summons Project, it is designed to test the efficacy of replacing arrest and bail in certain common misdemeanors, such as petit larceny and simple assault, with a station-house summons. Based upon Police Department and Criminal Court regulations which authorize the use of summons for specified offenses, the project utilizes on-the-spot interviews by Vera personnel stationed in the precinct house to determine the community roots of persons brought before the desk officer on the designated charges. If the accused consents, the information he furnishes is immediately verified by phone. No interviews are held when the accused is intoxicated or agitated, or where the police feel that the offense is likely to recur immediately. Recommendations for issuance of a summons are made to the desk officer on a point system similar to that used in the Manhattan Bail Project.

Released defendants are warned that in the event of default, a bench warrant will issue. Where summons recommendations are not made, or when they are rejected by the desk lieutenant, the accused is booked, detained and taken before a magistrate. Wherever the project recommendation is followed, the initial arrest is converted officially into a summons under Section 57 of the New York City Criminal Courts Act. Project personnel assume responsibility for reminding the defendant and, in some cases, a relative, friend or employer, of the scheduled court appearance. In less than two months of active operation, 101 cases have been interviewed, 58 recommended for summons, and 53 recommendations adopted. All 47 summoned defendants whose arraignment dates have so far arrived, have appeared on time; two had their cases dismissed, one had bail set, and 44 have been released on their own recognizance. In addition to the two dismissals, ten defendants pleaded guilty and received suspended sentences.

D. *Release on Conditions Other Than Money*

If a background investigation reveals the accused to be a good risk for release on his personal promise to appear, a summons in lieu of arrest or r.o.r. after arrest is appropriate.

If the risk is in doubt, however, jail is not the only alternative; conditions may be attached to the terms of the release. The bail bond system conditions release on the payment of money; failure to appear means forfeiture. But this system breaks down when the accused is financially disabled. To condition his release on money may be to demand the impossible.

Some have suggested that requiring monetary bail an accused cannot post may be "excessive" by definition, in violation of the Eighth Amendment. Others believe that to condition release on a price that some can pay and others cannot, discriminates between rich and poor so as to amount to a denial of the "equal protection of the laws." These arguments coupled with Supreme Court decisions like *Griffin, Coppedge, Gideon,* and *Hardy,*[8] have provoked the suggestion that monetary bail may at some future date be found unconstitutional when applied to a man without money.

In this context, new interest has focused on nonmonetary conditions for release. Not only can such conditions "afford the opportunity of pretrial liberty to those presently unable to secure it, but in many cases provide greater assurances against forfeiture and flight."[9] The proposed amendment to Rule 46(d) of the Federal Rules of Criminal Procedure would authorize the release of the defendant "without security upon such conditions as may be prescribed to insure his appearance." The Advisory Committee's Note indicates that the language is designed to be flexible enough to permit individually tailored conditions of release. At least three promising methods have been advanced: supervised release, release in the custody of a third party and daytime release.

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[8] *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Coppedge* v. *United States,* 369 U.S. 438 (1962); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Hardy* v. *United States,* 375 U.S. 277 (1964); see also *Bandy* v. *United States,* 81 S. Ct. 197 (1960); 82 S. Ct. 11 (1961).

[9] Attorney General's Committee Report, p. 78; Introduction: The Comparative Study of Conditional Release, 108 U. Pa. L. Rev. 290 (1960).

1. *Supervised release*

The Attorney General's Committee observed that:

> The supervision of persons at liberty to guard against violation of the conditions upon which liberty was granted is a problem wholly familiar to the legal order. The rich fund of experience derived from decades of administration of parole and probation laws is highly relevant to the formulation of a sound policy of pre-trial release in the federal courts. Moreover, less formal procedures requiring persons to "check in" periodically with the police and other official personnel are not unknown in many American and foreign jurisdictions.

Examples include release conditioned on remaining within the court's jurisdiction or at home, surrender of the accused's passport and periodic check-ins with the police, probation office or court.[10] In the latter case, failure to report could be communicated promptly to the court so that efforts to recapture fleeing defendants could begin much sooner than they do now under the hit or miss checking arrangements of the bondsman. The St. Louis recognizance project thus requires all defendants on personal bond to report to their probation officer each Monday. Similar supervision has been proposed for inclusion in the forthcoming projects in Philadelphia and Oakland. And recent orders of the United States Court of Appeals for the District of Columbia Circuit indicate the extension of this concept to convicted defendants seeking release pending appeal.

As a direct outgrowth of the Attorney General's Committee recommendation that the Federal Probation Service be enlarged to enable it to perform bail fact-finding and supervised release functions, the probation office in the United States District Court for the Northern District of California initiated a 6-month pretrial release project on April 1, 1964. The United States Marshal notifies the probation office as soon as a defendant is taken into custody. If he cannot

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[10] Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 975-7 (1961); Devlin, The Criminal Prosecution in England 89-91 (1958).

make bail and consents to the inquiry, he is given a questionnaire and interviewed immediately. The inquiry centers exclusively on stability factors, and additional data is supplied by the Marshal, the United States Attorney and the agency investigating the crime. No discussion of the alleged offense is permitted. Verification is made by phone, and a summary of the findings, together with recommendations for r.o.r. or bond, is submitted to the United States Commissioner at the preliminary hearing. If the accused is released under supervision, the probation officer determines the frequency and method of reporting and may refer him to appropriate community agencies for assistance during the pretrial period. Failure to report is immediately communicated to the commissioner or judge. The project maintains records on the use of bail investigations in later presentence reports, the effect of this early contact on the relationship between the accused and the officer, the cost of the program and its effect on the accused's employment opportunities.

2. *Third party parole*

Suggestions have been advanced that a defendant be paroled into the custody of a willing private third party, such as his attorney, minister, employer, landlord, school or labor union. In some parts of the United States this is common practice. It is widely used in juvenile courts, which often release children into the custody of their parents. While harking back to the original concept of the personal surety, still intact in England, third party parole raises questions concerning the sanctions to be imposed on the surety in the event of default. One recent study expressed the view that subjecting the surety to a criminal penalty would defeat the system's objective: it would either not be enforced or it would eliminate personal sureties.[11]

But workable sanctions can be devised. A large-scale program launched in Tulsa, Oklahoma, in July 1963, is experimenting with the release of defendants into the custody of their attorneys. To qualify, an attorney has to agree that

[11] New York City Bar Report, p. 22.

he will not knowingly request the release of a person previously convicted of a felony or, within six months, of an offense involving moral turpitude. Failure to produce his client in court when required results in removal of the attorney's name from the approved list. Since the program's inception, a total of $173,000 in bonds have been waived because the defendants were released to their attorneys. The loss to bondsmen has been estimated to exceed $20,000, and two bondsmen are reported to have left town since the program began. Nearly 200 defendants a month are being released and 310 members of the Tulsa County Bar Association are said to be participating. As of May 1, 1964, the names of 13 attorneys had been removed from the list because their clients had failed to appear.

3. *Daytime release*

For those who cannot safely be granted full-time release, the possibility of part-time or daytime release has been raised to permit the accused to leave for outside employment during the day and return to jail at night. Daytime release is now employed in 14 states for *convicted* offenders, but in none for persons in pretrial detention. It allows defendants not only to maintain their jobs and social contacts, but to provide for their families as well.

The first American legislation to provide for daytime parole, known as the Huber Law, was enacted in Wisconsin in 1913. By 1960, one-third of the approximately 10,000 county prisoners jailed annually in Wisconsin were sentenced under the Huber Law and earned a total of $633,000. About one-third went to support their families, and one-third to defray the cost of operating the county jails. The balance is kept in a trust fund for the prisoner. Only about eight percent of the prisoners absconded.

North Carolina began a similar program in 1957, applicable to all defendants except those involved in sex crimes, drug addiction or cases requiring maximum security. It now employs 580 convicts. Officials estimate that supervising daytime release costs only 1/12th the cost of imprisonment, and that the savings to taxpayers since the program began is $337,000.

E. *Release for Money*

For the defendant who can raise bail and whose risk of nonappearance requires attaching some conditions to his pretrial release, the use of money to induce return for trial may continue to be appropriate. Within that framework, however, the present system offers vast opportunities for improvement.

1. *Lower Amounts of Bail*

Because bail is very often set too high, tailoring the system to the individual requires downward revision to more realistic levels. For 35% of New York City's working population, the $50 premium on a $1,000 bond equals a full week's wages. One-half of the nonwhite population in New York City has a weekly income of $50 or less.[12] Even setting bail for such persons at $500 is often the same as denying it altogether. Bail should be set in each case at the amount necessary to deter the particular defendant from defaulting on his obligation to appear, taking into account all the other deterrent factors in his personal and social situation. This criterion, of course, depends on knowledge of what he can afford to pay. One proposal is to enact a statutory ceiling of $500 bail in the absence of an affirmative finding that a higher amount is necessary for adequate deterrence. But if the defendant is bailable at all, bail should be set at an amount he can raise. The alternative is hypocrisy.

2. *Cash Bail*

In some jurisdictions a defendant may, in lieu of a bail bond, deposit directly with the court a smaller amount of cash or securities. Except for a service charge, the deposit would be returned to the defendant on his appearance at trial. This cash bail system is also the subject of a proposed amendment to the Federal Rules of Criminal Procedure.[13]

Under a two year provisional law which went into operation on January 1, 1964, Illinois allows the defendant to

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[12] 1963 Report, Women's House of Detention, pp. 13-14.

[13] Proposed Rule 46(d) would authorize "the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the full amount of the bond." Second Preliminary Draft (March 31, 1964).

execute a personal bond in the bail amount, and then deposit with the clerk of court a sum equal to 10% of that amount.[14] On meeting the conditions of the bond, 90% of the deposit is refunded. Thus if bail is set at $1,000, the defendant executes a personal $1,000 bond, posts $100 cash value with the court and gets $90 back when the case is over. Although the statute has already evoked controversy over the adequacy of its deterrent effect, its experience will provide valuable information about just how high a monetary stake a defendant needs to insure his appearance.[15]

New York City has had some limited experience with cash bail. The judge may set bail in the alternative—$1,000 bond or $100 cash. This gives the defendant the choice of posting a bondsman's bond of $1,000 at a premium of $50 unrefundable, or $100 cash refundable except for a 2% service charge. A 1963 legislative report called the "growing tendency" to fix cash bail in low amounts "a praiseworthy development." It recommended that judges be instructed to consider cash bail in every case:

> The results of such an instruction would be to focus attention on the reliability factors of a particular defendant to reduce the automatic, or at least the routine setting of bail, and at the same time to reduce the arbitrary power of the bondsman to refuse to write a bond without the presentation of whatever collateral he may require. In effect, the Court will thereby be compelled to determine what financial sanction should be imposed in order to insure the defendant's return to court.[16]

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[14] Illinois Code of Criminal Procedure §110-7.

[15] Special Rule 72 of the Illinois Supreme Court excludes misdemeanor bail schedule offenses from the 10 percent provision; *Chicago American*, Mareh 31, 1964 (bondsmen's group is challenging constitutionality of eash deposit provision).

[16] New York Assembly Report, pp. 52, 20-21. The Attorney General's Committee also endorsed the cash deposit system, pp. 81-2. On May 14, 1964, S. 2840 was introduced in the Senate to authorize this system in the federal courts.

Cash bail eliminates the bondsman as a middleman and reduces substantially the financial loss to the defendant who fulfills his obligation. It provides opportunity for immediate release where posting at the police station is permitted.[17] And because the money or security is his, or has been borrowed from friends or relatives, the deterrent value is theoretically greater than where a bondsman is involved, for once the premium is paid, the money is gone.

F. *Adjuncts to Release*

Even with broadened horizons for conditions of release, the bail system will continue to release some but detain others. In either event, the procedural adjuncts call for improvement. Fundamental to the process is the right to counsel. Only he can advise the accused under the tension of arrest; help the magistrate shape suitable conditions of release; and secure prompt review if the accused cannot meet them.[18] For those who are going to be released, an effective bail system must set three goals: (1) speedy discharge from custody, (2) assurance of return and, in cases where the accused is believed to be dangerous, (3) setting an early trial date to minimize the period of release.

1. *Prompt Release*

The bondsman can often secure release of an accused within hours after arrest. For the accused who can afford him, the bail-setting process thus by-passes any inquiry into roots in the community and focuses on money in the pocket. It avoids

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[17] See note 15. Despite the Illinois Supreme Court rule, however, some Illinois counties still allow a 10% cash deposit for bail schedule offenses. Starrs, A Progress Report on the Illinois Bail Survey (1964).

[18] Bail surveys reveal that some courts view the right to counsel and the right to bail as mutually exclusive alternatives. A Boston report indicates that there is no right to assigned counsel for prisoners free on bail. In Philadelphia, accused persons have been reported to get bail revoked purposely in order to obtain assigned counsel when they found they could not afford their own. These practices raise a serious question whether a federal constitutional right to assigned counsel under *Gideon* can be conditioned on waiver of a state constitutional right to bail.

the need for background investigation. Stationhouse bail and endorsing the bail amount on the warrant are two examples now used. A cash deposit system achieves the same goal without bondsmen. Issuance of an on the spot summons in lieu of arrest by the policeman achieves the same goal without any money at all and with a minimum of inquiry.

But for those who can post neither money nor property, and who cannot be released immediately without further investigation, the problem of prompt release is serious. A decision to remand the accused to jail for several hours or days while the inquiry goes on or before it begins inflicts punishment usually reserved for the guilty. The ultimate solution probably lies in the direction of a day and night fact-finding service to make rapid background reports on those who have no money and would otherwise be detained. Such reports can form the basis for a stationhouse summons by the police or release on recognizance by a 24-hour city magistrate.

2. *Penalties for Nonappearance*

The bail system is improved by an increase in pretrial releases only if the releasees return. Many of the devices for insuring this goal are built into the release conditions already described. Not to be ignored are the deterrents inherent in modern society. The Attorney General's Committee cited "the difficulties of fleeing the geographical jurisdictions of the federal courts . . . policed by national law-enforcement agencies of high efficiency and reputation."[19] The same is true to a lesser degree in states with interstate extradition compacts. But criminal penalties are thought by many to be the most effective deterrents to flight. Penal sanctions logically should deter defaulters more strongly than forfeiture of a bond for which the premium has already been lost. Yet surprisingly few states have bail jumping statutes and fewer still inflict criminal penalties for jumping parole or recognizance.[20]

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[19] Attorney General's Committee Report, p. 78.

[20] The following jurisdictions have bail and/or release on recognizance-jumping statutes: California: Cal. Penal Code §§1319.4, 1319.6 (prohibits only recognizance jumping); Connecticut: Conn.

Bail jumping is adequately covered in the federal courts. Under 18 U.S.C. §3146, the failure of a person admitted to bail to surrender within thirty days of forfeiture of bail may incur up to five years' imprisonment and $5,000 fine for a felony, one year and $1,000 for a misdemeanor. But flight from r.o.r. or conditional releases lacks any specific statute or rule. In order to invoke the penalties of the bail jumping statute, most courts follow the practice of having the defendant execute "a personal bond in the bail amount without offering additional financial securities."[21] Some districts set bond at $1 to invoke the bail jumping penalties. S. 2838 just introduced in the Senate would fill in part of the gap. It provides in part that

> (b) Any indigent person in custody before a court of the United States or a United States commissioner shall, if otherwise eligible for bail and except for good cause shown to the contrary, be admitted to bail on his personal recognizance subject to such conditions as the court or commissioner may reasonably prescribe to assure his appearance when required. Any person admitted to bail as herein provided shall be fully apprised by the court or commissioner of the penalties provided for failure to comply with the terms of his recognizance and, upon a failure of compliance, a warrant for the arrest of such person shall be issued forthwith.[22]

Gen. Stat. Ann. §53-154 (1960) (prohibits jumping only if accused is charged with a felony); Florida: Fla. Stat. §843.15 (1959); Minnesota: Minn. Stat. §613.35 (1957) (prohibits jumping only on felony charges); New York: N.Y. Penal Code §1694-a; North Dakota: N.D. Cent. Code §29-08-27 (prohibits jumping only on felony charges); Illinois: Ill. Crim. Code of 1961 §32-10. The new Illinois Code calls for liberal construction of its recognizance provision "to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused." These sanctions are $1,000 fine and 1 year imprisonment for a misdemeanor bail jumper; $5,000 and 5 years for a felony bail jumper. §110-2.

[21] Attorney General's Committee Report, p. 61.

[22] A proposed amendment to Rule 46 of the Federal Rules of Criminal Procedure provides that "each person admitted to bail shall

The penalty for wilful failure to comply with the terms of personal recognizance would be $5,000, five years' imprisonment, or both. The Attorney General's Committee suggested that bail jumping offenses be vigorously prosecuted, and that—

> great care should be taken at the bail hearing that the accused understand the nature of the obligation to appear for trial and that this understanding be reinforced by the sending of letters to persons at liberty restating the accused's obligation to present himself for trial.[23]

3. *Speedy Trial*

One of the aims of criminal justice is to afford the accused a prompt trial. In this way, the question of guilt or innocence can be resolved when the evidence is fresh and memories unclouded. While the speedy trial is advocated most strongly for the accused who is detained, society's interest may often be served by also accelerating the trial of some who are released.

This is particularly true in cases where police and prosecutors are concerned that the accused may commit crimes while on bail.[24] Shortening the interval from arrest to trial also reduces the risk of nonappearance of defendants free on bail and thereby increases the number that can be given this privilege.[25] Money saved from such a decrease in detention costs might go into salaries for more judges, prosecutors and assigned counsel involved in a speed-up program.

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have called to his attention the penalties imposed by law for wilful failure to appear."

[23] Attorney General's Committee Report, p. 78.

[24] See *Philadelphia Evening Bulletin*, April 6, 1964 (early trial sought for suspected criminals with more than one major trial arrest who are free on bail); *Philadelphia Sunday Bulletin*, August 8, 1963 (early trial sought to deter criminals on bail suspected of burglarizing to pay back bail money).

[25] Philadelphia Bail Study, pp. 1067-9.

G. *Adjuncts to Detention*

In jurisdictions which purport to have an absolute right to bail, presumably no one should be detained before trial in a noncapital case.[26] If the full range of conditional release techniques were available, perhaps no one would. But under prevailing practices, many defendants for a variety of reasons will undoubtedly continue to be held deliberately. The most frequent reason is the court's belief that the accused represents a serious and immediate threat to the community's safety. Because prosecutors and judges are soundly criticized when a dangerous repeater is released back into the community, high but not "excessive" bail is the only weapon they have to cope with the problem.

Under a more rational system, explicit criteria might be formulated for detaining the individual whose past record and present psychology strongly suggest that he represents too substantial a danger to be let loose pending trial.[27] Any such articulated policy would clearly run counter to the traditional presumption of innocence and reduce it to the status of a rule of evidence. Careful and intensive analysis would be required to assess the effects of such a policy on defendants

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[26] In several states and in the federal system, no absolute right to bail is guaranteed by constitution. In *Carlson* v. *Landon*, 342 U.S. 524 (1952), a 5-4 decision in a noncriminal proceeding, the Supreme Court denied that any such right was implicit in the Eighth Amendment's prohibition against excessive bail. Noting that the bail clause "was lifted with slight changes" from England where it "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail," the Court found no different concept intended in the Bill of Rights. Compare *Stack* v. *Boyle*, 342 U.S. 1 (1951).

[27] " . . . The quality of American bail administration might be enhanced by frank recognition, as a matter of legal theory, that in some non-capital cases no bail right should be recognized and by providing speedy and routine procedures to review such decisions at the appellate level." Attorney General's Committee Report, p. 60; Bail; An Ancient Practice Re-examined, 70 Yale L.J. 966, 975-7 (1961); Beeley, The Bail System in Chicago 166 (1927); Philadelphia Bail Study, p. 1076 (" . . . The conclusion is inescapable . . . that the real purpose of high bail is to incarcerate defendants. . . . ")

and the trial process. But significantly, this type of consideration is not unprecedented in law. It is presently one of the factors which may be used to set or deny bail on appeal in this country, and is openly followed in granting or withholding pretrial freedom in other countries. In *Leigh* v. *United States*, involving bail on appeal, Chief Justice Warren acknowledged that bail could be denied if

> 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.[28]

In England, the Lord Chief Justice criticized the granting of bail to a long time offender accused of a violent robbery:

> This is what comes of granting bail to these men with long criminal records. The Court has pointed out over and over again how undesirable it is, unless there is some real doubt in the minds of the magistrates as to what the result of the case is likely to be.[29]

These analogies of course are not complete; the presumption of innocence that attaches before conviction is gone when the case is on appeal, and the English system, while granting widespread release on bail, does not treat bail as a right. But if bail is no longer to be manipulated for preventive use, some more adequate and acceptable substitute must be found.[30] Whether or not a substitute is found, the problem

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[28] 8 L.Ed. 2d 269 (1962); see also Rule 33, United States Court of Appeals of the District of Columbia Circuit; *Carbo* v. *United States*, 82 S.Ct. 662 (1962).

[29] Home Office Circular No. 132/1955 (Sept. 8, 1955); Bail and Bad Character, 106 The Law Journal 22 (1956).

[30] Cf. civil commitment statutes for mentally ill, e.g. N.Y. Mental Hygiene Law §72(1)(a); criminal commitments to determine competeney to stand trial, D.C. Code §24-301 (a) (Supp. 1958); N.Y. Code Cr. Prac. §658; hospitalization of sexual psychopaths, Minn. Stat. Ann. §526-09-11; peace bonds, N.Y. Code Cr. Prac. §85. Because each of these statutes has very limited applicability, they mark only the beginning of any effort to deal with the problem. Attaching a good behavior condition to pretrial release, revocable on arrest for any new charge, has also been suggested.

of how to minimize the disadvantages of pretrial jailing to the accused will remain.

No matter what the rationale for his detention may be, fairness to a detained person prior to conviction dictates recognition of at least four rights: (1) prompt and adequate bail review, (2) separate detention facilities, (3) a speedy trial and (4) credit, if convicted, for time served before sentence.

1. *Bail Review*

An integral part of any bail setting system should be provision for prompt and periodic review. This can serve to determine whether bail has been set too high or whether conditions have been attached that are impossible for the accused to attain. It also provides a check on the length and character of detention between arrest and trial.

Several jurisdictions already provide or have proposed periodic review of detention. The federal court in the Eastern District of Michigan requires the United States Attorney to furnish a weekly detention census. New York City has inaugurated an automatic three day review as part of its Criminal Court procedure.[31] A proposed amendment to Rule 46(h) of the Federal Rules of Criminal Procedure would require weekly reports to the court from the government attorney, justifying the detention of all defendants held more than 10 days.[32] By automatically bringing to the court's

[31] The New York Assembly Report, p. 37, states that this review has tended to reduce bail drastically, with the court often setting a cash bail in very low figures and occasionally granting parole.

[32] "The Court shall exercise continuous supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a weekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each defendant so listed the attorney for the government shall make a statement of the reasons, if any, including the amount of the bail, why the defendant is still held in custody."

The Advisory Committee stated that a periodic report was preferred over automatic trial court review because in many districts judges

attention instances of prolonged detention, these new rules mark a distinct advance over motions for reduction of bail, which are seldom made and have proved largely ineffective in reducing detention to any significant degree.[33]

Prompt review, while indispensable to early release, is not simply a matter of giving the accused an immediate appeal from a bail he is unable to meet. Since the amount of bail is within the discretion of the lower court, appellate courts rarely set it aside as "excessive." Quick appeal, if available, would likely meet with quick affirmance, unless the accused could show that the trial court relied on improper criteria, or refused to consider the facts. Automatic trial court review, on the other hand, while by no means negating the importance of appeal, provides a periodic reevaluation of the factors involved in the original bail determination, in light of new developments in the case or newly-acquired information about the defendant's background or stability.

2. *Separate Detention Facilities*

The question whether an accused should be detained or not is different from whether he should be put in the common jail. The theory of pretrial detention is to preclude flight and assure trial attendance by the accused; the theory of jail is to punish and rehabilitate the guilty. "It is a startling fact," observed the Attorney General's Committee, "that, in the country as a whole, American correctional practice has not yet succeeded in drawing the most elementary distinc-

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sit infrequently at the place of custody, so that detained prisoners could not be brought personally before them without substantial delay.

[33] A 3-year study of bail administration in the Southern District of New York showed that the bail initially set by a commissioner was reduced by a judge in less than 4% of all cases. In cities surveyed by the American Bar Association, the following percentages represent felony cases in which the original bail amounts were changed: Baltimore—none; Chicago—25%; Miami—16%; Detroit—8%; Los Angeles—7%; New Orleans—20%; Philadelphia—2%; St. Louis—3%; San Francisco—6%.

tions between the accused and the sentenced offender."[34] These differences have given rise to attacks on the indiscriminate mixing of the accused with the convicted, and the abysmal conditions in which pretrial detention often takes place. Critics suggest that pretrial detainees be housed in separate, decent facilities with fewer restraints on their individual rights.[35] The conditions of detention previously described themselves suggest the direction of needed change: opportunities for recreation and work; fewer limitations on communication with the outside world, e.g. phone calls, letters and visitors.

3. *Speedy Trial*

Detained defendants deserve trial priority. They should be tried as quickly as is consistent with the requirements for adequate trial preparation. Although all defendants enjoy a constitutional right to a "speedy trial," a waiting period of 102 days has been held not to violate that right even when the defendant was in jail.[36] Some courts have made efforts

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[34] Attorney General's Committee Report, p. 69; Foote, Forward: Comment on the New York Bail Study, 106 U. Pa. L. Rev. 685, 689 (1958).

[35] E.g. Taft, Criminology 384 (1942); Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031, 1078-9 (1954); *Philadelphia Evening Bulletin*, October 21, 1963 (new $6 million "Detention Center Will Hold Suspects Awaiting Trial"; marks "the first time in the penal history of the state that untried prisoners will be separated from those convicted"; "James V. Bennett . . . said the new detention center is one of a few institutions of its kind in the country").

[36] *Smith* v. *United States* (D.C. Cir. February 28, 1964). Cf. dissent of Judge Edgerton:

> "Because he could not buy a $2500 bail bond, the appellant was imprisoned, despite the legal presumption of innocenee while he waited to be tried. This means that for nearly six months he was guilty. An accused person may not be denied counsel, or the right to take an appeal that is plainly frivolous because of his poverty. We think the same general principle covers this case. In our opinion the right to a speedy

to adapt their schedules so as to minimize the length of pretrial custody.[37] The cooperation of prosecutors is vital in this effort, for they maintain a sizable control over the scheduling of the criminal docket. Under one proposal, in any case where a defendant is denied bail or cannot make it, the judge would set an early trial date. The prosecution would then have the burden of showing why the case could not be tried at that time.[38] New York courts combine the 3 day periodic review of bail for detained offenders with the alternatives of lower bail or an advanced trial date.[39] And although there is certainly an irreducible minimum delay in the trial of criminal cases, courts might well adopt rules which define the preference that should reasonably be given to defendants who are sitting in jail.

4. *Credit Against Sentence*

For detained defendants ultimately found guilty, pretrial custody in most states has long counted for nothing. The general rule of criminal law has been that a sentence of imprisonment commences to run only from the date the convicted person arrives at prison to serve it.[40] Whatever rationale gave rise to that rule, the fact is that any involuntary loss of freedom through the criminal process is time that can never be regained. Many judges take the loss into ac-

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trial includes, in the circumstances of this case, the right not to be kept in jail for months without trial for the convenience of the prosecution. We think this right may not be denied because the accused is poor."

See also *Reading Times*, November 8, 1963 (10 weeks awaiting sentence on misdemeanor), and the average periods of detention for various jurisdictions listed in Chapter IV.

[37] E.g. *Newark Ledger Star*, April 26, 1963 (New Jersey gives priority in Grand Jury hearing to detained defendant); *Washington Post*, March 15, 1964 ("lock up" cases expedited in effort to cut down 30 day average between arraignment and jury trial).

[38] Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 976 (1951).

[39] New York Assembly Report, p. 37.

[40] E.g. *Byers* v. *United States*, 175 F. 2d 654 (8th Cir. 1949), cert. denied 338 U.S. 887.

count in formulating the terms of sentence. Many others do not, and a defendant will often be given a maximum sentence on top of many months of pretrial detention.

Recognizing the injustice whenever discretionary credit is not given, some legislatures have moved to repair it. In 1960 Congress amended 18 U.S.C. § 3568 to provide for a mandatory credit "for any days spent in custody prior to the imposition of sentence . . . for want of bail." Even that statute is limited only to offenders sentenced under laws which require "the imposition of a minimum mandatory sentence." On May 14, 1964, Senator Ervin, on behalf of a group of Senators, offered S. 2839 to erase the limitation. In May 1961, the American Law Institute approved a provision of the Model Penal Code to provide unlimited credit.[41] Such a provision merits favorable action in every jurisdiction which lacks it. Distinctions based on which jail a prisoner is kept in, or on what theory he was detained prior to trial, have nothing to do with the simple justice of a rule that each day the state deprives a man of his freedom ought to bring him one day closer to release.

H. *The Material Witness*

The preceding portions of this handbook have dealt with pretrial release of defendants charged with criminal offenses.

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[41] Section 7.09(1) of the Proposed Official Draft, July 30, 1962, is entitled "Credit for Time of Detention Prior to Sentence" and provides:

> "When a defendant who is sentenced to imprisonment has previously been detained in any state or local correctional or other institution following his [conviction of] [arrest for] the crime for which such sentence is imposed, such period of detention following his [conviction] [arrest] shall be deducted from the maximum term, and from the minimum, if any, of such sentence. The officer having custody of the defendant shall furnish a certificate to the Court at the time of sentence, showing the length of such detention of the defendant prior to sentence in any state or local correctional or other institution, and the certificate shall be annexed to the official records of the defendant's commitment."

The material witness occupies a wholly different status. Although charged with no crime, in many states he can be indiscriminately jailed with accused or convicted offenders, with all the deprivations, restraints, and stigma which jail connotes, for the sole reason that he cannot afford bail.

A material witness is defined as a person whose testimony, as shown by affidavit, is "material in any criminal proceeding." [42] If a subpoena to secure his presence at trial seems "impracticable," the court may "require him to give bail for his appearance." If he fails to give bail, the court "may commit him to the custody of the marshal pending final disposition of the proceeding." If he is detained "for an unreasonable length of time" the court "may order his release." The constitutionality of such procedures for detaining persons charged with nothing but knowledge was upheld by the Supreme Court in 1929.[43]

Statistics on the detention of material witnesses are difficult to secure, but the volume is not very high. The estimate for all federal courts over the past three years is 100 released from custody per year. Another estimate puts the figure in Washington, D.C., at a dozen in the past ten years. The New York statute reportedly was invoked 53 times in 1959. But regardless of the numbers involved, the effect of long periods of detention upon the lives of individual material witnesses can be disastrous.

The material witness statutes appeared to be invoked in three situations: The innocent passerby or "good samaritan" witness who reports a crime, the victim of the crime whose presence at trial is essential to a conviction, and the involved associate or accomplice of the defendant who may be vulnerable to injury or intimidation. Recent examples include two migrant farm workers in Rhode Island, witnesses to a homicide, held for lack of $5,000 bail for 158 days;[44] a child detained in California on a District Attorney's "hold" as a

[42] The quotations in this paragraph come from Rule 46(b) of the Federal Rules of Criminal Procedure. See also Cal. Penal Code §§ 879-881; N.Y. Code Crim. Proc. c. 556.

[43] *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597 (1927).

[44] *Quince* v. *Langlois,* 149 A.2d 349 (R.I. 1959).

material witness against her grandfather—her parents had to bring habeas corpus to free her;[45] an informer in a robbery case held in New York City for several months on $50,000 bail while his wife and children suffered on the sidelines;[46] and Long Island housewives, some with young children, held as material witnesses in a call-girl syndicate case.[47]]

The policy behind setting high monetary bail to insure the appearance of material witnesses evokes even more skepticism than its use for defendants. Preferable alternatives should be available for all these situations. Texas statutes provides that if the witness cannot afford bail, he must be released on recognizance.[48] Colorado authorizes either side of a case to require a witness to post bail, but limits the amount to $500.[49] California, like federal law, authorizes the court to direct that a detained witness' deposition be taken, so that he may be released as soon as it has been subscribed.[50] A proposed amendment to Rule 46(h) of the Federal Rules would require courts actively to exercise supervision over material witnesses, as well as accuseds, "for the purpose of eliminating all unnecessary detention." For any witness held over ten days, the United States Attorney would be required to state reasons why he should not be released with or without taking his deposition. For the witness whose reliability gives cause for concern, supervised release with regular reporting in should suffice. Where protective custody is necessary to guard the witness from harm, that protection might better take the form of guarding the person than making him spend the entire period in jail.

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[45] *In re Singer,* 285 P.2d 955 (1955).

[46] "Long Nightmare of a Police Witness", *Saturday Evening Post,* November 2, 1963.

[47] *New York Times,* February 5, 1964.

[48] Texas Code Crim. Proc. Ann. Art. 300-304, 483-4 (Vernon 1954).

[49] Colo. Rev. Stat. Ann. §39-6-8 (1953).

[50] Rule 15(a), Federal Rules of Criminal Procedure. The California statute, however, provides that the deposition must be taken immediately on proof of inability to make bail, while the Federal Rules set no time limit. The California statute does not apply to homicide or accomplices.

Chapter VII

DETENTION OF JUVENILES

A rising tide of juvenile crime in the United States—552,300 delinquency cases in 1962 or 25.9 per 1,000 children—impels a close look at our juvenile detention policies.[1] Not only the numerical significance of such detention,[2] but its critical effect on the juveniles involved—particularly first offenders—call for a reexamination of detention procedures and facilities. Initial contacts with police and court personnel can decisively affect the juvenile's attitude toward the law, society, and the likelihood that he will repeat antisocial acts.[3]

A. *Theory*

A majority of youthful offenders under the age of 18 come within the jurisdiction of our 2,500 local juvenile courts. The juvenile court proceeding is technically not a criminal proceeding; it is a special statutory proceeding involving both civil and criminal principles, designed to adjudicate whether the juvenile is "delinquent," "dependent," "neglected" or other statutory designation that brings him under the court's jurisdiction. Conduct which might not qualify as criminal for an adult may nonetheless invoke the court's jurisdiction under the typical broad wording of juvenile court acts; similarly, an

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[1] Juveniles under 18 accounted for 64% of arrests for auto theft, 54% of arrests for burglary, 49% of arrests for larceny. See Parsons, Administration of Police Juvenile Services in the Metropolitan Regions of the United States, 54 J. Crim. L.C. & P.S. (March 1963).

[2] Children's Bureau Statistical Series (Juvenile Court Statistics—1962) (25% of children picked up are detained in jail). A 1956 estimate reported between 250-300,000 juveniles detained in special facilities, 50,000 in jail. Bloch & Flynn, Delinquency, the Juvenile Offender in America Today (1956).

[3] A study conducted within the Detroit Police Department showed markedly differing rates of recidivism among youths initially contacted by different officers in the same precinct. Wattenberg & Bufe, Effectiveness of Police Youth Bureau Officers, 54 J. Crim. L.C. & P.S. (1963).

absence of suitable environment or home may be the cause of his status as a ward of the court.[4]

A typical definition of a child who comes under the juvenile court's jurisdiction is one "who so deports himself as wilfully to injure or endanger the morals or health of himself or others". Moreover, since most juvenile courts also have jurisdiction over neglected or dependent children, police may take into custody a child whose surroundings "endanger" his "health, morals, or safety". Children who "habitually associate with" criminals or unsavory characters, who "chronically disobey" parents are also eligible for designation as "delinquents". In short, the standards for apprehension and detention of juveniles are often so wide and so vaguely defined as to encompass innocent, as well as all degrees of misbehaving children. They run the gamut from murder to use of profane language or truancy. The aim of the proceeding is solely rehabilitative, not punitive; what is best for the child is presumed to guide the judge, social workers and all involved in the case. Therefore, many of the basic rights of an adult defendant are denied a juvenile.[5] Among such rights are the right to bail and the right to be brought before a committing magistrate on arrest for a preliminary hearing.[6] Pretrial detention is regarded as merely one stage in the juvenile's processing from arrest to treatment and one in which the *parens patriae* philosophy of the juvenile court will protect his interests.

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[4] In 1962 there were 141,500 dependency and neglect cases in juvenile court, or 2.5 per 1,000 children (Juvenile Court Statistics—1962).

[5] This theoretical framework for juvenile court proceedings has been challenged. See, e.g., O'Connor & Watson, Juv. Del. & Youth Crime—The Police Role, p. 18 (1964): "When the veneer of technical jargon is removed, we find that children are in fact held to answer for their criminal conduct."

[6] Right to Bail: *In re Magnuson*, 110 Cal. App. 2d 73, 242 P.2d 362 (1952) (no); *State* v. *Fullmer*, 76 Ohio App. 335, 62 N.E.2d 268 (1945) (no); *Ex parte Espinosa* v. *Price*, 144 Tex. 121, 158 S.W.2d 576 (1945) (no); *Trimble* v. *Stone*, 187 F.Supp. 483 (D.D.C.) (1960) (yes); *State* v. *Franklin*, 202 La. 439, 444, 12 So. 2d 211, 213 (1943) (yes); *Cinque* v. *Boyd*, 99 Conn. 70, 121 Atl. 678 (1923) (no).

B. *Procedure*

Since the juvenile typically is not brought before a judicial officer immediately upon arrest to test the validity of the arrest, and since he has no right to be released on bail, the procedures and criteria for detaining him before adjudication by the juvenile court should withstand scrutiny to insure that his interests are in fact protected. The articulated philosophy of juvenile court acts[7] is that whenever possible a child will be immediately released to his parents or other guardian to await trial or adjudication in their custody upon their agreement to produce him in court, as required. Detention for juveniles has been repeatedly scored as "a disruptive experience and should be used selectively";[8] "detention as therapy is semantic acrobatics".[9] It often leads to identification as a confirmed lawbreaker; status as a bona fide "delinquent" or "big shot" among his peers; and perhaps, even more dangerous, introduces him to the philosophies and actual *modus operandi* of more experienced and sophisticated offenders.[10] In a survey of Pennsylvania police, 31% of those interviewed considered detention experience harmful, unhealthy, and schools for crime." Detention is concededly "drastic action" [11] and not to be used as a convenience to the police for interrogation or investigation, or for the court staff for study purposes, nor as short-term "treatment" or punishment.

C. *Criteria*

The types of delinquent children who must be detained are generally agreed upon, and include:[12]

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[7] Standard Juvenile Court Act (1959) Article 4 §17.

[8] Detention Facilities for Children in New York City; A Plan for Management Improvement—Office of Mayor (1962).

[9] Bloch & Flynn, *supra*, note 2.

[10] See Juvenile Delinquency—A Report on State Action and Responsibilities 1962—Council of State Governors p. 16. Goldman, The Differential Selection of Juvenile Offenders for Court Appearance, pp. 101-2.

[11] Downey, State Responsibility for Child Detention Facilities, Juvenile Court Judges Journal Vol. 14, No. 4, p. 3.

[12] National Council on Crime & Delinquency, Standards & Guides for Detention of Children and Youths (1961). Most juvenile court

a) Children who are almost certain to run away during the period the court is studying their case, or between disposition and transfer to an institution or another jurisdiction.

b) Children who are almost certain to commit an offense dangerous to themselves or to the community before court disposition or between court disposition and transfer to an institution or another jurisdiction.

c) Children who must be held for another jurisdiction; e.g., parole violators, runaways from institutions to which they were committed by a court, or certain material witnesses.

Translated into police regulations, however, these agreed upon criteria often encompass a wide area of discretion. For example, in Cincinnati police detention of children is authorized[13] when (1) the pattern of conduct or offense shows the child is dangerous to the community; (2) the child is in physical or moral danger, stranded, has no friends, relatives or neighbors; (3) the child's parents cannot control him and sign an affidavit to that effect; or (4) when it is necessary to assure (a) his presence in court, (b) his return to another jurisdiction, (c) his commitment to an institution, (d) the recovery of stolen property, or (e) the apprehension of his associates in crime.

In the District of Columbia, the police detain juveniles if there is cause to believe that (1) his parents will not make the child available for questioning or for court appearances, (2) he is, because of his prior record, a potential menace to the community, or (3) parental custody is inadequate, the parents or suitable substitutes cannot be located, or the home is unsuitable for the child.[14] In Baltimore,[15] detention is specified for cases where (1) juveniles are involved in such serious

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acts authorize detention when "necessary for the protection of the welfare of the child" e.g., former §7 29 of Cal. Welfare and Institutions Code; D. C. Code §11-912 (1961) (release unless "impractical").

[13] Cincinnati Police Department Regulations 16.005.

[14] Gen. Order No. 1, Metropolitan Police Department (1956).

[15] Rules & Regulations & Manual of Procedure of Police Department 177-182.

or persistent delinquent behavior that there is a risk of continuing offenses, (2) the juvenile's family cannot adequately care for him and assure his appearance in court, (3) he is a runaway from home, training school, or another jurisdiction, or (4) his condition requires medical or custodial care; i.e., he is sick, intoxicated or mentally ill.

D. *Proportion Detained*

When the breadth of discretion accorded to police under such regulations is considered, it is not surprising to find that despite the similarity of stated criteria, the rates of juvenile detention vary greatly among jurisdictions. In some places, all children referred to juvenile court are detained. In others, only two or three out of every 100 are held. A 50% ratio is not uncommon,[16] although the National Council on Crime and Delinquency estimates that only 10% of the children apprehended for delinquency are in need of official custody pending adjudication or disposition of their cases. The police interpretation of whether a child is dangerous to himself or to the community may differ radically from that of the social worker or judge.[17] Wide variations occur even among police officers themselves.[18] Once the police decide to detain a child,

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[16] The following figures are taken from Annual Police Reports. They are not analyzed and can give only a rough idea of variations in practice.

Juvenile Arrests	*Released*	*Detained*
Indianapolis (1957)	2342	1251
Detroit (1959)	3605	3054
San Diego (1962)	6148	3810
Washington (males) (1963) (Youth Aid Division)	1068	1514

[17] Goldman, *supra*, note 10, at 103 (20% police interviewed felt no value in sending juveniles to court because they were immediately released by the intake officer).

[18] O'Connor & Watson, Juvenile Delinquency and Youth Crime—The Police Role, p. 34 (1964). "Stark realism based on first-hand experience impels us to assert that there are some who prove to be incorrigible and irrevocably committed to criminal ways. We must

the likelihood of his remaining in detention is high,[19] even though the judge or juvenile court personnel have the power to review or veto the original decision.[20]

In California, a 1958 Governor's Commission investigated juvenile detention practices, among other aspects of juvenile court operations. California's rate of detention in the 1950's was 5 times that of Connecticut. According to the California Youth Authority, approximately ⅔ of those detained were referred after adjudication to the probation department and less than ½ were placed under official supervision. Presumably, most of these ⅔ originally detained could have been safely left in the care of their parents pending trial. Excessive detention was attributed to a variety of causes, including the taking of children into custody without sufficient investigation, and broad discretion to detain juveniles after apprehension. Some detentions were justified for their "shock treatment" value to the juvenile.[21] Juveniles were often detained in police lockups or juvenile halls without the knowledge of the court or its probation staff.

As a result of the Commission's findings, California's Juvenile Court Law enacted in 1961 specifies that an apprehended juvenile shall be released pending adjudication unless certain criteria are met. Detention is permitted only (1) where urgently necessary for the protection of the youth or the person or property of another; (2) where the youth is likely to flee the court's jurisdiction; or (3) where he has violated an order of the juvenile court.[22]

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admit, however, that we cannot tell in advance which ones they are." Goldman, *supra*, at 107-8, 124 reports factors such as the distance to the detention home, the availability of police personnel for the trip, or the uncooperative attitudes of the parents as influencing the decision to detain in some cases.

[19] Bloch & Flynn, p. 257.

[20] See discussion of state detention procedures, *infra*.

[21] Governor's Special Study Commission on Juvenile Justice, Report II, 103-104, 81.

[22] See Goldfarb & Little, 1961 California Juvenile Court Law, 51 Cal. L. Rev. 421 (1963).

Overuse of detention has not been attributed to the police alone. In 1962, New York City conducted an investigation of juvenile detention facilities and concluded that too many children who might have been released safely pending adjudication were being detained. A study of 2761 children found in detention homes revealed that 66.8% were released back to the community after adjudication; it was presumably unnecessary to have detained these children in the first place. This was attributed in part to judges who tended to put children in detention for "study" purposes in complex cases.

Until the New York Family Court Act was passed in 1962, children apprehended and referred to juvenile court were brought directly to the court for an initial decision on detention. Because of statutory restrictions and limited personnel, the intake service could screen very few. Judge Polier of the New York Family Court also conducted a study of the detention rates among the 12 rotating juvenile judges in Manhattan in 1961. In one month, two-thirds of the juvenile defendants were detained and one-third paroled to their homes. In the preceding month, two-thirds were paroled and one-third detained. Over the twelve month period about half were detained and half paroled. She concluded:

> Both of these findings—the variation among the judges in the use of remands of delinquent children and the high average of use by all judges—raise questions that call for study in the light of the standard formulated by the National Council on Crime and Delinquency.[23]

In most cases, however, the report found that psychiatric, psychological, and sociological studies could have been conducted on an out-patient basis.[24] Under the new Family Court

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[23] From January 1961 to February 1962 there were 1066 releases and 941 detentions. Polier, A View from the Bench, The Juvenile Court, p. 2 and Table 3.

[24] Detention Facilities for Children in New York City; A Plan for Management Improvement—Office of Mayor (1962). See also Polier, A View from the Bench, The Juvenile Court (1964) at 54-5—"The extension of remands to shelter or detention, pending reports, violates the spirit as well as the letter of due process."

Act of 1962, an intake investigation service was set up to provide juvenile judges with immediate information on the eligibility of children for release, and to decide on such releases when court was not in session. In its first eight months, the intake service helped to reduce the daily detention census from 478 to 316. It decreased by 37% in one year the number of delinquency referrals to the court.[25]

The New York Report concluded that detention ought not be corrupted into a "convenience" for social work study any more than for police investigation or interrogation. It found that while detention makes it easier for the police to question a child and take him to the scene of the alleged offense, and enables the social worker to observe and evaluate a child on a 24-hour basis, such considerations ought not be permitted to override the policy of no detention except for extreme cases.

Excessive detention rates for juveniles are a problem which largely affects minor violators or first offenders. For example, of 514,000 juvenile court delinquency cases in the United States in 1960, only 20% involved serious offenses, i.e., 18% for burglary and theft, 1% for robbery and aggravated assault and 1% for criminal homicide.[26] Out of all children detained overnight or longer, 43% are eventually released without ever being brought before a juvenile court judge, and half of all cases referred to juvenile courts are closed out at the intake stage before any judicial hearing.[27]

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[25] Botein, Shifting the Center of Gravity of Probation 2-3 (address delivered to the 55th Annual Conference on Probation, New York City, October 22, 1963); Polier, *supra*, at pp. 8-9.

[26] U. S. Children's Bureau Statistical Series (Juvenile Court Statistics—1960).

[27] In Dayton, Ohio, the estimate is 90% adjudication by court personnel. A low rate of detention is attributed to a severely overcrowded facility that allows only the most serious cases to be detained pending adjudication. Interviews with Capt. O'Connor and Lt. Williams of Dayton Police Dept.

E. *Period of Detention*

An important facet of the detention problem concerns the length of time for which children are held in custody prior to adjudication. The suggested limit is 2 weeks.[28] Longer periods are considered detrimental to the child's interests for two reasons. Detained children have been found to undergo maximum strain and anxiety in the period before their cases are disposed of rather than afterwards when institutionalization has begun and the tension of wondering what will happen to them is over. Such strain can easily erupt into violence.[29] Second, temporary detention centers are not geared to major rehabilitative efforts; the ebb and flow of their population makes difficult any constancy in recreational and educational programs. Temporarily detained children are largely in "hiatus." Furthermore, there is a basic question whether any rehabilitative effort should be begun before the factual issues, if any, in the case have been resolved, the child has been formally adjudicated a delinquent, and the preliminary investigative reports necessary to proper diagnosis and treatment have been completed.

Prolonged pre-adjudication detention is usually attributed to judicial or social intake backlogs, infrequent court sittings, and delays in the scheduling or completion of tests or reports.[30] Delays also occur in the transfer of adjudicated cases to long range treatment facilities.

The 1962 New York City investigation revealed that children were sometimes detained in temporary facilities for up

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[28] Standards and Guides for the Detention of Children and Youth (National Council on Crime & Delinquency 1961).

[29] See Downey, State Responsibility for Child Detention Facilities, 14 Juv. Ct. Judges J., No. 4, p. 4.

[30] Even after passage of the N. Y. Family Court Act, it took 7 weeks in Manhattan to obtain a clinical diagnosis of a child. Polier, p. 53. A study of the reasons for delayed disposition showed, at the end of the second month, that 70% of delays were caused by incomplete probation or clinic reports; at the end of the third month, 45% were delayed for this reason. Table 10.

to 3 months;[31] in Washington, D. C., 17% of the detainees are held for more than a month.[32] One suggested solution for such excesses is to send a daily or weekly list of all detention inmates to the juvenile judge for review, with reasons noted for any delay above a two-week period. The Baltimore Childrens Center has an absolute limit of 30 days beyond which a child cannot be detained. The New York Family Court Act bars adjournment of court proceedings beyond 20 days after jurisdiction has been adjudicated, if the child is in detention.[33]

F. *Distribution of Authority*

Jurisdictions have divergent practices with respect to who has the authority to place a child in detention after apprehension. They also differ as to whether a detention hearing is necessary, and when judicial review of the initial police decision to detain is required. Twenty-one states appear to require a court order for detention;[34] yet in some of these states there is evidence that the police or social workers have the power to detain temporarily pending application to the court, or that the court order requirement is observed only in form. More important is the requirement in many states that a hearing or appearance before the juvenile judge be held within a specified time. In other jurisdictions, the child may be initially detained by the court's probation officer. A minor-

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[31] Detention Facilities for Children in New York City: A Plan for Management Improvement—Office of Mayor (1962). Polier, *supra*, at 15. At end of 3 months in 1961, 42% of children whose cases were not disposed of by the same judge who saw them initially were still awaiting disposition. Table 8.

[32] The D. C. average is 15.4 days. 1963 Annual Report, D. C. Receiving Home for Children. A local newspaper recently reported that in one case, a child stayed at the Receiving Home 10 months due to a "mix up" of records. Other recorded extremes are *White* v. *Reed*, 125 F.2d 647 (1954) (6 mos.); *United States* v. *Dickinson*, 271 F.2d 487 (1959) (5-6 weeks).

[33] 29A Pt. I McKinney's Consol. Laws of New York, Art. 7, §749(a), (b).

[34] Manual of the National Council of Juvenile Court Judges.

ity of states permit the police alone to decide the initial detention question.

Detention of juveniles is increasingly being viewed as a sufficient infringement of the rights of the child to warrant judicial review at the earliest point. The 1961 California Juvenile Court Law, growing out of problems created by a division of detention responsibility between the police and probation officers, now requires a police officer to refer an apprehended juvenile to the probation officer immediately—by citation or personal delivery. The probation officer then decides whether further detention is necessary; if so, he has 48 hours in which to file a petition for a detention hearing before the juvenile judge on the next judicial day.[35] The juvenile must be present at the hearing, whose purpose is to determine whether the statutory grounds for detention are present.[36]

New York's 1962 Family Court Act requires the following procedures for detention.[37] Upon apprehension, the police officer must notify the parents he has taken custody of their child. He then must either 1) release the child to his parents, 2) with all reasonable speed take the child directly to court, without going first to the police station, or 3) take the child to a place designated by the court for the reception of such children. The law specifies, however, that the officer "shall" release the child unless there are "special circumstances." If the child is brought to a designated facility, the facility must bring the child to court "as soon as possible." If taken to court, the probation officer has the power to release the child before the filing of a petition unless he finds that there are "special circumstances" requiring detention. If the child is not released, he must be brought before the court within 48 hours for a hearing.

In Baltimore, a hearing is held for each arrested juvenile within 24 hours; the court sits daily and Saturday for this

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[35] Cal. Welf. & Inst. Code §630-1.

[36] If the arrest is after the probation office is closed, the police may hold the juvenile until the next day. Some probation offices have extended their office hours for this purpose.

[37] 29A Pt. I McKinney's Consol. Laws of N. Y., Art. 7, §724-28.

purpose. A juvenile court officer interviews children at the detention facility up to 10:00 p.m. to see whether they are properly being detained. The detention officer is responsible for seeing that the parents and necessary witnesses are present at the hearing.

The National Council on Crime and Delinquency has recommended that the decision to detain should always be made by a court or its officers.[38] From the moment of arrest, the child should be within the custody and control of the court.[39] Because the police usually make the first contact with the child, however, methods of cooperation between the police and court officials must be worked out. It has been suggested that juvenile courts, in consultation with the police, should formulate written guides to govern detention practices; police detention standards should be made to coincide with court standards so that a child will be detained initially only in situations where there is a firm expectation that the court will continue that detention. Detailed reports should be made to the court whenever a juvenile is detained. Cases in which the police and court personnel disagree might well be used as the basis for analysis and joint training.[40] In many communities liaison is maintained through the attendance of police representatives at juvenile court proceedings and of court representatives at police staff meetings, as well as through consultation in individual cases and written instructions to the police regarding approved juvenile procedures.[41]

Apart from these measures, however, prompt judicial hearings and review of detention decisions with the opportunity for challenge by the child appear to offer the most effective means of avoiding unnecessary detention.

G. *Detention Facilities*

Pre-adjudication detention, where absolutely necessary, ought logically be an integral part of the overall rehabilita-

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[38] Standards & Guides for Detention of Children & Youths (1961).

[39] Standard Juvenile Court Act 1959, §2(h).

[40] Myers, Processing & Reporting of Police Referrals to Juvenile Court (Southeastern Law Foundation Institute on Juvenile Delinquency, 1962).

[41] *E.g.*, Tulsa; Cincinnati.

tive process. Yet over 100,000 children are detained each year in ordinary jails or jail-like structures and according to the National Council on Crime and Delinquency, the number increases each year. Although a great many states have laws specifically forbidding the jailing of children with adult offenders, nearly 90% of all juvenile court jurisdictions, particularly those in non-metropolitan areas, are too small to warrant separate detention facilities for children financed by the city or county. As a result, children are detained in old-age homes, insane asylums, courthouses, or often in one or two cells of the local jail set aside as "detention quarters." Five states have no separate juvenile detention homes at all,[42] 21 states admit to some jail detention on a regular basis;[43] and most of the rest undoubtedly jail children to some extent in less populous areas. A recent magazine survey unearthed these examples. In Hopewell, Virginia, an "incorrigible" child was confined to a 3′ by 2′ cell; in Fort Worth, Texas, several children found "wilful or impossible to discipline" by their parents were placed in a cell with sex offenders and were later transferred into solitary confinement when fighting broke out. In Terre Haute, Indiana, the jail cells set aside for children were described as having "sagging cots, filthy bedding, corroded plumbing fixtures." In some places, 7 year olds have gone to such jails; in others, children have been jailed for up to a year. One 11 year old retarded child spent a year in jail awaiting placement; and a 15 year old material witness victim of a sex attack spent 6 months in jail waiting for the trial.[44]

With a few notable exceptions, juvenile detention facilities have been characterized as a "national disgrace."[45] The so-called separate facilities in jail often turn out to be a bunk on top of a block of cells within hearing if not sight of adult criminals or woefully inadequate rooms in a police station.

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[42] Alaska, South Dakota, Maine, Mississippi and Montana.

[43] Manual of the National Council of Juvenile Court Judges.

[44] *Parade Magazine*, Children in Jail, Nov. 17, 1963.

[45] Bloch & Flynn, Delinquency, the Juvenile Offender in America Today (1956).

Less than 20% of all local jails have been given a satisfactory rating for housing adult federal prisoners by the U. S. Bureau of Prisons.[46] There are model detention centers in various urban centers, such as Sacramento, Milwaukee and Salt Lake City. One of these, in Baltimore, has a 90-bed facility for boys which affords diagnostic services and complete psychological, medical and psychiatric services. Children are referred there by the court for study pending adjudication and disposition, but never for over 30 days. The facility is run by the State Department of Public Welfare.

Lack of money seems to be the basic problem with detention facilities. Less than 4% of the counties in the United States have a sufficient number of detention cases to justify a separate and adequate facility. To be satisfactory, a detention center must provide secure custody, good physical care, constructive activities, guidance, and opportunity to observe and study the child. In 1961 such a facility would have cost $12,000-$20,000 per bed. A juvenile facility needs personnel for 24 hours supervision; operating expenses come to an estimated $78,000 annually. To justify this expense, the facility would need to serve 278 cases per year, a figure likely to be found only in counties of over 250,000 population. Only 122 of the 3100 counties in the United States, less than 10% of all juvenile court jurisdictions, fall into this category.[47]

Voluntary cooperation among counties to build and maintain regional detention homes has turned out to be impractical; too many sparsely settled counties need to be involved in financing one adequate facility.[48] Most experts believe that a statewide detention plan is necessary to insure adequate care for children. Several states have already built detention homes: 4 regional detention homes in Connecticut have replaced 92 city and village jails; one regional home in Delaware

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[46] Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, p. 69.

[47] These estimates come from Downey, State Responsibility For Child Detention Facilities, 14 Juv. Ct. Judges Journal No. 4, p. 3.

[48] Northern Virginia has the only voluntary regional detention home at present.

serves all 3 Delaware juvenile court jurisdictions.[49] State-financed detention facilities not only can provide adequate services to detained children but out-patient diagnostic and study services to surrounding areas as well.

Some experts suggest that state programs encompass not only building adequate facilities but planning for their use.[50] They believe that intake should be controlled according to juvenile court criteria in writing, to avoid diverting institutions from their primary mission of housing children who require secure pretrial custody into becoming "catchalls" for minor cases of delinquency and neglect which do not require such a facility. Such diversions in the past have resulted in sending serious delinquents to jail because the regular juvenile detention facility, designed to serve these cases, was overcrowded.

The tendency to overcrowd detention facilities, regardless of size, has become prevalent. When a jurisdiction with a relatively low detention rate builds a new facility, its rate rises until overcrowding diminishes the advantages of having a separate physical plant and specialized staff. New York City Youth House for Boys with a capacity of 395 had a peak census of 544 before intensive efforts were made to reduce its population. Washington, D. C.'s Receiving Home, with a 90-bed capacity, has occasionally housed up to 199 children. One 30-bed-capacity center in Minnesota sends an overflow of 1,000 to jail each year.

Many experts believe that the answer lies not so much in building bigger shelters as in analyzing detention policies to see if the census can be cut. One year after inaugurating an adequate social intake service at the New York Family Court, the census of Youth House dropped from 312 to 192 boys and from 168 to 124 girls. The cost of detaining a child frequently runs from $10 to $20 a day. In a large city, a census reduction of 20 per day would save about $100,000 a year. This

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[49] State operated facilities also are located in Alabama, Indiana, and Massachusetts.

[50] The suggestions for a state detention plan which follow come mainly from Downey, State Responsibility For Child Detention Facilities, 14 Juv. Ct. Judges Journal No. 4.

would be enough to pay the salaries of 15 probation officers not only to supervise the release of more children, but to provide necessary investigations and casework for others as well.

Other suggestions for state plans include shelter homes for dependent and neglected children and others who come under court jurisdiction only because they lack proper custodial care. These children should not be mixed in "all purpose" institutions with delinquents of varying degrees.[51] Adequately supervised individual or group foster homes will frequently provide sufficient security for these children and still keep them within the community fabric.[52] Local overnight care facilities should also be a part of a statewide detention program so that children can be decently cared for while parents are being located or arrangements are being made to transport them to regional homes or for interviews.

Security type detention facilities should be reserved for children who cannot be trusted not to harm themselves or the community in the interim before trial. Neglected or mistreated children who come from home environments dangerous to their welfare, but who have committed no wrong themselves, should be treated separately. Children who are allegedly delinquent but would ordinarily be released to their parents if a suitable custodian would assure their appearance in court may also warrant specialized treatment. Subsidized foster homes operating under close supervision by court-appointed counsellors may allow the child to remain within the community, and attend school, church, etc. Such a "halfway" house for incoming juvenile court cases has been proposed in Washington, D. C. as part of the Washington Action for Youth (WAY) attack on juvenile delinquency. Still another proposal, for children who might ordinarily be detained to guard against repetition of alleged nonviolent offenses or runaway tendencies, involves supervised release to parents under the supervision of probation officers. Techniques here

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[51] The new California Juvenile Law forbids dependent and delinquent children to be placed in the same facilities.

[52] Foster homes are apparently used in Georgia; in Buffalo boarding homes have been in use for some time.

include home visits by the probation officers, daily reporting by the child, curfew, compulsory school attendance, and the sanction of detention for any repetition of trouble or violation of regulations.

Whenever possible children who have been in trouble with the law but would be released to parents if an adequate home were available should be spared the experience of security-type detention. They should not be mixed with the children who are detained because they cannot be trusted not to flee or perpetrate new crimes. The latter group contains the seriously disturbed, those charged with major crimes and those who have a long history of institutionalization. For the in-between child, supervised release, foster homes, shelter facilities or some variety of halfway house, represents a sounder long-run investment than indiscriminate intermingling. As one commentator put it: "It is no triumph for the court to substitute court neglect or community neglect for parental neglect." [53]

[53] Rubin, 43 J. Crim. Law, Criminology and Pol. Sci. 425 (1952).

CONCLUSION

Studies dissecting the bail system have been conducted for a good many years. Their uniform conclusion is that the system has not worked very well. Accused persons in large numbers in all parts of the country are forced to spend the interval between arrest and trial in jail. Most are detained only because they cannot pay the bondsman's premium, or put up the collateral he asks. They lose their jobs and their family life is disrupted. Their chances for acquittal are lowered; their opportunities for probation diminished; their quest for equal justice handicapped.

Courts set bail for most defendants on the basis of their alleged crimes and their records. Almost totally ignored are those ties to the community that determine the likelihood of appearing at trial. Courts sometimes set high bail out of fear of new crimes, yet the offender still goes free if he has money.

The trouble with the present system is that by relying on money, it jails too many of the poor; it also protects too little against the dangerous. Financial conditions imposed on those who cannot meet them have already been condemned by the courts in other aspects of our system of criminal justice. These decisions suggest that financial bail might some day be held unconstitutional under similar circumstances.

A more rational formula for pretrial release would evaluate the defendant's background to assess the likelihood of his return. Once such facts are known, many persons accused of minor crimes may be summonsed in lieu of arrest or, if arrested, released on their own recognizance. Where a personal promise is not enough, they may be paroled in the custody of a reliable third party or placed under a probation officer's supervision. For those to whom loss of money would be the most forceful deterrent, release can be hinged to a refundable cash deposit, or to a bondsman's bond in a modest amount. Greater risks can be released by day for employment, to return by night to jail. As the danger of flight increases, the bail condition can be made suitably more stringent.

For the accused whose danger is not flight but crime, high bail is an inadequate and unfair answer. The bail hearing is a poor setting in which to distinguish, without any trial, the harmless man from the menace. More scientific and legal study needs to be devoted to the accurate prediction of future crimes. But pretrial detention for any reason should be accompanied by provisions for effective review, speedy trial, better detention facilities and credit against sentence.

Juvenile detention practice is in desperate need of overhaul. Juvenile courts were devised to treat children's misdeeds differently from adult crimes, and to rehabilitate rather than punish. In any jurisdiction where children are detained before trial, for long periods, without hearings, in miserable quarters, or comingled with adults, the philosophy of the juvenile court system is betrayed. Wherever this occurs, a suitable alternative to detention should be found, for no good reason appears why the law should accord a child fewer rights and less protection than his elders.

The National Conference on Bail and Criminal Justice will not solve all these problems this week. Some may take many years to work out. But if the issues are identified, the facts appraised, and the pioneer projects used as examples, the Conference should provide the insight and incentive which our system has been lacking.

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